APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Tyabji.

1914. October 26 and 27 and November 12.

S. P. ABRAHAM SERVAI (DEFENDANT), PETITIONER,

v.

RAPHIAL MUTHIRIAN (PLAINTIFF), RESPONDENT.*

Limitation—Suit for contribution between joint debtors—Exoneration of defendant by the decree on the ground of limitation—Plaintiff paying the whole decree—Cause of action for contribution only after payment.

The plaintiff and the defendant having each borrowed a certain sum of money from a stranger executed a joint promissory note in 1903 for the total amount in favour of the stranger. After receiving some amounts from both the promisors, the promisee sued them both in 1911 but the decree was for the balance due, only as against the present plaintiff, the present defendant being exonerated on his plea of limitation. After paying the decree amount in March 1912 the plaintiff immediately sued the defendant for contribution.

Held (1) that the right to sue for contribution arose only on plaintiff's payment, (2) that the defendant was liable to contribute in spite of the fact that he was exonerated under the previous decree on the ground of limitation, and (3) that the suit was not barred by limitation, the cause of action having arisen only on the date of plaintiff's payment.

Gardner v. *Brookes* (1897) 2 Ir.R., 6 and *Woolmersharsen* v. *Guillick* (1893) 2 Ch.D., 514, followed.

The liability to contribute is based on an equity arising out of the co-debtor's payment and it has no reference to the original liability to the common promisee.

The *obiter dictum* in page 311 of *Subramania Aiyar* v. *Gopala Aiyar* (1910) I.L.R., 33 Mad., 308, not followed.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887), praying the High Court to revise the decree of T. JIVAJI RAO, the District Munsif of Srirangam, in Small Cause Suit No. 623 of 1912.

The facts of the case appear from the judgment of OLDFIELD, J.

O. Madhavan Nair and *John Matthai* for the petitioner.

M. O. Parthasarathy Ayyangar and *K. S. Ganesa Ayyar* for the respondent.

OLDFIELD, J. OLDFIELD, J.—The plaintiff and the defendant in this case were joint executants of a promissory note. It is common ground that each received part of the sum borrowed, and the correctness

* Civil Revision Petition No. 834 of 1912.

of the lower Court's finding as to its division between them and the amount repaid by each cannot be disputed. They were however sued by their creditor for the balance due; and a decree was passed against the plaintiff for the whole the defendant being exonerated on his plea of limitation. The plaintiff satisfied the decree and sues the defendant for contribution. The lower Court held that notwithstanding the defendant's exoneration it was equitable that he should contribute towards the discharge of the common debt. This Civil Revision Petition has been argued against that decision. It has been referred to a bench by a learned Judge sitting in the Admission Court.*

As pointed out by the learned Judge the facts in *Marrivada Chinna Ramayya* v. *Veerapurani Venkatappiah*(1), on which the lower Court relied differed materially from those now in question because in it there was no decision on limitation or any other ground, such as there is here, against any of the defendants and some had not been sued by the creditor. The principle there recognized is merely that liability for contribution between co-contractors is enforceable although the suit to enforce it is brought after a suit on the original liability would be barred. Here the point is that the original liability was held unenforceable against the defendant not only before the present suit was brought but also before the plaintiff was held liable or made any payment.

The argument apart from authority has been presented as follows :—

The defendant has been exonerated; and the debt must have been kept alive against the plaintiff by some act on his part for which it is not suggested that the defendant is responsible. Whether the plaintiff is regarded as the defendant's joint contractor, or as he contends that he should be, as his surety in respect of the amount which he has had to pay on the defendant's behalf, is immaterial, because he could not affect the defendant's position in either capacity.

The debt having been held unrecoverable from the defendant directly it is unjust that it should be recovered from him indirectly in consequence of the plaintiff's conduct, which he did not

* (Referred by Mr. Justice SADASIVA AYYAR; the reference is reported in 27 M.L.J., 746:—Ed.)

(1) (1910) M.W.N., 839.

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authorize. This treats the defendant's liability as originating in or at least as depending on the fact that a decree preceded the plaintiff's payment. But on the other side it is contended that it should be placed on a broader basis with reference to an earlier stage in the transaction, the separate contract between the parties, when the debt was incurred, to indemnify each other for any excess payment made by one for the other, which was independent of the creditor's suit and its result. We have to decide which of these views is correct.

There is, so far as we have been shown, no direct Indian authority. But *Subramania Aiyar* v. *Gopala Aiyar*(1) is relied on by the plaintiff, though one portion of the judgment certainly supports the defendant. It is therefore necessary to ascertain what was really decided in it. The plaintiff, a trustee, sued the sons of his predecessor in the trusteeship for damages on account of their father's misfeasance. The limitation applicable was that which would have been applicable to a suit against him. *Periasami Mudaliar* v. *Seetharama Chettiar*(2). The suit against them was therefore barred. The plaintiff also however sued certain sureties against whom (so far as the report shows) the suit was still in time, solely because they had given land as security. It was held that they had not been discharged by the fact that the remedy against their principal had been lost since his liability and therefore theirs to plaintiff were still subsisting: That is intelligible.

But the question there was between the creditor and his debtors, principal and surety, directly, whereas here it is only between the latter, and the case therefore gives no support to this part of the plaintiff's argument. He relies here in fact on an identification of the defendant's liability to the creditor which no doubt is unaffected by the latter's loss of his remedy, with his distinct liability to the plaintiff, which has not been shown to be legitimate and is irreconcilable with other cases he has cited. The relation between the sureties and their principal debtor is in fact dealt with in *Subramania Aiyar* v. *Gopala Aiyar*(1) only *obiter* in the words at page 311—"It has been urged that the surety will be prejudiced if he is liable to be sued, when he cannot have any remedy against the debtor after a suit

(1) (1910) I.L.R., 33 Mad., 308. (2) (1904) I.L.R., 27 Mad., 243 (F.B.).

against him has become barred. The answer is he is himself to blame. He can easily avoid the risk and clothe himself with all the creditor's right by payment or performance as soon as the debtor becomes liable. Section 140 of the Indian Contract Act." This no doubt supports the view, for which the defendant contends. The question however was not before the learned Judges directly, and the authorities relevant to it were not referred to and if the hardship involved and the means of avoiding it are to be considered it may respectfully be suggested that there is no more reason for penalising the surety for not paying and for failure to acquire the right to sue the principal debtor than the debtor for not paying what he primarily was bound to pay. The other cases are *Woolmersharsen* v. *Gullick*(1) and *Gardner* v. *Brooke*(2). They are directly relevant and are in the plaintiff's favour. In the first, the question arose between cosureties and is dealt with very shortly. The Court inclined to the belief that the statute did not begin to run, until the plaintiff made his payment, but was not obliged for the purpose of the case to decide between that date and the dates on which the amount of his liability was ascertained. That point however was placed beyond doubt as regards this Presidency by *Putti Narayanamurthi Ayyer* v. *Marimuthu Pillai*(3) and is not left open in the second case abovementioned in which the discussion is full and the parties like those before us were joint makers of a promissory note. The reasons for the decision in the plaintiff's favour were that the defendant's liability rested on grounds of equity, independent of the original contract with the creditor, was based on the payment made in discharge of the common obligation and had no existence till that payment was made. These decisions are directly in point and in the circumstances must be followed in preference to the *obiter dictum* above referred to, though it occurs in a judgment of this Court. In accordance with them the conclusion must be in the plaintiff's favour. The civil revision petition is therefore dismissed with costs.

TYABJI, J.

TYABJI, J.—The question before us is whether a joint promisor whose liability to the promisee was kept alive beyond three

(1) (1893) 2 Ch. D., 514.

(2) (1897) 2 Ir. R., 6.

(3) (1903) I.L.R., 26 Mad., 322.

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years from the date of the promissory note and who was consequently compelled to pay by a decree of the Court more than his proportion of the debt to the promisee can sue another joint promisor for contribution though the decree exonerated that other joint promisor from payment on the ground that the debt as against him was barred by limitation.

The facts are as follows:—The plaintiff and the defendant executed a joint promissory note on 25th June 1903. In or before January 1905 the defendant sent Rs. 20 to the plaintiff for part payment to the promisee and the plaintiff paid this sum together with Rs. 58 on his own account. Subsequently the promisee sued both the plaintiff and the defendant for the balance still due. A decree was passed on 5th August 1911 in which the whole balance was ordered to be paid by the present plaintiff and the present defendant was exonerated from all payment, the suit on the promissory note having become barred at the time as against the present defendant. On 9th March 1912 the plaintiff paid the whole of the amount decreed and in the same year sued for contribution from the defendant. His suit was allowed by the District Munsif. This petition raises the question whether the District Munsif was right. Being a suit for contribution between joint promisors (there being no express contract for indemnity between the joint promisors) the case must be governed by sections 42 to 44 of the Indian Contract Act, the effect of which for the present purpose may be stated as follows:—

Where two or more persons have made a joint-promise, in the absence of a contract to the contrary—

(1) As between the joint promisors and the promisee (*a*) all the joint promisors must fulfil the promise (section 42);

(*b*) the promisee may compel any one to perform the whole promise (section 43);

(*c*) a release by the promisee of one joint promisor does not discharge the other or others (section 44, first part).

(2) As amongst the joint promisors themselves, each joint promisor may compel every other joint promisor to contribute equally with himself to the performance of the promise (section 43, paragraph 2). Three incidents connected with the right of contribution are expressly laid down, (*a*) if any one joint promisor

makes default in contributing the others must bear the loss (section 43, paragraph 3);

(*b*) section 43 does not derogate from the rights of a surety to recover from his principal payments made on behalf of the principal; and

(*c*) the release of a joint promisor by the promisee does not free the joint promisor so released, from responsibility to the other joint promisor or joint promisors (section 44, second part).

The right to contribution (as between joint promisors) is referred to in the part of the Act directly applicable as a right "to compel contribution *to the performance of the promise.*"

This may at first sight appear to make the liability to contribute coincident with the performance of the promise. But the duty to contribute is clearly distinct from the duty to pay to the promisee; the first is to the promisor, the second to the promisee; the right of each joint promisor to claim indemnity does not consist merely of being subrogated to the right of the original promisee, for though the promisee's rights may have been released, the responsibility to the joint promisor is not annulled (section 44). Following therefore the wording of the Act it may be stated that the right of each joint promisor to compel every other joint promisor to contribute equally with himself to the performance of the promise is unaffected by the mode in which the promisee exercises or fails to exercise his rights (*a*) to compel all the joint promisors to fulfil the promise (section 42) or (*b*) to compel any one of them to do so (section 43) or (*c*) to release one without discharging the other (section 44). An express release by the promisee cannot (on principle even apart from section 44) affect the right of a third person (the joint promisor). The direct liability on the joint promise may thus be expressly annulled, without affecting the collateral liability. It is difficult then to conceive how the promisee's mere omission to sue during the statutory period—an omission which does not destroy even his own right but merely bars his remedy by suit [*Subramania Aiyar* v. *Gopala Aiyar*(1)]—can affect the joint promisor's collateral right.

It seems to me therefore that the District Munsif was right.

The result at which I have arrived agrees with the view of a strong Court of Appeal in Ireland in *Gardner* v. *Brooke*(2)

(1) (1910) I.L.R., 33 Mad., 303. (2) (1897) 2 Ir. R., 6 at p. 12.

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upholding the concurrent decisions of BRIAN, C.J., and the Division Court. In that case the right of contribution from a joint promisor was thus referred to. "The right comes in equity originally and absolutely by the payment in discharge of a common burthen and has no existence whatever, inchoate or complete till the payment is made. It is not therefore affected by what affects the contract . . . The principle came into England from the Civil Law where it pursues exactly the same consequences and distinctions that are found in equity, all based on community of burthen and benefit from payment and none from agreement." In the same case GIBSON, J., said. "Contribution is not limited to cases of guarantee but extends to all cases where one is compelled to pay more than his proportion of a joint liability [*Rumskill* v. *Edwards* (1)]. The question here is that is the extent of the obligation of the joint makers to one another. Is it an unqualified liability, according to the proportionate shares of each to indemnify any joint maker who may at any time be legally compelled to pay more than his share? or does the duty depend on the co-debtor who has paid in excess of his share, being merely subrogated into the creditor's rights? or does the obligation only bind a party so long as he himself remains liable to the creditor, and therefore may himself require the benefit of indemnity against the others? The first view is, I think, plainly the true one. When they signed the note the parties must have contemplated that it should be paid and that the burden should be shared equally. The fact that one happens to escape from legal liability to the creditor, without the consent of his associates, and perhaps even without their knowledge cannot be allowed to disturb the original obligation between the co-debtors, or to alter the proportions of liability or contribution which must be ascertained from the note at the time that it was made. The duty to contribute here binds all so long as any one remains legally liable by virtue of the joint contract."

The facts of the case last cited are exactly similar to those now before us except in two particulars (1) there the payment in respect of which contribution was sought was not made in execution of a decree, (2) there was no decree exonerating the defendant from liability on the contract.

(1) (1888) 31 Ch.D., 100.

The first of these particulars does not distinguish the case in favour of the defendant.

With reference to the second the defendant before us contends that by being exonerated from payment in the previous suit he is exonerated from the duty to contribute. But the decree gave effect to the direct liability arising from the contract as between the promisee and the joint promisors in so far as that liability could be enforced by suit. It did not affect the collateral liability as between the joint promisors themselves arising not from the contract which was the cause of action in the first suit, but from the payment consequent on the decree.

Another argument addressed to us was that the acts of the plaintiff, keeping the debt alive against himself after the promissory note became barred as against the defendant made in effect a new contract between the plaintiff and the promisee that the defendant was not privy as a joint promisor to this new contract. Such may conceivably be the case where a joint promisor against whom the debt is barred pays the debt; a payment so made may conceivably be taken as a payment not on account of any legal liability, but made out of honour, and a person making such a payment cannot in honour ask another to contribute to the maintenance of his honour, where under such circumstances an attempt is made to compel contribution. SADASIVA AYYAR, J.'s fears expressed in his referring judgment that the first payment might in fact have been made in collusion with the promisee might be well founded. But in the present case there is no suspicion of collusion and no basis for saying that a new contract for payment was made between the plaintiff and the promisee. The final payment was made because there was a decree against the plaintiff and it would appear that at least one of the earlier payments which kept the debt alive, was made on behalf of the defendant.

It seems to me therefore that alike on the construction of the section, on principle and on authority the plaintiff ought to succeed in the suit. Before concluding I must refer to two decisions of this Court. In *Putti Narayanamurthi Ayyar* v. *Marimuthu Pillai*(1) section 145 of the Indian Contract Act was referred to as though it directly governed a joint promisor's right of contribution. It seems to me that though the joint promisor's

(1) (1903) I.L.R., 26 Mad., 322 at p. 326.

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right is analogous to the surety's right of indemnity under section 145, there are distinctions between the two. The right of indemnity referred to in section 145 and the connected sections 126, 131, 133, 147 inheres in a person who contracts with the promisee himself expressly and solely as a surety ; in such a case the right to indemnity is implied—section 145. Next there is the case of a person who is a principal joint promisor as between himself and the promisee but as between himself and another joint promisor is (expressly or impliedly) only a surety. The promisee not being privy to the contract of the suretyship between the promisors *inter se* ; section 132. Thirdly there is the case of an express contract of indemnity (section 124) as distinct from a promise to indemnify implied by section 145 in a contract of guarantee. All these rights and liabilities are analogous to the one with which we have to deal. But if and in so far as the direct rules contained in sections 42 to 44 are not a sufficient guide, resort should be had, it seems to me, in the first instance, to section 124 which refers to the rights under an express contract to indemnify similar to that which section 43 implies amongst joint promisors, rather than to section 145 which refers to a contract for indemnity implied between a person who contracts expressly and solely as a surety on the one hand and the principal debtor on the other hand ; in order to make section 145 applicable to joint promisors the contractual liability of each joint promisor as principal debtor must be assumed to have reference only to a proportionate part of the debt, an assumption that is opposed to section 42.

The next case is *Subramania Aiyar v. Gopala Aiyar*(1) which has been already referred to. The question, there, before the Court was whether a surety's liability to the creditor (as defined in section 126) was discharged by the fact that the creditor's suit against the principal debtor was barred by limitation.

That question was answered in the negative. The ground for decision was that though the surety's liability continues only so long as "there is no act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor"

(1) (1910) I.L.R., 33 Mad., 308.

yet it could not be said that the legal consequence of the creditor's forbearance to sue the principal debtor during the period of limitation and the consequent loss of his remedy was a "discharge" of the principal debtor. In dealing with an objection to the result of this reasoning it seems to have been assumed by the Court that the surety's rights against the principal debtor had become barred at the time of the decision, i.e., before the surety had made any payments. It is unnecessary to consider whether this assumption was consistent with the terms of section 145 of the Indian Contract Act, and with the ruling in *Putti Narayanamurthi Ayyar* v. *Marimuthu Pillai*(1) where it was held that the cause of action under section 145 does not arise until actual payment by the surety; see also *Marrivada Chinna Ramayya* v. *Veerapurani Venkatappiah*(2) and *Woolmersharsen* v. *Gullick*(3). For the remark in *Subrahmania Aiyar* v. *Gopala Aiyar*(4), case based on the assumption just referred to was purely *obiter*, dealing not with the rights of the creditor against the surety which were being adjudicated upon but dealing with the remedy of the surety which might or might not have been barred as against the principal debtor. The circumstances alluded to on page 309 of the report and the fact that some property was given as security seem to have brought about the result that the creditor's remedy was barred against the principal debtor but enforceable against the property given as security. It seems to me that it would be going beyond all the limits of the doctrine of *stare decisis* to consider ourselves bound by an assumption as to a question which is not before the Court, an assumption made merely for the purpose of dealing with an argument that was not accepted.

I agree that the petition should be dismissed with costs.

N. R.

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(1) (1903) I.L.R., 26 Mad., 322.
(2) (1910) M.W.N., 839.
(3) (1883) 2 Ch.D., 514 at p. 529.
(4) (1910) I.L.R., 33 Mad., 308.