

should have sued for possession and not merely for a declaration. In our opinion the case must be remanded.

We allow the appeal, set aside the decree of the lower appellate court and remand the case to that court with directions to re-admit the appeal upon its original number on the file and proceed to hear and determine the same according to law. Costs here and heretofore will be costs in the cause.

Appeal decreed and cause remanded.

*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice
Muhammad Rafiq.*

NIHAL SINGH AND OTHERS (PLAINTIFFS v. THE COLLECTOR OF
BULANDSHAHAR AND ANOTHER (DEFENDANTS)*.

*Contribution—Compromise—Claim by party to a compromise alleging payment
by himself of money for payment of which he and others were jointly liable—
Joint tort-feasors.*

A Hindu widow, the owner of considerable property, brought a suit against her four brothers as managers of her estate for the profits of the estate to a considerable amount. One of the brothers had previously brought a suit against her for a declaration that she had adopted his son. These suits were compromised, and the compromise was made a decree of court. Amongst the conditions of the compromise was one to the effect that the brothers should pay back a certain sum of money belonging to their sister's estate which had been collected and misappropriated by them.

Held, on suit by one of the brothers who alleged that he had paid the whole sum and asked for contribution, that the rule laid down in *Merryweather v. Niswan* (1) that there was no right of contribution amongst joint tort-feasors did not apply to this case when the claim was based on the terms of a compromise, and *quære* whether the rule should be applied in India at all. *Palmer v. Wick and Pultneytown Steam Shipping Company, Limited* (2) referred to.

THE facts of this case were as follows :—

Thakur Umrao Singh had four sons and a daughter. The daughter was married into a family possessed of considerable property. On the death of the husband of the daughter the father became the guardian of the property of the daughter. On the death of Umrao Singh one of his sons, Rao Girraj Singh, brought a suit against his sister, alleging that she had adopted

* Second Appeal No. 1519 of 1914, from a decree of C. M. Collett, First additional Judge of Aligarh, dated the 16th of May, 1914, confirming a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 5th of March, 1914.

(1) (1799) 8 T. R., 186.

(2) (1894) A. C., 318.

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his son, Indarjit Singh, and that this son was entitled to the estate of the deceased husband of the sister. The sister met this claim with a denial and a counter suit against all the brothers, alleging that her father, and after him her brothers, had been in possession of her estate as managers, and were liable to account to her for the profits. Her claim amounted to several lakhs. These two suits ended in a compromise decree. The sister agreed to abandon her large claim for the profits of her estate save to the extent of a sum mentioned hereafter. On the other hand the brothers agreed to drop the allegation of the adoption of Indarjit Singh. They also agreed that a sum of Rs. 8,000 odd, which had been collected in her estate after the death of her father and spent on the estate of Kuchaser (i.e., the estate of Thakur Umrao Singh), should be paid to her. This compromise was incorporated in a decree.

The plaintiffs in the present suit alleged that they had paid the whole of this amount themselves, without Tejpal or his sons contributing anything, and they claimed contribution. Tejpal having died and his sons having been made wards of court, the suit was brought against the Collector representing the Court of Wards. The lower appellate court considered that this money represented damages for the wrong doing of all the four brothers and that, as there was no contribution between tort-feasors, the plaintiffs could not recover. The plaintiffs appealed to the High Court

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellants.

Mr. *A. E. Ryves*, for the respondents.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of a suit for contribution. The suit is against the two sons of Tejpal Singh through the Collector as manager of the Court of Wards. Various pleas were raised, including notice and limitation. These pleas have, however, now been dropped. The facts are shortly as follows:—Thakur Umrao Singh had four sons and a daughter. The daughter was married into family possessed of considerable property. On the death of the husband of the daughter the father became the guardian of the property of the daughter. On the death of Umrao Singh one of his sons, Rao Girraj Singh, brought a suit against his sister,

alleging that she had adopted his son Indarjit Singh and that this son was entitled to the estate of the deceased husband of the sister. The sister met this claim with a denial and a counter suit against all the brothers, alleging that her father, and after him her brothers, had been in possession of her estate as managers, and were liable to account to her for the profits. Her claim amounted to several *laks*. These ended in a compromise decree. The sister agreed to abandon her large claim for the profits of her estate save to the extent of a sum which we shall presently mention. On the other hand the brothers agreed to drop the allegation of the adoption of Indarjit Singh. They also agreed that a sum of Rs. 8,000 odd which had been collected in her estate after the death of her father and spent on the estate of Kuchaser (i.e., the estate of Thakur Umrao Singh) should be paid to her. This compromise was incorporated in a decree. The allegation of the plaintiffs in the present suit is that they paid the whole of this sum to the decree-holder without Tej Pal or his sons contributing anything and they claim contribution. The lower appellate court considered that this money represented damages for the wrong doing of all the four brothers and that as there was no contribution between tort-feasors the plaintiff could not recover. There can be no doubt that in England if damages are recovered against joint tort-feasors and one pays the entire amount of the decree there is no contribution. This was established in the case of *Merryweather v. Nixon* (1). This was considered in *Palmer v. Wick and Pulteneytown Steam Shipping Company Ltd.* (2). There a joint decree had been obtained against two persons for negligence. One of the judgement-debtors paid the entire amount of the decree and sued the other for contribution. The case was a Scotch one. Lord HERSCHELL says (at page 324 of the report) :—" Much reliance was placed by the learned counsel for the appellant upon the judgement in the English case of *Merryweather v. Nixon* (1). The reasons to be found in Lord KENYON'S judgement, so far as reported, are somewhat meagre, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country, but when I am asked to hold it to be part of the

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law of Scotland I am bound to say that it does not appear to me to be found on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries." It is somewhat doubtful whether the doctrine of *Merryweather v. Nixan* (1) should be applied to India, but it is certain that it will not be extended (see the remarks of the other noble Lords who decided *Palmer's* case). In our opinion, however, the question hardly arises in the present case, because the Rs. 8,000 odd, which according to the compromise decree the defendants had to pay in no way represented a decree for damages against tort-feasors. It was a sum of money which the defendants to the suit agreed (as part of the compromise) to pay, altogether irrespective of any tort they might have committed. There can be no doubt that the decree-holder was entitled to get the decretal amount from all or any of the judgement-debtors. No doubt there might have been some equities between the judgement-debtors *inter se*, but *prima facie* if any one of the judgement-debtors paid the entire amount he was entitled to contribution against the others, unless the latter pleaded and proved special circumstances which would render it inequitable that they should contribute to the satisfaction of the decree. In the present case the defendants neither pleaded or proved any such circumstances, and we think the courts below were bound to apply the general rule as to contribution. We allow the appeal, set aside the decrees of both the courts below and grant the plaintiffs a decree as claimed with interest at one per cent. per mensem. Future interest will be at the rate of six per cent per annum. The appellants will have their costs in all courts.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

PIARI LAL (PETITIONER) v. HANIF-UN-NISSA BIBI AND ANOTHER

(OPPOSITE PARTIES)*

Civil Procedure Code (1908), section 144—Execution of decree—Decree reversed on appeal—Bona fide auction purchaser under original decree—Restitution.

Restitution cannot be obtained under section 144 of the Code of Civil Procedure as against a *bona fide* purchaser for value at an auction sale held by a

* First Appeal No. 172 of 1914, from a decree of Shams-ud-din Khan, Additional Subordinate Judge of Aligarh, dated the 31st of March, 1914.

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