

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada  
Charan Banerji.*

SURAJ BHAN (DEFENDANT) v. HASMI BEGAM AND OTHERS  
(PLAINTIFFS) AND MUHAMMAD TAWAKKUL HUSAIN  
AND ANOTHER (DEFENDANTS).\*

1916  
April, 10.

*Act No. IX of 1872 (Indian Contract Act), section 70—Sale—Specified sum left  
with vendees for payment to mortgagees of property other than the  
subject of the sale—Interest paid by purchasers in addition to specified  
sum—Gratuitous payment.*

On the sale of certain immovable property of large value it was agreed between the parties that a specified portion of the purchase money should, instead of being paid to the vendors directly, be paid on their behalf to a certain mortgagee who held a mortgage over property of the vendors other than the subject of the sale. Owing to a delay in the registration of the sale-deed, which was caused by the action of the vendors, the purchasers did not immediately pay the stipulated sum to the mortgagee, and when they did come to tender it, the mortgagee refused to accept it upon the ground that by that time a further sum had fallen due as interest. The purchasers thereupon paid the further amount claimed. Subsequently the vendors sued the purchasers for the balance of the purchase money remaining unpaid, and the purchasers claimed to set off against the unpaid purchase money the sum which they had paid as interest, as above described.

*Held* that the purchasers were not entitled to the set-off claimed, as the payment of interest was in excess of the sum stipulated to be paid to the mortgagee and was in the circumstances a purely gratuitous payment.

OUT of the amount of consideration for a sale the vendors left with the vendee a sum of Rs. 8,150 for payment to a certain person in respect of a mortgage held by him over certain property of the vendors which was other than the property comprised in the sale. After the sale the vendors threw some difficulties in the way of registering the sale-deed. Eventually when the sale-deed was registered the vendee offered the Rs. 8,150 to the mortgagee, who refused to take it, on the ground that the money was insufficient, as a further sum of Rs. 749 odd had accrued due by way of interest in the meantime. It was alleged by the vendee that he paid the mortgagee this further sum of Rs. 749 as well. The vendors sued the vendee for recovery of an unpaid portion of the purchase money, and the vendee claimed

\* Second Appeal No. 299 of 1916, from a decree of E. C. Allen, District Judge of Moradabad, dated the 10th of September, 1915, confirming a decree of Ram Chandra Saksena, Additional Subordinate Judge of Moradabad, dated the 29th of April, 1915.

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credit for this sum of Rs. 749. Both the courts below refused to allow the set-off claimed. The defendant vendee appealed to the High Court.

Pandit *Kailas Nath Katju* (for the Hon'ble Dr. *Tej Bahadur Sapru*), for the appellant:—

The appellant is entitled to be re-imbursed for having paid the amount in question. Section 70 of the Contract Act applies to the case. The payment was not made gratuitously, and the plaintiffs have benefited by it. In the circumstances of the case, the payment must be deemed to have been made "lawfully" within the meaning of section 70. The meaning of that expression has been explained in the case of *Chedi Lal v. Bhagwan Das* (1). It was at the express request of the vendors that the vendee was to pay, and did pay, the mortgagee the sum of Rs. 8,150, which was calculated to discharge in full the amount then due on the mortgage. There can be no question that the payment of Rs. 8,150 was a "lawful" payment. The further sum of Rs. 749 was a natural and necessary addition to the original amount, brought about by the accumulation of interest during the period of delay in making the payment. Had this delay been the fault of the appellant, the case might be different; but the plaintiffs, and not the appellant, were to blame for the delay. The payment of the additional sum of Rs. 749 by the appellant was a direct and natural corollary to his obligation to pay the Rs. 8,150. If the sale-deed had not directed the vendee to pay any sum to the creditor, and the vendee had of his own accord paid him, no doubt, that would have been a clearly gratuitous payment. Here, it is submitted, the payments of the two amounts are correlated, and they stand on the same footing. The vendors' direction to pay the sum of Rs. 8,150 justified by implication the reasonable inference that for the payment of the further necessary sum the vendee was entitled to look for compensation to the vendors, for whose benefit the payment was made. The intention of the parties obviously was that the mortgage was to be fully paid off.

The plaintiffs are seeking relief from the court, and they must do equity: see observations in the case of *Ram Tuhul Singh v. Bisessar Lal Sahoo* (2).

(1) (1886) I. L. R., 11 All., 234 (243), (2) (1875) L. R., 2 I. A., 123

Dr. S. M. Sulaiman, for the respondents, was called upon only on the question of costs.

RICHARDS, C. J., and BANERJI, J. :—The point which arises in this appeal is as follows. Certain immovable property was sold for a considerable sum of money. In the sale-deed the consideration is stated to have been received in a certain way (as per details at the foot of the deed). According to this detail the vendee was to retain a sum of Rs. 8,150 for payment to a certain creditor of the vendors who had a mortgage upon other property belonging to the vendors, and, which was no part of the property sold to the vendee. Some delay seems to have taken place in the registration of the deed and, as a consequence, the vendee alleges that he did not pay the Rs. 8,150. Eventually, when he succeeded in getting the sale-deed registered, he went to the creditor and offered him the Rs. 8,150, which the creditor refused to receive because further interest had in the meantime accrued, amounting to the sum of Rs. 749 or thereabouts. The present suit was instituted by the plaintiffs to recover a portion of the purchase-money which they alleged had not been paid. The defendant admitted that a portion of the purchase-money had not been paid, but he claimed credit as against the amount that remained unpaid for the sum of Rs. 749 interest, which he alleged he had paid the creditor of the vendors. Both the courts below held that, assuming that the defendant had paid the creditor the extra sum of Rs. 749 for the interest which had accrued, he could not plead this as a set-off against the plaintiff's claim for the unpaid purchase-money, upon the ground that there was no obligation on the vendee to pay any money to the creditor except the Rs. 8,150 which had been left with him by the vendors. In second appeal to this Court it has been urged that the view taken by the courts below was incorrect, and section 70 of the Contract Act is relied upon. That section provides that "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered." We do not think that this section applies to the circumstances of the present case. It was admitted at the bar

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that if the sale-deed had been silent about payment to the creditor of the vendors and that the vendee of his own motion had paid off the creditor, he could not have pleaded such payment as a set-off against the purchase-money. We think that exactly the same reasoning applies to the present case. According to the sale-deed the only sum which the vendee was requested to retain out of the purchase-money and pay to the creditor was the sum of Rs. 8,150. The payment of the balance was a payment gratuitously made. We have already pointed out that the property mortgaged to secure the sum due to the creditors was no part of the property sold. It may be, of course, that the plaintiffs have benefited by the payment to the creditor, but this by itself is no sufficient ground to entitle the defendant to set it off against the plaintiff's claim. We dismiss the appeal with costs.

*Appeal dismissed.*

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April, 11.

*Before Mr. Justice Piggott and Mr. Justice Walsh.*

RADHE SHIAM (PLAINTIFF) v. BELHARI LAL (DEFENDANT)\*

*Act No. IX of 1872 (Indian Contract Act), section 65—Minor—Minority successfully pleaded as a defence to a suit—Disallowance of costs—Appeal—Competence of appellate court to interfere with the discretion of the court below as to allotment of costs.*

Where the Judge has given his reasons and all the circumstances are before the Court of Appeal, the Court of Appeal can, if satisfied that the Judge's discretion has not been judicially exercised, interfere with it and make the order which the court below ought to have made.

It is no ground for giving costs against a successful defendant that the defendant pleaded that he was a minor at the time when the transaction upon which the suit was based was entered into, there being nothing to suggest that the plaintiff had been misled as to the real age of the defendant by any action or statement on the part of the latter.

THE plaintiff sued the defendant upon a mortgage bond, for sale of the property comprised therein. The defendant pleaded that he was a minor at the time when the bond was executed, and he succeeded in that plea. The suit was dismissed. Nevertheless, the court refused to allow the defendant his costs on the ground that the defendant was "mostly responsible for the litigation." The plaintiff appealed to the High Court against

\* First Appeal No. 236 of 1915, from a decree of Gokal Prasad, Subordinate Judge of Allahabad, dated the 30th of September, 1915.