

APPELLATE CIVIL.

Before Mr. Justice Patkar.

1930
June 20.

GURULINGAPPA SHIVAPPA MASALI (ORIGINAL PLAINTIFF), APPELLANT
v. SOMANNA BIN SHIDDAPPA AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

Contribution, suit for—Decree for costs—Payment by one defendant—One suit against all co-defendants for contribution—Maintainability of—Form of decree.

One R filed a suit for partition against Gurulingappa and ten others and obtained a decree for costs against all the defendants. In execution of the decree R recovered Rs. 1,679 from Gurulingappa. After deducting his share of the decretal amount Gurulingappa brought a suit for contribution against the defendants who were his co-judgment-debtors. The trial Court passed a decree in favour of the plaintiff for Rs. 1,467 against all the defendants. On appeal the decree was reversed on the ground that the suit by the plaintiff claiming from all the defendants one lump sum by way of contribution was not maintainable :

Held, (1) that the suit by the plaintiff for contribution against the defendants, the co-judgment-debtors collectively, was maintainable.

Keshav Vithal v. Hari Ramkrishna⁽¹⁾; *Nihal Singh v. The Collector of Bulandshahr*⁽²⁾; and *Parsotam Das Kolapuri v. Lachmi Narain*⁽³⁾ followed.

Held, further, (2) that in such a suit the decree should apportion the liability of the several co-judgment-debtors.

Tavasi Telavar v. Palani Andi Telavar⁽⁴⁾; *Khema Deba v. Kumolakanth Bukshi*⁽⁵⁾; *Matungini Debi v. Brojeswar Banerjee*⁽⁶⁾; and *Ibn Husain v. Ramdai*⁽⁷⁾ followed.

SUIT for contribution.

The facts are set out in the judgment.

G. P. Murdeshwar and *M. M. Nadkarni*, for the appellant.

H. B. Gumaste, for respondent No. 6.

PATKAR, J. :—This is a suit brought by the plaintiff against eight persons for contribution in respect of a payment made by him in execution of a decree against him and the defendants.

One Ramalingappa brought suit No. 347 of 1919 for partition against Somanna and ten others. In execution of the decree the judgment-creditor filed darkhast No. 16

*Second Appeal No. 22 of 1928 against the decision of D. D. Cooper, District Judge at Bijapur, in Appeal No. 33 of 1926.

⁽¹⁾ (1923) 48 Bom. 351.

⁽²⁾ (1916) 38 All. 237.

⁽³⁾ (1922) 45 All. 99.

⁽⁴⁾ (1866) 3 Mad. H. C. 187.

⁽⁵⁾ (1868) 10 Beng. L. R. 259 n.

⁽⁶⁾ (1914) 20 Cal. L. J. 205.

⁽⁷⁾ (1889) 12 All. 110.

of 1923 and recovered Rs. 1,679-0-5 from the present plaintiff. The plaintiff, however, deducting his share of the decretal amount brought a suit for contribution against the present defendants.

The learned Subordinate Judge passed a joint decree in favour of the plaintiff for Rs. 1,417-7-6 and costs against the defendants. On appeal, the learned District Judge, relying on the decision in *Hira Chand v. Abdal*,⁽¹⁾ held that it was not open to the plaintiff to claim from the co-judgment-debtors collectively one lump sum as contributors, and, therefore, dismissed the suit.

In *Keshav Vithal v. Hari Ramkrishna*⁽²⁾ it was held that where in a partition suit all the defendants equally contest the suit and are directed to pay the plaintiff's costs, if one defendant pays the costs, he is entitled to contribution from his other co-defendants, unless facts are proved which are sufficient to defeat the equity. To the same effect are the decisions in *Nihal Singh v. The Collector of Bulandshahr*,⁽³⁾ and *Parsotam Das Kolapuri v. Lachmi Narain*.⁽⁴⁾ I think, therefore, that a suit for contribution would lie.

The next question is whether a single suit against all the persons liable to contribute lies or separate suits must be brought, and whether a joint decree can be passed against the contributors, or a several decree must be passed in such a suit. The decisions in *Hira Chand v. Abdal*⁽¹⁾ and *Rujapat Rai v. Nawab Mahomed Ali Khan*⁽⁵⁾ would support the contention that a single suit would not be maintainable. In *Hira Chand's* case⁽¹⁾ the plaintiff brought a suit not deducting even his quota of the payment made under the decree. In *Rujapat Rai's* case⁽⁵⁾ it was held that ordinarily claims for contribution should be brought in separate suits against the

1930
 GURULINGAPP
 SHIVAPPA
 v.
 SOMANNA
 Patkar J.

⁽¹⁾ (1877) 1 All. 455.

⁽²⁾ (1916) 38 All. 237.

⁽³⁾ (1923) 48 Bom. 351.

⁽⁴⁾ (1922) 45 All. 99.

⁽⁵⁾ (1873) 5 N. W. P. H. C. R. 215.

1980

GURULINGAPPA

SHIVAPPA

v.

SOMANNA

Patkar J.

individual contributors, but there may be cases where, by reason of special difficulty in the ascertainment of the shares, convenience may suggest a departure from the ordinary rule of separate suits, and in those cases the ascertainment of the shares should form a portion of the relief sought for. The decisions in the above mentioned two cases have not been followed subsequently. In *Ibn Husain v. Ramdai*,⁽¹⁾ it was held, distinguishing the case of *Hira Chand v. Abdal*,⁽²⁾ that where the owner of two villages, sold under a decree obtained upon a mortgage, claims contribution proportionately against the owners of the other properties included in the mortgage, and does not claim from them all collectively one lump sum as contribution, he may join all the contributors in one suit, and is not bound to bring separate suits for contribution against the separate owners. In *Tarasi Telavar v. Palani Andi Telavar*⁽³⁾ it was held that where one of several co-debtors satisfies the debt, his cause of action for contribution accrues against all at one and the same time, and the contributories may all be included as defendants in one plaint. The decree, if in favour of plaintiff, should order payment separately by each defendant of the amount only of his just proportion of the debt. This view is supported by the decision in the case of *Khema Debea v Kumolakant Bukshi*,⁽⁴⁾ where it was held that each co-sharer is bound to refund to the one who has paid the whole revenue so much as he ought himself to have paid, and that this obligation is to be enforced by a suit against all the co-sharers in which the amount of their several liabilities is to be declared by the Court. The same view is adopted in the cases of *Bhono Bibee v. Pallan Gazee*,⁽⁵⁾ *Rash Munjoree*

⁽¹⁾ (1889) 12 All. 110.⁽³⁾ (1866) 3 Mad. H.C. 187.⁽²⁾ (1877) 1 All. 455.⁽⁴⁾ (1868) 10 Beng. L. R. 259 n.⁽⁵⁾ (1869) 11 W. R. 131.

Chowdhraïn v. Radha Soonduree Dossee,⁽¹⁾ *Bhurat Pandey v. Mussamut Munthora Kooer,*⁽²⁾ and *Matungini Debi v. Brojeswar Banerjee.*⁽³⁾

1930
GURULING APPA
SHIVAPPA
v.
SOMANNA
Patkar J.

It would, therefore, follow that the view taken by the learned District Judge is erroneous. He ought not to have dismissed the suit but ought to have passed a decree apportioning the liability of the several defendants.

It is urged on behalf of respondent No. 6 that the decree is not produced in the case and it is not shown that he is liable to contribute in respect of the payment made by the present plaintiff. Respondent No. 6 did not appear in both the Courts and this contention was not raised by him in any of the two Courts. It is too late to raise that contention as a respondent in second appeal. The case of defendant No. 6 cannot be distinguished on the judgment produced in the case from the cases of the other defendants.

I would, therefore, reverse the decree and remand the case to the lower appellate Court for passing a decree apportioning the liability of the several defendants as contributories. Costs of this appeal will be costs in the lower appellate Court.

*Decree reversed and
case remanded.*

B. G. R.

⁽¹⁾ (1875) 29 W. R. 289.

⁽²⁾ (1875) 23 W. R. 421.

⁽³⁾ (1914) 20 Cal. L. J. 205.

APPELLATE CIVIL.

Before Mr. Justice Madgavkar and Mr. Justice Barlee.

HAJI AHMED KARIM (ORIGINAL DEFENDANT NO. 2), APPELLANT v. MARUTI RAMJI BHONGLE AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 1), RESPONDENTS.*

1930
June 27.

Civil Procedure Code (Act V of 1908), section 146—Indian Contract Act (IX of 1872), section 135—Surety for fulfilment of decree passed in suit or in appeal—Compromise of suit—Liability of surety.

Defendant No. 2 as surety for defendant No. 1 agreed to "fulfil the terms of the decree or order that may be passed in the suit by the (trial) Court or by

*Second Appeal No. 715 of 1928.