APPELLATE CIVIL.

1872
Nov. 20.

Before Mr. Justice Phear and Mr. Justice Ainslie.

RAM PERSHAD SINGH AND OTHERS (DEFENDANTS) *v.* NEERBHOY SINGH (PLAINTIFF).*

Suit for Contribution—Cause of Action.

The mere existence of a decree against one of several joint debtors does not afford ground for a suit for contribution against the other debtors (1).

THIS was a suit to recover Rs. 5,324-15-6. The plaint stated that—

"The plaintiff, Tundun Singh, and Monoruth Singh were three uterine brothers; that all the three brothers, while living jointly, carried on business jointly and also purchased properties jointly; that certain moneys were borrowed under bonds dated respectively 1st Aghan 1270 F. S. (7th November 1862) and 1st Pous 1271 F. S. (26th December 1863) from one Gossai Munraj Pooree for the management of the joint business and for joint gain; that in this state of things, one of the three brothers, Monoruth Singh, having died, the survivors, that is, the plaintiff and Tundun Singh, purchased a certain property from one Kessolall, and, for the purpose of making up the consideration-money, borrowed a further sum from Gossai Munraj, and thereupon executed a bond dated the 15th August 1864, to secure repayment of all these sums,—that is, the two sums which the three brothers had previously borrowed from Gossai Munraj, and the third sum which the two brothers after the death of the one had borrowed from the same creditor; that the amount so borrowed was applied to the aforementioned purposes, the property was purchased, and possession jointly obtained by the plaintiff and Tundun Singh after some litigation which was necessary to obtain it. Subsequently to this, the two surviving brothers, the plaintiff and Tundun Singh, separated, and, on the occasion, of separation, executed each to each certain *ikrarnamahs*, by which each untertook to pay his share of the joint debts; that Gossai Munraj brought a suit upon the basis of the bond against the present plaintiff

* Regular Appeal. No. 260 of 1871, from a decree of the Subordinate Judge of Gya, dated the 18th July 1871.

(1) See *Trailakhanath Roy* v. *Kashenath Roy*, 6 B. L. R., 633.

and the defendants, the representatives of Tundan Singh, and obtained a decree against the present plaintiff only; that the money covered by this bond was borrowed at the time of the joint tenancy, and expended in the joint business for joint benefit; and that, therefore, according to law, and stipulation entered into in the *ikrarnamah* of the said date, the debt was chargeable to the plaintiff and Tundun Singh, and upon his death, the defendants, in equal shares, that the decree-holder was about to sell the plaintiff's property; that the cause of action arose when the decree was passed against the plaintiff in favor of Gossai Munraj."

Hence the present suit to recover a moiety of the amount decreed in favor of Gossai Munraj.

The defendants set up (*inter alia*) in their written statement that, as the plaintiff had not paid the amount decreed in favor of Gossai Munraj, he had no cause of action, and that the suit ought to be dismissed.

The Subordinate Judge held that the decree having been passed exclusively against the plaintiff, he had a right of action for recovery from the defendants of the proportionate amount of the money so decreed; that "the acquisition of this right is not dependent on the payment of the decretal money; for the plaintiff is exclusively liable under the said decree. Had the decree been joint, it could have been said that he (the plaintiff) could not obtain a rateable share from his co-sharers without payment of the joint debt." He accordingly passed a decree in favor of the plaintiff.

The defendants appealed to the High Court.

Baboos *Kalimohun Doss* and *Chunder Madhub Ghose* and *Mr. C. Gregory* for the appellants.

Mr. *Allan* and Baboos *Moheschunder Chowdhry* and *Nilmadub Sein* for the respondent,

Baboo *Kalimohun Doss*, for the appellants, contended that the suit was premature. In a suit for contribution, the cause of action does not arise, until the plaintiff has satisfied the debt—*Boykantonath Saha* v. *Gourmonee Dassee Chowdhrain* (1) and *Ramkrishna Roy* v. *Madan Gopal Roy* (2). The decree

(1) 2 W. R., 159. (2) 6 B. L. R., App., 103.

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of Gossai Munraj is still unsatisfied. The obligation of the defendants to contribute arises from their having received some benefit from the acts of the plaintiff. Here the defendants have received no benefit, and consequently there is no cause of action.

Mr. *Allan*, for the respondent, contended that, as the plaintiff's property had been attached in execution of the decree of Gossai Munraj, he had a cause of action against the defendants for contribution. The plaintiff is not bound to wait till the sale of his property in execution of the decree. As the defendants are shareholders of the property for the purchase of which the debt was incurred, they are bound to pay their portion of the debt. A decree may be passed declaring the defendants' liability to contribute. There are cases in which declaratory decrees have been passed, although no consequential relief was granted—*Gabindprasad Tewari* v. *Udaichand Rana* (1) and *Shewakram Roy* v. *Syad Mahommed Shamsul Hoda* (2).

Baboo *Moheschunder Chowdhry*, on the same side, contended that, as the defendants had denied their liability to pay their share of the debt incurred by the plaintiff, the money so raised ought to be considered as the private property of the plaintiff. The amount was spent inthe purchase of a property for the benefit of the joint family, and the defendants are in the enjoyment of their share of this property. The plaintiff, therefore, is in the position of a Hindu, who has applied his private funds for the augmentation and improvement of the joint family property, and as such he is entitled to be reimbursed from his co-sharers the money so advanced. The obligation of the defendants in this case arises not because a joint debt has been satisfied, but because the defendants are in the enjoyment of properties purchased with the plaintiff's private funds. They cannot insist upon the plaintiff's payment of the loan as a condition precedent to his right to demand payment from them.

(1) 6 B. L. R., 321. (2) 3 B. L. R., A. C., 196.

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The following judgments were delivered :

PHEAR, J. (after stating the pleadings and judgment of the lower Court).—On appeal to this Court the defendants repeat this objection, and we are of opinion that the objection is a good one. The claim of the plaintiff in this suit belongs to a class of cases in which the principal feature is, that one person out of several having discharged a joint obligation is entitled to sue the others in order to obtain contribution from them. In this case the obligation has not been discharged. But the plaintiff urges that he is nevertheless entitled to have a declaration as against the defendants that they are liable to be called upon by him to help him to discharge the obligation. The decree of the Court below has gone much further even than this: it has, without any qualification whatever, directed the defendants to pay the plaintiff a certain share of the money which the plaintiff has been decreed to pay to Gossai Munraj. The general principle which underlies almost all classes of right to contribution has been explained and illustrated by Story, J., in several parts of his work on Equity Jurisprudence. In s. 477 (1), he says :—"Cases may easily be stated where apportionment of a common charge, or, more properly speaking, where contribution towards a common charge seems indispensable for the purposes of justice, and accordingly has been declared by the common law in the nature of an apportionment towards the discharge of a common burden. Thus, if a man, owing several acres of land is bound in a judgment, or statute, or recognizance, operating as a lien on the land, and afterwards he alienes one acre to *A*, another to *B*, and another to *C*, &c., there, if one alienee is compelled, in order to save his land, to pay the judgment, statute, or recognizance, he will be entitled to contribution from the other alienees. The same principle will apply in the like case, where the land descends to parceners who make partition ; and then, one is compelled to pay the whole charge ; contribution will lie against the other parceners." And in a judgment of Lord Chief Baron Eyre's (referred to in a note to the 8th Boston edition of Story), it is said :—"If we take a view of the cases, both in law and equity, we shall find that contribution is

(1) 8th Edition.

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bottomed and fixed on general principles of justice, and does not spring from contract, * * * * and the reason given in the books is that, *in æquali jure*, the law requires equality. One shall not bear the burden in ease of the rest." So, again, in s. 491, Story, J., says:—"By the general rule of the maritime law, in all cases of general average, the ship, the freight for the voyage, and the cargo on board are to contribute to the reimbursement of the loss according to their relative values." And in s. 492, he says:—"Another class of cases, to illustrate the beneficial effects of equity jurisdiction over matters of account, is that of contribution between sureties who are all bound for the same principal, and upon his default, one of them is compelled to pay the money, or to perform any other obligation, for which they all became bound. In cases of this sort, the surety who has paid the whole it entitled to receive contribution from all the others, for what he has done in relieving them from a common burden." And in the next paragraph:—"The claim certainly has its foundation in the clearest principles of natural justice; for, as all are equally bound, and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all." I should also add that, in s. 478, he remarks incidentally that each party "is liable to contribute only for his own portion," and that hence in proceedings at law, separate actions may become necessary against each, and so, to prevent multiplicity of suits, recourse is best had to a Court of Equity. In *Davies* v. *Humphreys* (1), which was an action brought by one surety against a co-surety, Mr. Baron Parke (afterwards Lords Wensleydale), in delivering the judgment of the Court of Exchequer, said:—"What then is the nature of the equity upon which the right of action depends? Is it that, when one surety has paid any part of the debt, he shall have a right to call on his co-surety or co-sureties to bear a portion of the burthen, or that, when he has paid more than his share, he shall have a right to be reimbursed whatever he has paid beyond it? or must the whole of the debt be paid by him, or some one liable, before he has a right to sue for contribution at all? We are not without

(1) 6 M. & W. 153, see 168.

authority on this subject, and it is in favor of the second of these propositions. Lord Eldon, in the case of *Ex parte Gifford* (1), states, that sureties stand with regard to each other in a relation which gives rise to this right amongst others that, if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay: and he expressly says, 'that, unless one surety should pay more than his moiety, he would not pay enough to bring an assumpsit against the other.' And this appears to us to be very reasonable for, if a surety pays a part of the debt only, and less than his moiety, he cannot be entitled to call on his co-surety, who might himself subsequently pay an equal or greater portion of the debt; in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive. In truth, threfore, until the one has paid more than his proportion, either of the whole debt, or of that part of the debt which remains unpaid by the principal, it is not clear that he ever will be entitled to demand anything from the other; and before that, he has no equity to receive a contribution, and consequently no right of action, which is founded on the equity to receive it. Thus, if the surety, more than six years before the action, have paid a portion of the debt, and the principal has paid the residue within six years, the statute of limitations will not run from the payment by the surety, but from the payment of the residue by the principal, for until the latter date, it does not appear that the surety has paid more than his share. The practical advantage of the rule above stated is considerable, as it would tend to multiplicity of suits and to a great inconvenience, if each surety might sue all the others for a rateable proportion of what he had paid the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his proportion of what the sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and the action will lie for it. It might, indeed, be more convenient to require that the whole amount should be settled before the sureties should be permitted to call upon each other,

(1) 6 Ves., 805.

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in order to prevent multiplicity of suits; indeed, convenience seems to require that Courts of Equity alone should deal with the subject; but the right of action having been once established, it seems clear that, when a surety has paid more than his share, every such payment ought to be reimbursed by those who have not paid theirs, in order to place him on the same footing."

The present case, no doubt, differs somewhat from the case, of sureties *inter se*, because the obligation of each surety is originally to pay the debt of a third person. In the present instance, as the claim is laid in the plaint, the defendants are co-principals with the plaintiff, each being bound to pay only his own share of the debt, to discharge his own part of the obligation. Consequentiy the principle, which I have endeavoured to explain as the principle of equity upon which this class of cases depends, goes, I may say, more strongly against the plaintiff here than if he was simply a co-surety with the defendants. He is bound, according to his own statement of the case, in the end, to bear a definite portion of the original debt; and it does seem to me to be stretching the principle a very long way to maintain that he has a right to come into Court and ask to be paid by his co-sharers before he has done anything whatever himself, even to discharge his own portion of the obligation. Moreover, he has himself disclosed in his plaint that the defendants have been by a competent Court acquitted of all obligations to pay the original creditor. The plaintiff cannot call upon them by his own showing to pay Gossai Munraj. His only right, if he has a right at all, is to call upon them to pay himself, and it seems to me, after the best consideration that I can give to this case and to the authorities which I think must be our guide in it, that he has no right to come into Court to ask that they be made to pay him until he can show that he has done something on their behalf. It seems to me that, until he has discharged that which he says ought to be treated as a common burden, or at any rate done something towards the discharge of it, he cannot say that there is anything of which he has relieved his co-debtors, and which he can call upon them to share with him.

The fact that Munraj has obtained a decree against him as

alleged in the plaint, is not alone, I think, of any importance in this suit under its present form. That decree merely declared authoritatively as between the present plaintiff and Munraj the existence of an obligation, which must now be taken to have existed previous to the suit in which the decree was made. The decree did not materially alter the character of that obligation: nor did the decree, in further ordering the mortgaged property to be sold unless the debt were paid, as we are told it did (although the plaint is silent on this point), place any new burden on that property, for it thus only gave effect to Munraj's already existing mortgagee rights. If then the plaintiff has a good cause of action in this suit, notwithstanding the fact that Munraj's decree remains altogether unsatisfied, he must have had that cause of action before the decree was passed; but no one has ventured to urge before us that this was so. The *ikrars* do not, I suppose, amount to a cause of action in themselves, otherwise they would have been sued on. The cases to which we have been referred by the learned pleader for the defendants, so far as they go, bear out this view. They were cases in which it was decided that the time for the purposes of barring a suit under the Limitation Act, does not in a suit of this sort begin to run until the plaintiff has paid the sum towards which he calls upon the defendants to contribute. In other words, the cause of action upon which he sued did not arise until he had paid that money.

It appears to me, therefore, on the whole, that the objection made by the defendants in this suit to the effect that the action in the form which the plaintiff has given it is premature, and that no cause of action is disclosed by the plaint as actually existing, is a good objection, and ought to have been allowed to prevail in the Court below. This conclusion, I think, is fortified by considering how difficult it would be to frame any decree upon the footing of the plaint in this case. The decree which has been passed by the lower Court is clearly wrong. It is not just, and it is not in accordance with the principle upon which the plaintiff must, if at all, place his right of suit, that the defendants should be ordered to pay to him without qualification, without conditions, a specified portion of

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the whole debt, interest, and costs decreed against him in another suit towards which he has not himself yet contributed a pice. And if such a decree cannot be made, the only alternative would be a decree declaring that the defendants ought,—in the event of the plaintiff's making a payment under and in discharge of Munraj's decree,—to contribute towards that payment in certain shares. But it is obvious that a decree in this form would be simply an interlocutory decree, and could only be made use of in some future proceeding or suit to be instituted when the present plaintiff may be in a position to come forward and say that he has paid the money. By passing such a decree, this Court would be doing that which I believe it invariably abstains from doing, namely, declaring judicially the relations between parties, not for the purpose or with the power of giving relief or remedy at the present time, but for the purpose of the declaration so made being used as a part of a judicial proceeding on some future occasion. In saying this, I do not at all forget or lose sight of the class of cases to which Mr. Allan called our attention, and in which the immediate action of the Court may be invoked, in order to prevent the future perpetration of a wrong or the future occurrence of irremediable mischief to the plaintiff when there is danger of either unless some such remedy be at the moment afforded to him. But here the plaintiff does not even suggest an equity of this sort, and I see no reason whatever why a part of this suit, so to speak, should be heard and determined now, while the remainder must be left to be finished in some future litigation. If the plaintiff could have alleged that his own separate property was mortgaged by the bond of 15th August 1864 at the request of Tundun Singh, that the money so borrowed was applied with Tundun Singh's sanction to the benefit of the joint property, and that afterwards the brothers separated and divided this joint property between them, I think that he would by such a plaint lay a good ground, upon which might be maintained an equity on his part to call upon Tundun Singh (or his representatives) at any time to help, in the proportion of his share in the joint property, to disencumber his (the plaintiff's) land; in other words, to aid the plaintiff to this

extent in redeeming the mortgage of 1864. At any rate there is authority for saying that the English Court of Chancery would recognize such an equity—*Lee* v. *Rook* (1). And if this be so, and if the suit brought by Munraj on the bond (2) was, as seems probable from the from of the decree (2) made in it on the 28th February 1871, essentially a suit for foreclosure or sale, inasmuch as such a suit would be to the present plaintiff a last opportunity to redeem, it would follow that he has a right to ask Tundun Singh's representatives to aid him in preventing the sale under that decree by paying into Court in that suit on the present plaintiff's behalf and in his name one moiety or other proper share of the money which was secured by the bond. Judging from that which has been disclosed to us in this matter, I can conceive it possible that the facts are such as would enable the plaintiff to make against the defendants a case of the character which I have just supposed. But, unfortunately, he has not done so in the plaint which before us, nor have the issues been tried in this suit which is would almost necessarily have arisen between the parties, if the plaint had taken the suggested form. I have been led to make the foregoing remarks, although they are perhaps not all strictly relevent to the determination of this suit, because I have been very reluctant to give a decision in this case which must have the effect of rendering useless all the proceedings which have been taken, and all the expenses incurred up to this time, and by upholding the preliminary objection, we shall unquestionably leave it open to the parties to litigate the same matter over again, probably at no very distant period: and under these circumstances I am anxious to mark out as distinctly as possible the exact ground on which our present decision rests. On the whole, I do not see how otherwise than by consent of parties we can pursue any course other than that of dealing with the objection raised by the defendants upon its strict legal merits, and consequently I feel myself obliged to say I think that the plaint, upon the materials before us, does not

(1) *Mosely*, 318.

(2) The bond and the decree there on have not been set out in the statement of the case as the record had been returned to the Zillah Court before the report was drawn up.

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disclose a complete cause of action, and that the suit ought to have been dismissed in the Court below.

It seems to me, therefore, that we must dismiss the suit with costs.

AINSLIE, J.—I concur with my learned colleague in thinking that the preliminary objection taken by the respondent must prevail.

As to how a suit may be framed which would enable the plaintiff to bring an action against the defendants before he (plaintiff) himself shall have paid the full amount that, on his own allegations, represents his share of the debt under the decree obtained by Gossai Munraj, I do not wish to express any opinion.

Appeal allowed.

PRIVY COUNCIL.

RAJAH CHUNDERNATH ROY (DEFENDANT) *v.* KOOAR GOBIND-NATH ROY AND OTHERS (PLAINTIFFS).

P. C.*
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April 27.

THE COLLECTOR OF MOORSHEDABAD (DEFENDANT) *v.* RANEE SHIBESSUREE DABEA (PLAINTIFF).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Adoption—Nattore Raj—Stridhun—Endowed Lands—Sheba—Presumption—Mode of Dealing with Evidence—Weight of Evidence.

In a suit as to the validity of the adoption of a claimant to the Nattore raj, held, notwithstanding a finding of the Judge of first instance that the adoption was not proved, that the evidence fully supported the adoption.

The presumption is that the object of an endowment by a Hindu for the worship of idols is to preserve the sheba in the family, rather than to confer a benefit on an individual; but if there are in the deed of gift no words denoting an intention of the donor that the gift should belong to the family, that presumption will not arise.

THE history of the litigation out of which these appeals arose is complicated.

* *Present* :—THE RIGHT HON'BLE SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, AND SIR ROBERT J. COLLIER.