

(1923) 08 MAD CK 0064
In the Madras High Court

Abboy Naidu

APPELLANT

Vs

N. Ramachandra Naidu and Another

RESPONDENT

Date of Decision : 27-08-1923

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 6

Citation : AIR 1924 Mad 279

Hon'ble Judges : Venkatasubba Rao, J;Phillips, J

Bench : Full Bench

Judgement

Venkatasubba Rao, J.—This appeal may be disposed of on a point of law but it is necessary to state a few facts that gave rise to the suit.

2. The plaintiff, the 1st defendant and the father of the 2nd defendant; borrowed from one Ramanatha Chettiar Ks. 4,000 on a promissory note and the creditor sued the executants of the note and he having died after the institution of the suit, his minor sons were brought on the record as plaintiffs with their mother as their next friend. A decree was passed in the suit against the plaintiff, the 1st defendant and the 2nd defendant who was added as a party on the death of his father. The plaintiff claims to have paid the full amount of the decree and has filed the suit for the recovery of that amount on the ground that the 1st defendant and the 2nd defendant's father are the principal debtors and he was himself a surety.

3. The learned Subordinate Judge has disbelieved the case of the plaintiff that the whole amount borrowed was received only by the 1st defendant and the father of the 2nd defendant. He further held that the payment alleged by the plaintiff to have been made with a view to satisfy the decree was not a valid payment which would enable the plaintiff to recover any amount from the defendants. In the result, he dismissed the plaintiff's suit.

4. On behalf of the plaintiff-appellant it was argued that the finding that he was not a mere surety did not entail the dismissal of the suit and as there was a

presumption that each of the joint debtors received an equal share of the amount originally borrowed, a decree should have been passed in his favour for two-thirds of the amount claimed and that the presumption was not rebutted by the evidence adduced on behalf of the defendant. It was next contended that the learned Judge's view that there was no valid payment is wrong.

5. There may be objections to the suit being treated as a suit for contribution; the defendants having had no opportunity to refuse a claim based on this footing, may be prejudiced by the nature of the suit being thus altered. But, in my opinion, it is unnecessary to deal with this aspect of the case. Nor is it necessary to decide any question of fact that arises in the appeal.

6. The facts bearing on the validity of the payment are these. The decree was passed on the 22nd of June 1915. The plaintiff alleges payment of the amount of the decree to one Kannuswamy Iyer who deposed that he was the agent of Ramanathan Ohetty. An application was made by the vakil of the decree-holders for the recording of the satisfaction of the decree and upon it the following order was made on the 16th of July: "Satisfaction cannot be recorded as the next friend of the minors is not entitled to receive money in their behalf without furnishing security." The learned Subordinate Judge holding that the payment was not duly recorded under Order 21, Rule 2, Civil Procedure, Code, decided that the plaintiff had no cause of action. I think the conclusion of the Subordinate Judge is right although I am not; disposed to agree that his reason is correct. It is not necessary to decide whether the observation of Bashyam Iyengar, J., in *Putti Narayanamurthi Iyer v. Marimuthu Pillai* (1903) 26 Mad. 322, that a payment which is not recorded is a valid payment correctly expresses the law; nor do I think it necessary to decide the effect of payment which is certified by the party but has not been recorded by the court. For, in my opinion, the provision of law that has a bearing on the present case is Order 32, Rule 6, Civil Procedure Code. It runs thus: (1) A next friend...for the suit shall not without the leave of the court receive any money...on behalf of a minor...under a decree or order in favour of the minor." (2) "...The Court shall, if it grants him (next friend) leave to receive the property, require such security and give such directions as will in its opinion be sufficient to protect the property from waste and ensure its proper application." This contains a prohibition against a next friend receiving money without the leave of the court under a decree in favour of the minor. The decree-holders were minors and the alleged payment was made to the agent of the next friend. Can such payment discharge the decree? It seems to me that if payment is made out of Court to a next friend without the leave of the Court the minors may ignore the payment and execute the decree. They may ignore it either because the money has not been applied for their benefit or because they may intend to commit a fraud. If the decree is sought to be executed the defendant cannot rely upon the unauthorised payment made to the next friend. This is obviously the effect of the section. It is no doubt true that the section does not in terms say what is to happen if such a payment is made. But surely the payment or the receipt in contravention of the rule is not an infringement of

the penal laws of the country and neither the party paying nor the party receiving becomes criminally liable. The object of the section is merely to safeguard the interests of the minor and it therefore follows that the payment does not discharge the decree. Let us look to the reason of the thing. If the defendants are now compelled to pay contribution to the plaintiff and if the full amount of the decree is again recovered from them by the minors in execution of the decree, the defendants will suffer great hardship. And why should they be prejudiced on account of the fault of the plaintiff? There is nothing in principle which requires that the co-debtor should contribute when he has not been himself exonerated from liability and when the original obligation is still outstanding. The right to contribution is not founded on contract but is the result of a general equity arising at the inception of the contract of guarantee on the ground of equality of burden and benefit". See. 15, Halsbury, page 527. Section 43, 2nd paragraph, Indian Contract Act, embodies this doctrine of English equity. It has been stated that the community of burden and benefit is the real ground of the right to contribution. Per O'Brien, J., in *Gardner v. Brooke* [1897] 2 Ir. R. 6. The mere fact that the surety has been damnified by payment cannot give him a right to claim contribution from his co-debtors. Let me take two instances. Suppose that an amount was borrowed by several debtors from A and that A died leaving B his heir. If one of the debtors paid the amount of the debt to C under the mistaken belief that he was the heir of A, would such payment entitle the man who paid the amount to claim contribution from the other debtors? Or again, suppose that the amount was due to A an infant for whom B was appointed guardian by the Court. If one of the debtors paid the amount to C under the impression that C was the guardian, would such payment give the man who paid any right of action against the other promisors? I see no difference in principle between these cases and the case on hand. It is not sufficient that the plaintiff is able to say "I have been damnified, I have suffered injury" but he must in addition satisfy the Court that his co-debtors have been exonerated from liability to the creditor, and that the parties who were equally bound to pay a common debt were relieved by the plaintiff of the burden of their debt. See *Roushah Ali Khan Chowdhuri v. Kali Mohan Moitra* (1906) Cri.L.J. 79. The right of contribution has its foundation in equity and it will not be just to compel the defendants to pay their share of the debt when they have not been relieved from the burden of the liability. I am therefore of the opinion that the plaintiff's claim has been rightly disallowed and I would therefore confirm the judgment and dismiss the appeal with costs.

Phillips, J.

7. In the peculiar circumstances of this case I agree in the order proposed by my learned brother.