
(1935) 10 MAD CK 0097
In the Madras High Court

K. Chengalroya Reddi

APPELLANT

Vs

Udai Kavour by her agent Mohanmull Choreda (deceased)
and Others

RESPONDENT

Date of Decision : 18-10-1935

Acts Referred:

Citation : AIR 1936 Mad 752 : (1936) 44 LW 214 : (1936) 71 MLJ 1(1)

Hon'ble Judges : Varadachariar, J;Stodart, J

Bench : Full Bench

Judgement

Varadachariar, J.—This appeal arises out of a suit for money instituted by a lady who owns two villages in the Karvetnagar Zamindari under a pre-settlement" grant. The 3rd defendant is the usufructuary mortgagee of another inam village in the Zamindari, 8th and 9th defendants being the owners of that village. The 1st defendant is the Zamindar; and the 2nd defendant is the usufructuary mortgagee of a division of the Zamindari known as the Narayanavaram Taluq. The other defendants are interested in some of the other villages in the Zamindari.

2. Though considerable portions of the Karvetnagar Zamindari have passed out of the ownership and possession of the Zamindar, no steps for separate registry have been taken in respect of many such portions; the result is that the Zamindar still continues to be the registered proprietor and as such liable for peishcush in respect of all the villages specified in Schedule A to the plaint and all the said villages remain liable to Government for the entirety of the peishcush due by the Zarmndar, The method of settlement adopted in connection with the Karvetnagar Zamindari and the three neighbouring Zamindaris was different from the scheme of Regulation 25 of 1802 The Secretary of State for India in Council Vs. Unde Rajaha Raje Sir Raja Velugoti Sri Rajagopala Krishna Yachendra, Bahadur Varu, K.C.I.E., Panchahazar Munsabdar, Maha Rajah of Venkatagiri, and AIR 1922 168 (Privy Council) with the result that in these estates even pre-settlement inams continue to remain liable to Government for the peishcush due

by the Zamindar.

3. When the usufructuary mortgage of the Narayanavaram Taluq in favour of the 2nd defendant's father was created, provision was made in Clause (7) of the deed for the mortgagee paying to the Government a sum of Rs. 70,000 per annum towards the peishcush payable by the Zamindar. The deed does not say that this represented the estimated proportion assessable on the Narayanavaram Taluq but it is stated in the course of the evidence that sometime later the Collector tentatively fixed the proportionate liability at Rs. 82,000. The 2nd defendant has not admitted his liability to pay this enhancement.

4. Portions of the peishcush due by the Zamindar for Faslis 1334 and 1335 remained unpaid and thirteen villages out of those specified in Schedule A to the plaint were sold in auction by the Revenue authorities on 20th August, 1926. For convenience of reference these thirteen villages are separately shown in Schedule B to the plaint; of these, eight, including one of the plaintiff's inam villages, form part of the Narayanavaram Taluq and the 3rd defendant's village is amongst the other five. It is stated in the plaint that the plaintiff was taking steps to set aside the sale of her village and the 2nd defendant was contemplating steps to set aside the sale in respect of the remaining seven villages comprised in his usufructuary mortgage. It is part of the plaintiff's case that at this juncture, her agent, and the 2nd defendant entered into a contract whereby the plaintiff was to lend a sum of Rs. 73,000 and odd to the 2nd defendant to enable him to get the entire sale cancelled, by deposit u/s 37(A) of the Revenue Recovery Act. The 2nd defendant denies the alleged contract and this is one of the questions for decision in the appeal. It is common ground that neither the 2nd defendant nor his agent signed the memorandum (Ex. A) which was drawn up for the purpose on the 17th September, 1926; but as that was the last day on which the deposit u/s 37(A) could be made, and as the sale could not be set aside except on a deposit of the entire sum, the plaintiff's agent deposited a sum of Rs. 73,503-10-5 and had the sale of all the B schedule villages set aside. This sum was made up as follows:

(vide Exhibit B) Rs. 69,614-9-2 .. Arrears of peishcush and land cess. 348-1-3 .. Interest on above. 3,540-8-0 .. 5% compensation to purchasers. 0-8-0 .. Miscellaneous. 5. The plaintiff claims that according to the terms of the original inam grant to her predecessor-in-title, the peishcush payable even in respect of the two villages granted to her was to be borne by the Zamindar himself. She accordingly filed this suit to recover the full amount of Rs. 73,000 and odd with future interest, from the 1st and 2nd defendants personally and as a first charge on the A schedule villages. In Clause (3) of para. 27 of the plaint, she prayed that in default of the defendants or any of them paying the plaintiff the amount or amounts that he or they may be made liable to pay, the Court may direct the sale of the properties of the defendants in Schedule A "severally for the recovery of the amounts due from several villages". By permission of the Court obtained on I.A. No. 506 of 1927 a schedule was added to the plaint (as Schedule, C)

wherein the plaint amount was distributed among the various groups of defendants as follows:

1, 2 and 7 defendants .. Rs. 67,954-14-8. 1, 3, 8 and 9 defendants .. 1,696-9-2. 1 and 4 defendants .. 102-3-2. 1, 5, 10-13 defendants .. 3,592-14-1. 1 and 6 defendants .. 84-0-7. 1st defendant .. 2,082-3-0. 6. The 1st defendant raised various pleas among which two only need be noticed, namely, (i) that as he is not in possession of most of the villages and has made arrangement for payment of the peishcush by the usufructuary mortgagee, the 1st defendant should not be held personally liable; (ii) that he should be proceeded against, if at all, only for such amount as could not be recovered from the 2nd defendant and the A scheduled properties. The 2nd defendant raised several pleas including a denial of the contract alleged in the plaint and an averment that the plaintiff's payment was voluntary. With reference to the covenant in the usufructuary mortgage deed about payment of Rs. 70,000 towards peishcush, he contended that the payment was one to be made at his option and that as he had obtained a decree on his mortgage but its realisation was being obstructed by the 1st defendant, the 2nd defendant could no longer be held liable on the covenant. It was also pleaded that the conditions required under Sections 69 and 70 of the Contract Act were not satisfied; and as the case did not fall within the terms of Section 35 of the Revenue Recovery Act, the plaintiff, it was said, was not entitled to any relief. The 3rd defendant pleaded that he had paid to the Government what must be considered to represent the proportionate sums payable in respect of his village and that the plaintiff had no further claim against the village in his hands- Defendants 5, 10, 11 and 14 also questioned the plaintiff's right to claim relief as against the villages in their possession. They further claimed priority in respect of a sum of Rs. 7,819 which they had paid towards peishcush for Fasli 1334. All the mortgagee defendants raised a further question that the plaintiff could not, in any event, have a first charge on their villages, but that her claim should be postponed to the mortgages in their favour.

7. The learned Subordinate Judge was of opinion that though there was an arrangement between the plaintiff's agent and the second defendant for a loan, there was no complete and enforceable contract because "the details of the arrangement connected with it were not completed by being reduced to writing and signed." (Para. 55.) He accepted the plaintiff's contention that she was entitled to a first charge for the amount claimed (subject to the fifth defendant's charge for revenue paid by him on an earlier occasion); but taking the view that the second defendant's liability to the plaintiff must be fixed in the proportion that the Rs. 70,000 provided for in the usufructuary mortgage bore to the total arrears of peishcush, he declared that the plaintiff should recover 7/10ths of the suit amount from items 1 to 7 of plaint B schedule which are comprised in the Narayanavaram Taluq. For the remaining 3/10ths he gave the plaintiff a charge on items 9-13 of the B schedule. He held that the plaintiff's claim against the second defendant fell within the terms of Sections 69 and 70 of the Contract Act, but it is not clear from the judgment and the decree whether he intended to give

a personal decree against the second defendant in respect of this 7/10ths of the suit amount. He declined to pass a personal decree against the first defendant or against the inamdars.

8. A.S. No. 78 of 1930 has been preferred by the third defendant and the connected appeal A.S. No. 84 of 1931, by defendants 5, 10, 11 and 14. The plaintiff has filed a memorandum of objections claiming a personal decree against defendants 1 and 2 and a charge for the whole amount on the entire Zamindari as per the plaint A schedule. The second defendant has filed a memo, of objections objecting to the lower court's decree and in particular to the priority given to the plaintiff over his own mortgage.

9. On behalf of the appellant in A.S. No. 78 of 1930 three contentions have been urged before us : (1) As the deposit was made by the plaintiff, according to her own case, in pursuance of a loan arrangement between herself and the second defendant, plaintiff's only remedy was on the contract and as against the second defendant and she could not invoke any doctrine of equity to support a claim against the properties in the hands of the other persons; (2) the plaintiff's right, if any, was only to recover severally from each of the villages specified in the A schedule a sum approximately representing its proportionate liability having regard to the total peishcush payable by the Zamindar; (3) in any event the plaintiff's claim was not entitled to priority over the mortgages which are anterior in date to the deposit made by the plaintiff.

10. It will be convenient to consider the list of the above contentions along with the plaintiff's claim (in the memo, of objections) for a personal decree against the second defendant. The personal liability of the second defendant was sought to be based on two grounds, viz., (i) express contract, and (ii) quasi-contractual liability, either under Sections 69 and 70 of the Contract Act or on equitable grounds. As regards express contract, the learned Counsel for the plaintiff admitted that he could not maintain that there was a concluded contract even on the night of 16-9-1926 when plaintiff's agent is said to have gone to the second defendant's house. He however contended that by reason of what happened at Puttur, on the 17th September, between the plaintiff's agent and the second defendant's agent, an enforceable contract must be deemed to have come into existence before the plaintiff's agent paid the money into the Taluq treasury. In this connection he relied particularly upon the evidence of P.W. 1 and also that of P.Ws. 2 and 4. He criticised the view of the learned Subordinate, Judge that the contract could not be deemed to have been concluded before a written memorandum in respect thereof had been signed.

11. It is not clear whether the observation in para. 55 of the lower court's judgment refers to the settlement of certain details in connection with the loan arrangement or merely to its reduction to writing. Whether the intention to have a formal document drawn up postpones the formation of the contract itself till such instrument is executed, is a matter to be determined with reference to all the circumstances of the case. See *Harichand Mancharam v. Govind Luxman*

(1922) 44 M.L.J. 608 : L.R. 50 IndAp 25 : ILR 47 Bom. 335 (P.C.) and (1933) ILR 60 980 (Privy Council) . It appears even from the evidence on the plaintiff's side that as different proposals were made from time to time in the course of the negotiations between the second defendant and the plaintiff's agent, it was considered desirable at each stage to have a draft from P.W. 1. to form the basis for discussion. Exhibit A, the draft finally intended to be executed in this connection, is a fairly complicated document and there will be nothing unreasonable in assuming that an arrangement of that kind would in all probability have been intended to come into effect only on the execution of the necessary document. The second defendant was obviously anxious that the method of repayment of the loan should be one that would suit his convenience and the proposals relating to repayment cannot therefore be dissociated from the proposal to lend. As stated already, the second defendant had not definitely bound himself even on the night of the 16th of September, and the plaintiff's agent would only say that he (second defendant) promised to send his agent (D.W. 6) and D.W. 4 to Puttur the next morning and himself come to Puttur by 2-30 p.m. and if he was unable to come, D.W. 6 would sign the agreement. It is admitted that even on the 17th, the second defendant's agent D.W. 6 took exception to some of the terms contained in the draft that had been prepared by P.W. 1 on the night of the 16th; but it is said that as plaintiff's agent agreed to the modifications suggested by D.W. 6 and Exhibit A was drafted only after both the agents had agreed on all the matters, a contract binding on the second defendant must be deemed to have come into existence. There is some force in the suggestion that D.W. 6 might have been playing a double game, in the hope that the plaintiff's agent would anyhow deposit the money; this only makes it all the more difficult to find that he entered into a binding contract. It is equally likely that the plaintiff's agent hoped that the second defendant will, in any event, agree to repay the money in view of the alleged earlier negotiations.

12. If a contract is to be inferred from what happened at Puttur on the 17th, the authority of D.W. 6 to bind the second defendant by such a contract must be placed beyond doubt. His power of attorney (Exhibit XIII) does not seem to confer such authority on him, Plaintiff is therefore obliged to fall back upon the conduct of the second defendant during the alleged preliminary negotiations and upon the fact that the second defendant's men did bring some money to Puttur on the 17th. The story given by the defendant's witnesses as to the purpose for which this money was taken by D.W. 6 is in some measure supported by the statement of P.W. 2 that on the 16th night the second defendant refused to pay Rs. 20,000 into the witness's hands because he required it to make an arrangement with the purchasers if the plaintiff was not going to deposit the amount required to set aside the, sale* Whether that story represents the whole truth or not, that circumstance does not suffice to carry the matter beyond the stage of negotiations and expectations. The evidence of P.W. 1 is only hearsay, so far as it relates to the promises and representations attributed to the second defendant. It is not therefore possible to hold that the learned Subordinate Judge

was wrong in holding that a concluded contract of loan had not been established.

13. As regards the alternative claim under Sections 69 and 70 of the Contract Act, the whole tenor of the discussion in the judgment of the lower court, from para. 31 to para. 57, suggests that the learned Judge was of opinion that the case fell both under Sections 69 and 70 of the Contract Act. Plaintiff's learned Counsel rightly contended that on this reasoning a personal decree against the second defendant should have followed. On behalf of the second defendant, it was argued that such a claim was wholly inconsistent with the case made in the plaint that plaintiff made the deposit in pursuance of an express contract with the second defendant. It was also said that the grant of any such relief would practically amount to permitting the plaintiff to enforce the covenant in the usufructuary mortgage to which she was not a party; in other words, the expression "bound by law to pay" in Section 69 must, it was said, be limited to liabilities arising under the law and not extended to cover liabilities founded on contracts with third parties. It was next argued that the covenant in the usufructuary mortgage, even taking it to impose an obligation on the second defendant to pay Rs. 70,000 towards peishcush, was no longer operative as the rights and liabilities of the parties in respect of that mortgage had been changed by reason of the Court of Wards taking possession of the mortgaged property in 1900 or had at any rate merged in the decree passed in O.S. No. 12 of 1901. It was also maintained that in the circumstances of the case, the plaintiff must be deemed to have made the deposit in her own interest and not "for another" within the meaning of Section 70 of the Contract Act. A further argument, in the same connection, advanced on behalf of the first defendant may also be noticed here. It was contended that whatever liability there was on the part of the defendants came to an end when the villages were sold by the Revenue authorities and Section 69 could not be invoked in respect of payment of money made to set aside that sale.

14. There is little force in the objection about the inconsistency between the claim on the express contract and that u/s 69 or Section 70. If the express contract between the plaintiff and second defendant had been found to be true and enforceable, a question might arise whether in the circumstances plaintiff would be entitled "to relief against the other defendants as well; but in view of our finding against the contract alleged, that problem does not arise.

15. The argument against the extension of Section 69 to obligations arising under contracts (with third parties) is not free from difficulty. A claim u/s 69 is not the same as the enforcement of a contract entered into by the defendant with a third party, because the claim can be made only after the plaintiff has made a payment to the paramount claimant. There are at least two decisions of this Court in favour of the wider construction *Muthurakku Maniagan v. Rakkappa* (1913) 26 M.L.J. 66 and *Rasappa Pillai Vs. Mitta Zemindar Doraiswami Reddiar alias Pethu Reddiar and Others*, and one decision of a Division Bench of the Bombay High Court, *Somashastry v. Swamirao Kashinath* I.L.R.(1917) 42

Bom. 93 . It is however not easy to reconcile one or two steps in the reasoning of Sadasiva Aiyar, J., in *Muthurakku Maniagarar v. Rakkappa* (1913) 26 M.L.J. 66 with the decision of the Judicial Committee in 16 CWN 97 (Privy Council) . The decision in *Muthurakku Maniagarar v. Rakkappa* (1913) 26 M.L.J. 66 was questioned in *Kunchithapatham Pillai v. Palamalai Pillai* (1916) 32 M.L.J. 347 and has recently been dissented from by Ramesam, J., in *Thoppai M. Muthiah Bhagavathar and Others Vs. T.V. Venkatarama Ayyar and Others*, . An observation in the judgment of the Judicial Committee in *Nathu Khan v. Thakur Burtonath Singh* (1921) 42 M.L.J. 444 (P.C.), lends some colour to the view that persons who are not parties to a contract cannot, even after they have made a payment to the paramount claimant, claim reimbursement from one who by contract with another had bound himself to make that payment. Their Lordships say that "the suit as against Bindersi was misconceived, for the plaintiffs were not parties to the deed of 7th September, 1904 and no trust was thereby created in their favour." This remark must however be understood in the light of the fact (noted in the judgment) that in another suit it had been decreed (on a compromise) that Bindersi should give up to his vendor the property in return for the sale of which Bindersi had agreed to discharge the debt due from the vendor to the paramount creditor. On that state of facts, it would be possible to say that Bindersi was no longer liable to anybody for the debt. In any view, this pronouncement can bear only on Section 69 and not on Section 70, because the condition of another person (i.e., Bindersi) enjoying the benefit of what the plaintiff did could not be postulated in that case. It is however unnecessary to express any final opinion upon this question in this case, because the liability of the second defendant under the usufructuary mortgage deed in respect of payment of revenue is little more, than a definition of the liability cast on him, by law, viz., Section 76(c) of the Transfer of Property Act.

16. The contention that the second defendant's liability (whether under the law or under the covenant) to pay the Government revenue had come to an end by reason of the decree in O.S. No. 12 of 1901 or by reason of his dispossession by the Court of Wards was not raised in the Court below, and even the papers relating to these proceedings have not been filed in the suit. Indeed, in view of the attitude all along taken by the second defendant, he could scarcely have intended to raise it. In his relations with the Revenue authorities as well as in interlocutory petitions filed by him in Court in O.S. No. 12 of 1901, he has always maintained that he was in possession and entitled to possession as a "usufructuary mortgagee". (See Ex. N-1.) He has admittedly continued to remain in possession; and even in his deposition in the present suit he asserts that he continues to be the usufructuary mortgagee.

17. The decree in O.S. No. 12 of 1901 was a compromise decree and it is too much to ask us to apply to it, as a mere matter of law, the dictum of the Judicial Committee in 22 CWN 1033 (Privy Council) that on the making of the order absolute for sale the security is extinguished and hold that the second defendant has thereafter been relieved of all obligations attaching to his possession. That

observation of their Lordships has relation to the right of the simple mortgagee as such, because their Lordships go on to say that for the right of the mortgagee under his security there was substituted the right to a sale conferred by the decree. What about the right to possession? Section 89 of the Transfer of Property Act did not contemplate such a case at all; and it cannot be maintained as a necessary legal consequence of the passing of the order absolute that the creditor's continued possession cannot be in the character of a usufructuary mortgagee cf. (1896) L.R. 23 I.A. 32 (Privy Council) .

18. Nor is there any specific provision in the Court of Wards Act to the effect that on dispossession u/s 43, a usufructuary mortgage is finally extinguished. It has been admitted before us that one of the provisions of the compromise decree was that the Court of Wards (who had then taken possession) should continue to pay to the second defendant the net income from the Narayanavaram Taluq; and that is apparently the reason why when the Court of Wards released the estate from their management, they put these villages in the possession of the second defendant. Even during the execution proceedings in the mortgage suit, he seems to have admitted that he was "liable to account to the judgment-debtor for the profits realised as mortgagee in possession" and his only contention was that that was not a matter to be gone into in execution. See *Lodd Govinda Doss v. Rajah of Karvetnagar* (1915) 29 M.L.J. 219 . The second defendant can therefore scarcely insist on being allowed to raise here for the first time without necessary material the contention that his obligations as a usufructuary mortgagee have come to an end and there appears to be little merit or substance in that contention.

19. It is accordingly unnecessary to consider at length whether the dictum in 22 CWN 1033 (Privy Council) can be understood and applied in the unqualified way that second defendant's learned Counsel asks us to do. In AIR 1922 11 (Privy Council) the Judicial Committee refer to the decision of this Court in *Vanmikalinga Mudali v. Chidambara Chetty* I.L.R.(1905) 29 Mad. 37 and clearly suggest that more guarded language might have been employed in the 22 CWN 1033 (Privy Council) if the Madras case had then been brought to their Lordships' notice. In *Abbas Ali Khan v. Chote Lal* I.L.R.(1926) 49 All. 162 one learned-Judge of the Allahabad High Court went so far as to suggest that the dictum in 22 CWN 1033 (Privy Council) could no longer be taken as good law in all its generality, in view of their Lordships' later pronouncements. The language of Section 89 of the Transfer of Property Act would be satisfied by holding as in *Vanmikalinga Mudali v. Chidambara Chetty* I.L.R.(1905) 29 Mad. 37 that that is the basis on which the execution of the decree should proceed cf. the observations in *Pingali Venkataramana Reddi* by his authorised agent *Brahmanda Narasimha Rau Vs. Kotigari M. Rangiah Chetti and Others*, .

20. We are not prepared to take seriously the contention that as usufructuary mortgagee the second defendant was under no obligation to pay Rs. 70,000 towards peishcush but only had an option. Clause (12) of the mortgage deed on

which reliance was placed in support of this contention can reasonably refer only to the balance of peishcush payable by the mortgagor over and above Rs. 70,000 which under Clause (5) the mortgagee has to pay. Such a provision was necessary because the villages comprised in the usufructuary mortgage could not be separately registered from those still held by the mortgagor. It will be making the document self-contradictory to hold that the very payment which was made obligatory in Clause (5) was intended to be made optional by Clause (12). Under Clause (5) the sum of Rs. 70,000 has to be paid annually out of the income of the mortgaged villages and the surplus income alone is to be credited towards interest. It will be meaningless to apply to this sum of Rs. 70,000 the provision in Clause (12) for payment-of interest on any sums which the mortgagee may pay under it towards peishcush.

21. The contention that plaintiff cannot rely on Sections 69 and 70 of the Contract Act because her village had also been sold and she must be deemed to have made the deposit for her own benefit is opposed to a long line of authorities. If, even as between the parties, the plaintiff had to bear a share of the liability, it might be argued that the plaintiff's remedy was a suit for contribution properly so called. But on the finding that the plaintiff is not liable to contribute any portion towards the peishcush, the argument based on *Jagapati Raju v. Dakshina Kavata Dugaraju* (1915) 29 M.L.J. 639 : ILR 39 Mad. 795 has no application. Cf. *Tirumalai Savuri Naicker Vs. Royar alias Kachiraya Thevar*, . The fact that by reason of the deposit, plaintiff's village also was saved does not of itself preclude the conclusion that the deposit was also made for the owners of the other villages. Section 69 or Section 70 has in numerous instances been applied as between co-owners *C. Damodara Mudaliar and Another Vs. The Secretary of State for India in Council*, , *Sri Sri Sri Gajapathi Kistna Chendra Deo Guru, Proprietor of Nandigam Estate being minor under the Court of Wards by his Next Friend the Collector of Ganjam Vs. P. Srinivasa Charlu (died)* L.R. of the Late Dewan Bahadur P. Anantha Charlu, , *Jarao Kumari v. Basanta Kumar Roy* I.L.R.(1904) 32 Cal. 374 *Upendra Krishna Mandal v. Naba Kishore Mandal* 25 C.W.N. 813 *Kedar Nath Mistri v. Narayan Chandra Safui* 34 C.W.N. 41 *Hari Prosad Roy v. Rama Prosad Rai* (1920) 60 I.C. 414 *Babu Bhagwati Saran Singh v. Maiyan Murat Mati Kuer* I.L.R.(1931) 10 Pat. 528 and the authorities there cited. In *Ganapathi Bhatta and Another Vs. Sanna Sedu Beari*, , *Wallace, J.*, does not as a matter of law negative the application of Section 70 to case where the plaintiff also benefited by his payment but only suggests that where the dominant motive of the plaintiff was to benefit himself, the application of Section 70 may not be justifiable. In *Rajah of Pittapur v. Secretary of State* (1914) 25 I.C. 783 *Spencer, J.*, agreed with the proposition of law laid down by *Miller, J.*, in *Sri Sri Sri Gajapathi Kistna Chendra Deo Guru, Proprietor of Nandigam Estate being minor under the Court of Wards by his Next Friend the Collector of Ganjam Vs. P. Srinivasa Charlu (died)* L.R. of the Late Dewan Bahadur P. Anantha Charlu, but on the facts of the particular case the learned Judges came to the conclusion that the work in respect of which contribution was claimed in -that case had been

done chiefly in the interests of the plaintiff. As Sankaran Nair, J. put it, in the course of the argument in that case, the position there was that the plaintiff would have gone on with the work whether he got contribution from the defendant or not. Even in *Avudayappe Pillai v. Thillai Thandavaraya Pillai* (1927) 27 L.W. 406 the point is left as one of fact for determination in the circumstances of each case. See also *Sampath Aiyangar v. Raja of Venkatagiri* (1930) 33 L.W. 284. The evidence and the probabilities in the present case clearly establish that the plaintiff in making the deposit did not act merely for herself. Even according to the evidence on the defendant's side, there was a proposal that the plaintiff might save her village by some arrangement with the purchaser thereof. There can be little doubt that it was the negotiation that had been going on between the plaintiff and the second defendant with a view to save all the B schedule villages that induced the plaintiff's agent not to seek plaintiff's benefit alone but save all the villages for the benefit of all concerned. It is fairly certain that the second defendant "knew that the plaintiff was laying out her money in the expectation of being repaid". Cf. *Narayanaswami Naidu v. Sree Rajah Vellanki Sreenivasa Jagannadha Rao* I.L.R.(1909) 33 Mad. 189 at 195.

22. Even if the question of an option to accept the benefit of the act be considered material, the second defendant has undoubtedly accepted the benefit in this case. As pointed out by Sankaran Nair, J., in *Rajah of Pittapur v. Secretary of State* (1914) 25 I.C. 783 if a person uses property which but for another's act would not have existed or been available to him, he consciously accepts the benefit of the other's act and must pay for it see also *Lakshmanan Chetti v. Arunachalam Chetti* (1931) 34 L.W. 859 and *Babu Bhagwati Saran Singh v. Maiyan Murat Mati Kuer* I.L.R.(1931) 10 Pat. 528 . It is not the second defendant's case that he does not want the property at the cost of paying the plaintiff the expenses incurred in saving it.

23. The distinction sought to be drawn by the first defendant's learned Counsel between a payment made prior to a sale and a payment made to set aside a sale after it has taken place, is not of much practical consequence in the circumstances of this case. Even if it be assumed that the defendants' liability to pay to the Government came to an end with the sale cf. *Kangal Chandra Pal v. Gopinath Pal* 14 C.W.N. 361 and *Sri Maharaja Parbhu Narain Singh v. Babu Beni Singh* 14 C.W.N. 361 that, will only exclude the application of Section 69 and not the application of Section 70. It will suffice to refer to the following authorities to show that reimbursement has been decreed even in respect of money paid to set aside a sale. *Rasappa Pillai Vs. Mitta Zemindar Doraiswami Reddiar alias Pethu Reddiar and Others*, , *Hari Prosad Roy v. Rama Prosad Roy* (1920) 60 I.C. 414 *Kedar Nath Mistri v. Narayan Chandra Safui* 34 C.W.N. 41 *Kangal Chandra Pal v. Gopinath Pal* (1920) 68 I.C. 104 and *Babu Bhagwati Saran Singh v. Maiyan Murat Mati Kuer* I.L.R.(1931) 10 Pat. 528 and the other cases there cited.) "But ki most of these cases, at any rate when the point was raised, the Court has declined to award, under these sections, the 5 per cent, payable to the purchaser as statutory compensation see the authorities collected in *Babu Bhagwati Saran*

Singh v. Maiyan Murat Mati Kuer (1931) ILR 10 Pat. 528 .

24. The plaintiff will, in the above view, be entitled to a personal decree against the second defendant for the amount of land revenue and excess land cess paid by her and interest thereon, either on the basis of Section 69 or Section 70 of the Contract Act or on general principles of equitable reimbursement.

25. The plaintiff's claim for a personal decree against the first defendant is scarcely open to question. So long as the first defendant continues to remain the registered proprietor, he is undoubtedly bound by law to pay the peishkush within the meaning of Section 69 and it makes no difference that he is not in possession of all the villages or is not the real owner in respect of some of them. Even if as above suggested, Section 69 should be held to be inapplicable after the revenue sale had taken place, the claim against him will be justified u/s 70. But even as against him, the personal decree must be only for the same sum as above indicated in respect of the second defendant.

26. A point was sought to be raised before us that the second defendant had paid a large amount for the June instalment of Kist for Fasli 1335 and he should be given credit here for that sum. The question was not raised in the Court below and we are not prepared to allow it to be raised here for the first time. Similarly it was suggested that the plaintiff had independently paid the land cess due on her villages and that amount should not therefore be deducted from the plaintiff sum. There is no proof of this payment either.

27. If we had come to the conclusion that the plaintiff's agent made the deposit in pursuance of an enforceable contract of loan between the plaintiff and the second defendant, it might be doubtful if the plaintiff could have sustained her claim for a charge on the properties, on the analogy of the doctrine of salvage or on equitable grounds cf. *Yourell v. Hibernian Bank* (1918) A.C. 372 . The decision in *Narain Pershad and Others Vs. Narain Singh and Others*, , relied on by the plaintiff's learned Counsel bears no true analogy to the present case. But the grant of relief to the plaintiff u/s 69 or 70 of the Contract Act will not preclude the declaration of a charge on equitable grounds cf. *Shib Lal v. Munni Lal I.L.R.* (1921) 44 All. 67. In *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (1867) 11 M.I.A. 241 the right to a charge was recognised in addition to the personal decree under Bengal Regulation I of 1845. The appellant's first contention must therefore be overruled.

28. Proceeding next to the second point urged on behalf of the appellant, I may point out - and this was particularly pressed on us - that the prayer in the plaint has been framed only on the footing of the liability of each of the A schedule villages for a proportionate share of the plaint amount. No reasons are gatherable from the judgment for the learned Judge departing from this basis and throwing the whole liability on the 13 villages specified in schedule B to the plaint and making it a joint liability, though some reasons are given to explain the division into 7/10 and 3/10ths. The extent of the difference between the two

methods to the appellant will be realised when it is noticed that according to the calculations worked out in schedule C, the appellant's village will be liable only for a sum of Rs. 1,696-9-2, whereas under the decree of the lower Court that village (with four other villages) is declared jointly liable to the plaintiff for about Rs. 17,000. Mr. Srinivasa Aiyangar who appeared for the plaintiff recognises that the basis adopted by the Court below is different from that on which relief was asked for in the plaint; and even in the memo, of objections filed here on behalf of the plaintiff, a point has been taken that a charge should have been declared on all the A scheduled properties. But he contends nevertheless that the course adopted by the learned Subordinate Judge is warranted by law. He argues that the plaintiff has two bases of claim - one resting on the common liability of all the A scheduled villages for the peishcush due to Government and the other on the fact that 13 of these villages which had been lost to the owners by reason of the revenue sale were saved for them by reason of the deposit made by the plaintiff. According to the learned counsel, a charge on all the A scheduled properties will be justified on the first ground and a charge for the whole amount on the B scheduled properties can be claimed on the second ground; he maintained that the latter alternative is even more closely analogous than the former to the "salvage lien" invoked in some of the authorities.

29. Here again, it seems to me legitimate to draw a distinction between the amount actually due as arrears and the 5 per cent., etc., payable u/s 37(A) of the Revenue Recovery Act for the privilege of setting aside a sale that has taken place. So far as the former amount is concerned, the liability was the liability of all the A scheduled properties and there appears no justification for making a difference between the stage before the sale and the stage after the sale. A revenue sale quite as much as an execution sale is conditioned by the possibility of its being avoided in the manner provided by law by application within a month; and during this period, the liability for revenue must, in a sense, be deemed to continue to subsist on all the properties. If this is the true position, there is no justification for throwing the entire liability on the properties actually sold when the payment is made after the sale any more than for throwing it exclusively upon the properties that may be attached, if the payment is made after attachment but before sale. In respect of this situation, the doctrine of salvage must be taken to be referred to more as furnishing an analogy than as literally applicable.

30. As regards the extra 5 per cent, and other miscellaneous items required to be deposited u/s 37(A) of the Revenue Recovery Act, the position is different. The analogy of salvage may be invoked even in respect of these items but as they never constituted a charge on the entire properties, the principle of salvage would make them recoverable only out of the properties whose sale has been set aside by such deposit. Cf. *Bhagwan Singh v. Mazhar Ali Khan* (1914) ILR 36 All. 272. It must be mentioned in this connection that the purchase of Kethumalmaharajapuram was not completed by the revenue auction purchaser; it cannot therefore be said to have been saved by the plaintiff, so as to be

subjected to a charge. For the same reason, so much of the 5 per cent, deposit as is proportionate to the sale price of this village must be decreed to have been unnecessarily made and accordingly left out of account for the purposes of this suit.

31. Whether in respect of the first item or in respect of the second, I think the analogy of salvage justifies only a pro rata liability and not a joint liability. Cf. Halsbury's Laws of England, Vol. 26, Tit. "Shipping", paras. 899 and 901.) This view is also supported by the principle enunciated in Section 82 of the Transfer of Property Act. Mr. Srinivasa Aiyangar contended that the rule of several liability for proportionate amounts should be followed only in cases where the suit is for contribution and he maintained that the present is not such a suit. In this connection he relied on *Moti Chand v. Bajrang Sahai* (1911) 16 C.L.J. and *Jognarain v. Badri Das* (1911) 16 C.L.J. 156. Where several persons are under a joint liability, these cases will no doubt apply cf. *Sampath Aiyangar v. Rajah of Venkatagiri* (1930) 33 L.W. 284 and likewise where a statutory provision expressly declares a charge on the entire holding in favour of the person making the payment. Cf. *Beni Madhub Banerjee v. Puma Chandra Daw* (1890) 14 C.L.J. 134. But in the present, case, there is no question of joint personal liability of the parties. Cf. *Mosafkanni Ravuthar v. Doraisami* (1926) 54 M.L.J. 30 and *Suryanarayana v. Appa Rao Bahadur* (1928) 29 L.W. 600. The principle underlying Section 82 of the Transfer of Property Act is not excluded merely because of the finding that as between the plaintiff and the zamindar plaintiff's villages are not liable to contribute towards the peishcush. The substantive declaration in the section that the liability of the items respectively belonging to different owners is only to contribute rateably to the common burden cannot be affected by the form of the action or even the existence of a contract to the contrary in favour of one of the several sharers. I am therefore of opinion that the declaration, of charge in plaintiff's favour can only be on the basis, of the pro rata liability of the properties in the hands of different owners and that for this purpose the amount paid for land revenue and excess land cess and subsequent interest thereon must be distributed on the entirety of the properties registered in the zamindar's name but that the sum representing the 5 per cent, solatium and interest thereon should be distributed on the B schedule properties (except Kethumalmaharajapuram). The apportionment must be made, if necessary, on the lines indicated in Section 45 of the Madras Revenue Recovery Act.

32. The third contention in the appeal, relating to the question of first charge, has been argued mainly with reference to the observations of the Judicial Committee in (1932) ILR 59 463 (Privy Council) and a decision of this Court in *Vyraperumal Mudaliar v. Alagappa* (1931) 62 M.L.J. 31 : ILR 55 Mad. 468. The question of priority did not arise for decision either in *The Maharaja of Vizianagaram by his Guardian and Next Friend, F.W. Gillman Vs. Sri Rajah Setrucherla Somasekhararaz Bahadur and Ramabhadraraz Bahadur*, , or in *Seshagiri v. Pichu* I.L.R.(1887) 11 Mad. 452. It may be recalled that in *The Maharaja of Vizianagaram by his Guardian and Next Friend, F.W. Gillman Vs. Sri*

Rajah Setrucherla Somasekhararaz Bahadur and Ramabhadraraz Bahadur, , a Full Bench of this Court adopted the conclusion reached in the dissenting judgment of Mitter, J., in *Kinu Ram Das v. Mozaffer Hosain Shaha* I.L.R.(1887) 14 Cal. 809 (F.B.), and of Mahmood, J., in *Seth Chitor Mai v. Shib Lai* ILR (1892) 14 All. 273 (F.B.). But it will be too much to attribute to the learned Judges who constituted the Full Bench an intention to adopt all the reasoning-contained in the judgment of Mitter, J. and Mahmood, J. In the referring judgment, Sir Bashyam Aiyangar, J., adverted to the question of priority and expressed a preference in favour of the view of Mahmood, J., but he guarded himself against being understood as expressing any decided opinion on the point.

33. In the opinions delivered by the Full Bench, not merely is there no reference to the question of priority but the reference to the possibility of supporting the charge on the principle of Section 82 and Section 100 of the Transfer of Property Act suggests that the learned Judges were not altogether following the reasoning of Mitter and Mahmood, JJ., for no argument in favour of priority could be deduced from these sections. Sir Subramania Aiyar, J., states his conclusion as one arrived at independently of the analogy of salvage lien and all the three learned Judges purport to follow *Seshagiri v. Pichu* I.L.R.(1887) 11 Mad. 452. The Full Bench judgment therefore throws no light on the question of priority.

34. In *Seshagiri v. Pichu* I.L.R.(1887) 11 Mad. 452 Mr. Justice Muthuswami Aiyar placed some reliance on the theory of subrogation and if this theory could be wholly relied on, it may be possible to suggest that the first charge possessed by the Crown will also pass to the person who pays the whole peishcush. But both Mr. Justice Bashyam Aiyangar in *The Maharaja of Vizianagaram by his Guardian and Next Friend, F.W. Gillman Vs. Sri Rajah Setrucherla Somasekhararaz Bahadur and Ramabhadraraz Bahadur, ,* and Mr. Justice Mahmood in *Seth Chitor Mal v. Shib Lal* I.L.R.(1892) 14 All. 273 (F.B.) have shown that the principle of subrogation cannot be invoked to place the subject in the same position as the State for this purpose. See also *Ramnandan Prasad Singh Vs. Ram Das and Others, .* The decision in *In re Lord Churchill : Manisty v. Churchill* (1888) L.R. 39 Ch. D. 174 must be limited to the law of principal and surety. Though in *Seshagiri v. Pichu* (1887) ILR 11 Mad. 452 Muthuswami Aiyar, J., refers to *Kinu Ram Das v. Mozaffer Hosain Shaha* I.L.R.(1887) 14 Cal. 809 (F.B.) he does not in terms purport to adopt the reasoning of Mitter, J., but the other learned Judge (Kernan, J.) expresses his concurrence with the reasons given by Mitter, J., in his judgment. In the Calcutta case the question of priority did not arise for decision but the reasoning of Mitter, J., is directly in favour of it. In *Seth Chitor Mai v. Shib Lal* I.L.R.(1892) 14 All. 273 (F.B.) the question of priority had to be considered and Mahmood, J., expressly affirmed it.

35. If the law relating to salvage lien can be held to furnish a true analogy, the right to priority over all the other interests will be a logical consequence; and this seems to be the trend of the Irish decisions referred to by Mitter, J. The following observations of Lord St. Leonards in *In re Tharp* (1886) 2 Sm. and Giff. 578 : 65

E.R. 533 put the reason for this view in terms which are identical with those employed in cases of maritime salvage:

He that pays the salvage has a prior encumbrance over every other charge and interest because so far as any interest is left to anybody it is acquired by that payment.

36. Notwithstanding the reluctance of Sir John Edge and Sir Arthur Wilson to drag in the analogy of Salvage, the Judicial Committee have reiterated the analogy *Dakshina Mohun Roy Chowdhry v. Saroda Mohun Roy Chowdhry* and (1932) ILR 59 463 (Privy Council) and the language employed by their Lordships in (1932) ILR 59 463 (Privy Council) is much too clear to be mistaken and much too positive to be ignored. Even in *Nugenderchunder Ghose v. Sreemutty Kaminee Dossees* (1867) 11 M.I.A. 241 the Judicial Committee recognised, in favour of the person paying the revenue, a charge as against all persons interested in the property; there is no reason for restricting this general observation to persons having an interest inferior to that of the persons making the payment or acquiring an interest subsequent to the date of payment. In (1932) ILR 59 463 (Privy Council) their Lordships not only quote with approval this passage from *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (1867) 11 M.I.A. 241 but speaking of the payment as a "salvage payment on behalf of all persons interested" add that the person making the payment would be entitled in accordance with the opinion of the Board in *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (1867) 11 M.I.A. 241 to a first charge. They follow up this statement of the law by modifying the decree of the trial Judge so as to give the plaintiff a "first charge on the sale proceeds."

37. It has been contended on behalf of the mortgagees that in (1932) ILR 59 463 (Privy Council) the question of first charge in the "sense of priority over all other encumbrances did not arise for decision and that their Lordships were merely giving to the plaintiff what he was entitled to under the terms of the document as well as under the express provisions of Bengal Act XI of 1859, namely, the privilege of adding the amount of revenue paid by him to the amount of his mortgage, so as to gain priority therefor over persons claiming under mortgages subsequent to the plaintiffs. In support of this interpretation of the judgment, reliance has been placed upon the observations of this Court in *Vyraperumal Mudaliar v. Alagappa* (1931) 62 M.L.J. 31 : ILR 55 Mad. 468.

38. With all respect, I am unable to agree that that is the true scope of their Lordships' pronouncement; for, on that footing, it would have been sufficient for their Lordships merely to rely upon the clause in the mortgage deed and on the terms of Act XI of 1859 and there would have been no necessity to refer at such length to the decision in *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (1867) 11 M.I.A. 241 or to invoke the analogy of the doctrine of salvage. It is true that it is not clear from the report whether the first charge declared on the sale proceeds was intended to affect the right under the prior usufructuary mortgage. We have not been able to ascertain from any of the available reports

or from the judgment of the High Court in *Hazarimull Babu v. Manohar Das Mohanta Maharaj* I.L.R.(1929) 57 Cal. 298 whether in the first suit of the plaintiff a sale had been ordered free of the usufructuary mortgage or not. It would appear that the usufructuary mortgage interest was represented in the plaintiff's mortgage suit and the appropriate form of the decree would in that case have been to direct a sale of the whole interest in the property and give the usufructuary mortgagee the first charge over the proceeds. It is only if some such thing had happened, the Privy Council would have found it necessary to give an express direction in the later suit that in respect of the revenue payment, the plaintiff should have a "first charge over the sale proceeds" in the first mortgage suit. The declaration of the first charge would have been inappropriate if all that was meant was that the plaintiff was to be entitled to the revenue amount, along with the amount of his own mortgage which had been decreed in that very suit. It is noteworthy that in the last paragraph on p. 470 in (1932) ILR 59 463 (Privy Council) where they refer to the clause in mortgage deed, their Lordships take care to say that it gives priority over "subsequent encumbrances". The discussion of *Nugenderchunder's* ease (1867) 11 M.I.A. 241 the reference to the salvage doctrine and the use of the expression "first charge" seem to us unmistakable in their significance, when it is borne in mind that the judgment of the Board was delivered by Sir John Wallis, who was quite familiar with the discussion of this topic in the Indian Courts, not merely by reason of his long stay here, but also by reason of his having been counsel for one of the parties in *The Maharaja of Vizianagaram by his Guardian and Next Friend, F.W. Gillman Vs. Sri Rajah Setrucherla Somasekhararaz Bahadur and Ramabhadraraz Bahadur*, .

39. It was next argued that the recognition of a first charge was opposed to the policy of the legislature as indicated in Section 35 of the Madras Revenue Recovery Act and in Section 72(c) of the Transfer of Property Act. It will be noticed that the provision in the Revenue Recovery Act is not even consistent with the provision in the Transfer of Property Act, because under the former, the charge will take effect only as from the date of the payment of the revenue, whereas under the latter, the amount paid towards revenue could be added on to the mortgage money so as to have priority over all encumbrances subsequent to the date of the mortgage itself. If, as observed by Bhashyam Aiyangar, J., in *The Maharaja of Vizianagaram by his Guardian and Next Friend, F.W. Gillman Vs. Sri Rajah Setrucherla Somasekhararaz Bahadur and Ramabhadraraz Bahadur*, there is no scope here for applying the maxim "*expressio unius est exclusio alterius*", there is even less scope for drawing from legislative enactments any indication of a consistent policy. For instance, in the Estates Land Act, provision has been made in Section 128 (on the analogy of Section 171 of the Bengal Tenancy Act) for a charge in favour of any person interested in paying the rent due on a holding and Clause (b) declares that such charge shall take priority over every other charge on the holding other than a charge for arrear of rent and any prior charge under this section. This is the logical result of the declaration in Section 5

that rent shall be a first charge on the holding. If one is to speculate as to the policy of the legislature, there is no reason why a person interested in the payment of public revenue which is equally a first, charge on the land should not on such payment be in the same position as one who pays the rent due on a holding in which he is interested. Section 128 of the Estates Land Act no doubt deals with payments made before the sale just like Section 35 of the Revenue Recovery Act. But speaking about the policy of the legislature, it is not possible to discover any reason for a differentiation between payment before sale and a payment after sale.

40. The recent amendment made in Sections 92 and 95 of the Transfer of Property Act also shows that it is only now and then, when its attention is pointedly drawn to such defects, that the legislature has bestirred itself to remove obvious defects. Till 1929 a co-mortgagor who pays off a prior mortgage could by reason of the payment acquirer charge only as from the date of the payment and his charge would thus be postponed to intermediate encumbrances. Under the amendment introduced in 1929 he is placed in the same position as a puisne mortgagee paying off a prior mortgage and both of them are by the application of the principle of subrogation given the same priority as try; mortgagee, whose mortgage they discharged, enjoyed I do not therefore feel that there is anything like a consistent or comprehensive policy indicated by the Indian Legislation which precludes us from giving due effect to the latest decision of the Judicial Committee, when we find that the principle of priority affirmed therein unnecessarily results from the very reasoning on which Mr. Justice Mitter, Mr. Justice Mahmood and Mr. Justice Bhashyam Iyengar have rested their conclusions in support of a charge in favour of a co-owner paying the entire land revenue due on land held by himself and others.

41. It only remains to point out that the finding in plaintiff's favour on the 5th issue will not entitle her to claim that even in working out the charge, whether in respect of the revenue and the cess or of the 5 per cent, solatium, she is not liable to bear her quota. The immunity rests only on a contract between a former zamindar and the plaintiff's predecessor in title and cannot be brought within the scope of the expression "contract to the contrary" in Section 82 of the Transfer of Property Act, whether that expression be understood in the sense of a contract between the owner and the paramount charge-holder cf. *Ramabhadrachar v. Srinivasa Aiyangar* I.L.R.(1900) 24 Mad. 85 or one between the parties liable to contribute cf. *Thoppai M. Muthiah Bhagavathar and Others Vs. T.V. Venkatarama Ayyar and Others*, . Nor am I prepared to accede to the second defendant's contention that the properties in his possession should in no event be held liable to contribute any sum in excess of the amount provided for in his usufructuary mortgage as payable by him towards peishcush.

42. The above discussion covers all the points raised by the plaintiff and the second defendant in the Memoranda of Objections preferred by them and they need not be separately dealt with. Having regard to the nature of the suit claim,

I am unable to accept the suggestion made on behalf of the first defendant that the enforcement of his personal liability should not be permitted till after the plaintiff has exhausted her remedy against the properties declaimed liable to a charge in her favour.

Stodart, J.—The facts of the case are as follows : Plaintiff, who is the head of a firm of bankers in Madras, owns the villages of Kuppambaduru and Paramala which were granted to one Begum Sahiba in 1760 free of rent, by the Zamindar of Karvetnagar in whose Zamindari they are included. In July, 1926, the Zamindar was in arrears to the Government in the following amounts:

Rs. A. P. Due for the previous Fasli 1334 .. 3,807 0 10 Due for the December and March kists of Fasli 1335 .. 62,872 8 5 For the June kist of Fasli 1335 .. 36,842 5 8 _____ Total Rs. 1,03,521 14 11 _____ 2. See Ex. P. By August there had been a payment or payments aggregating Rs. 33,907 odd (by whom paid is not disclosed) and on the 20th August, for the balance Rs. 69,614 and interest Rs. 348 thirteen villages including Kuppambaduru were sold. The purchaser of one village, namely, Kethumalmaharajapuram, did not however complete the sale by paying the balance of the purchase money. On the 17th September, plaintiff got the sale set aside u/s 37-A of the Revenue Recovery Act by paying Rs. 73,503 (Ex. B) made up of Rs. 69,614-9-2 the amount of arrears, Rs. 348 interest on the same and Rs. 3,540-8-0 being 5 per cent, solatium to be paid to the purchasers. Under this last head she paid too much. Rs. 3,540-8-0 is 5 per cent, of the amount bid. But, as the purchase of one village was not completed (see Ex. S) nothing was payable to the successful bidder who on the contrary was liable to have his initial deposit forfeited to the Government. Plaintiff should have paid only Rs. 3,285-8-0. The suit under appeal is to recover that money. First defendant is the Zamindar who, as landholder of a permanently settled estate is liable to pay the land revenue or peishcush fixed at the settlement and also the land cess levied under the Local Boards Act (Madras Act V of 1884). Second defendant is another banker of Madras who, at all material times, was in possession of a considerable portion of the Zamindari, namely, the Narayanavaram Taluq comprising 232 villages, which was mortgaged with possession to his father by a series of mortgages the last of which was in 1892. One of the principal conditions of the mortgages was that, before appropriating anything towards principal and interest he should pay annually to the Government out of the rents and profits of the estate Rs. 70,000 towards the land revenue and land cess. Anticipating an important point which arises for decision in these appeals I may say at the outset that in the minds of the contracting parties this sum represented the proportionate land revenue and land cess due on the Narayanavaram Taluq. In 1900 the Court of Wards, having assumed management of the Zamindari dispossessed the second defendant, u/s 39 of the Court of Wards Act (Madras Act IV of 1899). In 1905 they restored it to him. Meanwhile he had filed a suit on his mortgages and obtained a decree directing payment by the 24th March, 1904, and entitling him to remain in possession till that date. Since 1905 he has remained in possession of the taluk

and has been continuously taking steps to bring it to sale. The taluq was actually proclaimed for sale at the time of the transactions now in suit. Moreover, since 1905 the second defendant has been paying land cess and land revenue to the Government and the Government have been accepting it from him though of course the taluq has not been separately assessed and there has been no formal apportionment of the land revenue due on it. The land cess is assessed every year under the provisions of the Local Boards Act on the rental value of the lands.

3. Third defendant, the appellant in A.S. No. 78, is usufructuary mortgagee of the village of Eduvaripalli from the ninth defendant whose ancestors got it on a rent-free grant similar to that of the plaintiff. Fifth defendant and defendants 10, 11 and 14 are cotrustees who have obtained an usufructuary mortgage from the Zamindar of the two villages of Kethumalmaharajapuram and Bhaduvaripet. Eduvaripalli and Kethumalmaharajapuram were amongst the villages sold. The latter was the village of which the purchase was not completed.

4. Plaintiff based her claim against the second defendant primarily on an alleged agreement by which in consideration of her making the deposit in the first instance he undertook to repay her Rs. 20,000 immediately and the remainder in a year out of the rents and profits of the Narayanavaram Taluq or the sale proceeds thereof if the impending Court sale took place. Secondly, plaintiff sued to recover from first and second defendants on the ground that they were bound to pay the Government dues on the estate and under that head she claimed a first charge on the Zamindari. The lower Court held that the plaintiff was not entitled to recover under the alleged contract and that since the plaintiff's villages were exempt from liability to pay land revenue she was not entitled to sue for contribution. But it considered the question whether she was entitled to recover under Sections 69 and 70 of the Indian Contract Act and finally held that since the law on the subject of reimbursement u/s 69 was conflicting her proper remedy was u/s 70 of the Contract Act against first and second defendants. And since the Government dues on the whole Zamindari were Rs. 1,00,000 and second defendant was liable to pay Rs. 70,000 out of this it held that first and second defendants were liable to pay three-tenths and seven-tenths of the suit amount respectively. As for the charge claimed by the plaintiff the Court held she was entitled to a first charge but confined it to the villages which were sold excluding plaintiff's village of Kuppambaduru. And the Court apportioned the charge; it apportioned the liability, making the seven villages of the Narayanavaram Taluq which had been sold bear the seven-tenths awarded against the second defendant and the other villages bear the three-tenths awarded against the first defendant saving a prior charge in favour of the fifth defendant on account of money which that defendant paid in the previous fasli towards the arrears due to Government. The net result is that plaintiff is entitled to recover Rs. 54,320 by sale of seven villages in the Narayanavaram Taluq and Rs. 23,280 by sale of five villages outside it. This presses hardly on the appellant in A.S. No-78 who is interested in Eduvaripalli one of the villages in the latter groups.

5. The points which arise for decision on the appeals and cross-objections of plaintiff and second defendant are as follows:

On the appeal of third defendant and That second defendant should have the cross-objections of plaintiff .. been made liable under his contract. On the cross-objections of plaintiff .. That there should have, been a personal decree against first and second defendants. That the plaintiff should have been On the appeal of third defendant .. given a charge on the whole Zamin-dari and--for the benefit of the third defendant--it should have On the cross-objections of plaintiff .. apportioned the amount payable in respect of each village. On the appeal of third defendant and That plaintiff should not have been cross-objections of the second given a first charge. defendant. On the cross-objections of the second That the plaintiff should have been defendant. given no charge at all. On the appeal of fifth and other That the prior charge in their favour defendants. should have been laid on the whole Zamindari and failing that on the villages which in Fasli 1334 were saved from sale by these appellants. 6. The first point for decision is whether the lower Court was wrong in holding that there was no enforceable contract. Its finding is somewhat ambiguous (para. 55):

My finding is for the plaintiff so far as there was a contract with the second defendant to take the loan. But as the details of the arrangement connected with it were not completed by being reduced to writing and signed, there was no complete and enforceable contract of loan.

7. I find it difficult on the evidence to believe that there was any contract at all. I do not think the lower Court was right in accepting plaintiff's version of the transactions which are alleged to have taken place between her agents and the second defendant prior to the 17th September which was the last day on which the money could be deposited to set aside the sale. Her case is that on a particular day which was either the 12th, 13th or 14th of September, second defendant suggested that an agreement should be written on a twelve annas stamp paper according to which he, second defendant, undertook to re-pay the loan out of the income of the estate or out of the sale proceeds if it was sold in Court auction; and that this suggestion was accepted by plaintiff and by her legal adviser. But no document was prepared then and no sufficient reason appears why none was prepared. There was an unaccountable delay till the 16th. On that day plaintiff's agent secured a further promise from the second defendant that immediately on the deposit of the money he would repay Rs. 20,000. Even then no steps were taken to get the document written till 8 or 8-30 at night and it was not till nearly midnight that plaintiff's agent went to second defendant's house with the draft for his approval, but without the necessary stamp paper of 12 annas value. Second defendant said it was very late, and that he or his agent Subramanian would go to Puttur next day with the Rs. 20,000 and would sign the agreement if it was ready. Next day it was Subramanian who went to Puttur with plaintiff's agent and plaintiff's legal adviser, but even then the agreement had not been engrossed on stamp paper. Moreover Subramanian the man, who,

failing second defendant, was to execute the agreement was not empowered in that behalf, and I do not think he was the kind of man who would be so empowered. Two things strike me as unreal in this story, namely, the delay in getting the document ready after the terms of the agreement had been settled and the omission on the part of plaintiff's agents to make sure that the person who went to Puttur on second defendant's behalf was duly authorized to execute the document. Further I am inclined to attach more importance to Ex. I than the learned Subordinate Judge has given to it. This is a notice from plaintiff's vakil dated 11th November calling on second defendant to pay her back what she had deposited. In it there is no suggestion of any agreement or contract.

8. But even if there was a contract of the nature described above between the plaintiff and the second defendant I do not think that plaintiff was thereby debarred from other remedies. Plaintiff and the second defendant were both interested in the property which had been sold at the Revenue sale; both were anxious that the sale should be set aside. On the 29th August and again on the 3rd September, plaintiff wrote to the collector requesting to be informed how much had to be deposited u/s 37-A of the Act to get the sale set aside (Exs. XI and P). Second defendant, for his part, both before the sale (Ex. M-3) and after it (Ex. F-1), though obviously unable to pay the money, evinced a desire to avert the sale. Granting for the sake of argument* that there was some arrangement entered into, by which plaintiff should deposit the whole of the money in the first instance, it is clear in my opinion that plaintiff's primary motive in doing so was to save her own village Kuppambaduru and not merely to advance money to the second defendant on easy terms. On this ground also this part of third defendant's appeal must fail, and also the cross-objections of the second defendant.

9. The next question for decision is whether the lower Court was wrong in holding that the plaintiff was not entitled to a personal decree against the first and second defendants. Before the trial the plaintiff appears to have thought that her remedy lay in contribution; and that appears to have been the understanding on which the parties went to trial. See Issues 9, 10 and 11. But at the trial probably at the stage of arguments, plaintiff changed her ground and based her claim on her right to reimbursement u/s 69 or to compensation u/s 70 of the Indian Contract Act. At first sight there does not appear to be much material difference between the two positions. As a co-owner removing a common burden by paying the Government dues on the whole estate, plaintiff would be entitled to be reimbursed by the other owners in proportion to their shares. As a person paying money which another is bound by law to pay she would be entitled to be reimbursed by them. What then caused the change in the plaintiff's attitude? The reasons, I think, were twofold. First the plaintiff desired to establish that her villages were exempt from the payment of public revenue and that the sale of Kuppambaduru by the Government was illegal. This means that, not being liable for any part of the arrears, the whole of which she paid, she was not entitled to claim contribution from the other owners. The second reason was that

she realised that in a suit for contribution she could get a personal decree only against the first defendant the registered landholder. See *Sree Rajah Simhadri Jagapatiraju v. Dakshina Kavata Dugaraju* (1915) 29 M.L.J. 639 : ILR 39 Mad. 795.

10. The lower Court held that it was doubtful whether Section 69 of the Contract Act applied to the case of the second defendant and held that Section 70 did apply : The lower Court also held that a certain old judgment of the Provincial Court Ex. R-1 was conclusive that plaintiff's villages were exempt from liability to pay land revenue. But that is clearly not correct, if it means that they were not liable to be attached and sold, by the Government for arrears. The permanent settlement of this Zamindari was not made under the Permanent Settlement Regulation (Regulation XXV of 1802) by which the fixed tribute or peishcush was arrived at on a consideration of the resources of the estate and after excluding lands held on, favourable tenures. Prior to the settlement which was in 1803 the Zamindar had to maintain a military force in addition to paying a fixed sum as peishcush. At the settlement the obligation of military service was commuted into money which was added to the peishcush. See AIR 1922 168 (Privy Council) . But the lower Court was right in holding that the plaintiff was entitled to sue under Sections 69 and 70 as a person who was not herself liable to pay any of the land revenue payable on the Zamindari. Her villages were held rent free. From them the Zamindar derived no profit which he could utilise towards the payment of the peishcush. Though every part of the Zamindari is security for the payment of the land revenue plaintiff is not, in virtue of her ownership of Kuppambaduru and Paramala, liable to contribute towards the peishcush.

11. But to return to the question under consideration, since plaintiff paid to the Government arrears of land revenue and land cess (I shall have something to say about the land cess presently) which she was not bound to pay and which first defendant as the registered land holder is bound by law to pay she is clearly entitled to be reimbursed by the first defendant. Whether she is so entitled as against the second defendant is a point which was much canvassed on appeal. The question is whether the second defendant was in the words of Section 69 "bound by law to pay" any part of the arrears. Section 69 is:

A person who is interested in the payment of money which another is bound by law to pay and who therefore pays it is entitled to be reimbursed by the other.

12. I feel no hesitation in answering this question in the affirmative.

13. I have explained that by the terms of his mortgage the second defendant bound himself to pay Rs. 70,000 towards the peishcush and land cess due on the Zamindari, and that that sum was regarded by both the contracting parties as the proportionate amount due under those heads on the Narayanavaram Taluq, the mortgaged property.

14. u/s 76, Sub-section (c) of the Transfer of Property Act a mortgagee in possession is bound to pay out of the income of the property the Government

revenue and all other charges of a public nature accruing due in respect thereof during such possession. If therefore second defendant were still a mortgagee in possession it is clear in my opinion that he would be liable in law to pay Rs. 70,000, towards land revenue and land cess. But it is contended that from the date when he obtained his mortgage decree in 1903 he is no longer a mortgagee in possession in other words that although he is in possession he is not in possession as a mortgagee. Now on this point it must be stated at the outset that second defendant has always considered himself a mortgagee in possession and liable as such to pay land revenue and land cess even after the date of the decree. In an affidavit of 1907 filed in connection with the execution of his decree, Ex. N-1, he says:

The petitioner is under the provisions of Section 76 of the Transfer of Property Act bound to pay the Government revenue and all other charges of a public nature.

15. And again-

On the 15th June, 1905, the Court of Wards released the properties and on the 27th September, 1905, put him (petitioner) in possession of the same. The petitioner has also paid regularly the first instalment of peishcush and the second instalment of peishcush.

16. Later in 1909 in another affidavit filed in E.P. No. 145 of 1905 of the District Court of North Arcot the petitioner said:

The Narayanavaram Taluq has not been separately assessed. In my opinion the peishcush and land cess should be Rs. 72,000.

17. See A.A.O. No. 267 of 1911 of this Court reported in Lodd Govinda Doss v. Rajah of Karvetnagar (1915) 29 M.L.J. 219. See also similar statements made by him in 1925 (Ex. III). In point of fact therefore the second defendant is in the position of a mortgagee in possession entitled to the rights and subject to the duties of a mortgagee. The decree has not changed his position. It is not in my opinion open to him to say:

Under my decree I am entitled to bring the property to sale and meanwhile I shall retain the property holding myself accountable only for the surplus profits.

18. If he elects to remain in possession he must abide by the terms of his covenant. He entered into possession under that covenant. He cannot continue in possession except under the terms of the covenant. My finding is that, as he himself admits, he is liable to pay the land revenue and land cess due on the Narayanavaram Taluq to the extent of Rs. 70,000. The position therefore appears to be that with a small modification presently to be explained out of the total sum payable as peishcush and land cess on the Zamindari the second defendant is bound by law to pay Rs. 70,000 and the first defendant the remainder, which the lower Court has estimated to be about Rs. 30,000. (As a matter of fact in Fasli 1335 the whole amount due under both heads was Rs. 99,714.)

19. The modification which I have hinted at in the preceding paragraph arises out of the fact that the arrears which plaintiff paid off must have been arrears not only of land revenue (or peishcush) but also of laid cess which the Government on behalf of local bodies, levies under the Local Boards Act (Madras Act V of 1884). This tax is recoverable in the same manner as and revenue. Though it does not state the fact in express terms the lower Court must have been conscious of it, otherwise it would not have computed second defendant's liability on a proportion, one of the factors of which was the Rs. 70,000 which under the terms of his mortgage he was liable to pay as land revenue and land cess. Land cess is levied at one anna in the rupee on the rental value of holdings and when compared with the land revenue is not inconsiderable. Second defendant in the affidavit already referred to. See A.A.O. No. 267 of 1911 of this Court reported in *Lodd Govinda Doss v. Rajah of Karvetnagar* (1915) 29 M.L.J. 219 says (para. 3):

The Narayanavaram Taluq has not been separately assessed. In my opinion the peishcush and land cess should be approximately Rs. 72,000 (Peishcush Rs. 56,000 Land Cess Rs. 16,000).

20. But plaintiff herself under the second proviso to Section 73 of the Local Boards Act is undoubtedly bound to pay the land cess assessed on her holding every year u/s 65 of the Act, albeit she pays it in the 1st instance to the Zamindar who is a collecting agent for the Government. And it is admitted in the evidence that she has been paying it, sometimes to the Zamindar, sometimes to the Local Government officials. See P.W. 5. It might be objected that since the plaintiff is herself liable for that portion of the arrears which represents land cess payable on her holding she is disentitled from claiming reimbursement u/s 69 of the Indian Contract Act but must sue for contribution. But I do not think that the objection holds. Land cess is assessed every year u/s 65 or Section 68 of the Act on the individual holdings. If therefore the plaintiff paid all the land cess, she paid in addition to the amount assessed on her own property the aggregate of the amounts assessed on the property of the other owners. She is of course not entitled to recover from them the cess payable by herself. At the same time she is in no way liable for the several amounts of cess payable by them, and which they are bound by law to pay. If she does pay it she is entitled to be reimbursed u/s 69 of the Contract Act.

21. Granting therefore that first and second defendants are bound by law to pay the land revenue and land cess due on the Zamindari and that plaintiff is entitled u/s 69 of the Contract Act to be reimbursed by them in respect of Rs. 69,962 paid by her under that head (including interest), the exact sum due to her must be reduced by the land cess which she herself was bound to pay in Fasli 1335. There is no evidence of this; Land cess varies with the annual rental: and the rental is itself a variable quantity depending on the nature and quantity of the crops grown. But I find from Ex. 1 series that plaintiff paid for her two villages Rs. 443 in Fasli 1313, Rs. 592 in Fhsli 1318, Rs. 587 in Fasli 1319, Rs. 707 in

Fasli 1325, Rs. 68S in Fasli 1326, Rs. 818 in Fasli 1330. The average of these is Rs. 639. This must be deducted from the arrears of Rs. 69,962.

22. Before leaving this part of the appeal I must say that I think the lower Court was in my opinion unduly cautious in not applying the principles of contribution to the facts of the case. The leading case in this Presidency Sree Rajah Simhadri Jagapatiraju v. Dakshina Kavata Dugaraju (1915) 29 M.L.J. 639 : ILR 39 Mad. 795 lays down that when a co-owner has paid the Government revenue on the entire holding he can recover personally only from the registered holder and that his remedy against the other co-owners who are not registered owners is only by obtaining a charge on their shares. And the reason is that the registered holder is the only person who is bound to pay the land revenue to the Government, while the other co-owners are not only not bound by law to pay but could not, even if they would, because the land revenue has not been separately assessed on the shares or portions which they own. But here the second defendant though not a registered holder is in possession of a defined part of the estate and is bound by law by Section 72(c) of the Transfer of Property Act to pay a certain ascertained sum as representing the land revenue and land cess on that part. It appears to me that in a suit for contribution he also can be made personally liable.

23. How should the liability be apportioned between first and second defendants? Should plaintiff be entitled to recover the whole amount from either or both of these defendants? Or to recover from each only in the proportion in which they are liable under the mortgage covenant, as decided by the lower Court? On the principle of the case just cited I think they are liable proportionately and that the proportion is as fixed by the lower Court, namely, three-tenths and seven-tenths respectively. If this arrangement is not adopted in this suit and the first defendant is compelled to pay more than his share then another suit will be necessary at his instance to recover the excess from the second defendant.

24. It has been contended,, in this appeal that the ratio adopted by the lower Court is wrong and that the liability of the first and second defendants should be, proportionate to the value of the villages which were the subject of the revenue sale, the second defendant paying in proportion to the value of the seven villages in the Narayanavaram taluk and the first defendant in proportion to the value of the five villages outside that taluk. This introduces the doctrine of salvage lien which has been much discussed in the arguments before us. But I do not think it applies. It cannot be said that plaintiff paid the money merely to save those villages. The foundation of her suit was that she discharged a debt due by the other co-owners in the Zamindari. The position would have been the same if the villages had never been brought to sale.

25. I have dealt so far with that portion of the deposit which represents the arrears. There is the further question whether plaintiff can recover the 5 per cent solatium paid to the purchasers at the revenue sale which as I have pointed out above should be Rs. 3,285-5-0. The lower Court has not made any distinction

between this sum and the rest of the deposit and the point has not been raised specifically either in the appeals or in the cross-objections. In its nature it appears to me that the payment is of a kind which might be brought u/s 70 of the Indian Contract Act:

When a person lawfully does anything for another person . . . 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 . . . the thing so done.

26. And I think that section applies to the facts of this case. Besides plaintiff's village, eleven villages were restored to the defendants by plaintiff's act in getting the sale set aside. Having waited till the last possible moment when it was clear that neither the first nor the second defendant could make the deposit - though second defendant at least was desperately anxious to save the villages - the plaintiff stepped in and saved the villages for them. It is true that it has been held that in certain circumstances Section 70 does not apply to the payment of statutory compensation. *Saran Singh v. Mati Kueri* I.L.R.(1931) 10 Pat. 528 decided in the Patna High Court is a case in point. But it does not appear to me that the cases lay down any principle of law. Whether or no the 5 per cent, paid as compensation to purchasers when a sale is set aside is recoverable u/s 70 of the Contract Act depends on the facts of each particular case. In *Suchand Ghosal v. Balaram Mardana* I.L.R.(1910) 38 Cal. 1 the depositor was himself liable for the arrears on which the decree was obtained which led up to the sale and Mr. Justice Lal Mohan Das observes in that connection:

He (the depositor) is not entitled to ask for contribution in respect of the statutory compensation . . . deposited by him . . . because that sum did not form part of the joint obligation which the parties were by law bound to discharge. If he had paid the sum before the sale it would not have been necessary to pay this additional amount.

27. And Sir Lawrence Jenkins, C.J., the other Judge concerned in that case, says:

In the circumstances of this case I think there should also be excluded so much of the deposit as represents a sum equal to 5 per cent, of the purchase money.

28. Moreover in the Patna case *Fazl Ali, J.*, gives special reasons arising out of the circumstances of that case why the plaintiff should not recover:

The position is not so clear with regard to the statutory damage, and the Court may well decline to compensate the plaintiff under this head on the ground that (1) he was also responsible for the sale of the properties, and (2) that as the amount paid by him under that head represents only a small portion of the total payment there is no certainty that he would not have paid the whole of that amount to save his interest apart from that of the defendant if it had been possible for him to do so.

29. I do not think these circumstances exist here. We have not been referred to any decision in which it has been held that Section 70 in principle does not apply

to the payment of the 5 per cent, solatium. As for the measure of the compensation to be paid to plaintiff I do not think it can be fixed at less than the solatium.

30. I would however confine plaintiff's remedy in respect of this amount (after deducting the proportion attributable to her own village) to a first charge on the villages whose sale was set aside by reason of the plaintiff's deposit, viz., the plaintiff B scheduled villages excluding Kuppambaduru and Kethumalrajapuram.

31. Lastly, on the point, touching the distribution of the liability of*the first and second defendants' interest, that is, that the second defendant should pay seven-tenths and the first defendant three-tenths, and second defendant at a very late stage, namely, in August, 1935, when the appeal came on for hearing raised the contention that, out of the total land revenue and land cess payable for Fasli 1335 he had as a matter of fact paid prior to the revenue sale Rs. 28,535. This certainly was not brought to the notice of the lower Court and at the time of the hearing of the appeal, the second defendant does not produce the receipt for the money though the Government must have given him a receipt. It is true that in July, the arrears including Rs. 3,087 due for Fasli 1334 were Rs. 1,03,521 (Ex. P) and that by 20th August, they were only Rs. 69,614. Somebody must have paid Rs. 30,100 for Fasli 1335. And if second defendant had paid Rs. 28,535 out of this then for the remaining arrears, assuming he was answerable only for Rs. 70,000 in all, he was liable for Rs. 41,465 and not Rs. 48,729 which has been decreed against him under this head. But is the second defendant entitled to plead this payment at so late a stage in the suit? I do not think he is; if he had even raised the point in his cross-objections the other parties would have had an opportunity of meeting it. As it is, they have had no such opportunity. If in the result the second defendant has to pay under this decree something like Rs. 7200 more than he ought to pay, in the end he will lose nothing since for anything paid towards land revenue and land cess over and above Rs. 70,000 he is entitled to recover under the terms of his mortgage.

32. The result of these findings is that first and second defendants are liable to plaintiff as follows:

1st defendant.	2nd defendant.	For land revenue and land cess ..	20,692	8	0	
48,282	8	0	For interest ..	104	10	0
			243	10	0	
			20,797	2	0	48,526
						2
						0

_____ and plaintiff should have a personal decree against these defendants for the two items and further interest thereon. Plaintiff will also have a first charge on the plaintiff B scheduled villages excluding Kuppambaduru and Kethumalrajapuram for the sum of Rs. 2,780, i.e., 3,285 minus 505 (being the 5 per cent, payable on the sale price of Kuppambaduru).

33. There remains the questions raised by the appellants and in the cross-objections relating to the nature and extent of the charge to which the plaintiff is entitled. The lower Court has granted a first charge on the villages which were

the subject of the revenue sale (para. 61):

I would hold that plaintiff is entitled to the first charge. As to how far this charge should go it is enough to limit it to the 12 villages (other than her own) considering the principles at the bottom of contribution as saving the property in danger. Further in the amended Schedule C to the plaint which works out the contribution, plaintiff has confined it to those villages only of the Zamindari. By subrogation she can throw this charge against any portion of the property.

34. It is convenient to set out again the contentions of the parties leaving the case of appellants in A.S. No. 84 to be separately considered.

35. A.S. No. 78. - Plaintiff is entitled to no charge at all her sole remedy being under her contract with second defendant. The lower Court should have apportioned the charge holding third defendant liable for no amount in excess of the proportionate amount payable in respect of his village as compared with the total of villages of the Zamindari. Plaintiff is not entitled to a first charge. Her charge should rank according to the principles of Section 35 of the Revenue Recovery Act being postponed to third defendant's mortgages Exs. XXI and XXII.

36. Plaintiff is not entitled to any charge on third defendant's village since the latter is not liable to the payment of Government Revenue.

37. Plaintiffs cross-objections. - The lower Court should have made plaintiff's claim a first charge on the entire Zamindari.

38. Second defendant's cross-objections. - Plaintiff is entitled to no charge at all. Plaintiff's charge if any ranks after second defendant's mortgage and plaintiff can come in only u/s 35 of the Revenue Recovery Act.

39. It is not seriously contended now that plaintiff is not entitled to any charge or that the charge should not be laid on the whole Zamindari. That was firmly established in the Full Bench case *The Maharaja of Vizianagaram by his Guardian and Next Friend, F.W. Gillman Vs. Sri Rajah Setrucherla Somasekhararaz Bahadur and Ramabhadraraz Bahadur*, . The principle applicable to these cases where one co-owner pays the whole of the Government demand on an estate held jointly by himself and others is analogous to that denned in Section 82 of the Transfer of Property Act:

Where several properties whether of one or several owners are mortgaged to secure one debt such properties are in the absence of a contract to the contrary liable to contribute rateably to the debt secured by the mortgage after deducting from the value of each property the amount of any other encumbrance to which it is subject at the date of the mortgage.

40. u/s 2 of the Revenue Recovery Act the land, the buildings upon it and its products shall be regarded as security for the public revenue. And u/s 42 all lands brought to sale on account of arrears of revenue shall be sold free of all encumbrances. It follows that the public revenue is a first charge on the estate.

Plaintiff's case is that where one co-owner pays the whole of the public revenue the amount which the other co-owners should contribute should be made a first charge on the several properties owned by them.

41. At the outset it may be stated that there appears to be no foundation for the lower Court's finding that the charge should be confined to the villages which were the subject of the revenue sale and that the plaintiff confined her claim in this respect to those villages. What Schedule C, appended to the plaint during the course of the trial, means, is not capable of explanation now and the parties, are not in agreement as to its meaning. From the beginning plaintiff has claimed a first charge on the whole Zamindari. See her notice Ex. I issued prior to suit and paragraph 27 (d) of her plaint.

42. Granting therefore that plaintiff is entitled to a charge on the whole Zamindari two questions arise for decision. (1) Should it be a first charge? (2) How should it be apportioned? The first main objection is that Section 35 of the Revenue Recovery Act applies to the payment made by the plaintiff, the second that even in equity her charge must rank only from the date of the payment. Section 35 is:

It shall be lawful for any person claiming an interest in land which has been . . . attached to obtain its release by paying the arrears . . . and all such sums if paid by a tenant may be deducted from any rent then or afterwards due by him to the defaulter; and if paid by a bona fide mortgagee or other incumbrancer . . . or by any person not being in possession thereof but bona fide claiming an interest therein adverse to the defaulter, shall be a charge upon the land, but shall only take priority over other charges according to the date at which the payment was made.

43. Plaintiff is not a tenant within the meaning of this section because she is not liable to pay any rent to the defaulting landholder out of which rent, present and future, she might deduct the amount paid by her towards arrears of land revenue. Nor is plaintiff a mortgagee or incumbrancer or a person not in possession. Moreover it appears to me that the section applies to cases where land of the defaulter has been attached and the person paying the arrear is interested in that land. Then by virtue of the payment the extent of the latter's interest is increased, and the extent of the defaulter's interest is decreased, by the amount of the payment. Here the defaulter, the Zamindar, has no interest in the plaintiff's village, the release of which was the object of the payment. The plaintiff is the sole owner. She is not excluded therefore by Section 35 from her right of contribution from the other co-owners and to have a charge on their properties.

44. But is she entitled to a first charge? Is she entitled to be subrogated to the rights of the Government on foot of her payment of the land revenue arrears due to the Government? It is argued that the right to a first charge is a prerogative of the Crown only and the case *The Maharaja of Vizianagaram by his Guardian and*

Next Friend, F.W. Gillman Vs. Sri Rajah Setrucherla Somasekhararaz Bahadur and Ramabhadraraz Bahadur, is claimed to be an authority for that position, Apparently an isolated sentence in that decision at p. 110 is relied of where Bhashyam Aiyangar, J., says:

It is a charge by operation of law in favour of the Crown only, and ceases when the revenue upon the land ceases to be public revenue and is converted by assignment in favour of a subject into rent or private property.

45. But there is no question here of assignment of public revenue.

46. On the main point it appears to me to be clear that the charge created in favour of the plaintiff is a first charge. Granting that the equitable principle embodied in Section 82 of the Transfer of Property Act applies - there is ample authority for the proposition that it does not apply see *The Maharaja of Vizianagaram by his Guardian and Next Friend, F.W. Gillman Vs. Sri Rajah Setrucherla Somasekhararaz Bahadur and Ramabhadraraz Bahadur*, - then the public revenue is the common debt to secure which all the properties are as it were mortgaged and these properties are liable to contribute rateably to that debt after deducting from the value of the property the amount of any other incumbrance to which it is subject at the date of that debt. But by operation of law the property can be subject to no incumbrance ranking prior to the debt consisting of the obligation to pay public revenues. Cases may readily be imagined where out of several co-owners that one who is the landholder in the eye of the law and liable as such to pay the public revenue has encumbered the estate so much that the arrears of public revenue falling due by his default may be actually in excess of the value of the equity of redemption. To hold that a co-owner who pays the arrears obtains a lien on the estate subject only to such encumbrances would be to deny him his remedy under the principle contained in Section 82. In the Privy Council case *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (1867) 11 M.I.A. 241 that principle was affirmed though it was not necessary to a decision of that case:

Considering that the payment of the Revenue by the mortgagee will prevent the Taluk from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the Taluk as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the Taluk as against all persons interested therein.

47. And again recently re-affirmed in the Privy Council in (1932) ILR 59 463 (Privy Council) . It appears to me that the current of authority in this Presidency has always been to this effect. In the judgment of Benson, J., in *The Maharaja of Vizianagaram by his Guardian and Next Friend, F.W. Gillman Vs. Sri Rajah Setrucherla Somasekhararaz Bahadur and Ramabhadraraz Bahadur*, .

Under Section 2 of Madras Act II of 1864 it is expressly declared that the land, the buildings upon it and its products shall be regarded as the security for the

public revenue, due on the land and Section 42 shows that it is a first charge on any portion of the estate. Bearing this in mind it seems to me i clear that the principles of equity on which Sections 82 and 100 of the Transfer of Property Act are based, if not the very words of those sections, are applicable to the case before us, and that this is so, is placed beyond all doubt by the language of the Privy Council in *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (1867) 11 M.I.A. 241.

48. See also the language used by Miller, J., in *Amman Pariyayi v. Pakran Haji* I.L.R.(1912) 36 Mad. 493 :

Defendants are . . . not registered pattadars but their land is none the less subject to the burden and has been by the plaintiff relieved of it. But as the common burden is a burden on the lifted only, as the Government could recover the. revenue only from defendants" land and not from them personally, so all that the plaintiff is entitled to is a charge on the land for the amount paid by him.

49. Here the learned Judge was deciding the question whether a co-owner paying land revenue on the whole estate had a personal remedy against his co-owners other than the registered holders. But the language used in this passage surely means nothing else than that the charge which enures in favour of the former is not less than that possessed by the Government. The parties in these appeals who put forward the opposite view rely on a recent case of this Court, *Vyraperumal v. Alagappa* (1931) 62 M.L.J. 31 : ILR 55 Mad. 468. That was a case of one of two co-tenants of ryoti land in a Zamindari governed by the Madras Estates Land Act paying the whole of an arrear due to the landlord for which the land had been proclaimed for sale. Plaintiff claimed a charge on the share of the other tenant in priority to mortgage created by the latter. It was held that he was not entitled to priority. The argument for the plaintiff was that since the landlord had a first charge on the land u/s 5 of the Act, plaintiff acquired a first charge on his co-tenant"s share by paying the whole of the rent. The decision of the learned Judges who decided that case was:

It is clear that it is not the landlord"s charge for rent which the plaintiff claims but something different though having its roots there . . . The claim of first charge is available only to a landlord and while the relationship of landlord and tenant subsists. The plaintiff"s charge came into existence for the first time on his payment of his co-sharer"s share of the rent and both its character and extent are determined by the equitable doctrine that common burdens should be equally borne. The claim being thus against the co-owner and the charge which springs into existence on the date of payment being against his property, it follows that it can only avail against that property as it stood on the date of payment and cannot avail retrospectively against prior mortgagees and others who have in good faith and without any suspicion that such a charge may come into future existence advanced money on the property . . . When the real nature of the landlord"s charge and of the plaintiff"s charge is understood there is no basis for the application of Sections 82 and 92 of the Transfer of Property Act.

50. It is sufficient to distinguish this case on the ground that its decision is based on the finding that the statutory first charge given by Section 5 of the Madras Estates Land Act enures only for the benefit of the landlord. At the same time, with great respect, I find it difficult to agree with the learned Judges, who decided that case, that the principle of Section 82 of the Transfer of Property Act, did not apply, or that the mortgagee-defendants had no notice of the charge which the plaintiff claimed. The rent due to the landlord was a common burden which both the tenants were liable to pay and in respect of which the landlord had a first charge on the joint holding. If the portion possessed by each of the tenants was liable to contribute rateably to the payment of the rent then the principle of equity demanded that that tenant who paid the whole rent should have a charge on the other tenants' portion calculated on its value and not on its value as diminished by mortgages. Suppose the values are equal and each worth Rs. 200 and that B creates a mortgage on his portion for Rs. 190. Then if Rs. 40 is the amount of rent in arrear and A pays the whole of it, he can obtain a charge on B's portion for Rs. 20 but can only recover Rs. 10. Another argument of the learned Judges is that the mortgagees had no notice of the charge when they advanced the money. But a mortgagee of a part of a ryoti holding has notice that if the rent is left unpaid the land is liable to be sold free of his mortgage. He has notice of the landholder's lien. Constructively he may be held to have notice of rights founded on the landlord's lien.

51. I do not think that this decision stands in the way of our holding that the plaintiff is entitled to a first charge on the Zamindari. It remains to be decided how much that charge should be and, with special reference to A.S. No. 78, whether there should be any allocation of it in respect of the village of Eduvaripalli.

52. What is the extent of the charge? The deposit which is the cause of action in this suit comprised 5 per cent, solatium paid to the purchasers. I do not think that should form part of the general charge. It is no part of the common burden; no part of the debt secured on the common properties. It is only therefore in respect of the amount paid for arrears of land revenue and land cess and interest thereon that there can be a charge. This is Rs. 69,614 plus Rs. 348 interest or Rs. 69,962. As for the 5 per cent, solatium on separate considerations, it has been secured on the villages which were the subject of the revenue sale.

53. But, out of this, plaintiff's properties, the villages of Kuppambaduru and Paramala must bear a share. The lower Court has held on Issue V that plaintiff's villages are exempt from liability "for Government revenue; and the third defendant raises the same point in his appeal in respect of his own rent-free village, but all that this can mean is that under the terms of the original grant plaintiff pays nothing to the Zamindar. I have explained that the whole Zamindari is security for the public revenue. Any part of it is liable to be attached and sold when that revenue falls into arrears. The principle underlying Section 82 of the Transfer of Property Act is that the several properties on which the common debt

is secured should contribute rateably. And the test to be applied is not, whether the owner of any one of the properties is personally liable for the debt or part of it but whether the properties are liable. Plaintiff's villages therefore must bear their share. As for third defendant, it is clear, I think, that Eduvaripalli is not liable to more than its proportion. See *Jagapatiraju v. Sadrusannama Arad* (1915) 29 M.L.J. 639 : ILR 39 Mad. 795. It remains therefore to ascertain what part of the arrear should be contributed by plaintiff's villages deducting which from Rs. 69,962 the amount of plaintiff's charge on the rest of the estate will be known - and also what part should be borne by Eduvaripalli so that the charge on that village may be limited to the amount so calculated.

54. The lower Court has not worked out the amount that was due on plaintiff's two villages as land revenue and land cess. The figure of land cess I have already held to be Rs. 639. Ordinarily it is not possible to estimate the land revenue due on any un-separated part of a permanently settled estate. This is generally done only when that part is alienated and the alienee applies for separate registry (Act I of 1876). But where under the Land Revenue Recovery Act the Collector advertises separate portions for sale he is required to state in the proclamation for sale the separate assessment of each portion calculated in the manner laid down in Act I of 1876. See Section 45 of the Land Revenue Recovery Act:

Where only a part of a landed estate may be sold the assessment on such part shall be apportioned by the Collector previous to sale in the manner following.

55. Now one of the plaintiff's villages Kuppambaduru was the subject of the revenue sale in this case. The separate assessment fixed on it by the Collector is found in Ex. D of C.M.P. No. 511 of 1930 and is Rs. 2,056-14-0 say Rs. 2,057. Chinna Paramala however was not put up for sale and there is consequently no information on the record about the separate assessment due on it. I adopt a figure based on the proportion between the land cess paid by plaintiff on it and on Kuppambaduru as found in Ex. L series, in some of which the land cess is shown separately for each of the two villages (Exs. L, L-1, L-14 and L-16). The proportion is 1/7th. The land revenue of Chinna "Paramala may be roughly taken as proportionate to the average land cess levied on it. It will be one-seventh of the land revenue of Kuppambaduru Rs. 293. On the whole therefore plaintiff's villages were liable for (1) Land Revenue Rs. 2,057 plus 293 or Rs. 2,350, and (2) Land Cess Rs. 639. Total Rs. 2,989. There is no evidence that plaintiff paid anything under either head in Fasli 1335. Out of the total of the suit arrear paid by her Rs. 69,962 her villages were liable for Rs. 2,989. The charge in her favour will be only for the balance, namely, Rs. 66,973.

56. As for Eduvaripalli the village in which third defendant is interested the separate land revenue assessed u/s 45 of the Act as found in Ex. D. of C.M.P. No. 511 is Rs. 237-9-0. What the land cess of Fasli 1335 was is not ascertainable from the records of the suit." But from Ex. A of C.M.P. No. 511 it appears that in August, 1926, Rs. 54 was paid towards land cess. This, if not the whole sum due under that head, must have been the bulk of it. The total amount payable on

Eduvaripalli towards the arrears which plaintiff paid may be taken as Rs. 237-9-0 or in round figures Rs. 238. Jagapatiraju v. Sadrusannama Arad (1915) 29 M.L.J. 639 : ILR 39 Mad. 795. Plaintiff will therefore have a charge on Eduvaripalli for Rs. 238 and no more. The result is that if necessity arises to sell Eduvaripalli the sale can be averted on payment of a sum of Rs. 238, and the interest in respect of the claim for arrears of peishcush and land cess and Rs. 55 and interest in respect of the 5 per cent, solatium.

* * * 57. And this Appeal No. 78 of 1930 and the Memorandum of Cross-Objections filed by the respondents 1 and 3 therein having been set down to be spoken to this day, the Court made the following:

ORDER

1. The way in which the suit has been dealt with in the Court below has led to a dearth of materials necessary to work out the declarations above made as to the rights of the parties. Having regard however to the long pendency of this litigation, we are very reluctant to allow it to be further prolonged by a remand. We accordingly directed the appeal to be posted for being spoken to and it accordingly came on for further hearing today. In the circumstances, we think that the best we could do is to pass a decree in the following terms:

that the plaintiff do recover from the first defendant personally the sum of Rs. 20,797-2-0 with interest thereon at 6 per cent, per annum from 17th September, 1926, to date of payment, that the plaintiff do recover from the second defendant personally the sum of Rs. 48,526-2-0 with interest thereon at 6 per cent, per annum from 17th September, 1926, to date-of payment;

that out of the above sum, the plaintiff be entitled to recover by sale of the plaintiff A scheduled villages excluding the villages of Kuppambaduru and Paramala the sum of Rs. 66,973 with interest thereon at 6 per cent per annum from 17th September, 1926; this sum shall be a first charge on the sale proceeds, but the proportionate amount for which the several villages are liable to be sold shall, if necessary, be fixed by the lower Court, in accordance with the principles indicated in Section 45 of the Madras Revenue Recovery Act;

that the plaintiff be entitled to recover by sale of the plaintiff B scheduled villages (other than Kuppambaduru and Kethumalrajapuram) the sum of Rs. 2,780 with interest thereon at 6 per cent, per annum from 17th September, 1926; that this amount shall be a first charge on the sale proceeds; but the proportionate amount for which the several villages are liable to be sold, shall, if necessary, be fixed by the lower Court in accordance with the principles indicated in Section 45 of the Madras Revenue Recovery Act;

that so far however as the village of Eduvaripalli is concerned, the plaintiff be entitled to recover by sale thereof, as a first charge on the sale proceeds, only the sum of Rs. 238 plus 55 (being its proportion of the 5 per cent, solatium) in all, 293 with interest thereon at 6 per cent, per annum from 17th September,

1926;

that the village of Kethumalrajapuram shall be proceeded against in execution of this decree only to the extent that may be necessary to enable the plaintiff to recover from defendants 5, 10, 11 and 14 the proportionate share for which, on the principles above indicated, that village may be liable out of the sum of Rs. 66,973 and interest thereon;

that the appellant shall get his costs of this appeal from the plaintiff, that the plaintiff will get the costs of her memo, of objections from defendants 1 and 2 in the proportion of 3/10ths and 7/10ths and that the second defendant's memo, of objections be dismissed without costs;

that the costs awarded to the plaintiff by the decree of the lower Court be recovered in the proportion stated in that decree from defendants 1 and 2 and by the sale of such of the suit properties as are in the possession of defendants 1 and 2 and that the declaration in the decree of the lower Court of a prior charge in favour of the fifth defendant on Kethumalrajapuram for Rs. 8,000 and interest do stand.