

(1946) 01 MAD CK 0032
In the Madras High Court

K.P.RM. Kuppan Chettiar alias Kadiresan Chettiar	APPELLANT
Vs	
SP.R.M.RM. Ramaswami Chettiar and Another	RESPONDENT

Date of Decision : 15-01-1946

Acts Referred:

Citation : (1947) ILR (Mad) 58 : (1946) 59 LW 362 : (1946) 1 MLJ 383

Hon'ble Judges : Somayya, J

Bench : Division Bench

Judgement

Somayya, J.—Plaintiff appeals against the decree of the Subordinate Judge of Sivaganga in O.S. No. 17 of 1943. The suit is to recover a sum of Rs. 8,685 with further interest and costs from the first respondent Ramaswami Chettiar. The suit was dismissed by the lower Court and hence this appeal.

2. In order to understand the controversy between the parties, it is necessary to set out a fairly long history. The appellant's mother's brother is the first respondent. The second respondent Somasundara is the first respondent's wife's brother. The family of the first respondent were the melvaramdars of the village of Pappankulam and Ex. P-I series are certain promissory notes executed by the ryots of that village in the name of the first respondent's father and Meyyappa who is the elder brother of the first respondent. In 1910 a mortgage was taken in the name of the appellant's father Raman Chetti in discharge of Ex. P-1 series and that was for the benefit of the first respondent's family. No money was paid by the mortgagee to the first respondent's father or to his brother Meyyappa and admittedly it was taken for the benefit of the first respondent's family consisting of his father and two sons. Ex. P-2 dated 22nd July, 1910, is the mortgage executed in the name of the appellant's father. The mortgage was executed by the Pappankulam ryots who were the debtors under Ex. P-I series. The mortgagors under Ex. P-2 created a usufructuary mortgage under Ex. P-4 dated 9th December, 1917, in favour of Muthuraman Chetti for a sum. of Rs, 4,800 and directed Muthuraman Chetti to discharge Ex. P-2. This was not done and Muthuraman Chetti sub-mortgaged his right under Ex. P-4 in favour of the

present second defendant--second respondent. Consideration for this sub-mortgage was the undertaking to discharge the debt under Ex. P-2. Second respondent did not pay the amount due under Ex. P-2 as undertaken by him in the sub-mortgage, Ex. P-5, but he took an assignment of the rights under Ex. P-4 from Muthuraman Chetti's widow by means of Ex. P-6 dated 9th February, 1922. Thus the rights of Muthuraman Chetti became vested in the second respondent. It is found by the lower Court that the sub-mortgage under Ex. P-5 and the assignment under Ex. P-6 were really for the benefit of Ramaswami, the first respondent. Ramaswami and Meyyappa, his elder brother, were entitled to the properties left by their father and they had two other brothers and all the four of them were entitled to their father's properties. The family right in Pappankulam and the amounts due from Pappankulam ryots including the amount under Ex. P-2 were allotted to the shares of the first respondent Ramaswami and of Meyyappa, the other brother, at a partition between the four brothers. Meyyappa therefore became entitled to a half share in the hypothecation under Ex. P-2 along with his brother, the first respondent. It would appear that there were also certain other moneys which were due to both and that Meyyappa was collecting them and was not rendering an account of his collections to Ramaswami, the first respondent. On the 1st March, 1922, Ex. P-9 was executed by the appellant which is registered receipt for the full sum due under Ex. P-2 and purport of it is that the appellant received the entire amount from the second respondent Somasundara. Meyyappa then filed O.S. No. 10 of 1926 against Ramaswami the first respondent, the appellant Kadiresa and the second respondent Somasundara. They were defendants 1, 2 and 3 in that suit. In that suit Meyyappa wanted recovery of a half share of the properties which were the subject of the usufructuary mortgage Ex. P-4 and of the assignment Ex. P-6 on the footing that Somasundara the second respondent was merely a benamidar for Ramaswami the first respondent and that Ramaswami in taking those documents acted really for the benefit of both Meyyappa and himself. On this footing Meyyappa wanted a half share in the usufructuary mortgage right and asked for joint possession of the properties. In the event of the Court finding that Meyyappa was not entitled to a half right in the usufructuary mortgage and for possession of half the properties covered by that document, Ex. P-4 Meyyappa wanted a relief against the present appellant Kadiresa. The alternative case was that as a receipt for the amount due under Ex. P-2 was passed by Kadiresa the second defendant in that suit and as the amount really belonged to Meyyappa and his brother Ramaswami in equal shares Meyyappa was entitled to recover half of that amount from Kadiresa the present appellant. The suit was defended in the trial Court by Ramaswami and Somasundara the second respondent. The present appellant Kadiresa remained *exparte* in the trial Court. He apparently was not interested in the primary relief that was claimed against the first defendant in that suit. In passing we may mention that Meyyappa's allegation in the plaint was that no money was in fact paid for the receipt of the 1st March, 1922. That perhaps was the reason why the present appellant thought that there was no necessity for him to enter appearance or to take part

in the trial of the suit. The first Court held that the mortgage right acquired by Ramaswami the first respondent in the name of his brother-in-law the second respondent was really for the benefit of Meyyappa as well and therefore decreed joint possession in favour of Meyyappa. There was an appeal taken against that decree. Mr. R.S. Sankara Aiyar the then District Judge who heard the appeal came to the conclusion that Meyyappa was not entitled to a right in the usufructuary mortgage, because Meyyappa's evidence was that Ramaswami was acting in fraud of Meyyappa's rights and that that showed that Ramaswami did not intend to acquire the usufructuary mortgage right for the benefit of himself and his brother Meyyappa. The District Judge therefore thought that the only remedy of Meyyappa was to recover his half share in the mortgage amount due under Ex. P-2 from Kadiresa the present appellant who had also been made a respondent in the appeal before him. The attention of the District Judge was drawn to a document which had been executed after the filing of the previous suit by the present appellant in favour of Meyyappa. That is Ex. P-21 dated 28th October, 1925. Under that document, the present appellant for some reasons promised Meyyappa that in case he did not succeed against Ramaswami, he the appellant would pay Meyyappa a half share of the amount due under Ex. P-2. This was brought to the notice of Mr. R.S. Sankara Aiyar and without any further notice to the present appellant and on a statement made by Meyyappa and Ramaswami, the District Judge passed a decree against the appellant for half the amount due under Ex. P-2. The decree in favour of Meyyappa against the present appellant was based solely on Ex. P-21. Coming to know of this decree, the appellant took up the matter in second appeal (No. 676 of 1932). That was heard by Lakshmana Rao, J. The learned Judge held that a decree ought not to have been passed on the strength of a document which was not the basis of the suit and that as Ex. P-21, which was Ex. J, in the previous case had not even come into existence on the date of the. plaint, the suit was not and could not have been based on that document. Lakshmana Rao, J., held that as the suit was not based on Ex. J. (present ExP-21), the appellate decree passed on the basis of that agreement cannot be upheld. Without saying anything more, the appeals were remanded to the District Court. There were apparently two appeals. We are not concerned with the details of these appeals and the question raised in both the appeals was substantially the same. After remand the appeals were dealt with by Mr. S.P. Thompson who was the then District Judge. He pointed out that Meyyappa had not alleged in his plaint that the money due under Ex. P-2 had been collected and that on the other hand, Meyyappa had pleaded expressly that no money had been paid under the receipt Ex. P-9. He held that therefore Meyyappa was not entitled to get any relief against the present appellant. The matter was brought up by Meyyappa to this Court in S.A. No. 988 of 1937. It was first heard by Venkataramana Rao, J., who directed the papers to be placed before Lakshmana Rao, J. When the matter came before Lakshmana Rao, J., he first dealt with the question whether Mr. Thompson's order holding that the order of remand passed in the previous S.A. No. 676 of 1932, was confined to the present appellant was right. Lakshmana Rao, J., agreed that the order of the

District Judge was right and that the previous order of remand in S.A. No. 676 of 1932 was confined to the present appellant. He therefore dismissed the second appeal against Ramaswami and Somasundara. He then directed the District Judge to submit a finding on the evidence on record whether the present appellant collected the amount under the receipt Ex. P-g. This time the matter came before another District Judge, Mr. N.D. Krishna Rao. He returned a finding to the effect that money had been paid basing his finding On the evidence that had been adduced at the original trial which, as we pointed out above, was at a time when the present appellant had not even appeared in the case. However, the finding was that the money was collected under the receipt. After return of the finding Lakshmana Rao, J., accepted the finding as one of fact and granted a decree for half the amount covered by the receipt in favour of Meyyappa. Subsequent interest was also awarded. Meyyappa collected the amount with subsequent interest and costs from the present appellant on 24th August, 1942. The present suit is to recover the amount paid to Meyyappa from Ramaswami the first respondent. The plaint allegation is that Ramaswami asked the appellant to execute the receipt Ex. P-9 stating that no serious consequences would result to the plaintiff by executing a receipt and that the receipt was executed purely to oblige the first defendant without receiving a single pie under it [see paragraph (e)]. The plaintiff's case is that as the receipt was executed at the instance of and at the request of the first respondent and as the appellant was made liable to pay Meyyappa the amount collected under the previous decree by reason of the receipt Ex. P-9, the appellant is entitled to recover the amount from the first respondent. The main defence is that money was in fact collected by the appellant under the receipt Ex. P-9, that the plaintiff's claim is barred by res judicata by reason of the finding in the previous suit and that the appellant has no right to recover the amount which he was obliged to pay to Meyyappa as a result of the decree in the previous suit. Another defence was that the assignment of the usufructuary mortgage under Ex. P-6 was really for the benefit of the second respondent Somasundara. The lower Court found that Ex. P-2 the original mortgage was taken in the name of the appellant's father benami for Raman Chetti, the father of Meyyappa and Ramaswami, that Ex. P-6 the deed of assignment of the usufructuary mortgage Ex. P-4 was taken in the name of Somasundara benami for Ramaswami the first respondent, that no money was in fact paid under Ex. P-9 and that no money was received by the appellant thereunder. The lower Court however held that the appellant cannot, recover the amount which he paid under the previous decree. The ground of the decision of the lower Court is that the appellant has no cause of action against the first respondent.

3. The case seems to have been presented in the lower Court as one falling under Sections 69 and 70 of the Contract Act and the Subordinate Judge rejected that contention. Mr. A. Sundaram Aiyar, the learned Advocate for the appellant, has presented the case before us from another standpoint and that is that the appellant passed a receipt Ex. P-9 at the instance of the first respondent, that

the appellant was, in consequence of his having complied with the request of the first respondent made liable to Meyyappa in the previous suit and that therefore the appellant is entitled to be indemnified by the first respondent in respect of the loss so sustained. A number of decisions have been brought to our notice and after hearing the Advocate-General for the respondents, we think that this contention is bound to prevail. The law is summarised by Chitty in his work on "Contracts" (19th edition, page 823):

In many cases the law implies a promise to indemnify. If the circumstances are such that the law imposes on any person a legal or equitable duty to indemnify, it will imply a promise on his part to do that which under the circumstances he ought to do.

Several instances of the application of this doctrine are given by the learned author. It is pointed out that, this principle is not confined to cases of contract or to cases of principal and agent, landlord and tenant, vendor and vendee or cestui que trust and trustee. It is a general rule which applies to all cases where at the instance of A, B does an act which is apparently lawful but which is in fact tortious and B suffers in consequence and the circumstances are such that a promise to indemnify must be presumed. The rule is well laid down by the Judicial Committee in *Eastern Shipping Co. v. Quah Beng Kee* (1924) A.C. 177. There the owners of a wharf granted the appellant company the right to berth their ships at the wharf subject to liability; for any damage caused. The respondent was the managing director of the appellant-company and he gave instructions, without the company's authority, that a ship which he himself had chartered for his own benefit should berth at the wharf. Owing to the unskillful way in which the ship was unloaded the wharf collapsed. In an action by the owners of the wharf against the appellant-company for damages, they served a third party notice upon the respondent and claimed that he should be made to indemnify them against any damages for which they may be made liable to the owners of the wharf. The question was whether the company had a right of indemnity against the respondent. The law was discussed by the Judicial Committee and on page 182 their Lordships say this:

A right to indemnify generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnity need not arise by contract; it may (to give other instances) arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him; it may arise (to use Lord Eldon's words in *Waring v. Ward* (1802) 7 Ves. 33a (336) : 3a E.R. 136 a case of vendor and

purchaser) in cases in which the Court will " independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation " of the vendor.... The question of indemnity commonly arises in the case in. which a trustee claims to be indemnified by his cestui que trust. This class of cases was particularly discussed by Lord Lindley in *Hardlron v. Belilios* (1901) A.C. 118. The present case is the converse. The cestui que trust is here claiming to be indemnified by the trustee. Beng Kee has been found to stand in fiduciary relation to the Eastern Shipping Co. and the latter claim indemnity from him in respect of liability-imposed upon them by his abuse of powers in the exercise of which he owed them a duty and was responsible as a trustee of those powers. He was not a trustee in the full sense of that word. No property was vested in him. But he was a trustee of his powers in the sense that they were vested in him in such manner that he stood in a fiduciary relation to the company in respect of his exercise of those powers.

Some of the earlier cases which throw a light upon the facts of the present case may now be referred to. In *Dugdale v. Lovering* (1875) L.R. 10 C.P. 196, the plaintiffs were in possession of certain trucks which were claimed by the defendant and also by the proprietors of the K.P. Colliery. The defendant asked the plaintiff to deliver the trucks to him and the plaintiffs asked for an indemnity that if they should deliver up the trucks to the defendant and the K.P. Colliery thereafter claimed the same from the plaintiffs, the defendant should be liable for all the loss sustained by the plaintiffs. The defendant did not give any answer to this request for an indemnity but again wrote to the plaintiffs asking them to send the trucks to him. The plaintiffs there upon sent the trucks to the defendant. The K.P. Colliery proprietors then brought an action against the plaintiffs for conversion of the trucks and their claim was found to be well founded. The plaintiffs were in consequence obliged to pay a sum of money and they filed a suit to recover the amount upon a contract of indemnity, and it was held that the plaintiffs were entitled to it. It would be observed that there was no express contract of indemnity on the part of the defendant. In fact the plaintiffs asked the defendant to indemnify them and the defendant did not reply and therefore there was no case of an express contract of indemnity. All that happened was that at the request of the defendant, the plaintiffs delivered possession of the trucks to the defendant. It ultimately turned out to be tortious in that the K.P. Colliery Co., were found to be the real owners and that the plaintiffs' action in delivering them to the defendant was in fact unlawful. The plaintiffs had to pay a sum of money to the K.P. Colliery Co. and thereupon they filed the suit for recovering the same from the defendant. The action was tried with the help of the jury and the jury held that the plaintiffs were entitled to be indemnified against the loss which they sustained. The matter was brought up to the High Court and Brett, J., put the point thus:

The Court is not entitled to enter a non-suit if there was reasonable evidence for the jury of a contract to indemnify. It is clear from the correspondence that the plaintiffs delivered these trucks to the defendant upon the request of the

defendant and it is also clear that they belonged in truth to the Kiveton Park Colliery Co., who have made the plaintiffs answerable for such delivery. Under these circumstances, does there arise an implied promise by the defendant to indemnify the plaintiffs?

Then they considered the several earlier decisions. One of the decisions which Brett, J., referred to is that of *Toplis v. Gram* (1839) 5 Bing. N.C. 636 : 132 E.R. 1245, where Tindal, C.J., had decided the point. Brett, J., referring to that decision said this:

After the judgment in *Betts v. Gibbins* (1834) 2 Ad. & E. 57 : 111 E.R. 22, which, following the two former cases, laid down the principle upon which the implication of an indemnity arises in the broadest terms, there came the case of *Toplis v. Grane* (1839) 5 Bing. N.C. 636 : 132 E.R. 1245, in which Tindal, C.J., one of the most careful expositors of the law ever known, laid down the proposition on the subject in these terms : " We think this evidence brings the case before us within the principle laid down in *Betts v. Gibbins* (1839) 5 Bing. N.C. 636 : 132 E.R. 1245, that when an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to the rights of third persons, yet if such an act is not apparently illegal in itself, but is done honestly and bonafide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof.

Then Brett, J., repelled an argument that was put forward that such an indemnity is confined to cases of agents. Dealing with the facts of the case the learned Judge said this:

From these letters, I think the jury might well have found that the plaintiffs were justified in believing and did believe, that the defendant would indemnify them if they incurred liability.

Grove, J., agreed with this decision and said this:

In some cases, no doubt, a general proposition stated in a judgment must be limited by reference to the subject-matter, but that is where the proposition would be obviously unreasonable unless so limited. I do not find that in these cases there is anything to show that the expressions must be limited to the case of agency. I should hesitate to say that in cases of this sort it can be an absolute proposition of law that the party making the request is bound to indemnify. Whether there is such an obligation must greatly depend on the circumstances of each individual case, the effect of which seems to be for the jury to determine.

After referring the facts of the case, Grove, J., agreed with Brett, J., that the facts of that case gave rise to a promise to indemnify.

4. In *Birmingham and District Land Co. v. London and N.W. Railway, Co.* (1886) 34 Ch.D. 261 the Court of Appeal laid the law in similar terms. At page 272, Cotton, L.J., expressed himself thus after dealing with the cases of express contract and trustees and *cestui que trust*:

Then, is there any ground of indemnity? Of course, if A requests B to do a thing for him and B in consequence of his doing that act is subject to some liability or loss, then in consequence of the request to do the act the law implies a contract by A to indemnify B from the consequence of his doing it. In that case there is not an express but an implied contract to indemnify the party for doing what he does at the request of the other.

On the facts they found that there was no such contract of indemnity. Bowen, L.J., put the matter thus:

In nine cases out of ten a right to indemnity, if it exists, at all as such, must be created either by express contract or by implied contract; by express contract if it is given in terms by the contract between the two parties; by implied contract if the true inference to be drawn from the facts is that the parties intended such indemnity, even if they did not express themselves to that effect, or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, there being many cases in which a remedy is given upon an assumed promise by a person to do what, under the circumstances, he ought to do."

In *Lord Mayor, etc., of Sheffield v. Barclay* (1905) A.C. 392, T and H were two registered holders of a stock in a particular corporation. A banker (Barclay Bank) sent an application for the transfer of the stock which purported to be executed by both T and H and requested the corporation to register the stock in the name of the banker. The Corporation acted upon the request and granted a fresh certificate to the banker and the banker transferred the stock to third parties and they were registered as holders. Afterwards it was discovered T had forged H's signature and H recovered against the Corporation a judgment whereby they were compelled to buy equivalent stock and register it in H's name and to pay him the missing dividends with interest. In an action by the Corporation against the Barclay Bank it was held that both parties acted bona fide and that the banker was bound to indemnify the corporation against liability to H upon an implied contract that the transfer was genuine and the contract was held to be one to indemnify the Corporation against any loss which it may sustain in consequence of its transferring the shares at the request of the bank. The Lord Chancellor said this at page 397:

As I have said, I think if it were *res integra* I should think the bank were liable; but I do not think it is *res Integra*, but is covered by authority. In *Dugdale v. Lovering* (1875) L.R. 10 C.P. 196 Mr. Cave arguing for the plaintiff put the position thus : " It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done." This though only the argument of Counsel, was adopted and acted upon by the Court and I believe it accurately expresses the law. Qualifications have been constantly introduced into the discussion which I think have led to some confusion; they are not really

qualifications of the principle here enunciated at all, but the expression of principles which would render the application of principle in question erroneous. One qualification is that there is no right of contribution between tortfeasors; and the other is to distinguish the right insisted upon from the ordinary remedy in damages against a person who has caused injury by intentional falsehood.

5. Lord Davey agreed with the Lord Chancellor and at page 401 we find this:

In some cases it is a question of fact whether the circumstances are such as to raise the implication of a contract for indemnity; but in cases like the one now before your Lordships when a person is requested to exercise a statutory duty for the benefit of the person making the request I think that the contract ought to be implied.

6. The learned Advocate-General appearing for the respondent seeks to distinguish the present case on the ground that the appellant knew the facts of the case and knew that his act in executing Ex. P-9 was an unlawful act and that he was actively assisting the first respondent in playing a fraud upon Meyyappa. It is urged that the appellant was not well-disposed towards Meyyappa for the reason that Meyyappa was standing in the way of the appellant getting the properties left by his father and that that was the motive which prompted the appellant in executing Ex. P-9, without receiving any money thereunder. It is also pointed out that later on the appellant tried to help Meyyappa and executed Ex. P-21 and that the whole trouble was the result of the appellant's own action in trying to support one brother against the other at different stages of this transaction. He relied upon the decision in *William Cory and Sons, Ltd. v. Lambton and Heiton Collieries, Ltd.* 115 L.T. 738. There the plaintiffs were the Charterers of a ship and the defendants were the owners of that ship. The plaintiffs removed certain hatch beams on behalf of the ship-owners and while so removing them an accident occurred and a third party was injured. The plaintiffs were obliged to pay damages to the third party and the action was brought to recover that sum from the ship-owners. The doctrine laid down in *Dugdale v. Lovering* (1875) L.R. 10 C.P. 196, was sought to be pressed into service. Repelling the case of the plaintiffs the learned Judges pointed out that the ship-owners asked the plaintiffs to effect certain repairs and that that was a perfectly lawful act. The plaintiffs acted negligently in the carrying out of that act and were therefore held liable to a third party. The damages which the plaintiffs were held liable to pay to the third party was not the result of the removal of the hatch beams being held to be in violation of third party's rights. Therefore it was not a case where at the request, of A, B did an act which was apparently lawful but which in fact was tortious being an invasion of another person's rights and B being obliged to pay that third person some amount by way of damages. The plaintiffs were authorised by the owners of the ship to remove the hatch beams and that act which the defendants,, the owners of the ship, authorised was a lawful act and continued to be a lawful act and it was not an invasion of another person's rights. On this ground the learned Judges held that the doctrine laid

down in *Dugdale v. Lovering* (1875) L.R. 10 C.P. 196 was not applicable. Swinfen Eady, L.J., after referring to the argument based upon *Dugdale v. Lovering* (1875) L.R. 10 C.P. 196, said this:

Then it is said that this Act was done by the plaintiffs, William Cory and Sons, Ltd., under the express direction or under the implied directions--it is immaterial whether it is express or implied if it was under the directions--of the defendants and they say that that has occasioned an injury to the rights of a third person, the deceased workman, Peacock, so that if the act is not apparently illegal, but is done honestly and in good faith then the defendants are bound to indemnify the plaintiffs--against the consequences thereof. Mr. Rawlinson and Mr. Macnaghten have urged before us that this case clearly comes within the principle as there laid down.

In my opinion it does not and I am satisfied that in the present case there was no evidence to go ? to the jury of any implied indemnity by the defendants, the ship owners in respect of any liability of the plaintiffs, William Cory and Sons, Ltd., to their workmen under the Workmen's Compensation Act. The statement of the law which I have just read, in which it is held that the defendant is bound to indemnify the plaintiff against the consequences thereof, must be read as meaning that the plaintiff claiming the indemnity must have acted without negligence and that the injury to the third party,, when it says " the consequences thereof" must be the direct result--that is, the natural and direct consequences--of doing the particular act which he was requested to do and not a consequence merely arising from the manner in which the act was done.

As all the judges pointed out, the first condition is that the Act must have been done at the request of the defendants. Next that the act itself must have been in fact tortious, i.e., it must be an invasion of another person's rights. It is only then that any occasion would arise for the application of the doctrine laid down in *Dugdale v. Lovering* (1875) L.R. 10 C.P. 196. They rightly repelled the contention that from the mere fact that one person does an act gratuitously without a request from another person the law would imply a contract to indemnify. Bankes, L.J., said this:

But Mr. Macnaghten had advanced another and different argument, as I understand it and his contention is that where request is made to a person to do an act gratuitously and he does that, act gratuitously, the law implies a contract to indemnify him against all the consequences of that act, whatever they may be--it may be that in some cases the fact that the service is done gratuitously may be an element for consideration. I am expressing no opinion about that, but I say that, so far as my opinion goes, it is impossible to contend and there is no authority to contend, that the law implies such a contract as Mr. Macnaghten contends for, from the mere fact that the person performing the act is doing it gratuitously.

Lawrence, J., put the matter thus:

Mr. Rawlinson applies the doctrine of *Dugdale v. Lovering* (1875) L.R. 10 C.P. 196 but the doctrine is applicable to different facts altogether. There the request was to do an act that was apparently quite lawful, but was in fact tortious and it is the same thing in the case cited in that case of *Tindal, C.J.*, which is mentioned there; the act was in fact illegal, though it was not known to be so and it was from that that the indemnity was implied. But there the request was to do a perfectly lawful act and there was, therefore, no implied promise of indemnity.

In the present case, we are of opinion that the appellant granted Ex. P-9 at the request of the first respondent. He did so without receiving any amount and the result of his passing Ex. P-9 was an invasion of the right of Meyyappa and was therefore a tortious act. There are no materials for holding that the appellant was guilty of negligence or that he was acting with the knowledge that he was doing an unlawful act. When a benamidar pays the amount to one of the joint real owners or passes a receipt to one of the joint real owners, it does not necessarily mean that he was acting in fraud of the rights of the other real owner.

7. Our attention was drawn by the learned Advocate-General to the deposition of the appellant in support of his case that the appellant deliberately colluded with, the first respondent in executing Ex. P-9 and that the reason was a grudge which the plaintiff appellant bore towards Meyyappa. The passage is this:

I executed the receipt original of Ex. P-9. Defendant I wanted me to execute it. He represented that Meyyappa Chetti was collecting the outstandings of Pappangulam and was not giving him anything and so asked me to execute the receipt in the name of his brother-in-law defendant a. I said I could not execute any document without records. Then he produced a copy of the hypothecation bond. As the property was not mine I executed the receipt herein. I had not received any copy of the hypothecation bond.

Certain passages from the cross-examination of the appellant were brought to our notice but all that we gather from it is that the first respondent said that Meyyappa was not acting fairly by him and that therefore the first respondent asked the appellant to execute the receipt in question. We do not think that there are any circumstances proved to take the present case out of *Dugdale v. Lovering* (1875) L.R. 10 C.P. 196.

8. It was then argued that the appellant did in fact collect the entire sum from the second respondent. The lower Court has found against this contention and we see no reason to differ from the finding of the Subordinate Judge on this point.

9. It is then urged that the appellant is precluded from contending that he did not receive the amount by reason of the judgment in the previous suit where it was held that the appellant received the amount. In the previous suit, O.S. No. 10 of 1926, the present appellant and the first respondent were both defendants. The requisite conditions for the applicability of the doctrine of *res judicata* as between co-defendants are laid down by two decisions of the Judicial Committee

in *Munnibibi v. Trilokinath* (1931) 61 M.L.J. 196 : L.R. 58 LA. 158 : ILR 53 All. 103 (P.C.) and *Maung Sein Done v. Ma Pan Nyun* (1932) 63 M.L.J. 64 : L.R. 59 LA. 247 : ILR 10 Rang. 322 (P.C.) These are, (1) a conflict of interest between co-defendants, (2) necessity to decide that conflict in order to give the plaintiff appropriate relief and (3) a decision on the question between the co-defendants. If these conditions are present, it does not matter even if one of the defendants did not appear at the trial or did not even contest the suit and remained *ex parte*.

10. Difficulty has arisen in the application of this rule to the facts of a particular case. In the present case, we are of opinion that the doctrine of *res judicata* does not apply. In O.S. No. 10 of 1926, two reliefs were asked by the plaintiff, one which may be called the primary relief and the other an alternative relief. The primary relief was based upon the contention that the first respondent in taking an assignment of the usufructuary mortgage acted for and on behalf of the plaintiff, Meyyappa as well. On that footing the relief asked was one of joint possession along with the first respondent and a declaration of his rights to a half of the right under Ex. P-4. Meyyappa's allegations as regards the primary relief was that no amount was paid under Ex. P-9 and that the first respondent's action in getting an assignment of Ex. P-4 enured for the benefit of both the brothers. In an enquiry of this question and in the decision thereof, the appellant had no interest whatever. He was not concerned with the question whether the usufructuary mortgage right under Ex. P-4 was acquired by the first respondent for his sole and exclusive benefit or whether it became the joint property of the two brothers. The alternative relief was that in the event of the Court holding that the plaintiff Meyyappa was not entitled to a joint right in the usufructuary mortgage, Ex. P-4, a decree should be passed against the present appellant for half the amount covered by Ex. P-9. In the determination of this question, it is difficult, to see how the first respondent had any interest. Meyyappa's alternative contention was that if the present appellant was found to have recovered the whole amount under Ex. P-9 he (Meyyappa) was entitled to a half share therein and that therefore he should be given a decree for that sum against the present appellant. The first respondent had no interest whatever in the determination of this question. He was a co-sharer in the amount covered by Ex. P-2, the original deed of usufructuary mortgage. If it was found that the present appellant had not recovered any amount under Ex. P-9, Meyyappa would fail. If, on the other hand, he was found to have recovered the whole amount, the plaintiff would be entitled to get half that amount. Whether it was the one or the other, it was no concern of the appellant and he was not interested in the determination of that question. There was therefore no conflict of interest between the appellant and the first respondent as co-defendants in O.S. No. 10 of 1926. We may also mention the ground upheld by the lower Court and that is this. The first respondent and the second respondent, his brother-in-law were both exonerated by Lakshmana Rao, J. and the second appeal No. 988 of 1937 was dismissed against the two respondents and thereafter Lakshmana Rao, J., called for a finding whether the present appellant had recovered the amount due

under Ex. P-2. The finding was returned in favour of Meyyappa and it was accepted by the learned Judge. After the second appeal was dismissed against the present respondents, they were no longer parties to the further proceedings which took place in that suit. At the time when the decision was rendered that the present appellant had recovered the whole amount under Ex. P-9 the present respondents were not parties to the action. On both these grounds we hold that there can be no question of res judicata preventing the appellant from proving that in fact he did not receive any amount under Ex. P-9.

11. In the result, we allow the appeal and pass a decree for the sum of Rs. 8,685-6-5 with further interest at six per cent, per annum from the date of the plaint upto the date of realisation against the first respondent. The first respondent will pay the appellant his costs here and in the lower Court. The second respondent will bear his own costs throughout.