
(1922) 07 AHC CK 0016
In the Allahabad High Court

Parsotam Das Kolapuri and Others

APPELLANT

Vs

Lachmi Narain and Others

RESPONDENT

Date of Decision : 21-07-1922

Acts Referred:

Citation : AIR 1923 All 67 : 69 Ind. Cas. 688

Hon'ble Judges : Stuart, J; Ryves, J

Bench : Division Bench

Judgement

Ryves, J.—The facts of this case are simple. Jamna Praead, Gharib Das and Khedu Ram were three separate Hindu brothers. The ports and grandsons of Jamna Prasad, (now plaintiffs respondent's) and the sons of. Gharib Dap, (now defendants-. appellants) combined together to bring a suit against the sons of Khedu Earn. They were unsuccessful both in the Trial Court. and on appeal in this Court, and their suit and appeal were dismissed with costs.

2. Shortly afterwards, distensions arose between the plaintiffs and the defendants, and the decree holders (defendants in that suit) siding with the present defendants, recovered the whole of the costs from the plaintiffs.

3. The plaintiffs now sue to recover from the defendants half of the costs, the whole; of which they had to pay, The main defense was that the defendants had paid their half share. This was disbelieved by both the lower Courts, who decreed the suit.

4. In the Courts below, although the plea was not taken specifically in the written statement, it was allowed to be argued that the suit was not maintainable on the ground that there is no right of contribution between joint tort-feasters. This plea was based on the well known case of Merry weather v. Nixan (1799) 1 S.L.C. 12 : 8 T.R. 186 : 16 R.R. 810 : 101 E.R. 1337, decided as long ago as 17.9 by Lord Kenyon. The rule broadly "aid down in that case has been modified by subsequent decisions in England vide Merrywecther v. Nixsn (1799) 1 SL.C. 12th Ed. 418 at p. 457 : 8 T.R. 186 : 16 R.R. 810 : 101 E.R. 1337. The case, however,

was "considered in *Palmer v. Wick Steam Shipping Co. Ltd*" (1894) A.C. 318 : 6 R. 245 : 71 L.T. 163 by the House of Lords. In that case the family of a man, who had been killed by the fall of a block which was part of the ship's tackle, while unloading the vessel, brought two suits (in Scotland) for damages : (1) against the Shipping Company for negligence in supplying weak tackle, and (2) against Palmer, a stevedore, for negligence in using the same. The two suits were consolidated, and on the finding of the Jury against the defendants, a joint decree was passed against them both for damages and costs. The whole amount was paid by the Shipping Company, who then brought this suit against Palmer for contribution of half the damages and half the costs. The Trial Court dismissed the suit on the ground that the Shipping Company "being joint wrong doers with Palmer, had no ground for relief". On appeal this judgment was set aside, and the Company's suit was decreed in full, and this was affirmed by the House of Lords, on the ground that the Company's claim rested on a decree which created a civil debt.

5. The words which I have italicised are taken from the head-note, and appear to be based, more particularly, on the observations of Lord Watson. Lord Halsbury, while concurring in dismissing the appeal, seems to have doubted "whether in England the transmutation of the cause of action into a judgment (in India, a decree) would prevent the application of the principle of *Merryweather v. Nixon*" (1799) 1 S.L.C. 12th Ed.) 418 at p. 457 : 8 T.R. 186 : 16 R.R. 810 : 101 E.R. 1337 although he concurred generally in Lord Herschell's opinion of that case.

6. The appellant's case was argued, mainly on the ground that *Merryweather v. Nixon* (1799) 1 S.L.C. 12: 8 T.R. 186 : 16 R.R. 810 : 101 E.R. 1337 was conclusive. Lord Herschell said: "it is not founded on any principle of justice or equity or even of public policy which justifies its extension to the jurisprudence of other countries ", although he thought it was too late to question it in England.

7. It seems to me, therefore, very doubtful whether we should apply it in India. The same view was suggested in the case of *Nihal Singh v. Collector of Bulandshahr* 38 Ind. Cas. 165 : 38 A. 237 : 14 A.L.J. 276. Recently it has been held in the case of *Mahabir Prasad v. Darbhanga Thakur* 51 Ind. Cas. 697 : 4 P.L.J. 486 : (1919) Pat. 289, that the rule as therein modified is applicable in this country. It is, however, unnecessary for us to decide the point, because it has been held by the Court below as a fact, that the parties were not tortfeasors. The District Judge finds that they were simply " unsuccessful litigant;, not criminals".

8. There remains, however, a still broader question which has been argued before us at considerable length. It is urged that an unsuccessful party cannot, at all, enforce contribution by suit against another unsuccessful party, and this is said to be the rule prevailing in England, and is supported, by the case of *Dearsly v. Middleweek* (1881) 18 Ch. D. 236 : 50 L.J. Ch. 777 : 45 L.T. 404 : 30 W.R. 45, in which Fry, J., said: "I shall follow the dictum which has been cited to me from the Court of Appeal in *Real and Personal Advance Co. v. McCarthy* (1881) 18 Ch.

D. 362 : 45 L.T. 116 : 30 W.R. 481 and hold that a defendant cannot proceed against a co-defendant for contribution in respect of costs to which both are equally liable." That dictum appears in the judgment of Sir George Jessel, on page 368 [Real and Personal Advncos Co. v. McOarthy (1881) 18 Ch. D. 362 : 45 L.T. 116 : 30 W.R. 481] of the same volume and is in the following terms: "This is a Common Law action, and at Common Law there is no such thing as apportionment of costs. There is an apportionment of costs in equity, but it is of quite a different kind--it is an apportionment of costs between different claims."

9. Reference is also made to the case of Wilson v. Thomson (1875) 20 Eq. 459 : 44 L.J. Ch. 527 : 23 W.R. 744 in which Sir Charles Hall, V.C., said: "The plaintiff must have costs against both the defendants, but I consider that Timms is the person whose misconduct has brought about this suit, and I should like to make him bear the costs as between himself and Thomson if I have jurisdiction to do so. It has been suggested that I should order the plaintiff to pay Thomson's costs, and give the plaintiff those costs against Timms, but I will not imperil the plaintiff in that way. He may never be able to recover anything from Timms. Besides, I have held the plaintiff to be entitled to costs against Thomson as well as Timms. Belief cannot ordinarily be given as between co-defendants. I think, however, that I have jurisdiction to declare that costs, which the plaintiff may recover from Thomson, shall be re-paid to Thomson by Timms." Having regard to this ruling, it is argued that unless the Court directs, in the suit itself, how the costs are to be paid by the parties inter se, they cannot claim contribution by a separate suit.

10. Various cases from the Indian Law Reports have also been cited. Fakirs v. Tasadduq Huttain 19 A. 462 : (1897) L A.W.N.107 : 9 Ind. Dec. 297. That was a suit for contribution by one defendant against his co-defendants, and it was dismissed on the ground that it " lay upon the plaintiff to show that there was either some contract between him and the defendants, or some equity which created a duty on these defendants to contribute to the costs in question as between themselves. Apparently the plaintiff and defendants here were wrong-doers. They were holding on to property to which the plaintiff in the former suit was entitled, and to which they, or either, or any of them, were not entitled. Each was acting independently and for his own benefit, and setting up a title against the plaintiff to the former suit which was independent of, and separate from, and inconsistent with, the title set up by the other defendants. Their claims were mutually exclusive. There was no contract between them. One was not acting as the servant of the other; and there was no equity between these persons whose cases were antagonistic to each other." In coming to this conclusion, reliance was placed on the observations of their Lordships of the Privy Council in the case of Abdul Wahid Khan v. Shalukha Bibi 21 C. 496 : 21 I.A. 26 : 6 S.P.C.J. 399 : Rafique & Jackson's P.C. No. 134 : 10 Ind. Dec. 961. (P.C.) where their Lordships say: "in the present appeal the defendant claimed to be allowed a proportion of those costs on the ground that the plaintiffs had got the benefit of the reversal of the decree of the Judicial Commissioner. This is not a ground for making the

plaintiffs liable for any portion of those costs. The proceedings were taken by the defendant for his own benefit it and without any authority, express or implied, from the plaintiffs; and the fact that the result was also a benefit to the plaintiffs does not create any implied contract of give the defendant any equity to be paid a share of the costs by the plaintiffs."

11. The next case relied upon was the case of *Mulla v. Jagannath* 6 Ind. Cas. 684 : 32 A. 685 : 7 A.L.J. 720. That also was a suit for contribution among co-defendants, and this Court dismissed the suit following the English case of *Dearly v. Middleyveek* (1881) 18 Ch. D. 236 : 50 L.J. Ch. 777 : 45 L.T. 404 : 30 W.R. 45, holding that the mere fact that a joint decree was passed against all the defendants for costs did not prove conclusively that if one of those defendants paid the whole of the costs, he would have an absolute right to get contribution from his co-defendants, but that it would be necessary to prove some contract or equity between them. I confess I do not quite appreciate the ratio decidendi. But the facts are not fully stated. It is interesting, however, to contrast this case with the case of *Siva Panda v. Jujusti Panda* 25 M. 599 : 12 M.L.J. 13, which was quoted in argument in that case but is not referred to in the judgment. There a suit had been brought to recover a sum of money and costs jointly against two defendants. Defendant No. 1 did not defend the suit and proceedings were taken against him ex parte. Defendant No. 2 defended the suit unsuccessfully, and a joint decree was passed against both, which was satisfied by defendant No. 2. He then brought this suit against his" co-defendant for contribution for half the amount paid by him, which included half of the costs. The Trial Court dismissed the suit on the ground that "the present defendant had no interest in that case. The foundation of the action thus fails." This was a Small Cause Court suit and an application in civil revision was taken to the High Court and came before Davies, J., who reversed the Trial Court and decreed the suit. On appeal under the Letters Patent, *Benson and Basbyam Ayyangar, JJ.*, dismissed the appeal. They held that the production of the judgment and the decree in the former suit, and the certificate of satisfaction by the plaintiff alone, gave him a prima facie case, but they went on to say, it will, of course, be open to the party from whom contribution is sought, to plead and establish, that, as between the joint-debtor the plaintiff is solely liable to the debt, or that he is not equally liable with the plaintiff, or that both being joint tort-feasors in a sense in which on public grounds the right of contribution is negative, that the suit is not maintainable." Another case, which has been a strongly relied upon is the case of *Punjab v. Petum Singh* 6 N.W.P.H.C.R. 19. That case, however, and the cases which have followed it, can be left out of consideration, as they have no application whatsoever to the present case. There, several persons were jointly liable to pay a sum of money. The creditor successfully sued one of them for the whole amount and recovered it with costs. This person then brought a suit for contribution against the other persons, who were jointly liable with him to pay the debt, to contribute their share both of the original debt and of the costs which were incurred in defending the creditor's suit. This Court held that the

plaintiff was entitled to recover a proportionate share of the debt, but was not entitled to recover any of the costs. It was there said: "When a joint debt is incurred, it is in contemplation of the parties that it will be paid- without suit. Although every one of the persons who spay be under the joint liability must be presumed to engage to contribute his fair share to its satisfaction, they are not to be presumed to engage to pay their shares of the costs of litigation to which they may not be parties, and over which whether it be more or less protracted they may have no control. If persons, who are under a joint liability, are jointly sued and a decree passes for the debt and costs against both of them, each being under a joint liability in virtue of a decree, is bound to contribute, in respect both of debt and costs, his share of the decree. Where only one of several co-con-traotors is sued, he cannot call upon his co-contractors to contribute to the costs of the suit." This extract from the judgment is enough to show that it has no application here.

12. An examination of all these and other cases leads me to think that the proposition propounded by Mr. Peary Lal Banerji that one party can never recover contribution for costs against another party, who joined with him in the litigation, is put much too broadly, if indeed, it is not altogether inadmissible.

13. I have Dot been able to find what is the underlying principle which prevents can unsuccessful party getting contribution for costs from a co-party when he has had to pay the whole of it himself. I think there must be some idea, more or less, analogous to that underlying Merry weather v. Nixan (1799) 1 S.L.C. 418 at p. 457 : 8 T.R. 186 : 16 R.R. 810 : 101 E.R. 1337, namely, that the defending of a successful suit was in itself something in the nature of a tort. I think this must be so, became in the numerous cases which I have examined in which the question of the right to contribution for costs in any of the various forms in which it has arisen, a reference has almost invariably been made to Merryweather v. Nixan (1799) 1 S.L.C. 418 at p. 457 : 8 T.R. 186 : 16 R.R. 810 : 101 E.R. 1337. However, be that as it may, I find on examination, that in all these cases the question has arisen between co defendants, and the only rule of practice in Kngland which I can find on the subject is set out in the English "Annual Practice", 1920, at page 1199, in the notes to Order LXV, Rule 1 where it is said: "a defendant, it seems, cannot enforce by action contribution for casts against a co-defendant, Dearsly v. Middleweek (1881) 18 Ch. D. 236 : 50 L.J. Ch. 777 : 45 L.T. 404 : 30 W.R. 45, but he can do be in the original station, Newry Salt Worke Co. v. Macdonell (1903) 2 Ir.R. 454 : 37 Ir. L.T. 97 : 7 Ir.L.R. 466." Nothing is said as to contribution between co-plaintiffs, and I think the reason is fairly obvious, Where, two or more persons join in an attack,-or in a common defense, in an action, I think there is at least an implied contract that they will shire the gain or the loss. I think equity at any rate will infer such a contract; I base this opinion on the cases already quoted, Punjab v. Petum Singh 6 N.W.P.H.C.R. 19, and the House of Lords case. Indeed I. cannot differentiate this case from that of an ordinary firm of partners suing, or being sued as such. In such a case it is obvious, I think, that the partnership must pool the gains or jointly pay the

losses.

14. But these cases show that it may often happen that the defendants to a suit may have different, antagonistic and exclusive defenses, and that in such, a case, in the absence of a contract or some equity between them, there will be no contribution. I deduce from all these cases three rules which may be set cut in three simple illustrations;

(1) The plaintiffs are all in the same boat palling together. Their objects, aims and interests are ex necessitu identical and mutual,

(2) The defendants, on the other hand, are persons who have been pushed into the same boat whether they like it or not, and if their interests are adverse inter se, they cannot pull together, and, in this case, contribution may not be allowed,

(3) If, however, the occupants of the plaintiffs' boat are pirates, out on a marauding expedition, then it may be that under the rule of *Merryweather v. Nixan* (1799) 1 Sm.L.C. 418 at p. 457 : 8 T.R. 186 : 16 R.R. 810 : 101 E.R. 1337 or on grounds of public policy, the Courts will not help them to get contribution among themselves. But it is unnecessary to decide this point,

15. I now come to the cases on the other side, the first of which is a case decided by a Bench of this Court, *Kishna Ram v. Rakmini Sewak Singh* 9 A. 221 : (1887)A.W.N 31 : 5 Ind. Dec. 581. There the plaintiff, along with other person?, caused certain property to be attached and put up for sale. Subsequently this attachment was set aside with costs, and the plaintiff had to pay the whole" of the costs. He sued for contribution. The two lower Courts dismissed his suit on the ground that "as the attachment, was a trespass, he could not obtain contribution I take this to mean that the Court held that the parties were joint tort-feasors. This case was decided seven years before the House of Lords had commented on *Merry weather v. Nixan* (1799) 1 S.L.C. 418 at p. 457 : 8 T.R. 186 : 16 R.R. 810 : 101 E.R. 1337 and the learned Judges (Mr. Justice Straight presiding) seem to have decided the case on the assumption that the rule in *Merryweather v. Nixan* (1799) 1 S.L.C. 418 at p. 457 : 8 T.R. 186 : 16 R.R. 810 : 101 E.R. 1337, as explained and qualified by later decision was applicable. Having explained this, the learned Judges go on to say;--"Adapting it to the circumstances of the present case, it is obvious that there is no evidence to show that the plaintiff, in attaching and advertising the four village for sale in execution of his decree against "Ajudhia Prasad, knew he, was doing an. illegal act -indeed the inferences are all the other way, Consequently, he was in our opinion, fully entitled in law to maintain the present suit, and to recover from the defend ants. the proportionate amount of the costs which be had to pay for them."

16. The word "consequently", which I have italicised, seems to indicate that in the Court's opinion, unless the plaintiff came within the rule of *Merryweather v. Nixan* (1799) 1 Sm.L.C. 418 at p. 457 : 8 T.R. 186 : 16 R.R. 810 : 101 E.R. 1337, as modified up -to date, there was nothing else to bar his suit. This case

so far as I know, has not been over-ruled, and is an authority in favour of the respondents. The case of Shakul Kameed Alim Sahib v. Syed Ibrahim Sahib 26 M. 373 is also in point.

17. In my opinion, therefore, this suit was rightly decided, and I would dismiss the appeal.

18. After I had prepared this judgment and taken considerable time and trouble in examining authorities, I stumbled upon the case of Ram Sarup v. Bai Nath 58 Ind. Cas. 324 : 43 A. 77 : 18 A.L.J. 872 : 2 U.P.L.R.299, That case is exactly in point, and if it had been referred to in argument, or if I had been fortunate enough to discover it earlier, it would have been unnecessary to do more than dismiss the appeal relying on that decision. However, it is satisfactory to find "that I have independently arrived at the same conclusion as my brothers, Gokul Prasad and S. M. Sulaiman.

Stuart J.

19. I concur in the order proposed.

20. By the Court.--Appeal dismissed with costs.