

(1922) 04 MAD CK 0016
In the Madras High Court

T.M. Sundara Aiyar and Another	Vs	APPELLANT
T.M. Ananthapadbhanaba Aiyar and Others		RESPONDENT

Date of Decision : 27-04-1922

Acts Referred:

Citation : (1922) 16 LW 231 : (1922) 43 MLJ 271

Hon'ble Judges : Odgers, J;Devadoss, J

Bench : Full Bench

Judgement

Odgers, J.—I have had the advantage of reading the Judgment about to be delivered by my learned brother which sets out the facts, The

matter arises u/s 70 of the Indian Contract Act. The respondent in this case does not dispute that he has had the benefit of the 1st plaintiff's action

but he says all the expenses would have been incurred even if 1st defendant had not joined as plaintiff. It is true that the District Munsif found

generally that some of the items incurred would have had to be paid whether or not 1st defendant was a plaintiff in the suit but the appeal to the

lower appellate Court was dismissed on two points of law (1) that the party sought to be made liable must not only have benefited but must have

had the opportunity of accepting or rejecting the benefit; and that in this case there is no proof of such option. This is laid down in Raja of

Pittapuram v. Secretary of State (1914) 16 M.L.T. 375. The second point of law is that when a person paying is himself interested in making the

payment he cannot be presumed to have intended to act for the other. That he accepted and intended to accept the benefit is, I think, shown by the

fact that he himself successfully applied to be joined in the suit as a plaintiff and by his having drawn out of Court his share of the decree amount. It

cannot in my view be said that plaintiff intended to do the act gratuitously as regards 1st defendant in face of the notices plaintiff served upon him,

Exhibits B and BI, the effect of which has not been considered by the lower Appellate Court. The notices go to show that plaintiff intended to act

for 1st defendant in the suit as well as for himself. I therefore think that respondent has not only been benefited by his actions but has adopted the benefit.

2. As to limitation, it is quite clear that Article 61 as applied by the lower Appellate Court cannot apply. It refers only to money paid for the

defendants and as stated by Oldfield, J. in *Viswanatha Vijya Kumar a Bangaroo v. G.R. Orr* (1917) 45 C. 786, that Article is inapplicable to a

case such as this where there was at the time of payment no question of any immediate benefit being conferred on defendant by it. It was there held

that Article 120 applied. I am of opinion that this is the proper Article to apply and if so the suit is in time, as limitation will begin to run from the

time 1st defendant derived benefit from the suit, i.e., when he first received a cheque for his share of the money decreed.

3. I therefore think that a case is made out for appellants u/s 70 of the Indian Contract Act. There must be a finding as to which if any of the items

incurred by the plaintiffs were reasonably necessary for the conduct of the suit and the lower Appellate Court is requested to find accordingly.

Finding will be submitted in 6 weeks. 7 days are allowed for filing objections. Fresh evidence may be taken. If it is found any items were

reasonably necessary appellant will have a decree for one-fourth of the amount so found.

Devadoss, J.

4. The facts of the case are: In 1891 when plaintiffs and 1st defendant were members of a joint family, a mortgage was taken with the family funds.

The plaintiffs got a half share and the 1st defendant one-fourth share of the mortgage. Before a suit on the mortgage could be barred, the plaintiffs

called upon the 1st defendant to join them in filing a suit on it. The 1st defendant did not care to reply to the notices of the plaintiffs who thereupon

filed O.S. No. 31 of 1909 on 30-8-1909 on the mortgage making the 1st defendant pro forma defendant. The 1st defendant made an application

to the Court on 13-10-1909 to be made a co-plaintiff which was granted. A

mortgage decree was passed on 11-12-1912. The 1st defendant received his quota of the money in Court by cheques, dated 21-12-1914 and 22-12-1914. The suit out of which this second appeal arises was filed on 18--12--1917. The plaintiffs seek contribution from the de-fendahts in respect of the expenses incurred by them in conducting the suit. The defendants plead that the expenses were not necessary for the conduct of the suit and the claim is barred by limitation. The District Munsif dismissed the suit holding that Article 59 of the Limitation Act applied. The learned Subordinate judge dismissed plaintiffs" appeal on the ground that Section 70 of the Contract Act did not apply, that defendant had no option of refusing the benefit, that the plaintiffs acted for their own benefit and did not intend to benefit the 1st defendant and that in any event the suit was barred by reason of Article 61 of the Limitation Act.

5. The question whether the 1st defendant had the option of refusing the benefit could be disposed of easily. Exhibits B and B1 show that

defendant was asked to join in the suit and pay his quota of the expenses and was warned that he would be responsible for the loss that might

accrue by his not joining the plaintiffs in filing a suit on the mortgage. The 1st defendant chose not to reply, it cannot be said in the circumstances he

has not had the option. But it is not necessary that he should have had the option of joining in the suit when he gladly availed himself of the benefit

of the plaintiffs" action.

6. The question whether the plaintiffs did intend to benefit the 1st defendant is one of difficulty. The suit brought by the plaintiffs is for the benefit of

both. Without making the 1st defendant a party, the plaintiffs could not sue, as the law requires that all persons interested in the mortgage should be

parties to the suit. In this case the plaintiffs did not intend to do the thing they did gratuitously, for they clearly demanded that the 1st defendant

should pay his share of the expenses and join in the suit (vide Exhibit B.) The respondents" vakil contended that where the plaintiff is interested in

doing a thing which benefits himself and the defendant, the plaintiff is not entitled to ask for contribution even though the defendant gets the benefit

of the plaintiff's act. This contention deserves consideration. Of the 4 conditions required by Section 70 of the Indian Contract Act, two are

fulfilled in this case, viz., - the legality of the act and the enjoyment of the

resulting benefit. The other conditions are: (1) Plaintiff doing the act for the 1st defendant and (2) plaintiff not intending to do the thing gratuitously. I have already held that plaintiffs did not intend to do the act gratuitously.

The remaining question: did the plaintiff the and conduct the suit for the 1st defendant? - must be answered in the negative, It may be taken as

settled law that where a person does an act which is greatly beneficial to himself and which is sure to benefit another, the former cannot claim

contribution from the latter; in other words, where a person is bound to do an act or would do an act, whether another consents to it or not, the

former cannot claim contribution even though the latter derives benefit in consequence of the act. In short, where the benefit to himself is great, a

person cannot be said to do the thing for another within the meaning of Section 70 of the Contract Act, Vide *Visvanadha Vijia Kumar a Bangaroo*

v. G.R. Orr. (1917) 45 I.C. 786, *Abdul Wahid Khan v. Shaluka Bibi* ILR (1894) Cal. 496 , *Yogambal Boyee Ammani Ammal v. Naina Pillai*

Marakayar ILR (1909) Mad. 15, and *Rajah of Pithapuram v. Secretary of State* (1914) 16 Mad. L.T. 375 .

7. In this case the 1st defendant applied to the Court to be made a plaintiff and continued in that capacity throughout the proceedings. An

application was made for amendment of the plaint and to this application the 1st defendant was also a party and the amendment asked for was

ordered on terms and the 1st defendant cannot now be heard to say that he did not give his tacit consent to the application for amendment. If he

had remained *ex parte* and had taken no interest in the proceedings the matter might have been different; but in the light of the evidence and taking

all the circumstances into consideration I hold that 1st defendant is liable to contribution to the plaintiffs in respect of all legitimate expenses of the

suit.

8. The next question is one of limitation. The District Munsif held that Article 59 of Schedule I of the Limitation Act applied to the facts of the case.

The lower Appellate Court thought that Article 61 applied. Article 59 is clearly inapplicable. Article 61 is not applicable to the present case as no

money was paid for the defendant. Expenses were incurred in filing a suit on a mortgage and the mortgage decree was for the benefit of the 1st

defendant as well. The proper Article applicable to the case is Article 120. In

Visvanadha Vijia Kumara Bangaroo v. G.R. Orr. (1917) 45 I.C.

786, the facts were the lessees of the Sivaganga Zamindari executed certain necessary repairs to a tank which irrigated their lands and the

defendant's lands and also the lands of other persons. The lessees claimed a proportionate share of the expenses from the defendants u/s 70 of the

Contract Act. Abdur Rahim and Oldfield, JJ. held that Article 120, and not Article 61 of the Limitation Act applied to the facts of the case.

9. The next question is, from what date did limitation begin to run? Time began to run, only from the date when the first defendant enjoyed the

benefit of the plaintiffs' Act, i.e., from the date when he got cheques from the Munsif's Court on 21-12-1914 and 22-12-1914. In Upendra

Krishna Mandal v. Naba Kishore Mandal Orr. (1917) 45 I.C. 786, the facts were - the plaintiffs and defendants were joint owners of a tank

situated within the limits of the Calcutta Municipality. The tank was in an insanitary condition and the water was so un-whole-some as to be a

menace to the health of the locality. The corporation issued, a notice on the common manager of the estate of the plaintiffs and the defendants

directing him to fill up the tank. As the requisition was ignored criminal proceedings were started. The common manager arranged with the plaintiffs

to take steps to fill up the tank. The tank was filled up and the plaintiffs demanded proportionate share of the expenses from the defendants who

refused to contribute. The plaintiffs sued the defendants for contribution. Mookerjee and Fletcher, JJ, held ""that Article 120 applied and that the

liability of the defendant did not arise in successive fragments as the plaintiff paid money to the contractor from day to day; the liability arose when

the tank was filled up and the contemplated benefit was conferred.

10. In Umatul Soghar v. Zohra (1915) 34 I.C. 54, Chapman, and Atkinson, JJ. of the Patna High Court held, that plaintiff would have no cause of

action against the defendant if the suit intended to benefit both the plaintiff and the defendant was dismissed. It follows that the cause of action

arose only when the 1st defendant received the benefit of the suit, that is, when he got cheques for his share of the amount realised in execution.

11. It was contended by Mr. Padmanabha Aiyengar that the order on the amendment petition was a decree and the defendant was a Judgment-

debtor and he could not be asked to contribute after 3 years. In the first place

the order on the amendment petition" was not a decree and

secondly the cause of action could not arise before the defendant received the benefit of the plaintiff's action.

12. The defendant is liable to pay his share of Rs. 258-2-0. With regard to the rest of the claim the lower Appellate Court has not recorded a

finding as to whether it was necessary to incur it for the conduct of the suit. Before the Second Appeal could be disposed of a finding is necessary.

13. I agree with my learned brother in the order proposed by him.

14. In compliance with the order contained in the above judgment the District Court of North Arcot submitted the following.

FINDING: I have been directed to return a finding on the following issue namely-

1. Which if any of the items incurred by the plaintiffs were reasonably necessary for the conduct of the suit O.S. No. 31 of 1909 on the file of the

District Court of Salem and O.S. No. 66 of 1911 on the file of the Court of the Sub-Judge of North Arcot.?

2. The vakils on both sides have filed a Joint Memorandum stating that the plaintiff is willing to take Rs. 60 in lieu of Rs. 114-11-0 which he

claimed in the plaint as principal over and above what has been declared due to him.

15. I would accordingly submit a finding that the parties agree that Rs. 60 may be taken as the principal amount, which was necessarily incurred by

the plaintiff for the conduct of the suit, in addition to the two items of principal w, Rs. 753-15-0, which the defendant has already paid to the

plaintiff, and Rs. 64-8-0 which has been declared to be due to the plaintiff by the High Court in S.A. No. 1313 of 1920.

JUDGMENT

1. We accept the finding. Plaintiffs are entitled to Rupees 124-8-6 and interest from 21st December 1914 at 6 per cent per annum to date.

Plaintiffs will have proportionate costs here and below.