Lachmi Narain and Others Vs Parsotam Das Kolapuri and Others

None

Court: Allahabad High Court

Date of Decision: July 21, 1922

Citation: (1923) ILR (All) 99

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

Bench: Division Bench

Final Decision: Dismissed

Judgement

Ryves, J.

The facts of this case are simple. Jamna Prasad, Gharib Das and Khedu Ram were three separate Hindu brothers. The sons and

grandsons of Jamna Prasad (now plaintiffs respondents) and the sons of Gharib Das (now defendants appellants), combined together to bring a

suit against the sons of Khedu Ram. 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, dissensions 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 defence 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-feasors. This plea was based on the well-known case of

Merryweather v. Nixan (1799) 16 R.R, 810 decided as long ago as 1799 by Lord Kenyon. The rule broadly laid down in that case has been

modified by subsequent decisions in England, vide Smith''s Leading Cases, 12th Ed., Vol. I, pp. 443 to 457. The case, however, was considered

in Palmer v. Wick Steam Shipping Co. (1894) A.C. 318 by the House of Lords. In that case the family of a man, who had boon 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 italicized 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. Nixan"" although he concurred generally in Lord

Herschell''S opinion of that case.

6. The appellants'' case was argued mainly on the ground that Merryweather v. Nixan (1799) 16 R.R, 810 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 ILR (1916) ALL. 237 Recently it has been held in the case of Mahabir Prasad v. Darbhangi. Thahur (1919) 4 P. L.J.

486, 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 tort-feasors. The District Judge finds that they were simply "" unsuccessful litigants, 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 I L.R. (1881) Ch. Div. 230 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 Company v. McCarthy L.R. (1881)

Ch. Div. 362 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 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 I L.R. (1875) Eq. 459 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. Relief 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

repaid 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. Fakire v. Tasadduq Husain ILR (1897) All. 462 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 wrongdoers. 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. Shaluka Bibi ILR (1893) Calc 496 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, 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 or 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 Singh v. Jagannath Singh ILR (1910) All. 585. That also was a suit for contribution among

co-defendant, and this Court dismissed the suit, following the English case of Dearsly v. Middleweek L.R. (1881) Ch. Div. 236 holding that the

mere fact that a joint decree was passed against all the defendants for cost 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 I.L.R.(1901) Mad. 599 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 codefendant 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 Bhashyam

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 primÃ¯Â¿Â½ 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-debtors 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 negatived, the suit is not

maintainable."" Another case which has been strongly relied upon is the case of Punjab v. petum Singh (1874) 6 N.W.P. H.C.R. 192. That ease,

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 perspn 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 coats 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, bat 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 may 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-contractors 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. Piari 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 not been able to find what is the underlying principle which prevents an 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 Merryweather v. Nixan

(1799) 16 R.R. 810 namely, that the defending of a successful suit was in itself something in the nature of a tort. I think this must be so, because in

the numerous cases which I have examined, in which the question was 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) 16 R.R. 810 However he 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 England 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 costs against a co-defendant, Dearsly v. Middleweek I L.R. (1881) Ch. Div. 236 but he can do

so in the original action, Newry Saltworks Co. v. Macdonell (1903) 2 I.R. 454."" 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 defence, in an action, I think there is at least an

implied contract that they will share the gain or the loss. I think equity any rate will infer such a contract. I base this opinion on the cases already

quoted, Punjab v. Petum Singh (1874) 6 N.W.P. H.C.R. 192 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 defences, 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 out in three simple illustrations:

(1) The plaintiffs are all in the same boat pulling together. Their objects, aims and interests are ex necessitate 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. Niwan (1799) 16 R.R. 810 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

ILR (1887) All. 222. There the plaintiff, along with other persons, caused certain property to be aftached 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 courts held that the

parties were joint tort-feasors. This case was decided seven years before the House of Lords had commented on Merryweather v. Nixan (2) and

the learned Judges (Mr. Justice Straight presiding) seem to have decided the case on the assumption that the rule in Merryweather v. Nixan as

explained and qualified by later decisions, 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 villages 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 defendants the proportionate amount of the costs

which he had to pay for them.

16. The word ""consequently,"" which I have italicized, seems to indicate that in the Court"s opinion, unless the plaintiff come within the rule of

Merryweather v. Nixan (1799) 16 R.R. 810 as modified up to date, there was nothing else to bar his suit. This case, so far as I know, has not

been overruled, and is an authority in favour of the respondents. The case of Shakul Kameed Alim Sahib v. Syed Ebrahin Sahib ILR (1902) Mad.,

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.

Baij Nath ILR (1920) All. 77. That case is exactly in point, and if it bad 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. Appeal dismissed with costs.