(WILSON, P., ZEKIA, VASSILIADES AND JOSEPHIDES, JJ.)

1962
Oct. 9
1963
Jan. 17

ISMINI KYRIACOU HJI LOIZI AND OTHERS,

Appellants-Defendants,

v.

IRINI IONA

Respondent-Plaintiff.

(*Civil Appeal No.* 4366)

ISMINI KYRIAKOU HJI LOIZI AND OTHERS v. IRINI IONA

Immovable Property—Well—Common well—Whether a co-owner of a well, held in undivided shares, is liable to contribute to the cost of repairs carried out by another co-owner to which repairs the former refused to give his consent—No such liability exists, either under the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 *or under section* 70 *of the Contract Law, Cap.* 149, *as at common law.*

Unjust enrichment—The Contract Law, Cap. 149, *section* 70*—On its true construction four conditions are required to establish a right of action under it—All these conditions must be fulfilled.*

Immovable property—No provision exists regarding liability of a co-owner towards cost of repairs of common well under the Immovable Property etc., etc., Law, Cap. 224 (supra)*—Need for amendment.*

Common Law—Tenancy in common—At Common Law a tenant in common of a house who expends money on ordinary repairs has no right of action against his co-tenant for contribution.

The well in question is owned equally in undivided shares by the respondent-plaintiff and her six children by one seventh share each. In 1960, as the water in the well diminished and on inspection it was found that the underground channel in the well needed cleaning and repairing, respondent's husband informed all the co-owners of the well that repairs were necessary. Three of the co-owners agreed, but the three appellants-defendants refused to give their consent. The respondent proceeded to do the repairs herself and as a result the water was increased. Appellants 1 and 3 made use of the water from 1960 until 1961. The respondent-plaintiff paid for the repairs but the appellants-defendants refused to contribute their share to the cost of repairs.

The trial Judge relying on section 70 of the Contract Law, Cap. 149 found for the respondent-plaintiff and held that the

appellants-defendants were liable to contribute to the costs of the repairs and adjudged them to pay £7,250 mils each and the costs. The three co-owners, defendants, appealed against this judgment. Section 70 of the Contract Law, Cap. 149 reads as follows : " Where a person lawfully does anything for another person, or delivers anything to him, 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, or to restore, the thing so done or delivered."

In the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, apart from express provision with regard to the cost of repairs of the common walls and other parts of a building which are of common use to the owners of the various storeys, and the cost of repairs of watercourses or channels in common (*see* sections 6 (4) and 75 (2) and (3)), there is no general provision with regard to the liability of a co-owner of a well or other property to contribute to the cost of necessary repairs.

The High Court in allowing the appeal :—

Held, (1) at common law one tenant in common of a house has no right of action against his co-tenant for contribution. (*Leigh and another* v. *Dickeson* (1885) 15 Q.B.D. 60, at p. 64, per Brett, M.R., *followed*). And as there is no express statutory provision in Cyprus with regard to the liability of a co-owner of a well to contribute to the cost of repair of the common well carried out by another co-owner, the plaintiff (respondent) can only succeed in her claim for contribution if she can bring it within section 70 of the Contract Law, Cap. 149 (*supra*).

(2) This section reproduces verbatim the provisions of section 70 of the Indian Contract Act, 1872, which has been interpreted in a number of Indian cases, but, unfortunately, the reports are not available in our library. According to the learned editors of Pollock and Mulla's " Indian Contract and Specific Relief Acts ", 8th edition, at page 423 et seq., there appear to be two distinct lines of decisions on the point, one in favour of accepting the view that the word " enjoys " used in the section must be construed as " accepts and enjoys ", and the other holding that such a construction is not warranted by the language of the section and that the Courts in India should not import into it restrictions taken from English decisions.

(3) The whole case turns on the construction to be placed on section 70 of our Contract Law which has to be interpreted in accordance with the English Principles of interpretation (*see* section 2 of Cap. 149, *supra*).

(4) On a fair reading of section 70 it appears that four conditions are required to establish a right of action, namely, (*a*) the act must be done lawfully ; (*b*) for another person ; (*c*) it must be done by a person not intending to act gratuitously ; and (*d*) the person for whom the act is done must enjoy the benefit of it. The fulfilment of the conditions is a question of fact in each case.

(5) In this case there is no doubt that conditions (*a*) and (*c*) are fulfilled. With regard to condition (*b*), that is to say, that the act must be done " for another ", how can it be said that the repairs have been done for another, in this case for the co-owners (appellants), if the repairs were made against their will ? And with regard to condition (*d*), it would not be reasonable to hold that a person enjoys the benefit of the repairs if, as in this case, he had no option but to enjoy such benefit. Unless the defendant has an option to enjoy or reject the benefit it cannot legitimately be said that he enjoys the benefit.

(6) I am accordingly of the view that a co-owner of a well is not bound to contribute to the cost of the repairs of such well where (*a*) the repairs were done against his will *i.e.*, he refused consent to the repairs being carried out, and (*b*) he had no option but to enjoy the benefit, *i.e.* to benefit out of the increase of the water in the well.

Appeal allowed. Judgment of the Court below set aside with costs on appeal and in the first Court.

Per curiam : We adopt what was said by LINDLEY, J. in *Leigh and another* v. *Dickeson* (*supra*) at p. 69 that co-ownership is a tenure of an inconvenient nature and it is unfit for persons who cannot agree amongst themselves ; but the evils attaching to it can be partially dealt with under the provisions of sections 27 and 28 of the Immovable Property Law, Cap. 224, under which the rights of the various co-owners can be adjusted either by partition or sale of the property. However, this is not always considered to be a satisfactory solution and we would venture to suggest that the Legislature might consider putting wells

owned in common on the same footing as watercourses and channels used in common, under section 15 of the Immovable Property Law, Cap. 224, which provides for the cleaning and repairing of such watercourses and channels and for the liability of the co-owners to contribute to the cost thereof.

Cases referred to :

Leigh and another v. *Dickeson* (1885) 15 Q.B.D. 60 at pp. 64 and 69, per Brett, M.R. and Lindley, J. respectively.

Appeal.

Appeal against the judgment of the District Court of Nicosia (Demetriades D.J.) dated the 29.12.61 (Action No. 1484/61) whereby the defendants, co-owners of a well, were adjudged to pay £7.250 mils each, being their share in the cost of repairs carried out by plaintiff who is one of the co-owners.

Al. S. Tziros for the appellant.

X. *Clerides* for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court.

WILSON, P, : The judgment of the Court, with which I agree, will be delivered by Mr. Justice Josephides.

ZEKIA, J. : I had the advantage to read and discuss the judgment which will be delivered and I agree with it.

VASSILIADES, J. : I also agree.

JOSEPHIDES, J. : This is an appeal by three out of the seven co-owners of a well against the judgment of the District Court of Nicosia adjudging them to pay £7.250 mils each, being their share in the cost of repairs carried out by the respondent who is one of the co-owners.

This case raises the question whether a co-owner of a well, held in undivided shares, is liable to contribute to the cost of repairs to which he refused to give his consent.

The facts, as found by the trial Judge and not challenged by the appellants, were that the well in question is owned equally in undivided shares by the respondent (plaintiff) and her six children, i.e. one-seventh share each. Three of the six children are the present appellants (defendants).

In 1960 the volume of the water in the well diminished and on inspection it was found that the underground channel in the well had been blocked and that the well required cleaning and repairing. The respondent's husband got in touch with all the co-owners of the well and informed them that it was necessary to do this work. Three of the co-owners agreed but the three appellants refused to give their consent. The respondent, nevertheless, proceeded to do the necessary cleaning and repairing and, as a result, the supply of water was increased. Appellants No. 1 and 3 subsequently made use of the water from the well during the summer of 1960 and until May, 1961. The respondent paid for the repairs but the appellants refused to contribute their share to the cost of repairs. It was not in dispute that the repairs executed by the respondent were necessary.

The trial Judge, relying on the provisions of section 70 of the Contract Law, Cap. 149, found that (*a*) the repairs to the well were carried out lawfully ; (*b*) there was evidence that the plaintiff never intended to carry out the repairs gratuitously ; and (*c*) the defendants enjoyed the benefit of the repairs, *i.e.* the quantity of the water of the well was increased and they made use of that water ; and he accordingly held that the appellants were liable to contribute to the cost of the repairs and adjudged them to pay £7.250 mils each and the costs of the action.

It was argued on behalf of the appellants before us that they were not liable to contribute anything towards the cost of repairs as such repairs had been carried out against their will and they had no option of refusing the benefit of the increase of water.

Until the 1st September, 1946, when the relevant provisions of the Mejellé were abolished by the Immovable Property (Tenure, Registration and Valuation) Law, 1945 (now Cap. 224), this matter would have been governed by the provisions in Chapter V of the Mejellé (Articles 1308 to 1328). Under Article 1313 when there was need for repair of a property owned in common which was not " capable of partition, like a mill or a bath, " and one of the owners wished to repair it, if his co-owner objected he could only proceed to do so with the leave of the Judge ; and if he had done the repairs without obtaining the leave of the Judge then he could not compel his co-owner to contribute to the cost of repairs. Article 1311 provided that if someone without asking the permission of his co-

owner or the Judge repaired, of his own accord, property held in common he became a "giver", that is to say, he could not recover from his co-owner any part of the expense from him, whether the property held in common was capable of division or not. And, under Article 1323, in the case of a private river held in common those who wished to cleanse the river cleansed it with the permission of the Judge, and, until the person who objected to such cleansing had paid his share of the cost, he was prohibited from taking benefit from the river.

In the Immovable Property Law, Cap. 224, now in force, apart from express provision with regard to the cost of repair of the common walls and other parts of a building which are of common use to the owners of the various storeys, and the cost of repair of watercourses or channels in common, there is no general provision with regard to the liability of a co-owner of a well or other property to contribute to the cost of necessary repairs. Section 6, sub-section (4) provides that if any of the owners of the several storeys fails or neglects to carry out the necessary repairs to any part of the building held and enjoyed in undivided shares, then any other co-owner may carry out such repairs and may recover the amount for which the owner in default may be liable, by civil action. Section 15, sub-sections (2) and (3), likewise provide that a co-owner is liable to contribute to the cost of repairs of watercourses and channels used in common.

At Common Law one tenant in common of a house who expends money on ordinary repairs has no right of action against his co-tenant for contribution : *Leigh and another* v. *Dickeson* (1885) 15 Q.B.D. 60. In the course of his judgment Brett, M.R. said (at page 64) :

> "It has been always clear that a purely voluntary payment cannot be recovered back. Voluntary payments may be divided into two classes. Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed to him to adopt or decline the benefit : in this case, if he exercises his option to adopt the benefit, he will be liable to repay the money expended ; but if he declines the benefit he will not be liable. But sometimes the money is expended for the benefit of another person under such circumstances, that he cannot help accepting the benefit, in fact that he is bound to accept it : in this case he has no opportunity of exercising any option, and he will be

under no liability..... The cost of the repairs to the house was a voluntary payment by the defendant, partly for the benefit of himself and partly for the benefit of his co-owner ; but the co-owner cannot reject the benefit of the repairs, and if she is held to be liable for a proportionate share of the cost, the defendant will get the advantage of the repairs without allowing his co-owner any liberty to decide whether she will refuse or adopt them. "

And, finally he held :

" The refusal of a tenant in common to bear any part of the cost of proper repair may be unreasonable : nevertheless, the law allows him to refuse, and no action will lie against him. "

Coming now to the present case, as there is no express statutory provision in Cyprus with regard to the liability of a co-owner to contribute to the cost of repair of a well, the plaintiff (respondent) can only succeed in her claim if she can bring it within the provisions of section 70 of our Contract Law, Cap. 149, which reads as follows :—" Where a person lawfully does anything for another person, or delivers anything to him, 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, or to restore, the thing so done or delivered ".

This section reproduces verbatim the provisions of section 70 of the Indian Contract Act, 1872, which has been interpreted in a number of Indian cases but, unfortunately, the reports are not available in our library. According to the learned editors of Pollock and Mulla's " Indian Contract and Specific Relief Acts ", 8th edition, at page 423 et seq., there appear to be two distinct lines of decisions on the point, one in favour of accepting the view that the word " enjoys " used in the section must be construed as " accepts and enjoys ", and the other holding that such a construction is not warranted by the language of the section and that the Courts in India should not import into it restrictions taken from English decisions.

The whole case turns on the construction to be placed on section 70 of our Contract Law which has to be interpreted in accordance with the English principles of interpretation (see section 2).

On a fair reading of section 70 it appears that four conditions are required to establish a right of action, namely, (*a*) the act must be done lawfully ; (*b*) for another person ;

(*c*) it must be done by a person not intending to act gratuitously ; and (*d*) the person for whom the act is done must enjoy the benefit of it. The fulfilment of the conditions is a question of fact in each case.

In this case there is no doubt that conditions (*a*) and (*c*) are fulfilled. With regard to condition (*b*), that is to say, that the act must be done " for another ", how can it be said that the repairs have been done for another, in this case for the co-owners (appellants), if the repairs were made against their will ? And with regard to condition (*d*), it would not be reasonable to hold that a person enjoys the benefit of the repairs if, as in this case, he had no option but to enjoy such benefit. Unless the defendant has an option to enjoy or reject the benefit it cannot legitimately be said that he enjoys the benefit.

I am accordingly of the view that a co-owner of a well is not bound to contribute to the cost of the repairs of such well where (*a*) the repairs were done against his will, *i.e.* he refused consent to the repairs being carried out, and (*b*) he had no option but to enjoy the benefit, *i.e.* to benefit out of the increase of the water in the well.

In conclusion may I adopt what was said by Lindley J. in *Leigh and another* v. *Dickeson* (quoted above), at page 69, that co-ownership is a tenure of an inconvenient nature and it is unfit for persons who cannot agree amongst themselves ; but the evils attaching to it can be partially dealt with under the provisions of sections 27 and 28 of the Immovable Property Law, Cap. 224, under which the rights of the various co-owners can be adjusted either by partition or sale of the property. However, this is not always considered to be a satisfactory solution and I would venture to suggest that the Legislature might consider putting wells owned in common on the same footing as watercourses and channels used in common, under section 15 of the Immovable Property Law, Cap. 224, which provides for the cleaning and repairing of such watercourses and channels and for the liability of the co-owners to contribute to the cost thereof.

In the circumstances the appeal is allowed. The judgment of the Court below is set aside and the appellants are allowed their costs here and in the Court below.

Appeal allowed. Judgment of the Court below set aside with costs on appeal and in the first Court.