Dharni Dhar And Ors. vs Chandra Shekhar And Ors. on 2 February, 1951

Equivalent citations: AIR1951ALL774, AIR 1951 ALLAHABAD 774

JUDGMENT

Wall Ullah, J.

1. I agree to the order proposed to be passed in this appeal. I, however, wish to deal with the main question of law which has been discussed in this case.

2. The main question of law which calls for decision in this case is whether the rule laid down in the English case, Merryweather v. Nixon, (1799) 8 T. R. 186: 16 R. R. 810 : 101 E. R. 1337, applies to India. On this question, there is a serious conflict of judicial opinion in India. There is a serious conflict of opinion even in this Court. This is the principal reason for reference of this case to a Full Bench.

3. The case of Merryweather v. Nixon was decided by the King's Bench in 1799 by Lord Kenyon, C. J. It was a Court of Common Law as distinct from a Court of Equity. It was an action based upon an implied "assumpsit" on these facts. The plaintiff and the defendant had destroyed the machinery and injured the mill of a millowner. The mill owner brought an action 'on the case' against both of them. Having recovered £ 840 he levied the whole on the plaintiff, Thereupon the plaintiff brought an action, 'upon an implied assumpsit', against the defendant for a contribution of a moiety, as for so much money paid to his use. It may be noted here, in passing, that an action upon an assumpsit in English Law was an action for the recovery of damages, whether liquidated or unliquidated, for the breach of a parol or a simple contract, either express or implied. It was, however, abolished by the Common Law Procedure Act of 1854. It is, therefore, clear that the plaintiff based his claim on an implied contract. The plaintiff was nonsuited as it was held in substance, though not in so many words, that no implied promise to pay could be inferred in the circumstances of the case. It must be observed that the reasons to be found in the judgment of Lord Kenyon as well as the statement of the facts of the case are very meagre. The rule deduced from the actual decision and commonly known as the rule in Merryweather v. Nixon, however, is formulated in these terms : There is no contribution among joint tort-feasors or joint wrong doers i. e. if a decree is given against two or more defendants, but the whole decretal amount be realised from one defendant alone, he has no right to claim an indemnity, or contribution, from the other or others. This rule became well established at Common Law in England. It did not, however, escape serious criticisms at the hands of learned Judges who, with the gradual predominance of equitable considerations in later years, felt that the case of Merryweather v. Nixon was decided on a very narrow ground and that in that case the rule laid down was very imperfectly considered and formulated, Even the right of Merryweather v. Nixon to be treated as a leading case has been seriously questioned: See, for instance, the preface

to volume 16 of the Revised Reports where it is characterised as "being really neither an adequate nor an accurate authority." Again, in Betts v. Gibbins, (1834) 2 A & E 57, Taunton J. spoke about the case thus :

> "Rather an unsatisfactory case. It is shortly reported and the nature of the injury does not appear."

4. In course of time certain qualifications were engrafted on the original rule by later authorities as well as by statutes. Particular reference may be made to the case of Adamson v. Jarvis, (1827) 4 Bing 66 at p. 73, in which the plaintiff, an auctioneer, was considered to be entitled to an indemnity from the defendant (client) who had instructed him to sell goods to which, it subsequently appeared, he had no title. Best, C. J. in delivering the judgment of the Court observed :

> "From the inclination of the Court in this last case and from the concluding part of Lord Kenyon's judgment in Merryweather v. Nixon and from reason, justice, and sound policy, the rule that wrong, doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."

Again, reference may be made to the case of Betts v. Gibbins, (1834) 2A & E 57, where Lord Denman observed:

> "The general rule is that between wrong-doers there is neither indemnity nor contribution: the exception is where the act is not illegal in itself." In Palmer v. Wick & P.S. Shipping Co., (1894) A. C. 318 at p. 324 Lord Herschell L. C., quotes these observations with approval and regards them as establishing a right of contribution in a case of joint negligence.

5. The rule was thus modified and came to be stated in these words :

> "No person who has been guilty o! fraud or any other form of wilful wrong-doing, and has been made liable in damages, has any right of contribution or indemnity against any other person who was a joint wrong-doer with him."

There were also at least two statutory exceptions to the rule : (1) Section 84 of the Companies (Consolidation) Act, 1908, provided that there shall be a right of contribution between directors or pro-motors who are jointly and severally liable under the provisions of that Act, for misrepresentation contained in a prospectus. Even, in this case, a person guilty of fraud was not given a right to claim contribution against another who was guilty merely of negligence. (2) Section 3 of the Maritime Conventions Act of 1911 created a right of contribution between two ships in the case of loss of life or personal injuries where both ships were at fault.

6. The net result so far reached was that, barring statutory exceptions, except in the case of wilful wrong-doing there was a right either of contribution, or of indemnity, between joint wrong-doers.

The rule, subject to these limitations, prevailed in England and was characterised by Lord Herschell L. C. and Lord Halsbury in Palmer's case (ubi supra) as too firmly established to be open to question in that country. But the way was prepared for the final 'Coup de grace' by the Act of 1933. The rule was abrogated in England by statute after having remained in force for 136 years. The Law Reform (Married Women and Tort-feasors) Act, 1935 abrogated the rule. It came into force on 1-11-1935 and Section 6 (1) (c) of the Act provided that a tort-feasor may recover contribution from any other tort, feasor who is or would, if sued, have been liable in respect of the same damage whether as a joint tort-feasor or otherwise. This is, in bare outline, the eventful career of the rule in Merryweather v. Nixon, in its homeland, England.

7. On the merits of the rule, Lord Herschel L. C. in Palmer's case, observed thus at page 324 :

> "When I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity or even of public policy, which justifies its extension to the jurisprudence of other countries."

Dealing with another aspect of the case, at p. 322, Lord Herschell, L. C. observed :

> "In general, where one of two co obligants discharges the entire debt, he is entitled, unless there be some equity to the contrary. to call for an assignation of it, and to use such assignation for the purpose of enforcing payment of the share of his co-obligant. It is no answer to such an action to say that the whole of the debt has been discharged, and that there was, therefore, nothing to assign . . . . . The only answer, as it seems to me, must be that the joint debt resulted from a joint wrong, and that law will not permit or assist wrong-doer to recover contribution from another, It will be observed, however, that this is to allow the defender to set up his own wrong by way of answer, for the pursuer makes out a prima facie case by the production of the judgment and assignation. He has no need to rely on the joint wrong, or to go behind the judgment and assignation. On principle I can see no reason why, when a joint judgment debt has resulted from a joint wrong, each co-debtor should not pay his share; or why, if one be compelled by the 'creditor to pay the whole debt, the other should be enabled to go free by setting up his own wrong."

Again, Lord Watson at p. 332, dealing with the case of a joint decree obtained against the-wrongdoers, observed:

> "There might be some principle in a Court of law refusing to permit a suitor to aver and prove his own crime or moral delinquency as the medium of recovering from one whom he alleges to have been a co-delinquent. But the case is very different where the injured party's claim of damage is liquidated by a joint and several decree against all the delinquents. In that case --which is the present case --the sum decreed is simply a civil debt, and the meaning which the law attaches to a decree constituting a debt in these terms is, that each debtor under the decree is liable in solidum to the pursuer and that inter se each is liable only pro rata as, in other words, for an equal

> share with the rest."

Finally, at p. 333, Lord Watson, with reference to the case of Merryweather v. Nixon, observed :

> "Assuming it to be an authority establishing the-general rule for which the appellant contends -- a proposition which seems to admit of doubt -- I can only regard it as a positive rule of the Common Law of . England, which is inconsistent with, and ought not to override, the law and practice of Scotland. The merits of the rule are not, in my opinion, such as to commend it to universal acceptation."

Lords Halsbury and Shand agreed with the opinion of the Lord Chancellor and Lord Watson. For these reasons, the House of Lords declined to extend the rule in Merryweather v. Nixon to Scotland.

8. It is interesting to note that at the time when the Law Reform (Married Women and Joint Tort-feasors) Act, 1935, was about to be passed by Parliament in England Dr. Ernst J. Cohn in a learned article entitled "The Responsibility of Joint Wrongdoers in Continental Laws" published in the ''Law Quarterly Review,' (1935), Vol. LI clearly indicated that the position on the continent of Europe regarding the responsibility of joint wrong-doers for contribution was the same as that attained in England by the Law Reform (Married Women and Joint Tort-feasors) Act, 1935. In other words, there was contribution between joint tort-feasors. There the principle of contribution among wrong-doers was extended even to cases of wilful tort. To quote Dr. Cohn :

> "In Continental laws the rule of contribution at present is an essential part of the law of solidary obligations. It has been so ever since the earliest codifications of modern times . . . . The rules of the different Continental Codes are by no means identical as to their content. But the principle that solidary obligation creates a right of contribution in favour of that debtor who has paid is the same everywhere."

On the question whether all wrong-doers ought to bear equal shares, or whether their shares should be apportioned according to certain considerations --of which the degree of culpability is the most important--the net result of investigations by Dr. Cohn was that, generally speaking, apportionment was left to the discretion of the Judge to be exercised in the light of the attendant circumstances.

9. We may now see how far the rule in Merryweather v. Nixon has been considered by Courts in India to be applicable in India. It is well known that the Courts in India in the absence of any express provision of law applicable to a particular case, are empowered to act according to justice, equity and good conscience. In Maharaja of Jeypore v. Rukmani Pattamahdevi, A. I. R. (6) 1919 P. C. 1, at p. 4, Lord Phillimore, delivering the judgment of the Board observed:

> "They (the Courts in India) are directed by the several charters to proceed where the law is silent, in accordance with justice, equity, and good conscience."

In this connection, reference may be made to the Bengal, Assam and Agra Civil Courts Act (NO. xII [12] of 1887) Section 37(2) provides :

> "In cases not provided for by Sub-section (1) or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience." They can, therefore, invoke the aid of the Common Law of England on considerations of justice, equity and good conscience. To my mind, this means that Courts can refer to the Common Law which is actually enforced by the Courts in England. It follows that a Court in India which has recourse to the Common Law of England and seeks to apply its principles to cases in India cannot afford to ignore the extent to which the Common Law in England stands abrogated by statute. Further, in applying the rules of the English Common Law, Courts in India must of necessity consider the time and the circumstances in which the rule is to be applied. Although a rule may be so well established in England e. g. by repeated decisions of the House of Lords, that it may not be open to question in that country, yet it is open to Courts in India to examine such a rule in order to see whether it is in accordance with the true principles of equity. The rule in Merryweather v. Nixon and its application to cases in India has to be judged in the light of these principles. As mentioned above in Palmer's case (ubi supra), the House of Lords declined to extend the rule to Scotland. Their refusal to extend it to Scotland was based on the view that it was not founded on "principles of justice, equity or even public policy."

10. Now we may proceed to examine the actual cases decided by different High Courts in India. In our own Court, the first reported decision on the point is of the year 1872, in the case of Har Nath v. Haree Singh (1872) 4 N. W. P. H. C. R. 116, decided by Pearson and Spankie JJ. It was held :

> "Where one of several joint wrong doers liquidates the whole amount of the damages obtained in satisfaction of the wrong committed by them all, he is not entitled to contribution from the rest."

The only reason given, in a very short judgment, is that the parties were joint wrong-doers and therefore no suit for contribution lay. The next case is that of Kishna Ram v. Rakmini Sewak Singh, 9 ALL. 221. In this case, the learned Judges referred to the rule in Merry-weather v. Nixon as a "well known legal truism", but it was pointed oat that the rule had this limitation that it was confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act. In that case, contribution was allowed as it was found that the person claiming it could not be presumed to have known that he was acting; illegally at the time of the commission of the wrong. It would be noticed that it was taken for granted that this rule of the English Common Law was applicable to India. The Division Bench did not enter into the question whether or not the basis of the rule in Merryweather v. Nixon rested in justice, equity or good conscience,

11. The next case which has been referred to, is that of Ram Prasad v. Arja Nand, 1890 A. W. N. 161 decided by Mohamood J. In this case Mohamood J. refused to apply the rule that there was no contribution between joint tort-feasors. Here a joint decree was passed against two joint tortfeasors, and one of them paid up the whole amount of the decree and afterwards sued the other for contribution. It was held that:

> "Whatever the rights and liabilities of joint tort-feasors inter se may be before such a decree is passed there is a right of contribution afterwards, the matter having passed is rem judicatam and the Court is not entitled to go behind such a decree and consider the merits of the case."

It would be noticed that neither the decision in the case of Har Nath v. Haree Singh nor that of Kishna Ram v. Rakmini Sewak Singh was brought to the notice of the learned Judge in this case. The basic principle on which the decision proceeds is that a joint decree in effect creates a joint debt against each one of the judgment-debtors. In order to enforce liability for contribution for part of that debt it is no longer necessary for one of the joint debtors to go behind the decree and enter into a question whether or not the two or more joint debtors were joint tort-feasors. This view finds strong support from the view of the law taken by the House of Lords in the case of Palmer v. Wick, four years later.

12. The next case is that of Fakire v. Tasadduk Husain, 19 ALL 462, decided by Edge C. J, and Blair J. I may note that it was not really a case of joint wrong doers. The case related to a suit for possession which was decreed with costs against all the defendants. The decree for costs having 'been executed and amount realised from only one of the defendants, he sued the other defendants for contribution. It was found as a fact that each of the two defendants had been acting independently and for his own benefit, their cases being antagonistic to each other, and there was no equity between them. It was held that the suit was not maintainable. It was observed by the learned Judges 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 those defendants to contribute to the costs in question as between themselves. On facts, it was found that the plaintiff had failed to discharge that onus. From the facts stated above, it is clear that it was not a case of joint tort-feasors and therefore there was no room for the application of the rule in Merry-weather v. Nixon either in its original or modified form. The decision can be supported on the general ground that there was no equity in 'favour of the plaintiff nor was there any contract of indemnity between him and his co-defendant in the original suit. With great respect, it may be pointed out that the view expressed by the Bench in that case that it lay upon the plaintiff (i. e. person seeking contribution) to show that there was either some contract between him and the defendants or some equity which created a duty on those defendants to contribute is contrary to the view taken in several other Bench decisions of this Court. It is also in conflict with the basic principles underlying the doctrine of contribution.

13. The next case to be noticed is that of Mulla Singh v. Jagannath Singh, 32 ALL. 685, decided by Richards and Tudball, JJ. This also was not a case of joint tort-feasors. In this case, what happened was that in suit a decree was jointly passed against two sets of co-defendants for the costs of the suit. One of the defendants paid the entire amount of costs and then sued his co-defendants for contribution. It was held by the Bench:

> "The mere fact that a decree for coats has been made against several persons jointly will not of itself render the co-defendants liable in a suit for contribution, but if one of the defendants pays the full amount of costs and then sues his co-defendants for contribution, he should show some equity existing between himself and his

> co-judgment-debtors making the latter liable for contribution."

In this case, on the facts found, it was held that both the defendants, against whom contribution was sought, as well as the defendant who figured as the plaintiff, who sought contribution, were equally innocent. In other words, the Court found that the plaintiff had failed to establish any equity in his favour. The learned Judges followed an English case, Dearsly v. Middleweek (1881) 18 Ch. D. 236, decided by Fry J. In that case, Fry J. acted upon what was wrongly asserted by counsel before him to have been the dictum of the Court of appeal in the case of Real and Personal Advance Co. v. MacCarthy, (1881) 18 Ch D. 362, which had been decided the day before. A reference to the decision of the Court of Appeal in the case of Real and Personal Advance Company would make it plain that the learned Judges of the Court of Appeal never said what was alleged to have been said by them, namely that "any apportionment of or contribution for costs, could be obtained by one co-defendant against another in an independent proceeding." The learned Judges, in the case of Mulla Singh expressly stated that they had been referred to no other case on the point. It is clear, therefore, that the basis on which the decision of the case of Mulla Singh rests was not quite sound.

14. The next case which I may notice is that of Nihal Singh v. Collector of Bulandshahr, 38 ALL. 237: 14 A. L. J. 275. It may be noted that it was not a case of a joint decree against joint tortfeasors. In this case, a Hindu widow, the owner of considerable property, brought a suit against her four brothers as managers of her estate for the profits of the estate which came to a considerable amount. One of the brothers had previously brought a suit against her for a declaration that she had adopted his son. These suits were compromised and the compromise was nude the decree of the Court. Amongst the conditions of the compromise was one to the effect that the brothers should pay back a certain sum of money belonging to their sister's estate which had been collected and misappropriated by them. On a suit by one of the brothers who alleged that he had paid the entire sum and asked for contribution, it was held that the rule laid down in Merryweather v. Nixon did not apply to the case when the claim was based on the terms of a compromise. The learned Judges referred to the observations made by Lord Herschell L. C. in the case of Palmer v. Wick (ubi supra) regarding the rule in Merryweather v. Nixon and then observed:

> "It is somewhat doubtful whether the doctrine of Marryweather v. Nixon should be applied to India, but it is certain that it will not be extended."

As the question did not directly arise in the case, the observations made by the Bench must be treated as obiter dicta. On the facts, contribution was allowed in that case inasmuch as the appellant had neither pleaded nor proved special circumstances which would render it inequitable that they should contribute to the satisfaction of the decree. At page 240 it was observed:

> "It was a sum of money which the defendants to the suit agreed (as part of the compromise) to pay, altogether irrespective of any tort they might have committed. There can be no doubt that the decree-holder was entitled to get the decretal amount from all or any of the judgment-debtors. No doubt, there might have been some equities between the judgment-debtors inter se, but prima facie if any one of the judgment-debtors paid the entire amount he was entitled to contribution against the

> others, unless the latter pleaded and proved special circumstances which would render it inequitable that they should contribute to the satisfaction of the decree."

15. The next case is that of Ram Sarup v. Baij Nath, 43 ALL. 77, decided by Sulaiman and Gokul Prasad, JJ. This again was not a case of joint tort-feasors. It was held :

> "Speaking generally, and in the absence of any special reason to the contrary, if a decree for costs is given against several co-plaintiffs and one is made to pay, he will hare a suit for contribution against the others,"

At page 79 the Bench observed:

> "Coming, however, to the general question whether a suit for contribution between joint judgment-debtors would lie or not, it would depend more or less on the facts of the particular case. Prima facie the fact of a joint decree having been paid off by one of the judgment-debtors, would be some evidence that he had a right of contribution but the defendant can always show that he, as between himself and the plaintiff, was not at all liable for the claim or was not liable equally with the plaintiff..... or for other reasons the suit could not be maintained."

The next case to be noticed is that of Parsotam Das v. Lachmi Narain, 45 ALL. 99, decided by Ryves and Stuart, JJ. In this case, two branches of a Hindu family combined to bring a suit against the third branch and lost it, the consequence being a decree against the plaintiffs for costs in both the original and appellate Courts. The defendants executed their decree for costs against one set of plaintiffs only and these then sued the other set for contribution. It was held that there was no a priori objection to such a suit and the plaintiffs were entitled to a decree. It was not a case of joint tort-feasors. Many of the earlier cases decided by this Court, referred to above, have been reviewed in the course of the judgment in this case. The rule in Merryweather v. Nixon was considered in the light of the observations made by the House of Lords in the case of Palmer v. Wick Steam Shipping Company and it was observed that "it was very doubtful whether we should apply it (the rule) in India." The Bench decision in the case of Ram Sarup v, Baij Nath (ubi supra) as well as the Bench decision in Kishna Ram v. Rakmini Sewak Singh (ubi supra) were followed.

16. The next case which it is necessary to refer to is that of Sheo Ratan Singh v. Karan Singh, 22 A. L. J. 788, decided by Daniels, and Neave, JJ. In this case, it was held:

> "The doctrine that no suit for contribution lies between tort-feasors does not apply in its full extent to India. If it does apply, it applies only where it must be presumed that the party in default knew that he was committing an unlawful act or the act was one of an obviously illegal character.
>
> It is equitable, in the case of a decree for mesne profits against parties who were in joint possession, that a person who had to satisfy the entire decree should be able to recover his share from his co-defendants, unless there has been something in his

conduct to deprive him of his right.

The mere fact that a decree for mesne profits implies that the possession of the parties was unlawful is not sufficient in itself to do away with the right to contribution."

It has however, been observed, at page 789:

"It has been generally recognized that the doctrine of Merryweather v. Nixon . . . . does not apply in its full extent to India. A doubt has been expressed in some cases whether it applies at all, but the point has never been decided, nor is it necessary to decide it in this case.

Again, at page 790, it was observed :

"The rule of justice, equity and good conscience is in general, no doubt, considered to be identical with the rule of English law, but there are exceptions and there is the high authority of Lord Herschel is Palmer v. Wick for the view that the rule in Merryweather v. Nixon is not founded on any principle of justice, equity, or even public policy which would justify its extension to the jurisprudence of other countries."

The next case to be noticed is that of Babu Ram v. Badri Das, 24 A. L. J. 720, decided by Daniels J. In this case, it was held :

"Prima facie a right of contribution exists between persons against whom a joint decree for costs has been passed and it is for a defendant seeking to avoid liability to show some equity which entitles him to exemption."

It was pointed out by the learned Judge that the proposition laid down in the case of Mulla Singh v. Jagannath Singh (ubi supra) was gravely shaken by the subsequent decisions of this Court and in particular by the decisions in the cases of Ram Sarup v. Baij Nath and Parsotam Das v. Lachmi Narain (ubi supra).

17. The next case is that of Bal Kishan v. Chhidda, A. I. R. (16) 1929 ALL. 654 decided by Dalai J. In this case, the view taken in the case of Babu Ram v. Badri Das was referred to with strong approval. The last case of this Court which has been brought to our notice is that of Parbhoo Dayal v. Dwarka Prasad, A. I. R. (19) 1932 ALL. 334:54 ALL. 371 : (1932) A. L. J. 215, decided by a Division Bench of this Court, Mukerji and Bennet JJ. In this case, it was held :

"As between persons who are conscious tort-feasors in the sense that when they commit the act of tort knowing that what they are doing is nothing but a clear case of tort, a right of contribution does not exist."

The learned Judges referred to the rule in Merryweather v. Nixon. They also referred to the criticisms levelled against that rule by the House of Lords in the case of Palmer V. Wick. The decision of the House of Lords in the case of Palmer however, appears to have been summarily disposed of by saying that that case was decided "on the basis of Scotch law which we are not bound to administer in India." The learned Judges went on to observe that no case had been cited to them where it had been distinctly held that as between persons who were conscious tort-feasors, in the sense that when they committed the act of tort knowing that what they were doing was nothing, but a clear case of tort, a right of contribution existed. Then it was observed: "In our opinion, the authority of Merry-weather v. Nixon still holds good so far as this country is concerned." The case of Ram Prasad v. Arja Nand decided by Mahmood J. which proceeded on the footing of a joint decree debt was not accepted as laying down the correct principle. It was further held by the Bench :

> "To claim contribution there must be either ft contract express or implied, by which it may be said that the defendant agreed to compensate the plaintiff in certain events, or that there should be an equity between the parties which would induce the Court to grant the plaintiff a relief from the burden he has undergone, by discharging the decree or a debt payable by the parties. The mere fact that certain persons agree to-commit an act of tort cannot be regarded as a valid agreement, much less as a valid contract on which a suit can be based by a joint tort-feasor against his co-tort-feasor."

With great respect to the learned Judges, it seems to me that the rule in Merryweather v. Nixon was accepted without question as laying down the correct principle in spite of the severe criticisms which had been levelled against the basic inequity of the rule by the House of Lords in the case of Palmer v. Wick and in many other cases both in England as well as in India. Again, with great respect, it seems to me that no attempt was made to consider whether in the year 1930, when the case was decided by the High Court, the rule in Merryweather v. Nixon, was still a rule which deserved to be accepted as a rule in consonance with the ideas of justice, equity and good conscience as they prevailed either in this country or in England. The clear view expressed in this case is that the authority of the rule in Merryweather v. Nixon still holds good so far as this country is concerned. The view expressed in this case runs counter to that held in several other Bench decisions of this Court. As I have indicated in an earlier part of this judgment, this rule of the Common law, like any other rule derived from the Common law, has to be accepted and acted upon by Courts in this country only on the ground that it is in consonance with justice, equity and good conscience.

18. In the light of the views expressed by the House of Lords in the case of Palmer, it is clear that this rule was considered even in England, by the highest Court of Appeal, to be virtually devoid of any equity or justice or even public policy. I may add that, as pointed out above, some four years after the decision of this case by our High Court, the rule in Merryweather v. Nixon was actually abrogated by statute so far as England was concerned.

19. Now, in 1950, we are called upon to decide whether the rule in Merryweather v. Nixon is to be accepted as a correct principle to be applied by this Court. Today, the position is that this rule has already been abrogated so far as England is concerned by statute. Obviously, therefore, at this date it cannot be looked upon as a part of the Common Law of England and as such it cannot be invoked in

this country as a rule to be applied in a case on the ground of justice, equity and good conscience. On the contrary, the fact that the equity underlying this rule was seriously questioned by the House of Lords in if 94 and later, in 1935, the rule was totally abrogated obviously for the reason that it was no longer a rule consonant with justice, equity and fair play, go to show that the intrinsic equity of the rule, if there ever existed any, had disappeared so far as England was concerned, by the year 1935. In view of all these considerations, it seems to me clear that the rule in Merryweather v. Nixon can no longer be accepted as a correct principle on the score of justice, equity or good conscience.

20. Decisions of other High Courts in which the rule relating to contribution between joint tort-feasors has been considered may now be noticed. Two cases decided by the Oudh Judicial Commissioner's Court have been referred to by learned counsel in this case: Bhagwan Das v. Bajpal Singh, 21 O. C. 148 decided by Lindsay and Daniels, J. Os. and Karya Singh v. Shiva Satan Singh, A. I. R. (12) 1925 Oudh 408, decided by Daniels J. C. The case of Bhagwan Das v. Bajpal Singh had absolutely nothing to do with the doctrine laid down in Merryweather v. Nixon. There was no question of a contribution between joint tort-feasors in that case. A partition suit had been decreed with costs against all the defendants jointly. The decree-holders, however, realised the entire costs from one set of the defendants. Then that set of defendants brought a suit for contribution against the other judgment debtors to the partition suit. In effect, the Division Bench held that the general doctrine of contribution which was well recognized in this country was applicable to the case and, therefore, on broad grounds of justice and equity there was no reason why a joint decree for costs should be excepted from the operation of the doctrine of contribution. The learned Judges referred to several decisions of other Courts, including this Court, where the applicability of the doctrine laid down in Merryweather v. Nixon to India had been doubted.

21. In the case of Karya Singh v. Shiva Baton Singh it was held:

> "A joint decree is sufficient to support a suit for contribution by a defendant who has paid more than his share, unless the persons sued can show some equity rendering it unjust that contribution should be allowed against them."

In that case, a suit was brought against the defendants for damage to crops on the ground that the defendants had allowed their cattle to graze the crops of the plaintiffs. It resulted in a decree passed jointly against all the defendants. In execution, the major portion of the decretal amount was realised from some of the defendants. Thereupon those defendants sought contribution from the other co defendants. The learned Judge referred to the rule in Merry- weather v. Nixon and pointed out that the applicability of the rule in Merryweather v. Nixon, to India had been seriously doubted in several cases. On the other hand, a suit for contribution for costs between unsuccessful co-plaintiffs as well as between co-defendants was competent. At p. 409, the learned Judicial Com missioner observed:

> "If the mere fact that the suit is in tort is sufficient to exclude co defendants from liability, clearly a very dangerous weapon is placed in the hands of an unscrupulous plaintiff. Where a large amount of costs is decreed against a large number of defendants who are jointly responsible for the loss, it will be in the power of the

> plaintiff to ruin any particular defendant against whom he may have a grudge by recovering the whole amount of the decree from him and allowing the other judgment-debtors to escape scot-free . . . . . This IS neither justice, equity nor good conscience. The true rule in my judgment is that a joint decree is sufficient to support a suit for contribution by a defendant who has paid more than his share, unless the persons sued can show some equity rendering it unjust that contribution should be allowed against them."

Next is the case of Khesav Vithal v. Hari Ram krishna, A. I. R. (11) 1921 Bom. 318, decided by Macleod C. J. and Crump J. The facts of the case were that a partition suit was decreed with costs against several defendants. All the defendants had equally contested the suit unsuccessfully. All of them were directed to pay the plaintiff's costs and one of the defendants paid the entire costs Thereupon he sought to recover by contribution from his co-defendants their share in the costs in the partition suit. It was held that the plaintiff was entitled to contribution from his co-defendants unless there were equities to defeat this course. At p. 320, it was observed by the Bench :

> "It seems to us on general principles of equity that when in a partition suit all the defendants equally contest the suit, and are directed to pay the plaintiff's costs, if one defendant pays the costs, he should be entitled to contribution from his other co-defendants, unless facts could be proved which would be considered sufficient to defeat the equity. The common defence raised by the defendants in the partition suit would not be such a fact."

It would be observed that in this case, there was no occasion for considering the specific doctrine laid down in Merryweather v. Nixon, nor was there any reference to it.

22. Some decisions of the Patna High Court referred to in the arguments may now be noticed. The first case to be noticed is Mahabir Prasad v. Darbhangi Thakur, A. I. R. (6) 19 9 Pat. 165 decided by a Division Bench of that Court. This case also relates to a partition suit which is decreed with costs against several defendants. It was held:

> "There is nothing wrong in a defendant putting the plaintiff to proof of the facts necessary to prove his claim by denying in the written statement the existence of such facts. It is for the plaintiff to prove his case and if his proof fails, the defendant will succeed even if the facts are capable of proof to the knowledge of the defendant."

Further, it was held :

> "Where several defendants, jointly and in collusion with each other, set up a defence which they know cannot be substantiated in fact and which fails and costs are decreed against them jointly, there is a right of contribution in favour of the defendant who discharges the joint liability for costs under the decree."

The rule that there is no contribution between joint tort-feasors was referred to in the course of the judgment. Dawson Miller C. J. (with whom Adami J. agreed) observed:

> "That the rule of non-contribution between joint tort-feasors exists in India cannot I think, be questioned, but the authorities appear to show that it ought only to apply in cases where the parties are wrong doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act."

The decision in the case reviews quite a large number of cases dealing with this question. The learned Chief Justice, at the close of his judgment, observed :

> "It seems clear therefore that the doctrine of contribution is well recognized in this country and that the only cases in which it will not be enforced are those in which a liability arises out of a joint wrong, or where the equities of the case demand that the plaintiff should not recover, as where the party sued was merely a formal defendant in the previous suit and not personally interested in the result of it. Again there may be cases where it is just and proper that the liability should be apportioned in unequal shares."

23. Then there is the case of Bishambhardeo Narayan Singh v. Hitnarayan Singh, A. I. R. (23) 1936 Pat. 49, decided by Fazl Ali and Luby JJ. it was held:

> "The only cases in which the doctrine of contribution will not be enforced are those in which a liability arises out of a joint wrong; or where the equities of the case demand that the plaintiff should not recover as where the party sued was merely a formal defendant in the previous suit and not personally interested in the result of it."

In this case, the Division Bench adopted, in full, the view taken by Dawson-Miller C. J. and Adami J. in the case of Mahabir Prasad v. Darbhangi Thakur (ubi supra). It would thus appear that in the cases noticed above, the Patna High Court has accepted the position that the rule laid down in Merryweather v. Nixon, as modified by subsequent decisions, is applicable in India.

24. Next, I refer to certain decisions of the Calcutta High Court in the case of Suput Singh v. Imrit Tewari, 5 Cal. 720. A decree was obtained against several defendants for recovery of Rs. 610 the price of 122 palm trees which had been cut down and appropriated by them. A joint decree was passed against all the defendants. The decree-holder obtained satisfaction of the entire decretal amount from one of the defendants. Thereupon the defendant who had paid the entire amount, instituted a suit for contribution against the other defendants. Following the decision of a Full Bench of that Court in Sreeputty Roy v. Loharam Roy, 7 W. R. 384, it was held:

> "The question as to whether as between persons against whom a joint decree has been passed there is any right of contribution at all, depends upon the question whether the defendants in the former suit were wrong-doers in the sense that they knew, or ought to have known, that they were doing an illegal or wrongful act. In that

> case no suit for contribution will lie. If the defendants in the former suit were not guilty of wrong in that sense, but acted under a bona fide claim of right, and had reason to suppose that they had a right to do what they did, then they may have a right of contribution inter se, and in such case the Court should enquire what shore they each took in the transaction; became, according to circumstances, one or more of them might be excused altogether, or in part, from contributing, as for instance, one of them might have acted as a servant, and by the command of the others; or the others might have been the only persons benefited by the wrongful act; in which case those who were benefited, or who ordered the servant to do the act, would not be entitled to contribution."

25. Similarly the rule in Merryweather v. Nixon, was followed in the case of Gobind Chunder v. Srigovind Chowdhry, 24 Cal. 330 but the case of in Kamala Prosad v. Kishori Mohan, 55 Cal 666 as well as in the case of Bishnu Charan v. Bepin Chandra, 18 C. W. N, 622 doubt was expressed whether the rule in Merryweather v. Nixon applied in India. Lastly, I may refer to the case of Sashi Kantha v. Promode Chandra, A.I.R. (19) 1932 Cal. 600, decided by Mukerji and Guha, JJ. In this case, the Division Bench had occasion to consider the nature of the liability for mesne profits. At p. 617, it was observed :

> "In the case of a claim for mesne profits two courses are left open to the Court. A decree for mesne profits may be passed jointly and severally against all the trespassers who may have jointly kept the plaintiffs out of possession for any particular period, leaving them to have their respective rights adjusted in a separate suit for contribution. Or the respective liabilities of such trespassers may be ascertained in the plaintiff's suit against them, and a decree on the basis of such several liabilities may be passed as against the respective trespassers in plaintiff's favour."

Further, it was observed:

> "It is doubtful if Merryweather v. Nixon which denied a right of contribution as between joint wrongdoers, is still good law in England (see the observations of Lord Herschel in Palmer v. Wick Steam Shipping Co.) . . . The rule enunciated in this decision has since been considerably modified. . . . In any case, the applicability of the doctrine to this country has been repeatedly questioned."

26. Next, I briefly notice some of the decisions of the Madras High Court. The first case to be referred to is Siva Panda v. Jujusti Panda, 25 Mad. 599, decided by Benson and Bhashyam Ayyangar JJ. In this case a decree was passed jointly against two defendants directing them to deliver to the plaintiff certain lands and to pay a certain sum of money on account of profits of such land and costs of the suit. The amount of the decree was recovered from one of the two judgment debtors alone. Thereupon, he sued the other judgment-debtor for contribution. It was held that a prima facie case was made by the production of the judgment and the certificate of satisfaction. That judgment was conclusive as between the judgment-debtors in the sense that it will not be open to either of them to

contend that the former suit should have been dismissed or that one of the parties should not have been made liable or that the amount decreed was excessive. But it will be open to the party from whom contribution is sought, to plead and establish as between the joint debtors that the plaintiff is solely liable for the debt or that the defendant is not equally liable with the plaintiff or that the suit for contribution is not maintainable for some reason or another. At p. 602, some observations were made to the effect that in view of the pleadings it was unnecessary in that case to consider how far the rule in Merryweather v. Nixon, which Lord Herschell in Palmer's case felt bound to say did not appear to him "to be founded on any principle of justice or equity or even of public policy, which justifies its extension to the jurisprudence of other countries," should be followed in India or to consider the extent to which it had been limited in England by subsequent cases.

27. The next case is that of Shakul Kameed Alim Saheb v. Ebrahim Sahib, 26 Mad. 373, decided by Arnold White, C. J. and Benson, J. In this case, A, B and C, being defendants in a partition suit, were ordered to pay the costs of the plaintiff therein. A was impleaded because he held a mortgage which had been executed in his favour by B over a portion a of the property. Upon a warrant of attachment being issued against A, he paid the whole amount due in respect of the costs and then sued B and C for contribution: Held, that he was entitled to contribution from both the defendants. At p. 375 it was observed:

> "Even assuming the rule of law laid down in Merryweather v. Nixon forms part of the jurisprudence of this country (and this seems doubtful, see the observations of Lord Herschell in Palmer v. Wick and Pultaney Town Steam Shipping Co., Ltd. (1894) A. C. 318) the doctrine does not apply to this case. In Merryweather v. Nixon the suit was in tort. Here the suit was not in tort."

Reference may next be made to the case of Narayana Murti v. Komalichandrayya, A.I.R. (14) 1927 Mad. 790, decided by, Waller, J. In this case, a suit based on a promissory note was filed against two persons. It was decreed against them jointly. The whole of the amount of the decree was realised from one of the judgment-debtors who thereupon sought to recover half of it from the other. This claim was contested substantially on the ground that both the plaintiff and the defendant were engaged in an illegal partnership and that the money was borrowed on the promissory note for that partnership; it was accordingly contended that the suit for contribution did not lie. The learned Judge referred to the case of Merryweather v. Nixon, and observed that it had been repeatedly held in this country that a suit for contribution between wrong-doers does not lie. He then referred to Palmer's case (ubi supra) in which the House of Lords refused to apply the decision in Merry-weather v. Nixon holding that it was not founded on any principle of equity which justified its extension to the jurisprudence of other countries. The learned Judge then went on to observe :

> "It seems strange that a decision so characterizes should have been imported into the law of India,"

He then referred to what Lord Watson said in Palmer's case where he pointed out the distinction between a case where an action is brought by one delinquent against whom a decree has been passed in order to obtain contribution from his co-delinquent who had not been sued and a case

where the injured party's claim to damages is liquidated by a joint and several decree against all the delinquents. In the latter case, the sum decreed was simply a civil debt. At p. 791, the learned Judge observed :

> "The plaintiff produces the decree and proves that he has satisfied it. He is under no necessity to rely on the joint wrong or to go behind the decree. It is the defendant, on the other hand, who seeks to avoid the decree by alleging and proving his own co delinquency. If any principle of public policy is involved, it is, it seems, to me that a suitor should not be allowed to succeed by setting up his own delinquency."

28. The next case to be referred to is that of Yegnanarayana v. V. Yagannadha Rao, A. I. R. (19) 1932 Mad. 1, decided by Madhavan Nair J. In this case, a decree for specific performance of a contract was passed, jointly against two defendants, with costs. In execution, the entire amount of costs was realised from one of the defendants. Thereupon, the defendant, who had paid the entire amount of costs, sought to recover half of the amount of costs which he had paid in Court in the suit as well as half the money he had to pay to the plaintiff of the earlier suit, as costs. In the suit for contribution, it was found as a fact that the plaintiff was a joint tort-feasor along with the defendant. On the question of law, whether the plaintiff was entitled to claim contribution from the defendant, the learned Judge referred to the rule in Merryweather v. Nixon. Then the learned Judge proceeded to review the case law, both English and Indian, on the point and summed up the position thus :

> "From a consideration of the above authorities two points emerge, viz.,(1) that though the rule in Merryweather v. Nixon is not applicable in its broadest form, still if an act is unlawful or the doer of its knows it to be unlawful as constituting either a civil wrong or a criminal offence he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom; and (2) that an express promise of indemnity to him for the commission of such an act is void."

Then, the learned Judge considered the question whether the rule in Merry weather v. Nixon, as modified by subsequent decisions in England, should or should not be followed in this country and concluded thus:

> "However much one may not be inclined to extend the rule in Merryweather v. Nixon, more than is absolutely necessary, I see no reason against the modified rule in that case being applied in India as in England."

The decision of Waller J. in Narayanamurti's case (ubi supra) was distinguished on facts.

29. Lastly, I may refer to the case of Venkata Rao v. Venkayya, A. I. R. (30) 1943 Mad. 38 (2), decided by King J. In this case, two brothers, who were jointly carrying on the business of publishing books, published a book called The English Primer and thus infringed the copyright possessed by the widow of the author of the book. In consequence of this, the widow took criminal proceedings against one of the brothers, namely the plaintiff. The plaintiff was advised legally to compound the claim and accordingly he paid a certain sum of money to the widow of the author of the book and the

prosecution was withdrawn. Thereafter the plaintiff sought to recover from his brother, the defendant, one half of the money which he had paid to the widow of the author. On the facts, it was found that both the brothers must be considered to have jointly committed a tort. On the question of law whether a claim for contribution lay, at page 41, the learned Judge held :

> "I am unable to accede to the contention for the respondent that the rule in Merryweather v. Nixon should be applied in this country. In England the universal application of the rule had long been questioned and finally in 1935, a new Act was passed which made the rule in Merryweather v. Nixon no longer good law and no longer enforceable in the English Courts."

The case of Yegnanarayana (ubi supra) was relied upon by the respondent and the learned Judge observed :

> "I am not, with respect, prepared to follow that ruling, or to apply the rule in Merryweather v. Nixon, to any case."

30. Last of all, it is necessary to refer to the case of Khushalrao v. Bapurao, A. I. R. (29) 1942 Nag. 52 decided by Stone C. J. and Vivian Bose J. In this case five men in partnership were granted a licence to cut timber in a forest. The partners operated under the licence. The licence was, however, defective inasmuch as the grantor of the licence had failed to obtain the necessary sanction. The partners, however, were not to blame for that defect. A suit was brought against all the partners for damages and for trespass. It was decreed and a joint decree was passed against all the defendants. Thereafter execution was-taken out against one of the defendants alone; He paid the whole amount and sued his co-defendants for contribution. The claim was contested mainly on the ground that the rule in Merryweather v. Nixon, was applicable and that there could be no contribution between joint tort-feasors. The learned Judges, after a very learned-and critical examination of the case law, both Indian and English, on the point, reached the conclusion that the English rule, that where a joint decree is given against several in a suit in tort and one satisfies the decree, he cannot obtain' contribution from his co-judgment-debtors, does not apply in India. In India, where one of the joint judgment-debtors pays off the decretal debt, he has a right of contribution from his co-judgment-debtors; to what extent and in what proportion may depend upon circumstances. The learned Judges observed at p. 54 :

> "Neither the rule in Merryweather v. Nixon nor any rule which would rigorously divide up the liability into as many shares as there were persons liable should, we think, be applied to Indian conditions where Courts do not merely administer the common law but decide in accordance with equity, justice and good conscience and where it is very desirable to exercise the power to differentiate between the various persons held jointly liable at the suit of the person injured."

Eventually the suit for contribution was decreed, and it was held that the Court should so distribute the resulting loss that it falls as equally upon all and that, since all the partners were on a parity, they should bear their share in accordance with their interest in the partnership.

31. In the light of the foregoing discussion of the case law, I now proceed to record my conclusions. I am quite clear in my mind that the rule laid down in the English case of Merry weather v. Nixon has no application to cases arising now in this country. It cannot be invoked as a rule of the English common law on the ground of justice, equity and good conscience for the simple reason that since 1935 it no longer remains part of the English Common Law. The rule is devoid of the basic principle of equity that there should be an equality of burden and benefit. Further, after a decree has been obtained against two or more tort-feasors, which imposes a joint and several liability upon each one of the judgment-debtors, if one of them is made to pay the entire amount of the decree, justice and fairplay obviously require that he should be able to share the burden with his compeers i. e. the other joint judgment-debtors. In enforcing a right to contribution, such a judgment-debtor bases his claim in reality on the fact that a common burden has been discharged by him alone ; he does not need to travel further beyond the joint decree passed against him ,as well as his other co-defendants. The decree itself creates a joint debt and each one of the judgment-debtors must, on principle, share the burden. Here no occasion need arise for the Court to look behind the decree and enter into a question as to the cause of action on which the suit resulting in the decree was founded. If the defendant or defendants be permitted to resist the claim for contribution on the ground that the cause of action on which the decree is founded involved a joint wrong committed by :them along with the plaintiff (in the contribution suit), it would be allowing the defendants to take advantage of their own wrong in resisting the claim for contribution. It seems to me, therefore, clear that neither on principle nor on authority, the rule in Merry weather v. Nixon is fit to be recognised and followed in India. I accordingly hold that the rule does not apply in this country.

32. The doctrine of contribution developed by equity in England is essentially founded, not on contract, but is the result of general equity, on the ground of "equality of burden and benefit". The true reason underlying the doctrine of contribution is indicated by the maxim "equality is equity". In the leading English case, Dering v Earl of Winchelsea (1787) 1 Cox. 318, it was laid down that the doctrine was not founded on contract, but was the result of general equity on the ground of "equality of burden and benefit." Their Lordships of the Judicial Committee in the case of Mohammad Kazim Ali Khan v. Mohammad Sadiq Ali Khan, 1988 A. L. J. 843 had occasion to consider the basis of the rule of contribution. In the course of the judgment, it was made clear that it was not necessary that the plaintiffs should base their claim upon an actual or implied promise- Further, at page 850, their Lordships observed thus :

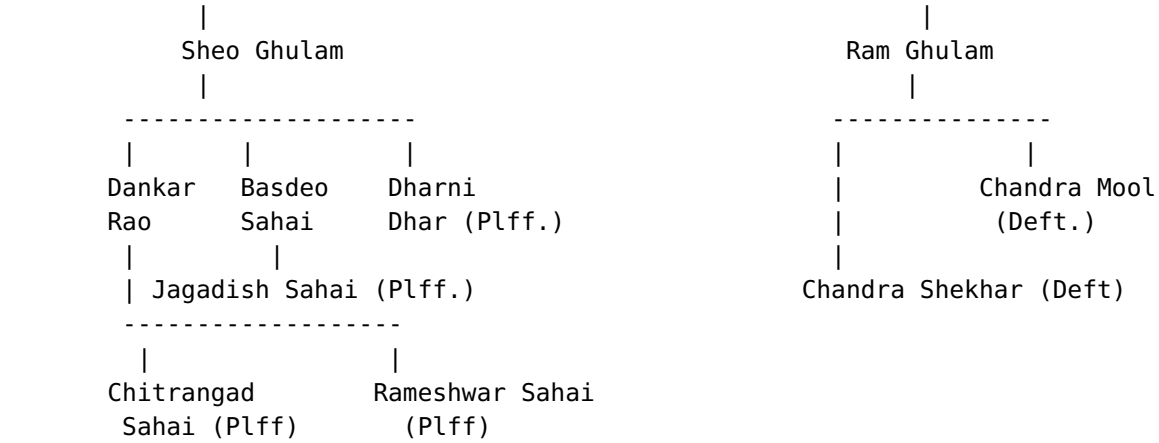
> "The reason given in the books is that acquali jure the law requires equality: one shall rut bear the burden in case of the rest" Dering v. Earl of Winohelsea.
>
> The principle established in the case of Dering v. Earl of Winchelsea (supra) is universal, that the right and duty of contribution is founded on doctrines of equity; it does not depend upon contract. Ramskill v. Edwards, (1685) 31 Ch. D. 100, a. p. 109. This has been settled law in India since Bambux Chittandeo v. Modho soodun 7 W. R. 377, a Full Bench decision of the High Court at Calcutta in Sir Barnes Peacock's time which contains a careful exposition of the matter from an Indian standpoint."

33. It is, therefore, clear that a tort-feasor may recover contribution from any other tort-feasor who is, or would, if sued, have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise. The question whether contribution is actually recoverable and, if so, in what proportion, would necessarily depend on various factors and principally on the facts of the particular case. Generally speaking, apportionment of the entire liability is to be made in such proportions as the Court thinks just and equitable having regard to the extent of the moral responsibility of the parties concerned for the damage caused. In a proper case, one of the many tort-feaeors may be ordered to pay the whole of the damages.

Agarwala J.

34. This is a plaintiffs' appeal arising out of a suit for contribution. The facts briefly stated are as follows.

35. The parties are near relations. The following pedigree will explain their relationship :



36. One Phem Lal owned certain zamindari in villages Khumani Siddiqpur and Govindpur. On his death, his widow Laraiti succeeded him in her widow's right. On Laraiti's death, one Narain, who claimed to be the next reversioner, executed a deed of sale in favour of one Khunnu Lal in respect of a part of the property. Khunnu Lal and Narain then made applications for mutation of their names over the property in the revenue Court. This mutation case was contested by three sets of persons, who also claimed to be the nearest reversioners of Phem Lal, and pleaded that Narain, the applicant in the mutation case, was an imposter, the real Narain who was the next reversioner of Phem Lal having already died. These three sets of disputants were, (1)

Chet Ram, the ancestor of the parties to the present suit, (2) Debi Prasad and his brothers, and (3) Raghubar Dayal and his brothers. The mutation case was decided in favour of these disputants and their names were recorded over the whole of the property of Phem Lal and they obtained possession over the property, Chet Ram's share in the property being one-third.

37. Khunnu Lal then filed a suit in the civil Court for possession of the property sold to him by Narain and for mesne profits against some of these three sets of claimants, and against the heirs of the others. Chet Ram had died before the suit was instituted and so his sons, Sheo Ghulam and Ram Ghulam, were impleaded. Sheo Ghulam and Ram Ghulam contested the suit and took the same pleas as had been taken by Chet Ram in the mutation case. But at a later stage Ram Ghulam withdrew his defence and admitted Khunnu Lal's claim, but the suit continued to be contested by Sheo Ghulam. On 10th September, 1931, the suit was decreed for possession and after a further enquiry into the amount of mesne profits, a joint decree was passed on the 29th April, 1932, for Rs. 8486 together with interest by way of mesne profits was passed with costs against Sheo Ghulam and others but without costs against Ram Ghulam. The mesne profits were for two period (1) upto the death of Chet Ram, (2) after the death of Chet Earn, upto delivery of possession. The Court observed that the defence set up by the defendants in that suit was false to their knowledge and that they had been in possession of the properties in dispute without a bona fide belief that they were entitled to do so. Khunnu Lal applied for recovery of 2/3rd share out of the decretal amount from Debi Prasad and Raghubar Dayal and their brothers and l/3rd share from Sheo Ghulam's heirs, Dharnidhar and others, the plaintiffs-appellants in the present appeal, Sheo Ghulam having died in the meantime. The amount paid by Dharnidhar and others, the plaintiffs appellants, to Khunnu Lal was R3. 4300. The plaintiffs-appellants then brought the suit which has given rise to this appeal for recovery of half of this amount, namely, us. 2,150, together with Interest at 1 per cent. per month as against Ram Ghulam

38. Ram Ghulam contested the plaintiffs' suit mainly on the ground that there can be no contribution amongst joint tort-feasors, that he was duped into defending the suit by Sheo Ghulam, and as soon as he came to know the truth, withdrew his defence, that he never came in possession of the property and derived no profit from it and was, therefore, not liable to pay anything by way of contribution.

39. The learned Munsif held that the whole family of Chet Ram, including his sons and grandsons had knowingly put up a false defence and were in enjoyment of the property without a bona fide belief that they had a right to do so, that Ram Ghulam was not in possession after Chet Ram's death, that Ram Ghulam was liable to contribute towards the mesne profits decreed against him and Sheo Ghulam for the period upto Chet Ram's death, but not for the later period. In the result he passed a decree for Rs. 758 together with interest at 6 per cent. He did not allow any contribution to the plaintiffs on account of the costs of the previous litigation. The

plaintiffs appealed against this decree to the lower appellate Court and Ram Ghulam filed cross-objections. Ram Ghulam died during the pendency of the appeal in the lower appellate Court and his sons, Chandra Shekhar and Chandra Mool, were brought on the record in his place. Chandra Shekhar and Chandra MOOL filed a further cross-objection pleading that they were not bound to discharge their father's liability, if any, inasmuch as it was based on an immoral debt. The lower appellate Court dismissed the appeal and allowed the cross-objections and dismissed the plaintiffs' suit in toto. The learned Judge of the lower appellate Court held, that Chet Ram and others were conscious joint tort-feasors, because they illegally and wrongfully took possession of the property belonging to Narain and falsely accused Narain of false personation and even produced false evidence in support of their claim, that the doctrine of Merryweather v. Nixaon that there could be no contribution between conscious joint tort-feasors did not apply to suits for contribution in respect of the period before Chet Ram's death because the tort-feasors for that period were Chet Ram, Debi Prasad Raghubar Dayal and others and not the sons of Chet Ram inter se that doctrine, however, applied in respect of the period after Chet Ram's death and that the suit for both the periods was not maintainable as against the sons of Ram Ghulam because the liability was based upon immoral debt.

It is not celar from the judgment whether the learned Judge intended to hold that the position of Ram Ghulam and Sheo Ghulam after Chet Ram's death was that of conscious tort-feasors. But for the purpose of this appeal we shall assume that it was so.

40. Against this decree the plaintiffs have filed the present appeal and two points have been urged on their behalf. It has been contended, in the first place, that the doctrine, that there could be no contribution between joint tort-feasors should not be followed in India, and, in the second place, that Ram Ghulam's liability to contribute could not be said to be based on an immoral debt. The case came up for hearing before a Bench of this Court, which referred it to a Full Bench and so the case is' now before us for decision.

41. Contribution may be claimed on three grounds (a) an express agreement, (b) an implied agreement and (e) equitable considerations. So far as a suit for contribution based upon an express contract is concerned, the contract can be enforced only if its enforcement is not prohibited or forbidden by any law. Now section 24 of the Contract Act declares that if any part of a single consideration for one or more objects or any part of any one of several considerations of a single object is unlawful, the agreement is void. Section 23 lays down what considerations and objects are lawful and what not. The consideration or object of an agreement is lawful unless forbidden by law or is of such a nature as would defeat the provisions of any law or is fraudulent or involves an injury to the person or property of another or the Court regards it is immoral or opposed to public policy. Therefore if the agreement on the basis of which contribution is claimed, is for an unlawful consideration or object, the agreement is not enforceable. Where two perons mala fide agree to commit an offence or tort and as part of the agreement covenant that in case of the parties being made liable in damages for the offence or tort they will bear the loss in certain proportions, such an

agreement; "involving as it does injury to the person or property of another" or being contrary to law, would be unlawful and, therefore, unenforceable. The term of the contract relating to contribution in such a case is a part of the very same contract by which injury to the person or property of another was agreed to be caused or an unlawful act was agreed to be committed, and cannot be separated from it, and, when the whole contract becomes unlawful the terms relating to contribution falls along with it and cannot be enforced.

42. Where there is no express contract for indemnity or contribution as between joint tort-feasors, does the law imply one? Or, if there is no implied contract, does equity require that a a party who has alone suffered a burden that was cast on others along with himself, should be unable to reimburse himself of the portion of the burden which should in justice fall on those others? Before we answer these questions, let us review the authorities.

43. It was in answer to the first question that Lord Kenyon stated the rule which is now known as rule in Merryweather v. Nixon, (1799) 8 T. R. 186. In that case an action had been brought "on the case" (i. e., upon tort) for the recovery of damages for injury done to a mill and its machinery, and the amount decreed had been recovered from one of the tort-feasors, who thereupon brought a suit for contribution of a moiety upon an "implied assumpsit" i. e. upon an implied agreement. The suit was dismissed . . . . Lord Kenyon observed that he had "never before heard of such an notion having been brought, where the former recovery was for a tort; that the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit and that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right."

It will be observed that the suit for contribution was founded in "implied assumpsit", that is, upon an implied contract, and was instituted in a Common Law Court, and the ruling of Lord Kenyon was to the effect that no such implied contract to pay contribution could arise in the case of joint tort feasors. Since the case was not in a Court of Equity, it was not considered whether upon equitable considerations, the plaintiff was entitled to relief.

44. Soon, however, equity began to assert itself and modified the rule. In Adamson v. Jar-vies (1827) 4 Bing. 66: 130 E. R. 693, Best C. J. observed:

> "From reason, justice and sound policy the rule that wrong doers cannot have redress or contribution against each other is confined to case where is the person seeking redress must be presumed to have known that he was doing an unlawful act."

In Betts v. Gibbins, (1834) 3 A. E. 57 111 E. R. 22. it was said by Derman, C. J. that the general rule is that between wrong-doers there is neither indemnity nor contribution; exception is where the act is not clearly illegal in itself. Taunton, J. in the same case observed that "Merryweather v. Nixon, is rather an unsatisfactory case It is shortly reported and the nature of the injury does not appear." In 1890 the statute abrogated the rule-in the case of joint fraud, committed by Directors of a Company, and allowed contribution as between them. In Palmer v. Wick, (1894) A. C. 318 the rule was considered as not being based upon any principle of equity and, though established in England, was

considered as being unfit to be applied to the jurisprudence of other countries. That was a case from Scotland in which one of the joint tort-feasors sued the other for contribution after he had satisfied a joint decree for damages and the House of Lords reused to extend the English Common Law doctrine to that country. Lord Herschell, L. C. observed :

> "It is now too late to question that decision (Merryweather v. Nixon) in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries."

Lord Watson stressed the distinction between a claim for contribution arising out of an agreement and a claim for contribution arising out of a joint decree for damages and held that in the case of a joint decree "each debtor under the decree is liable in solidum to the pursuer, and that inter se each is liable only pro rata,"

> and that, therefore, the claim for contribution was tenable. In Re : The Englishman and the Australia, (1895) P. (SIC) 212 Bruce J. observed :
>
> "It was never decided in Merryweather v. Nixon, that one wrong-doer could not sue another for contribution, but that an implied promise to indemnity did not arise from the mere fact of payment of the whole of the joint liabilities by one of several wrong-doers."

In 1911, Maritime Conventions Act (1 and 2 Geo. V, C. 27, Section 3) permitted the right of contribution in a case "where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that Teasel or any other vessel or vessels and a proportionate of the damages is recovered against the owners of one of the vessels which exceeds the proportion in which she was in fault."

The rule of Merryweather v. Nixon, even as modified by subsequent decisions, was considered to be an inequitable rule and so it was finally abrogated by statute, the Married Women and Tort-Feasors Act, 1986 (25 & 26 Geo V. ch. 30 Section. 6).

45. Thus it will be observed that the original rule was that there is no implied promise to pay contribution or indemnity between joint tort-feasors as there is between joint debtors upon a joint debt but that an implied promise to indemnify may be inferred where one man employed another to do acts which were not unlawful in themselves for the purpose of asserting a right. The rule that there was no implied promise to pay contribution between tort-feasors was later on confined to cases where the persons seeking redress must be presumed to have known that he was doing an unlawful act or an act which was manifestly illegal in itself. The rule was a rule of law and not of equity and this was pointed out in the case of Palmer v. Wick, (1894) A. C. 318. It was not extended to the law of Scotland because it was not based on equity The statute finally abrogated the rule in its entirety in 1935 because it was not considered to be equitable.

46. What has been the position of the rule in India? The history of the rule in India falls into three periods : (a) before 1894 (b) between 1895 and 1935 and (c) from 1936 to today. Before the year 1894, when the decision in Palmer v. Wick was given by the House of Lords, the rule was assumed to be good law in India, though the observations to that effect were obiter except in two cases Har Nath v. Haree Singh, 4 N. W. P. H. C. R. 116, in which the rule as broadly stated in Merryweather v. Nixon, even without its modifications as introduced by subsequent decisions in England, was applied, and Suput Singh v. Imrit Tiwari 5 Cal. 720, in which the modified rule was held to apply. In the Full Bench case of Sreeputty Roy v. Loharam Roy, 7 W. R. 384 and in Kishna Ram v. Rakmini Sewak Singh, 9 ALL 221 and Brojendro Kumar v Rash Behari, 13 Cal. 300 the observations as regards the applicability of the rule are by way of obiter dicta.

47. The case of Kristo Chunder v. J. P. Wise, 14 W. R. 70 has been cited before us but it does not follow Merryweather v. Nixon at all. In that case, in a suit for possession, an intervenor claimed the land in dispute upon a title distinct from the original defendant, whereupon the intervenor was made a defendant and a decree was ultimately passed against the original defendant and the intervenor jointly and severally. The original defendants had been obliged to pay the whole amount; suit for contribution against the legal representatives of the intervenor; it was held that the plaintiff not having attempted to show that he paid anything more than what he would have paid if the intervenor had not intervened, he was not liable to claim contribution from the intervenor's heirs. The case of Merryweather v. Nixon, was not even referred to in the judgment.

48. But in a few cases the doctrine of Merryweather v. Nixon, was not applied when the claim arose out of a joint decree for damages even though the parties were conscious tort feasors. For instance, in Ram Prasad v. Arja Nand, (1890) A. W. N. 161 certain trees were felled by the lessees jointly contrary to the terms of the lease. A suit was instituted against them for recovery of damages and a decree obtained, which was realised from one of the lessees only. The right of the other lessees to contribution was upheld by Mahmood J. on grounds similar to those enunciated by Lord Watson in Palmer v. Wick.

49. After the decision in Palmer's case and before the coming into force of the married Women and Tort-Feasors Act, 1935, in some cases the Courts in India doubted whether the rule should be applied in this country : vide, Siva Panda v. Jujusti Panda, 25 Mad. 599, Shakul Kameed v. Ebrahim Sahib, 26 Mad. 378, Nihal Singh v. Collector of Bulandshar, 38 ALL 237, Pursotam Das v. Lachmi Narain, 20 A. L. J. 890, Sheo Ratan Singh v. Karan Singh, 22 A.L.J. 788, Kamala Prosad v. Kishori Mohan, 85 Cal. 666, Basanta Kumar v. Ramshankar, 59 Cal. 859, Bhagwan Das v Rajpalsingh, 24 O. C. 148, and Karya Singh v. Shiva Ratan Singh, A. I. R. (12) 1925 Oudh. 408. In the following cases the dictum of Lord Watson in Palmer v. Wick was followed when the claim for contribution was based upon a joint decree, even though both parties had been conscious tort-feasors : Siva Panda v. Jujusti Panda, 25 Mad. 599, Karya Singh v. Shiva Ratan Singh, A.I.R. (12) 1926 Oudh 408, Narayanamurti v. Komalichandrayya, A.I.R. (14) 1927 Mad. 790. In the following cases the rule of Merryweather v. Nixon, was not applied to a joint decree for costs on the ground that the unsuccessful resistance to a claim does not constitute a tort so as to render the defendants joint tort-feasors : Shakul Kaneed Alim v. Ebrahim Sahib, I. L. R. 26 Mad. 373, Bhagwan Das v. Raspal Singh, 24 O. C. 148, Pursotam Das v. Lachmi Narain, 20 A. L. J. 890, Ram Sarup v. Bijai Nath, 43

ALL 77, Babu Ram v. Badri Das, 24 A L J. 720 and Balkishan v. Chhidda, A. I. R. (16) 1929 ALL 654.

50. In Fakra v Tasadduq Husain, 19 ALL. 462, there was a joint decree for costs, but contribution was refused. The facts were peculiar. There was a suit for possession of certain property against one particular defendant. The defendant claimed the property to be his own. Certain third persons got themselves added to the array of the parties as defendants and put in a defence in opposition to and exclusive of that of the original defendant. The plaintiff in that suit obtained a decree for costs jointly against the original defendant as well as against the intervenors. The decree having been executed against the original defendant, he sued the other defendants for contribution. It was held that since the defence of the parties were exclusive and they did not act jointly, one could not claim contribution against the other. It would be seen that this was not a case of joint tort-feasors at all and the case does not purport to follow the doctrine of Merryweather v. Nixon. It may be respectfully observed that the decision was correct if the amount for costs, which would have been decreed against the original defendant in case the other defendants had not intervened, would have remained the same as the amount of joint decree against all of them. But if the amount of the joint decree was larger, the decision cannot be supported, vide Kristi Chandra v. J. P. Wise, 14 W. R. 70.

51. The learned Judges in Fakira v. Tasadduq Husain, 19 ALL. 462 referred to the Privy Council case of Abdul Wahid Khan v. Saluka Bibi, 21 Cal. 496. That was a case in which one of two co-sharers entitled to equal share in an inheritance having taken possession of the whole was sued by the other for her share with mesne profits from the date of the suit. One of the defence was that the plaintiff should pay a proportionate money which the defendant had spent in good faith in litigation for the protection of the inheritance. This defence was rejected on the ground that the expenses had been incurred voluntarily without any authority. This case is, however, distinguishable from Fakira's case, in that no joint decree had been passed against the two co-sharers.

52. In a few cases, e. g. Hari Saran v. Jotindra Mohan, 5 C. W. N. 393, Mahabir Prasad v. Darbhangi Thakur, 4 Pat L. J. 486 and Bishambhardeo Narayan Singh v. Hitnarayan Singh, 15 Pat. 219, contribution was, in fact, allowed, though by way of obiter dicta it was observed that the limited rule applicable in England was applicable in India as well.

53. In two cases only i. e., in Prabhu Dayal v. Dwarka Prasad, 54 ALL. 371 and Yegnanarayana v. Vankamamidi Yagannadha Rao, A. I. R. (19) 1932 Mad. 1 the Courts applied the English rule.

54. In Prabhu Dayal's case, a joint decree for damages had been obtained against conscious joint tort-feasors and was realised from one of them who sued for contribution against the other judgment-debtors. A Bench of this Court held that the principle of Merryweather v. Nixon, applied and the suit for contribution was dismissed. The Bench held that the true principle on which contribution might be claimed was that there must be either a contract, express or implied, by which it might be said that the defendant agreed to compensate the plaintiff in certain events, or that there should be equity between the parties which would induce the Courts to grant the plaintiff a relief from the burden he had undergone by discharging the decree or debt payable by the parties. Then the Bench observed that where three persons agreed to commit an act of tort, the agreement could not be regarded as a valid agreement and that an implied agreement to pay contribution would be

immoral and could not be countenanced in a Court of law. The Bench, however, did not consider whether the relief could be granted on the ground of equity. Apparently however, they thought that it could not be. In arriving at this decision, the Bench relied upon Fakira's case, the facts of which, as already shown, were entirely different and this was also recognised by the Bench. The Bench dissented from Mahmud J.'s dictum in Ram Prasad v. Arja Nand, 1890 A.W.N. 161 upon the ground that no distinction could be drawn in principle between a case where a joint liability had been liquidated without a suit and where a joint liability had been established by a suit and the judgment had been liquidated by one of the parties. The case of Palmer v. Wick was brushed aside with a single observation that it was decided "on the basis of Scotch law which we are not bound to administer in India." Lord Herschel's observation in Palmer v. Wick that the doctrine of Merryweather v. Nixon was not based on equitable consideration was not even adverted to.

55. In Yegnanarayana v. Venkamamidi, A. I. R. (19) 1932 Mad. 1, the facts were these, One D agreed to sell some lands to F. P. knowing that there was a contract between D and F prevailed upon D to sell the lands to him as he was prepared to pay him a higher price and also to fight out the matter with V. V brought a suit for specific performance of the agreement to sell the lands in his favour making both D and P defendants to the suit. D did not contest the litigation and it was carried on solely by P. V obtained a decree in the suit jointly against P and D. The amount for costs having been realised entirely from P, P sued D and V for contribution for costs incurred in the previous litigation as also for costs paid by him to V. Madhavan Nair J., as he then was, held that P's suit could not be decreed and reliance was placed upon Merryweather v. Nixon. With all respect it may be stated that the suit was correctly decided because upon the facts of the case, there was no equity on P's side. D had not contested the suit at all. The costs realised from P were, therefore, not more than what P would have Buffered if he had contested the suit alone. The principle applicable to the case was the same as was laid down in Kristi Chandra's case 14 W. R. 70. The observations with regard to Merryweather v. Nixon were, therefore, not necessary for the decision of the case. These observations were, however, dissented from by another Judge of that Court in a later case: Venkata Rao v. Venkayya, A I. R. (30) 1943 Mad. 38 (2).

56. After the coming into force of the Married Women and Tort-Feasors Act, 1935, it has been consistently held by all Courts that had to deal with the matter that the rule does not apply to India : vide Secretary of State v. Mt. Rukmini Bai, I. L. R. (1938) Nag 54, Khushalrao v. Baburao Ganpatrao Marathe, A. I. R. (29) 1942 Nag. 52 and Edara Venkata Rao v. Venkayya, A. I. R. (30) 1943 Mad. 38 (2).

57. The position, therefore, is that the rule, which originated in England, has been abrogated in that country, was applied in a few cases in India but is no longer considered to be binding in this country.

58. In Roman law a claim for contribution was founded upon either a societas or mandatum or a neogtiorum gestio between the co-debtors, provided that there was some contractual or quasi-contractual relation existing between them. But there could be no contribution between tort-feasors and no beneficium cedendarum actiorum in favour of them.

59. In continental laws though the rule of contribution is uniformally applied to cases of joint debtors there is no uniformity in its application to joint tort-feasors. For instance, in the former Prussian Civil Code the provision was :

> "If the damage has been caused with intention by several persons, there is no contribution between them. But each of them has to pay to the local public poor fund the share which he would have to pay as compensation to the injured person if the latter had sued all the wrong-doers for their respective shares."

60. In the Civil Code of Mentenegro, Article 573, instead of to the local poor fund the payment was to be made to the church of the place where the tort was committed.

61. Earnest J. Cohan in an article in 51 Law Quarterly Review p. 468 at seq has summarised the present position of the law on the continent as follows :

> "At present the communis opinio in Prance as elsewhere on the continent considers it proper to extend the application of the principle of contribution among wrongdoers even to cases of wilful tort. In France there is an old tradition originating in the 'ancien droit' in favour of this course. Already Pothier has quite correctly pointed out the existence of this tradition and the reasons for it.
>
> Notre pratique francaise . . . . . accorde . . . . . une action a celui qui a paye le total, eontre chacun de sea co-debiteure pour repeter de lui sa part. Cotte action ne nait pas du delit qu'ils ont commis ensemble ; nemo enim ex delicto consequi potest actionem ; elle nait du paiement qu'il a fait d'une dette qui lui etait commune avec ses co-debi eurs et de l'equite qui ne permet pas quo ses co-debiteurs profitent ases depens de la liberation dont ils etaient tenus comme lui."

(Our French practice grants an action to him, who has paid the total amount, to claim back from each of his joint-debtors his part (his share). This action is not born of (does not arise out of) the offence they have jointly committed ; it is born of (arises oat of) the payment he has made of a debt which was common to him and his joint-debtors, and of equity which does not permit that his joint debtors should, at his cost, profit from the discharge by which they were bound as much as he).

> "The last words indicate the decisive arguments in favour of the modern course. Another reason of some importance has been pointed out by Demolombe --
>
> "Estce qu'il ne serait pas tout a fait inique qu'il de-pendit du creancier, de sa partialite, de sa fantaisie, de faire porter le poids entier de la dette sur l'un, plutot que sur l'autre?"

(Will it not be completely iniquitous that it should depend on the creditor, on his partiality, on his whim, to place the whole burden of the debt on one (of the debtors), rather than on another?)
"These reasons have been sufficient to convince most modern law-givers and the great majority of

writers and Judges in France and Belgium that in principle there should be contribution between wilful as well as not wilful wrongdoers."

62. The rule of Merryweather v. Nixon, could be applied to Indian law only if it were a rule of equity, justice and good conscience. If it is nod considered to be such a rule even in the country of its origin, and if it is not considered to be such a rule in other civilised countries of the world, it is difficult to hold that the rule should be made applicable in India.

63. It was urged that we should follow the rule of Merryweather v. Nixon, on the basis of stare decisis. As shown above there has been no uniformity of opinion in following Merryweather v. Nixon, in India and the principle of stars decisis cannot apply.

64. The rule of Merryweather v. Nixon, and the old Roman Law rule both had their origin in the notion that a tort is a crime and the law should not help a criminal. The notion that tort is a crime has long been given up and tort is now a mere civil liability. The basis of the old rule, has, therefore, disappeared.

65. It is urged that a person who comes in Court must come with clean hands and that, therefore, a person who has intentionally committed a tort should not be given relief by a Court of equity. It is further urged that since both parties were in pari delicto the principle of the loss being allowed to lie where it falls should be followed and that, therefore, if the loss has fallen on one of the joint tort-feasors it should be allowed to lie there.

66. Where a civil wrong is committed jointly by certain persons as against another, they purge themselves of the consequences of the wrong when they repair the damage caused to that person. It cannot, therefore, be said that the hands of tort-feasor who has repaired the damage are unclean. Indeed the hands of the person who has not yet contributed his share of the loss are unclean and there is no justice in denying the relief to the person who has repaired the whole of the damage caused by the action of both of them.

67. No doubt, the maxim, in in pari delicto potior est conditio possidentis, has been applied to the case of contribution between joint tort-feasors and the case of Merryweather v. Nixon, is supposed to be based upon the maxim (Broom's Legal Maxims, 10th edition, p. 495). It is true that where each party is equally in fault the law favours him who is actually in possession. "If," said Buljer J., "a party come into a Court of justice to enforce an illegal contract, two answers may be given to his demand ; the one, that he must draw justice from a pure fountain, and the other, that potior est conditio possidentis." (Munt v. Stokes, (1792) 4 T. E. 561 at p. 564). (Broom's Legal Maxims 10th Edn., p. 489).

The maxim is one of law established not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy which will not assist a plaintiff who has paid over money, or handed over property, in pursuance of an illegal or immoral Contract, to recover it back, for the Courts will not assist an illegal transaction in any respect. (Taylor v. Chester, (1869) 4 Q. B. 309 at p. 318). The maxim is, therefore, intimately connected with the more comprehensive rule of our law, ex turpi

cauca non oritur actio on account of which no Court will "allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal", and the maxim may be said to be a branch of that comprehensive rule, for the well-established test, for determining whether money or property which has been parted with in connection with an illegal transaction can be recovered in a Court of justice, is to ascertain whether the plaintiff, in support of his case, or as part of his cause of action, necessarily relies upon the illegal transaction: if he "requires and from the illegal transaction to establish his case", the Court will not entertain his claim. (Broom's Legal Maxims, 10th Edn. page 490).

68. The question, therefore, is whether a claim for contribution arises out of an illegal transaction. As pointed out by Pothier in the passage quoted already, the claim for contribution arises out of the payment one tort-feasor has made of a debt which was common to him and his joint debtors and of the equity which does not permit that his joint debtors should, at his cost, profit from the discharge by which they were bound as much as he Since the case does not arise out of an illegal transaction the maxim pari delicto cannot apply to the same.

69. Then it is said that equity follows the law and that, therefore, if no agreement to make contribution could be implied as between conscious tort feasors the rule of equity should be the same. Here again the maxim is sought to be applied where it has no application. The maxim really means that equity is governed by the rules of law as to legal estates, rights and interests, and that equity acts on the analogy of legal rules with regard to equitable estates, rights and interests, when such an analogy exists. (Hanbury: Modern Law of Equity, 4th Edn. page 23). There is no question of legal and equitable estates here.

70. In olden times, in cases in which it was considered that demands of justice required that reparation must be made or a person must be indemnified for the expenses incurred by him for the discharge of a liability, which, either wholly or in part, fell on another, the fiction of implied promises was invented to find a place for the principle within the rules of common law pleading. This fiction was raised whether the relationship originated in contract or not. In jurisdictions where the old rules, of pleading have been abrogated, or were never in force, the fiction of an implied promise, where the relationship between the parties did not originate in contract, is superfluous, and the duty to pay may be based upon equitable considerations. Sections 68, 69, 70 and 72 of the Indian Contract Act are illustrations not really of the doctrine of implied promise, but of duties based upon equitable considerations; the basic principle being that equity does not favour unjust enrichment On the same principle contribution should be allowed when two parties should have borne a loss which has been borne by one party alone. The fact that the wrong was consciously committed, is irrelevant.

71. My conclusions, therefore, are that:

(a) The doctrine of Merryweather v. Nixon does not apply in India.

(b) That even in the case of conscious tort-feasors contribution should be allowed where| the facts warrant the same.

(c) That this should be BO whether a joint decree' has been passed against the joint tort-feasors or not.

(d) That contribution is to be allowed as between conscious tort-feasors not upon the principle of implied agreement but upon equitable considerations.

The mode of calculating the amount of contribution depends upon the facts of each case.

72. It may be that a party is not entitled to contribution at all though he has paid the entire amount of joint liability. Such would be the case when one party engages another to commit the tort or where one party prevails upon another to lend his name for the commission of the tort and the party so prevailing upon another suffers no greater loss than if the other party had not lent his name or had not joined in the commission of the tort. (A. I. R. (19) 1982 Mad. 1).

73. Normally parties would be liable to contribute in proportion to the profits which they made in the commission of the tort or the loss which they severally inflicted upon a third person; or, if the tort consists in unlawful possession over a third person's property in proportion to the extent of the property occupied.

74. No hard and fast rule, however, with regard to apportionment can be laid down. Each case must be decided upon its own facts.

75. In the present case it is common ground that Sheo Ghulam and Ram Ghulam were in possession, each, of a moiety of the property of Khunnu Lal. They were, therefore, responsible for half the amount of mesne profits. Ram Ghulam was not responsible for the costs because he admitted Khunnu Lal's claim at a later stage and Was exempted from costs.

76. This brings us to the question whether the liability of Chet Ram or Ram Ghulam was an immoral liability which the defendants-respondents are toot liable to discharge. It will be observed that the suit was not to enforce the pious obligation of she sons to pay their father's debt. It was a suit to enforce the liability of Ram Ghulam. A decree was passed against Ram Ghulam for damages both for the period before Chet Ram's death and for the period after his death. He was bound by the decree. His legal representatives are also bound by the same. Since the decree has been paid off by a joint debtor, Sheo Ghulam, Sheo Ghulam is entitled to recover his half share from Ram Ghulam or his representatives. The question of the liability of Ram Ghulam being based on immoral debt was raised for the first time in the lower appellate Court. The plaintiffs-respondents had no opportunity to meet it by adducing fresh evidence The question does not really arise at the present stage. It will arise only when joint family property which is in the hands of the respondents is attached and sold in satisfaction of the liability of Ram Ghulam. If it is found that Ram Ghulam's liability was immoral, the respondents will not be liable to pay it out of the joint family property belonging to themselves and Ram Ghulam but they are bound to discharge the liability whether immoral or not out of Ram Ghulam's self-acquired property. The question, therefore, whether the liability of Ram Ghulam was based on an immoral debt is left undermined at this state and, if need be, will be decided in the execution department.

77. It is agreed by parties that the amount of liability of Ram Ghulam for contribution was to the extent of Rs. 1457/10/-. The plaintiffs are entitled to interest on this amount at the rate of six per cent. per annum from the date of the suit till the date of realisation.

78. I would, therefore, allow this appeal, set aside the decree of the Court below and decree the plaintiffs' suit for recovery of Rs. 1467/10/. with interest thereon at the rate of six per cent. per annum from the date of the suit till the date of realisation.

79. Parties will pay and receive costs in accordance with their success and failure in ,all the Courts.

P. L. Bhargava J.

80. I also agree to the order proposed to be passed in this appeal by my learned brother, Agarwala J.

81. I have had the advantage of reading the judgments prepared by my learned brothers; and I do not think I can usefully add much. The question which has necessitated the reference to the Full Bench is whether the rule laid down in the case of Merryweather v. Nixon, (1799) 8 T.R., 186, should be applied to cases in India. I have no hesitation in answering the question in the negative.

82. The report of the case in Merryweather v. Nixon has been reprinted in the Revised Reports, vol. 16, at page 810, from (1799) 8 T. R., 186. It is a short report and may be reproduced here:

> "One Starkey brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included, a count in trover, for the machinery belonging to the mill; and having recovered 8401, he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much money paid to his use.
>
> At the trial before Mr. Baron Thomson at the last York Assizes, the plaintiff was nonsuited, the learned Judge being of opinion that no contribution could by law be claimed as between joint wrong-doers; and consequently, this action, upon an implied assumpsit, could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action.
>
> Chambre now moved to set aside the nonsuit; contending, that as the former plaintiff had recovered against both these parties, both of them ought to contribute to pay the damages; but Lord Kenyon, Ch. J.:
>
> "There could be no doubt but that the nonsuit was proper: that he had never before heard of such an action having been brought, where the former recovery was for a tort; that the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit: and that this decision would not

> affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right."

The Editor of the Revised Reports has appended the following note :

> "The case of Merryweather v. Nixon, (1799) 8 T. R. 186, has been referred to (by Taunton, J. in Betts v. Gibbins ((1834) 2 Ad. & El. 57 at p. 65), as an unsatisfactory case; and no doubt it lays down the doctrine as to contribution between wrong-doers too broadly (see Adamson v. Jarvis, (1827) 4 Bing. 66), As the principle upon which any such doctrine may be supposed to rest has been recently discussed in the House of Lords in the Scottish case of Palmer v. Wick and Pulteneytown Steam Shipping Co., (1894) A.C. 318 at p. 324 ; 6 Rule 245 it seemed proper that the original report should be here reproduced."

The rule laid down in the above case is that if an action were brought for a joint tort and one tort feasor paid the whole damage recovered he could not recover any proportion of the sum so paid from the others.

82a. As regards the merits of the rule, I may quote the opinion of Lord Herschell L. C. in Palmer v. Wick & P. S. Shipping Co., (1894) A. C. 318 at p. 324 :

> "It is now too late to question that decision (Merryweather v. Nixon) in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries."

The rule as modified by subsequent decisions was considered as an inequitable rule and it was finally abrogated by the Law Reform (Married Women and Tort-feasors) Act, 1935 The position of the rule in England is thus summarised in Clerk and Lindsell on Torts (10th Edn) p. 102 :

> "The rule in Merry weather v. Nixon, is no longer law, for now, by Section 6 (1) (c) of the law Reform (Married Women and Tortfeasors) Act, 1935, where damage is suffered by any person as a result of a tort (whether a crime or not), any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person is to be entitled to recover contribution under the section from any person entitled to be indemnified by Him in respect Of the liability in respect of which the contribution is Bought By Section 6 (2) of the same Act the contribution recoverable is to be such as may be found by the Court to be just and equitable having regard to the extent of the responsibility for the damage of the person against whom contribution is claimed; he may be exempted altogether, or ordered to give a complete indemnity."

If the rule has ceased to have the force of law in the country of its origin and, as far back as the year 1894, it was not considered proper to extend its application to Scotland, and in the year 1935 it was abrogated, there appears to be no justification for its extension to the jurisprudence of this country.

83. In India in a number of cases, which have been noticed by my learned brothers, doubts were expressed as to the applicability of the rule in this country, and in some other cases it was not applied. As I am of opinion that the rule should not be applied to cases in India, I would notice the case of this Court in which it was observed that the authority of Merryweather v. Nixon, still holds good so far as this country is concerned. That case is reported in Parbhu Dayal v. Dwarka Prasad, 51 ALL. 371. The facts found in that case were: The plaintiff and the defendants, who were two in number, without the least semblance of right, removed the materials of a building in a certain village. The building belonged, in part, to one Basityar Khan, who brought a suit against the parties to that case to recover his own share of the value of the materials. That suit was decreed. The decree was executed against the plaintiff in that litigation namely, Parbhu Dayal, and Parbhu Dayal satisfied that decree. Thereupon Parbhu Dayal brought the suit to recover a certain sum of money said to be due to him from the defendants by way of contribution. The learned Judge of the small cause Court dismissed the suit on the finding that the plaintiff had no interest or share in the beams which he had removed, that he was conscious of his wrongful act, and that as such the suit for contribution did not lie. When the matter was taken to this Court in revision it was contended that although the parties to the suit were joint tort-feasors in the true sense of the expression, yet the plaintiff was entitled to succeed simply because there was a decree made in favour of Basityar Khan jointly against the parties to the litigation. Reliance was placed upon the dictum of Lord Watson in Palmer v. Wick. In relation to this case the learned Judges observed that it was decided on the basis of Scotch law, which they were not bound to administer in India. The learned Judges drew a distinction between cases where the tort-feasors were aware of the fact that they were acting purely in tort and without any semblance of right in themselves and cases where an act of trespass or other action in tort was committed more or less innocently and in good faith with a semblance of one's rights, although those rights might not actually exist. While observing that the authority of Merryweather v. Nixon held good, the learned Judges did not consider the various decisions in which that case was considered and the rule laid down therein was modified in England. Apart from it, the decision in Parbhu Dayal's case having been given in 1931 before the Law Reform (Married Women and Tort-feasors) Act was passed, it cannot be considered good authority for the view that the rule in Merry-weather v. Nixon still holds good and ought to be applied to cases in India.

84. There is a decision of the Madras High Court also in which the rule in Merryweather v. Nixon was applied (vide Tegnanarayana v. Yagannadha, A I. R. (9) 1932 Mad. 1). In that case A agreed to sell certain property to another person B. A third person C, who was aware of the contract between A and B, persuaded A to sell the property to him for a higher price and also to fight out the matter, if necessary, with B. B instituted a suit for the specific performance of the agreement to sell and made A and C parties to the suit. C alone contested the suit, which was decreed against both A and C. The costs awarded in the suit were realized from C alone. C sued A for contribution. The suit for contribution was dismissed following the rule laid down in Merryweather v. Nixon. In the circumstances of the case, it was hardly necessary to fall back upon the rule of Merryweather v. Nixon; and the view taken in that case was not accepted in a later decision of that Court in Eda(SIC)

Venkata Rao v. Edara Venkayya, A.I.R. (30) 1943 Mad. 38.

85. Contribution may be claimed on the basis of express or implied agreement or on equitable considerations. In the case of joint tortfeasors there may be no express or implied contract to indemnify one another, but it seems inequitable that one man should be made to suffer the consequences arising from the actions of all of them. In the case of Merryweather v. Nixon Lord Kenyon himself made an exception in respect of certain cases of indemnity. There may be other cases like the one before us. In such cases the Court while decreeing damages may specify the liability of each tort-feasor; and if the Court fails to do so that fact should not make any difference as to the respective liability of different tortfeasors. Consequently, on the authority of Lord Herschell in Palmer v. Wick, it must be held that the rule in Merry weather v. Nixon, is not founded on any principle of justice, equity, or even public policy, and as such it should not be applied to cases in India, where, if the law is silent, the Courts have to act in accordance with the principles of justice, equity and good conscience.

86. I, therefore, agree with the conclusions recorded by my learned brother, Agarwala J.

87. We allow the appeal, set aside the decree of the Court below and decree the plaintiffs' suit for recovery of Rs. 1457-10-0 with interest-thereon at the rate of six percent. per annum from the-date of the suit till the date of realisation. The parties will pay and receive costs in accordance with their success and failure in all Courts.