(1867) 04 CAL CK 0003

Calcutta High Court

Case No: None

Rambux Chittangeo		APPELLANT
	Vs	
Modoosoodhun Paul Chowdhry and Others		RESPONDENT

Date of Decision: April 15, 1867

Judgement

Sir Barnes Peacock, Kt., C.J.

The question which has been referred by the Small Cause Court Judge in this case is (reads). It is stated that the plaintiff, a co-sharer, deposited the revenue payable upon the whole estate under s. 9, Act XI of 1859. Probably this is a mistake, and s. 15 was the section intended. S. 9 applies only to deposits made by a person not being a proprietor of the estate, or share of an estate, in arrear, and it gives an action to the depositor in certain cases. It is clear that an action founded upon that section could not be brought in the Small Cause Court. It is founded on the statute, and not upon contract, express or implied. We will therefore consider the question propounded without reference to the fact alleged that the money was deposited under s. 9.

2. No apology was due from the Judge of the Small Cause Court for respectfully laying before the High Court the reasons which induced him to think that he had jurisdiction to entertain the suit, notwithstanding a contrary decision of the High Court which is referred to in his judgment but we think that the Judge ought not to have assumed that, if that case had been argued by Counsel, the Court would probably have arrived at a different conclusion. There can be no doubt that the Court derives great assistance from a careful and well considered argument of a learned and experienced Counsel, but it ought not to be assumed that such arguments are necessary to enable the Court, to arrive at a sound conclusion. When a case comes before the Court for adjudication, whether it is argued by Counsel or not, the Court ought to give it full and careful consideration. They ought to ascertain accurately what are the facts of the case, and to apply their own knowledge of the law to the facts so ascertained, and, if the law is doubtful, to search, if necessary, into the authorities before they pronounce a decision.

3. We think that the decision referred to by the Judge of the Small Cause Court--Modoosoodhun Mozoomdar v. Bindoobashiny Dossee 6 W.R., Civ. Ref., 15 is correct, viz., that a suit for contribution under the circumstances stated is not maintainable in the Small Cause Court. That decision was brought to the notice of the First Bench in another similar case, and after full consideration it was upheld and acted upon; see Brommoroop Goswamee v. Prannath Chowdhry 7 W.R., 17. At the time when the last mentioned case was determined. I was not aware of a case in which a different opinion had been acted upon by another Bench. The case of Ram Money Dossia v. Pearee Mohun Mozoomdar 6 W.R., 325 had not then been reported. In like manner when that case was decided, the Judges who determined it were not aware of the previous decision of Modoosoodhun Mozoomdar v. Bindoobashiny Dossee 6 W.R., Civ. Ref., 15 above mentioned. The case had probably not been reported at that time. In the last mentioned case it was held that a claim for money, not exceeding Rs. 500, as contribution on account of revenue paid by one shareholder for the whole estate in order to save the estate from sale for arrears, is a claim for money due under an implied contract, and is therefore cognizable by a Small Cause Court. In consequence of the above conflicting decisions, the question, has now been referred to a Full Bench.

4. By Act XI of 1865 (the Mofussil Small Cause Courts Act), s. 6, claims for money due on bond or other contract, or for damages, when the debt or damage does not exceed in amount the sum of 500 rupees, are (subject to certain exceptions), cognizable in the Courts of Small Causes; and by s. 12, "no suit cognizable by such Court can be heard or determined in any other Court having jurisdiction within the local limits of the jurisdiction of such Court of Small Causes." This suit is not one for damages within the meaning of the section above referred to. One must assume that there was no express contract, as there is no mention of one, and the only question is whether there was an implied contract for contribution. It has been held by some of the Common Law Courts in England that a claim for contribution among sureties is founded upon implied contract; see the case of Kemp v. Finden 12 M. & W., 421. But it must be remarked that the Small Cause Courts in the Mofussil are bound to adjudicate according to the law which is administered in the other Courts of the Mofussil. In those Courts the rights of parties are to be determined according to the general principles of equity and justice, without any distinction, as in England, between that partial justice which is administered in the Courts of Law, and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of Equity. The rules, and I may add the fictions, which have been in many cases adopted by the Common Law Courts in England, for the purpose of obtaining jurisdiction in cases which would otherwise have been cognizable by the Courts of Equity, ore not necessarily to be followed in this country where our aim is to do complete justice in one suit. It is not necessary for us to imply promises or requests, merely because they would be implied under similar circumstances by the Common Law Courts in England in cases in which, but for such

implication, they would probably have no jurisdiction, and, especially where we find that the Courts of Equity and the Courts of Law are in conflict upon the subject of such implications. I have generally found that when fictions are resorted to, uncertainty and confusion are the consequences.

5. In Dering v. The Earl of Winchelsea 1 Wh. & Tu. L.C. 89; S.C., 2 B. & P., 270, it was held that where several sureties ore bound by different instruments, but for the same principal, and for the performance of the same engagement, and one of the sureties is compelled to pay the whole amount, he may recover contribution from the others. It was admitted that if the sureties had been bound by one bond there must have been contribution; but it was contended that in the case of one bond, the liability depended upon contract and privity amongst the sureties, which did not exist in the case of separate bonds; that where there were separate bonds, the case admitted of the supposition that the sureties were perfect strangers to each other, that each of them might be ignorant of the others and of their engagements; that the undertakings were perfectly distinct, and without any connexion with each other; and that no contract amongst the sureties could be implied. But Lord Chief Baron Eyre held that the obligation to contribute did not depend upon contract. He said, "If we take a view of the cases in law and equity, we shall find that contribution is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it." Again, he says: "In Sir William Harbet''s case 3 Co., 11 b, many cases of contribution are put and the reason given in the books is that in &#65533;quali jure the law requires equality: one shall not bear the burden in case of the rest, and the law is grounded in great equity. Contract is never mentioned." In Stirling v. Forrester 3 Bli., 575, at p. 590, Lord Redesdale says, "The principle established in the case of Dering v. The Earl of Winchelsea 1 Wh. & Tu. L.C. 89; S.C., 2 B. & P., 270 is universal, that the right and duty of contribution is founded in doctrines of equity. It does not depend upon contract."

6. Cases of average rest upon the same principle; and so in the case of land descending to several co-parceners subject to a debt, if the creditor proceeds against one of the co-parceners, the others must contribute. As regards contribution, the application is at law in many cases very different from what it is in equity. If there are several sureties, and one of them becomes insolvent, and another pays the debt, the surety who pays cannot at law recover more from the solvent sureties than their shares which they would have recovered if all the sureties were solvents. Thus, if there are four sureties and one is insolvent, a solvent surety who pays the whole debt can recover only one-fourth part thereof, and not a third part from each of the two solvent sureties, but in a Court of Equity he would be entitled to recover one-third part of the debt against each of them, for in equity the insolvent''s, share is apportioned among all the other solvent sureties. A similar rule applies to other cases of contribution. So if one of the sureties die, the remedy at law is only against the surviving parties for their respective proportions, whereas in equity contribution may be enforced against the representatives of the deceased

sureties; see Story''s Equity Jurisprudence, ss. 496 and 497.

7. We think that, according to the law as administered in the Mofussil, the obligation to contribute is not founded upon contract, in the absence of an express contract; and that no contract can be implied on the part of co-sharers of an estate to contribute towards the payment of the Government revenue. Further, we are of opinion that there is no implied contract for contribution on the part of sureties, any more than there is on the part of persons who are liable by law to contribute to general average.

8. Imagine the difficulties which would arise if every person, liable to contribute to general average in respect of goods thrown overboard at sea, were liable to be sued in a Small Cause Court in the Mofussil within whose jurisdiction he might be residing. Similar difficulties might arise in cases of contribution claimed against sureties; see Story''s Equity Jurisprudence, ss. 490, 491, 492, 493 and 498;--or amongst co-shareholders in an estate. For instance, in a case in which the estate of a Mahomedan has upon his death descended to numerous relations,--is each person said to be entitled to a share to be sued separately in the Small Cause Court, and compelled to pay contribution in respect of a share which may ultimately, in a suit in the Civil Court between the claimants to thy estate, turn out not to be his; and this from time to time as often as the Government revenue falls due, pending the suit in the Civil Court for the adjustment of the shares? Cases may be supposed in which it might be necessary amongst Hindus to try a question of adoption, before it could be ascertained whether a particular individual was a shareholder or not, or what share he was entitled to. Are all these questions to be tried by a Small Cause Court deriving its jurisdiction from the implication by law of a promise which never existed in fact, and was never in the contemplation of the parties concerned? And is this jurisdiction of the Small Cause Court to oust the jurisdiction of the ordinary Civil Court having jurisdiction within the local limits of the Small Cause Court, although it may be necessary to resort to such Civil Court for the purpose of obtaining complete justice? In Cowell v. Edwards 2 B. & P., 268. Lord Eldon said it was too late to hold that an action for contribution could not be maintained at law, though neither the insolvency of the principals, nor of any of the sureties, was proved but in that case, in which there were six sureties, he held that at all events the plaintiff could not be entitled to recover at law more than one-sixth of the whole sum paid. He said that he had conversed with Lord Keuyon upon the subject, who was also of opinion that no more than an aliquot part of the whole, regard being had to the number of co-sureties, could be recovered at law, though if the insolvency of all the other parties were made out, a larger proportion might be recovered in a Court of Equity. In the note to that case it is said that Lord Eldon also added a doubt of his own, whether a distinction might not be made between holding that an action at law is maintainable in the simple case where there are but two sureties, or where the insolvency of all the sureties but two is admitted, and the insolvency of the principal is admitted, and holding it to be maintainable in a complicated case like the case

then before the Court, the insolvency of some of the sureties being neither admitted nor proved, and where the defendant, after a verdict against him at law, might still remain liable to various suits in equity with each of his other co-sureties, and where the event of the action could not deliver him from being liable to a multiplicity of other suits founded upon his character as a co-surety.

9. If a contract is to be implied, it is necessary to ascertain what is the contract which is to be implied and is a contract to be also implied if the co-sharer expressly request the other not to pay his proportion of the revenue? Is the contract which is to be implied a contract such as the common law in England would have implied or a contract which would create an obligation equal to that which the Courts of Equity in England would enforce that is to say, is it a contract by each contributory that he will pay his proportion only, or that he, and, in case of his death, his representatives, will make goad his own share, and will also bear his proportion of any loss which the insolvency of any other co-contributory may occasion? If we are to follow the law of England as laid down by the Common Law Courts, the contract in the case of sureties would be limited to the surety and to his own share.

10. But still, if the general principles of justice and equity, as administered in England, are to be enforced, the representative of a deceased surety must make good the proportion of the deceased, and in case of the insolvency of one or more sureties, those who are solvent must make good their proportions of the shares of those who are insolvent. If we are to hold that there is a contract, such as would be implied in England, and nothing more, complete justice cannot be done by a Small Cause Court in the case of death or insolvency, but further proceedings will be necessary in the ordinary Civil Court in order to compel the representative to pay the proportion which the deceased ought to have paid, or to make a solvent surety bear his proportion of an insolvent surety''s share.

11. Again, if there are several contributories, are they to be sued in the Small Cause Court jointly or separately upon the contract which is to be implied? Lord Eldon in one case says, they may be sued separately. In Craythorne v. Swinburne, 14 Ves., 160 at p. 164. I would go further and say that they cannot be sued jointly. If there is a contract at all, it cannot be a joint contract; for if there is a joint contract, each of the contributories would be liable, not only for his own share, but for the shares of the other contributories. They cannot be sued jointly in the Small Cause Court, unless the contract is joint, for the jurisdiction depends upon there being a contract. They might be sued jointly in the ordinary Civil Court, for in that Court the obligation is held to arise not from contract, but from general principles of equity, and in such suit the shares in which they are to contribute can be adjusted, and the several amounts for which they are liable can be decreed against them separately, according to their several liabilities--Bama Soonduree Debia v. Anund Moyee Debia 3 W.R., 170. In that case it was held, in accordance with former rulings of the Court, that a decree for contribution cannot pass against the contributories jointly.

12. In one of the cases which has been referred to us Post, p. 867 twenty-three persons were sued for wrongly constructing a bund and catching fish. A decree was obtained against them for Rs. 204-8 annas, and the amount was levied upon one of them. He, after deducting Rs. 8-14-6 as his one-twenty-third share of the amount decreed, sued the other twenty-two in the Small Cause Court for Rs. 195-9-6, being the remaining twenty two twenty-thirds of the amount decreed. If he is entitled to contribution by virtue of an implied contract, it would he necessary in such a case to determine whether the twenty-two sureties contracted with the one who paid the decree to pay him twenty-two twenty-thirds of the amount which he paid, or whether each surety promised to pay one twenty-third. If the joint action can be maintained upon the ground that there was a joint contract, the decree in that suit will be against the twenty-two defendants jointly, and the amount decreed in that suit for contribution may be levied against the property of any one of the twenty-two defendants. Suppose it be levied against one only, he will have to sue the others; and if he can deduct his one twenty-third share, and sue the other twenty-one jointly for the remaining twenty-one twenty-thirds, as he and the others were sued for the twenty-two twenty-thirds, he will recover the twenty-one twenty-thirds against the defendants jointly. The amount may be levied upon one of them, and he in his turn may sue the remaining twenty to recover twenty-twenty-thirds, and so on; and fresh suits may be brought until each of the twenty-three defendants in the original suit has paid his proportion; and thus before the lust suit is at an end, the last defendant may have been a co-defendant in twenty-two different actions for contribution arising out of one payment of a joint decree. It may so happen that of the twenty-two defendants in the first action for contribution ten may be insolvent in that case, if the amount of the joint decree against the twenty-two for the twenty-two twenty-thirds be levied upon one of them only, he will be unable, in consequence of the insolvency of the others, to get back more than eleven shares-Thus the plaintiff who first satisfied the decree will, in effect, pay only one share, i.e., twenty-three shares minus twenty-two shares recovered back, whilst the defendant who satisfied the decree in the first suit for contribution will, in effect, pay eleven shares, viz., his own share and those of the ten insolvent contributories, from whom he will be unable to recover any portion of the amount paid. Is he then to resort to the Civil Court against the defendant who first sued for contribution, in order to compel him to contribute his proportion of the amount due from the insolvent contributor? It would be a violation of every principle of equity and justice that, of two solvent defendants, one should pay only one twenty-third, and the other eleven twenty-thirds of the whole amount; but this will be the effect of implying a joint contract. On the other hand, if separate contracts only be implied, the defendant who satisfied the first decree will in effect have to pay eleven twenty-thirds, and each of the other solvent defendants only one twenty-third, for he will be unable to recover back the ten twenty-thirds paid for the ten insolvent defendants.

13. Besides this, if separate suits are to be brought on separate implied contracts, the evil pointed out by Lord Eldon in Craythorne v. Swinburne 14 Ves., 160 will arise, viz., the multiplicity of suits, which will be necessary every time a fresh payment of Government revenue is made.

14. The truth is there is no implied contract, either joint or several, for contribution. The payment of revenue by one shareholder is made, not at the instance or at the request of the others, or with their consent, but to save the estate from being brought to sale for arrears. In some instances it may be made contrary to express directions. In such cases there is an obligation to contribute, but surely not arising from an implied contract. The duty of contributing is caused not by any convention or agreement between the share holders, but arises from the principles of justice, which require that one shall not bear the whole burthen in case of the rest, and that all the co-sharers shall bear the burthen in proportion to their respective shares. These shares and the amounts to be contributed may be ascertained in one suit in the ordinary Civil Courts, but not in the Small Cause Courts and in the case of sureties, the principal may be joined as a co-defendant, and ordered to indemnify the sureties; and in case of the insolvency of any of the sureties, the shares to be contributed by those who are solvent will be equitably adjusted.

15. The obligation arises from what in the civil law was described as a quasi-contract. Pothier in his treatise on Obligations, Part I, Chapter I, Section 2, says: "In contracts it is the consent of the contracting parties which produces the obligation; in quasi-contracts there is not any consent. The law alone, or natural equity, produces the obligation." They are called quasi-contracts, "because without being contracts, and being in their nature still further from injuries, they produce obligations in the same manner as actual contracts." In Austin on Jurisprudence, p. 133, it is said: "strictly, quasi-contracts are acts done by one man to his own inconvenience for the advantage of another, but without the authority of the other, and consequently, without any promise on the part of the other to indemnify him, or reward him for his trouble. An obligation arises, such as would have arisen had the one party contracted to do the act, and the other to indemnify. Hence the incident is called a ''quasi-contract,'' i.e., an incident in consequence of which one person is obliged to another, as if a contract had been made between them. But quasi-contract seems to have a larger import, denoting any incident by which one party obtains an advantage he ought not to retain, because the retention would damage another, or by reason of which he ought to indemnify the other. The prominent idea in quasi-contract seems to be an undue advantage would he acquired by the obligor, if he were not compelled to relinquish it or to indemnify." Again at p. 138, under the heading Tendency to confound tacit contracts with quasi-contracts. Mr. Austin says: "This confusion is more likely to arise amongst English lawyers than others, on account of their wanting a generic name (which, had as it is, the Romans have) for marking this sort of obligatory incidents." The learned author of Ancient Law has also pointed out very clearly the distinction between

implied contracts and quasi-contracts, and has shown that a quasi-contract is not contract at all Maine''s Ancient Law, 2nd edit., p. 343. He says: "The part of Roman law which has had most extensive influence on foreign subjects of inquiry has been the law of obligation, or, what comes nearly to the same thing, of contract and depict. The Romans themselves were not unaware of the offices which the copious and malleable terminology belonging to this part of their system might be made to discharge, and this is proved by them by their employment of the peculiar adjunct quasi in such expressions as quasi-contract and quasi-delict. Quasi, so used, is exclusively a term of classification. It has been usual with English critics to identify the quasi-contracts with implied contracts, but this is an error, for implied contracts are true contracts, which quasi-contracts are not. In implied contracts, acts and circumstances are the symbols of the same ingredients which are symbolized in express contracts by words; and whether a man employs one set of symbols or the other must be a master of indifference so far as concerns the theory of agreement. But a quasi-contract is not a contract at all. The commonest sample of the class is the relation subsisting between two persons, one of whom has paid money to the other through mistake. The law, consulting the interests of morality, imposes an obligation on the receiver to refund; but the very nature of the transaction indicates that it is not a contract, inasmuch as the convention, the most essential ingredient of contract, is wanting."

16. The word "contract" used in s. 6 of the Small Cause Courts Act refers to true contracts, whether express or implied. The question, therefore, which has been referred to us must be answered in the negative, and the Judge of the Small Cause Court informed that a co-sharer in an estate paying revenue to Government, who has paid the revenue due upon the whole estate, cannot sue in a Small Cause Court his co-sharers for contribution. We may remark that, in the case of Boykunt Nath Bhooya v. Ram Nath Bhooya 4 W.R., S.C. Ref., 9, it was held that a suit against a co-sharer for contribution in respect of revenue paid by another, was not a suit for breach of contract within s. 1, cl. 9 of the Limitation Act, XIV of 1859; and a similar decision was come to in respect of a suit for contribution brought against one judgment-debtor by another judgment-debtor who had satisfied the decree; see Doorga Monee Dossee v. Doorga Mohun Doss 2 W.R., 266. Care must be taken not to confound cases like the present with the cases in which there is a convention. If a man buys goods and they are delivered to him, there is a contract of sale, and an implied promise to pay the price, though there may be no contract in words to do so. So if a man hire, at certain wages, another who serves him under the hiring, there is an implied contract to pay the wages. If one man borrows money from another, there is a contract of loan, and an implied promise to repay the money lent. If one man pays money for the use of" another at his request, there is, in the absence of circumstances showing that the money was advanced as a gift, an implied promise for repayment by the person on whose account the money is paid. We have thought it right, in order to prevent misconception, to point out the

distinctions between cases in which there is, and those in which there is not, a convention.