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similar to the present, and it was held that a suit for the establishment of a right to an hereditary office, such office being a trust for the performance of particular duties in a temple, would lie under s. 11 of the Code of Civil Procedure, even though the right to be established brought no profit to those claiming it.

We are, therefore, of opinion that the suit is maintainable.

It was next urged that the suit is not one in which a perpetual injunction could properly be granted. It is found, however, that the plaintiffs have a status in the temple as holders of a certain hereditary office, and when that status is violated, they are entitled to be protected by such processual remedies as are available in the circumstances of the case, even though no legal dues or damages are payable to them. The decision in second appeal No. 664 of 1887 turned upon the special circumstances of that case, and is not inconsistent with this view.

Taking this view, we are of opinion that the second appeal must fail, and we dismiss it with costs. The memorandum of objections is also dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

1887. Oct. 27, Dec. 27.

SESHAGIRI (PLAINTIFF), APPELLANT,

and

PICHU (DEFENDANT No. 4), RESPONDENT. *

Revenue Recovery Act, 1864, *s.* 35—*Contract Act*, *ss.* 69, 70—*Right to contribution where part owner pays revenue due on whole estate to save his own interests.*

In 1881 while the patta of certain land held on raiyatwari tenure stood in the name of defendant No. 1, the real owner being defendant No. 2, the revenue fell into arrear. Subsequently plaintiff and defendant No. 3 each bought a portion of the land, and defendant No. 3 sold his portion to defendant No. 4. After this, the land in plaintiff's possession was attached for the said arrears of revenue, and plaintiff paid the whole amount to prevent a sale. Plaintiff sued to recover from defendants 1 to 4 a portion of the arrears paid by him. He also prayed that the land in the possession of defendant No. 4 might be held liable.

The claim was decreed, but on appeal by defendants 3 and 4, the suit was dismissed as against them.

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* Second Appeal No. 43 of 1887.

Plaintiff appealed making defendant No. 4 alone respondent:

Held, that plaintiff was entitled to a decree for contribution against defendant No. 4 and to a charge on the land in his possession.

APPEAL from the decree of V. Srinivasacharyar, Subordinate Judge at Negapatam, reversing the decree of V. Malhari Rau, District Munsif of Mannargudi, in suit 366 of 1885.

Plaintiff sued to recover Rs. 85-9-0 and interest thereon from defendants 1 to 4 and for a decree in default of payment against certain land in the possession of defendant No. 4.

The Munsif decreed the claim. Defendants 3 and 4 each appealed and the suit as against them was dismissed.

Plaintiff appealed making defendant No. 4 only respondent.

The facts of this case are fully set out in the judgments of the Court (Kernan and Muttusami Ayyar, JJ.).

Rama Rau for appellant.

Subramanya Ayyar for respondent.

KERNAN, J.—Whether the plaintiff is entitled to contribution from defendant No. 4 with a right to recover the amount from the lands in that defendant's possession does not depend on the provisions of the Act II of 1864 as decided by the Subordinate Judge. That Act, s. 35, relates to the rights of persons having interest in land as against the "defaulter," *i.e.*, the tenant to Government.

Defendant No. 4 is not a "defaulter" within that Act. Section 69 of the Contract Act does not provide for this case.

The plaintiff's case is founded on the equitable principle that equality is equity and that he who had the advantage should bear the burden. Defendant No. 1 owned 7 velis of land subject to rent to Government. Plaintiff was the mortgagee of 4 velis, $3\frac{5}{7}$ kulis of that land from the defendant No. 1 and in suit No. 108 of 1882 plaintiff bought the interest of defendant No. 1 therein.

Defendant No. 3 in June 1882 purchased the interest of defendant No. 1 in velis 4 and odd, the residue of the 7 velis. Defendant No. 4 purchased from the defendant No. 3 on the 1st July 1882. For recovery of arrears of Government kist due by defendant No. 1 for fasli 1291 (1st July 1882), the whole 7 velis, including the 4 velis mortgaged to the plaintiff, was attached and was about to be sold, and the plaintiff in order to save his interest in the land paid off, on the 6th October 1882, Rs. 191-3-1 to Government, being the arrear on the whole 7 velis. The rent

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due to Government is the first charge on all the land demised by the patta held by defendant No. 1, and Rs. 85-9-0 is the share of that rent which the land of defendant No. 4 ought to bear if plaintiff is entitled to recover contribution.

The lands of defendant No. 4 and of the plaintiff are both liable to a common burden, neither of them can get his land free from the claim for the revenue without paying the amount due on the whole lands. *Secretary of State for India* v. *Narayanan*(1). It would be against equity and good conscience that the common burden should be thrown exclusively on either lot of land or on either of the parties. This subject was much discussed by a Bench of five Judges in Calcutta, *Kirit Ram Das* v. *Mozaffer Hosain*(2). In that case many authorities were considered, and by a majority of three Judges to two it was decided that a plaintiff in the same position as the plaintiff here was not entitled to a decree, that the lands of the defendant were subject to a charge to repay the defendant's share of the common liability for rent paid by plaintiff. I agree with the opinion of the minority for the reasons expressed by Mr. Justice Mitter in his judgment. I wish to add that *Harbert's Case* (referred to in s. 477, Story) is an authority that in case of persons liable to payment of a common burden affecting their lands, the lands of one alone shall not be liable. In that case it is said "when two or more are bound on a recognisance or statute each is bound in the whole, yet the land of one only shall not be excluded." Further it is said "so it appears by those cases that when land shall be charged by any lien, the charge ought to be equal and one alone should not bear all the burden, and the law on this point is grounded in great equity." It is there pointed out that the remedy is by common law writ. The same principle applies to this case, but the remedy given by a Court of Equity is different and more effectual. Story, s. 477, instances the case of a man owning several acres of land subject to a lien and who aliens one part of the land to each of three people. In that case, he says, if one man is compelled to pay the debt in order to save his land, he shall have contribution from the other alienees. See also Story, ss. 483-484. In *Swain* v. *Wall*(3), Chief Baron Eyre says, "If we take a view of the case both in Law and Equity, we shall

(1) I.L.R., 8 Mad., 130. (2) I.L.R., 14 Cal., 809.
(3) 1 Ch. Rep., 149.

find that contribution is bottomed and fixed on general principles of justice." The observations of Story were not confined to mere personal claim against the party sued for contribution.

The argument that the transfer of the land to plaintiff was not registered is beside the question. *Mangammâ* v. *Timmapaiya*(1). I would reverse the decree of the Lower Appellate Court so far as regards defendant No. 4, the respondent, with costs and the costs of this appeal and restore the decree of the Munsif.

MUTTUSAMI AYYAR, J.—I am also of the same opinion. The contest in this second appeal has reference to the liability *inter se* of two part owners of land held under one patta on the raiyatwari tenure in respect of arrears of revenue due upon it. The first defendant owned 7 and odd velis of land in the Devadanam village in the district of Tanjore. The land was registered in the Collector's books in the name of defendant No. 2, the mother of defendant No. 1, and the patta was issued in her name. On the 22nd December 1882, the plaintiff purchased 4 and odd velis out of 7 and odd velis in execution of a mortgage decree which he obtained in O.S. 108 of 1882, and he has since been in possession of the same. In February or March 1882 defendant No. 3 purchased 3 and odd out of 7 and odd velis of land in execution of a money decree which he obtained against defendant No. 1 in O.S. 215 of 1881 on the file of the Court of First Instance. In July 1882 defendant No. 3 resold 3 and odd velis which he had purchased to defendant No. 4 and placed him in possession. On the 6th October 1882, the sum of Rs. 191-3-1 was due to Government for arrear of revenue payable on the entire holding, and in view to its realisation 7 mas and 81½ kulis out of 4 and odd velis purchased by the plaintiff was placed under attachment in order that the same might be sold under Act II of 1864. To prevent the impending sale, the plaintiff paid the whole arrear, of which Rs. 85 represented the proportion due on the 3 and odd velis purchased by defendant No. 3 and resold to defendant No. 4. Thus in October 1882 when the plaintiff paid the arrear of revenue, defendant No. 2 was the mirasidar or the registered holder, defendant No. 3 was the prior owner, and defendant No. 4 the then owner of 3 and odd velis of land; the plaintiff was the owner of 4 and odd velis, of which a part was attached under

(1) 3 M.H.C.R., 134.

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Act II of 1864, and defendant No. 1 was the prior owner of the entire holding and one who had beneficial enjoyment of the produce of the land in fasli 1291 for which year the arrear became due.

The plaintiff's case was that Rs. 85 was a debt payable by defendants Nos. 1 to 4, and that it was a charge on the 3 and odd velis in the possession of defendant No. 4. There was no express contract between the plaintiff and the defendants in regard to the payment made by him, and the District Munsif considered that his decision must rest on s. 35, Madras Act II of 1864, and ss. 69 and 70 of the Contract Act, 1872. Applying those provisions of law to the facts stated above, he came to the conclusion that the amount claimed by the plaintiff was a charge on the land in the possession of defendant No. 4, and that defendants Nos. 1—3 and 4 were also personally liable, because there was an implied promise on their part to repay what the plaintiff was compelled by law to pay for their benefit and decreed the claim making defendants 1—3 and 4 personally liable, and declaring the 3 and odd velis of land in the possession of defendant No. 4 liable to be sold in default of payment. From this decree defendants Nos. 3 and 4 appealed, and the Subordinate Judge exempted them and the land claimed by them from all liability. From this decision the plaintiff has preferred this second appeal.

Defendant No. 3 has not been made a respondent to this appeal, and the decree of the Subordinate Judge is not therefore open to revision so far as it relates to him.

Nor is the decree liable to be revised so far as it relates to the defendants Nos. 1 and 2, for there was no appeal from that portion of the decree of the District Munsif which was against them to the Subordinate Court. The contest in this appeal is then confined to the liability of defendant No. 4 and of that portion of the holding which he had purchased. The special law applicable in this Presidency to the recovery of arrears of revenue is Act II of 1864, and it was urged by the appellant's pleader that s. 35 of that enactment was not applicable, because the appellant was neither a mortgagee nor a tenant and had no interest in the land in respondent's possession which was neither attached nor about to be attached. He contended also that ss. 69 and 70 of the Contract Act were likewise inapplicable.

Act II of 1864 defines first a land-holder and declares that the

land is security for the public revenue. It then declares when the revenue is payable every year by the land-holder, when it is to be treated as being in arrear, and that the land-holder is the real defaulter. Section 5 declares the defaulter's person and property, movable and immovable, responsible for the arrear. Section 40 directs that the land brought to sale for arrears of revenue shall be sold free of all incumbrances, and s. 35 declares it lawful for any person claiming an interest in land which has been or is about to be attached to obtain its release by paying the arrears, and that if he is a *bonâ fide* mortgagee or other incumbrancer on the estate, the payment made by him shall constitute a debt from the defaulter to him and shall be a charge upon the land, but shall only take priority over the other charges according to the date at which the payment was made. In this connection it is also desirable to refer to Regulation XXVI of 1802 which makes the registered holder liable at the instance of Government so long as the registry stands in his name. Now as to the liability of defendant No. 4 and of the land purchased by him for the proportion of the arrear due thereon, it seems to me there can be no doubt. As I read Act II of 1864 and the prior Regulations which were consolidated by it, the arrear of revenue is a debt due by the real owner of the land and it is a charge on the whole and every part of the holding registered as one estate for purposes of revenue. As to registered holders they and their property are declared liable at the option of Government in order that Government may not be hampered on the collection of revenue by being compelled to hold a complicated enquiry as to real ownership on each occasion when the revenue is in arrear. The right which the Government has to proceed against the registered proprietor does in no way alter the liability of the real owner or of his holding for the arrear of revenue. The contention therefore between two real part owners that neither of them was the defaulter within the meaning of the Act cannot be supported. The reason is that the revenue is a debt due by the real owner and a charge on the holding, and that the registered holder who might not be the actual proprietor when the arrear accrued due is declared liable as an additional facility towards the realisation of revenue by officers of Government. The legal relation then between the appellant and the respondent is that of two part owners of land held on raiyatwari tenure under a single patta subject to a joint burden.

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So long therefore as they choose to hold under one patta, they do so with the knowledge that either of them or his portion of the holding is liable at the instance of Government for the arrear due on the entire holding or any portion of it. It follows that when either is thus compelled to pay the whole arrear by the attachment of his portion of the holding, the payment made by him so far as it relates to the arrear due by the other part owner on his own portion of the holding is one made under compulsion of law for his benefit and in satisfaction of a charge on his portion. The respondent who bought his 3 and odd velis subject to the statutory charge thereon for arrear of revenue and to the incidents of a joint holding is in the same position in which a principal debtor who is primarily liable for a debt stands in regard to his surety, and he is therefore clearly liable in a suit for contribution. Again his quota of arrear was a charge on his portion of the holding, and the appellant who paid it under compulsion of law and freed it from the statutory burden must be taken, in the absence of a special contract, to have intended to preserve the charge for his benefit. I do not see why a party who liquidates a statutory charge under compulsion of law ought to be treated differently from a person who advances money to satisfy a prior mortgage intending to preserve the security for his benefit. The only distinction between the two cases seems to me to consist in this, namely, the one the intention is a question of fact to be determined with reference to the circumstances of each case as ruled by the Privy Council, whilst in the other it is a matter of legal inference. In *Gokul Doss Gopal Doss* v. *Rambux Seochand*(1) the Judicial Committee say in advertence to the payment of a prior charge or mortgage, "The doctrine of *Toulmin* v. *Steere*(2) is not applicable to Indian transactions. The obvious question to ask in the interest of justice, equity, and good conscience is what was the intention of the party paying off the charge. He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest." As to s. 35 on which much stress was laid by the appellant's pleader, it is

(1) L.R., 11 I.A., 133. (2) 3 Mer., 210.

true that the land in respondent's possession was not attached or about to be attached and that the appellant had no interest on it. But it must be remembered that that section is not exhaustive and that it gives effect to two rights mentioned above, namely, the right to claim contribution and the right to treat the amount to be contributed as a charge subject, however, to the condition that the charge shall not prevail against prior incumbrances in cases in which the person paying the arrear does so to protect his own interest in land actually under attachment or about to be attached. The case before us is similar in principle and it is governed by the rule of equity and good conscience, if not by s. 35. The part owner made the payment not only to protect his own land but also because he was legally compellable to make the payment by reason of the joint holding. As to the case *Kinu Ram Das* v. *Mozaffer Hosain Shaha*(1), I am inclined to agree with the minority of the learned Judges who decided it, and Act II of 1864 is further not in force in Bengal. I am of opinion that the decree appealed against should be set aside and that of the District Munsif restored with costs throughout so far as it relates to defendant No. 4, respondent.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

VOLKART BROTHERS (DEFENDANTS), APPELLANTS,

and

VETTIVELU NADAN AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1887. Dec. 20. 1888. April 27.

Sale—Exchange—Trade usage, Proof of—Contract Act, ss. 49, 77, 92, 151.

According to mercantile usage in the cotton trade in Tuticorin, where a dealer delivers cotton to the owner of a cotton press, not in pursuance of any special contract, the property in the cotton vests in the owner of the cotton press who is bound to give the merchant in exchange cotton of like quantity and quality:

The transaction is not a sale but an agreement for exchange:

Where therefore cotton thus delivered was accidentally destroyed by fire:

Held, that the loss fell on the owner of the press.

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(1) I.L.R., 14 Cal., 800.

* Appeal No. 100 of 1886.