

I think the plaintiff is entitled to judgment against the first and second defendants. Execution, however, will only issue against the second defendant in respect of any *stridhan* of which she may be shown to be possessed ⁽¹⁾.

1879

GOVINDJI
KHIMJI
v.
LAKMIDA'S
NATHUBHOY
AND OTHERS.

Order accordingly.

Attorney for plaintiff.—*J. J. Cama.*

Attorneys for second defendant.—Messrs. *Tyabji and Sayani.*

(1) Note.—See *Collett v. Dickenson*, 11 Ch. Div., 687; and *In re Harvey's Estate*, 13 Ch. Div., 216.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice (Officiating) and Mr. Justice M. Melvill.

HARI TRIMBAK AKOLKAR (PLAINTIFF) v. ABASA'HEB alias
BA'HIRJI JUGJIVAN SIRKE (DEFENDANT).*

1880
January 27.

Suit by one surety against another for contribution—Jurisdiction—Court of Small Causes—Act XI of 1865, Section 6.

A suit by one surety against another for contribution, where the sureties are bound by the same instrument, is a suit on an implied contract, and, therefore, within the jurisdiction of a Court of Small Causes.

Govinda Muneja Tiruyan v. Bapu and others (1) concurred in.

Ratanshankar v. Gulabshankar (2) followed.

THIS case was referred for the opinion of the High Court by Madan Shrikrishná, Judge of the Court of Small Causes at Poona. He stated it as follows:—

“ This is a suit brought by a surety against his co-surety for contribution of the amount which he was compelled to pay on default of payment by the principal debtor. It was originally filed in the First Class Subordinate Court at Poona; but the Joint Second Class Subordinate Judge, Mr. Naoroji Dorábji, on the authority of the ruling of the High Court of Judicature at Bombay in *Ratanshankar v. Gulabshankar* (10 Bom. H. C. Rep., A. C. J., 21) returned the plaint to the plaintiff in order to its being presented to this Court.

“ The plaintiff has accordingly presented the plaint to this

* Small Cause Court Reference, No. 6 of 1879.

(1) 5 Mad. H. C. Rep., 200.

² 10 Bom. H. C. Rep., 21.

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Court, and the question for decision is whether a suit for contribution between sureties can lie in a Small Cause Court or not ?

“ My opinion is, that such a suit cannot be maintained in a Court of Small Causes. By section 6 of the Mofussil Small Cause Court Act (No. XI) of 1865, suits for money due on a bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, are (subject to certain exceptions) cognizable by a Court of Small Causes, and it has been ruled in several cases by the High Courts of all the three Presidencies that the word ‘ contract ’ used in the aforesaid section includes express as well as implied contracts. The question that now arises is, whether any contract for contribution can be implied.

“ According to the law of England, a claim for contribution is grounded on principles of natural justice and not on mutual contract, express or implied (Smith’s Manual of Equity Jurisprudence, 8th ed., p. 339), and from sections 145, 146 and 147 of the Contract Act (No. IX) of 1872 it may be inferred, that the Indian Legislature has adopted the same view of the law. Section 145 provides that in every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety ; but the Act has not provided in section 146 or 147 or elsewhere that there is such a promise by one co-surety to the other.

“ This view of the case is supported by several decisions of the Calcutta High Court. [The learned Judge referred at length to the following cases :—*Modoosoodhun Mozoomdar v. Bindoobashiny* ⁽¹⁾, *Rammoney Dossia v. Pearee Mohun* ⁽²⁾, *Brommoroop Goswami v. Prannath Chowdry* ⁽³⁾, *Rambux Chittangeo v. Modhoosoodan Paul Chowdhry* ⁽⁴⁾, *Pitamber Chuckerbutty v. Bhyrubnath Patel* ⁽⁵⁾, *Gunga Gobind v. Ashootosh Dhur* ⁽⁶⁾.]

“ But in *Govinda Muneya Tiruyan v. Bápu* (5 Mad. H. C. Rep., 200) it was decided by the Full Bench that a Small Cause Court has jurisdiction to entertain a suit by one of several debtors against whom a decree for rent had been enforced against his co-debtors for contribution.

(1) 6 Calc. W. R. 15 Civ. Ref.

(2) 6 Calc. W. R. Civ. Rul., 325.

(3) 7 Calc. W. R. Civ. Rul., 17.

(4) 7 Calc. W. R. Civ. Rul., 377.

(5) 15 Calc. W. R. Civ. Rul., 52.

(6) 21 Calc. W. R. Civ. Rul., 255.

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“The decisions of the two High Courts are thus in conflict, and it does not appear that the question raised herein, has been decided in this Presidency.”

The parties neither appeared in person or by pleaders in the High Court.

Per Curiam.—The Court concurs in the view expressed by the Madras Full Bench in *Govinda Muneya v. Bápu*⁽¹⁾.

In the present case, in which this Court understands that the sureties were bound by the same instrument as the principal debtor, the Court thinks that a suit by one surety against another for contribution, is a suit on an implied contract, and, therefore, (as held in *Ratanshankar v. Gulábshankar*⁽²⁾) within the jurisdiction of a Court of Small Causes.

(1) 5 Mad. H. C. Rep. 200.

(2) 10 Bom. H. C. Rep. 21.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.

HARILA'L AMTHA'BHAI (PLAINTIFF) v. ABHESANG MERU
AND OTHERS (DEFENDANTS).*

January 6.

The Code of Civil Procedure (Act X) of 1877, Sections 268, 278 and 287—Prohibitory order—Attachment of a debt due to judgment-debtor—Proclamation of sale—Decree—Execution.

A decree-holder, by a prohibitory order issued under section 268 of the Civil Procedure Code, attached a debt due to his judgment-debtor. The person served with the order applied, under section 278, to have the attachment removed.

Held, that the application could not be entertained under section 278, that section having no application to the case; but that before issuing a proclamation of sale, in execution of a decree, of the debt so attached, it is the duty of the Court, under section 287 of the Code, to ascertain all that the Court considers it material for the intending purchaser to know in order to judge of the nature and value of the property proclaimed for sale. If the property, of which sale is sought, is a debt, and the Court receives notice from the alleged debtor that no debt exists, the Court should satisfy itself as to the existence, or otherwise, of the debt, and, if it comes to the conclusion that no debt exists, should abstain from proceeding to sale.

THIS was a reference under section 617 of the Code of Civil Procedure (Act X of 1877) for the orders of the High Court, by Ráo

* Civil Reference, No. 23 of 1879.