could be brought to the notice of the Munsif. That being so, the Munsif had no jurisdiction under section 476, Criminal Procedure Code, to make the order which he did, inasmuch as the offence was not brought to his notice in the course of a judicial proceeding.

The result is that the Rule is made absolute.

Rule absolute.

1905 JAN. 16.

CRIMINAL REVISION.

32 C. 367=9 C. W. N. 364 =1 C. L. J. 161=2 Cr. L. J. 110.

32 C. 374.

[374] APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Mitra.

JARAO KUMARI *v.* BASANTA KUMAR ROY.*

[2nd December, 1904.]

Contribution, suit for—Improvements by co-owner—Non-gratuitous act—Contract Act (IX of 1872), s. 70—Notice by Municipality.

A notice was issued upon the owners of a *hât* by the Municipality to effect certain improvements, and *A*, one of the co-sharers, effected the required improvements, for in the event of non-compliance with the notice the license for holding the *hât* was threatened to be withdrawn. Upon a suit for contribution brought by *A* against *B*, the other co-sharer :—

Held, that inasmuch as the property was saved from a forfeiture or disability which would have injuriously affected its value, *A* in making the improvements did not intend to act gratuitously and was, therefore, entitled to contribution under section 70 of the Contract Act.

Damodara Mudaliar v. *The Secretary of State for India* (1) approved.

[**Rel.** 38 Mad. 189; **Ref.** 16 M. L. T. 375=25 I. C. 788.]

SECOND APPEAL by the defendant, Bibi Jarao Kumari.

The plaintiffs brought an action against the defendant, Jarao Kumari, for the recovery of a sum of money spent by them in effecting certain improvements to a *hât* which jointly belonged to them and the defendant. The plaintiffs alleged that the Baidyabati Municipality had issued notices to them and the defendant to effect certain improvements in the *hât*, intimating to them at the same time that non-compliance with the said notices would lead to a withdrawal of the license granted to hold the *hât*; and that in pursuance of the said notice they effected the required improvements at their own cost and thus benefited the defendant. [375] The plaintiffs further alleged that the defendant's servants contracted to pay a moiety of the said costs.

The defence, *inter alia*, was that the suit in its present form was not maintainable without bringing a suit for account as owing to objections by the Municipality, the plaintiffs and the defendant jointly and separately had to make improvements of the *hât* ; that there was no contract as stated by the plaintiffs, and that even if there was such a contract it was not binding on her.

The Court of first instance found that the contract, if any, was not binding on the defendant, but on equitable grounds it passed a decree in favour of the plaintiffs. On appeal, the Subodinate Judge, relying upon section 70 of the Contract Act, affirmed the decision of the first Court. Against this decision the defendant appealed to the High Court.

* Appeal from Appellate Decree, No. 2207 of 1902, against the decree of Aukhoy Kumar Bose, Subordinate Judge of Hooghly, dated July 26, 1902, affirming the decree of Surendra Nath Mitra, Munsif of Sirampore, dated Feb. 21, 1902.

(1) (1894) I. L. R. 18 Mad. 88.

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Dr. *Rash Behari Ghose* (Babu *Digambar Chatterjee* and Babu *Joy Gopal Ghose* with him) for the appellant. Mere acceptance of benefit did not give rise to liability to contribute, unless there was an option to accept or decline the benefit. The act of effecting the improvement being voluntary and not done under circumstances in which a request could be implied the claim could not be maintained : *Leigh* v. *Dickeson* (1), and *Munro* v. *Butt* (2). In the present case the improvement was separable from the property and the defendant had no option but to accept it.

[PRATT, J. Contract Act, section 70 illustration (*b*) does not contemplate any option.]

Babu *Braja Lal Chakrabutty*, for the respondent. The law laid down in the case of *Leigh* v. *Dickeson* (1) is not the law in India. The case is governed by the Indian Contract Act, section 70. The facts of the case show the presence of all the elements required by that section. The plaintiffs acted lawfully in effecting the improvements, as they were bound to do, for the protection of the property, and they did not mean to do the improvements gratuitously, and the defendant enjoyed the benefit thereof.

Dr. *Rash Behari Ghose*, in reply.

Cur. adv. vult.

[376] PRATT AND MITRA, JJ. The plaintiffs and the defendant are co-owners of the Seoraphuli *hât*, each having an equal share. Notices were issued upon them by the Municipality to effect certain improvements in the *hât*, and in the event of non-compliance they were threatened with a withdrawal of the license for holding the *hât*. The plaintiffs sued the defendant for contribution on the ground that they had effected the required improvements and that the defendant's servants had contracted to reimburse them half the expense, and that in any case the defendant was under a legal obligation to do so.

The first Court held that the defendant was not bound by any promise made by her servants; but that inasmuch as the improvements were made and benefited the defendant, she was bound to contribute.

On appeal, the Subordinate Judge took the same view. He observes that if neither party had complied with the notice issuing from the Municipality, the license for holding the *hât* would have been withdrawn and the *hât* closed, thus causing injury to both parties; further, that the plaintiffs by complying with the requisition benefited the defendant as well as themselves, and having done this under compulsion and not gratuitously their action came within the scope of section 70 of the Indian Contract Act, and they were entitled to be reimbursed.

The only point pressed before us in appeal on behalf of the defendant is that conceding that the plaintiffs acted lawfully and not gratuitously, still the defendant did not enjoy the benefit of their acts because she had no option in the matter.

Dr. Rash Behari Ghose cited the following cases in support of his contention : *Leigh* v. *Dickeson* (1) and *Munro* v. *Butt* (2). In the former case one tenant in common having executed ordinary repairs on the property made a claim for contribution against his co-tenant. It was held that the claim could not be maintained, because the act of the claimant in executing the repairs was voluntary, and not done under circumstances in which a request could be implied.

(1) (1884) 15 Q. B. D. 60. (2) (1858) 8 El. & Bl. 738.

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In the second case, an action was brought to recover compensation for work and labour with respect to houses belonging to [377] the defendant. Plaintiff failed to fulfil the special agreement by completing the work within a specified time and to the satisfaction of a surveyor. It was held that the mere fact of the owner entering upon possession of the premises would not entitle the plaintiff to compensation for actual work done, as there was nothing else for the owner to do unless he entered on expensive litigation to compel specific performance of the contract.

The point urged before us was not taken in the memorandum of appeal, and we doubt if it could be fairly raised on the written statement of the defendant. She admitted having been informed that the respective officers of both parties had carried out repairs, &c., to the *hât* to the best of their ability, and that the improvements were mutually beneficial, but she put the plaintiffs to strict proof of what they had actually done, and she proposed as a set-off to prove what improvements her servants had done. She was given an opportunity of establishing a set-off but failed to do so. But assuming that the defendant is entitled to raise the contention, we think it is not valid. From illustration (*b*) to section 70 of the Contract Act it may be inferred that if *A* saves the property of *B* from fire, and the circumstances show that *A* did not intend to act gratuitously, he is entitled to compensation from *B*. In the present instance the property was saved not from fire, but from a forfeiture or disability which would have injuriously affected its value, and we see no principle upon which the one case can be distinguished from the other. The language of the section is clear and unambiguous and we think that if the Legislature had intended to follow the case of *Leigh* v. *Dickeson* (1) some qualifying words would have been inserted, and illustration (*b*) would have been excluded. In short the section goes beyond the English law in creating an obligation to pay for services voluntarily rendered. In the case of *Damodara Mudaliar* v. *The Secretary of State for India* (2), in which Government repaired a tank from which the defendant's zamindari lands as well as *ryotwari* villages held under Government were irrigated; the Secretary of State recovered from the defendants their share of the cost incurred. It was found that the defendants had benefited, that Government [378] had not intended to do the work gratuitously, and that there was no request, either express or implied, on the part of the defendants to the Government to execute the repairs. The learned Judges who upheld the plaintiff's claim in that case observed that according to the English authorities [*Leigh* v. *Dickeson* (1) being cited among others] it would seem that the action must fail.

In coming to a similar decision in the present case we fully endorse the following reservation which was expressed in the case just cited. "It is plain that the section ought not to be so read as to justify the officious interference of one man with the affairs or property of another, or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered." In the result, we affirm the decision of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

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(1) (1884) 15 Q. B. D. 60

(2) (1894) I. L. R. 18 Mad. 88.