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the occupation of the land, but that would depend upon the particular circumstances of the case.

In this case there is no set-off pleaded charging that the plaintiffs were indebted to the defendants for the use of the land, and under those circumstances if the defendants are upon the whole facts of the case entitled to any remuneration for the use and occupation of the land, they must resort to a cross action, in which that question, as well as the amount, if any, which they may be enttiled to recover, will be settled.

The only answer we can give to the Judge of the Small Cause Court is that the defendants were bound to return the money in default of registering the *maurasi;* and not having registered it, the plaintiffs are entitled to recover the amount which the defendants stipulated to pay.

There will be no costs of the argument before this Court.

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*Before* Mr. *Justice Kemp and* Mr. *Justice Markby.*

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*Aug.* 9.

BHAIRAB CHANDRA MADAK (PLAINTIFF) *v.* NADYAR CHAND PAL AND OTHERS (DEFENDANTS.)*

*Apportionment—Purchasers of Mortgaged Premises—Decree, form of.*

See also 15 B. L. R 304.

In execution of a decree, the right, title, and interest in two parcels of property of a judgment-debtor, who had previous to the attachment executed a simple mortgage thereof to A, was sold; and B and C respectively purchased them at different prices.

A sued the mortgagor and the purchasers B and C, for enforcing his lien on the two parcels of property. The suit was dismissed by the first Court; but on appeal, the order was "appeal decreed." A entered into a compromise with B, and entered satisfaction of a moiety of the decree. He afterwards issued execution of the other moiety against C, and compelled him to pay.

C now sues B for recovery of the proportion of the amount paid by him to A, but which, according to the valuation of the respective properties, should have fallen into the share of B.

*Held*, that the proper decree in the suit of A against the mortgagor and B and C would have been a money-decree against the mortgagor only, with a declaration that the two properties were liable to be sold, clear of subsequent incumbrances, in satisfaction of the mortgage bond-debt.

* Special Appeal, No. 276 of 1869, from a decree of the Subordinate Judge of West Burdwan, dated the 16th December 1868, reversing a decree of the Moonsiff of that district, dated the 6th July 1868.

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*Held*, that debt due upon the mortgage bond was a general burden upon the two properties, for which no portion of those two properties was more liable than the other.

*Held*, that as between the plaintiff and defendant, the liability was not joint, but several in proportion to the respective values of the property, and that the plaintiff having been compelled to pay for which the property of defendant was legally liable, was entitled to recover the amount from the defendant.

*Held*, that no arrangement between the decree-holder and one of the judgment-debtors would affect the interest of a co-judgment-debtor, unless by express consent.

Baboo *Rashbehari Ghose* for appellant.

Baboos *Ramesh Chandra Mitter* and *Mahini Mohan Roy* for respondent.

MARKBY, J.—In this case the facts, as stated before us by the plaintiff, appellant, and not contested by the defendant, respondent, were these: One Gopal Shebait was possessed of two properties, which for brevity's sake, I will call No. 1 and No. 2. Both these properties were mortgaged by him to one Ramnarayan by one simple mortgage bond. Subsequently to the execution of this mortgage bond, a creditor of Gopal Shebait obtained a decree against him, and in execution of that decree the creditor attached the properties No. 1 and No. 2, and proceeded to get them sold. The properties were lotted and sold separately; the plaintiff in this suit becoming the purchaser of No. 1 for rupees 212, and the defendant in this suit becoming the purchaser of No. 2 for rupees 522. The plaintiff and defendant respectively got into possession, and after they had done so, Ramnarayan, in one suit sued Gopal Shebait the mortgagor, the present plaintiff, and the present defendant, for the purpose of recovering his loan by enforcing his lien on these two properties. He failed in the first Court, and his suit was dismissed; but on appeal this decision was reversed; no decree, however, was drawn up except the unintelligible one of "appeal decreed." Ramnarayan seems first to have attached or threatened to attach the larger property, No. 2. The defendant in this suit, who had purchased that property, thereupon came to terms, and on getting a discharge from Ramnarayan surrendered to him a portion of the property No. 2, and in consequence satisfaction was entered up for half the amount which was due under Ramnarayan's decree. When the

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present plaintiff heard of this, he at once objected. He represented to the Court that he and the defendant were not liable in equal shares; and he paid into Court the sum of rupeess 222, which he said represented the full amount of liability. Ramnarayan, however, disregarding this, took steps to sell the plaintiff's property No. 1, and notwithstanding the opposition of the plaintiff, the sale was ordered to take place. The plaintiff thereupon paid rupees 187 to get his property released.

He then brought the present suit to recover this sum of rupees 187 from the defendant, on the ground that he and the defendant were liable for the debt in proportion to the value of their respective properties, and that the rupees 187, which he had been compelled to pay, were really due from the defendant. The defendant denies his liability.

Some confusion has arisen by the plaintiff in his plaint, and by both plaintiff and defendant, in the course of this argument, speaking as if the result of Ramnarayan's suit had been to make the plaintiff and defendant liable for a sum of money, whereas, if that decree had been properly drawn up, it would have been a money-decree against Gopal only, with a declaration that the properties No. 1 and No. 2 were liable to be sold, clear of subsequent incumbrances, in satisfaction of the mortgage bond-debt.

The real effect of the decree, if it had been thus drawn up, would have been not to have made either plaintiff or defendant directly liable for any sum of money at all, but it would, nevertheless, have made them both indirectly liable to pay the whole of what was due under the decree; as otherwise their property could be sold in satisfaction of it. What I understand the plaintiff to urge in this case, and what I think he has urged throughout, though not always in language legally precise, is this: that the debt due under the mortgage bond, with its accumulations, was a general burden upon the two properties for which no portion of those two properties was presumably more liable than another; that as between the plaintiff and defendant the liability of the two properties ought to be considered not as joint, but as several, being divided in proportion to the respective values of the properties; and that the plaintiff having been compelled to discharge a burden for which the property purchased by the defend-

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ant was legally liable, he may recover the amount so paid from the defendant.

I have come to the conclusion that this is a sound argument. I take it, that though it does not appear in evidence that these two properties were contiguous or ever formed one parcel of land, yet that the effect of joining them together in one mortgage bond was to make every portion of them equally liable for the debt, and that the legal result is the same as if they had been one single property.

The principal question is whether the liability of the two properties which, as between the owners of those properties and the mortgagee is undoubtedly joint, is as between the plaintiff and defendant to be considered as several; in other words whether this joint liability is, as between the owners of the two properties, to be apportioned. I think that it is. The pleader for the plaintiff, in support of this proposition, relied upon certain passages in Story on Equity and the general principles of what is called "equity and good conscience." In this case, however, I think it is not necessary to resort to any thing so vague or so distant. I think this case is exactly analogus to one that occurs every day in our own Courts of Justice, and may be decided on principles already adopted in India. I see no distinction in principle between this case and that of a suit for contribution between the several holders of a single lot, one of whom has paid the whole revenue. The only difference is that, inone case, the liability of the land to be sold in satisfaction of the claim is created by the law; in the other (the case before us), the same liability is created by the act of private persons competent for the purpose. But to my mind this is a difference which is wholly immaterial; the liability in both cases is complete, and the same reason for apportionment seems to me to exist in both cases, namely the injustice of allowing a mere accident to cast upon a particular portion of land, and therefore upon the owner of that portion, a burden, which was originally and ought still to be fairly laid equally on all. I also think the liability should be divided in the proportion of the value of the two properties at the time of the purchase. The case of contribution for revenue does not here afford an exact

analogy; for, if the separation of ownership is into undivided shares, of course the liability to the revenue is considered to be in proportion to the shares; whereas, if the separation is by an actual partition of the property, the liability to the revenue is, I believe, almost invariably apportioned by the parties themselves, with or without, but generally with, the sanction of the Revenue Officers, upon principles similar to those on which the revenue was originally assessed. It seems to me, however, that no other proportion can be suggested in this case which is so equitable as that of the respective values at the date of division, that is, at the date of the auction-sale. Neither a division according to the respective areas, nor a division according to any combination of area and value would be satisfactory. I therefore think the liability should be thus apportioned, and having arrived so far, the next step in the argument needs no demonstration. The plaintiff, if his figures are correct, has clearly been compelled to pay a sum of money in discharge of a burden which the defendant was legally compellable to discharge; and it is a well established principal of law, in support of which I may again refer to the practice in revenue cases, that, under such circumstances, the defendant is bound to refund the plaintiff the sum of money so paid.

The only objections which the defendant has made to the application of these principles to the present case are: *first*, that the property No. 2 was by the arrangement between Ramnarayan and the defendant completely discharged from all liabiltiy to be sold under the decree; and *second*, that there was never any decree of the Court which compelled the plaintiff to pay this money to Ramnarayan, but only the unmeaning declaration that the appeal was decreed. But in my opinion both these objections failed. The first, upon the manifest principle that no arrangement between Ramnarayan and the defendant can, in any way, affect the rights of the plaintiff, unless he assented to that arrangement whereas the plaintiff in this case, as soon as he heard of the arrangement, at once objected to it. The second, also, fails, because in fact the plaintiff was not bound to resist the claim of Ramnarayan, and drive him to take legal proceedings. That claim was altogether irresistible, and the plaintiff's right as against the

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defendant would have been just as complete, if he had paid Ramnarayan the rupees 187 on demand, without going into a Court of law at all. The only question which remains is as to the figures; the parties seems to be agreed as to the amount which was due upon the mortagage bond-debt to Ramnarayan, although that sum was not, as it ought to have been, ascertained in the decree which he obtained. As regards the respective values of the properties No. 1 and No. 2, the first Court found that they were in proportion to the prices paid for them at the auction-sale, and if so these prices would have afforded a correct criterion for the apportionment of the liability. But the defendant in appeal to the Court below objected to this valuation, and that ground of appeal has, in consequence of the suit having been altogether dismissed, not yet been adjudicated on. The case must therefore go back in order that the lower Appellate Court may consider whether there is any reason for disturbing the finding of the Moonsiff on the question of value, unless, as I cannot help hoping may be the case, the parties will have the good sense to settle that matter amicably.

KEMP, J.—I concur.

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*Before Mr. Justice Bayley and Mr. Justice Hobhouse.*

1869 Aug. 11.

RADHA MOHAN DHAR AND OTHERS (SOME OF THE DEFENDANTS) v. RAM DAS DEY (PLAINTIFF) AND OTHERS (DEFENDANTS.)*

*Hindu Widow—Abandonment of—Ancestral Property—Adverse Possession—Reversionary Heirs—Procedure.*

A Hindu widow held her husband's property till within twelve years of the date of suit. At that time, one of the defendants claimed the property as belonging to his own separate talook; and thereupon gave it up, and ever since refused to enter on it. In a suit by the reversionary heir of the husband to have his title declared, and to obtain possession of the property, *held*, that possession of the defendant was adverse to the widow and reversioners; that the reversioners therefore had a right to sue for a declaration of their title at any time within twelve years from

* Special Appeal, No. 1340 of 1869, from a decree of the Officiating Additional Judge of Chittagong, dated the 18th March 1869, affirming a decree of the Moonsiff of that district, dated the 3rd June 1868.