Appellate Jurisdiction. (a)

Referred Case No. 12 *of* 1869.

GOVINDA MUNEYA TIRUYAN *against* BAPU and two others.

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.

The meaning of the word contract in Section 6, Act XI of 1865 considered.

1870. *February* 12. *S. A. No.* 12 *of* 1869.

THIS was a case referred for the opinion of the High Court by J. H. Nelson, the Judge of the Court of Small Causes at Combaconum in Suit No. 77 of 1869.

The following was the case stated :—

The plaintiff sues as being the managing member of a Hindu family consisting of himself and the 3rd defendant to compel the 1st and 2nd defendants to contribute their aliquot shares of a certain judgment-debt on account of rent. The plaintiff's father and the 1st and 2nd defendants were jointly declared to be liable for the amount of that debt by the decree passed by the Court of the District Munsif of Combaconum in Original Suit No. 939 of 1859, but the whole was levied from the father of the plaintiff and 2nd defendant. The 3rd defendant who is the brother of the plaintiff is alleged to have declined to sue jointly with him, and the plaintiff was advised to join him as a defendant in the suit.

The 1st and 3rd defendants did not appear to answer the matters alleged against them, and it was directed that the hearing of the cause should proceed in their absence.

The 2nd defendant appeared and resisted the claim, and amongst other things pleaded want of jurisdiction in the Court to entertain the suit, inasmuch as the Court is one of very limited jurisdiction, and competent to hear and dispose of such suits only as manifestly fall within the classes specified in Section 6 of Act XI of 1865, which is commonly known as the Small Cause Court Act. And the attention of the Court was especially invited to the full bench decision of the Calcutta High Court reported at page 89, Volume 1 of the *Madras Revenue Register*, which apparently declares it to be the law that no suit for contribution will be in an Indian Court of Small Causes.

(a) Present: Scotland, C.J., Bittleston, Holloway, Innes and Collett, JJ.

1870. *February* 12. *R. C. No.* 21 *of* 1869.

I am of course not bound by that decision, and I see reason to question, though with the utmost deference, the soundness of the doctrine therein expounded, but as the decision is relied on by the 2nd defendant, whilst certain indications of opinion contained in Reports of Madras Cases appear to be favorable to the plaintiff's contention, I conceive it to be my duty to refer for the decision of the High Court two very doubtful questions, upon which the jurisdiction of this Court seems to depend in the present case, and which appear not to have been decided as yet in this Presidency.

These questions are the following, namely

1. In the Mofussil, where the whole amount of a joint judgment-debt has been levied from one of several co-defendants, does that one's right to compel his co-debtor to contribute spring from what is usually termed an implied contract?

2. If it does spring from such contract can a suit for such contribution be entertained in a Court of Small Causes in the Mofussil?

I am of opinion that the first of these questions must be decided in the affirmative, and the second in the negative, and I therefore consider that I have no jurisdiction to entertain the suit, and I direct, subject to the orders of the High Court, that the plaintiff be permitted to withdraw from his suit under Section 97 of the Code of Civil Procedure, with permission to bring a fresh suit for the same matter in a Court of competent jurisdiction, on condition of his paying the costs of the 2nd defendant in defending this suit, or, in default of such withdrawal, that the suit be dismissed with costs.

No counsel were instructed.

The Court delivered the following judgments:—

THE CHIEF JUSTICE.—This case raises substantially the question whether one of several debtors against whom a decree for rent had been obtained can sue his co-debtors for contribution in a Court of Small Causes. The claim is founded upon the defendant's obligation as a co-contractor to pay a proportionate part of the joint debt which the plaintiff had been compelled to discharge, and whether that is an obligation "on contract" within Section 6 of the Act governing Courts

1870. *February* 21. *R. C. No.* 12 *of* 1869.

of Small Causes in the Mofussil (No. XI of 1865) is the point to be considered.

There can be no dobut, I apprehend, that the language of the section "claims for money due on contract," was intended to have the meaning which according to English law it would properly bear, and is consequently not restricted to obligations created by express assent to the terms of an agreement, but include the class of obligations which by that law rest on contracts implied from the circumstances in which the parties stood at the time the obligation arose. The jurisdiction in the present case then depends upon whether the obligation of the defendants is one of this nature. Now I consider that the English decisions have unquestionably established that when a person does or undertakes to do anything which is a benefit to another or burthensome to himself on the request of that other, or which the latter was under a legal duty to do arising out of a relation formed by contract, the law presumes that the parties promised to perform what was just and reasonable with respect to the thing done, and so creates an implied contract which is treated as the basis of the obligation to perform what is just and reasonable. In effect a contract is considered as presumptively proved and the obligation therefore *ex contractu*. Among the decisions which warrant this position several are to be found referred to in the English text-books laying down the existence of an implied contract in a case like the present, and they have been recognized in Referred Case No. 10 of 1863—1, *Madras High Court Reports*, 411, and Referred Cases No. 8 of 1866 and No. 4 of 1868 not reported. It does not strike me that in principle any objection can be made to the implication of a promise in cases of this nature which would not also be more or less applicable to the whole class of cases in which undertakings are impliedly made incidents of a principal contract and so the bond of a liability *ex contractu*. The promise in all is referable to conventional acts of the parties themselves which are considered equivalent in evidentiary effect to proof of express assent. This it is, I think, which makes an implied contract according to the whole tenor of the English decisions, and I cannot doubt that the section was intended by the Legislature to apply to all cases of such implied contracts. It follows from this view of the law that the obli-

1870. *February* 21. *R. C. No.* 12 *of* 1869.

gation in the present case is in my opinion one arising out of a well formed implied contract. The duty to contribute on the payment of the whole debt by one of the parties sprang from the original joint contract to pay the rent, and it is reasonable to imply a promise on the part of the defendant to do that which he was justly bound to do by reason of his relation of co-contractor. I do not think that the circumstance of payment of the debt having been enforced by a judgment makes any difference. The same liability would have arisen if payment had been made before the institution of the suit.

The obligation of contribution is no doubt rooted in general principles of equity independently of contract, as is pointed out in the judgment of the High Court at Calcutta in the case to which reference is made in the statement of the case. But that position, speaking with every respect for other opinions of the Judges who decided that case, does not appear to me to militate against the inclusion of such an obligation in the class of obligations resting on implied contracts when the acts and circumstances from which it springs admit of the inference of a tacit understanding between the parties that each should contribute. Further, I do not feel that any serious objection is presented by the difference between the liability to contribution imposed by the common Law Courts and by the Courts of Equity in England. Equity and good conscience is the rule to be administered by the Courts in the Mofussil, and whatever under it is the limit of the obligation which joint debtors incur, it seems to me that an implied contract may be raised to the same extent on the general ground just expressed.

The liability to contribution on an implied contract does admit of a number of suits on the separate liabilities of the co-debtors, but a similar course of proceeding might be taken in a case of liability upon the equitable obligation only, for I apprehend that the obligation is several as well as joint. Besides a consideration of the possible inconvenience of several suits in some cases should not, it appears to me, have weight in construing the section. Express contracts making several debtors separately liable would be open to a similar observation, and the Civil Procedure Code provides a mode of preventing any injustice being occasioned by several suits.

1870. *February* 21. *R. C. No.* 12 *of* 1869.

There are, I am aware, cases in which the doctrine of obligations arising out of implied contract has been applied more widely. Those for instance in which it has been decided that there is an implied contract to return money paid through mistake:—that a party is at liberty to waive a tort and recover in respect of the wrongful act on the implied contract of the wrong-doer, and that an implied contract between judgment debtors existed although the acts and circumstances giving rise to the liability adjudged precluded the presumption of a promise or request. But in such cases it does appear to me that the obligations can be said to rest on implied contracts only by a pure fiction, and I think they must be considered to be simply obligations arising out of the general principles of justice and positively imposed: obligations merely *quasi ex contractu*. The intervention of a judgment can be no ground for the implication of a liability *ex contractu* when the acts of the parties from which the liability springs do not present any ground for such an implication. At present therefore my opinion is that it would be a strained construction to hold that claims in cases of this nature were claims "on contract" within the meaning of the section.

For these reasons I am of opinion that the obligation to contribute in the present case rests on an implied contract according to the tenor of the English decisions, and is therefore one to which the section is applicable. Consequently that the suit is cognizable by the Court of Small Causes.

MR. JUSTICE BITTLESTON.—I concur in the opinion that the Court of Small Causes has jurisdiction, the suit being based on *contract* within the meaning of the Act.

MR. JUSTICE HOLLOWAY.—Some conflicting rulings upon the question of the liability of a joint-debtor who has been compelled to pay the whole of the debt to be sued in the Small Cause Court for contribution appear to have taken place. I shall make no observations upon any of those cases. Some of them I have not seen (notably the Calcutta one), and as we are now to review those which have been decided here, they must be regarded as in themselves of no authority. The question turns upon the construction of Section 6 of Act XI of 1865 with a trifling addition in Clause 4, a mere copy of Section 3, Act XIII of 1860.

1870. *February* 21. *R. C. No.* 12 *of* 1869.

If the question of the meaning of this clause is to be answered according to the principles of jurisprudence the assignment of any meaning will be very difficult. A contract creates an obligation upon which money may be due, but to say that money is due upon it would be language not very intelligible. The only possible meaning, on the assumption that we are talking as jurists, would be that actions may be brought on bonds and any other contracts which expressly create unilateral or bilateral obligations to pay money. The operations of the Courts will be rather restricted in matters of contract. It seems however to be assumed that at any rate this word "contract" includes all obligations arising out of contract—although I am quite at a loss to see any words justifying that belief if I am to know only the Roman and Civilian meaning of this word standing alone. When however we come to the exceptions, we find that the Legislature thought it necessary to except obligations arising out of the contract of partnership unless the balance was struck by the parties or their agents. Such money would scarcely come under the description of rent, personal property or its value or damages. So that contract seems clearly to mean something more than its proper meaning and something more than the very peculiar meaning above suggested.

It seems pretty clear at the first blush that neither a Roman nor a Civil lawyer drew this Act; it would be to them a mere jargon. Is there a class of lawyers to whom it would be perfectly comprehensible and have a meaning perfectly definite settled in their text books, and embalmed by Legislation? If there is such a body of lawyers, and the gentleman mainly responsible for this Act was one of them, I have as much right to look at the language of such lawyers as, if the Act were written in a foreign language, I should have to use a dictionary. I do not like to quote authority for positions perfectly plain, but for English authority I would refer to *Lord St. Leonards' Remarks* at VII, H. L, 505. Without further periphrasis do we not know, and on the face of this Act can we not see that so far as any lawyer was concerned with this Act it was an English lawyer and could be none other? Then what does contract mean in English law books? There is a book pretty well known to most of us *Addison's Law of Contracts*. In this book I find at pages 26 and 575 of the

1870. *February* 21. *R. C. No.* 12 *of* 1869.

last edition pretty conclusive proof that he thinks this obligation to contribute contractual.

In *Batard* v. *Hawes, Lord Campbell,* a Judge not unacquainted with English Law, tells us *II, El. and Bl.*, 299, that there is an implied contract in such a case. Mr. Justice Bayley, who perhaps knew it still better, is quoted as indirectly, but no less clearly, saying the same thing. Mr. Leake, joint-author of one of the most useful modern text-books, after a very little philosophy which he luckily drops after four pages, gets happy at page 5 when he tells us that "It (contract) is also used and perhaps more accurately to denote the legal rights themselves which spring from those sources," *i. e.*, rights he tells us "*ex contractu* and *quasi ex contractu.*" He goes on "in the latter sense like the word obligation it is used to indicate not only the bond of law arising between and connecting the two parties to the contract, but also as occasion requires the right on the one side and the legal duty and liability on the other which are comprised in the contract," (*Leake's Law of Contracts, p.* 5). Some of his observations are astounding, but he is quite right in what he tells us of English law and justly says that the Law Procedure Act divides all actions into those on contracts and those for wrongs independent of contract. So that what an English lawyer always did and still does mean by contract is not a contract at all in the sense of any one else, but obligations which happen to correspond pretty nearly to the Roman obligations *ex-contractu* and *quasi ex-contractu.* Other more recent legislators have not got clear of a misuse of terms which leads to endless confusion. Being certain that the terms used in this Act were used in the sense of English lawyers, I answer without hesitation that the demand in this case is a demand of money due on contract because I am sure that in the language of those who drew the original Act this was and is the meaning of the word. I will add a few words as to what the obligation really is. It is a one-sided obligation not arising out of contract but out of contract-like grounds, and the basis of the obligation is the possession by one man without ground of what belongs to another; and the Roman lawyers have correctly thought that when a man by his money frees me from my debt I as much have what belongs to him as if he had lent

me the sum of money which he has paid for me. It is taken from his potentiality, and added to mine.

1870. *February* 21. *R. C. No.* 12 *of* 1869.

"*Constat id demum posse condici alicui quod vel non ex justâ causâ ad eumpervenit velredit ad non justam causam.*" Sintenis lawyer, Statesman and Legislator II, S. 109, 3rd *ed.*, and Windscheid, 2nd *ed.*, Pand., Section 421 deal with the matter. With this a whole string of similar obligations will disappear if contract is only to mean *obligationes ex contractu.*

If this action were not cognizable under the word contract, I could not consent to bring it in under the word "damages," for if I gave this latitude of construction I could not understand the use of any of the other words. I take debt to mean the money due on bond or contract to pay money, demand to embrace all the other matters arising out of contract and quasi contract, and damages to mean sums due for the things called torts, and *Exception* 3 confirms me in this opinion.

MR. JUSTICE COLLETT.—I understand the Chief Justice and two senior Puisne Judges to agree that the present case is cognizable by a Court of Small Causes; and I therefore think it unnecessary for me to say more than that I concur in that conclusion which is, I think, in accordance with the decisions in one or two previous cases in which I took part.

MR. JUSTICE INNES.—Four of the judges having concurred, it is unnecessary for me to say more than that I agree that the Act XI of 1865 when speaking of contracts had in view all the obligations which are classed as contracts under English law, viz., express contracts, implied contracts, and obligations *quasi ex contractu.* But in regard to the particular nature of the obligation, I consider that it is one which cannot properly be classed as an implied contract, (or an obligation arising out of an agreement inferred from the conduct of other parties) but that it is an obligation *quasi ex contractu* arising simply *ex debito justitiæ.*