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different from the facts of the present case, and we do not think that the law laid down therein is applicable here; or that section 99 of the Penal Code can protect the Excise Officer, when his conduct was altogether illegal. For the above reasons we set aside the conviction and sentences.

We might, however, hold that the petitioners are guilty of the offence of ordinary assault punishable under section 352 of the Penal Code, but we are not quite sure whether the resistance offered or the force used was not necessary to resist the Excise Officer in what he attempted to do, *viz.*, to break open the door of the petitioner's house. But in any view of the matter, it seems to us that the incarceration, which the petitioners have already suffered under the sentence imposed by the Magistrate, is sufficient in the circumstances of the case, and that there need not therefore be any formal conviction for assault under section 352.

C. E. G. *Rule made absolute.*

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

1896 *December* 8.

GOBIND CHUNDER NUNDY AND ANOTHER (PLAINTIFFS) *v.* SRIGOBIND CHOWDHRY AND ANOTHER (DEFENDANTS).*

Contribution, Suit for—Joint wrong-doers—Decree for costs—Evidence—Proceedings in former case not between same parties—Admissibility in evidence of finding in former case.

S granted to *G* and *A* a *putni* of a certain share in a zemindari, and thereupon *P* brought a suit against *G*, *S* and *A* for specific performance of an agreement to grant to him (*P*) a *putni* of the same share. That suit was decreed with costs, the whole of which were realized from *G*. In a suit for contribution brought by *G* against *S* and *A*, the lower Appellate Court found that *G*, *S* and *A* had conspired in setting up a false defence in the former suit in order to defeat *P's* claim.

*Appeal from Appellate Decree No. 1237 of 1895, against the decree of K. N. Roy, Esq., District Judge of Pubna and Bogra, dated the 20th of April 1895, affirming the decree of Babu Rash Behari Bose, Munsif of Serajgunge, dated the 10th of September 1894.

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Held, on second appeal, that, assuming such collusion were proved, the suit for contribution was not maintainable: G, S and A being joint wrong-doers.

Vayanara Vadaka Vittil Manja v. *Pariyangot Padinnara Kuruppath Kudugoth Nayar* (1) followed; *Brojendro Kumar Roy Chowdhry* v. *Pash Behari Roy Chowdhry* (2), distinguished.

The only evidence on which the lower Appellate Court had acted as establishing such collusion was the finding of the Court in the former suit (gathered from the grounds of appeal in that suit). *Held*, that that finding was inadmissible in evidence, as laid down in *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdry* (3), being the finding in a case in which G, S and A were all co-defendants, and a third party the plaintiff; and the case was remanded for the determination of the question whether G, S and A were wrong-doers, and were as such held liable for the costs of the former suit.

SRI GOBIND CHOWDHRY, defendant No. 1, the proprietor of a three annas share in *mouzah* Mouhaly, let out in *putni* 2 annas and 5 gundas to the plaintiffs, and the remaining 15 gundas to Anand Chunder Tarafdar, defendant No. 2. Under a previous contract he had, however, agreed to grant a *putni* of the entire 3 annas share to one Prannath Nundy. On that contract Prannath Nundy brought a suit No. 25 of 1891 in the Subordinate Judge's Court at Pubna against the plaintiffs and the defendants in this suit for cancellation of the leases granted to the plaintiffs and the defendant No. 2, for execution of a lease in his favour by the defendant No. 1, and for possession of the property. In that suit Prannath obtained a decree, which was upheld on appeal, and the present plaintiffs and the defendants were made jointly liable for his costs. In execution of the decree for costs the plaintiffs' property was attached and advertised for sale. They paid the money into Court and brought this suit against the defendants for contribution. The defendant No. 2 appeared and contended that the suit was not maintainable, that he was not liable to contribute, and, that if he was so liable, the proportion of his liability should not exceed the proportion of the share let out to him in *putni*. The Court of first instance dismissed the suit on the ground that no suit for contribution lies by one of several joint wrong-doers against another. The plaintiffs appealed to the Officiating Judge of Pubna, who dismissed the appeal.

(1) I. L. R., 7 Mad., 89. (2) I. L. R., 13 Calc., 300.
(3) I. L. R., 13 Calc., 352.

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The plaintiffs appealed to the High Court.

Babu *Mohini Mohun Chuckravarti* for the appellants.

Babu *Hur Chunder Chuckravarti* and Babu *Sarat Chunder Khan* for the respondents.

The judgment of the Court (BANERJEE and RAMPINI, JJ.) was as follows :—

This appeal arises out of a suit brought by the plaintiffs-appellants for contribution, on the allegation that the plaintiffs and defendant No. 2 took from defendant No. 1 a 2 annas 5 gundas and a 15 gundas share of a certain zemindari in *putni* by two separate documents ; that thereupon a suit was brought by one Prannath Nundy against the plaintiffs and defendants Nos. 1 and 2 for enforcing specific performance of a contract to grant a *putni* to him of the said two shares ; that that suit was decreed with costs, and the whole costs decreed in favour of Prannath Nundy were realized from the plaintiffs. The plaintiffs seek to recover two different amounts from the two defendants Nos. 1 and 2.

The defence of the defendants was a denial of liability. They also pleaded that the suit was not maintainable ; and they took some exception as to the extent of the liability of each.

The Courts below have thrown out the suit on the ground that no suit for contribution lies by one of several joint wrong-doers against the others.

In second appeal it is contended that the lower Appellate Court is wrong in finding that the plaintiffs and the defendants were joint wrong-doers, or that they conspired together in setting up a false defence in the suit in which the decree for costs was made, when there is no legal evidence to sustain the finding ; and further that the lower Appellate Court is wrong in treating this suit as one for contribution by one of several wrong-doers against the others.

Upon the first point what the lower Appellate Court says is this : "From the grounds of appeal of the original suit, it is clear that the Court held that the plaintiffs and the defendants made a conspiracy to defeat the contract between the defendant No. 1, Sri Gobind Chowdhry and Prannath Nundy, and, as such, were joint wrong-doers, and they knew that they were

doing an illegal and wrongful act." Exception is taken to this finding on the ground that the grounds of appeal in the former suit could not be used as evidence to establish the fact found. We are of opinion that this contention is correct. The utmost that the grounds of appeal can be taken to show is that the plaintiffs, who were some of the appellants, admitted in their grounds that the finding of the first Court was what the lower Appellate Court in this case states it to be. But though that may be so, the finding of the Court in the former suit would be no evidence in the present suit of the fact found, for this simple reason, that that finding was arrived at in a case in which the present plaintiffs and the defendants were all co-defendants and a third party was the plaintiff. This is the rule of law laid down by a Full Bench of this Court in *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry* (1). The finding of the lower Appellate Court upon this point cannot therefore stand.

The next question is whether the case should be remanded for the determination of the question whether the plaintiffs and the defendants in this case combined to defeat the plaintiffs in the former suit, and with that object put in false defences. We are of opinion, having regard to the manner in which this case has been dealt with by the Courts below, that if the determination of this question is necessary for the right decision of the case, the case ought to go back to the Court of first instance. It becomes important, therefore, to determine whether it is necessary for the decision of the case that the question stated above should be determined. The learned Vakil for the appellants relies upon the case of *Brojendro Kumar Roy Chowdhry* v. *Rash Behari Roy Chowdhry* (2) in support of his contention that the plaintiffs in a case like this are entitled to contribution quite irrespective of the question referred to above, as the suit which resulted in the award of costs in respect of which contribution is asked for was a suit based, not upon tort, but upon contract. But we are of opinion that that case is distinguishable from the present one, as no question arose in that case as to whether the parties who were made liable for damages and costs in that

(1) I. L. R., 13 Calc., 352. (2) I. L. R., 13 Calc., 300.

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suit had incurred that liability by reason of their having set up any false defence. On the other hand, we think the case of *Vayangara Vadaka Vittil Manja* v. *Pariyangot Padingara Kurup-path Kadugochen Nayar* (1) is much more in point upon this question. In that case it was held that where the plaintiffs colluded with the defendant in a former suit to endeavour to defeat the plaintiffs there, and were made liable for costs, no suit for contribution in respect of such costs would lie. Following this decision of the Madras High Court, which in our opinion lays down a wholesome rule, we think the case ought to be remanded to the first Court for the determination of the question stated above and of any other question relative to the apportionment of liability that may be found necessary.

The costs will abide the result.

F. K. D. *Case remanded.*

Before Mr. Justice Banerjee and Mr. Justice Gordon.

1896
November 28.

JATRA MOHUN SEN (PLAINTIFF) APPLICANT *v.* AUKHIL CHANDRA CHOWDHRY (DEFENDANT No. 1) AND OTHERS, OPPOSITE PARTIES.*

Sale for arrears of Revenue—Right of Auction-Purchasers to annual incumbrances—Act XI of 1859, section 37—Suit to cancel under-tenures—Parties—Review—Civil Procedure Code (Act XIV of 1882), section 630.

The right that is given by section 37 of Act XI of 1859 to the auction-purchaser of an entire estate in the permanently-settled districts of Bengal, Behar, and Orissa, sold for arrears of revenue, to avoid and annul an under-tenure is a right that must be exercised by all the purchasers jointly where there are more purchasers than one.

THE plaintiff brought a suit to recover possession of some land comprised in two schedules appended to the plaint as appertaining to a *taluk* held and owned by him. The defendant No. 1 resisted the claim upon the ground chiefly that he, the defendant, being one of the purchasers of the entire estate within which the *taluk* set up by the plaintiff was situated, at a sale for arrears of Government revenue, the plaintiff was not entitled as against him to enforce his right as *talukdar*. The other defendants did not appear. The Court of first instance decreed the claim

* Civil Rule No. 883 of 1896 and Application for Review in Appeal from Appellate Decree No. 1757 of 1894.

(1) I. L. R., 7 Mad., 89.