

therefore prepared to say that the order so far as it referred to Rent Courts was entirely without jurisdiction.

In my opinion no good ground has been made out for interference and I would dismiss the application.

By THE COURT.—The order of the Court is that the application is dismissed.

1908

IN THE  
MATTER  
OF THE  
PETITION  
OF KEDAR  
NATH.

## APPELLATE CIVIL.

1908  
December 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

MUHAMMAD YAHIYA AND OTHERS (PLAINTIFFS) v. RASHID-UD-DIN  
(DEFENDANT).\*

*Mortgage—Joint mortgage—Satisfaction of mortgage debt by sale of part only of the mortgaged property—Suit for contribution by mortgagor whose property has been sold.*

In a suit for contribution amongst co-mortgagors, even if it is a condition precedent to the institution of such a suit that the whole mortgage debt should have been satisfied by sale of mortgaged property, it is not also necessary that it should have been satisfied wholly out of the property of the plaintiff. *Ibn Husain v. Ram Dai* (1) and *Ibn Hasan v. Brijbhukan Saran* (2) referred to.

THIS was a suit for contribution arising out of the following facts. There was a mortgage executed by the plaintiffs and some of the defendants and the predecessors of others on the 20th of August 1892. A decree for sale was obtained on it on the 11th of July 1902. On the 22nd of April 1903 portions of the mortgaged property were sold by auction in execution of the decree and the whole amount of the mortgage was thereby discharged. The plaintiffs came into Court alleging that their property had contributed towards the mortgage debt a much larger amount than that for which it was proportionately liable. They therefore claimed the difference between the amount realized by the sale of their property and the amount of their proportionate liability. The Court of first instance, relying on the case of *Ibn Hasan v. Brijbhukan Saran* (2), dismissed the suit upon the ground that the whole of the mortgage money was not realized by sale of the plaintiff's property alone. The plaintiffs appealed to the High Court.

\*First Appeal No. 155 of 1906, from a decree of Raj Nath, Subordinate Judge of Allahabad, dated the 29th of May 1906.

(1) (1889) I. L. R., 12 All., 110. (2) (1904) I. L. R., 26 All., 407.

1908

MUHAMMAD  
YAHYA  
v.  
RASHID-U-D-  
DIN.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Tej Bahadur Sapru*, for the respondent.

BANERJI, J.—This appeal arises out of a suit for contribution brought by the plaintiffs in respect of a mortgage executed by them and by some of the defendants and the predecessors in title of other defendants. The mortgage was made on the 20th of August 1892, and a decree was obtained on the basis of it on the 11th of July 1902. On the 22nd of April 1903 portions of the mortgaged property were sold by auction in execution of the decree and the whole amount of the mortgage was thereby discharged. One of the mortgagors whose property was sold has already sued for and obtained a decree for contribution. The present suit was brought by the plaintiffs for contribution against those of the mortgagors or their representatives whose interests in the mortgaged property were not sold by auction. The allegation of the plaintiffs is that their property has contributed towards the mortgage debt a much larger amount than that for which it was proportionately liable. The plaintiffs accordingly claimed the difference between the amount realized by the sale of their property and the amount of their proportionate liability. The Court below has dismissed the suit simply on the ground that the whole of the mortgage money was not realized by the sale of the plaintiffs' property alone, and in support of its opinion it has relied on the decision of this Court in the case of *Ibn Hasan v. Brijbhukan Suran* (1). In my judgment the Court below has misunderstood that ruling. According to the view which I took in that case the present suit was clearly maintainable. But even according to the opinion of the majority of the Judges who decided that case the suit is also maintainable. What was held in that case was that unless the whole amount of the mortgage had been discharged, a suit for contribution was not maintainable. In the present case the whole of the mortgage money has admittedly been realized by the sale of the property of some of the mortgagors, and therefore the plaintiffs have a right of contribution if the sale of their property has discharged more than their rateable share of the debt. The question in the case referred to above was whether a suit for contribution

(1) (1904) I. L. R., 26 All., 407.

could be maintained unless the whole amount of the mortgage was discharged, and the majority of the Judges constituting the Bench answered the question in the negative. It was not held that a plaintiff seeking contribution must be the person who has discharged the whole mortgage. If the whole of the mortgage debt has been paid off, a right of contribution undoubtedly arises. The Court below therefore was wrong in dismissing the suit on the preliminary ground on which it dismissed it, and the case must be remanded for trial on the merits.

STANLEY, C. J.—I agree. In my judgment in *Ibn Hasan v. Brijbhukan Suran* (1) upon which reliance has been placed by the appellants' learned advocate, I did not decide or intend to decide, that where a mortgage has been wholly satisfied, a co-mortgagor who has discharged more than his rateable portion of the debt, is not entitled to contribution from his co-mortgagors. What was decided in that case was that until the entire mortgage debt has been satisfied a claim for rateable contribution could not be enforced. The case of *Ibn Hasan v. Ram Dai* (2) was, I think, rightly decided. In the case before us the whole debt has been satisfied. The right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that other property alone.

BY THE COURT:—The order of the Court is that the appeal is allowed and the decree of the Court below set aside, and, inasmuch as the suit was decided on a preliminary point, we remand the case under the provisions of section 562 of the Code of Civil Procedure, with directions that it be readmitted on the file of pending suits in its original number and be disposed of on the merits. The appellants will have the costs of this appeal. All other costs will abide the event.

*Appeal decreed and cause remanded.*

(1) (1904) I. L. R., 26 ALL., 407.      (2) (1889) I. L. R., 12 ALL., 110.

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