

REVISIONAL CIVIL.

Before Mr. Justice Dalal.

1927
November, 8. MUHAMMAD ALI (DEFENDANT) v. MAKTUB-UN-NISSA
AND ANOTHER (PLAINTIFFS.)*

Act No. IX of 1887 (Provincial Small Cause Courts Act), schedule II, article 42—Jurisdiction—Small Cause Court suit—Suit by one co-mortgagor who had been obliged to pay the entire decree on the mortgage for re-imbusement—Act No. IX of 1872 (Indian Contract Act), section 69.

Only such suits are barred by the Provincial Small Cause Courts Act as are actually covered by the words of the different articles and not those which are in substance like suits described in those articles.

A suit, therefore, for contribution brought by one co-mortgagor against another—not being a suit falling under section 95 of the Transfer of Property Act, 1882, but rather under section 69 of the Indian Contract Act, 1872—is not excluded from the jurisdiction of a Court of Small Causes. *Talaimand Singh v. Gobind Singh* (1), *Gaya Pande v. Amar Deo Pande* (2), and *Raza Husain v. Hasan Jan* (3), referred to.

THIS was an application in revision against a decree of the District Judge of Budaun, upon the ground that the suit had been tried as a regular suit, whereas it ought to have been tried as a Small Cause Court suit. The facts of the case sufficiently appear from the judgment of the High Court.

Mr. Akhtar Husain Khan, for the applicant.

Munshi Shiva Prasad Sinha, for the opposite parties.

DALAL, J. :—I am afraid that this Court must interfere in revision, though it appears on the face of the record, as pointed out by the plaintiffs respondents' learned counsel, that substantial justice has been done. The

*Civil Revision No. 149 of 1927.

(1) (1915) 13 A.L.J., 694.

(2) (1924) 22 A.L.J., 855.

(3) (1915) 13 A.L.J., 632.

plaintiffs were heirs of one of two co-mortgagors and paid up the entire amount of the decree for sale obtained on the mortgage. Subsequently they brought the present suit for contribution against the defendant to the extent of his share in the property. The defendant has been held by the two subordinate courts to have been one of the mortgagors. Ground of revision No. 2, therefore, has no force. The difficulty arises, however, that the suit was tried regularly and not by a Court of Small Causes. The trial court referred to article 42, schedule II of the Provincial Small Cause Courts Act which takes away from the jurisdiction of that court a suit by one of several joint mortgagors of immoveable property for contribution in respect of money paid by him for the redemption of the mortgaged property. I have read the plaint of the present suit. It is based on the provisions of section 69 of the Contract Act. A person who is interested in the payment of money which another is bound by law to pay and who, therefore, pays it, is entitled to be reimbursed by the other. The present suit is not one under section 95 of the Transfer of Property Act, which says :—“ Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.” The wording of clause 42, schedule II, of the Provincial Small Cause Courts Act is such that it must refer to a suit of the nature mentioned in section 95 of the Transfer of Property Act which is a suit for the enforcement of a lien by sale of mortgaged property. The learned counsel for the respondent very properly referred me to the case of *Talaimand Singh v. Gobind Singh* (1), where a learned Judge of this Court held that a suit like the present was in substance one covered by article 42. No reasons are given for the opinion. The learned Judge is not of opi-

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nion that the suit is the same as that referred to in article 42, but has stated that it was in substance such. I think, however, that only such suits are barred as are actually covered by the words of the different articles and not those which are in substance like suits described in those articles. In the present case the plaintiffs were compelled to pay money which the defendant was liable to pay, and the suit is based on an implied contract for reimbursement. The suit is not brought under any of the sections of the Transfer of Property Act. I have been referred by learned counsel to other decisions of this Court, *Gaya Pande v. Amar Deo Pande* (1) and *Raza Husain v. Hasan Jan* (2). In those cases, however, the facts were not similar.

I set aside the decrees of the two subordinate courts and direct the court of the Munsif to return the plaint to the plaintiffs for institution of a suit in the Court of Small Causes having jurisdiction. Costs here and heretofore shall abide the result.

Decrees set aside.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Ashworth.

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 November, 8.

PHUL CHAND AND ANOTHER (PLAINTIFFS) v. RAM NATH AND ANOTHER (DEFENDANTS).*

Act (Local) No. II of 1903 (Bundelkhand Alienation of Land Act), section 16A—Act (Local) No. XI of 1922 (Agra Pre-emption Act), sections 3, 7 and 12—Pre-emption—Plaintiff not belonging to same agricultural tribe as vendor—Competence of Collector to sanction suit for pre-emption.

Plaintiff claimed a right on the strength of a custom recorded in the *wajib-ul-arz* to pre-empt certain property, situated in Bundelkhand and sold by a co-sharer in the mahal to a

* Second Appeal No. 99 of 1926, from a decree of M. F. P. Herchenroder, District Judge of Cawnpore, dated the 13th of October, 1925, reversing a decree of Raghunath Prasad, Munsif of Banda, dated the 30th of March, 1925.

(1) (1924) 22 A.L.J., 855.

(2) (1915) 13 A.L.J., 632.