

## REVISIONAL CIVIL

*Before Mr. Justice Misra*

SHIAM LAL (PLAINTIFF) *v.* NAWAL KISHORE AND  
ANOTHER (DEFENDANTS)\*

1938  
August, 22

*Contribution—Costs awarded against co-mortgagees defendants in a suit for declaration by person with paramount title—Costs payable by each co-mortgagee should be proportionate to his interest in the mortgage—Contribution interest.*

In a simple mortgage the co-mortgagees had advanced the mortgage money in unequal shares. After a decree for sale had been obtained on the mortgage a suit was brought against the mortgagees by a third person with paramount title to a part of the mortgaged property and a declaratory decree was passed therein and costs of the suit were awarded against the defendants co-mortgagees. The plaintiff of that suit realized the costs from one co-mortgagee, and he then brought a suit for contribution against the other co-mortgagees: *Held*, that the co-mortgagees were liable to contribute towards the costs not in equal shares but in shares proportionate to their respective interests in the mortgage, i.e. to the amounts of money which had been advanced by them respectively on the mortgage.

Mr. C. B. Agarwala, for the applicant.

Mr. S. N. Seth, for the opposite parties.

MISRA, J.:—This is an application in revision against the order of the Judge, small cause court of Aligarh, in a suit for contribution for costs.

One Muhammad Zafar Husain Khan borrowed Rs.47,000 on foot of a simple mortgage from the parties to this revision and their predecessors in interest; Rs.42,000 were taken from Nawal Kishore defendant and Mst. Genda Kuer deceased predecessor in interest of Ram Kishore defendant and Rs.5,000 from Shiam Lal plaintiff and his deceased brother Gulab Rai. A suit was brought on this mortgage. A decree was passed on it and the mortgaged property was put to sale. Thereafter one Ruqya Begam with some others

brought a declaratory suit claiming that half the mortgaged property was hers and was not liable to attachment and sale. The parties to this case were defendants in that suit for a declaration. The suit was eventually decreed and costs were awarded to Mst. Ruqya Begam and others from the defendants in that case. These costs were realised solely from Shiam Lal plaintiff who paid the money under protest and then brought a suit for contribution against Nawal Kishore and Ram Kishore. Shiam Lal's case was that he was liable to pay costs only to the extent of his interest in the property for which Mst. Ruqya Begam and others had sued and the opposite parties Nawal Kishore and Ram Kishore were liable to pay to the extent of their interest. The learned Judge of the small cause court, however, held that each of the parties was jointly and equally liable.

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On behalf of the applicant Shiam Lal it is contended that the learned Judge of small causes was in error in holding the applicant to be equally liable with the defendants, because the extent of the interest of the applicant in the property for which Mst. Ruqya Begam had sued was only 5/47. In support of his argument learned counsel has referred to the cases of *Kisto Coomar Chowdhry v. Anund Moyee Chowdhraïn* (1), *Shaikh Murdan Ali v. Shaikh Tufuzzul Hossein* (2) and *Obhoy Kant Lahoree v. Ram Soonduree Dabee* (3). On behalf of the opposite party it is argued that these cases were cases of possession of property and a different principle would apply to a case like the present. In my judgment, however, the same principle would apply in the present case. If instead of the mortgage having been a simple one, the mortgagees had been in possession of the property and Mst. Ruqya Begam had sued for possession and half the property had gone out of the possession of the mortgagees, the interest of the parties

(1) (1867) 7 W.R. 300.

(2) (1871) 16 W.R. 78.

(3) (1873) 20 W.R. 209.

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which would have been affected would have been the same as now. By the declaration having been granted to Mst. Ruqya Begam, half the mortgaged property has ceased to become available to the parties and in that half the interest of the plaintiff applicant is only  $5/47$  and that of the opposite parties  $42/47$ . I think, therefore, that in equity costs should have been contributed by the parties in proportion to their interest in the property affected by the suit of Mst. Ruqya Begam.

For these reasons I allow this application in revision with costs and order that the claim of the plaintiff in the lower court be decreed not to the extent of  $1/2$  but to the extent of  $42/47$  with proportionate costs. Interest was not allowed by the trial court and is therefore not allowed to the applicant.

### APPELLATE CIVIL.

*Before Mr. Justice Bennet, Acting Chief Justice*

KALIKA PANDE (DEFENDANT) v. RAM AUTAR PANDE  
AND ANOTHER (PLAINTIFFS)\*

1938  
August, 24

*Civil Procedure Code, order XLI, rule 27—Remand for further evidence—When justified—“Any other substantial cause”—Appellate court finding plaintiff's evidence insufficient to prove his case—Civil Procedure Code, order XLI, rules 23, 25, 27—Remand, when justified.*

Order XLI, rule 27(1)(b), or (c) as re-numbered after amendment of the rule by the Allahabad High Court, gives a limited power for an appellate court to use where certain definite evidence is required by the court itself to enable it to pronounce judgment or for any other substantial cause; the rule is not intended to allow a party, who did not produce sufficient evidence in the trial court necessary to establish his right, to produce further evidence in order to prove his right when he has reached the stage of appeal.

There is no justification for an order of remand for further evidence where the plaintiff's evidence, which had been regarded by the trial court as sufficient to prove his case, is deemed

\*First Appeal No. 292 of 1937, from an order of Kunwar Bahadur, Additional Civil Judge of Gorakhpur, dated the 3rd of February, 1937.