

XXXIV of the Code of Civil Procedure. That a decree may provide for the relief of a sale as well as of further execution in case the sale proceeds were found to be insufficient to satisfy the whole of the decretal amount is borne out by the decision of their Lordships of the Judicial Committee in the case of *Jeena Bahu v. Parmeshwar Narayan Mahta* (1). We regret that the respondents are not present, but we are indebted to the learned Counsel for the appellant that every thing that could be said on behalf of the respondents has been placed by him before us for consideration, and we have delivered our judgment after anxious thought as to the point involved in this appeal.

We accordingly allow the appeal, set aside the order of the court below, and direct that the application be restored to its original number in the appropriate register and proceeded with according to law and in the light of the observation made in this judgment. No order as to costs.

Appeal allowed.

REVISIONAL CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge.

KASHI NATH RAI (PLAINTIFF-APPLICANT) *v.* THAKUR
NAND BEHARI SINGH (DEFENDANT-OPPOSITE-
PARTY).*

1928
January, 5.

Provincial Small Cause Courts Act (IX of 1887), second schedule, article 41—One of joint executants of a bond discharging the whole debt—Suit against the other to make good the loss—Contribution suit—Cognizance of suit by a court of small causes.

Where two persons share in the benefit derived from the joint execution of a bond and one of them leaves the other

* Section 25, Application No. 54 of 1927, against the decree of G. C. Chatterji, Subordinate Judge of Fyzabad, dated the 17th of September, 1927, dismissing the plaintiff-appellant's suit.

(1) (1919) L.R., 46 I.A., 294.

1928
 KASHI
 NATH RAI
 v.
 THAKUR
 NAND
 BEHARI
 SINGH.

to make certain payments and to satisfy the amount due thereon, a suit by the person who makes the payments and satisfies the bond against the other to make good the loss. is not a suit for contribution, and there is nothing in the Provincial Small Cause Courts Act to prevent a suit of that nature being brought in the Small Cause Court. *Sardha Bakhsh Singh v. Durga Bakhsh Singh* (1), distinguished.

Mr. S. N. Roy, for the appellant.

Mr. Naim Ullah, for the opposite party.

STUART, C. J. :—The facts are as follows. On the 16th of June, 1919, Kashi Nath Rai and Thakur Nand Behari Singh executed jointly a bond in favour of Hanuman Prasad for Rs. 187-8-0. I find on the facts that Kashi Nath Rai paid in respect of the liability on this bond Rs. 40 on the 1st of February, 1920, Rs. 25 on the 2nd of February, 1921, Rs. 10 on the 2nd of May, 1921 and Rs. 20 on the 1st of April, 1922. Thakur Nand Behari Singh paid nothing. The consideration in question of the first bond had been shared equally between Kashi Nath Rai and Thakur Nand Behari Singh. On the 25th of September, 1922, over Rs. 300 was found due on the bond of the 16th of June, 1919. Hanuman Prasad obtained from Kashi Nath Rai a promissory note for Rs. 300 in full satisfaction of this liability. Thakur Nand Behari Singh was asked to join in the execution of this promissory note. He agreed to do so but refrained from executing it. Hanuman Prasad instituted a suit on the basis of the promissory note against Kashi Nath Rai alone. A decree was obtained. Kashi Nath Rai has paid in all Rs. 646 in full satisfaction of this decree between February, 1925; and the 23rd of February, 1927. On the 23rd of February, 1927, he instituted the suit which I am now considering against Thakur Nand Behari Singh. The learned Small Cause Court Judge has decided on the facts much as I have

decided. The facts are very clear. Thakur Nand Behari Singh shared in the benefits derived from the execution of the bond of 16th of June, 1919. He left Kashi Nath Rai to make all the payments that were made prior to the 25th of September, 1922. He left Kashi Nath Rai to stand alone for the liability of satisfying the balance. The learned Small Cause Court Judge accepts this view of the facts, but he dismissed the suit on the ground that it was a suit for contribution, and as such could not be maintained according to the decision of the late Court of the Judicial Commissioner in *Sardha Bakhsh Singh v. Durga Bakhsh Singh* (1). This decision has no bearing on the case. The present suit is not a suit for contribution. There was no question of joint promise in respect of the promissory note of the 25th of September, 1922, inasmuch as Thakur Nand Behari Singh did not join in the execution of the promissory note. The plaintiff Kashi Nath Rai has no remedy in respect of the payments made before the 25th of September, 1922. Any such remedy as he might have in respect of those payments is now barred by time, but he is certainly entitled to a remedy in respect of payments which he has made since February, 1925. How does the case stand? If Thakur Nand Behari Singh had acted, as he should have acted, he would have joined Kashi Nath Rai in executing the promissory note of the 25th of September, 1922. By the action which he has taken he has put Kashi Nath Rai at a loss to the extent of Rs. 323, and the cause of action is within time. There is nothing in the Provincial Small Cause Courts Act to prevent a suit of this nature being brought in the Small Cause Court. I accordingly allow the application to this extent. I direct that a decree shall be passed in favour of Kashi Nath Rai against Thakur Nand Behari Singh for Rs. 323. I see no reason to allow

1928

KASHI
NATH RAI
v.
THAKUR
NAND
BEHARI
SINGH.

Stuart, C. J.

1928

KASHI
NATH RAI
v.
THAKUR
NAND
BEHARI
SINGH.

interest. Thakur Nand Behari Singh will pay his own costs and those of Kashi Nath Rai in both courts. I do not reduce costs.

Revision allowed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Muhammad Raza.

1928
January, 10.

RAJ FATEH SINGH, THAKUR, (PLAINTIFF-APPELLANT)
v. BALDEO SINGH, THAKUR, AND ANOTHER (DE-
FENDANTS-RESPONDENTS.)*

Hindu law—Illegitimate son—Succession of an illegitimate son to the estate of collaterals as heir—Succession as sapinda—Sapinda relationship pre-supposes lawful marriage—Evidence Act (I of 1872), sections 13 and 18—Statement of agent that his principal was a bastard, admissibility of—Judgment stating that illegitimacy of a person was undisputed, admissibility of.

An illegitimate son is not a collateral heir. By an exceptional rule he takes his father's estate by the right of inheritance and also succeeds by right of survivorship. But there is no authority for holding that he succeeds to the estate of collaterals as an heir. A *sapinda* relationship pre-supposes a lawful marriage. Where a person cannot succeed as a *sapinda* to another person it follows as a necessary conclusion that the former's successor cannot succeed to a successor of the latter, and has no rights under the Hindu law.

Where the agent of a person stated before the Settlement Officer that his principal was a bastard, and another agent holding a properly executed power of attorney made a statement before a court that the father of his principal was born of a mistress, the statements are admissible in evidence under section 18 of Act I of 1872, being statements made by an agent to a party to proceedings in circumstances showing that they were expressly or impliedly authorised to make the

*First Civil Appeal No. 39 of 1927, against the decree of Bhudar Chandra Ghosh, Subordinate Judge of Bahraich, dated the 23rd of December, 1926, dismissing the plaintiff's claim.