

1927

ZAKAULLAH
KHAN
v.
MUSAMMAT
GULSHANI.

when the decree determines the liabilities of judgment-debtors *inter se* for an amount which is necessarily less than the total amount awarded. We consider that the learned Judge of this Court who has arrived at the same view has arrived at a correct view, and we accordingly dismiss this appeal with costs.

Stuart, C. J.
and
Hasan, J.

Appeal dismissed.

MISCELLANEOUS CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge, and
Mr. Justice Wazir Hasan.*

1927

December,
20. *

DATA DIN AND ANOTHER (PLAINTIFFS-APPELLANT) v. BALDEO AND OTHERS (DEPENDANTS-RESPONDENTS).*

Provincial Small Cause Courts Act (IX of 1887), schedule II, article 41—Contribution suits founded on a decree, whether always governed by article 41—Small Cause Courts, cognizance of suits by—Suit by a sharer in joint property in respect of payments made by him of money due from him jointly with other co-sharers.

Held, that it cannot be laid down broadly as a proposition of law that every claim for contribution founded upon a decree is not a claim of the nature specified in article 41 of the Small Cause Courts Act, 1887. The fact that a decree may furnish the cause of action for a suit of contribution is itself no ground for holding that it cannot be a suit of the nature contemplated by article 41. The right test always is the nature of the suit as brought, and not the circumstances which constitute the cause of action.

Where in execution of a decree for arrears of rent the decree-holder sold certain zamindari shares belonging to the plaintiff and certain other co-sharers and the sale was set aside in respect of the plaintiff's share on payment of a certain sum, *held*, that the suit brought by the plaintiff for the recovery of the sum so paid together with interest against a number of persons, majority of whom were parties to the decree, was a

*Reference for Ruling No. 1 of 1927.

suit by a sharer in joint property in respect of payment made by him of money due from a co-sharer, and the cognizance of such a suit by the Small Cause Court was excluded by article 41 of schedule II of the Small Cause Courts Act. *Bhairon v. Ram Barun* (1), distinguished, *Hon'ble Maharaja Sir Bhagwati Prasad Singh, K.C.I.E., of Balrampur Estate v. Raja Muhammad Abdul Hasan Khan of Bilahra Estate* (2), and *Sidhnath v. Sheo Dayal* (3), referred to.

Mr. Mahabir Prasad, for the appellants.

Mr. Hardhian Chandra, for the respondents.

STUART, C.J., and HASAN, J. :—This is a reference under rule 6 of order XLVI of the Code of Civil Procedure by the Additional Subordinate Judge of Gonda for a ruling as to whether a certain suit pending before him in the character of a Judge of Small Cause Court is maintainable as such or its cognizance is excluded by article 41 of schedule II of Act IX of 1887, Small Cause Courts Act.

The learned Judge of the court below is of opinion that cognizance of the suit by the Small Cause Court is excluded by article 41 of schedule II of Act IX of 1887. We agree with the learned Judge. We want to state at the outset our appreciation of the way in which the learned Judge has clearly and forcibly marshalled arguments in support of his opinion. The nature of the suit is as follows :—

One Bishen Narain brought a suit in the Court of Revenue for recovery of arrears of rent against a large number of persons. He obtained a decree for a sum of Rs. 394-10-6 on the 22nd of December, 1918. In the process of execution of that decree, Bishen Narain sold certain zamindari shares belonging to the plaintiffs and other co-sharers. The sale was set aside in respect of the plaintiffs' share on payment of a sum of Rs. 182-7-5 on the 7th of April, 1924. The plaintiffs now claim a sum of Rs. 240-15-2 as principal and interest from the

(1) (1906) I.L.R., 28 All., 292. (2) (1918) 5 O.L.J., 109.

(3) 1925) 2 O.W.N., 571.

1927

DATA DIV

v.

BALDEO.

Stuart, C. J.
and
Hasan, J.

defendants the majority of whom were party to the decree obtained by Bishen Narain.

The liability of each defendant is specified in the list attached to the plaint, and is in proportion to the share which each defendant holds in the under-proprietary tenure in respect of which the decree for rent was passed. The question in the case is whether a suit of the nature described above is or is not covered by article 41 of the Small Cause Courts Act, 1887. The only argument urged in favour of the plea that it is not covered by that article is that the cause of action for this suit is the decree for rent obtained by Bishen Narain, and a claim for contribution between co-judgment debtors is not a claim which would fall within the article mentioned above. The argument is sought to be supported by cases of *Bhairon v. Ram Baran* (1), the *Hon'ble Maharaja Sir Bhagwati Prasad Singh, K.C.I.E., of Balrampur Estate v. Raja Muhammad Abul Hasan Khan of Bilahra Estate* (2) and *Sidhnath v. Sheo Dayal* (3). There is no doubt that these decisions establish, to a certain extent, the point taken in the argument, but we are of opinion that it cannot be laid down broadly as a proposition of law that every claim for contribution founded upon a decree is not a claim of the nature specified in article 41 of the Small Cause Courts Act, 1887. In our judgment the fact that a decree may furnish the cause of action for a suit for contribution is itself no ground for holding that it cannot be a suit of the nature contemplated by article 41. We think the right test always is the nature of the suit as brought and not the circumstances which constitute the cause of action. In the present case the fact which has given rise to or supplied the cause of action for the present suit is certainly the decree of the rent court. but that fact alone makes the present suit one for contribution and no

(1) (1906) I.L.R., 28 All., 292.

(2) (1918) 5 O.L.J., 103.

(3) (1925) 2 O.W.N., 571.

more. As to whether it is a suit "by a sharer in joint property in respect of payment made by him of money due from a co-sharer" still remains to be determined. That the plaintiffs are sharers in the joint property is not disputed, and it was in that character alone that they were made liable in the decree for rent. That they are also judgment-debtors does not detract from their status of sharers. The payment of money which they made and now claim was on the same reasoning the money due from the other co-sharers in the joint property. This aspect of the case is brought into prominence by the fact that neither the plaintiffs' own share of liability nor those of the defendants' can be ascertained without reference to the extent of share which each holds in the underproprietary tenure held by them jointly.

1927
DATA DIS

Stuart, C. J.
and
Hasan, J

From what we have said above it would appear that the case of *Bhairon v. Ram Baran* (1) is clearly distinguishable from the present case, and the cases of the *Hon'ble Maharaja Sir Bhagwati Prasad Singh, K.C.I.E. of Balrampur Estate v. Raja Muhammad Abul Hasan Khan of Bilahra Estate* (2) and *Sidhnath v. Sheo Dayal* (3) are not helpful. The point of view now taken was not placed for consideration in the last two mentioned cases.

This answer to the reference, together with the reference, should be returned to the court below.

Reference returned.

(1) (1906) I.L.R., 28 All., 292.

(2) (1918) 5 O.L.J., 109.

(3) (1925) 2 O.W.N., 571.