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threat had been proved, which cannot be said in this case, could not of itself be taken to show that the person uttering the threat was connected with the death, which took place 3 months later, of the person against whom the threat had been uttered.

We hold that the approver's statement in this case is not corroborated: we allow the appeal, set aside the conviction and the sentence and acquit the accused.

P. S.

Appeal accepted.

APPELLATE CIVIL.

Before Young C. J. and Monroe J.

1935

Nov. 28.

SITAL DAS AND ANOTHER (DEFENDANTS) Appellants

versus

PUNJAB AND SIND BANK, LTD., LYALLPUR (PLAINTIFF)
HOSHNAK MAL-HIRA NAND AND OTHERS (DEFENDANTS) } Respondents.

Civil Appeal No. 2277 of 1935.

Mortgage — Suit by mortgagee to enforce mortgage — Puisne mortgagee the real contesting defendant — whether can be made liable for costs — Civil Procedure Code, Act V of 1908, section 35 : Discretion of Court.

In a suit to enforce a mortgage the *puisne* mortgagees were the real contesting defendants. The suit was decreed by the trial Court and the *puisne* mortgagees were burdened with costs along with the mortgagors. On appeal to the High Court, it was contended that the mortgaged property should normally bear the costs and the *puisne* mortgagee could only be made to pay the *extra* costs occasioned by his defence.

Held (repelling the contention), that under section 35 of the Code of Civil Procedure, the Court has an absolute discretion in the matter of costs and there is no principle of law which makes it wrong or improper for a Court to saddle with costs the real contesting defendants to a suit.

Dawsons Bank, Ltd. v. H. Oppenheimer (1), not followed.

First Appeal as to costs from the preliminary decree of Sardar *Kartar Singh, Senior Subordinate Judge, Lyallpur, dated 12th July, 1934, passing a decree in favour of the plaintiff and making an order for costs against all the defendants including the* puisne *mortgagees.*

IQBAL SINGH and KRISHNA SWARUP, for Appellants.

MEHR CHAND MAHAJAN and DAULAT RAM, for (Plaintiff) Respondent.

The judgment of the Court was delivered by—

YOUNG C. J.—This is a first appeal from the decision of the learned Subordinate Judge first class at Lyallpur. The plaintiffs were mortgagees of certain property and they sued the mortgagors for enforcement of the mortgage. Defendants Nos.5 and 6 were *puisne* mortgagees. In their deed it was recited that the plaintiffs had a prior mortgage. When the plaintiffs proceeded to enforce their mortgage the mortgagors had no real interest left in the property. The amount that they had borrowed on the property was far more than the property could produce. The *puisne* mortgagees, in an application for a receiver, disputed the right of the prior mortgagees to possession of the factory. They also asserted that they themselves had a first charge on the property wholly contradictory to their own deed under which they held a mortgage. The matter was fought nominally by the mortgagors who put in the same written statements as the *puisne* mortgagees, but there can be no doubt whatever that the real contesting defendants in

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this case were defendants 5 and 6. The learned Subordinate Judge passed a decree in favour of the plaintiffs and made an order for costs against all the defendants including defendants Nos.5 and 6. Defendants Nos.5 and 6 alone filed an appeal. Defendants Nos.1 to 4 were apparently satisfied. This alone shows who the real contesting defendants were in the case.

The defendants tried to have the appeal heard on a ten rupee stamp. When the matter came up before a Bench of this Court it ordered that the defendants should pay a Court-fee upon the ordinary valuation of the property. The appellants, however, have failed to pay the Court-fee on this basis and they have petitioned this Court to allow the appeal to be heard simply on the question of costs for which they have paid the necessary Court-fee. The whole question now is whether the Judge in the lower Court had jurisdiction to make the order he did make, making defendants Nos.5 and 6 liable for the costs.

Counsel for the appellants has argued that in a mortgage suit the property must bear the costs. That is a proposition which no one will dispute. He also quoted an authority—*Dawsons Bank, Ltd. v. H. Oppenheimer* (1)—which apparently supports his contention that in a case where there is a mortgagor and a *puisne* mortgagee sued, the mortgaged property would normally bear the costs, but that there was discretion in the Court to make the *puisne* mortgagee pay costs, but only to the extent of the extra costs occasioned by the *puisne* mortgagee's defence. We have considered this proposition and with great respect we do not see upon what principle of law the authority

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limits the discretion of the Judge trying the suit. Section 35 of the Civil Procedure Code is clear that the Court has discretion in the matter of costs. There is no principle of law with which we are acquainted which makes it wrong or improper for a Court to saddle with costs the real contesting defendants to a suit. The discretion is absolute. In this case the real contesting defendants have been made liable for costs together with the other defendants and there is nothing improper in law in such an order. In fact, in our opinion, on the facts of this case the learned Judge would have been failing in his duty if he had not saddled the present appellants with costs.

For these reasons we dismiss the appeal with costs.

P. S.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Young C. J. and Monroe J.

SARDAR KHAN—Petitioner

versus

THE CROWN—Respondent.

1935

Dec. 4.

Criminal Revision No. 800 of 1935.

Criminal Procedure Code, Act V of 1898, section 106 : Security bond to keep the peace — Forfeiture of — Liability of surety for amount of bond — in addition to any amount recovered from the principal.

On a Security bond for Rs.500 under section 106 of the Code of Criminal Procedure, the petitioner S. K. stood surety and himself expressly agreed that he would forfeit Rs.500 if the principal broke the peace. The principal having defaulted the Magistrate ordered the forfeiture of the amount of the bond against the principal as well as the surety.

Held, that the surety was liable to pay the amount specified in the bond in addition to any amount that might be recovered from the principal.