

No order for costs.

Attorneys for appellant: Messrs. *Wadia, Gandhi & Co.*

Attorneys for respondents: Messrs. *Merwanji, Kola & Co.*

Order accordingly.

V. G. R.

APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and
Mr. Justice Crump.*

KESHAV VITHAL OLTIKAR (ORIGINAL PLAINTIFF). APPLICANT v. HARI
RAMKRISHNA OLTIKAR (ORIGINAL DEFENDANT), OPPONENT^o.

Partition suit—Co-defendants—Costs of suit—Contribution.

When in a partition suit all the defendants equally contest the suit and are directed to pay the plaintiff's costs, if one defendant pays the costs, he is entitled to contribution from his other co-defendants, unless facts are proved which are sufficient to defeat the equity.

Shakul Kameed Alim Sahib v. Syed Ebrahim Sahib⁽¹⁾, relied on.

CIVIL extraordinary application against the decree passed by J. B. Phanse, Subordinate Judge at Roha.

Suit for contribution.

One Krishnaji Mahadev Ghate filed Suit No. 841 of 1916 for possession by partition of his one-sixth share in certain property against the petitioner Keshav and three brothers, Hari, Narayan and Janardan. The suit was decreed with costs against all the defendants.

In execution of the decree, Krishnaji recovered all the costs from the defendant Keshav.

^o Civil Application No. 66 of 1923 under Extraordinary Jurisdiction (with Applications Nos. 65 and 67 of 1923).

⁽¹⁾ (1902) 26 Mad. 373.

1923.

RUSTOMJEE
HEERJEE-
BHOY
v.
COWASJEE
DADABHOY.

1923.

December 7.

1923.

KESHAV
VITHAL
o.
HARI
RAMKRISHNA.

Keshav then filed Suit No. 410 of 1922 against the opponent Hari Ramkrishna for contribution of his share of the cost paid, and also Suits Nos. 408 and 409 of 1922 against the defendants Narayan and Janardan for their contribution.

The Subordinate Judge held that the defendants in the suit of 1916 had made a common defence and all of them were equally guilty and according to the principle laid down in *Mulla Singh v. Jagannath Singh*⁽¹⁾ the plaintiff Keshav had no equity against the defendants. He, therefore, dismissed the plaintiff's suits.

• The plaintiff applied to High Court.

V. B. Virkar, for the applicant.

No appearance for the opponent.

MACLEOD, C. J. :—The question which arises in these applications under section 25 of the Provincial Small Cause Courts Act, is whether, in the circumstances of the case, the plaintiff was entitled to contribution against the defendants with regard to the amount of costs which he had paid in a suit filed by one Krishnaji Mahadeo Ghate for possession by partition of his one-sixth share in certain property against the petitioner and his brothers, all of whom had to pay plaintiff's costs in those proceedings. The present plaintiff now seeks to recover by contribution from his co-defendants their shares in the costs in that suit, which he had paid to the successful plaintiff.

The learned Judge relying on the decision in *Mulla Singh v. Jagannath Singh*⁽¹⁾ dismissed the plaintiff's suit. He thought all the defendants were equally guilty in defending the proceeding brought by Krishnaji Mahadeo, and, therefore, according to the principle laid down in that case, the plaintiff had no equity against the present defendants.

(1) (1910) 32 All. 585.

No case has been decided in this Presidency where the point has been raised, and for that reason I granted the Rules on these applications. We have been referred to the decision in *Mahabir Prasad v. Darbhangi Thakur*⁽¹⁾ in which case the facts were somewhat similar, the plaintiff having brought a suit for a declaration that by reason of a previous partition, which still subsisted, the property in suit was not liable to be again partitioned. The defendants contested the claim, pleading that there had been no previous partition. That defence failed, and the suit was decreed with costs against all the contesting defendants jointly and severally. The decree was executed and costs were recovered against one of the defendants. He then instituted a suit to recover from his co-defendants their proportionate share of the costs recovered from him under the decree. The real issue seems to have been obscured by the defendants being allowed to raise an issue in the trial Court whether the plaintiff and defendants in the previous suit had been joint wrong-doers in so far as the defence in that suit was concerned. It appears to have been suggested that when several co-defendants joined in a defence which failed, that thereupon they became joint tort-feasors, in which case according to the English authorities one tort-feasor would not be entitled to contribution against the others. But, as pointed out by the learned Chief Justice, such a suggestion was not applicable to that case. His Lordship said (p. 493) :—

“To hold that it is a tort for the defendant by his pleadings to deny a fact which he knows to be true, even if he has no evidence to the contrary, is a proposition which cannot be supported on any known principle of law. It follows, therefore, that on the facts found by the lower Court the parties were not wrong-doers in the sense which would debar contribution between them.”

1923.

KESHAV
VITHAL.
v.
HARI
RAMKRISHNA.

(1) (1919) 4 Pat. L. J. 486.

1923.

KESHAV
VITHAL
v
HARI
BAMKRISHNA.

His Lordship then went on to consider the cases which had been cited on one side or the other on the question of contribution, and it was pointed out that the English case of *Dearsly v. Middleweek*⁽¹⁾, which was relied upon in *Mulla Singh v. Jagannath Singh*⁽²⁾, could not be considered as an authority, as Mr. Justice Fry in that case followed what was wrongly asserted by counsel before him to have been the dictum of the Court of Appeal in *Real and Personal Advance Company v. McCarthy*⁽³⁾ which had been decided the day before. When reference is made to the report of that case, which appears in the same Volume at p. 362, it will be found that their Lordships of the Appeal Court never said what was alleged to have been said by them, namely, that "no apportionment of or contribution for costs could be obtained by one co-defendant against another in an independent proceeding". It seems difficult to imagine how those remarks could have been attributed to the Court of Appeal, as there was no question in that case of contribution between co-defendants. One defendant in the case had elected to give up the case and was directed to pay plaintiff's costs of the action so far as they were occasioned by his defence down to a certain date, and the only question was what costs the defendant who retired from the case was liable to pay under that order.

There is also the case of *Shakul Kameed Alim Sahib v. Syed Ebrahim Sahib*⁽⁴⁾, which seems to be a decision directly in point, in which it was held that where A, B and C being defendants who had taken part in defending a suit, were ordered to pay the costs of the plaintiff therein, and A, one of those defendants, paid the whole amount due in respect of costs, he was entitled to sue the other defendants for contribution.

⁽¹⁾ (1881) 18 Ch. D. 236.

⁽³⁾ (1881) 18 Ch. D. 362.

⁽²⁾ (1910) 32 All. 585.

⁽⁴⁾ (1902) 26 Mad. 373.

It seems to us on general principles of equity that when in a partition suit all the defendants equally contest the suit, and are directed to pay the plaintiff's costs, if one defendant pays the costs, he should be entitled to contribution from his other co-defendants, unless facts could be proved which would be considered sufficient to defeat the equity. The common defence raised by the defendants in the partition suit would not be such a fact.

We think, therefore, that the decrees of the lower Courts in these cases must be set aside and the plaintiff's claim decreed with costs throughout.

Decree set aside.

J. G. R.

APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and
Mr. Justice Shah.*

BAI JAYAGAVRI WIFE OF MUKUNDLAL HARILAL (ORIGINAL APPLICANT), APPELLANT v. RAMANLAL CHHOTALAL (ORIGINAL OPPONENT), RESPONDENT^o.

1921.
January 7.

*Bombay Pleader's Act (XVII of 1920), section 18 (1), Schedule III, Clause IV
—Costs of Darkhast—Darkhast presented after the commencement of
the Act.*

In 1919, the plaintiff filed a suit in the Court of the First Class Subordinate Judge of Broach. It was dismissed with costs. The plaintiff, thereupon, presented in November 1920, an appeal to the High Court. The appeal was dismissed with costs. In 1922, the respondent presented a Darkhast in the Subordinate Judge's Court to recover costs awarded to the respondent in the appeal of 1920 and also the costs of the Darkhast on the ground that he was entitled to such costs under section 18 (1) of Bombay Pleader's Act, XVII of 1920.

Held, that the respondent would be entitled to the costs of the Darkhast under section 18 (1) of Bombay Pleader's Act, XVII of 1920, as the Darkhast

• * First Appeal No. 164 of 1922.