

by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal."

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—  
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In *Fateh Mohammad v. Emperor* (1), Bhandari J. was also of the same opinion. Relying on the rule laid down in these cases my opinion is that in this particular case an explanation was given by the accused which has been accepted to be reasonably true and even if it was not convincingly true, the accused was therefore entitled to acquittal. I would, therefore, dismiss this appeal and uphold the order of acquittal.

FALSHAW J.—I agree.

Falshaw, J.

### REVISIONAL CIVIL

*Before Khosla and Harnam Singh, JJ.*

SHRI NANAK CHAND,—*Defendant-Petitioner*

*versus*

SHRIMATI TARA DEVI,—*Plaintiff-Respondent.*

Civil Revision No. 479 of 5191

1952

July, 15th

*Delhi and Ajmer-Merwara Rent Control Act (XIX of 1947), section 9 (I) (d)—'Family'—meaning of—Joint Hindu family—Presumption.*

*Held*, that in clause (d) of section 9 (I) of the Act XIX of 1947 the Legislature used the word 'family' not in any special sense but in a loose and general sense. In this country specially a joint Hindu family is a normal feature and even if members of a joint Hindu family live in different places because of their being employed in offices or carrying on other avocations the tie is strong enough to include them within the term 'family'. Given a joint Hindu family the presumption is, until the contrary is proved, that the family continues joint. The presumption of union is the greatest in the case of father and sons. The presumption is stronger in the case of brothers

(1) A.I.R. 1948 Lah. 80.

than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker.

In determining what is 'family' it is not only permissible but is proper and desirable for the court to bear in mind the context of social order, the habits and ideas of living and the religious and socio-religious customs of the community to which the individual concerned belongs. Parents, brothers and sisters living jointly with the tenant are members of his family.

*Pushpa Lata Devi v. Dinesh Chandra Dass* (1), and *Price v. Gould and others* (2), relied upon.

(This case was referred by Hon'ble Mr. Justice Soni, to the Division Bench consisting of Mr. Justice Khosla and Mr. Justice Harnam Singh,—*vide* his order, dated 14th November 1951).

*Petition under Act XIX of 1947 for revision of the decree of Shri Tek Chand Vih, Senior Sub-Judge, Delhi with enhanced appellate Powers, dated the 2nd July 1951, affirming that of Shri Bahal Singh, Sub-Judge, 1st Class, Delhi, dated the 4th August 1950, granting the plaintiff a decree for ejectment from the house in suit against the defendant.*

BISHAN NARAIN, D. K. KAPUR AND S. C. MITAL for Petitioner.

A. N. GROVER, for Respondent.

#### ORDER.

Soni, J. A suit was brought in the court of a Subordinate Judge, Delhi, by the plaintiff *Shrimati Tara Devi* as landlord of one of her flats in Darya Ganj against Nanak Chand for the recovery of Rs 50-13-0 as rent and for ejectment.

It is alleged that arrears of rent had not been paid, that the defendant had without the consent of the plaintiff assigned, sublet or otherwise parted with the possession of the whole of the premises in suit; that the premises were let out to the defendant for use as residence, but that

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(1) 85 C.L.J. 74.

(2) 143 Law Times Reports 333.

neither the defendant nor any member of his family had been residing therein for a period of six months; that after the 24th of March, 1947, the defendant had been allotted quarter No. 12 of the Delhi Cloth Mills Quarters on Rohtak Road and had shifted into it and that the defendant was therefore liable to be ejected under sub-clauses (a), (b), (c), (d), (e) and (f) of subsection (1) of Section 9 of the Delhi Rent Control Act, 1947.

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This suit was brought in 1949. The defendant traversed the allegations of the plaintiff and pleaded that in or about 1942 the flat had been let out to the defendant and his younger brother Manak Chand who formed a joint Hindu family with their younger brother Kahan Chand. The defendant denied that he had assigned, sublet or otherwise parted with the possession of the premises and denied that he or his family members had not been residing in the flat let out to them for a period of six months. It was not denied that a quarter had been allotted by the Delhi Cloth Mills to the defendant in July 1948. It was, however, submitted that Manak Chand with his family and Kahan Chand had been residing in the flat as before. He submitted that he had moved into the quarter in August 1948, but his children had been living with other members of the family in the said flat. The trial Judge framed a number of issues out of which the third, fourth and fifth issues were:—

3. Whether the defendant has without the consent of the plaintiff assigned, sublet or otherwise parted with possession of the whole of the premises in suit.
4. Whether the premises were let out to the defendant for use as residence and neither the defendant nor any member of his family has been residing therein for a period of six months.
5. Whether the defendant is not liable to be evicted despite the allotment of a quarter to him.

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The trial Judge's finding was that the flat had first been let to Manak Chand in 1942, that Manak Chand was transferred from Delhi and thereafter his brother Nanak Chand, the present defendant, came as an occupant of the house and that it was admitted by Nanak Chand that he had moved into the quarter allotted to him by the Delhi Cloth Mills in August 1948, that the present suit had been filed in 1949 and that therefore the defendant was liable to be ejected on all the three grounds. The rent and costs having already been paid, that question did not arise. Upon these findings the trial Judge decreed the plaintiff's suit on the 4th of August, 1950.

From the judgment of the trial Court there was an appeal. The appeal was heard by the Senior Subordinate Judge, Delhi, who dismissed it on the 2nd of July, 1951. The learned Senior Sub-Judge's judgment is vitiated by one very grave finding and that was that he had assumed that the father of the defendant was dead and that the defendant and his brothers did not form a joint Hindu family. It is, however, a fact that the father is alive and there is no proof that the defendant Nanak Chand did not form a joint Hindu family with his father and brothers. The learned Senior Subordinate Judge came to the conclusion that the flat was too small to be occupied by all the brothers and the wives of two of them and their children.

Against the decree of the Senior Subordinate Judge a revision has been preferred to this Court. I have heard Mr. Bishan Narain for the petitioner and Mr. Amar Nath Grover for the respondent. Mr. Bishan Narain's contention is that the judgment of the Senior Subordinate Judge has been vitiated by the mistaken presumption that the father was dead and that therefore he had not appreciated the case with as much care as the case deserved. As I have remarked before, it is quite correct that Nanak Chand defendant's father is alive and that there is no proof that the defendant with his father and brothers did not form a joint Hindu family. The question nevertheless has to be decided whether the suit was properly decreed by both the Courts. Mr. Bishan Narain urged that there is no

proof that there had been any assignment, subletting or otherwise parting with the possession of the whole of the premises without the consent of the plaintiff. As a matter of fact, he urged that the plaintiff *Shrimati* Tara Devi when examined on commission did not state that after Manak Chand had gone, Nanak Chand came without her permission. She also stated:—

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“Manak Chand is brother of Nanak Chand and he used sometimes to visit him before also. But I got the information about the occupation of the premises when a receipt was demanded by Manak Chand. For about two or three months the rent was being collected and the receipt was being issued in the name of Nanak Chand because he said that he would be returning soon.”

In my opinion, it cannot be urged that the premises can be vacated because of their being assigned, sublet or otherwise parted with without the consent of the landlord and clause (b) (ii) of section 9(1) would not apply.

Mr. Bishan Narain urged that under the provisions of clause (d) eviction can be ordered if the premises were let for use as a residence and neither the tenant nor any member of his family has been residing therein for a period of six months immediately before the date of the institution of the suit for eviction. Mr. Bishan Narain urged that the words ‘member of his family’ should be given a wide meaning. He argued that we must take into account the habits and customs of this country and that in this particular instance Manak Chand, Nanak Chand and Kahan Chand, three brothers, with their father formed a joint Hindu family and therefore even if Manak Chand was in the premises, or his brother Kahan Chand was in the premises it should be held that the premises were occupied by a member of his family. Mr. Bishan Narain drew my attention to page 120 of Sarin and Pandit’s book on Rent Restriction Act in Delhi and

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Ajmer where a Calcutta ruling, *Puspa Lata Devi v. Dinesh Chandra Das* (1), has been quoted and it is said:—

“In determining what is ‘family’ it is desirable and proper to bear in mind the social order, the habits, the religious and socio-religious customs of the community to which the individual belongs.”

Mr. Bishan Narain also relies on the case *Price v. Gould* (2), cited on that page. This case is reported as 143 L.T. 333. In that case the issue was whether brothers and sisters of a tenant were to be included in the word ‘family’. Wright, J. in that case said:

“It has been said in a number of equity cases, relating principally to wills or to settlements under powers of appointment, that the word ‘family’ is a popular, loose, and flexible expression and not a technical term. It has been laid down that the primary meaning of the word ‘family’ is children, but that primary meaning is clearly susceptible of wider interpretation, because the cases decided that the exact scope of the word must depend on the context and the other provisions of the will or deed in view of the surrounding circumstances.”

Wright, J. went on to say:—

“I hold that in section now under consideration, the word ‘family’ includes brothers and sisters of the deceased living with her at the time of her death. I think that that meaning is required by the ordinary acceptance of the word in this connection, and that the legislature has used the word ‘family’ to introduce a flexible and wide term.”

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(1) 85 C.L.J. 74.  
(2) 143 L.T. 333.

It appears to me that in clause (d) of section 9(1) the Legislature used the word 'family' not in any special sense but in a loose and general sense. In this country specially a joint Hindu family is a normal feature and even if members of a joint Hindu family live in different places because of their being employed in offices or carrying on other avocations the tie is strong enough to include them within the term 'family'. I think therefore there is considerable force in the argument of Mr Bishan Narain when he said that Nanak Chand and his brothers were members of the family and either one or the other was residing in the flat owned by *Shrimati* Tara Devi. The question, however, is not quite so simple as is alleged. Mr. Grover says that at the time when this flat was first let to Manak Chand in 1942 it was not the intention of Manak Chand nor was it the intention of the lady that the flat was being let to a joint Hindu family. When Manak Chand was transferred and Nanak Chand took his place in 1945 it was then Nanak Chand who as an individual was occupying the position which his brother Manak Chand had formerly occupied and he was not occupying the flat as a member of the joint Hindu family. Later when Nanak Chand got allotted to him one of the quarters by the Delhi Cloth Mills and he moved into that quarter in August 1948 and when his brother Manak Chand again came in and occupied the flat he was not doing so as a member of the joint Hindu family but he was doing so in his individual capacity. It is in evidence in this case that the mother of the brothers used occasionally to live here, so also their father, whenever he came to visit Delhi. The youngest brother Kahan Chand was a student at one time in a place outside Delhi, but is now a student in Delhi and is also living in the premises. It is in evidence that Nanak Chand's son is also living with his uncles in the flat. The question is whether in these circumstances and from the fact that one brother occupied the premises in 1942 and was then succeeded by his second brother in 1945 and was later succeeded by the first and the third brothers in 1948 without any opposition from *Shrimati* Tara Devi, it could be

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held that the premises were without objection being occupied by members of a joint Hindu family and the tenancy was with the joint Hindu family. The matter raised in this case is a matter which probably will affect joint Hindu families and is of some importance. As this is a case of its own kind and likely to be followed as a precedent in other cases under similar circumstances, I think it is important enough to be decided by a Division Bench. I would therefore send these papers on to my Lord, the Chief Justice, with the recommendation that the case be heard by a Division Bench. As the matter of tenancies in Delhi is of urgency, it would be desirable that this case be heard as soon as possible.

#### JUDGMENT

Harnam Singh,  
J.

HARNAM SINGH J. On the 29th of March 1949, *Shrimati* Tara Devi instituted Civil Suit No. 234 of 1949 for the ejectment of Nanak Chand defendant from flat No. 9 of building No. 7/21, Darya Ganj, Delhi, and for the recovery of Rs 50-13-0 on account of arrears of rent. Nanak Chand, Manak Chand and Kahan Chand are sons of Brij Basi Lal.

In these proceedings it is plain that Brij Basi Lal, Nanak Chand and Manak Chand are in service. No evidence was given as to whether Kahan Chand is in service. Nanak Chand and Manak Chand are married and Nanak Chand has a son. Mother of Nanak Chand, Manak Chand and Kahan Chand is alive.

Nanak Chand defendant paid in the trial Court the arrears of rent together with the costs of the suit in accordance with the provisions of section 9 of Act No. XIX of 1947, hereinafter referred to as the Act, and the suit for ejectment proceeded on the grounds specified hereunder:—

- (1) that Nanak Chand defendant has without the consent of the plaintiff assigned, sublet or otherwise parted with the

possession of the whole of the premises in suit;

- (2) that the premises were let for use as residence and neither the defendant nor *any member of his family* has been residing therein for a period of six months immediately before the institution of the suit; and
- (3) that Nanak Chand defendant after the commencement of the Act has been allotted quarter No. 12 of the Delhi Cloth Mills Quarters on Rohtak Road, Delhi.

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In the written statement Nanak Chand stated that in 1942 flat No. 9 of building No. 7/21, Darya Ganj, Delhi, owned by the plaintiff was let to him and Manak Chand who form a joint Hindu family with Kahan Chand on a monthly rental of Rs 15, exclusive of house-tax and water charges. Nanak Chand admitted that accommodation was allotted to him by his employers in July, 1948, but it was stated that as Manak Chand and Kahan Chand are residing in flat No. 9, the case does not fall within clauses (b), (d) and (f) of section 9 (1) of the Act.

Issues Nos. 3, 4 and 5 fixed by the Court of first instance read:—

- (3) Whether the defendant has without the consent of the plaintiff assigned, sublet or otherwise parted with possession of the whole of the premises in suit?
- (4) Whether the premises were let to the defendant for use as residence and neither the defendant nor any member of his family has been residing therein for a period of six months?
- (5) whether the defendant is not liable to be evicted despite the allotment of accommodation to him by the Delhi Cloth Mills?

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Finding against the defendant on issues Nos. 3 to 5 the Court of first instance granted the plaintiff a decree for ejectment of the defendant from flat No. 9.

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From the decree passed by the Court of first instance on the 4th of August 1950, Nanak Chand appealed in the Court of the Senior Subordinate Judge at Delhi, but the appeal has been dismissed with costs.

Nanak Chand now applies for the revision of the order passed on appeal.

In this Court Civil Revision No. 479 of 1951 was placed before Soni, J., for disposal on the 14th of November 1951. In a detailed judgment Soni, J., pointed out that the case did not fall within section 9(1) (b) (ii) of the Act. Soni, J., entertained some doubt whether the case fell within section 9 (1) (d) of the Act and, therefore, the case has been put up for disposal before this Bench.

In the referring order Soni, J., said:—

“The learned Senior Sub-Judge’s judgment is vitiated by one very grave finding and that was that he had assumed that the father of the defendant was dead and that the defendant and his brother did not form a joint Hindu family. It is, however, a fact that the father is alive and there is no proof that the defendant Nanak Chand did not form a joint Hindu family with his father and brothers.”

From the record it is clear that at the time of the institution of the suit Manak Chand, wife of Manak Chand, Kahan Chand and the son of Nanak Chand were living in flat No. 9.

In these proceedings it is conceded by Mr. A. N. Grover that if it be found that Brij Basi Lal, Manak Chand, Nanak Chand and Kahan Chand form joint Hindu family the plaintiff’s suit

for ejection is liable to dismissal. In deciding the appeal the Senior Subordinate Judge said:—

“There is no presumption under the Hindu law that the brothers form a joint Hindu family after the death of their father and if there is any such presumption it is a very weak one, and from the evidence discussed above the defendant has not been able to make this presumption a stronger one. I, therefore, hold that the defendant and his brother Manak Chand did not constitute a joint Hindu family.”

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In my judgment, the decision given by the Senior Subordinate Judge that there was no presumption under Hindu Law that brothers form a joint Hindu family is erroneous. Given a joint Hindu family the presumption is, until the contrary is proved, that the family continues joint. The presumption of union is the greatest in the case of father and sons. The presumption is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker. In this connection paragraph 233, Principles of Hindu Law by Mulla, may be seen.

Krishan Lal, P.W.1, K. L. Batta, P.W.2, Kanti Lal, P.W.3, Siri Ram, P.W.4 and Mian Jagdish Singh, P.W.5, gave evidence for the plaintiff.

Now, evidence given by Krishan Lal Postman deals with the service of the registered notice of ejection upon Nanak Chand given to him by the plaintiff. K. L. Batta gave evidence that Nanak Chand defendant was allotted accommodation by the Delhi Cloth Mills on the 17th July, 1948. Kanti Lal, P.W.3, gave evidence that Nanak Chand with his family used to live in flat No. 9 and that he did not see Manak Chand living there. Siri Ram, P.W.4, Mian Jagdish Singh, P.W.5, and Shrimati Tara Devi did not give any evidence on the point whether Nanak Chand, Manak Chand and Kahan Chand were joint or separated.

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brothers Rent receipts, Exhibits D. 1 to D. 5, were given to Manak Chand and rent receipts, Exhibits D. 9 to D. 13, were given to Nanak Chand but that does not prove that there was any interruption of the tenancy which began in 1942 or that Nanak Chand, Manak Chand and Kahan Chand were separated brothers. In this connection, it is significant to notice that the plaintiff has not placed on the record rent receipts for the period when it is said that there was a break in the tenancy. From the letter, Exhibit P.C./2, written by the plaintiff to the wife of Manak Chand on the 12th of August, 1948, it appears that on that date the wife of Manak Chand was living in flat No. 9. Clearly, there is no evidence to rebut the presumption that Nanak Chand, Manak Chand and Kahan Chand form joint Hindu family with Brij Basi Lal as the Karta of that family.

Counsel appearing for the plaintiff-respondent concedes that if it be found that Brij Basi Lal, Nanak Chand, Manak Chand and Kahan Chand form joint Hindu family the plaintiff's suit is liable to dismissal.

Basing himself on *Puspa Lata Devi versus Dinesh Chandra Das* (1) and *Price versus Gould and another* (2) counsel for the defendant-petitioner maintains that the word 'family' occurring in section 9(1) (d) of the Act includes brothers and sisters of the tenant.

In 85 C. L. J. 74, the point that arose for decision was whether the word "occupation" in section 11 (1), proviso (f) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, means only residence of the individual.

Proviso (f) reads:—

“Where the premises are *bona fide* required by the landlord either for purposes of building or rebuilding, or for his own occupation, or for the occupation of any person for whose benefit the premises are held.”

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(1) 85 C. L. J. 74

(2) 143 L.T.R. 333.

In deciding that case Mukharji, J., said:—

“The expression ‘his own’ does not necessarily mean of the particular individual alone but must be interpreted to include the individual’s family and dependents and such person or persons who may be essential and necessary for the purpose of such occupation.

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In determining what is family or a dependent or a person essential and necessary for occupation, it is not only permissible but is proper and desirable for the Court to bear in mind the context of social order, the habits and ideas of living and the religious and socio-religious customs of the community to which the individual concerned belongs and then come to a conclusion on the facts of each case.”

In *Price versus Gould and another* (1), the question that arose for decision was whether the word ‘family’ occurring in section 12, subsection 1 (g) of the Rent Restriction Act, 1920, includes brothers and sisters. In deciding that point Wright, J., said:—

“I hold that in the section now under consideration the word ‘family’ includes brothers and sisters of the deceased living with her at the time of her death. I think that that meaning is required by the ordinary acceptance of the word in this connection, and that the Legislature has used the word ‘family’ to introduce a flexible and wide term.”

Section 12 (1) (g) of the Rent Restriction Act, 1920 reads:—

“The expression ‘tenant’ includes . . . .  
where a tenant dying intestate is a

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(1) 143 L.T.R. 333

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woman such member of the tenant's family residing with her at the time of her death as may be decided in default of agreement by the County Court."

In construing section 12 (1) (g) Wright, J. found that the word 'family' occurring in that section includes brothers and sisters of the tenant living with her at the time of her death. *Prima facie* it is permissible to regard Nanak Chand, Manak Chand and Kahan Chand to be members of one family for the purposes of section 9 (1) (d) of the Act.

Finding as I do, that Nanak Chand, Manak Chand and Kahan Chand form joint Hindu family it is not necessary to express a considered opinion on the point whether the word 'family' occurring in section 9(1) (d) of the Act includes separated brothers of the tenant.

From what I have said above it follows that no question arises under section 9 (1) (b) (ii) of the Act when Manak Chand and Kahan Chand are residing in flat No. 9.

In the Courts below reliance was placed on section 9 (1) (f) of the Act which provides for the ejection of a tenant where the tenant after the commencement of the Act has been allotted a suitable residence. If the tenancy was for the benefit of the joint Hindu family consisting of Brij Basi Lal, Nanak Chand, Manak Chand and Kahan Chand no suitable residence has been allotted to the family. Nanak Chand, being an employee of the Delhi Cloth Mills, has been allotted quarter No. 12 on Rohtak Road, Delhi, at a monthly rent of Rs 45 while Manak Chand and Kahan Chand continue to live in flat No. 9. The residence allotted to Nanak Chand on Rohtak Road has one room, one store and one kitchen while flat No. 9 consists of two rooms 20'x16' and 10'x8', kitchen 10'x6' and an open roof. Clearly, the case does not fall within section 9 (1) (f) of the Act. In the referring order Soni, J., said :—

"In my opinion, it cannot be urged that the premises can be vacated because of

their being assigned, sublet or otherwise parted with without the consent of the landlord and clause (b) (ii) of section 9 (1) would not apply."

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For the foregoing reasons, I would allow the petition for revision, set aside the judgments and decree passed by the Courts below and dismiss Civil Suit No. 234 of 1949.

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J.

Arrears of rent together with the costs of the suit have been paid.

In the circumstances of the case, I would leave the parties to bear their own costs throughout.

KHOSLA, J.—I agree.

Khosla, J.

#### APPELLATE CIVIL

*Before Kapur and Soni JJ.*

GURCHARAN SINGH AND OTHERS,—*Plaintiffs-Appellants*

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*versus*

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SUBEDAR SAWAN SINGH AND OTHERS,—*Defendants-Respondents.*

Regular Second Appeal No. 436 of 1948.

*Civil Procedure Code (Act V of 1908)—Section 100 and Order 41 rule 33—Question of necessity—Whether finding of fact—Powers of the Appellate Court under Order 41 rule 33—Transfer of Property Act (IV of 1882) Sections 91 and 92—Co-mortgagor redeeming property—Subrogation of such co-mortgagor in place of the mortgagee.*

Held, that the question of necessity is one of fact and as the finding has been given on the evidence on the record, it cannot be challenged in second appeal.

Held, that under Order 41, Rule 33, of the Civil Procedure Code the appellate Court has the power to pass any decree and make any order which ought to have been passed or made and this power may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed or filed cross-objections.

Held, that under section 91 of the Transfer of Property Act a co-mortgagor (and the plaintiffs are co-mortgagors