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HARJAS v. RADHA KISHAN.

The learned District Judge seems to take it for granted that Didari was an occupancy-tenant, but had ceased to be so by the operation of some rule of law, of which I am not aware, and which the learned Judge does not mention in his judgment. If we were to allow the judgment of the learned Judge to stand, we would be turning out of possession a person who is entitled to hold possession of the land sold by the operation of law. I entirely concur in, and fully accept, the interpretation placed by the learned Chief Justice upon s. 7 of Act XII of 1881. It seems to me that the plaintiff's title to the possession of the land fails, and his case must therefore fail.

Appeal allowed.

1886
April 14.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

HAZARI AND OTHERS (DEFENDANTS) *v.* CHUNNI LAL (PLAINTIFF).*

Surety—Act IX of 1872 *(Contract Act), ss.* 134, 137, 139, *and* 141.

A decree-holder, in execution-proceedings, agreed to accept payment of the decretal amount by the judgment-debtors in annual instalments. He also accepted from certain other persons a surety-bond in the following terms:—"In case of default of paying the instalments, the whole decretal money, with costs and interest at 8 annas per cent., shall be executed after one month; and for the satisfaction of the decree-holder we, the executants, stand as sureties of the judgment-debtors." The judgment-debtors paid five instalments and then made default. The decree-holder omitted to apply for execution, and the decree became time-barred. He then sued the sureties to recover the amount of the decree.

Held that the terms of the bond requiring the creditor to execute his decree within one month were peremptory, and imported much more than the usual agreement under such circumstances, that the decree-holder might execute his decree, if he pleased, on a default; that the legal consequence of his omission to execute the decree being the discharge of the principal debtors, the sureties would, under s. 134 of the Contract Act, stand discharged likewise; that his action was much more serious than "mere forbearance" in favour of his debtors, in the sense of s. 137; that he had done an act inconsistent with the equities of the sureties and omitted to do an act which his duty to them (under the agreement) required, whereby their eventual remedy against the principal debtors was impaired (s. 139); that he had deprived the sureties of the benefit of the security constituted by the decree; that they were therefore discharged to the extent of the value of that security (s. 141); and that the suit must consequently be dismissed.

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* Second Appeal No. 1162 of 1885, from a decree of E. B. Thornhill, Esq., District Judge of Jaunpur, dated the 22nd May, 1885, reversing a decree of Maulvi Muhammad Nasirullah Khan, Subordinate Judge of Jaunpur, dated the 15th January, 1885.

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HAZARI v. CHUNNI LAL.

THE plaintiff in this case claimed Rs. 719-6-0. It appeared that the plaintiff, Chunni Lal, held a decree for money against certain persons and took out execution of it. In the course of the execution-proceedings he agreed to accept payment of the decretal amount in eleven annual instalments, the defendants in the present suit giving him a bond in which they agreed to pay the debt in case of default on the part of the judgment-debtors, and mortgaged certain immoveable property as collateral security. The judgment-debtors paid five instalments and then made default. In the present suit Chunni Lal sought to recover the amount of the decree from the sureties. At the time of suit the decree had become time-barred, Chunni Lal having omitted to apply for execution. The terms of the surety-bond are stated in the High Court's judgment.

The first Court dismissed the suit. On appeal by the plaintiff the lower appellate Court gave him a decree.

It was contended in second appeal on behalf of the defendants, with reference to the terms of the surety-bond, that the sureties had been discharged in law by the conduct of the creditor, in allowing the decree to become time-barred.

Mr. *C. H. Hill*, for the appellants.

Mr. *T. Conlan* and Babu *Jogindro Nath Chaudhri*, for the respondent.

OLDFIELD and TYRRELL, JJ.—Having carefully examined the terms of the surety-bond, the basis of this action, we are of opinion that they amount to this, that the creditor having given his debtor time to pay Rs. 816-3-6, costs, and interest at 8 annas per cent., the amount of his judgment-debt, the debtor covenanted to pay this sum in eleven years by engaging, on the occurrence of a single default, to execute his decree for the whole sum remaining due under it, on the expiry of one month from the date of the default, and the sureties bound themselves to guarantee satisfaction of the decree debt, in the event of failure of payment, by the mode indicated above. In other words, the debtors were to have time, and to make punctual periodical payments, failure in punctuality to be necessarily followed within one month by execution of the decree on the decree-holder's part, the sureties becoming then and thereafter responsible for any eventual failure in full satisfaction

of the decree. The words of the deed were :—"In case of default of paying the instalments, the whole decretal money, with costs, and interest at 8 annas per cent., *shall be* executed after one month; and for the satisfaction of the decree-holder, we, the executants, stand as surety of the judgment-debtors to Rs. 816-3-6, with all the costs of the Court and interest." The first and necessary step to be taken on occurrence of a default was, within a month from its date, execution of his decree on the part of the creditor. The language of this part of the covenant is peremptory, and imports much more than the usual agreement under such circumstances, that the decree-holder may or is at liberty to execute his decree, if he pleases, on a default. Instalments were regularly paid for five years, down to the 20th April, 1879; then payments ceased, and the decree-holder took no steps against his judgment-debtors to execute his decree which is now defunct by lapse of time. He sues the sureties for the unpaid balance due on the decree, with interest to the date of his suit, instituted in November, 1884. Having failed in the Court of first instance, he obtained a judgment from the District Judge in appeal; and the sureties seek in second appeal to get that decree set aside. On our reading of the peculiar terms of the agreement set out above, we are satisfied that the appeal should prevail. It must be conceded that the legal consequence of the respondent's omission to execute the decree has been the discharge of his principal debtors. The decree is dead, and they are released from all responsibility under it. The sureties, then, would, under the rule of s. 134 of the Indian Contract Act, stand discharged likewise by virtue of this omission of the creditor. But it was argued that (s. 137, *id.*) "mere forbearance on the part of the creditor to enforce his remedy against the principal debtor does not, in the absence of any provision in the guarantee to the contrary, discharge the surety." This is doubtless true; but the action of the respondent, who omitted in this case to resort to the execution of his decree, and allowed it to become a dead letter by limitation, is, in our opinion, much more serious than "mere forbearance" in favour of his debtors. And we hold that by his failure to carry out this express part of his agreement, he did an act (s. 139, *id.*) inconsistent with the equities of the sureties, and omitted to do an act which his

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duty to the sureties (under the agreement) required him to do, whereby the eventual remedy of the sureties themselves against the principal debtors must necessarily have been impaired. We are also of opinion that by allowing his decree to become incapable of enforcement, the respondent deprived the sureties of the benefit of the decree, which was a subsisting security in his hand at the time when the contract of suretyship was entered into, and the loss of this security, to the benefit of which the sureties were entitled, through the act of the creditor, would operate to the discharge of the sureties to the extent of the value of that security (s. 141, *id.*). In this view of the facts of the agreement and of the law applicable to them, we must set aside the decree of the lower appellate Court, and, allowing this appeal, dismiss the respondent's suit with all costs.

Appeal allowed.

1886
April 28.

Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.

RAM SAHAI AND OTHERS (DECREE-HOLDERS) *v.* THE BANK OF BENGAL (JUDGMENT-DEBTORS).*

Execution of decree—Costs—Reversal of decree—Refund of costs recovered by execution—Interest.

A successful appellant in an appeal to the High Court applied, in execution of his decree, for a refund of a sum of money which he had paid to the respondent, by way of costs with interest thereon, in execution of the lower Court's decree. He further applied for interest on the refund claimed, at the rate of Rs. 6 per cent. per annum. The respondent objected to paying interest on the refund.

Held that the appellant was entitled to the interest claimed on the refund of costs. *Forester* v. *The Secretary of State for India in Council* (1) referred to.

ONE Gur Prasad sued for the sale of mortgaged property, impleading the mortgagor and the Bank of Bengal, which had purchased the mortgaged property at an execution-sale. The Subordinate Judge of Cawnpore, by whom the suit was tried, dismissed the claim for the sale of the property, awarding the Bank its costs, with interest. The Bank recovered these costs, amounting to Rs. 642, that is, Rs. 633 principal and Rs. 9 interest, in execution of the decree. The plaintiff appealed from the decree of the

* First Appeal No. 41 of 1886, from an order of Munshi Rai Kulwant Prasad, Subordinate Judge of Cawnpore, dated 14th December, 1885.

(1) I. L. R., 3 Calc., 161.