

hand, the defendant might, with perfect propriety and without difficulty, have stated his particulars of objections to the plaintiff's patent, notwithstanding the prejudicial pleas which he was maintaining. If the suit had been competently brought, their Lordships would certainly not have thought it right to indulge the defendant with a new trial of the cause, and would have given judgment for the plaintiff, with damages assessed upon a proper principle. As the case stands, they must humbly advise Her Majesty that the judgment of the High Court, except in so far as it recalls the decision of the District Judge, must be reversed, and the suit dismissed, with costs in both Courts below. The executors of the defendant, Mr. Petman, will have their costs in the original and cross appeals.

Appeal allowed. Decree reversed. Suit dismissed with costs.

Solicitors for the appellant—Messrs. *Barrow and Rogers.*

Solicitors for the respondent—Messrs. *Sanderson and Holland.*

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BHUP SINGH AND ANOTHER (PLAINTIFFS) v. ZAIN-UL-ABDIN AND OTHERS (DEFENDANTS),*

Mortgage—First and second mortgages—Sale of mortgaged property in execution of money decree obtained by first mortgagee—Effect on second mortgagee's rights—Purchase by one of several joint mortgagees of mortgaged property—Extinguishment of mortgage debt—Principal and surety—Liability of surety—Limitation—Costs—Suit for sale of mortgaged property.

In January, 1866, *B* obtained a simple money decree only in a suit for enforcement of lien created by a bond executed by the wife of *Z*, and, at a sale in execution of such decree, a 10 biswas share hypothecated in the bond was sold and purchased by *Z*, in November 1872. On the 3rd May, 1872 two bonds were executed in favour of *B* and *H* jointly, the first by *Z* and *I* jointly, hypothecating 6½ out of the above-mentioned 10 biswas, and the second by *S*, in which the obligor promised to pay the obligees the amount of the bond given by *Z* and *I* in the event of such amount not being paid by them, and mortgaged certain property as security for such payment by him. In December, 1872 *Z* gave another bond to *B*, hypothecating the same 10 biswas, and in execution of a decree obtained by *B* upon this bond the 10 biswas were sold and purchased by *B* himself in 1877, and in 1883 were sold by him to *D*. Subsequently, *B* and *H* brought a suit against *Z* and *I*, the joint obligors under the bond of the 3rd May, 1872, the heirs of their surety

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* First Appeal No. 52 of 1885, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 17th December, 1884.

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S, a purchaser from those heirs of the property mortgaged in the security-bond, and *D*, in which they claimed to recover the money due on the bond by sale of the property mortgaged therein and also by the sale of the property mortgaged in *S*'s security bond.

Held, that inasmuch as *B*'s decree of January, 1866 was a simple money decree only, *Z*'s purchase thereunder in November, 1872 could not be regarded as operating in defeasance of the joint bond of the 3rd May, 1872, executed by *Z* and *I*, and that the sale of November, 1872, therefore, left the rights of the parties wholly unaffected *quoad* that instrument.

Held also, that the effect of *B*'s purchase of the 10 biswas in 1877 upon the joint bond of the 3rd May, 1872 was as effectually to extinguish the joint incumbrance thereon as if *H* had been associated with him in buying it; that consequently when *B* sold the 10 biswas to *D* in 1883, they were free of all incumbrance under the joint bond; and that he passed to her a clean title which she could assert as a complete answer to the present suit in regard to the 6½ biswas.

Held further, that inasmuch as the bond executed by *S* was only a guarantee for the personal obligation created by the joint bond of *Z* and *I*, and a cause of action could only accrue as against him in respect of the personal default of the joint obligors to pay the bond money, and such default occurred beyond the period of limitation within which a suit to enforce the personal obligation to pay the money could have been maintained, it followed that, had there been a claim in the plaint to obtain a decree personally against the joint obligors, the plea of limitation by which such a claim could have been defeated would have been equally efficacious as regards the heirs of *S*; but no such claim had been made, and the obligation of the surety under his bond of the 3rd May, 1872, being confined to the personal default of *S*, his heirs had been wrongly imported into the present litigation, which alone sought to enforce the hypothecation of the joint bond against the hypothecated property.

Held also, that one set of costs was enough for the heirs of *S* and the purchaser from them of the property mortgaged in the security-bond, as their defences were identical, and that *D*'s costs should be calculated on the value of the 6½ biswas, the decree of the Court of first instance being modified to this extent.

On the 3rd May, 1872, Zain-ul-abdin and Ismail Husain gave a bond for Rs. 2,000 to Bhup Singh and Har Dayal Mal, in which they mortgaged, amongst other property, a 6½ biswas share of a village called Tahirpur. On the same date, Siraj-ud-din Husain gave Bhup Singh and Har Dayal Mal a security-bond, in which he promised to pay them the amount of the bond given them by Zain-ul-abdin and Ismail Khan, if those persons did not pay the same, and mortgaged a share in a village called Amirpur Gangu as security for such payment by him. Bhup Singh and Har Dayal Mal now sued Zain-ul-abdin and Ismail Husain, the obligors of the bond of the 3rd May, 1872, the heirs of Siraj-ud-din Husain,

the surety for those persons, of one Karim Bakhsh, and one Musammat Dewa, for Rs. 6,000, the principal and interest due on that bond. Musammat Dewa was made a defendant because she had purchased the $6\frac{1}{4}$ biswas of Tahirpur mortgaged in that bond, and Karim Bakhsh because he had purchased the property mortgaged in the security-bond. The plaintiffs claimed to recover the money by the sale of the property mortgaged in the bond, and also by the sale of the property mortgaged in the security-bond.

The lower Court (Subordinate Judge of Moradabad) dismissed the suit in respect of the heirs of Siraj-ud-din and the share of Amirpur Gangu mortgaged in the security-bond, and in respect of Musammat Dewa's $6\frac{1}{4}$ biswas of Tahirpur, and decreed the rest of the claim.

The plaintiffs appealed to the High Court.

The other material facts of the case are stated in the judgment of the Court.

Pandit *Bishambar Nath*, for the appellants.

Munshi *Kashi Prasad*, for the respondents.

STRAIGHT and TYRRELL, JJ.—The following are the facts material to the determination of the questions raised by this appeal:—

On the 19th September, 1863, Musammat Ulfat-un-nissa, wife of Zain-ul-abdin, defendant No. 1, executed a bond in favour of Bhup Singh, plaintiff-appellant No. 1, hypothecating thereby 10 biswas of the village Tahirpur, which, for convenience, we will call bond No. 1.

On the 3rd May, 1872, Zain-ul-abdin and his son Ismaïl Husain made a bond for Rs. 2,000 in favour of Bhup Singh and Har Dayal Mal, plaintiff-appellant No. 2, hypothecating $6\frac{1}{4}$ biswas of Tahirpur. This we will call the "joint bond." On the same date Siraj-ud-din Husain, the deceased husband of defendant No. 3, executed a surety-bond, guaranteeing Zain-ul-abdin's payment of the principal and interest borrowed, and as security charged certain mortgagor rights in mauza Amirpur Gangu.

On the 2nd December, 1872, Zain-ul-abdin made another bond in favour of Bhup Singh, plaintiff-appellant No. 1, in which he

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hypothecated 10 biswas of Tahirpur, and this we will call bond No. 2.

On bond No. 1 Bhup Singh obtained a decree on the 16th January, 1866, and in execution of it, he, on the 20th November, 1872, brought the 10 biswas to sale, and they were bought by Zain-ul-abdin with money lent him by Bhup Singh.

On bond No. 2 Bhup Singh got a decree on the 6th February, 1877, and on the 20th July of the same year 10 biswas of Tahirpur were sold and purchased by Bhup Singh. On the 11th April, 1883, Bhup Singh sold those 10 biswas to Musammât Dewa, defendant-respondent.

The only questions with which we are concerned in the present appeal relate to $6\frac{1}{2}$ biswas of the 10 biswas of Tahirpur in the hands of Musammât Dewa, and the right of the plaintiffs to enforce the surety-bond given by Siraj-ud-din against the 10 biswas of Amirpur Gangn; and a point as to costs. As to the former of these two matters, it may be convenient, first, to consider what effect the sale of the 20th November, 1872, under bond No. 1, and Zain-ul-abdin's purchase, had upon the joint bond of May, 1872. Now, though the suit of Bhup Singh, in 1866, was for enforcement of the lien created by bond No. 1, the decree he obtained was, as we read it, a simple money-decree, and Zain-ul-abdin's purchase under it therefore cannot be regarded as operating in defeasance of the joint bond. We think, therefore, that the sale of the 20th November, 1872, left the rights of the parties wholly unaffected *quoad* that instrument.

It next becomes necessary to consider the effect of the sale of the 20th July, 1877, under bond No. 2, and of Bhup Singh's purchase thereof of the 10 biswas of Tahirpur upon the joint bond. At that date $6\frac{1}{2}$ biswas out of the 10 biswas were undoubtedly subject to the charge created by the joint bond; and we do not think it can seriously be denied that had Bhup Singh been the sole obligee of the instrument of the 3rd May, 1872, his purchase in enforcement of his subsequent charge of the 2nd December, 1872 would have satisfied and extinguished the earlier incumbrance. The question then is, does the fact of Har Dayal Mal being jointly interested with him under the joint bond alter the position? This

involves the point of how far one of two joint obligees is bound, in regard to the joint rights under a bond, by the acts of the other in respect to the joint contract. According to the terms of the instrument of the 3rd May, 1872, it is clear that the rights of the two obligees were joint and indivisible, and it cannot be denied that, in the absence of fraud, had the obligors, or either of them, paid the whole debt in cash to either of the obligees, such payment would have satisfied the bond, and could have been successfully pleaded in answer to any suit brought upon it. We cannot see that any distinction can properly be drawn between satisfaction obtained in this way and that secured, as in the present case, under the circumstances stated in regard to Bhup Singh's purchase of the 20th July, 1877. If, in the one instance, he can rightly be regarded as the agent of his co-obligee, and, as such, binding him equally, so is the principle applicable in the other; and we have no hesitation whatever in holding that the effect of Bhup Singh's purchase of the 10 biswas of Tahirpur upon the joint bond of the 3rd May, 1872, was as effectually to extinguish the joint incumbrance thereon as if Har Dayal Mal had been associated with him in buying it. It follows, as a necessary consequence, that when Bhup Singh sold the 10 biswas to Musammat Dowla on the 11th April, 1883, they were free of all incumbrance under the joint bond, and that he passed to her a clean title which she can assert as a complete answer to the present suit in regard to the 6½ biswas of Tahirpur. We are of opinion, therefore, that as to the first question raised by this appeal, the Subordinate Judge was right, and the contention urged before us fails.

As to the second point, namely, the liability of the heirs of Siraj-ud-din to have the 10 biswas of Amirpur Gangu brought to sale, it is clear that that document was a guarantee for Zain-ul-abdin alone, and for any personal obligation by him under the joint bond. The present suit does not seek the enforcement of any such personal obligation against Zain-ul-abdin, probably for the best of all reasons, that any claim of that kind would be barred by limitation. But the prayer alone is for enforcement of lien against the hypothecated property. The only right Bhup Singh and Har Dayal Mal had against Siraj-ud-din under his surety-bond was in respect of the personal default of Zain-ul-abdin to pay the bond

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money; and it was only as to such personal default of their principal debtor that a cause of action could accrue to them as against the surety. That default, as we have said, occurred beyond the period of limitation within which a suit could have been maintained against Zain-ul-abdin for his personal failure to pay the money, and, being time-barred as to the principal debtor, is also barred in respect of the surety. This being so, had there been a claim in the plaint to obtain a decree personally against Zain-ul-abdin, the plea of limitation by which he could have defeated it would have been equally efficacious as regards the heirs of Siraj-ud-din. But no such claim is made in the plaint, and the obligation of the surety under his bond of the 3rd May being confined to the personal default of Siraj-ud-din, his heirs have been wrongly imported into the present litigation, which alone seeks to enforce the hypothecation of the joint bond against the hypothecated property.

The only other matter which was incidentally urged by the appellants' pleader had reference to the question of costs, and as to this we think there is some room for objection to the Subordinate Judge's decree. We consider that one set of costs was enough for the heirs of Siraj-ud-din Husain and the auction-purchaser from them of Amirpur Gangu, as their defences were identical, and that with regard to Musammat Dewa, the amount of her costs should be calculated on the value of the 6½ biswas of Tahirpur. We therefore to this extent decree the appeal with costs in proportion, and modify the decree of the Court below. As to the residue, the appeal is dismissed with costs.

Decree modified.

CRIMINAL REVISIONAL.

Before Sir John Edge, Kt., Chief Justice.

QUEEN-EMPRESS v. RAHAT ALI KHAN.

Act I of 1879 (General Stamp Act), ss. 11, 16, 17, 18, 62, 69—Instrument requiring to be stamped before or at time of execution—Non-cancellation of adhesive stamp—Sanction to prosecution.

The first paragraph of s. 11 of the General Stamp Act (1 of 1879) applies to cases in which the instrument chargeable with duty may be stamped after execution.

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