

sale of an adjoining tenement. The text quoted from the Alam-giri, Vol. IV, p. 5, to which we have already referred, seems to leave no doubt upon the point. That text seems also to show that when on the vitiating circumstances being removed, as by possession, an invalid sale becomes complete, the ownership does not pass from the seller to the purchaser as from the date of the sale.

The result is that we must find, firstly, that Ajaib Ali did not become the owner of the house purchased by him until the 6th September 1896, and therefore he was not entitled to claim pre-emption against Najm-un-nissa when she purchased her houses on the 14th July 1896; secondly, that Najm-un-nissa was entitled, on the sale to Ajaib Ali becoming complete on the 6th September 1896, to claim pre-emption against him. Accordingly we allow the appeal of Najm-un-nissa and dismiss that of Ajaib Ali. Najm-un-nissa will have her costs of both appeals.

Appeal decreed.

Before Mr. Justice Banerji and Mr. Justice Aikman.

DAMODAR DAS (PLAINTIFF) v. MUHAMMAD HUSAIN (DEFENDANT).*

Act No. IX of 1872 (Indian Contract Act), sections 135, 137—Principal and Surety—Agreement to give time to principal debtor—Gratuitous agreement—Surety not discharged.

A mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety. In order to have such effect an agreement to give time to the principal debtor must amount to a contract, that is, there must be consideration therefor. *Philpot v. Briant* (1), *Tucker v. Laing* (2), and *Clarke v. Birley* (3), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. D. N. Banerji, for the appellant.

Maulvi Ghulam Mujtaba, for the respondent.

BANERJI and AIKMAN, JJ.—The question which arises in this appeal is whether the defendant Muhammad Husain, who was surety for the defendant Wali Ahmad, was discharged

* Second Appeal No. 22 of 1898 from a decree of E. J. Kitts, Esq., District Judge of Bareilly, dated the 29th September 1897, confirming a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 24th February 1897.

(1) (1828) 4 Bing., 717.

(2) (1856) 2 K. and J., 745.

(3) (1888) L. R. 41, Ch. D. 422.

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under section 135 of the Indian Contract Act. What happened was this. Wali Ahmad had written a letter to the plaintiff, asking for time to pay the instalments which were payable by him. In reply to that letter the plaintiff wrote to say:—"If there is no legal impediment, then I agree; if there is, then I do not agree." It was contended in the lower appellate Court that this was a conditional acceptance of the proposal of the principal debtor. The learned Judge overruled this contention, and held that by reason of the creditor, plaintiff, accepting the proposal to grant time to the principal debtor the surety was discharged. It is contended before us, and in our opinion rightly, that a mere agreement between the creditor and the principal debtor does not discharge the surety unless the agreement amounts to a contract, that is, unless the agreement is one enforceable by law at the instance of the debtor. An agreement is not enforceable by law unless there is consideration for it. In this case there was no consideration for the plaintiff's agreement to delay the realization of the instalments originally fixed. This agreement was nothing more than a mere gratuitous forbearance on the part of the creditor within the meaning of section 137 of the Contract Act. Under section 135 the liability of the surety would cease if there was a contract between the creditor and the principal debtor by which the creditor promised to give time to the principal debtor. The real test for the application of that section is whether the agreement became a contract, that is to say, whether there was consideration for the promise made in the agreement. In the absence of such consideration the agreement could not be enforced by the debtor. The cases of *Philpot v. Briant* (1), *Trucker v. Laing* (2), and *Clarke v. Birley* (3), which were cited at the hearing, entirely support the contention of the learned counsel for the appellant. It was not suggested in this case that section 139 of the Contract Act had any application. For the above reasons we are unable to agree with the Courts below in holding that the surety was discharged by reason of the forbearance of the plaintiff to realize the instalments payable by the principal debtor. We allow this appeal and vary the decree of the Court below by setting

(1) (1828) Bing., 717.

(2) (1856) 2 K. and J., 745.

(3) (1888) L. R. 41, Ch. D., 422.

aside that portion of the decree which dismissed the claim against Muhammad Husain with costs, and we decree the claim against the said defendant with costs here and in the Courts below, and direct the property hypothecated by the said defendant to be sold for the realization of the amount decreed, together with interest at the rate of 6 per cent. per annum up to the date of realization, unless the amount payable under the decree is paid on or before the 15th November, 1900. Our decree will be drawn up in the terms of section 88 of the Transfer of Property Act.

Decree modified.

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Before Mr. Justice Burkitt and Mr. Justice Aikman.

DEBI SAHAI (DEFENDANT) v. SHEO SHANKER LAL AND ANOTHER
(PLAINTIFFS).*

Hindu law—Mitakshara—Stridhan—What constitutes Stridhan—Property inherited from a female—Descent of Stridhan.

Amongst property which becomes *stridhan* according to the law of the Mitakshara is property inherited from a female.

It is not the case that where such *stridhan* has once devolved according* to the law of succession which governs the descent of this peculiar species of property it ceases to be ranked as *stridhan* and is ever afterwards governed by the ordinary rules of inheritance. *Thakoor Deyhee v. Rai Baluk Ram* (1), *Bhugwandeen Doobey v. Myna Bae* (2), *Chotay Lall v. Chunno Lall* (3), *Phukar Singh v. Ranjit Singh* (4), and *Muttu Vaduganadha Tevar v. Dora Singha Tevar* (5), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri (for whom Babu Satya Chandar Mukerji), for the appellant.

Pandit Sundar Lal and Munshi Haribans Sahai, for the respondents.

AIKMAN, J. (BURKITT, J., concurring).—This is an appeal brought by the defendant to a suit instituted by the plaintiffs-respondents to recover possession of landed property of considerable value together with mesne profits, and for invalidation

* First Appeal No. 46 of 1898, from a decree of Maulvi Saiyid Jafar Husain Khan, Subordinate Judge of Gorakhpur, dated 7th December 1897.

(1) (1866) 11 Moo., I. A., 139.

(3) (1876) L. R., 6 I. A., 15.

(2) (1867) 11 Moo., I. A., 487.

(4) (1878) I. L. R., 1 All., 661.

(5) (1881) I. L. R., 3 Mad., 220.