Subordinate Judge that the present application is not a fresh application, but a continuation of the proceeding which had been temporarily stayed by the Court in consequence of the objections of the owners of the houses. The appeal fails, and is dismissed with costs.

Appeal dismissed.

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NAND KISHORE v. SIPAHI SINGH.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

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THE MAHARAJA OF BENARES (PLAINTIFF) *v.* RAMKUMAR MISIR AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Security—Liability of sons under an engagement by their father to be answerable for the payment of rent by a third person.

Held that under the Hindu law the sons in a joint Hindu family are liable as such for the due fulfilment of an engagement entered into by their father as surety for the payment of rent by a lessee in accordance with the terms of his lease. *Tukrambhat* v. *Gangaram Mulchand Gujar* (1), and *Sitaramayya* v. *Venkatramanna* (2) followed.

THE facts of this case are as follows:—

In the year 1888 the Maharaja of Benares gave a lease of four villages for a term of nine years (1296 to 1304 Fasli), at a rental of Rs. 1,385 per annum, to one Ram Prasad. To secure the due payment of the rent payable under this lease a surety bond was entered into by the lessee and two others—Mahabir and Ram Harakh. Each of the sureties hypothecated certain property, and it was provided in the bond that "in case the lessees are in arrears and the sureties fail to pay the amount, the plaintiff shall have the power to recover the money payable to him from the persons of the sureties and by means of attachment and auction sale of the property hypothecated in the deed of surety, or in whatever manner he may realize it." The rent for the years 1301 and 1302 Fasli being due and unpaid, the Maharaja instituted a suit in the Rent Court for recovery of the arrears, and obtained a decree for Rs. 2,348 odd. Failing to realize that sum by execution of his decree in the Rent Court, he instituted the

* Second Appeal No. 1032 of 1902 from a decree of J. Sanders, Esq., District Judge of Benares, dated the 29th of August 1902, modifying a decree of Maulvi Muhammad Sirajuddin, Subordinate Judge of Benares, dated the 10th of June 1902.

(1) (1898) I. L. R., 23 Bom., 454. (2) (1888) I. L. R., 11 Mad., 373.

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present suit against Ram Kumar Misir, Bhagwati Prasad and Kedar Singh, sons of the three obligors of the security bond mentioned above, all of whom were dead. The plaintiff asked for a decree for the sum decreed to him by the Rent Court with interest, under section 88 of the Transfer of Property Act, 1882, and in default of payment for sale of the property hypothecated in the security bond. In their written statements the defendants raised various questions of fact, and finally pleaded that the security bond was not binding on the defendants according to the Hindu law. The Court of first instance (Subordinate Judge of Benares) dismissed the plaintiff's suit. The plaintiff appealed, and the lower Appellate Court (District Judge of Benares) dismissed the appeal. The plaintiff thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* (for whom Mr. *M. L. Agarwala*) and Munshi *Gokul Prasad*, for the appellant.

Mr. *Abdul Raoof*, and Pandit *Sundar Lal*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This is an appeal from an appellate decree of the District Judge of Benares. There is no dispute as to the facts out of which it arises. In the year 1888 the Maharaja of Benares gave a lease of four villages for a term of nine years (1296—1304 Fasli) at a rent of Rs. 1,385 per annum to one Ram Prasad, father of the defendant-respondent Bhagwati Prasad. To secure the payment of the rent by Ram Prasad to the Maharaja a surety bond was entered into on the 28th September 1888 by Ram Prasad with two other men, named Mahabir and Ram Harakh, each hypothecating certain property. The terms of the surety bond, as stated in the plaint, and not contradicted by any of the defendants, are "that in case the lessees are in arrears and the sureties fail to pay the amount, the plaintiff shall have the power to recover the money payable to him from the persons of the sureties and by means of attachment and auction sale of the property hypothecated in the deed of surety bond, or in whatever manner he may realize it."

The rent for the years 1301 and 1302 Fasli being due and unpaid, the plaintiff Maharaja instituted a suit in the Rent

Court for recovery of the arrears, and obtained a decree of Rs. 2,348 odd. Failing to recover that sum by execution of his decree in the Rent Court, this suit has been instituted against the three defendants Ram Kumar Misir, Bhagwati Prasad and Kedar Singh, sons of the three obligors of the instrument of September 28th, 1888, all of whom are dead. By the prayer to his plaint the plaintiff asked for a decree for the sum decreed to him in the Rent Court, with interest, under section 88 of Act No. IV of 1882, by enforcement of the hypothecation lien against and sale of the property hypothecated in the security bond.

In their written statements the defendants raised certain questions as to the genuineness of the bond and the amount due under it, and also as to whether any of the hypothecated property was the self-acquired property of the original obligors. These are questions of fact which have been decided by the lower Court, and need not be further referred to here.

The last question is one of law, namely, is the instrument of September 28th, 1888, which the learned Subordinate Judge (not incorrectly) calls a mortgage bond, binding on the defendants?

As to this the Court of first instance divided the property into two classes. One of these it declared "is not saleable because the sureties have only mortgagees' rights therein, and such properties have been held over and over again as not being *(sic)* saleable by auction in execution of decree."

The learned Subordinate Judge does not cite any authority for this proposition. If by his dictum he means that properties which the sureties hold under a mortgage cannot be sold under a decree passed on the surety bond of September 28th, 1888, he is no doubt right. But if he means that the interest of the sureties as mortgagees cannot be sold, we are of opinion that he is wrong. The interest of the sureties as mortgagees can undoubtedly be sold, and that we take it is what the appellant wants. The lower Appellate Court expressed no opinion on this point.

As to the liability of the ancestral property to be taken under the instrument of September 28th, 1888, the learned

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Subordinate Judge remarks "the sureties were liable for the honesty of the *thikadar*, and the obligations incurred for the honesty of the *thikadar* or for appearance of any one are limited to the sureties themselves, and those obligations do not bind the sons." For that reason the learned Subordinate Judge held that neither the ancestral property nor the persons of the defendants, who are the sons of the sureties, were liable, and accordingly dismissed the suit.

In appeal the learned District Judge was of the same opinion. His words are:—"I also consider that the lower Court has rightly held that the sureties bound themselves merely for the honesty of the lessee, and that therefore the sons are not liable under the Hindu law." In this matter we are of opinion that both the lower Courts are unquestionably wrong. The sureties did not bind themselves to guarantee the "honesty" of the lessee. There is no question whatever of "honesty" involved in this case. This is not a case in which sureties bind themselves under a penalty that the person for whom they bind themselves will honestly perform duties which are to be entrusted to him and will not embezzle moneys which may come into his hands in the execution of those duties. Here the sureties undertook that if the lessee failed to pay the rent agreed on between him and his lessor the sureties would pay for him. They are in fact "sureties for payment." There is no suggestion of dishonesty. The lessee we notice did pay for five years of the term, and his failure to pay for 1301 and 1302 Fasli may have been due to causes beyond his control. The question then is, does a son's pious duty to pay his father's debts (not tainted with immorality) attach in the case of a debt incurred by the father as surety for payment? This question we may note arises only in the case of the sons of Mahabir Misir and Ram Harakh. The son (Bhagwati Prasad) of the actual debtor Ram Prasad is undoubtedly liable. The fiction under which Ram Prasad made himself a surety for his own debts simply means that he gave his lessor a mortgage on his immovable property to secure payment of his rent.

In supporting the decree of the lower Appellate Court, the learned advocate for the respondent contended that in two

instances only of security for payment could the sons be liable, namely, *firstly*, where at the request of the father and on his security money was advanced by the lender to the borrower, and, *secondly*, where on similar conditions goods were sold and delivered to a purchaser. The transaction, the learned advocate contended, should be purely of a ready money character, which is not the case here. In the case of *Tukarambhat* v. *Gangaram Mulchand Gujar* (1) the head-note runs as follows: —"Ancestral property in the hands of sons is liable for a father's debt incurred as a surety," and to the same effect is the head-note in the case of *Sitaramayya* v. *Venkatramanna* (2). Mr. Mayne in paragraph 304 of his "Treatise on Hindu Law and Usage" (6th edition) lays down that a son is not compellable to pay, *inter alia*, sums for which the father was surety. As to this Mr. Justice Ranade in the Bombay case cited above remarks:—"This is, however, obviously a general exposition intended to set forth the limitations upon the son's liability to pay his father's debts. Occurring in the context where it stands it simply suggests that surety obligations recklessly incurred stand in the same category with other extravagant or immoral acts of the father which entail no liability on the sons. These propositions occur in the chapter on the recovery of debts. It would not be safe, however, to infer from such texts occurring in such a place that the words above italicised are to be literally understood." The words above italicised are the words "sums for which the father was a surety." The learned Judge then proceeds:—"They are controlled by the particular maxims laid down in the special chapter on surety obligations. The texts relating to this special subject are referred to by Mr. Mayne in the foot-note to the same paragraph" on surety obligations. The learned Judge then goes on to enumerate the four classes of sureties recognized by Hindu law, and to point out the consensus of the text books from Manu onwards that for the first two classes (sureties for appearance and for honesty) the fathers are liable, but not the sons, while the obligations incurred by the two last kinds (sureties for payment of money lent and sureties for goods

(1) (1898) I. L. R., 23 Bom., 454. (2) (1888) I. L. R., 11 Mad., 373.

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delivered) bind both them and their sons after their death. In the same case the Acting Chief Justice after mentioning the four kinds of sureties recognized by Hindu law proceeds as follows:—"In the laws of Manu (I quote this and succeeding authorities from Max Müller's "Sacred Book of the East") at section 159 it is said that the son shall not be obliged to pay money due by a surety, but at section 160 it is explained that this rule applies to the case of a surety for appearance only; and that if a surety for payment shall die, the Judge may compel even his heirs to discharge the debt. Brihaspati in section 40 mentions the four classes of sureties, and in section 41 says:—"If the debtors fail in their engagements, the two first (the sureties themselves, but not their sons) must pay the sum lent at the appointed time; both the two last (sureties) and in default of them their sons (are liable for the debt) when the debtors break their promise to pay the debt." The learned Acting Chief Justice then cites other authorities, and among them Colebrook's "Hindu Law," Vol. I, p. 164, Chapter 142. All these authorities declare the liability of a son to pay the debts of a father when incurred as surety for the payment of a debt. We have no doubt that the words "security for the payment of a debt," though no doubt primarily applicable to the case of an advance of money, would include a case like the present of a lease of immovable property granted on security being given that the rent would be paid according to the stipulation of the lease. The security is given for money's worth, that is, for land let to a third party in consideration of the payment of rent. For these reasons we are of opinion that both the lower Courts were wrong in dismissing the plaintiff's (appellant's) suit. We allow this appeal, we set aside the concurrent decrees of the lower Courts, and as the learned District Judge has not disposed of the question as to the amount for which the sureties were liable, he holding that they were not liable for anything, we remand the record under section 562 of the Code of Civil Procedure to the lower Appellate Court and order that Court, after ascertaining the amount, if any, due from the defendants on the surety bond of September 28th, 1888, to pass a decree as regards the hypothecated

property under section 88 of the Transfer of Property Act; and as regards the property held in mortgage by the defendants, or any of them, to direct that if necessary their interest as mortgagees in that property be likewise sold and the proceeds applied to discharge the debt. The defendants must pay the costs of this appeal.

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Appeal decreed and cause remanded.

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Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

LACHMI NARAIN AND OTHERS (DEFENDANTS) *v.* MAKUND SINGH (PLAINTIFF) AND DURGA KUNWAR AND OTHERS (DEFENDANTS).*

Act No. XXIII of 1871 *(Pensions Act), sections* 3 *and* 11—*Civil Procedure Code, section* 266—*Pension—Zamindari granted as a reward for services rendered to Government.*

Held that zamindari granted—not revenue free—by Government as a reward for services rendered is not a pension, and its alienation by the grantee is not prohibited either by Act No. XXIII of 1871 or by section 266 of the Code of Civil Procedure. *The Secretary of State for India in Council* v. *Khemchand Jeychand* (1), *Bal Krishna Bhao* v. *Govind Rao* (2) and *Bishambhar Nath* v. *Nawab Imdad Ali Khan* (3) referred to.

THE facts of this case are as follows :—

In 1868 the Government granted certain zamindari villages, subject to the payment of land revenue, to one Ganga Bakhsh, as a reward for services rendered by Ganga Bakhsh to the Government. In 1870 Ganga Bakhsh and his uncles mortgaged this, along with other property, to secure previous debts and a further advance of money. A decree for sale was obtained on that mortgage, and some of the property was sold. Upon a further portion of the mortgaged property being proclaimed for sale on the 25th of October 1901, a suit was instituted by the minor son of Ganga Bakhsh through his next friend for the purpose of obtaining a declaration that "the property sought to be sold is the land granted as a pension for good services, and that, according to military law and the conditions of the grant, as well as according to the Hindu law, it is not saleable as against the plaintiff in execution of the decree held by defendants

* First Appeal No. 169 of 1902 from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 2nd of May 1902.

(1) (1880) I. L. R., 4 Bom., 432. (2) Weekly Notes, 1902, p. 161.
(3) (1890) L. R., 17 I. A., 181.