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pre-emption based upon the Muhammadan law on the ground that the plaintiff had not performed the *talab-i-ishtishhad* in compliance with the rules of Muhammadan law. We think that the learned Judge of the Court below was right. The plaintiff was bound not only to make an immediate demand, but also to make a second demand by invoking witnesses. In this case what took place was that the first and second demands were made in the presence of certain persons. Those persons were not taken to the spot, nor were they asked to be witnesses to the demand. They were persons who simply happened to be present. That being so, the *talab-i-ishtishhad* was not performed in the manner required by Muhammadan law as laid down in Chapter II of the Hidaya, Book 38. Our view is supported by the ruling in *Issur Chunder Shaha* v. *Mirza Nisar Hossein* (1). That was a case very similar to the present, and it was held that the plaintiff had not duly performed the second ceremony of affirmation by witnesses, although when he expressed his desire to purchase there were witnesses present. The appeal therefore fails, and is dismissed with costs.

Appeal dismissed.

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

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MAHARAJA OF BENARES (PLAINTIFF) *v.* HAR NARAIN SINGH AND OTHERS (DEFENDANTS).*

Practice—Payment into court of money due under a bond bearing interest—Appropriation of such payments first to satisfaction of interest.

It appears to be a well settled practice of the Courts to appropriate payments made upon a bond first to the interest due thereon, and thereafter, if any balance remain, to the principal. *Luchmeswar Sing Bahadur* v. *Syad Lutf Ali Khan* (2) and *Gooroo Doss Dutt* v. *Ooma Churn Roy* (3) referred to.

IN the suit out of which this appeal arose the plaintiff claimed against the defendants, who were sureties or representatives of sureties for due payment of rent by one Jadunandan Singh, the lessee, from the plaintiff of taluqa Dhanethu, for the sum of Rs. 13,361-1-0, representing arrears of rent with interest,

* First Appeal No. 225 of 1903, from a decree of Maulvi Saiyid Zainul Abdin, Subordinate Judge of Jaunpur, dated the 30th July of 1903.

(1) W. R., 1864, p. 351. (2) (1871) 8 B. L. R., 110.
(3) (1874) 22 W. R., 525

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which the plaintiff, in spite of having obtained decrees therefor, had been unable to recover from the tenant. Amongst other defences, the defendants pleaded that under their agreement they were not liable for interest on arrears of rent due by their principal, but only for the arrears themselves. Also in execution of the decrees obtained by him against the principal defendant the plaintiff gave credit for a sum of Rs. 1,829-7-4 as realized by him from the plaintiff, but without showing whether this was appropriated to payment of the arrears themselves or of interest thereon, which amounted to a sum in excess of that realized. The Court of first instance (Subordinate Judge of Jaunpur) appropriated this sum to payment of the arrears, and so far relieved the defendants. The plaintiff appealed to the High Court, urging that the plaintiff was entitled to recover from the defendants interest upon the arrears for the payment of which they were responsible, and also that the payments made by Jadunandan should have been set off against the aggregate amount due to the plaintiff by the lessee, and not merely against the principal sum due.

The Hon'ble Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellant.

Mr. *Agarwala*, for the respondents.

STANLEY, C.J., and KNOX, J.—Two grounds of appeal have been pressed before us. The first is that upon a true construction of the *kabuliat* and security bond, upon the latter of which documents the defendants respondents have been sued in the suit out of which this appeal has arisen the appellant is entitled to recover interest on the rent in arrears the second ground is that payments which have been made by the lessee should be set off in the first instance against the interest payable by him and not against the principal.

In regard to the first of these questions, it appears to us that the Court below came to a right conclusion and for these reasons. Ordinarily the liability of a surety is co-extensive with that of the principal debtor. This indeed is provided for in section 128 of the Indian Contract Act. In the bond, however, upon which the plaintiff has sued it appears to us that the liability of the sureties is confined to liability for the arrears of rent

alone. After setting forth the lease, the defendants, the executants of the bond, covenant that "in case of default by the lessee and non-payment of the arrears by us, the sureties, the *sarkar* (*i e.* the Maharaja) will have power to realize the arrears from us personally or by attachment, etc." Here the obligation undertaken by the executants is confined to *the arrears*. That would ordinarily mean the arrears of rent previously referred to in the instrument. This seems to be made clear by the last clause in the bond, in which the following words appear: "The responsibility for the *annual rent* till expiry of the entire term of the farm shall rest with us." It seems to us that upon the true construction of this surety bond, the executants intended to be responsible for the rent, and for the rent alone. If it had been in the contemplation of the parties to give security not merely for the arrears of rent but also for interest it would, we think, have been so stated, and the passages in the bond to which we have referred would have contained some such words as "with interest thereon." Therefore this is not, we think, a case to which the ordinary rule according to which the liability of a surety is co-extensive with the liability of the principal is applicable. On the first point therefore the appeal fails.

As regards the second point, the learned Subordinate Judge has applied moneys which have been recovered from the lessee in payment of the arrears of rent due, and not in payment in the first instance of the interest recoverable from him in respect of such arrears. In this we think he was mistaken. It appears to be a well settled practice of the Courts to appropriate payments made upon a bond first to the interest due thereon, and thereafter, if any balance remain, to the principal. As an authority for this we would refer to the case of *Luchmeswar Singh Bahadur* v. *Syad Lutf Ali Khan* (1) and also to the case of *Gooroo Doss Dutt* v. *Ooma Churn Roy* (2). The appeal therefore succeeds upon this point. Now the interest payable by the lessee amounted to more than the sum recovered from him, namely, Rs. 1,829-7-4. This amount must therefore be appropriated to the payment of interest. The result will be that the decree passed against the defendants must be increased by that

(1) (1871) 8 B. L. R., 110. (2) (1874) 22 W. R., 525.

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amount, namely, Rs. 1,829-7-4. We accordingly to this extent allow the appeal, modify the decree of the Court below by awarding to the plaintiff this sum in addition to the sum already awarded. In other respects the decree will stand. We also think that the plaintiff is entitled to interest at 6 per cent. per annum from the date of the suit on the amount decreed. We so order. Under the circumstances we say nothing as to the costs of this appeal.

Decree modified.

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May 29.

Before Mr. Justice Knox.

MISRI LAL (JUDGMENT-DEBTOR) *v.* MITTHU LAL AND OTHERS (DECREE-HOLDERS).*

Civil Procedure Code, section 291—*Act No. IV of* 1882 *(Transfer of Property Act), section* 89—*Execution of decree—Payment into Court of decretal money and costs—Stay of sale.*

Where the sale of mortgaged property has been directed by an order absolute under section 89 of the Transfer of Property Act, 1882, it is open to the person holding the equity of redemption in such property to pay into Court at any time before the sale the amount of the decretal debt and costs, and thereupon the execution proceedings will cease. It is not necessary that the person holding the equity of redemption should wait until the property is actually put up for sale. *Raja Ram Singhji* v. *Chunni Lal* (1) and *Harjas Rai* v. *Rameshar* (2) followed. *Bibijan Bibi* v. *Suchi Bewah* (3) referred to.

IN this case a certain house was to be sold in execution of a decree for sale held by Mitthu Lal and others and an order absolute for sale pursuant to that decree. By the decree the whole of the house was liable for a debt of Rs. 200 and one-fourth only for a debt of Rs. 558-2-0. Misri Lal, the holder of the prior mortgage for Rs. 200, paid that amount into Court and prayed that three-quarters of the house might be released, and the remaining quarter only sold in execution of the plaintiffs decree-holders' decree. The Court executing the decree (Subordinate Judge of Aligarh) gave effect to the applicant's contention and directed that one quarter of the house only should be sold. The decree-holders appealed. The lower

* Second Appeal No. 1016 of 1904, from a decree of J. H. Cuming, Esq., District Judge of Aligarh, dated the 12th July 1904, reversing a decree of Maulvi Muhammad Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 30th April 1904.

(1) (1897) I. L. R., 19 All., 205. (2) (1898) I. L. R., 20 All., 354.
(3) (1904) I. L. R., 31 Calc., 863.