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PARTAP
SINGHTHE DELHI
AND LONDON
BANK, LD.

the Bank would be losers, and he prayed the Court to appoint a receiver to realize the amounts of his decrees attached by the Bank. The learned Subordinate Judge in his order under appeal states that the judgment-debtor's case is a pitiable one, as there is very little likelihood of the decrees fetching a suitable price at the auction sale. But he was of opinion that section 503 of the Code of Civil Procedure did not apply to a case like the present, and accordingly rejected the application. In our opinion the opening words of the section are wide enough to cover a case like the present. We accordingly allow the appeal, set aside the order of the lower Court, and remand the case to that Court with instructions to re-admit the application under its original number in the register and adopt proper steps for the appointment of a receiver. We make no order as to costs.

Appeal decreed.

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Before Mr. Justice Sir George Knox and Mr. Justice Aikman.
KALLU AND ANOTHER (PLAINTIFFS) v. FAIYAZ ALI KHAN AND
OTHERS (DEFENDANTS)*

*Hindu law—Hindu widow—Money advanced on personal security of widow—
Decree against widow binding only on her widow's estate—Res judicata—
Civil Procedure Code, section 13.*

Where money is lent to a Hindu widow on her personal security, a decree for such a debt and a sale of property late of the widow's husband in execution of such decree binds only the widow's estate, notwithstanding that the original debt may have been incurred for legal necessity. *Dhiraj Singh v. Munga Ram* (1) followed.

K and S (two brothers) executed a usufructuary mortgage of their respective shares in certain property. The share of S was then purchased in execution of a simple money decree by D. The share of K was after his death brought to sale in execution of a simple money decree against K's widow and purchased by G. G transferred his rights to R, who was D's brother. D sued for redemption of half the mortgaged property, naming as defendants the mortgagee, the heirs of S, and R. Pending this suit R died and D amended his plaint, claiming redemption of the whole. The heirs of S did not defend this suit, which was decided *ex parte* as against them, and the suit was compromised by D's widow. The heirs of S then, claiming as next reversioners to K on the death of his widow, brought the present suit, seeking to redeem

*Second Appeal No. 819 of 1906 from a decree of J. H. Cuming, Additional Judge of Aligarh, dated the 2nd of August 1906, confirming a decree of Sheo Prasad, Munsif of Khurja, dated the 19th of August 1905.

(1) Weekly Notes, 1897, p. 67.

half of the mortgaged property. *Held* that the suit was not barred by section 13 of the Code of Civil Procedure, inasmuch as the plaintiffs, though they might have done so, were not bound in the former suit to raise the defence that D was not entitled to redeem more than half of the mortgaged property.

THIS was a suit to recover possession of a half share in 76 bighas and 5 biswas, which was mortgaged by two brothers, Sher Singh and Khaman Singh in 1858. The plaintiffs alleged that the mortgage debt had been satisfied by the usufruct. The brothers are said to have been separate and each is said to have mortgaged his half share of the property. The equity of redemption of Sher Singh was brought to sale in execution of a simple money-decree held by Deekishen and was purchased by Deekishen himself. He died and was succeeded by his widow Musammat Ganga, respondent No. 2. Both the mortgagors, Sher Singh and Khaman Singh also died. Khaman Singh was succeeded by his widow Musammat Gaura, who is also dead. The plaintiffs claimed as heirs to Khaman Singh. Khaman's widow Musammat Gaura executed a simple money bond on the 21st of December 1883 in favour of Deekishen for the sum of Rs. 95. Deekishen got a decree on the bond on the 8th of March 1887. In execution of that decree Gaura's rights and interests in the property mortgaged were sold and bought by one Ganga Prasad. On the 21st January 1889 Ganga Prasad sold these rights and interests to Ram Chandar, brother of Deekishen. On the 17th of March 1892 Deekishen brought a suit to redeem half the property. The defendants to the suit were (1) the predecessor in title of Nawab Sir Faiyaz Ali Khan, respondent No. 1, who had by purchase acquired the rights of the original mortgagees, (2) the plaintiff's brother Ram Chandar, and (3) the present appellants, the heirs of the mortgagors. Ram Chandar died during the progress of that suit, and Deekishen, alleging that he was Ram Chandar's heir, amended his plaint and asked to redeem the whole 76½ bighas. Only the representative of respondent No. 1 contested the suit. On the 13th September 1898 Deekishen got a decree for redemption of the whole property subject to the payment of Rs. 1,000 to Nawab Sir Faiyaz Ali Khan. Against this decree two appeals were preferred, one by Nawab Sir Faiyaz Ali Khan and the other by Deekishen. Deekishen died during the pendency of the appeals and his widow Musammat

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Ganga was brought on the record as his legal representative. The present plaintiffs were not made parties to the appeals. These appeals ended in a compromise, and a decree on the compromise was passed on the 20th of December 1900. Under the compromise both the appeals were withdrawn. Musammât Ganga was to get Rs. 4,000 and the decree of the lower Court for redemption was to be treated as if it never existed ("kaladam"). The Court of first instance (Munsif of Khurja) dismissed this suit finding that the debt incurred by Musammât Gaura was incurred for legal necessity, and that the sale in execution of the decree against her passed the whole of Khaman Singh's rights. One of the defences to the suit was that the plaintiffs' suit was barred by the decree passed in the suit of Deokishen instituted on the 17th of March 1892. This plea was overruled by the Court of first instance. The plaintiffs appealed against the decree of that Court dismissing their claim, and the respondents filed an objection under section 561 of the Code of Civil Procedure, assailing the finding of the first Court on the question of *res judicata*. The lower appellate Court (Additional Judge of Aligarh) without dealing with the question raised by the plaintiffs' appeal, sustained the objection filed by the respondent No. 1, and, holding that the plaintiffs' suit was barred by section 13 of the Code of Civil Procedure, dismissed it. Against the decree of the lower appellate Court the plaintiffs appealed to the High Court.

Dr. *Tej Bahadur Sapru* and *Munshi Gobind Prasad*, for the appellants.

Mr. *Abdul Majid*, *Babu Jogindro Nath Chaudhri* and *Maulvi Rahmatullah*, for the respondents.

KNOX and AIKMAN, JJ.—This appeal arises out of a suit brought by the appellants to recover possession of a half share in 76 bighas and 5 biswas, which was mortgaged by two brothers Sher Singh and Khaman Singh in 1858. The plaintiffs' allegation is that the mortgage debt has been satisfied by the usufruct. The brothers are said to have been separate and each is said to have mortgaged his half share of the property. The equity of redemption of Sher Singh was brought to sale in execution of a simple money decree held by Deokishen and was purchased by

Deekishen himself. He is dead and is represented by his widow Musammat Ganga, respondent No. 2. Both the mortgagors Sher Singh and Khaman Singh are dead. Khaman Singh was succeeded by his widow Musammat Gaura, who is also dead. The plaintiffs claim as heirs to Khaman Singh. It appears that Khaman's widow Musammat Gaura executed a simple money bond on the 21st of December 1883 in favour of Deekishen for the sum of Rs. 95. Deekishen got a decree on the bond on the 8th of March 1887. In execution of that decree Gaura's rights and interests in the property mortgaged were sold and bought by one Ganga Prasad. On the 21st January 1889 Ganga Prasad sold these rights and interests to Ram Chandar, brother of Deekishen. On the 17th of March 1892 Deekishen brought a suit to redeem half the property. The defendants to the suit were (1) the predecessor in title of Nawab Sir Faiyaz Ali Khan, respondent No. 1, who had by purchase acquired the rights of the original mortgagees, (2) the plaintiff's brother Ram Chandar, and (3) the present appellants, the heirs of the mortgagors. Ram Chandar died during the progress of that suit, and Deekishen, alleging that he was Ram Chandar's heir, amended his plaint and asked to redeem the whole 76½ bighas. Only the representative of respondent No. 1 contested the suit. On the 13th September 1898 Deekishen got a decree for redemption of the whole property subject to the payment of Rs. 1,000 to Nawab Sir Faiyaz Ali Khan. Against this decree two appeals were preferred, one by Nawab Sir Faiyaz Ali Khan and the other by Deekishen. Deekishen died during the pendency of the appeals, and his widow Musammat Ganga was brought on the record as his legal representative. The present plaintiffs were not made parties to the appeals. These appeals ended in a compromise, and a decree on the compromise was passed on the 20th of December 1900. Under the compromise both the appeals were withdrawn. Musammat Ganga was to get Rs. 4,000 and the decree of the lower Court for redemption was to be treated as if it never existed ("kaladam"). The Court of first instance dismissed this suit, finding that the debt incurred by Musammat Gaura was incurred for legal necessity, and that the sale in execution of the decree against her passed the whole of Khaman Singh's rights. One of

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the defences to the suit was that the plaintiff's suit was barred by the decree passed in the suit of Deekishen instituted on the 17th of March 1892. This plea was overruled by the Court of first instance. The plaintiffs appealed against the decree of that Court dismissing their claim, and the respondents filed an objection under section 561 of the Code of Civil Procedure, assailing the finding of the first Court on the question of *res judicata*. The learned Additional Judge, without dealing with the question raised by the plaintiffs' appeal, sustained the objection filed by the respondent No. 1, and, holding that the plaintiffs' suit was barred by section 13 of the Code of Civil Procedure, dismissed it. Against the decree of the lower appellate Court the plaintiffs have preferred the present appeal.

The first question we have to decide is, whether the sale in execution of the decree on the simple money bond executed by Musammat Gaura was a sale only of her life interest in the property or whether it passed the estate of her deceased husband Khaman Singh. As said above, the learned Munsif decided that the whole estate passed by the sale. In our opinion that decision cannot be supported. When Deekishen lent money to Musammat Gaura in 1883 he chose to do so on her personal security. He did not obtain from her any mortgage of her husband's property. That being so, we hold that any decree which he obtained on his simple money bond could only bind the rights and interests of his debtor on whose personal security he had advanced the money. Musammat Gaura is dead. She had only a widow's estate, and with her death the rights and interests in the property in suit purchased in execution of the decree against her came to an end. In support of this view we may refer to what is said in paragraph 641 of the 7th edition of Mayne's Hindu Law and to the case *Dhiraj Singh v. Manga Ram* (1). This disposes of the first issue which we have to decide.

The next question that arises is whether the present suit of the plaintiffs is barred by what took place in the suit for redemption instituted by Deekishen in 1892. It is true that in that suit, by the amendment of his plaint, Deekishen claimed to redeem the whole property. It appears that in that suit no issue was framed

(1) Weekly Notes, 1897, p. 67.

as to whether in point of fact Deekishen did or did not own the equity of redemption, and consequently it cannot be said that the issue as to his owning the whole was "heard and finally decided" by the Court. The learned counsel for the defendant, however, relies on explanation II to section 13 of the Code of Civil Procedure, which enacts that any matter which might and ought to have been made a ground of defence in a former suit shall be deemed to have been a matter directly and substantially in issue in that suit. As we have said, the present plaintiffs did not appear to defend the suit, and the decree was passed *ex parte* against them. The present plaintiffs might in that suit undoubtedly have raised the plea that Deekishen was not the owner of the equity of redemption of the whole of the property. But although they might have raised such a defence, we are of opinion that it was not incumbent on them to do so. It was not necessary for the Court to decide the issue as to the extent of Deekishen's rights to enable it to pass the decree which it did. Deekishen admittedly owned a share in the equity of redemption, and, that being so, he was entitled to redeem the whole. We hold that, this being so, the plaintiffs as representatives of one of the co-mortgagors were not bound in the previous suit to raise the issue as to whether or not Deekishen owned the equity of redemption over the whole. We hold, therefore, that the plaintiffs are not precluded by anything in the previous suit from maintaining their present claim. We have already held on the first question that we have to decide that the property itself did not pass at the sale in execution of the decree obtained against Musammat Gaura, but only her rights and interests. The plaintiffs as the heirs of one of the original co-mortgagors are therefore entitled to maintain this suit for redemption. Issues were remitted to the lower appellate Court to decide two questions of fact, namely, what was the amount secured by the mortgage which it is sought to redeem, and next, whether or not that amount has been discharged by the usufruct of the property. On these issues the lower appellate Court has found, first, that the amount secured by the mortgage is Rs. 425, and next, that the mortgage debt has long ago been discharged by the usufruct. Objections have been filed by the respondent. One objection is

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that on the finding of the lower appellate Court that the mortgage debt has been satisfied long ago out of the usufruct, the suit of the plaintiffs is barred by limitation. This plea, however, was abandoned before us. Another objection has been raised as to the finding of the lower Court in regard to the amount of the mortgage money. The respondents contended that the terms of the wajib-ul-arz of 1890 show that the amount secured by the mortgage was Rs. 1,000. We have examined this wajib-ul-arz and we agree with the construction placed on it by the lower appellate Court. We set aside the decrees of the Courts below and decree the plaintiffs' claim as set forth in relief (a) of the plaint. The plaintiffs will have their costs here and in the Courts below.

This case was very ably argued by the learned advocates for the parties, particularly by the learned advocate for the appellants.

Appeal decreed.

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

COLLECTOR OF MIRZAPUR (PLAINTIFF), v. DAWAN SINGH
AND OTHERS (DEFENDANTS).*

Act No. XV of 1877 (Indian Limitation Act), schedule II, article 116—Limitation—mortgage—Suit for compensation for the breach of a contract in writing registered.

A registered mortgage bond provided that the amount secured by it should be paid by instalments, and that in case of default the mortgagee would be entitled to take possession; further, that should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the mortgagee would have power to realise the amount secured by the bond with the interest at 1 per cent. from the date of the cause of action till repayment, either from the person or from the property, movable or immovable, of the debtor, or from the property mortgaged.

Held that a suit based upon the foregoing covenant to recover the mortgage money upon failure of the mortgagor to pay instalments was in substance a suit for compensation for breach of contract, to which the limitation prescribed by article 116 of the second schedule to the Indian Limitation Act, 1877, applied. *Husain Ali Khan v. Hafiz Ali Khan* (1) referred to.

THIS was a suit to recover the amount of a mortgage bond, dated the 17th of April 1899. It was a registered document,

* Second Appeal No. 10 of 1907 from a decree of Muhammad Ali, District Judge of Mirzapur, dated the 12th of September 1906, modifying a decree of Amjadullah, Subordinate Judge of Mirzapur, dated the 1st of June 1906.

(1) (1881) I. L. R., 8 All., 600.