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that the suit is not barred by limitation. The result of the view which we take in this case is that the plaintiff's suit must fail as regards $\frac{9}{16}$ of the property in dispute. As to the remaining $\frac{7}{16}$ of the property, the plaintiff is entitled to a decree for possession on payment of such proportion of the dower debt of Musammat Azima as might be chargeable against that share. The question of the amount of the dower debt of Musammat Azima has not been tried by either of the Courts below. [Their Lordships remitted an issue to determine it.]

Issue remitted.

REVISIONAL CIVIL.

1920
July, 10.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

MUHAMMAD UBED-ULLAH AND OTHERS (DEFENDANTS) *v.* MUHAMMAD INSHA ALLAH KHAN (PLAINTIFF).*

Act No. IX of 1872 (*Indian Contract Act*), *section* 131—*Surety—Liability of heirs of surety for default occurring after surety's death—Construction of document.*

Two persons engaged themselves as sureties in behalf of a peon in the Postal department. The bond which they executed was in a prescribed form of general application. It bound both the sureties personally and their representatives after their death; but the bond further provided that a surety could terminate his liability in respect of the future by giving six months' notice to the prescribed postal authority.

The bond in the present case was executed in 1902. In 1910 one of the sureties died. In 1916 the person on whose behalf the bond was given embezzled a sum of money, which was recovered by the Postal department from the surviving surety. The surviving surety then sued the heirs of the deceased surety for contribution.

Held that the plaintiff was entitled to recover.

THE facts of this case are fully stated in the judgment of Gokul Prasad, J.

Pandit *Sham Krishna Dar* and the Hon'ble Munshi *Narain Prasad Ashthana*, for the applicants.

Pandit *Uma Shankar Bajpai*, for the opposite party.

GOKUL PRASAD, J.:—The facts which have given rise to this revision are as follows:—It seems that Syed Zahur-ul-Hasan was a candidate for service in the Postal department and had to furnish two sureties for good conduct during his term of

* Civil Revision No. 93 of 1919.

service. On the 25th of March, 1902, he executed a personal security bond, with two sureties in the form prescribed by the Postal department. The two sureties were Hafiz Abdul Rahim and Insha Allah Khan. Hafiz Abdul Rahim died in 1910, and in 1916 Zahur-ul-Hasan embezzled a sum of Rs. 482-2-0. The postal authorities recovered the amount from the surviving surety, Insha Allah Khan. The present suit is by him to recover half of this amount from the heirs of his deceased co-surety Hafiz Abdul Rahim. The suit was brought in the Court of Small Causes at Meerut and was decreed. The defendants come here in revision and contend that the court below has erred in decreeing the suit, as the security bond ceased to be operative as against the deceased surety after his death. This revision came up for hearing before a Judge of this Court sitting alone, and having regard to the importance of the question of law he referred it to a Bench of two Judges.

The decision of the question raised in this revision depends upon the terms of the security bond, because it is admitted and is quite clear that the provisions of section 131 of the Indian Contract Act would apply to this case. A large number of cases, both Indian and English, have been cited during the course of the argument, but as the English law on the subject of continuing guarantees is somewhat different from the Indian law, we wish to confine ourselves to the Indian cases and the Indian Contract Act alone. The important portions of the security bond which we have to construe are :—

(1) that the sureties bound "ourselves, our heirs, executors, administrators and the representatives jointly, and each of us binds himself, his heirs, executors, administrators and representatives severally, formally etc." and (2) "provided always that neither of the two sureties shall be at liberty to terminate his suretyship except upon giving to the head of the said postal circle for the time being 6 calendar months' notice in writing of his intention so to do, etc., etc." and in the event of any such notice being given, the liability of the surety by whom it shall be given, shall be thereby determined in respect only of acts and omissions happening after the expiration of the said period of months."

Section 131 of the Indian Contract Act runs as follows :—

The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee so far as regards future transactions.

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The question, therefore, which arises is whether there is any contract to the contrary in this document which takes it out of the provisions of the said section There is no doubt that the first part of the document which we have already quoted does clearly show that the surety bond should remain operative after their deaths and that their estate, if any, would remain liable for the defalcations of Zahur-ul-Hasan, and that the operation of the bond would continue so long as he was in service. It is, however, contended that the insertion in the latter part of the agreement, that a surety could terminate his liability by giving 6 months' previous notice, shows that this agreement could be terminated at any time, and therefore, would *ipso facto* terminate with the death of the surety. We do not think that this contention is a sound one. The only exception to the previous part of this bond, which was to enure during the whole of the period of the service of Zahur-ul-Hasan, was that 6 months' notice would terminate it. There was no other contingency contemplated and we will not be justified in importing another condition, that the death of one of the sureties, by itself, would terminate the responsibility.

The case of *Gopal Singh* v. *Bhawani Prasad* (1) has been cited on behalf of the opposite party. That case, however, was not a case of a guarantee for good service. In the special terms of that lease this Court came to the conclusion that the guarantee was to remain in existence during the full term of the lease which had been given on the basis of that guarantee. The Judges did not decide in that case whether it was a case of continuing guarantee within the meaning of section 131 of the Indian Contract Act or not, but they came to the conclusion that having regard to the terms of the agreement and the circumstances under which it was executed, there was no doubt that the parties intended that the guarantee given by the surety should continue during the whole of the currency of the lease which was arrived at on the face of that guarantee, and it was on their interpretation of the security bond that they held that in that particular case the liability continued notwithstanding the death of the surety. This case illustrates what is meant by the words

(1) (1888) I. L. R., 10 All., 531.

"in the absence of any contract to the contrary" used in section 131 of the Indian Contract Act. We have not been referred to any other Indian cases which were decided under the Indian Contract Act. The case of *James Lyall & Co.* v. *Amorabutty Dossee* (1) is of not much help inasmuch as it was decided without any reference to the Indian Contract Act.

As an ordinary rule of law it might be said that where a continuing relationship is constituted on the face of a guarantee, there is a strong reason for holding that the guarantee cannot be annulled during the continuance of that relationship except where there is a contract to the contrary. The Indian Legislature has, however, modified this general rule by enacting section 131 of the Indian Contract Act. Having regard to the terms of the particular security bond, we cannot but come to the conclusion that the parties intended that the security should continue during the continuance of the service of Zahur-ul-Hasan. The death of one of the sureties during the continuance of the service did not affect the contract of guarantee, and in our opinion the claim of the plaintiff respondent was rightly decreed by the court below. We, therefore, dismiss this application with costs.

RYVES, J. :—I have had the advantage of reading my learned brother's judgment and I agree with his conclusion that this application must be dismissed, and I also agree generally with his reasons. I only wish to add a few words because at the close of the arguments I was inclined to think that the estate of the deceased guarantor could not be held liable for a default made years after his death, because under the contract of indemnity there was a condition that either one or both of the guarantors could, at any moment, terminate his or their liability, and that this condition differentiated this case from that of *Lloyds* v. *Harper* (2). On further consideration I have come to the conclusion that I was wrong in thinking that one or either of guarantors could terminate his liability automatically by a notice to that effect. If that had been so the result might have been different.

We have to interpret the bond and gather from it what was, in fact, the intention of the parties, that is to say, what, in fact, was

(1) (1873) 20 W. R., 12. (2) (1880) L. R., 16 Ch. D., 290

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the contract. It is quite clear that the postal authorities would never have admitted the peon into their service unless his honesty during the whole course of his employment had been guaranteed by two approved guarantors, who bound themselves, not only jointly and severally but also their estate, that they would, to the extent of Rs. 1,000, be responsible in case of the peon's default. What the Post Office postulated was a guarantee commensurate with the peon's employment. But as the exigencies of the service might result in the peon's being transferred from the place of his original employment to a distant locality, they made a very reasonable condition in favour of the guarantors, namely, that either or both of them would be entitled at any time to give notice that he or they wished to revoke his or their guarantee, and that on their giving such notice to the proper postal authorities in the place where the peon happened to be then employed, then after the expiry of six months, their liability under their guarantee would terminate, so far as future losses were concerned. So long, and until, the guarantors or either of them gave notice of his or their intention to revoke their guarantee, 6 months after the receipt of that notice, the postal authorities had what they demanded as a condition of the peon's employment, that is, that up to the extent of Rs. 1,000 they were safeguarded against his dishonesty. If either or both guarantors died within a month, let us say, of the peon's employment that was a matter perfectly indifferent to the postal authorities. Unless and until the period of six months had elapsed after a notice to revoke their liability, the contract of indemnity remained and the estate of both was liable. There must have been hundreds or even thousands of persons who had been employed under similar indemnity bonds. In fact, the bond in question is on a printed standard form and is obviously used in all similar cases. The postal authorities could not possibly keep in touch with its thousands of guarantors nor was there any necessity why they should. Each of these subordinate appointments was only made after two approved guarantors had guaranteed each individual servant's good conduct and honesty during his service and until one or either of these guarantors had given notice that after six months of its due receipt he or they

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would not be bound in the future. The postal authorities had ample time on receipt of such notice to call on the peon to supply other approved security or make other suitable arrangements. It seems to me therefore clear that on a proper construction of the contract, as no notice was given by Hafiz Rahman as contemplated in the bond during his life or after his death by his representatives, his estate must be held liable in this suit. I agree in dismissing this application with costs.

BY THE COURT.—The order of the Court is that the application for revision is dismissed with costs.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

JAGAT SINGH AND ANOTHER (DEFENDANTS) *v.* BALDEO PRASAD AND ANOTHER (PLAINTIFFS).*

1920
July, 13.

Pre-emption—Valuation of property the subject of a claim for pre-emption—Property subject to a mortgage—Personal remedy barred and mortgage debt in excess of market value.

Where the personal remedy of the mortgagee has become barred, and the mortgage debt exceeds the value of property mortgaged, the value of the property from the point of view of a claimant for pre-emption is the market value simply.

THE facts of this case are fully set forth in the judgment of the Court.

Munshi *Shiva Prasad Sinha* (for Dr. *J. N. Misra*), for the appellants.

Dr. *Surendra Nath Sen*, for the respondents.

TUDBALL and SULAIMAN, JJ. :—The sole point in this appeal which has been argued before us is the question of consideration. The vendor owned property, the market value of which was Rs. 1,250. He had borrowed from the vendee appellant a sum of Rs. 800 many years ago and had hypothecated this property as security. At the time that this sale was transacted the debt due on the mortgage was Rs. 2,468. The personal

* Second Appeal No. 83 of 1919, from a decree of H. E. Holme, District Judge of Bareilly, dated the 25th of October, 1918, modifying a decree of Baijnath Das, Subordinate Judge of Bareilly, dated the 28th of February, 1918.