

1881

 PAHLWAN
 SINGH
 v.
 RISAL SINGH.

as to the date from which interest due on the defaulting instalments was exigible under the terms of the bond was directly and substantially in issue in the former suit between the same parties, and was heard and finally decided, and must therefore be held to be *res judicata*. The matter was alleged by the appellant and repudiated by the respondents in their respective positions, of plaintiff and defendants in the former suit on a claim in all respects similar both in subject-matter and cause of action. And the similar relief contained in the plaint was granted by the decree of that suit.

It is possible that the decision of the lower appellate Court has proceeded on an erroneous reading of s. 13, as would appear from its use of the phrase "subject-matter" of the suits now in question. The subject-matter in the sense of the thing sued for is of course different in each suit, but it is the "matter in issue" not the "subject-matter" of the suit that forms the essential test of *res judicata* in the section in question. "Matter in issue" is defined as matter from which either by itself, or in connection with other matter, the existence, non-existence, nature or extent of any right, liability, or disability asserted or denied in any suit or proceeding necessarily follows (Indian Evidence Act, s. 3). In the two suits of the parties now before us, one *common* matter in issue was the question of the liability of the obligors of the bond in regard to the amount of the interest secured thereby. That question was determined in the previous suit, and cannot be re-opened now. We must therefore modify the decree of the lower appellate Court, by allowing the appellant's claim in full, and decree this appeal with costs.

Decree modified.

Before Mr. Justice Straight and Mr. Justice Duthoit.

PANCHAM SINGH (DEFENDANT) v. ALI AHMAD (PLAINTIFF).*

Joint mortgage—Contribution.

P and *D*, in May, 1867, jointly mortgaged their respective two biswas shares of a certain village. In August, 1877, the mortgagee sued to recover the mortgage-money, by the sale of the mortgaged property, and obtained a decree. Before this decree was executed *L* obtained a decree against *D*, in execution of which his

* Second Appeal, No. 50 of 1881, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 13th September, 1880, affirming a decree of the Munsif of Etah, dated the 15th May, 1880.

 1881
 July 4.

two biswas share was put up for sale on the 20th June, 1878, and was purchased by *A*. Subsequently the mortgagee applied for execution of his decree, and *D*'s two biswas share was attached and advertized for sale in execution thereof. In order to save such share from sale *A*, on the 29th June, 1878, satisfied the mortgagee's decree. He then sued *P*, *D*'s co-mortgagor, to recover half the amount he had so paid, by the sale of *P*'s two biswas. Held that, inasmuch as, when *A* discharged the whole amount of the mortgage-debt, he not only became entitled to a contribution of half such amount from *P*, but having acquired the rights of the mortgagee was competent to assert a lien on *P*'s two biswas share, *A* was entitled to a decree as claimed.

1881

PANCHAM
SINGH
v.
ALI AHMAD.

The facts of this case are sufficiently stated in the judgment of the High Court.

The Senior Government Pleader (*Lala Juala Prasad*) and *Munshi Hanuman Prasad*, for the appellant.

Pandit Nand Lal, for the respondent.

The judgment of the High Court (*STRAIGHT, J., and DUTHOIT, J.*) was delivered by

STRAIGHT, J.—On the 12th May, 1867, *Pancham Singh*, defendant-appellant, mortgaged, jointly with one *Dungar Singh*, their several two biswas zamindari shares in mauza *Bithal Kutubpur* to *Sher Singh* and others for Rs. 200. On the 6th August, 1877, the mortgagee brought a suit to recover Rs. 507 principal and interest by enforcement of lien against the mortgaged shares, and on the 18th of the same month obtained a decree. Before execution had been taken out, one *Lati Ram* got a judgment against *Dungar Singh*, and having attached his two biswas share, it was brought to sale, and purchased by the plaintiff-respondent on the 20th June, 1878. Subsequently the obligees decree-holders under the bond of May, 1867, proceeded to execute their decree, and attached the two biswas share of *Dungar Singh*, of which the plaintiff-respondent had become the purchaser. In order to save it from sale he on the 29th June, 1878, paid Rs. 643-8-0, the total amount of the mortgage-money, with interest, then due, and he now sues to recover from *Pancham Singh*, the co-mortgagor of *Dungar Singh*, half that amount, Rs. 321-12-2½, by enforcement of lien against his two biswas share of mauza *Bithal Kutubpur*. Both the lower Courts decreed the claim in its entirety, and the only plea pressed

1881

PANCHAM
SINGH
v.
ALI AHMAD.

by the defendant-appellant in appeal to this Court is that the decisions of the Munsif and the Subordinate Judge cannot be maintained, in so far as they grant the plaintiff-respondent enforcement of lien. We do not concur in this contention. It appears to us that, when the plaintiff-respondent discharged the whole amount of the mortgage-debt, he not only became entitled to a contribution of half the sum from the defendant-appellant, but having acquired the rights of the mortgagee, it was competent for him to assert a lien on the two biswas share of the defendant-appellant, for the proportion borne by it to the original pledge. In our opinion, therefore, the judgments of the lower Courts were right and we dismiss this appeal with costs.

Appeal dismissed.

1881
July 5.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SITLA DIN (JUDGMENT-DEBTOR) v. SHEO PRASAD AND ANOTHER
(DECREE-HOLDERS)*

Execution of decree—Application for execution—“Step in aid of execution”—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (4), (6).

Application for execution of a decree was made on the 22nd November, 1875, and in pursuance of such application certain property belonging to the judgment-debtor was advertised for sale on the 27th March, 1876. On the latter date the parties to such decree made a joint application in writing to the Court, wherein it was stated that the judgment-debtor had made a certain payment on account of such decree, and the decree-holders had agreed to give him four months time to pay the balance thereof, and it was prayed that such sale might be postponed and such time might be granted. The Court on the same day made an order on such application postponing such sale. The next application for execution of such decree was made on the 17th January, 1879. The lower appellate Court held, with reference to the question whether such application had been made within the time limited by law, that it had been so made, as under No. 179 (6), sch. ii of Act XV of 1877, such time began to run from the date of the expiration of the period of grace allowed to the judgment-debtor under the application of the 27th March, 1876. Held that No. 179 (6) had not any relevancy to the present case; but, inasmuch as the proceedings of the 27th March, 1876, might be considered as properly constituting a “step in aid of execution,” within the meaning of No. 179 (4), the application of the 17th January, 1879, was within time.

SHEO PRASAD and TULSHI RAM were the holders of a decree for money against Sitla Din. They applied for execution of their

* Second Appeal, No. 15 of 1881, from an order of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 23rd December, 1880, reversing an order of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 25th February, 1879.