## APPELLATE CIVIL.

*Before Mr. Justice Wazir Hasan, Acting Chief Judge and Mr. Justice Bisheshwar Nath Srivastava.*

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*February*, 13.

MUHAMMAD MIAN (PLAINTIFF-APPELLANT) *v.* THAKUR BHARAT SINGH AND OTHERS (DEFENDANTS-RESPONDENTS).*

*Transfer of Property Act (IV of 1882), sections 82, 95 and 100—Mortgage—Two separate properties owned by two owners mortgaged to secure one debt—Liability of the different properties to contribute rateably to the debt—Charge, whether can be obtained apart from the provisions of section 95—Contribution, doctrine of—Doctrine of contribution, whether applies to a case where payment is made voluntarily or involuntarily to save the property from sale—Limitation Act (IX of 1908), article 132—Starting point of limitation under article 132.*

The provisions of section 82 of the Transfer of Property Act read with section 100 clearly give rise to a charge against such portions of the mortgaged property as have not discharged their proportionate share of the liability, *Bhagwan Das* v. *Karam Husain* (1), relied on.

Section 95 of the Transfer of Property Act is by no means exhaustive of cases of contribution giving rise to a charge. The section provides for one class of cases in which a charge arises. It is not correct to say that a charge cannot be obtained otherwise than under the provisions of that section. Section 82 lays down a general principle and if a case can be brought within the principles enunciated in that section, there is no reason why a charge should not arise even though the case may not fall within the provisions of section 95. *Ibn Hasan* v. *Brijbhukhan Saran* (2), and *Muhammad Yahiya* v. *Rashiduddin* (3), referred to.

If the payment made by any person or the amount realized from his property exceeds his share of the liability he is entitled to contribution as against the other party who has contributed less than his share towards the liability, irrespective of the consideration whether he does still continue

*Second Civil Appeal No. 219 of 1929, against the decree of Sh. Muhammad Bakar, Additional Subordinate Judge of Sitapur, dated the 30th of April, 1929, reversing the decree of Pandit Fradyumna Krishna Kaul, Munsif of Sitapur, dated the 19th of December, 1928.

(1) (1911) I.L.R., 33 All., 708. (2) (1904) I.L.R., 26 All., 407.
(3) (1908) I.L.R., 31 All., 65.

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to be the owner of the property or not. Further there is no reason why a person should lose his right because he makes the payment from his pocket to save his property from sale or raises money by means of a private sale. *Ibn Hasan* v. *Brijbhukhan Saran* (1) and *Raja Vizianagram* v. *Raja Satrucharia Somasekhararaz* (2), relied on

A claim to enforce a charge is clearly governed by Article 132 of the first schedule of the Indian Limitation Act and the starting point for limitation under this article is the time when the money sued for becomes due, that is, when the money left for redemption of the mortgage was paid.

Mr. *Naziruddin*, for the appellant.

Mr. *Ali Zaheer*, for the respondents.

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HASAN, A. C. J. :—The facts of this case have been stated at length in the judgment of my learned brother SRIVASTAVA, J. By virtue of the deed of mortgage, dated the 16th of October, 1906, executed by the two brothers, Ismail Hasan and Idris Hasan, Raja Pratab Singh redeemed the earlier mortgage and incumbrances which existed on the village of Misra Khera. In so doing Raja Pratab Singh had to pay an additional sum of Rs. 3,700 for the discharge of those incumbrances. When Ismail Hasan on the 3rd of April, 1913, sold his half share in the village to Bhabhuti Singh for Rs. 18,725, he left the purchase money in the hands of the vendee for the purpose of being paid to Raja Pratab Singh on redemption of the mortgage of the 16th of October, 1906. This sum of money included the additional amount of mortgage money to the extent of Rs. 3,700 which Raja Pratab Singh had paid while redeeming the earlier mortgages. It is beyond dispute that Ismail Hasan's half share in the village was liable only to half the amount of mortgage money due to Raja Pratab Singh. This is so under the provisions of section 82 of the Transfer of Property Act, 1882. But when Ismail Hasan left the entire sum of Rs. 3,700 in the hands of Bhabhuti Singh for payment to Raja Pratab Singh he intended not only to discharge the liability

(1) (1904) I.L.R., 26 All., 407. (2) (1903) 26 Mad., 686.

resting on his own half share but also the liability resting on the other half share of his brother, Idris Hasan. Bhabhuti Singh when subsequently on the 5th of April, 1921, bought a share in the village from one of the heirs of Idris Hasan he became a representative *pro tanto* of Idris Hasan. In 1925 Bhabhuti Singh's representatives redeemed the village from the hands of Raja Pratab Singh and in so doing they paid to the mortgagee also the sum of Rs. 3,700 which Ismail Hasan had left in the hands of Bhabhuti Singh for payment to Raja Pratab Singh both for his share and his brother's share of liability. According to section 82 of the Transfer of Property Act, 1882, the half share of Idris Hasan was only liable to contribute rateably to the mortgage debt of Rs. 3,700 but under the deed of the 3rd of April, 1913, Ismail Hasan's share of the property had been sold to pay the whole of that debt. It follows that Ismail Hasan is entitled to be recouped of the sum of money which he paid for his brother's share of the debt.

The question in the case is whether Idris Hasan's interest in the village now held by the representatives of Bhabhuti Singh is or is not liable to satisfy Ismail Hasan's claim for recoupment. To my mind the provisions of section 82 of the Transfer of Property Act, 1882, already referred to, clearly answer the question in the affirmative. The section says "Where several properties . . . of several owners are mortgaged to secure one debt, such properties are . . liable to contribute rateably to the debt secured by the mortgage . . ." In this case there were two properties, the share of Ismail Hasan and the share of Idris Hasan, and each was the owner of his share. They were both mortgaged to secure one debt of Rs. 3,700 of Raja Pratab Singh. Each is therefore liable to contribute rateably to that debt. When specific immoveable property is made liable by operation of law to satisfy a specific debt the debt is clearly a charge on the property.

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The claim to enforce the charge could not and did not arise in favour of the representatives of Ismail Hasan a moment earlier than the date on which the money which Ismail Hasan had left in the hands of Bhabhuti Singh was utilized by the representatives of the latter in redeeming the mortgage of Raja Pratab Singh and this was in 1926. The claim is therefore well within time under Article 132 of schedule I of the Indian Limitation Act, 1908. I, therefore, agree with my learned brother that the appeal should be allowed, the decree of the court below be set aside and that of the court of first instance be restored with costs in all courts.

*Hasan, A. C. J.*

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SRIVASTAVA, J. :—The facts of the case which has given rise to the present appeal are somewhat complicated and for a proper comprehension of the points arising for determination, need to be stated in detail.

Two brothers, Ismail Hasan and Idris Hasan, owned a moiety each of village Misra Khera. On the 3rd of August, 1900 they jointly executed a deed of mortgage with possession in respect of the entire village, in favour of Niaz Ahmad, Mouji Ram and Babu Ram for Rs. 10,000. In 1903 the aforesaid mortgagors executed a deed of further charge for Rs. 2,000. This deed included also a shop in Sitapur along with the aforesaid village. In 1904 they executed a second deed of further charge for Rs. 500. On the 16th of October, 1906, Ismail Hasan and Idris Hasan both executed another usufructuary mortgage in favour of Raja Pratab Singh in respect of the village alone for the sum of Rs. 15,500. Rupees 12,000 out of the mortgage money were left with the mortgagee for redemption of the previous mortgages to which reference has been made above. Raja Pratab Singh redeemed the earlier mortgages but in doing so he had to pay a sum of about Rs. 3,700 in excess of the amount which had been left with him for redemption of the prior mortgages. Idris Hasan died in 1907 leaving as his heirs defendants Nos. 6

to 9 as well as Ismail Hasan his brother. On the 3rd of April, 1913, Ismail Hasan sold his half share in Misra Khera to Bhabhooti Singh, the predecessor-in-title of defendants Nos. 1 to 5, for Rs. 18,725 and left with him Rs. 7,750 for payment to Raja Pratab Singh, being his half share of the mortgage money raised under the mortgage-deed dated the 16th of October, 1906, and a further sum of Rs. 3,700 being the excess money which Raja Pratab Singh had paid from his own pocket in redeeming the prior mortgages. On the 5th of February, 1921, Qamar Alum, defendant No. 6, who was one of the heirs of Idris Hasan, sold his one-third share in the moiety of his father Idris Hasan in village Misra Khera to defendants Nos. 1 to 5 who are the legal representatives of Bhabooti Singh. These defendants thus became owners of half of the village as representatives of Bhabhooti Singh the vendee of the share of Ismail Hasan and of another one-sixth share in the village as vendees of the share of Qamar Alum. In 1925 the aforesaid defendants obtained a decree for redemption against Raja Pratab Singh. They ultimately redeemed the mortgage by paying him Rs. 22,832-14-3 and obtained possession of the whole village in 1926. This amount of Rs. 22,832-14-3 included a sum of Rs. 3,690-5-0 on account of the excess payment made by Raja Pratab Singh to the prior mortgagees together with interest thereon. Ismail Hasan instituted the present suit for contribution against the defendants in respect of this sum of Rs. 3,690-5-0 (which has been referred to in the plaint as Rs. 3,700), on the allegation that the defendants as representatives of Idris Hasan had benefited by this payment and that plaintiff was entitled to recover it, together with interest thereon at 12 annas per cent. per mensem, proportionately, from the defendants and prayed that it should be declared a charge upon the share of Idris Hasan in the hands of the defendants. The suit was contested by defendants Nos. 1 to 5 who were

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impleaded as transferees of the one-third share of Idris Hasan which was inherited from Qamar Alum. The remaining defendants Nos. 6 to 9 who were impleaded as heirs and legal representatives of Idris Hasan, did not defend the suit and the trial was *ex parte* against them.

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The contesting defendants raised various defences but only one which now survives is that the amount claimed by the plaintiff could not be a charge upon the property of Idris Hasan. Ismail Hasan died during the pendency of the suit and his legal representative was brought on the record in his place. The learned Munsif held that Ismail Hasan and his representatives were entitled to a rateable share of the sum of Rs. 3,700 together with interest from the defendants and that the said amount constituted a charge on the share of Idris Hasan in the hands of the defendants and decreed the plaintiffs' claim accordingly. Defendants Nos. 6 to 9 accepted this decision of the trial court. Defendants Nos. 1 to 5 alone appealed. The only contention urged on their behalf in the lower appellate court was that the amount claimed by the plaintiff could not be a charge on the property of Idris Hasan and that no decree could therefore be passed against them. The learned Subordinate Judge was of opinion that Idris Hasan and his heirs were no doubt under a liability to reimburse the plaintiff according to their respective shares for the sum paid on their behalf but that this liability was personal and that it did not create any charge on the estate left by Idris Hasan. His line of reasoning was that such a charge could arise only under section 95 of the Transfer of Property Act and that section 95 of the Transfer of Property Act did not apply to the case for three reasons, namely, (1) because Ismail Hasan did not obtain possession over the property, (2) because he did not redeem the entire mortgage and (3) because he sold away his entire interest and had no subsisting interest in the property. He, therefore, allowed the appeal and dismissed the plaintiff's claim against defendants Nos. 1 to 5.

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The plaintiff has come here in second appeal. His learned counsel has conceded before us that section 95 of the Transfer of Property Act does not apply to the case. The only contention urged by him is that the one-third share of Idris Hasan which has been purchased by the defendants Nos. 1 to 5 from Qamar Alúm, is liable to contribute rateably towards the plaintiff's claim and that the plaintiff is entitled to a charge against the aforesaid share under section 82 of the Transfer of Property Act. I am of opinion that the contention is well founded and the appeal must succeed. The first paragraph of section 82 of the Transfer of Property Act enunciates the general rule as regards the apportionment of liability between several properties whether belonging to one or several owners when they are mortgaged to secure one debt. The rule is based upon general principles of justice and equity inasmuch as it makes a proportionate distribution of the burden of the mortgage debt over the several properties which form the subject of mortgage. The provision that the properties are liable to contribute rateably to the debt secured by the mortgage clearly implies that this liability constitutes a charge upon the properties. Further section 100 of the Transfer of Property Act lays down that where immoveable property of one person is, by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property. Thus it seems to me that the provisions of section 82 read with section 100 clearly give rise to a charge against such portions of the mortgaged property as have not discharged their proportionate share of the liability. This view is supported by the decision of a full Bench of the Allahabad High Court in *Bhagwan Das* v. *Karam Husain* (1). Mr. Justice BANERJI (afterwards Sir Promoda Charan

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Banerji) at page 722 of the Report observed as follows :—

> "I am of opinion that by virtue of the provisions of sections 82 and 100 of the Transfer of Property Act, a mortgagor or his representative-in-interest, whose property has contributed more than its proportionate share of the mortgage debt, is entitled to a charge on the remainder of the mortgaged property which has not discharged its own share of the debt."

The learned counsel for the defendants-respondents has, however, disputed the plaintiff's right to a charge under section 82 on several grounds. His first contention is that section 82 lays down only the rule as regards the proportionate liability of the several properties which form the subject of mortgage but that this liability can be enforced only in accordance with the rules laid down in section 95 of the Transfer of Property Act. His argument is that if the plaintiff's case cannot be brought within the four corners of section 95 he cannot be allowed to enforce any charge by reference to section 82 of the Transfer of Property Act. I am of opinion that the argument is fallacious. Section 95 is by no means exhaustive of cases of contribution giving rise to a charge. The section provides for one class of cases in which a charge arises. It is not correct to say that a charge cannot be obtained otherwise than under the provisions of that section. As stated above section 82 lays down a general principle and if a case can be brought within the principles enunciated in that section, there is no reason why a charge should not arise even though the case may not fall within the provisions of section 95.

Next it was contended that Ismail Hasan did not leave with Bhabhooti Singh the whole of the money which was payable to Raja Pratab Singh in respect of Idris Hasan's share of the mortgage money but only the

portion which was payable to him for Idris Hasan's share in the excess money paid by Raja Pratab Singh.

The learned counsel for the defendants-respondents relied upon the decision of STANLEY, C. J. and BURKITT, J. in *Ibn Hasan* v. *Brijbhukhan Saran* (1) where they held that one of two or more mortgagors (including the transferees of the equity of redemption from any of them) whose portion of the mortgaged property has been sold in execution of a decree for sale on the mortgage and has fetched at auction a larger sum than was rateably attributable to it but has not discharged the whole of the mortgage debt, has no right against his co-mortgagors to compel them to contribute and indemnify him to the extent by which the proceeds of the sale of his portion of the mortgaged property was in excess of the amount rateably due from it. It may be noted that Mr. Justice BANERJI dissented from this view. He was of opinion that it was not essential to the accrual of the right of contribution that the whole of the debt in respect of the payment of which contribution is claimed, should have been satisfied. In a later case, *Muhammad Yahiya* v. *Rashiduddin* (2), Sir JOHN STANLEY, C. J., himself explained his meaning in *Ibn Hasan* v. *Brijbhukhan* (1) in the following words :—

> "I did not decide or intend to decide that where a mortgage has been wholly satisfied, the co-mortgagor who has discharged more than his rateable portion of the debt, is not entitled to contribution from his co-mortgagors. What was decided in that case was that until the entire mortgage debt has been satisfied, a claim for rateable contribution could not be enforced."

So the decision in *Ibn Hasan* v. *Brijbhukhan* (1) cannot be of any help to the defendants-respondents. The present suit for contribution has been brought after the

(1) (1904) I.L.R., 26 All., 407. (2) (1908) I.L.R., 31 All., 65.

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whole of the mortgage debt had been paid up. No exception can, therefore be taken to the maintainability of the suit.

It was also argued that the plaintiff cannot maintain the suit as he has no interest left in any portion of the mortgaged property inasmuch as Ismail Hasan sold the whole of his share to Bhabhooti Singh in 1913. It seems to us that this is quite immaterial. Rs. 3,700 out of the consideration of the sale-deed executed by Ismail Hasan was left with Bhabhooti Singh for payment of the excess money paid by Raja Pratab Singh on account of both Ismail Hasan and Idris Hasan. Thus Rs. 3,700 out of the sale proceeds of Ismail Hasan's property has gone to meet the liability for which the properties of Ismail Hasan and Idris Hasan were both liable. Idris Hasan's property therefore in the terms of section 82, is liable to contribute rateably towards it. It is of no consequence that Ismail Hasan has no longer any subsisting interest in the property. No such condition is imposed by the terms of section 82. Many cases in which a claim for contribution arises are cases in which the whole of the plaintiff's property has been sold off to meet the joint liability of himself and another. The fact that the plaintiff has lost the whole of his property has never been regarded as a defence to such a claim. If the payment made by any person or the amount realized from his property exceeds his share of the liability he is entitled to contribution as against the other party who has contributed less than his share towards the liability, irrespective of the consideration whether he does still continue to be the owner of the property or not.

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Lastly it was argued that the payment made by Ismail Hasan was a voluntary payment by means of a private sale and that such payment could not create any charge upon the property. I cannot accede to this argument. In *Ibn Hasan* v. *Brijbhukhan Saran* (1), already

(1) (1904) I.L.R., 26 All., 407.

referred to Mr. Justice BANERJI held that as regards the application of the doctrine of contribution, there is no distinction between a case where the payment, in respect of which contribution is claimed, is made to avert a legal process and a case in which payment has been enforced by sale of the property of the claimant out of court. Similarly in *Raja Vizianagram* v. *Raja Setrucharia Somasekhararaz* (1) BHASHYAM AYYANGAR, J., in his order of reference to a Full Bench observed that :—

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> "It is perfectly immaterial whether a party seeking contribution made the payment voluntarily or involuntarily, i.e., whether he made the payment and thus averted any coercive process against his property, or, without making such payment suffered his property to be seized under process of law for the purpose of the amount being realized from its income or by its sale."

We can see no reason why a person should lose his right because he makes the payment from his pocket to save his property from sale or raises money by means of a private sale. This disposes of all the arguments advanced on behalf of the defendants-respondents against the appellant's contention. It is quite clear that Ismail Hasan and Idris Hasan were equally bound for the payment of the excess amount which Raja Pratab Singh had to pay for redeeming the prior mortgages. As the whole of this amount was paid by Ismail Hasan out of the sale price of his share of the property and Idris Hasan has benefited by this payment to the extent of his share of the liability, his property is bound to contribute to the extent of the benefit which it has derived from such payment. It follows that the plaintiff is entitled to a share in respect of one third of the amount as against the one third share of Qamar Alum in the hands of defendants Nos. 1 to 5.

The learned counsel for the defendants-respondents

(1) (1903) I.L.R., 26 Mad., 686.

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also contended that limitation for enforcement of the plaintiff's claim should run from the 3rd of April, 1913, the date on which Ismail Hasan left the money with Bhabhooti Singh for the benefit of Idris Hasan. This contention is without substance. A claim to enforce such a charge is clearly governed by article 132 of the first schedule of the Indian Limitation Act. The starting point for limitation under this article is the time when the money sued for becomes due. In this case the money sued for did not become due until Bhabhooti Singh paid the money to Raja Pratab Singh in 1925. Idris Hasan cannot be considered to have derived any benefit until payment was made to Raja Pratab Singh of this amount. The claim is clearly within time from the date when the mortgage was redeemed from Raja Pratab Singh.

It was also suggested on behalf of the defendants-respondents that the price realized by Ismail Hasan by means of the private sale made by him was not a true criterion of the value, under section 82 of the Transfer of Property Act and that the amount of the defendants' liability fixed by the trial court was not correct. As Ismail Hasan and Idris Hasan were equal sharers in the property so the proportion of Idris Hasan's liability would always be the same irrespective of the value of the property. In any case, the defendants did not question the correctness of the finding of the trial court as regards the amount in their appeal before the lower appellate court. We must, therefore, accept the finding of the trial court as regards the amount of the defendants' liability as correct.

It might be mentioned that the learned counsel for the plaintiff-appellant also argued before us that in case the defendants alleged that the payment which they had made to Raja Pratab Singh was out of their own money and not out of the money left with them by Ismail Hasan, then the plaintiff should be entitled to a charge in respect of the amount claimed by him as unpaid con-

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sideration money under section 55 of the Transfer of Property Act, against the share sold by Ismail Hasan. It is not necessary for us to enter into a discussion of this question, as the defendants have not alleged that the money which they paid to Raja Pratab Singh was not the money left with Bhabhuti Singh by Ismail Hasan and as no such case was raised on the pleadings of the parties in any of the two lower courts.

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The result, therefore, is that I would allow the appeal, set aside the decision of the Additional Subordinate Judge and restore that of the Munsif. The appellant will get his costs in all the courts from the defendants-respondents.

BY THE COURT :—The appeal is allowed, the decree of the court below set aside and that of the court of first instance restored with costs in all courts.

*Appeal allowed.*

## REVISIONAL CIVIL.

*Before Mr. Justice A. G. P. Pullan.*

RAM DAYAL (DEFENDANT-APPLICANT) *v.* TIRBENI *alias* TIRLOKI NATH (PLAINTIFF-OPPOSITE PARTY).*

1930 *February*, 12.

*Provincial Small Cause Courts Act (IX of 1887), article 35(2)—Suit for damages for cutting and removing a tree—Jurisdiction of small cause court—Small Cause Court, whether has jurisdiction to try suit for damages for cutting and removing a tree.*

A suit for damages in respect of a portion of a tree which had been cut and removed by the defendant is a civil matter and is within the jurisdiction of the Small Cause Court. *Kuarpal* v. *Bakshi Madan Mohan* (1), and *Kunwar Singh* v. *Ujagar* (2), relied on. *Deoki Rai* v. *Harakh Narain Lal* (3), dissented from.

*Section 25, Application No. 1 of 1930, against the order of Babu Shiva Charan, Munsif as Judge of Small Cause Court, Ramsanehighat at Bara Banki, dated the 30th of September, 1929.

(1) (1923) 21 A.L.J., 213. (2) (1921) 8 O.L.J., 391.
(3) (1926) 24 A.L.J., 1017.