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falsely led to believe that he could lawfully marry her, and it afterwards appears that the marriage was not lawful, it may be that the legality of the marriage is not essential to the validity of the gift. Whether the marriage was lawful or not may be considered to make no difference in the intention of the testator."

Hasan, C. J.
and Nana-
vally, J.

We think that the present case also falls within the following dictum of the Vice-Chancellor in the case of *Wilkinson v. Joughin* (1) referred to in the judgment of their Lordships of the Judicial Committee in the case of *Fanindra Deb Raitak* (2). The Vice-Chancellor said:

"In my opinion there is no warrant for saying, where the testator knew this infant legatee personally, and intended to benefit her personally, that the language of the will is not a sufficient description."

On the grounds stated above this case is also distinguishable from the case of *Musammatt Lali v. Murli Dhar* (3).

The result is that this appeal fails and we dismiss it with costs.

Appeal dismissed.

APPELLATE CIVIL

*Before Sir Syed Wazir Hasan, Knight, Chief Judge and
Mr. Justice Bisheshwar Nath Srivastava*

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HASHMAT ARA BEGAM AND OTHERS (JUDGMENT-DEBTORS-APPELLANTS) v. BARATI LAL (DECREE-HOLDER-RESPONDENT)*

Civil Procedure Code (Act V of 1908), section 145, and Order XLV, rule 7—Privy Council appeal—Surety for costs undertaking personal liability and also hypothecating property—Property cannot be sold under section 145—Personal liability can only be enforced under section 145.

*Execution of Decree Appeal No. 13 of 1933, against the order of S. Shaukat Husain, Subordinate Judge of Unao, dated the 14th of November, 1932.

(1) (1866) L.R., 2 Eq., 319.

(2) (1884) L.R., 12 I.A., 72.

(3) (1906) L.R., 33 I.A., 97.

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Where a person becomes surety under Order XLV, rule 7 of the Code of Civil Procedure for the cost of the respondent in a Privy Council appeal and executes a security bond in favour of the respondent hypothecating certain immovable property of his as security and also undertaking personal liability on dismissal of the appeal by the Privy Council the decree-holder-respondent is not entitled to enforce the sale of the mortgaged property under section 145 of the Code of Civil Procedure. It is only the personal liability and not the liability of the hypothecated property which can be enforced under that section. *Amir v. Mahadeo Prasad* (1), relied on.

Mr. M. *Wasim*, for the appellants.

Messrs. *Hyder Husain* and *Salig Ram*, for the respondent.

HASAN, C.J. and SRIVASTAVA, J.:—This is an execution of decree appeal against the order dated the 14th of November, 1932, of the learned Subordinate Judge of Unao. It arises under the following circumstances:

The plaintiffs in a suit decided against them by the Subordinate Judge of Sitapur appealed to the Court of the Judicial Commissioner of Oudh. The appeal was successful. The defendants thereupon obtained leave to appeal to the Privy Council. Musammat Hashmat Ara Begam and her husband Afsar Mirza became sureties, under Order XLV, rule 7 of the Code of Civil Procedure, for the costs of the plaintiffs-respondents in the Privy Council appeal. On the 16th of May, 1918, they executed in favour of the plaintiffs of that suit a security bond hypothecating certain landed properties in the Unao District as security. The decision of the Judicial Commissioner's Court was upheld by their Lordships of the Privy Council on the 21st of November, 1922. One of the plaintiffs after getting a transfer certificate from the Sitapur Court, on the 2nd of October, 1931, made the application for execution which has given rise to the present appeal, in the Court of the Subordinate Judge of Unao praying for sale of the property hypothecated under the afore-mentioned security bond.

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The sureties objected to the execution of the decree on the ground that the application was barred by time and on certain other grounds which are not material for this appeal.

*Hasan, C. J.
and Srivas-
tava, J.*

The learned Subordinate Judge of Unao rejected the objections. The sureties have come to this Court in appeal.

The main contention urged on their behalf is that the decree-holder-respondent is not entitled to enforce the sale of the hypothecated property by means of the application for execution made by him. Section 145 of the Code of Civil Procedure provides that in a case like the present, the decree may be executed against the surety "to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees and such person shall for the purposes of appeal be deemed a party within the meaning of section 47". It has been argued that the sureties did not make themselves personally liable under the security bond. The argument has no substance. The security bond clearly says that the executants had mortgaged the property in favour of the decree-holders and that the property should remain charged by way of simple mortgage for the sum of Rs.4,000 secured by the deed. It further provides that it shall be lawful for the executants to pay the decree-holders the aforesaid sum of Rs.4,000 within a period of six months from the date of the decision of the appeal in which case the mortgage shall become void, otherwise it shall remain in force. We are therefore clearly of opinion that apart from the personal liability implicit in a simple mortgage, the deed contains an express covenant under which the sureties undertook to pay the money personally.

Next we have to see whether in a case like the present where the sureties have undertaken personal liability and also charged the property as further security, the hypothecated property can be put to sale summarily under the provisions of section 145 of the Code of Civil

Procedure. The word "personally" was added to the provisions of the section when the present Code of Civil Procedure was enacted in 1908. The word did not find place in the corresponding section 253 of the old Code of 1882. The object of introducing this word in the section obviously was to remove the conflict which existed in the various High Courts in this country on the question whether a mortgage made by the surety could be enforced under section 253 of Act XIV of 1882. Under the circumstances the intention of the Legislature in adding this word seems to be that it is only the personal liability and not the liability of the hypothecated property which can be enforced under the section. The words "in the manner herein provided for the execution of decrees" also seem to point to the same conclusion. The heading of Order XXI of the Code of Civil Procedure is "Execution of decrees and orders". The words of section 145 last quoted seem to indicate that the execution of the decree or order contemplated by section 145 is execution in the manner provided in Order XXI of the Code of Civil Procedure which has no application to the case of sales of mortgaged property. The same view appears to have been taken by a Bench of the Allahabad High Court in *Amir v. Mahadeo Prasad* (1). We are therefore of opinion that the decree-holder-respondent is not entitled to enforce the sale of the mortgaged property under section 145 of the Code of Civil Procedure.

The learned counsel for the respondent has requested that in view of the conclusion reached by us, as stated above, he may be allowed to relinquish his interest in the charge and may be permitted to amend his application for execution so as to enable him to enforce the personal liability of the sureties by attachment and sale of the property charged. We think that the request is a reasonable one as otherwise the respondent might be deprived altogether of his remedies against the sureties.

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(1) (1916) I.L.R., 39 All., 225.

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It is objected on behalf of the appellants that an execution application for enforcement of the personal liability against the sureties is barred by time. The objection will be considered and decided by the lower Court when the application has been amended by the respondent.

The result is that we allow the appeal with costs, set aside the order of the lower Court and send the case back to the Subordinate Judge of Unao with the directions that he should allow the decree-holder to amend his application and then deal with it according to law.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

MAHMUDUL HAQ KHAN (DEFENDANT-APPELLANT) v.
WAQFUL AULAD (PLAINTIFF-RESPONDENT)*

1934
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Acquiescence—Defendant making road over land belonging to plaintiffs believing bona fide that he had plaintiffs' permission—No protest by plaintiffs during construction or afterwards—Plea of acquiescence, if sustainable.

For a defence of acquiescence to be successful, it is necessary that the defendant should have acted in good faith believing that he had a valid right to do the act in question and that the plaintiff knowing that the defendant was under this mistaken belief, should have abstained from doing anything to prevent his spending money in doing that act. Where, therefore, the defendant constructs a road over land belonging to the plaintiffs with the *bona fide* belief that he had the permission of the plaintiffs to make the road and the plaintiffs raised no protest at the time when the road was under construction or at any time since then during the last 10 years the plea of acquiescence does apply. In such a case no question of ownership of the land arises. It is enough that the defendant believed *bona fide*, albeit wrongly, that he had the necessary permission from the owners of the land to construct the road. *Jagannath v. Din Muhammad* (1), and *Beni Ram v. Kundan Lal* (2), relied on.

*Second Civil Appeal No. 298 of 1932, against the decree of Babu Gauri Shankar Varma, Subordinate Judge of Gonda, dated the 17th of November, 1932, reversing the decree of Sh. Mohammad Tufail Ahmad, Munsif, Uraula at Gonda, dated the 19th of August, 1932.

(1) (1921) 8 O.L.J., 474.

(2) (1899) I.L.R., 21 All., 496.