

THE
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APPELLATE CIVIL

*Before Sir C. M. King, Knight, Chief Judge and
Mr. Justice H. G. Smith*

DWARKA SINGH (DEFENDANT-APPELLANT) v. B. HARIHAR
BAKHSH SINGH AND OTHERS (PLAINTIFFS-RESPONDENTS)*

1935
August, 9

Civil Procedure Code (Act V of 1908), section 2(11)—“Legal representative”, meaning of—Universal legatee, whether included—Contract Act (IX of 1872), section 37—Transfer of Property Act (IV of 1882), section 128—Mortgagor executing subsequent deed—Personal covenant not to redeem prior mortgage without paying amount due on subsequent deed—Covenant, whether can be enforced against universal legatee of mortgagor.

The universal legatee of a person is his legal representative within the meaning of section 2(11), C. P. C.

Where the executant of a deed of mortgage executes a subsequent deed by which he creates a personal covenant not to redeem the prior mortgage until he has satisfied the amount due on the subsequent deed, the covenant can be enforced against a universal legatee of the mortgagor, the legatee being liable to the extent of the property of the testator in his hands. *Case law discussed.*

Mr. *Hyder Husain*, for the appellant.

Messrs. *Bhagwati Nath Srivastava* and *Ganpat Sahai*, for the respondents.

KING, C.J. and SMITH, J.:—This is an appeal from a judgment and decree, dated the 10th of March, 1933, of

*First Civil Appeal No. 38 of 1933, against the decree of Sheikh Ali Hammad, First Additional Subordinate Judge of Sultanpur, dated the 10th of March, 1933.

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the learned Additional Subordinate Judge of the Sultanpur District.

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The facts briefly are that there were three brothers, Sheo Bhikh Singh, Sheo Sahai Singh and Ramphal Singh. They owned a share of about $2 \frac{4}{5}$ biswas in a certain mahal in a village called Chandauli. The greater part of this share they mortgaged for a sum of Rs.800 on the 3rd of June, 1892, to three men named Gaya Bakhsh Singh, Bishunath Singh and Chanda Bakhsh Singh. Later, on the 18th of April, 1895, they executed a deed of further charge for a sum of Rs.200 in favour of Gaya Bakhsh Singh, Bishunath Singh and Jageshwar Bakhsh Singh, the son of Chanda Bakhsh Singh. Afterwards, on various dates between 1895 and 1907, six other deeds were executed, which purported to be deeds of further charge. The first three of these deeds purported to have been executed on behalf of Sheo Bhikh Singh, Sheo Sahai Singh and Ramphal Singh, the fourth purported to be executed by Sheo Bhikh Singh and Sheo Sahai Singh, and the fifth and sixth purported to be executed by Sheo Sahai Singh alone. Sheo Bhikh Singh and Ramphal Singh afterwards died. They were issueless, and Sheo Sahai Singh succeeded to the property after their deaths. He himself was also issueless, and died about 1914. He had made a will in favour of one Dwarka Singh, who, on the 19th of August, 1930, brought a suit in the Court of the Munsif of Amethi at Sultanpur seeking to redeem the mortgaged property on payment only of what was due under the original mortgage of the 3rd of June, 1892. The defendants in that suit, who were the representatives in interest of the original mortgagees, contended that besides what was due under the original mortgage-deed, the plaintiff in that suit was also liable to pay the amount due under the deed of further charge of the 18th of April, 1895, and the six subsequent deeds referred to above. The learned Munsif, on the 24th of January, 1931, gave the plaintiff a decree for redemption

of the mortgaged property on payment of what was due under the original deed of the 3rd of June, 1892, and the deed of further charge of the 18th of April, 1895. The plaintiff was not found liable to pay anything under the six subsequent deeds. The defendants in that suit appealed, but as they did not pay the correct court-fee their appeal was dismissed by the Subordinate Judge on the 31st of July, 1931. The plaintiff, Dwarka Singh, paid up the amount found due from him, and got possession of the mortgaged property on the 30th of June, 1932. The defendants in that suit are the plaintiffs in the present suit. They brought this present suit claiming a total sum of Rs.5,132-2 under the six deeds referred to above, and asking that in default of payment one-third of the mortgaged property, (i.e., the share of Sheo Sahai Singh), be sold. The defendant, Dwarka Singh, pleaded that the deeds in question constituted no charge on the mortgaged property, and further pleaded that the suit was barred by the principle of *res judicata*, and was also barred by time. The judgment of the learned Subordinate Judge shows that the plea of limitation was abandoned by the defendant's counsel. He found that the decision in the previous suit did not operate as *res judicata*. He found that the six deeds, which form the basis of the present suit, did not constitute charges on the share of Sheo Sahai Singh in the property. He, however, gave the plaintiffs a money decree for the amount claimed, as against the assets, "if any", of Sheo Sahai Singh in the hands of the defendant. Against that decision the defendant, Dwarka Singh, has preferred this present appeal. Substantially, the only point taken before us in arguments is that the defendant is not liable, as the legatee of Sheo Sahai Singh, to pay what is due under the six deeds in question. It was common ground in the Court below that these deeds were really executed by Sheo Sahai Singh alone. The learned counsel for the appellant referred us to rulings reported

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in *Ramadhin Misra v. Sitla Bakhsh Singh and another* (1); *Gaya Prasad v. Rachpal and another* (2) and *Kandhiya Bakhsh Pande v. Ram Charitar* (3). It was held in the first of these rulings that where the executant of a deed of mortgage executes a subsequent deed, by which he creates a personal covenant not to redeem the prior mortgage until he has satisfied the amount due on the subsequent deed, the covenant can be enforced against him personally, but not against a subsequent transferee of the mortgaged property. In the second case it was held that an undertaking by a mortgagor, who takes a fresh advance, that he will not redeem the mortgage until he has repaid the advance, is legal and enforceable against himself, but is not a charge on the land and it is not enforceable against a purchaser of the land. In the third case it was held that a deed styled as "*tamasuk zar-i-mazid*", and giving no details of the property, but a mere reference to the original mortgage, cannot be regarded as a deed of further charge. It creates only a personal covenant against the mortgagor, and does not involve his transferee in any liability.

We do not think that the principle laid down in those rulings can be made applicable to the facts of the present case, for here we are not concerned with a transferee for value, but a legatee. Somewhat more to the point is an old decision to which we were referred by the learned counsel for the appellant reported in *Ram Oottum Chowdhry v. Oomesh Chunder Chatterjee and another* (4). It was there held that parties in possession under a will, i.e., a voluntary transfer without any consideration except that of family affection, are not thereby bound to pay the debts of the former holder, whether the donee's possession began at the date of the instrument called a will, or after the death of the testator.

On the other side it was contended that the defendant-appellant is the legal representative of Sheo Sahai Singh

(1) (1914) 17 O.C., 303.

(3) (1924) 1 O.W.N., 678.

(2) (1922) 9 O.L.J., 484.

(4) (1874) 21 W.R., (Sutherland),
p. 155.

within the meaning of section 2(11), C. P. C., and is Sheo Sahai Singh's universal legatee. Reference was also made to section 37 of the Indian Contract Act, and to section 128 of the Transfer of Property Act. In support of the contention that the defendant is the legal representative of Sheo Sahai Singh, reference was made to rulings reported in *Dinamoni Chaudhurani v. Elahadut Khan and others* (1); *Dakoju Subbarayudu v. Musti Ramadasu* (2); *Kusum Bandhu Chakravarty v. Ramdayal Bhattacharjee* (3); *Maddala Madhayarayudu v. Tanikalla Subbamma* (4) and *Sachindra Nath Maity v. Bepin Behari Sasmal* (5).

The first question is whether Dwarka Singh was, in fact, the universal legatee of Sheo Sahai Singh. The will in question has unfortunately not been produced by either side, so it cannot be said precisely what were its provisions. In the previous suit, however, in which Dwarka Singh, the present defendant, was seeking as plaintiff to redeem the mortgaged property, he said in paragraph 9 of the plaint that Sheo Sahai Singh died at the end of December, 1914, and that he (the plaintiff) entered into possession of his assets by virtue of the will executed by Sheo Sahai Singh, ("*muddai zaria wasiyat-nama nawishta Sheo Sahai Singh kabiz tarka mutwaffi hua*"). At the end of the above paragraph of the plaint he spoke of himself as being the representatives of the mortgagors ("*kaim mukam rahinan*"). In the present suit, in paragraph 5 of their plaint, the plaintiffs said that Sheo Sahai Singh died about 18 years ago, and the defendant became his representative ("*kaim mukam*"), by virtue of the will executed by Sheo Sahai Singh. In his written statement the defendant took no exception to that part of the plaint, the contents of paragraphs 4 to 7 of the plaint being admitted. As far as can be seen, therefore, from the materials at our disposal, the defendant, Dwarka Singh, was the universal legatee of Sheo

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(1) (1904) 8 C.W.N., 848.

(2) (1921) I.L.R., 45 Mad., 872.

(3) (1922) 69 I.C., 179.

(4) (1916) 35 I.C., 124.

(5) (1931) 35 C.W.N., 1028.

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Sahai Singh, and we shall dispose of the appeal on that assumption.

As regards the question whether the defendant is the legal representative of Sheo Sahai Singh, we think having regard to the definition of legal representative given in section 2(11) of the Code of Civil Procedure that he is his legal representative.

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The question remains whether, as the universal legatee of Sheo Sahai Singh, the defendant has rightly had passed against him a money decree to the extent of the assets of Sheo Sahai Singh in his hands. It is somewhat curious that the position of a universal legatee as distinct from that of a universal donee should be a matter of doubt, but such appears to be the case. The question seems to us to be determinable only on the basis of analogy. According to section 37 of the Indian Contract Act, promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract. According to section 128 of the Transfer of Property Act,

“Subject to the provisions of section 127, where a gift consists of the donor’s whole property, the donee is personally liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of the property comprised therein.”

We can see no reason why a universal legatee should stand in a more favourable position than a universal donee in respect of the liabilities of his testator. That he should be liable to the extent of the property of the testator in his hands for the debts and liabilities of the testator is also in accordance with the general principles of Hindu Law governing the liability of heirs. We may refer on the position of heirs generally to Sarkar’s Hindu Law, (7th Edition), pages 431-432.

The result is that we are in substantial agreement with the learned Additional Subordinate Judge. One difficulty, however, remains. The learned Additional

Subordinate Judge has given the plaintiffs a money decree as against the assets, "if any", of the deceased Sheo Sahai Singh in the hands of the defendant. As Sheo Sahai Singh came by survivorship into the whole of the property, his assets, strictly speaking, would include the whole of that property. In the plaint, however, it was only asked that a one-third share out of the entire property mortgaged should be put to sale in the event of the decretal amount not being paid. In these circumstances we must make it clear that the decree is executable only against the one-third share specified at the end of the plaint. The learned counsel for both parties agree that this is the correct view of the matter. With this modification we uphold the decision of the learned Court below, and dismiss the appeal, with costs.

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Appeal dismissed.

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THAKUR ZAMIN ALI KHAN AND OTHERS (PLAINTIFFS-
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Oudh Rent Act (XXII of 1886), section 19A—"Tenant", whether includes thekadar—Remission of rent, if thekadar entitled to—United Provinces Assistance of Tenants Act (VIII of 1932), section 2, scope and object of—Thekadar contracting not to claim remission on account of any calamity affecting the crops or produce, if entitled to remission under the section—Oudh Rent Act (XXII of 1886), section 141—Amendment by Act IX of 1934, whether has retrospective effect.

Where a thekadar binds himself to pay arrears of rent irrespective of anything which might happen in the shape of failure of crops for one reason or other, he is not entitled to any remission of rent because the expression "tenant" as used in section 19A, Oudh Rent Act, which deals with the remission of

*First Rent Appeal No. 64 of 1933, against the decree of S. Nazir Ahmad, Honorary Assistant Collector, 1st Class, Sitapur, dated the 26th of June, 1933.