ORIGINAL CIVIL.

Before Lort-Williams J.

1940

April 12;
May 14.

RANJIT RAY

v.

KISORI MOHON GUPTA.*

Limitation—*Principal and surety—Payment by principal—Indian Limitation Act (IX of 1908), s. 20 (1).*

Payments of principal or interest by either principal or surety and acknowledgments in accordance with the provisions of s. 20(*1*) of the Indian Limitation Act create a fresh period of limitation in respect of the common debt as against either the principal or the surety.

Domi Lal Sahu v. *Roshan Dobay* (1); In re *Frisby. Allison* v. *Frisby* (2); In re *Powers. Lindsell* v. *Phillips* (3); *Coope* v. *Cresswell* (4) and *Lewin* v. *Wilson* (5) relied on.

Brajendra Kishore Roy Chowdhury v. *Hindustan Co-operative Insurance Society, Ld.* (6) dissented from.

Where the form of the guarantee is such that the surety agrees that it shall remain in force until the debt due is fully and finally adjusted and will not be affected by any forbearance or arrangement for giving time to or other facilities to the principal debtor, there is implied authority to the principal debtor to make payments and acknowledgments in accordance with the terms of s. 20(*1*) of the Limitation Act.

ORIGINAL SUIT.

The facts of the case are fully set out in the judgment.

S. R. Das and *H. N. Sanyal* for the plaintiffs. The claim is not barred by limitation. *Parr's Banking Company Limited* v. *Yates* (7).

The form of guarantee clearly makes the guarantee continue until the debt is paid up in full. This case is quite different from that of *Brajendra Kishore Roy*

*Original Suit No. 74 of 1939.

(1) (1906) I. L. R. 33 Cal. 1278.
(2) (1889) 43 Ch. D. 106.
(3) (1885) 30 Ch. D. 291.
(4) (1866) L. R. 2 Eq. 106.
(5) (1886) 11 App. Cas. 639.
(6) (1917) I. L. R. 44 Cal. 978.
(7) [1898] 2 Q B. 460.

Chowdhury v. *Hindustan Co-operative Insurance Society, Ld.* (1), where the form of guarantee was not the same.

N. C. Chatterjee and *M. K. Sen* for the guarantor defendant. The contract with the guarantor is separate from that with the principal debtor, so payment by the latter cannot have the effect of saving limitation as against the former. This case is covered by *Brajendra Kishore Roy Chowdhury* v. *Hindustan Co-operative Insurance Society, Ld.* (1).

Cur. adv. vult.

LORT-WILLIAMS J. The plaintiffs are the receivers of the Co-operative Hindusthan Bank, Ltd. (in liquidation).

On or about May 31, 1929, the bank at the request of both defendants and upon the guarantee of the second defendant lent to the first defendant a sum of Rs. 1,000.

The first defendant executed a promissory note dated May 31, 1929, as follows:—

On demand I, Kaviraj Kisori Mohon Gupta, residing at 167-1-1, Cornwallis Street, Calcutta, promise to pay to the Co-operative Hindusthan Bank Limited at Calcutta or order for value received the sum of rupees One thousand only together with interest at 12 per cent. per annum until repayment in full.

The second defendant executed a letter of guarantee dated May 30, 1929, and addressed to the bank as follows:—

As at my request and on my guarantee you have agreed to advance Rs. 1,000 (One thousand) only on pronote to Kaviraj Kishori Mohan Gupta, M.A., as may from time to time be required and as sanctioned by you. I do hereby guarantee the due repayment of the amount so advanced with all interests and charges on or before the due date or earlier on demand. This guarantee will remain in force until the debt due is fully and finally adjusted and will not be affected by any forbearance or arrangement for giving time or other facilities to the principal debtor the said Kaviraj Kishori Mohan Gupta.

Between July 2, 1929, and November 17, 1936, the first defendant made various payments on account of accrued interest on the loan aggregating

(1) (1917) I. L. R. 44 Cal. 978.

1940

Ranjit Ray v. *Kisori Mohon Gupta.*

Lort-Williams J.

Rs. 935-3-0, which were all endorsed on the back of the note in the handwriting of and signed by the first defendant. The last of such payments was made on November 17, 1936.

The plaintiffs allege that there is now due and owing by the defendants a sum of Rs. 1,009-11-5 for principal and interest calculated up to May 31, 1938, after giving credit for all such payments.

Demands for repayment were made on each of the defendants in 1932 and 1933, respectively.

The suit was instituted on January 14, 1939.

It is defended only by the second defendant, who pleads that he had no knowledge of either payments or endorsements and denies liability on the ground of limitation. This plea can apply only to the debt and interest thereon, which, it is alleged, had become barred by limitation at the time of the institution of the suit, and cannot apply to interest and charges which had not become barred or which have accrued subsequently: *Parr's Banking Company Limited* v. *Yates* (1). The appropriate Article of the Indian Limitation Act is Art. 115, under which limitation begins to run after three years from the breach of contract.

On the plaintiff's behalf it has been argued that the second defendant's guarantee under the terms of his contract remains in force until the first defendant's debt has been paid in full and that in any case the provisions of s. 20(*1*) of the Indian Limitation Act operate to extend the period of limitation as against the surety when payments and endorsements have been made by the principal debtor. Those are the only issues, and no witnesses have been called to give evidence.

Section 20(*1*) is as follows:—

Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, or

(1) [1898] 2 Q. B. 460.

where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf,

a fresh period of limitation shall be computed from the time when the payment was made :

Provided that, save in the case of a payment of interest made before the first day of January, 1938, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

A promissory note payable on demand is a present debt and is payable without demand and limitation begins to run from the date of it. A stipulation for compensation in the shape of interest makes no difference. *Norton* v. *Ellam* (1), per Baron Parke at page 464. That this is the law in India also is recognised by Art. 73 of the Indian Limitation Act.

A surety's liability depends upon the terms of his contract, because his is a collateral obligation. In re *J. Brown's Estate. Brown* v. *Brown* (2); *Bradford Old Bank Limited* v. *Sutcliffe* (3); s. 128, Indian Contract Act.

In the case of *Brajendra Kishore Roy Chowdhury* v. *Hindustan Co-operative Insurance Society, Ld.* (4) a promissory note payable on demand bore an endorsement signed by the surety "repayment "guaranteed by me." It was held that the liability of the surety accrued from the date of the note, that the fresh period of limitation created under s. 20(*1*) of the Indian Limitation Act by the payment of interest by the principal debtor could be only in respect of the debt upon which the interest was paid, namely, the debt of the principal debtor, unless the circumstances could be said to render the payment one on behalf of the surety, that there would seem to be nothing in the relation of principal and surety itself which makes payment by the principal binding as a payment by the surety, and that, although s. 128

(1) (1837) 2 M. & W. 461 (464); 150 E. R. 839 (840).
(2) [1893] 2 Ch. 300.
(3) [1918] 2 K. B. 833.
(4) (1917) I. L. R. 44 Cal. 978.

1940

Ranjit Ray v. *Kisori Mohon Gupta.*

Lort-Williams J.

of the Indian Contract Act makes the liability of the surety co-extensive with that of the principal debtor, it must be read along with the provisions of the Indian Limitation Act; it defines the measure of liability and has no reference to the extinction of liability by operation of the Limitation Act.

The finding that "there would seem to be nothing "in the relation of principal and surety itself which "makes the payment by the principal binding as a "payment by the surety" seems to be the quotation of an opinion offered by the learned author of Rowlatt on Principal and Surety, 2nd Ed., at p. 294, which is founded upon the cases of *Cockrill* v. *Sparkes* (1); *Henton* v. *Paddison* (2) and In re *Wolmershausen; Wolmershausen* v. *Wolmershausen* (3), but I cannot find anything in these cases which directly supports the statement, except in the last in which Stirling J. referred to the judgment of Fry L. J. in In re *Frisby. Allison* v. *Frisby* (4) and sought to explain it, but did not disagree with it.

The judgment in *Brajendra Kishore Roy Chowdhury* v. *Hindustan Co-operative Insurance Society, Ld.* (*supra*) was founded upon the form of the guarantee in that suit and upon the view that in cases of principal and surety there are two distinct debts, following the opinion of Cotton L. J., stated in In re *Powers. Lindsell* v. *Phillips* (5).

With respect, it seems to me that this is not a complete statement of the position in law. In cases of principal and surety there are two distinct contracts in respect of one debt common to both. There cannot be two distinct debts, otherwise payments on account of principal or interest by the principal would not, *ipso facto*, reduce the debt due by the surety, and *vice versa*, as they do (s. 128, Indian Contract Act).

(1) (1863) 1 H. & C. 699; 158 E. R. 1065.
(2) (1893) 68 L. T. 405.
(3) (1890) 62 L. T. 541.
(4) (1889) 43 Ch. D. 106, 118.
(5) (1885) 30 Ch. D. 291, 295.

It follows that payments of principal or interest by either principal or surety, and acknowledgments in accordance with the provisions of s. 20 (*1*) of the Indian Limitation Act create a fresh period of limitation in respect of the common debt as against either the principal or the surety. The expression "fresh period of limitation" is in general terms, and it was held by Maclean C. J. in *Domi Lal Sahu* v. *Roshan Dobay* (1) that there is nothing in the section to indicate that the new period of limitation is only to operate against the person making the payment.

That no such restriction is intended is confirmed by the fact that s. 18 of the Indian Limitation Act expressly provides for such a restriction in cases of fraud only.

That this is the correct view is confirmed by the judgments of the learned Judges in In re *Frisby. Allison* v. *Frisby* (*supra*). That was a case of a joint and several covenant by a mortgagor and his surety, but that fact is immaterial for the present purpose.

By a mortgage deed dated in 1872, F. the mortgagor, and M., as his surety, jointly and severally, covenanted for payment of the mortgage debt with interest in June 10, 1873. F. paid interest till 1880, but paid nothing afterwards. M. died in 1888, never having made any payment or given any acknowledgment. The executrix of the mortgagee claimed to be a creditor against M's estate for the mortgage debt and interest.

It was held by Kay J. and by the Court of Appeal, that, assuming the 8th section of the Real Property Limitation Act, 1874, to apply to an action brought on a covenant in a mortgage deed against a surety, the payment of interest by the mortgagor prevented the statute from running in favour of the surety, and that the right against M's state was not barred.

(1) (1906) I. L. R. 33 Cal. 1278.

1940

Ranjit Ray v. *Kisori Mohon Gupta.*

Lort-Williams J.

Section 8 is as follows:—

No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent.

At p. 116, Cotton L. J. said as follows:—

But is the claim kept alive by the payment of interest by the mortgagor? In my opinion it is. The section says nothing about the person by whom the money is paid, and in my opinion it is satisfied if the payment is made by any one liable to pay. If the surety takes the benefit of the section he must also take the burden. I think the payment by either principal or surety takes the case out of the statute as against both of them.

At p. 117, Bowen L. J. said:—

Assuming, however, that the section is applicable, I am of opinion that payment of interest by the mortgagor kept the debt alive as against the surety.

Fry L. J. said:—

If the section do not apply there is an end of the case. If it do, the question is whether the payment of interest by the mortgagor do not take the case out of the section as against the surety. I think that it does. The section does not say by whom the payment is to be made, so the case is within its terms. In my opinion a payment satisfying the words of the section is made whenever there is a render of money to a person entitled to receive it by a person liable to pay it. I agree that payment by a stranger would not do, the money in that case not being paid in discharge of a liability of the person paying it. If we were to confine "payment" to a payment by the person against whom or his representatives the action is brought, I think we should be doing great injustice. It is usual for the mortgagor—not the surety—to pay the interest, and it would be contrary to good sense and the common understanding of mankind that while he is doing so the statute should run in favour of the surety unless he makes a payment or gives an acknowledgment.

In In re *Powers. Lindsell* v. *Phillips* (*supra*) the facts were that T. P. mortgaged an estate to L. & A. for £1,000 and at the same time E. P. and C. P. gave to L. & A. a joint and several bond reciting that the loan had been advanced at the request of E. P. and C. P., and that they had agreed to give the bond as a better security. The

bond was to be void if the mortgagor repaid the loan and interest. The mortgagor made several payments of interest and then fell into arrear. It was held, *inter alia*, that if the remedy on the bond had been barrable by limitation, the payments of interest by the mortgagor would have prevented the bar.

The case turned upon the same s. 8 of the Real Properties Limitation Act, 1874. As I have already stated, it was the opinion of Cotton L. J., expressed at page 295, that there were two different debts, that of the principal and that of the sureties. He went on to say that—

If the remedy on the bond taken by itself was barred, I am of opinion that no payment by the mortgagor would keep it alive, but where a bond which by itself is not barred, is given for the purpose of guaranteeing the payment by the mortgagor of the mortgage debt, and the mortgagor makes payments which prevent the remedy on the mortgage from being barred, I am of opinion that the remedy on the bond is not barred. The decision in *Cockrill* v. *Sparkes* (1) is not inconsistent with this. There were in that case two makers of a joint and several promissory note, and it was decided that under the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 14, a part payment by one did not take the case out of the Statute of Limitation as against the other. I do not think that this applies where a separate bond is given by sureties to guarantee the payment of a mortgage debt, and the mortgagor makes payment.

Lindley L. J., at p. 297, said as follows:—

But suppose the twelve years limitation to apply to the bond, can the remedy under it be considered as barred while the mortgage is yet alive. To decide that let us look at the condition of the bond, which is that if Thomas Powers, his heirs, executors, or administrators, shall pay the mortgage money and interest the bond shall be void. The mortgage money and interest have not been paid or satisfied, and the mortgagor is still liable to pay them, so the bond remains in force.

And Bowen L. J. said at p. 297,—

But an action on a bond given by another person to guarantee payment of that debt is not a proceeding against the same person, nor to recover the same sum, it is an action to recover damages from a third person, because the mortgagor does not pay.

And—

In the present case the proceeding is not between the same parties, nor to recover the same sum, as if an action had been brought on the mortgagor's covenant, it is a proceeding to recover an indemnity against the non-payment by another person of a sum of money which he had charged on land. If the

(1) (1863) 1 H. & C. 699; 158 E. R. 1065.

1940

Ranjit Kay
v.
Kisori Mohon Gupta.

Lort-Williams J.

bond could be brought within the 8th section I think it must be held that the part payments by the mortgagor would prevent that clause from barring the remedy.

The case of *Coope* v. *Cresswell* (1) turned upon s. 5 of the Statute of Limitations which provided that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such debt, or his agent, or by part payment, or part satisfaction on account of any principal or interest then due thereon, it shall be lawful, for the party entitled to such action to bring his action within twenty years after such acknowledgment by writing, or part payment or part satisfaction.

Sir R. T. Kindersley V. C., at pp. 118 and 119, said :—

Supposing any one of the parties liable (say the executor) pays interest or part of the principal within twenty years, is that to have the effect, according to the language used in the 5th section, of preventing the bar of the statute as respects all the parties liable, or is it to have the more limited effect of preventing the bar of the statute only *quoad* the party marking such payments ? What is the language of the 5th section ? It shall be lawful for the party entitled to such action to bring his action within twenty years after such acknowledgment or payment. What action ? Surely it must be the same action which he might have brought if the twenty years had not elapsed since the cause of action ; and that action he shall still be entitled to bring, notwithstanding twenty years have elapsed since the cause of action, provided within twenty years there has been an acknowledgment or payment. That according to the language used would appear to me to be the fair interpretation of the section, and I see no reason for importing (what the argument for the defendants asks the Court to import), a limitation on the generality of the terms used in this section. I am asked to insert these words : "It "shall be lawful for the party entitled to such action to bring his action "against the person who has made the acknowledgment or payment within "twenty years." It is contrary to the plainest course of construction to introduce such language into an Act of Parliament, or any other instrument, unless driven to it by necessity arising out of the context ; and I see no such necessity here. Is there anything unjust or unreasonable in such a construction of the statute ?

A debtor dies, having by his will devised real estate for the payment of his debts, and devising other real estate beneficially and leaving personal estate ; if the executors, or trustees of the estate devised for payment of debts, make a payment on account, is there anything unreasonable or unjust in saying that that payment shall keep alive to the creditor the right to all the remedies which he would have had supposing the twenty years had not elapsed ? Why should the creditor, having received part payment from the executor, be under the necessity, in order to keep alive his remedy against

(1) (1866) L. R. 2 Eq. 106, 118-9.

the real estate devised for payment of debts, and against the real estate beneficially devised, of bringing his action or suit against the trustees or the beneficial devisee? It would not be for the benefit of the devisee that the creditor should be driven to that necessity. I do not see anything unjust or unreasonable in that construction of the statute, which, as it appears to me, is most consistent with the language used.

In the case of *Lewin* v. *Wilson* (1) Lord Hobhouse observed at p. 644:—

> Their Lordships have not been referred to any case where it has been decided that payment made by some person concerned to answer the debt has been held to be insufficient to keep a right alive against the party charged in the suit merely because he was not that party or his agent.

Further, it seems to me that the principal or the surety is authorised by the other, by implication, to make payments on account of the common debt, and in the manner provided by s. 20(*1*) of the Limitation Act. The object and intention of the arrangement made by the principal and surety is that the principal shall pay the debt and thus reduce or cancel the surety's liability, and the surety must be taken to be aware of the provisions of the section and the effect of payments made in accordance therewith.

The fact that s. 21(*2*) of the Indian Limitation Act expressly provides that joint contractors, partners, executors or mortgagees shall not be rendered chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them, indicates, by omission, that s. 20 is intended to apply to principals and sureties who, according to all the decisions, are not to be regarded as joint contractors.

Finally, the form of the guarantee in the present case is such that the surety agrees that it shall remain in force until the debt due is fully and finally adjusted, and will not be affected by any forbearance or arrangement for giving time to or other facilities to the principal debtor. By implication this amount to an authority to the principal to make payments

(1) (1866) 11 App. Cas. 639, 644.

1940

Ranjit Ray
v.
Kisori Mohon Gupta.

Lort-Williams J.

and acknowledgments in accordance with the terms of s. 20(*1*) of the Limitation Act.

The result is that there must be judgment in favour of the plaintiffs against each of the defendants for the amounts claimed with interim interest and costs.

Suit decreed.

Attorneys for plaintiffs: *Dutt & Sen.*

Attorney for defendant: *M. N. Mitra.*

S. M.