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be to the surety to have the security which the creditor possessed against the principal debtor at the date when the contract of guarantee was entered into, if the creditor's right to sue upon the security had become barred by limitation before payment by the surety. According to the law of England on which the Contract Act is principally framed, at least with regard to the sections in connection with contracts of guarantee, a surety could in an action brought against him by the creditor avail himself of any set-off arising in the same transaction, of which the debtor might have availed himself if the creditor had brought the action against him. In our opinion the liability of the surety determined as soon as the liability of the principal debtor by the omission of the creditor was discharged. It appears to us that the view which we take is laid down in the judgment of this Court in *Hazari Lal v. Channi Lal* (1). Holding the view which we do as to the law in this case, we allow the appeal and dismiss the action with costs.

*Appeal allowed.*

## FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight  
and Mr. Justice Tyrrell.*

MUHAMMAD SULAIMAN KHAN AND OTHERS (JUDGMENT-DEBTORS)  
v. FATIMA (DECREE-HOLDER).

*Practice—Execution of decree—Decree affirmed on appeal—Amendment of decree by first Court after affirmance—Objection by judgment-debtor to execution of amended decree—Appeal from order disallowing objection—Objection allowed on appeal.*

The decree of a Court of first instance having on appeal been affirmed by the High Court, the first Court altered the decree which had been affirmed, intending to bring it into accordance with the judgment of the High Court. After the decree had been altered, application was made to execute it as altered, but this was opposed by the judgment-debtor on the ground that that was not the decree which could be executed.

*Held* by the Full Bench that the objection must prevail, on the grounds that the decree sought to be executed was not that of the appellate Court, and that the decree had been altered by the first Court, which had no power to alter it.

*Abdul Hayai Khan v. Chunia Kuar* (2) referred to.

(1) I. L. R., 8 All., 259,

(2) I. L. R., 8 All., 377.

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*Held* by the Division Bench that the order of the first Court disallowing the objection and directing that execution of the decree as altered should proceed, could not be regarded as passed under s. 206 of the Civil Procedure Code, but was an order passed in execution of decree and, as such, was appealable.

THIS case was connected with *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (1). Musammat Fatima obtained a decree against Muhammad Sulaiman Khan and others in the Court of the Subordinate Judge of Aligarh. On appeal, the decree was affirmed by the High Court on the 8th February, 1882. On the 18th July, 1885, an order was passed by the Subordinate Judge, on the application of the decree-holder, amending the original decree, which was defective in not clearly specifying the property to which it related. After the amendment had been made, the decree-holder applied for execution of the decree as amended. The judgment-debtors opposed this application, on the ground that the decree of which execution was prayed was not the decree which could be executed. On the 29th August, 1885, the Subordinate Judge disallowed the objection, and directed execution of the decree as amended.

The judgment-debtors appealed to the High Court from this order, on the ground that the Subordinate Judge had no jurisdiction to amend the decree, and that the decree as amended could not be executed.

A preliminary objection was taken on behalf of the respondent to the hearing of the appeal on the ground that the Subordinate Judge's order was passed under s. 206 of the Civil Procedure Code, dealing with an objection to the amendment of the decree, and was therefore at appealable.

The Hon. Pandit *Ajubhia Nath* and Pandit *Harkishen Das*, for not the appellants.

Mr. *Amir-ul-din*, for the respondent.

The Court gave judgment first upon the preliminary objection, as follows :—

STRAIGHT, J.—This has been filed as a first appeal from order in execution of decree, and the appellants are the judgment-debtors,

(1) Ante, p. 267.

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and the respondent the decree-holder. Mr. *Amir-ud-din*, the counsel for the respondent; takes a preliminary objection to the hearing of the appeal, on the ground that the order it assails was an order passed under s. 206 of the Civil Procedure Code, and dealt with an objection to the amendment of the decree. I dissent from that view. It seems to me that the order of the Subordinate Judge, which is the subject-matter of appeal here, was an order passed in execution of decree. An application to execute the decree had been made upon the 24th September, 1878, and subsequently to that application a variety of proceedings had taken place, the result of which was that, somewhere prior to June, 1885, the decree-holder had intimated her intention to obtain amendment of the decree, and ultimately, upon the 18th July, 1885, that decree was amended. On the 29th August, 1885, the matter came before the Subordinate Judge in the shape of an application for the purpose of proceeding with the execution of the amended decree, and it was in reference to that application for execution to proceed, that he determined by his order which is now impeached, the matter that was then before him. I do not, therefore, think that his order can, as Mr. *Amir-ud-din* contends, be regarded as an order passed under s. 206 of the Civil Procedure Code, in which case it would be an unappealable order, and only open to revision under s. 622 of the Code, but I regard it as an order passed in execution of a decree, from which an appeal has been properly preferred. This disposes of the preliminary point, and we shall in due course proceed with the determination of the appeal.

BRODHURST, J.—I am of the same opinion.

The hearing of the appeal was then proceeded with; and ultimately, on the 13th August, 1888, the appeal was referred to a full Bench, by the following order :—

STRAIGHT, J.—This case is connected with a reference which was before the learned Chief Justice, my brother Mahmood and myself, in which the question, to put it broadly, was whether, when once a case has gone in appeal to an appellate Court, and been decided by such appellate Court, the lower Court could disturb or

amend the decree passed by it, under s. 206 of the Civil Procedure Code. The learned Chief Justice and myself have held that the decree of the appellate Court is the only decree which is capable of amendment under s. 206 of the Civil Procedure Code. The question raised by this appeal is in some sense connected with that reference to the learned Chief Justice, my brother Mahmood and myself.

But this raises the further question as to whether, a decree having been erroneously amended by a first Court after there has been an appeal, when such amended decree is sought to be put into execution, the Court asked to execute it can go into the question whether it has been properly or improperly amended.

In my opinion, having regard to a series of decisions of this Court, which have held that a Court executing a decree must take it as it finds it, and not enter into any question as to whether it was made with or without jurisdiction, the present appeal should fail. But as there is a ruling of my brothers Oldfield and Brodhurst in *Abdul Haywi Khan v. Chunia Kuar* (1) taking a contrary view, I think it would be desirable that this case should be determined by a Bench consisting of the learned Chief Justice, my brother Brodhurst, and myself. I accordingly, subject to the learned Chief Justice's approval, direct that it should be so heard and determined.

BRODHURST, J.—I concur in referring the case to a Full Bench.

The case again came on for hearing on the 18th January, 1889, when the following judgments were delivered by the Full Bench:—

EDGE, C.J.—In this case the decree of the late Subordinate Judge of Aligarh was on appeal to this Court confirmed on the 8th February, 1882, and on the 18th July, 1885, another Subordinate Judge altered the decree which had been confirmed, intending, no doubt, to bring it into accordance, from his point of view, with the judgment of the High Court. Whether the decree, as confirmed by the High Court, correctly represented the judgment of the High Court, is absolutely immaterial for present purposes. After the decree had been altered, application was made to execute the decree as altered. Objection was taken that that was not the

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decree which could be executed. The Subordinate Judge of Aligarh disallowed the objection and ordered the altered decree to be executed. Hence this appeal here.

It has been decided in this Court that the Court executing a decree cannot alter the decree which it receives to execute. But it has been held by Mr. Justice Oldfield and my brother Brodhurst in the case of *Abdul Hayai Khan v. Chunia Kuar* (1) that when a decree-holder proceeds to execution it is open to the person against whom execution is prayed, to show that the decree which is sought to be executed is not the decree of the Court to be executed. It has also been decided that when a decree has been confirmed by an appellate Court the subordinate Court cannot amend the decree. It has also been decided by this Court that when a decree has been confirmed by the appellate Court, the decree to be executed is the decree of the appellate Court. In this particular case there were two good objections to the execution, one was that it was not the decree of the appellate Court, and secondly, that the decree had been altered by the Subordinate Judge, who had no power to alter it. I think the appeal should be allowed and the order of the Subordinate Judge set aside. The appellants to get their costs in all the Courts.

STRAIGHT, J.—I am of the same opinion. It is now established beyond all question that upon the 29th August, 1885, the amended decree of which the Subordinate Judge directed the execution was not worth the paper it was written upon, because that amendment of it had been made by a Court not having power to make it. Consequently any execution upon the basis of that decree took place without authority or legal countenance and cannot be sustained. The plea in appeal is a well founded plea, and I am of opinion that it should prevail. Therefore the result is that the order of the Subordinate Judge being set aside this appeal succeeds with costs.

BRODHURST, J.—I concur with the learned Chief Justice and my brother Straight in decreeing the appeal with costs.

*Appeal allowed.*