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direct any imprisonment for default in payment of such fine. All he could do was—

(1) to remit the whipping altogether,

(2) to sentence the offender in lieu of whipping, or of so much of the sentence of whipping as was not executed, to *imprisonment*, &c.

In my opinion "*imprisonment*" there means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine. If the Legislature had intended otherwise it could easily have declared that a Court revising its sentence under s. 395 could substitute a fine for a whipping that could not be inflicted, but it has not done so, and I must presume that having expressed itself clearly as to the power it gives, it intended to exclude every other power. Mr. Bower's order must be quashed to the extent that it ordered a fine of Rs. 30 or, in default, six months' rigorous imprisonment.

Order quashed.

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January 7.

APPELLATE CIVIL.

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

RADHA AND OTHERS (PLAINTIFFS) v. KINLOCK (DEFENDANT).*

Principal and surety—Omission by creditor to sue principal debtor within period of limitation—Discharge of surety—Act IX of 1872 (Contract Act), ss. 134, 137.

The omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under s. 134 of the Contract Act (IX of 1872), even though the non-suing within such period arose from the creditor's forbearance.

Section 137 of the Contract Act does not limit the effect of s. 134. Its object is to explain and prevent misconception as the meaning of s. 135. It applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise a right which is still in existence.

Hajarimal v. *Krishnarav* (1) and *Krishto Kishori Chowdhrain* v. *Radha Romun Munshi* (2), dissented from. *Bazari* v. *Chunni Lal* (3) referred to.

* Second Appeal No. 826 of 1887, from a decree of A. Sells, Esq., District Judge of Meerut, dated the 18th March, 1887, reversing a decree of Babu Brijpal Das, Subordinate Judge of Meerut, dated the 24th December, 1886.

(1) I. L. R., 5 Bom., 647. (2) I. L. R., 12 Calc., 330.
(3) I. L. R., 8 All., 259.

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THIS was a suit for the recovery of Rs. 1,316-7-6 alleged to be due upon a surety bond executed by the defendants on the 5th January, 1876. One Mangal was indebted to the plaintiff for a sum of Rs. 767-11-6, which he agreed to pay by yearly instalments, and the defendants by their bond engaged to pay any instalments not duly paid by him with interest. The present suit was instituted on the 19th June, 1886, on which date it was admitted that the claim of the plaintiff against the principal debtor, Mangal, was barred by limitation. The Court of first instance (Subordinate Judge of Meerut) dismissed the suit on the ground that the legal effect of the omission of the plaintiff to enforce the claim against the principal debtor Mangal was his discharge, and consequently, under s. 134 of the Contract Act, the discharge of his sureties, the defendants.

The plaintiff appealed to the District Judge of Meerut. The District Judge allowed the appeal and reversed the Subordinate Judge's decree, upon grounds which he stated as follows :—

"The simple question now to be decided is, whether, under these circumstances, the plaintiff has any right to recover from the sureties. The lower Court has refused him relief. For the defendants it is contended that the omission to sue the principal within the legal period is, under s. 134, sufficient to discharge the sureties. But there is no legal obligation upon the creditor to sue his debtor, and, under s. 137, forbearance on his part does not necessarily discharge the surety. And this would seem to show that it was intended that the words 'discharge of the principal debtor' should refer only to such a discharge as would presumably operate also as a discharge of the principal debtor *in regard to his obligation to the surety*. But in the present case the sureties defendants would still have their right of recovery against their principal. They are in fact in no worse position than they were before. The omission of the creditor to sue does not affect them; that is, it does not in any way affect the contract as entered into by them; and I am of opinion that the word 'omission' in s. 134 should be interpreted in the sense of s. 139; that it is intended to comprise such omissions only as would

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be omissions of *duty*, a neglect of certain acts which the creditor's duty to the sureties required him to perform. And this seems to be the view taken by the Bombay High Court in the case of *Hajarimal* v. *Krishnarav* (1). On the other hand, my attention has been drawn by the pleader for the defendants to the case of *Hazari* v. *Chunni Lal* (2) in the Allahabad High Court, which at first sight would seem to militate against the view taken above. But I am of opinion that it does not really do so. In that case the creditor had omitted to perform an act which was actually imposed upon him by the contract for the performance of which the security was given. That omission might seriously have prejudiced the interests of the sureties. In this respect, therefore, the Allahabad case differs materially from the present one and from the Bombay case. For these reasons then, I am of opinion that the lower Court is wrong in holding that the plaintiff's claim against the defendants has been extinguished. The appeal is accordingly decreed with costs."

The defendants appealed to the High Court.

Kunwar *Shivanath Sinha*, for the appellants.

Mr. *Abdul Majid*, for the respondent.

EDGE, C.J., and TYRRELL, J.—This appeal arises in a suit brought by a creditor against a surety on a contract of guarantee. The surety in his contract of guarantee had hypothecated certain immoveable property, and at the time when the suit was brought the rights of the creditor against the debtor whose debt was guaranteed were barred by limitation.

The Court below held that the surety was liable notwithstanding the fact that the remedies of the creditor against the debtor had been barred before the suit was commenced. The Court below came to the conclusion from a consideration of the case of *Hajarimal* v. *Krishnarav* (1). In this Court Mr. *Abdul Majid* for the respondent has relied upon the Bombay case and on the judgment in *Kristo Kishori Chowdhrain* v. *Radha Romun Munshi*, (3) in which the ruling of the Bombay case was approved by the Calcutta

(1) I. L. R., 5 Bom., 647. (2) I. L. R., 8 All., 259.
(3) I. L. R., 12 Calc., 330.

Court. In the Bombay case Westropp, C.J., in delivering the judgment, we think put a correct construction on s. 134 of the Contract Act (IX of 1872), that is to say, he held at page 650 of the report that the omission of a creditor to sue the principal debtor within three years from the date of the bond produced the legal consequence of the discharge of the principal debtor, but he also held, and in this we do not agree with that learned Judge, that the effect of s. 137 of the Contract Act is to make s. 134 inapplicable when the non-suing by the creditor on the debt within the period of limitation arose from his own forbearance. This latter view is a view also adopted by the Judges of the Calcutta Court, with which we do not agree. We think, as did Sir Michael Westropp, that it is quite plain that the legal consequence of the omission of a creditor to sue his debtor within the period of limitation would be the discharge of the surety, and it appears to us that s. 137 does not limit the effect of s. 134. In our opinion ss. 135, 136 and 137 are founded upon the English law, and s. 137 is more a section by way of explanation and to prevent misconception as to the effect of s. 135 than a variation of the rule of law enunciated in s. 134. In our view s. 137 applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise a right which is still in existence. The view of s. 137, which was adopted in Bombay and followed in Calcutta, is, in our opinion, inconsistent not only with s. 134, but with the policy of ss. 140 and 141. By s. 140 it is provided that when a guaranteed debt has become due, to take the case of a debtor only, the surety upon payment of the debt is invested with all the rights which the creditor had against the principal debtor. If the view adopted at Bombay be correct, that section applied to such a case as the present. The payment by the surety after the statutory period of limitation, so far as the debt was concerned, could not transfer to the surety any rights of the creditor against the principal debtor, for all those rights were barred at the time. Again, to take s. 141, it shows that the intention of the framers of the Act was that the surety should have the benefit of every security which the principal debtor had at the time the contract of surety was entered into. We fail to see what advantage it would

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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. *Chunni 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.

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January 18.

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.