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The order, therefore, of the District Judge in remanding the case is correct, but he has not directed the attention of the Court of first instance to all the issues which it is necessary to determine for the purpose of fully adjudicating upon the rights of the parties as indicated above. We therefore dismiss the appeal, and confirm the order of remand of the District Judge; but in doing so and in confirming the order of remand, we should direct the Court of first instance to have regard in the determination of the suit, to the matters which we have dealt with in our judgment. The costs of this appeal will abide the event.

Appeal dismissed.

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June 16.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RANJIT SINGH AND ANOTHER (PLAINTIFFS) *v.* NAUBAT AND OTHERS (DEFENDANTS).*

Act No. IX of 1872 *(Indian Contract Act), sections* 134 *and* 137*—Principal and surety—Creditor allowing remedy against principal debtor to become barred by limitation—Discharge of surety.*

"Mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him" as these words are used in section 137 of the Indian Contract Act, 1872, indicate a forbearance for a more or less limited period to exercise a subsisting right. The section does not cover such forbearance as results in the remedy of the creditor against the principal debtor becoming barred by limitation.

Hence where a judgment-creditor allowed his judgment-debtor to enter into an agreement for the satisfaction of his decree by instalments, certain persons becoming sureties for the due payment of such instalments, and, the judgment-debtor having made default in payment of the instalments, delayed taking out execution of the decree until execution had become time-barred, it was *held* that the creditor had forfeited his remedy against the sureties also. *Hazari Lal* v. *Chunni Lal* (1) and *Radha* v. *Kinlock* (2) followed. *Hajarimal* v. *Krishnarav* (3) dissented from.

The facts of this case are as follows:—

On the 30th of March 1885 Ranjit Singh and others obtained a decree against one Harnam. The decree was transferred to the Collector for execution on the 28th of May 1886, the property which the decree-holders sought to sell being ancestral.

* Second Appeal No. 813 of 1899 from a decree of Munshi Sheo Sahai, Additional Subordinate Judge of Meerut, dated the 20th of July, 1899, reversing a decree of Babu Daya Nath, Munsif of Meerut, dated the 20th of March 1899.

(1) (1886) I. L. R., 8 All., 259. (2) (1889) I. L. R., 11 All., 310.
(3) (1881) I. L. R., 5 Bom., 647.

On the 30th of August 1886 a compromise was entered into between the parties, whereby the plaintiffs agreed to give time to Harnam for payment of the debt upon the condition that Harnam should provide certain sureties to guarantee payment. Upon the 30th of August 1886 a bond was executed by the sureties on behalf of Harnam which provided that if Harnam failed to pay the amount of the decree by annual instalments of Rs. 100, with interest, the sureties would pay the amount of the decree, and by the bond the sureties pledged their property as security for the fulfilment of the obligation. On the 6th of November 1886 the security was accepted by the Collector, and he granted time and sanctioned the compromise. Under this arrangement six annual instalments were paid, namely, the instalments extending from the 6th of November 1887 to the 6th of November 1892. Four instalments became due on the 6th of November 1896, whereupon the decree-holders took out execution against Harnam. On the 7th of February 1898, the Munsif held that the execution proceedings against Harnam were barred by lapse of time. That order was not appealed from, and, as against the decree-holders, became final. On the 23rd of August 1898 the decree-holders brought the suit out of which this appeal has arisen to recover from the sureties the unpaid balance of the decretal debt. The Court of first instance (Munsif of Meerut) gave the plaintiffs a decree. On appeal the lower appellate Court (Additional Subordinate Judge of Meerut) reversed this decree and dismissed the suit, holding in general terms that, the plaintiffs' remedy as against the principal being barred, no remedy against the sureties remained. The plaintiffs thereupon appealed to the High Court.

Pandit *Tej Bahadur Sapru*, for the appellants.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the respondents.

STANLEY, C. J., and BANERJI, J.—The suit out of which this second appeal has arisen was instituted by the plaintiffs to recover as against the defendants a sum of money alleged to be due on foot of a surety bond entered into by them on behalf of one Harnam, a judgment-debtor of the plaintiffs. The plaintiffs on the 30th of March, 1885, obtained a decree against

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Harnam. The decree was transferred to the Collector for execution on the 28th of May, 1886, the property to be sold being ancestral property. On the 30th of August, 1886, a compromise was entered into between the parties, whereby the plaintiffs agreed to give time to Harnam for payment of the debt, upon the condition that the defendants in the present suit should guarantee the payment of the debt. This they agreed to do, and they executed on the 30th of August, 1886, a bond, which provided that if Harnam failed to pay the amount of the decree by annual instalments of Rs. 100 with interest, the sureties would pay the amount of the decree, and by the bond they pledged their property as security for the fulfilment of their obligation. On the 6th of November, 1886, the security was accepted by the Collector—we do not know under what powers—and he granted time and sanctioned the compromise. Six annual instalments were paid, namely, the instalments extending from the 6th of November, 1887, to the 6th November, 1892, by the judgment-debtor Harnam. Four instalments became due on the 6th of November, 1896, whereupon the plaintiffs took out execution against Harnam. On the 7th of February, 1898, the Munsif held that the execution proceedings against Harnam were barred by lapse of time. No appeal was taken from this order; and we must take it that, as against the original debtor, the claim of the plaintiffs is statute-barred. Thereupon, on the 23rd of August, 1898, the plaintiffs instituted the present suit to recover the balance of the debt from the sureties, the present defendants.

The defence set up was that the plaintiffs, not having appealed against the order of the 7th of February, 1898, allowed the debt to become statute-barred against the principal debtor, and, in consequence, the sureties were discharged. The Court of first instance gave a decree for the amount claimed. On appeal the lower appellate Court reversed this decree and dismissed the suit, holding, in general terms, that, the plaintiffs' remedy as against the principal being barred, no remedy against the sureties remained. The Court also held that the suit was barred by the provisions of section 257A of the Code of Civil Procedure; but having regard to the view which we

entertain upon the other question, it is unnecessary to discuss the effect of section 257A.

An appeal has been taken to this court by the plaintiffs, and the case on their behalf has been ably presented to the court by Mr. *Tej Bahadur*. We are unable, however, to follow him in the argument which he has presented. He relies with confidence on the decision of the Bombay High Court in the case of *Hajarimal* v. *Krishnarav* (1). The question turns upon the true construction of several sections of the Indian Contract Act, the first and most important of which is section 134. This section provides that "the surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, *or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.*" Section 137, which has been prominently brought to our notice, provides that "*mere* forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety." It is unnecessary for us to refer to some of the other sections which perhaps do throw some light on the question. It is contended on behalf of the appellant that in this case the forbearance of the plaintiffs to proceed with due diligence with their execution proceedings against the principal debtor, the result of which was to release him from the debt, was mere forbearance on the part of the creditor within the meaning of section 137, and therefore, in the absence of any guarantee to the contrary, did not discharge the surety. In section 134 it is provided in very clear terms that the surety is discharged by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. It appears to us, reading together these two sections of the Act, that the meaning of "mere forbearance" in section 137 is such forbearance, the legal consequence of which is not to discharge the principal debtor, but merely forbearance to sue immediately the debt becomes due, or for a limited time thereafter, as indeed is exemplified by the illustration to the section, whereby a period of one year after the debt has become payable

(1) (1881) I. L. R., 5 Bom., 647.

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is mentioned. It does not mean forbearance for such length of time as by reason of the statute of limitation would be a bar to the claim against the principal debtor. In the case to which we have referred in the Bombay High Court, it was decided by the Chief Justice, Sir M. Westropp, and Mr. Justice Birdwood, that, although the suit in that case was barred as against the principal debtor under the Limitation Act, yet the surety being an agriculturist, was still liable, inasmuch as section 72 of the Dekhan Agriculturists' Relief Act, which extends the period of limitation in the case of suits against agriculturists, applies to all agriculturists, whether principals or sureties, in the districts affected by the Act. In the judgment of the court the meaning of the sections of the Indian Contract Act to which we have referred, relating to contracts of guarantee, were considered, and the learned Judges were of opinion that mere forbearance means a forbearance not resting upon, or in consequence of, such a promise to give time to, or not to sue the principal debtor as is the subject of section 135. They observe:—"The omission of the creditor to sue the principal debtor within three years from the date of the bond has undoubtedly [having regard to section 2 already mentioned, and to the Limitation Act of 1877] produced the legal consequence of the discharge of the principal debtor; and *primâ facie*, if we were not to look beyond section 134, we should hold the surety to be discharged. But this view is dispelled by section 137, which qualifies section 134 by enacting that 'mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.'" We are unable to agree in this view of the sections. We think that the language of the two sections read together shows that mere forbearance is used in the restricted sense which we have already mentioned, and that it does not mean, and does not apply to a case of forbearance, the legal consequence of which is the discharge of the principal debtor. This question has been decided in two cases in this High Court, the earlier of which is the case of *Hazari Lal* v. *Chunni Lal* (1). In that case the facts are very similar to the facts of

(1) (1886) I. L. R., 8 All., 259.

the present case. A decree-holder in execution proceedings agreed to accept payment of the decretal amount by the judgment debtors in annual instalments. He also agreed to accept a surety bond for the payment of the debt from certain other persons in the following terms :—"In case of default in payment of the instalments, the whole decretal money, with costs and interest at 8 annas per cent., shall be executed after one month; and for the satisfaction of the decree-holder, we the executants stand as sureties of the judgment-debtors." The judgment-debtors paid five instalments and then made default. The decree-holder omitted to apply for execution, and the decree became time-barred. He then sued the sureties to recover the amount of the decree. It was held that the legal consequence of the omission to execute the decree being the discharge of the principal debtor, the sureties would, under section 134 of the Contract Act, stand discharged likewise; that the action of the decree-holder was much more serious than "mere forbearance" in favour of his debtors in the sense of section 137; that he had done an act inconsistent with the equities of the sureties, and omitted to do an act which his duty to them (under the agreement) required, whereby their eventual remedy against the principal debtors was impaired. The learned Judges who decided that case, Oldfield and Tyrrell, JJ., in the course of their judgment, observe :—"It must be conceded that the legal consequence of the respondents' omission to execute the decree has been the discharge of his principal debtors. The decree is dead, and they are released from all responsibility under it. The sureties then would, under the rule of section 134 of the Indian Contract Act, stand discharged likewise by virtue of this omission of the creditor. But it was argued that (section 137 *ib.*) 'mere forbearance on the part of the creditor to enforce his remedy against the principal debtor does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.' This is doubtless true; but the action of the respondent, who omitted in this case to resort to the execution of his decree, and allowed it to become a dead letter by limitation, is, in our opinion, much more serious than 'mere forbearance' in favour of his debtors." In that case the case in I. L. R., 5 Bom., does not appear to have been brought to the

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notice of the learned Judges. But in the more recent case of *Radha* v. *Kinlock* (1) the authority of the case in I. L. R., 5 Bom., was discussed by Sir John Edge, Chief Justice, and Mr. Justice Tyrrell, and it was held there that "the omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under section 134 of the Contract Act, even though the non-suing within such period arose from the creditor's forbearance; that section 137 of the Contract Act does not limit the effect of section 134; its object is to explain, and prevent misconception as to the meaning of section 135. It applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise the right which is still in existence." The learned Judges say, in reference to the Bombay case, "If the view adopted at Bombay be correct, that section (*i. e.*, section 137) 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 section 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 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." Further on they say:—"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." We entirely concur in the view of the learned Judges who decided the last two cases to which we have referred, and we think that the decision of the lower appellate Court, which is expressed in very general terms, is, for the reasons which we have mentioned, a correct decision. We therefore dismiss the appeal with costs.

Appeal dismissed.

(1) (1889) I. L. R., 11 All., 310.