APPELLATE CIVIL.

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Bennet.

ANAND SINGH AND ANOTHER (DEFENDANTS) v. COLLECTOR OF BIJNOR (PLAINTIFF).*

1932 June, 13.

Contract Act (IX of 1872), sections 134, 140, 145—Surety not discharged by creditor's failure to sue principal debtor within limitation—Surety's rights against principal debtor—Transfer of surety's liability—Whether transferee, on paying creditor, can sue principal debtor—Provincial Insolvency Act (III of 1907), sections 28 and 45(2)—Effect of discharge.

The creditor of a simple money bond sued the surety thereon, the suit being brought just before the expiry of the period of limitation. The principal debtor was not sued, as he had been adjudicated an insolvent. The suit was decreed; and the surety's son having in course of time paid up the decree sued to recover the amount from the principal debtor, who had, in the meantime, obtained his discharge. The defence was that the surety could have defeated the suit against him by pleading section 134 of the Contract Act, and therefore he should not have paid the creditor. *Held* that section 134 of the Contract Act did not apply to a case of this nature. It applies where there is either a release or a discharge of the principal debtor. The section intends that the act or omission of the creditor should be something in the nature of a breach of the contract on his part. The failure of the creditor to bring a suit within the period of limitation against the principal debtor is not an act or omission of the nature contemplated by that section. In the present case it was not necessary for the creditor to sue the principal debtor as the latter had become an insolvent at the time of the suit against the surety.

The surety having, subsequent to the decree against him, relinquished or transferred his estate together with all existing liabilities to his son, and the son having paid off the decree accordingly, it was *held* that as the right which would accrue to the surety to be reimbursed by the principal debtor, had not been transferred, it was the surety himself and not his son who was entitled to a decree against the principal debtor in respect of the payment made to the creditor.

Held, also, that the failure of the surety to apply to have the contingent liability to himself of the insolvent entered in the

*First Appeal No. 482 of 1928, from a decree of G. L. Vivian, Subordinate Judge of Naini Tal, dated the 26th of October, 1928.

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schedule of debts, in accordance with section 28 of the Provincial Insolvency Act, 1907, did not stand in his way; for, at the time of the distribution of the insolvent's assets the surety had not yet made the payment to the creditor, and therefore even if his name had been entered in the schedule of creditors it would have been removed, and so the order of discharge would not, under section 45(2) of that Act, have released the insolvent from this contingent liability to the surety.

Section 140 is not the only section of the Contract Act which lays down the surety's rights. It has to be read with section 145; and although the creditor's right against the principal debtor may have become time barred, the surety's rights under section 145 are not barred thereby.

Messrs. *S. K. Dar* and *S. N. Seth*, for the appellants.

Messrs. *U. S. Bajpai* and *H. P. Sen*, for the respondent.

MUKERJI and BENNET, JJ. :—This is a first appeal by defendant No. 1, Kunwar Anand Singh, with whom his son Kunwar Sunder Singh has been joined as an appellant. The lower appellate court has granted a decree in favour of the plaintiff, the Collector of Bijnor in charge of the Kashipur estate under the Court of Wards, the estate being owned at present by the Raj Kumar Hari Chand Raj Singh, minor. The transactions out of which this suit has arisen are as follows. On the 14th of June, 1911, the appellant Kunwar Anand Singh borrowed Rs.20,000 on a simple bond, payable on demand, from Bisheshwar Nath and Gauri Shankar, the rate of interest being annas 12 per cent. per mensem with six monthly rests. On the same date defendant No. 2, the brother of Kunwar Anand Singh, Raja Udai Raj Singh, who was at that time the Raja of Kashipur, executed a surety bond by which he mortgaged certain property in Naini Tal called Strawberry Hall and Kashipur House. The deed set forth that he stood surety for the appellant and if the appellant failed to pay the sum of Rs.20,000, the Raja would pay the amount with interest and that he hypothecated the property for that purpose. Now on the 22nd of July, 1916, the appellant

applied to be declared an insolvent and he was adjudicated an insolvent apparently in that year, although the exact date is not given. The limitation on the bond would have expired on the 14th of June, 1917. On the day previous to that, on the 13th of June, 1917, the creditors brought a suit against the Raja of Kashipur, defendant No. 2. They did not sue the principal debtor, apparently because he had been declared an insolvent. A decree was obtained on a compromise on the 1st of October, 1917, which was to the effect that the parties had agreed that the plaintiffs' claim be decreed with costs and contractual interest including compound interest up to the date of payment and interest *pendente lite*, with the provision that the defendant be not liable to pay anything under the decree until after the expiry of seven years and that he be liable to pay them only such amount as may not have been paid in the interval by Kunwar Anand Singh, his heirs or receivers of his estate. Nothing was paid by Kunwar Anand Singh appellant; and as a result of this transaction the interest has very largely increased and the sum now claimed is Rs.66,000 and odd. On the 22nd of October, 1924, the creditors made an application for a final decree against the surety and the decree was passed on the 6th of May, 1925. The claim had then increased to Rs.52,369-12-0. Subsequent to this decree, on the 4th of June, 1925, defendant No. 2, the Raja of Kashipur, executed a deed of relinquishment of his estate in favour of the minor plaintiff his son. In this document he stated that he transferred the estate "to the transferee for ever, subject to and charged with the payment of all the lawful debts, liabilities and obligations (except such as are now barred by any rule or law of limitation) of the transferor and existing at the date of these presents, the estimated amount of which is Rupees 3 lakhs or thereabouts; and the transferee hereby covenants with the transferor that the transferee will duly pay and discharge all such debts, liabilities etc." Accordingly the plaintiff assumed the liability to pay the decree

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which had been passed on the 6th of May, 1925, against the Raja. Eventually payments were made on the 7th of May, 1926, and the 18th of October, 1926, by the Court of Wards of a total amount of Rs.57,664-12-0 and interest. The plaintiff now sues to recover this amount from defendant No. 1 on the ground that the plaintiff has succeeded to the rights of the surety and that the defendant No. 1 is the principal debtor.

The first point with which we may deal is the question of whether the plaintiff has the right of a surety to obtain a decree against the principal debtor. It is true that the Raja of Kashipur, defendant No. 2, did transfer his liabilities to the plaintiff but he did not transfer the right which would accrue to him as surety on paying the amount due from the principal debtor. Accordingly we are of opinion that any decree which can be granted should be granted to defendant No. 2, the Raja, and not to the plaintiff.

The next point which we may deal with is the question of the amount of interest which would be due to the decree-holder if his claim is valid. Learned counsel for the appellant argued that the compromise of 1917 should not affect the liabilities of the appellant. By that compromise the surety undertook to pay after a period of seven years and the claim has now been swollen by the accumulated compound interest during this period of seven years. The appellant was no party to the compromise and no allegation has been made in the plaint to the effect that the appellant agreed to the compromise. There was therefore no pleading in the written statement on the point. We are of opinion that the liability of the appellant should be limited, if there is a liability, to the amount which the surety was bound to pay at the date of the suit against the surety which was at the expiry of the period of limitation, plus the *pendente lite* interest at 6 per cent. and simple interest at 6 per cent. until the date of payment.

Various other grounds were argued to show that there was no liability of the appellant. It was argued in the

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first place that at the date of suit there was a period of one day only within which the claim against the principal debtor became barred and that after the 14th of June, 1917, the debt against the principal debtor was time barred. Therefore it was said that the surety should have made a defence in the suit of the creditors that the debt had become time barred against the principal debtor and that under section 134 of the Indian Contract Act the surety would be thereby released. Various rulings were shown to us for this proposition: *Salig Ram Misir* v. *Lachhman Das* (1), *Jagmohan Singh* v. *Gatali* (2); and some earlier rulings, *Hazari* v. *Chunni Lal* (3), *Radha* v. *Kinlock* (4) and *Ranjit Singh* v. *Naubat* (5). In these cases the suit against the principal debtor was barred on the date on which the suit was brought against the surety, and, therefore, the rulings will not apply to the present case. We are of opinion that section 134 of the Contract Act does not apply to a case of this nature. That section says 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 debtor the legal consequence of which is the discharge of the principal debtor; that is, the section applies where there is either a release or a discharge. The illustrations indicate the kind of release or discharge which is intended by the section. The illustrations of course are not intended to be exhaustive, but they do illustrate that the section intends that the act or omission of the creditor should be something in the nature of a breach of the contract on his part. In the present case it is suggested that the failure of the creditor to bring a suit within the period of limitation against the principal debtor is an omission on the part of the creditor which would bring the matter within the provisions of section 134 of the Indian Contract Act. We are of opinion that the act or omission contemplated by that

(1) (1927) I.L.R., 50 All., 211. (2) [1930] A.L.J., 1084.
(3) (1886) I.L.R., 8 All., 259. (4) (1889) I.L.R., 11 All., 310.
(5) (1902) I.L.R., 24 All., 504.

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section is not an act or omission of this nature at all. We consider that in the present case it was not necessary for the creditors to sue the principal debtor, because at the time of suit against the surety the principal debtor had already become an insolvent, and, therefore, it was obvious that the creditors could not sue him without the permission of the insolvency court which was unlikely to be granted. It is true that the creditors made an application in insolvency and that application was rejected on the ground that their debt was time barred. This of course was subsequent to the suit against the surety.

The next ground on which argument was made arises from this action of the creditors in making an application to the insolvency court. The order of the insolvency court was passed on the 21st of September, 1918, and it is as follows: "Kunwar Anand Singh's pleader Pandit Chandra Datta objects on the ground that the Raja had taken over the debt, and applicant has himself in a previous case stated that he did not hold Kunwar Anand Singh liable. The debt appears to be time barred and the objection of Kunwar Anand Singh is allowed regarding parts. I therefore order this debt of Rs.20,000 to be struck off the schedule of debts owed by the insolvent Kunwar Anand Singh." This order shows that the debt of the creditors was struck off from the schedule of debts on the ground that it was time barred. Nevertheless the learned counsel argued that the subsequent discharge of the insolvent would release the insolvent from this debt in question. The discharge of the insolvent was on the 22nd of September, 1919. Under the Insolvency Act then in force, Act III of 1907, section 45(2) provided: "Save as otherwise provided by sub-section (1), an order of discharge shall release the insolvent from all debts entered in the schedule." The debt of the creditors had been expunged from the schedule and therefore the discharge of the insolvent could not release the insolvent from the debt in question.

Some further argument was made in regard to the contingent debt which would arise when the surety, the Raja of Kashipur, paid the debt in question. It will be noted that no payment was made by the surety until long after the discharge on the 22nd of September, 1919. It was argued, however, that the surety might have applied to be entered as one of the creditors on account of this contingent liability. The section referred to in Act III of 1907 is section 28. The section provides that a contingent liability to which a debtor may become subject before his discharge shall be deemed to be a debt provable under the Act. Now even if the Raja had made an application and had been entered as a contingent creditor, under the facts of this case the obligation did not arise before the discharge and therefore the debt would not have been a debt to which the Act would have applied. As a matter of fact the Raja did not apply to have his contingent debt entered in the schedule, and therefore we do not consider that the question arises in this case; that is to say that even if the Raja had applied and had been entered as a creditor on this contingent liability, at the time of distribution of assets the Raja had not made any payment and would not have been entitled to any distribution and therefore the Raja could not have remained as a scheduled creditor and it would have been necessary to remove his name from the list of scheduled creditors, and therefore under section 45(2) the order of discharge would not have released the insolvent from the contingent debt of the Raja.

Some further argument was made that the judgment between the creditors and the insolvent by the insolvency court, holding that the debt of the creditors was time barred, would operate as *res judicata* between the plaintiff and defendant No. 1. In the insolvency order of the 21st of September, 1918, there was no issue decided between defendant No. 1 and defendant No. 2 and the present plaintiff was not a party to those proceedings. We may note that the argument that the plaint is in

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any way time barred is founded apparently on section 140 of the Contract Act. That section lays down that where a surety makes payment he is invested with all the rights which the creditor has against the principal debtor. But this is not the only section of the Contract Act under which the surety has a right. The surety also has a right under section 145 of the Contract Act which states as follows: "In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully." There would be no question of the right of the surety under section 145 being limited to the rights of the creditor against the principal debtor.

For the reasons stated above we allow this appeal in part to the extent indicated, that is, a decree will be granted in favour of Raja Udai Raj Singh defendant No. 2, and the decree will be limited to the amount of the decree obtained by the creditors against the principal debtor as already stated, that is, the Rs.20,000 and interest at the contractual rate for six years, and thereafter simple interest at 6 per cent. per annum on the total amount up to the date of payment. [An order as to costs followed.]

Before Mr. Justice Pullan and Mr. Justice Niamat-ullah.

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June, 14.

BHAROSA SHUKUL (PLAINTIFF) *v.* MANBASI KUER AND ANOTHER (DEFENDANTS).*

Hindu law—Stridhan—*Widow acquiring property from savings of income of her husband's estate—Accretion to husband's estate—Presumption—Widow's intention at the time of acquisition—Alienation by her.*

Any profits which may accrue to a widow during her possession of her husband's estate become her *stridhan*, and

*Second Appeal No. 1359 of 1929, from a decree of Charu Deb Banerji, Subordinate Judge of Azamgarh, dated the 1st of August, 1929, modifying a decree of S. Ejaz Husain, Second Additional Munsif of Azamgarh, dated the 10th of July, 1928.