plaint, and remand the case to it for decision in accordance with law. Court-fee on this appeal shall be refunded : other costs shall be costs in the cause.

ABDUL RASHID J.—I agree.

*A. N. C.*

*Appeal accepted,*
*Case remanded.*

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## APPELLATE CIVIL.

*Before Addison and Din Mohammad JJ.*

BHARAT NATIONAL BANK, LTD., DELHI, AND ANOTHER (DEFENDANTS) Appellants

1934
*Dec. 14.*

*versus*

THAKAR DAS (PLAINTIFF)
SAWAN MAL (DEFENDANT) } Respondents.

**Civil Appeal No. 1316 of 1931.**

*Indian Contract Act, IX of 1872, sections 128, 134, 139 : Surety* — onus probandi — *that his liability is not co-extensive with that of the principal debtor — Omission by creditor to sue principal within time — whether discharges surety — Foreign judgment — not decided on merits — Civil Procedure Code, Act V of 1908, section 13 (h) : Banker's lien.*

The plaintiff T. D. sued for recovery of money he had advanced to the Bank (Defendant-Appellant). The Bank claimed as a set-off the amount due on a loan made by it to one N. M., a contractor of Bhatinda in Patiala State, for which plaintiff was a surety and which had not been repaid by N. M. The Bank sued both N. M. and plaintiff in the Patiala Courts for recovery of the money lent to N. M., but the suit was dismissed for default and an application for its restoration was rejected as barred by time. The Bank appealed up to the highest Court in the State but its appeals were rejected and so was a subsequent application for revision.

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*Held*, that under section 128 of the Indian Contract Act plaintiff's liability as a surety was co-extensive with that of the principal debtor, in the absence of a provision to the contrary in the contract.

*Held further*, that failure to bring a suit against the principal debtor is not an act or omission which would relieve the surety of liability under section 134 of the Act, nor would the surety be discharged by the creditor allowing his remedy against the debtor to become barred by limitation.

*Carter* v. *White* (1), *Anand Singh* v. *Collector of Bijnor* (2), and *Nur Din* v. *Allah Ditta* (3), relied upon.

*And also*, that section 139 of the Act was equally inapplicable to the case of a creditor having omitted to sue the principal debtor within limitation.

*Dil Muhammad* v. *Sain Das* (4), followed.
*Ranjit Singh* v. *Naubat* (5), not followed.

*Held also*, that the Bank having taken all the steps it could in the Patiala Courts to recover the loan money could not be charged with negligence.

*And*, that the judgment of the Patiala Court, being a foreign judgment, not passed on the merits, could not be used by plaintiff to resist his liability to the Bank, *vide* section 13 (*b*) of the Code of Civil Procedure.

*Keymer* v. *Visvanatham Reddi* (6), *Oppenheim and Co.* v. *Mahomed Haneef* (7), and *Mahomed Kassim and Co.* v. *Seeni Pakir Bin Ahmed* (8), relied upon.

*Held lastly*, that the Bank had a lien on the amount due by plaintiff as surety for N. M. and could set off that amount against the claim of the plaintiff in the present suit.

*First Appeal from the decree of* Lala *Shankar Lal, Subordinate Judge, 1st Class, Delhi, dated 7th April, 1931, ordering defendant No.1 to pay to the plaintiff the sum of Rs.12,117-12-5, etc.*

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(1) (1883) 25 Ch. D. 636.
(2) (1932) I. L. R. 54 All. 1007.
(3) (1932) I. L. R. 13 Lah. 817.
(4) 1927 A. I. R. (Lah.) 396.
(5) (1902) I. L. R. 24 All. 504.
(6) (1917) I. L. R. 40 Mad. 112 (P.C.).
(7) (1922) I. L. R. 45 Mad. 486 (P.C.).
(8) (1927) I. L. R. 50 Mad. 261 (F.B.).

KISHAN DAYAL and BHAGWAT DAYAL, for Appellants.

NAWAL KISHORE and ASA RAM AGGARWAL, for (Plaintiff) Respondent.

The judgment of the Court was delivered by—

DIN MOHAMMAD J.—The Bharat National Bank, Limited, Delhi, was in straits for money in 1913. Thakar Das, plaintiff, and Barkat Ram and Sawan Mal, defendants, together raised a personal loan of Rs.20,000 from one Jamiat Singh of Wazirabad with a view to help the Bank out of its financial difficulties. The Bank accepted this liability and undertook to repay it on its own account. Some payments were made by the Bank to Jamiat Singh, but on default he brought a suit against the plaintiff and the two defendants mentioned above, and obtained a decree for Rs.18,721-5-0. Once more the Bank offered to bear the burden itself and, crediting the decretal amount to the floating account of the plaintiff and the two defendants, made itself responsible for its repayments. This decretal amount had been partly satisfied by the Bank when Jamiat Singh sued out execution against the plaintiff alone and realised from him Rs.13,607 on various dates from January, 1927, to August, 1928. The plaintiff further incurred an expense of Rs.190-5-0 in defending the suit. Consequently he instituted the present suit on the 12th September, 1928, for recovery of the whole amount he had thus been made to pay and spend on behalf of the Bank. It was claimed by him that the total amount due to him including interest and damages to the extent of Rs.2,022 came to Rs.15,819-5-0, that he owed Rs.3,701-8-7 to the Bank on account of the outstanding calls on his shares and that he was thus

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entitled to receive the balance of Rs.12,117-12-5 from the Bank as well as a rateable contribution from the other defendants.

Sawan Mal did not appear. Barkat Ram, defendant, and the Bank put in joint pleas. They pleaded *inter alia* that Barkat Ram had paid his own share of the liability and had consequently been discharged. They further averred that the Bank was entitled to deduct a sum of Rs.10,358-12-7 which was due to the Bank from one Niaz Mohammad, who had raised the loan from the Bank on the security of the plaintiff. The plaintiff in his replication repudiated this liability and urged that though he had stood surety for Niaz Mohammad his guarantee was limited and conditional, and as the Bank was itself on account of its laches responsible for the loss of the amount due from Niaz Mohammad, this amount could neither be deducted from his claim nor could be demanded as a set-off.

On the main pleas indicated above the Subordinate Judge found in favour of the plaintiff and passed a decree for the full amount claimed against the Bank. He, however, held that out of this amount Sawan Mal, defendant, was liable to the extent of Rs.6,240-7-0 and Barkat Ram to the extent of Rs.1,119-2-0 only as he was proved to have paid Rs.5,121-5-0 towards his share of the liability. Against this decision Sawan Mal has not appealed, but Barkat Ram and the Bank have appealed.

Counsel for the appellants has confined his arguments to the points specified above and has strenuously contended that the Bank was entitled to deduct Rs.10,358-12-7 due to the Bank from Niaz Mohammad and that neither section 128 nor section 134, Contract Act, could protect the plaintiff.

It has not been disputed before us by the respondent that the amount mentioned above is due from Niaz Mohammad. The only thing that remains to be seen, therefore, is whether the Bank is entitled to deduct this amount in the present suit or not. For this purpose, it will be necessary to give a brief history of this loan. Niaz Mohammad was a contractor at Bhatinda in Patiala State. In 1913 he applied for a loan from the local branch of the Bank but the branch demanded security. This was admittedly given by the plaintiff; it is only the nature and the extent of the security that is being disputed. Niaz Mohammad received the loan but did not repay it afterwards. The Bank sued both Niaz Mohammad and the plaintiff but the suit was dismissed for default. An application for its restoration was also rejected, being barred by time. The Bank preferred two appeals one after the other in the Court of Nazim and the High Court at Patiala. These were also rejected. Finally, an application for revision of these orders met the same fate at the hands of the Minister of Law and Justice, Patiala. It is abundantly clear, therefore, that there is no likelihood now of this amount coming to the coffers of the Bank.

We have, therefore, to determine how far the plaintiff can be held liable for this loss, and to what extent he can be called upon to recoup it. Barkat Ram, defendant, has stated as a witness in the case that the plaintiff was a Director of the Bank for 7 or 8 years. Niaz Mohammad was known to the plaintiff alone and it was on his security that the money was advanced to Niaz Mohammad. Plaintiff gave a letter to the Bank, undertaking to indemnify it for any loss that accrued. This letter along with some other relevant papers was despatched to Girdhari Lal,

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an employee of the Bank, for the purpose of instituting a suit against Niaz Mohammad and the plaintiff, but could not be traced afterwards on account of Girdhari Lal's sudden death before the suit was lodged. This story is corroborated by Mata Parshad, an employee of the Bank, as defendant's witness. The plaintiff, on the other hand, has deposed as his own witness that he stood surety only to the extent that he would be liable if no money was realised from the person or the property of Niaz Mohammad and that he wrote no letter, nor executed any bond to that effect. In support of this version he mainly relies on two documents which have been marked as Exs. P. 16 and P. 22 and have been duly proved. So far as Ex. P.22 is concerned, we agree with the Subordinate Judge for reasons given by him that it cannot help the plaintiff in this case as it never came to the knowledge or possession of the Bank. Ex. P.16 on the other hand helps the Bank rather than the plaintiff. It is a letter written by the Bank to the plaintiff on the 24th June, 1927, in which the Bank intimates to him that a sum of Rs.9,000 is due from him to the Bank on account of Niaz Mohammad for whom he had stood surety. There is nothing on the record to show what reply he gave to this demand nor has the plaintiff taken any steps to prove that his reply was not favourable to the Bank or that he took up the same position as he is doing now. He has neither called upon the Bank to produce his reply, if any, nor made any other effort to bring his reply on the record. Taking this letter, therefore, as it stands at present, we cannot but conclude that the version put forward by the Bank in the present suit is the more honest of the two and that the position taken up by the Bank now is exactly the same as it took to the knowledge of

the plaintiff more than a year and a quarter prior to the institution of the present suit.

Let us now consider how far sections 128 and 134, Contract Act, absolve the plaintiff from his liability. Section 128 reads as follows:—

"The liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract."

The onus, therefore, clearly lay upon the plaintiff to prove those circumstances which took his case out of the ambit of the affirmative portion of this section and if he has failed to establish any contract which limited his liability, as alleged by him, the inevitable conclusion will be that his liability will be co-extensive with that of the original debtor. The Subordinate Judge appears to have taken an erroneous view of the case in this respect and has arrived at a wrong conclusion to the effect that it was for the Bank to prove that the plaintiff's liability was unlimited as the plaintiff admitted only a limited liability.

Section 134, Contract Act, enacts:—

"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."

In this connection reliance is mainly placed on the unsatisfactory conduct of the Bank in prosecuting the case against Niaz Mohammad. Counsel for the respondent has urged that if the Bank had not been so neglectful in proceeding with its remedy against Niaz Mohammad, it would not have incurred this loss and the plaintiff surety is, therefore, discharged on account of this gross negligence on behalf of the Bank

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which amounts to an "omission of the creditor" as contemplated by section 134, Contract Act. The Subordinate Judge appears to have agreed with this contention, but here also we consider that the decision of the Subordinate Judge is wrong.

Counsel for the appellants has invited our attention to *Anand Singh* v. *Collector of Bijnor* (1), in which the following remarks of the learned Judges are most pertinent :—

"Section 134 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."

Reference may also be made with advantage to *Nur Din* v. *Allah Ditta* (2), where it was held :—

"When a creditor allows his remedy against a debtor to become barred by limitation the surety is not thereby discharged from his liability to the creditor."

This rule was enunciated on the basis of the remarks made by Lindley J. in *Carter* v. *White* (3) which read as follows :—

"It was next said that the defendant had discharged his surety by holding the bills till the Statute of Limitations had run. Is it the law that a creditor who neglects to sue his debtor till the statute has run will thereby discharge his surety? There is no decision to that effect. On the contrary the true principle is that mere omission to sue does not discharge

(1) (1932) I. L. R. 54 All. 1007. (2) (1932) I. L. R. 13 Lah. 817.
(3) (1883) 25 Ch. D. 636.

the surety because the surety can himself set the law in operation against the debtor."

The present case is much stronger than all the cases mentioned above. The history of the loan given above will clearly indicate that the Bank prosecuted their case against Niaz Mohammad even up to the last Court of Appeal and this shows its diligence. In these circumstances, therefore, we are clear that the mere filing beyond time by the Bank of an application for restoration of the suit against the principal debtor which had been dismissed for default will not be legally sufficient to absolve the surety from his liability.

Moreover, the judgment in the Patiala case was a foreign judgment and in the case of such judgments it has been held by their Lordships of the Privy Council in *Keymer* v. *Visvanatham Reddi* (1), that if judgment was entered for the plaintiff by striking out the defence it will not be a judgment given between the parties on the merits of the case within the meaning of the provisions of the Code of Civil Procedure. Similarly, in *Oppenheim and Co.* v. *Mahomed Haneef* (2), their Lordships of the Privy Council held that a judgment on the award obtained in England by default cannot be sued upon in India since it is not a judgment on the merits. To the same effect is *Mahomed Kassim and Co.* v. *Seeni Pakir Bin Ahmed* (3). The Patiala judgment, therefore, dismissing the suit of the Bank against Niaz Mohammad for default was not a judgment *inter partes* on the merits of the case and cannot now, therefore, be used by the plaintiff to resist his liability to the Bank.

(1) (1917) I. L. R. 40 Mad. 112 (P. C.).
(2) (1922) I. L. R. 45 Mad. 496 (P. C.).
(3) (1927) I. L. R. 50 Mad. 261 (F. B.).

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Counsel for the respondent has finally urged that the surety is entitled to take shelter under section 139, Contract Act. This section provides for discharge of the surety only if the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do and the eventual remedy of the surety himself against the principal debtor is thereby impaired. We are satisfied that the plaintiff's case does not fall under section 139, Contract Act. In *Dil Muhammad* v. *Sain Das* (1), a Single Bench of this Court considered this question and came to the conclusion that a creditor's omission to sue the principal debtor within limitation was not an act or omission of the kind contemplated by section 134 or section 139 whereby the surety was discharged. It was further observed in that case that it was always open to a creditor to pursue his remedy against one of the debtors and forbearance to sue the others did not bring the case within section 134 or section 139, Contract Act. As against this the only case relied upon by the respondent is *Ranjit Singh* v. *Naubat* (2), but that case has not been followed even in the later rulings of the same High Court.

It only remains to be seen now whether the Bank is entitled to claim any lien on this account. This is an obvious proposition which requires little authority. In *Roxburghe* v. *Cox* (3), K. kept an account current with C. and Co., as his bankers, which was overdrawn to the amount of £647. K. obtained leave to retire from the army and his commission was valued at £3,000, which was paid by the Paymaster-General to C. and Co. K. had mortgaged to R. to secure

(1) 1927 A. L. R. (Lah.) 396. (2) (1902) I. L. R. 24 All. 504.
(3) (1881) 17 Ch. D. 520.

£5,000, all moneys which should be realized by sale of his commission. As soon as K.'s retirement was gazetted R. gave C. and Co. notice of his security. R. having claimed payment of £3,000, C. and Co. claimed to retain out of it the £647 and it was held that C. and Co. received the £3,000 as K.'s bankers and had a banker's lien upon it for the balance due to them and were, therefore, entitled to retain the £647.

Now taking Barkat Ram's case * * * * * * * * * * * * * We * * * find that the plaintiff is not entitled to any contribution from Barkat Ram.

The liability of the Bank will now be reduced by a sum of Rs.10,358-12-7 which Niaz Mohammad owed to the Bank. Deducting this amount from the plaintiff's claim on the basis of the calculation made in the statement annexed to this judgment which has been prepared under our orders, we find that the plaintiff is entitled to a sum of Rs.415-6-3 only from the Bank.

We, therefore, accept this appeal, set aside the decree of the Court below, dismiss the suit so far as Barkat Ram is concerned and reduce the decree against the Bank to a sum of Rs.415-6-3 only. The appellants will get their costs here as well as in the Court below.

*A. N. C.*

*Appeal accepted.*