APPELLATE CIVIL.

Before Sir Stanley Batchelor, Kt. Acting Chief Justice, and Mr. Justice Kemp.

1918. *January* 21.

MANJU MAHADEV SHETTI (ORIGINAL DEFENDANT), APPELLANT *v.* SHIVAPPA MANJU SHETTI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Indian Contract Act (IX of 1872), sections 126 and 128—Contract of guarantee—Time-barred debt guaranteed—Liability on principal contract not enforceable at law—Contract of guarantee not valid.

In 1883, a sum of money was deposited by the trustees of a certain temple with the father of one M. In 1889, there was a demand for the return of the money and a refusal thereof by M's father. In 1897, on another demand being made, one B by an oral contract of guarantee undertook to repay the temple trustees in case M failed to pay. In 1900, the temple trustees brought a suit against M and B to recover the deposit. The Subordinate Judge decreed the claim against both. Against this decree M alone appealed and in appeal it was held that the deposit with M's father was proved but that the suit was time-barred in 1895. The suit was, therefore, dismissed as against the appellant M but the trial Court's decree as against B was confirmed. In 1912, the plaintiffs, temple trustees, executed their decree against B. In 1915, B having died his sons brought a suit to recover from M the sum which had been paid by them in execution. Both the lower Courts decreed the claim. On appeal to the High Court,

Held, that it being ascertained that the debt due to the trustees of the temple was barred by time in 1895 and the contract of guarantee was not made until 1897, there was not in law any valid contract of guarantee. The foundation of the contract of guarantee was wanting inasmuch as there was not any enforceable liability in the third person.

Hajarimal v. *Krishnarav*[1], distinguished.

Per BATCHELOR AG. C. J.:—By the word 'liability' used in sections 126 and 127 of the Indian Contract Act, 1872, is intended a liability which is enforceable at law, and if that liability does not exist, there cannot be a contract of guarantee.

SECOND appeal against the decision of E. H. Leggatt, District Judge of Kanara, confirming the decree passed by S. K. Patkar, Subordinate Judge at Kumta.

* Second Apdeal No. 1237 of 1916.

(1) (1881) 5 Bom. 647.

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Suit to recover money.

In 1883, a sum of money was deposited with the father of the defendant, Manju Mahadeo, by the trustees of a temple in Karwar District.

In 1889, the trustees made a demand for a return of the deposit but it was refused by the defendant's father.

Subsequently in 1897, there was a second demand and on that occasion there was an oral contract of guarantee by which one Manju Buddu (father of the plaintiffs) undertook to repay the temple trustees in case the defendant failed to pay.

In 1900, the temple trustees brought a suit No. 283 of 1900 against the defendant Manju Mahadeo and the surety Manju Buddu to recover the deposit. The Subordinate Judge decreed the claim against both. An appeal was preferred against the decree by Manju Mahadeo alone with the result that the decree against him was reversed on the ground that the claim against him was barred by time. Manju Buddu had not appealed and therefore the decree against him was confirmed.

The trustees took out execution of the decree against Manju Buddu in May 1912 and recovered Rs. 378.

Manju Buddu having died, the plaintiffs, his sons, brought a suit to recover the amount paid in execution from the defendant Manju Mahadeo as the principal debtor.

The defendant contended that nothing was due from him or from his father to the temple trustees in question ; that the plaintiff's father was not his surety and that the claim was time-barred.

The Subordinate Judge disallowed the contentions of the defendant and held on the authority of *Krishto*

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Kishori Chowdhrain v. *Radha Romun Munshi*[1] and *Hajarimal* v. *Krishnarav*[2] that the plaintiffs' claim was in time under Article 81 of the Indian Limitation Act, 1908.

The District Judge, on appeal, confirmed the decree.

The defendant appealed to the High Court.

G. P. Murdeshwar for the appellant :—I submit the lower Courts were wrong in holding me liable to reimburse the plaintiff. The case of *Hajarimal* v. *Krishnarav*[2] has no application. There the contract of suretyship was entered into on behalf of the principal debtor who was under an existing liability, and the principal contract and the collateral undertaking of suretyship had taken place at one and the same time. In my case, the facts are quite different. My father owed a debt to a temple, which had become time-barred in 1895. The debt was not enforceable against me under the ordinary law. Neither was it enforceable under the Hindu law, for a son is not bound to pay the time-barred debt of his father : *Subramania Aiyar* v. *Gopala Aiyar*[3] followed in *Naro Gopal* v. *Paragauda*[4]. The plaintiffs' father volunteered to pay the debt, if I did not pay. He wrongly supposed that I was under a liability. Such a voluntary promise cannot in law constitute a contract of guarantee. Wills J. in *Mountstephen* v. *Lakeman*[5], observed : "The law of contract gives you, as foundation, that a person was taken to be liable, and that the suretyship was a suretyship in respect of that liability. Take away the foundation of principal contract, the contract of suretyship would fail." The word "liability" in section 126 of the Contract Act meant an existing liability, one which

(1) (1885) 12 Cal. 330.
(2) (1881) 5 Bom. 647.
(3) (1909) 33 Mad. 308.
(4) (1916) 41 Bom. 347.
(5) (1871) L. R. 7 Q. B. 196 at p. 202.

was enforceable. In the present case, I made no contract with anybody nor was the contract of my father enforceable as against me. The promise made by the plaintiffs' father was void, as it was not in writing : see section 25, Clause (3) of the Indian Contract Act, 1872. There was no consideration for the contract of suretyship : see section (2) (*d*) and section 127, illustration (*c*), of the Indian Contract Act, 1872, also *Nanak Ram* v. *Mehin Lal*[1]. The contract of suretyship is in consequence void. The consent of the principal debtor is necessary, for a person cannot make himself a creditor of another by volunteering to discharge his obligations : see *Hodgson* v. *Shaw*[2]. The contract of the plaintiffs' father was in law a principal contract, not a collateral one. Hence section 145 of the Indian Contract Act had no application.

Nilkant Atmaram, for the respondents :—The question whether our father was a surety or not is one of fact. The lower Courts, having regard to all the facts, have found that he was in fact a surety. The case of *Hajarimal* v. *Krishnarav*[3], therefore, is in point. On the question of law, I submit, that the liability of Manju Mahadu was in existence at the time when our father became a surety for him. There was a debt outstanding in 1897. The fact that a suit to recover it was time-barred does not affect the existence of the debt. The statute of limitations, so far as claims other than property are concerned bars the remedy but does not extinguish the right. Here it was merely a debt : *Nursing Doyal* v. *Hurryhur Saha*[4] ; *Mohesh Lal* v. *Busunt Kumaree*[5]. There was no finding in this case that our father voluntarily offered to pay. The finding

(1) (1877) 1 All. 487 at pp. 494-497.
(2) (1834) 3 My. & K. 183 at p. 190.
(3) (1881) 5 Bom. 647.
(4) (1880) 5 Cal. 897.
(5) (1880) 6 Cal. 340.

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that he was a surety for the payment of the debt must be taken to imply a request on the part of the defendant to guarantee the payment of the debt. If on such a request our father guaranteed the payment the defendant is liable.

BATCHELOR, AG. C. J. :—The facts upon which this Second Appeal comes up for decision are these. In 1883, a sum of money was deposited by the trustees of a certain temple with the father of one Manju Mahadu. In 1889, there was a demand for the return of the money, and a refusal by Manju's father. In 1897, on the occasion of another refusal, it is found that there was an oral contract of guarantee by one Manju Buddu, who undertook to repay the temple trustees in case Manju Mahadu should not do so. In 1900, the temple trustees brought a suit against both Manju Mahadu and Manju Buddu to recover the deposit. The Subordinate Judge decreed the claim both against Manju Mahadu and against Manju Buddu. From this decree an appeal was taken to the District Judge, Mr. Leggatt. But it was taken only by Manju Mahadu. The learned District Judge held that the deposit with Manju Mahadu's father was proved, but that the suit had become time-barred five years prior to its institution in 1900, that is to say, it became time-barred in 1895. The suit was, therefore, dismissed as against the appellant, Manju Mahadu. But since Manju Buddu had not appealed, the trial Court's decree against him was confirmed. The then plaintiffs executed their decree against Manju Buddu in May 1912, and in 1915 Manju Buddu having died, his sons brought this suit to recover from the defendant, Manju Mahadu, the sum which had been paid by them in the execution. The learned District Judge affirming the decree of the Subordinate Judge has held the plaintiffs entitled to recover from Manju Mahadu, the principal debtor.

He is the appellant before us, and on his behalf Mr. Murdeshwar's principal point is that the lower Courts were wrong in their determination, inasmuch as there never was a valid contract of suretyship by Manju Buddu. To that contention Mr. Nilkant replies that the question whether there was or was not such a contract is a question of fact, and that the learned District Judge having decided it in his client's favour, it is not open to us to reconsider the decision in Second Appeal. It appears to me, however, that the finding upon this point cannot be regarded as a finding of fact. For my own part, I am prepared to accept all that Mr. Leggatt has found as matter of fact, that is to say, that there was in 1897 an oral undertaking by Manju Buddu to guarantee the debt due by Manju Mahadu. That, I think, is as far as the finding of fact really goes, and the question still remains whether in the ascertained facts there was in law a valid contract of suretyship. Upon that point all that the learned District Judge says is that the appellant is clearly liable to pay the money by virtue of the ruling in *Hajarimal* v. *Krishnarav*[1]. That, however, is by no means decisive of the legal point under consideration, for in *Hajarmal's case*[1] it is clear that, at the time the contract of suretyship was entered into, there was admittedly an existing enforceable liability of a third party. That is plain from the discussion in the judgment as to the comparative extent of the applicability of sections 134 and 137 of the Indian Contract Act. Here, however, the facts take the present case entirely out of the reach of the decision in *Hajarimal's case*[1]. For here the facts are that by a decision which is now *res judicata*, it is ascertained that the debt due to the trustees of the temple was barred by time in 1895, and that the alleged contract of guarantee upon which the respondents rely, and which admittedly

[1] (1881) 5 Bom. 647.

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was not embodied in writing, was not made until 1897, that is to say, was not made until two years after the debt had become time-barred. That being so, I am of opinion that there was no valid contract of guarantee. Mr. Nilkant, quoting such cases as *Subramania Aiyar* v. *Gopala Aiyar* [1], has reminded us that, in regard to money claims, the effect of the Statute of Limitations is merely to bar the remedy and not to extinguish the right. That no doubt is so, but the consideration appears to me to have little bearing upon the construction of the sections which govern the present decision. Those sections are 126 and 128 of the Indian Contract Act. The former section defines the "contract of guarantee" as a contract to perform the promise, or discharge the liability, of a third person in case of his default, and section 128 enacts that the liability of the surety is co-extensive with that (that is to say, the liability) of the principal debtor. It appears to me that by the word 'liability' used in these sections is intended a liability which is enforceable at law, and, if that liability does not exist, there cannot be a contract of guarantee. That is well explained by Mr. Justice Willes in *Mountstephen* v. *Lakeman* [2], where, in delivering a judgment of the Exchequer Chamber, the learned Judge said this: "The leading case upon the application of the Statute of Frauds has generally been considered to be *Birkmyr* v. *Darnell* [3], and in the note to Mr. Evans's edition of Salkeld's Reports it is stated, that, 'from all the authorities it appears, conformably to the doctrine in this case, that, if the person for whose use the goods are furnished is liable at all, any other person's promise is void, except in writing'. I think that may very well be modified: 'or if his liability is made the foundation of a contract

[1] (1909) 33 Mad. 308. [2] (1871) L.R. 7 Q. B. 196 at p. 202.

[3] (1795) 1 Salk. 27.

between the plaintiff and the defendant, and that liability fails, the promise is void' : so as to include the case which I put to Mr. Charles of persons wrongly supposing that a third person was liable, and entering into a contract on that supposition. If, in such a case, it turned out that the third person was not liable at all, the contract would fail, because there would be a failure of that which the parties intentionally made the foundation of the contract. The *lex contractus* itself would make an end of the claim, and not the application of the Statute of Frauds, whether the contract was in writing or not, and whether signed or not. The law of contract gives you, as foundation, that a person was taken to be liable, and that the suretyship was a suretyship in respect of that liability. Take away the foundation of principal contract, the contract of suretyship would fail."

So in the case before us the foundation of the alleged contract of suretyship was wanting, inasmuch as there was not any enforceable liability in the third person. There was not, therefore, any consideration for the alleged contract of suretyship.

On these grounds, it appears to me that on the ascertained facts of the case, there was not in law any valid contract of suretyship and upon this contract the respondents are bound to rely for their success.

On this ground I would reverse the decree under appeal and dismiss the plaintiff's suit with costs throughout.

KEMP, J. :—The appellant is one Manju Mahadu. The respondents are the sons of one Manju Buddu. In 1883, certain trustees of a temple deposited monies with the appellant's father. In 1897, the respondents' father guaranteed payment of those monies, if the appellant did not pay them It is not stated in the evidence

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whether the appellant himself promised to repay the monies or not, but in the view which I take of the case, that is immaterial. In 1900, the trustees brought a suit No. 283 of 1900 against the appellant and the respondents' father. The first Court decreed the claim against both. The appellant appealed. The respondents' father, although he was joined as a party to the appeal, did not appeal. The appellate Court held that the appellant was not liable because the cause of action accrued against him eight years before the filing of that suit. That would be in 1892. The claim, therefore, against him was barred in 1895. So far as the respondents' father was concerned, the appellate Court held that, as he had promised to pay a time-barred debt, he was liable.

I think that that finding was wrong, for this reason, that there was neither any consideration under section 2, Clause (*d*), nor any promise by the respondents' father in writing under section 25, Clause (3) of the Indian Contract Act to enable the promisee to succeed on the respondents' father's promise. Moreover, it is to be noted that the suit was against the respondents' father as a surety, and the finding of the appellate Court had the effect of holding him liable as a principal. However that may be, the decree was confirmed against him. It would only be *res judicata* between the plaintiffs in that suit and the respondents' father on the question as to whether the respondents' father had promised to pay a time barred debt.

Now the present appeal is from the decision of the lower Court in suit No. 120 of 1915 by the respondents, after the death of their father, against the appellant for the amount that their father had to pay under the decree in suit No. 283 of 1900. That assumes that there was a contract of guarantee. If it be contended that the appellant is liable to pay otherwise than as a principal debtor in a contract of suretyship, the answer to

that is that the payment by the respondents' father was a voluntary payment. He was under no obligation to pay, and therefore, on the authority of *Falcke* v *Scottish Imperial Insurance Company*,[1] the person for whose benefit he pays will not be liable to him for the payment. So the question is, is the appellant bound to pay on any contract of guarantee? Now a contract of guarantee presupposes the liability of a third party.

Was the appellant liable to pay? It can only be contended that he was liable to pay because (1) there was an outstanding debt in 1897 which was enforceable against him. The answer to that is that by 1897 it was barred; or (2) because he made a promise in 1897 to pay a Statute barred debt. The answer to that is that there was no consideration under section 2, Clause (*d*) of the Indian Contract Act, incurred at his request, nor was there any promise in writing under section 25, clause 3 of the Indian Contract Act; or (3) it may be contended that as the son of a Hindu, he was liable to pay his father's debts. The complete answer to that is that in 1897 the liability was time-barred: see *Subramania Aiyar* v. *Gopala Aiyar*.[2]. So that there being no liability of a third party, it is clear that there can be no contract of guarantee. In my opinion, the lower Courts have failed to appreciate the fact that the appellant's father's debt was time-barred prior to the date of the alleged contract of guarantee, and not after that date. I, therefore, agree with the decision of my Lord that the appeal should be allowed and the plaintiffs' suit dismissed with costs throughout.

Decree reversed.

J. G. R.

[1] (1886) 34 Ch. D. 234.

[2] (1909) 33 Mad. 308.