APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Kincaid.

1924. *September 10.*

RAGHAVENDRA GURURAO NAIK (ORIGINAL DEFENDANT No. 3) APPELLANT *v.* MAHIPAT KRISHNA SOLLAPUR AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS*.

Indian Contract Act (IX of 1872), section 145—Principal and surety—Debt time-barred as against principal—Liability of surety kept alive by payment of interest—Decree against surety—Payment under decree—Whether payment wrongful.

Where, in the case of a debt which had become time-barred as against the principal debtor, a surety had kept his own liability alive by *bona fide* payments of interest within time and had, on a decree being obtained against him by the creditor, paid a sum in satisfaction of that decree,

Held, that the sum so paid was not paid wrongfully within the meaning of section 145 of the Indian Contract Act, and the surety was entitled to recover the amount thereof from the principal debtor.

Suja v. *Pahlwan*[1], dissented from.

SECOND appeal from the decision of J. T. Lawrence, Assistant Judge of Belgaum, confirming the decree passed by V. V. Pandit, Subordinate Judge at Athni.

Suit to recover a sum of money. The following statement of the facts of the case is taken from the judgment of the learned Acting Chief Justice :—

On October 8, 1895, the father of defendant No. 2 executed a money bond for Rs. 2,000 payable after five years in favour of one Shidhraj Desai. The present plaintiff and defendant were sureties in respect of this debt. The principal debtor did not pay the debt nor did he acknowledge his liability to the creditor, and the claim against him became time-barred on October 9, 1903. The sureties, however, paid one rupee as interest first on October 5, 1903, and then on October 1, 1906. Shidhraj sued the present plaintiff and defendant No. 1 on the bond in 1909, and

* Second Appeal No. 178 of 1922.

[1] (1877) P. R. No. 30 of 1878.

obtained a decree against them, as the claim was kept alive by the payment of interest on two occasions before the expiration of the period of limitation. Thereafter he recovered from the present plaintiff different sums on different occasions. A sum of Rs. 800 was paid to Shidhraj on September 1, 1915, during the pendency of the application for execution of the decree obtained by Shidhraj against the sureties. The present suit was filed on September 2, 1918, to recover the said sum of Rs. 800 just within three years against defendant No. 1, his co-surety and defendant No. 2, the son of the principal debtor. Defendant No. 1 did not appear to contest the suit. Defendant No. 2 raised various defences and several issues were raised. The learned trial Judge held that defendant No. 2 was liable for the payment made by the plaintiff in satisfaction of the decree obtained by the original creditor against him in the suit of 1909. Accordingly a decree was passed for the amount claimed against defendant No. 2, and for a moiety of that amount against defendant No. 1.

Defendant No. 2 appealed to the District Court, and the learned Assistant Judge, who heard the appeal, came to the same conclusion as the trial Court in respect of the liability of the defendant No. 2 as the principal debtor in respect of the sum paid by the surety in satisfaction of the decree obtained against him by the original creditor, and confirmed the decree of the trial Court.

Defendant No. 2 appealed to the High Court.

S. R. Parulekar, for *A. G. Desai*, for the appellant :— The surety had no business to pass an acknowledgment of a debt that already had become time-barred against the principal debtor. If he is sued on the acknowledgment and has to pay the money in execution of a decree

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against him, he cannot be said to have "rightly" paid the amount. The principal debtor is, therefore, not liable to make good the amount under section 145 of the Indian Contract Act: see *Suja* v. *Pahlwan*[1]. Otherwise, there is likelihood of collusion between the surety and the creditor.

H. B. Gumaste, for the respondent:—The amount having been paid in execution of a decree for a just debt was "rightfully" paid within the meaning of section 145 of the Indian Contract Act. No collusion has been alleged in this case [*Hajarimal* v. *Krishnarav*[2] and *Abraham Servai* v. *Raphial Muthirian*[3], referred to.]

SHAH, AG. C. J.:—[His Lordship after setting out facts as above, proceeded:—]

In the appeal before us, on behalf of defendant No. 2 it is urged that he is not liable in respect of this sum paid by the surety, that at the date when the suit was filed against the surety in 1909 the claim against the principal debtor had become time-barred long since, that, as regards the present plaintiff and the co-surety, the claim was kept alive by their own acts consisting of the payments of interest on two occasions; that under section 145 of the Indian Contract Act, 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, and that the sum paid under the circumstances of this case must be treated as a sum paid wrongfully within the meaning of the section. There is no reported decision of any High Court directly bearing on this point; but there is a decision of the Punjab Chief Court in *Suja* v. *Pahlwan*[1] upon which the appellant has relied.

[1] (1877) P. R. No. 30 of 1878. [2] (1881) 5 Bom. 647 at p. 651.
[3] (1914) 39 Mad. 288.

On the other hand, on behalf of the plaintiff it is contended that though the claim of the creditor against the principal debtor might be time-barred, it was open to him to keep the debt alive with a view to get more time for payment of the debt, which he was undoubtedly liable to pay at the time when he paid interest to keep the debt alive, that in any case, when he paid the sum in satisfaction of the decree passed against him in respect of his liability as a surety, he made the payment rightfully under the guarantee, within the meaning of section 145 of the Indian Contract Act, and that he is entitled to recover it from the principal debtor, quite independently of the consideration whether the claim of the original creditor was barred against the principal debtor or not.

We have considered the arguments urged on both sides, and though the point is not covered by any authority which is binding upon us, we have carefully considered the arguments put forth in the judgments of the learned Judges in the case of *Suja* v. *Pahlwan*[1]. Section 137 provides that mere forbearance on the part of the creditor to sue the principal debtor does not discharge the surety in the absence of any provision in the guarantee to the contrary. It has been held by this Court in *Hajarimal* v. *Krishnarav*[2] that, though the claim against the principal debtor may be barred, the creditor can enforce his right against the surety. In this case the effect of the various sections of the Indian Contract Act has been considered with reference to a state of facts under which by operation of law, though the claim against the principal debtor was barred, it was enforceable against the surety. The same view was taken in *Sankana Kalana* v. *Virupakshapa Ganeshapa*[3] and that view is also accepted

[1] (1877) P. R. No. 30 of 1378. [2] (1881) 5 Bom. 647.

[3] (1883) 7 Bom. 146.

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by the Calcutta and Madras High Courts in *Krishto Kishori Chowdhrain* v. *Radha Romun Munshi*[1] and *Subramania Aiyar* v. *Gopala Aiyar*[2]. Though this view is not accepted by the Allahabad High Court, so far as we are concerned, we are bound by the decisions of this Court; and it is not disputed before us that, though the claim against the principal debtor may be barred, it is not necessarily barred against the surety. In other words, the liabilities of the principal debtor and the surety to the creditor are not absolutely interdependent, and, though the remedy as against the one may be barred, it does not follow that it is necessarily barred as against the other.

Further it has been held by this Court in *Gopal Daji* v. *Gopal bin Sonu*[3], that the payment of interest by the debtor within limitation does not give a fresh starting point for limitation against the surety. Having regard to the *ratio decidendi* of this case, and that of *Brajendra Kishore Roy Chowdhury* v. *Hindustan Co-Operative Insurance Society, Ld.*[4], it is clear that the surety may effectively keep alive his liability by his own act without in any way affecting the plea of limitation in favour of the principal debtor. According to these two cases, the principal debtor and the surety can each keep his liability alive, though the remedy of the creditor may be barred as against the other on account of limitation. That being so, it is clear that in 1909 the surety was liable in respect of the amount for which he had stood surety at the time the original bond was passed by the principal debtor. In keeping the debt alive against himself, he cannot be said to have acted improperly or wrongfully. If he was not in a position to pay, it was open to him to secure extension of time for payment by keeping his liability

(1) (1885) 12 Cal. 330 at p. 333.
(2) (1909) 33 Mad. 308.
(3) (1903) 28 Bom. 248.
(4) (1917) 44 Cal. 978.

alive ; and it is clear in this case that, as a decree was passed against him in favour of Shidhraj in the suit of 1909, he was bound to pay the decretal debt. It is not reasonable, in my opinion, to hold that he paid the sum wrongfully within the meaning of section 145 of the Indian Contract Act when he paid it in satisfaction of a decree passed against him. It must be treated as a sum rightfully paid under the guarantee. The liability of the principal debtor to indemnify the surety is provided for by section 145 and is in no way dependent upon the existence of his original liability to the creditor. It may be said that this view may lead to an indefinite extension of the period of the liability of the principal debtor, which cannot be enforced directly against him on account of the bar of limitation. It is possible that in some cases, as in the present case, it may so happen ; but I am unable to think that there is any particular hardship or injustice to the principal debtor involved in his being called upon to indemnify the surety. The cause of action in respect of his liability to indemnify the surety arises when the surety in fact pays the amount under section 145 of the Indian Contract Act. Even if it involves some hardship, I do not think it can afford any reasonable basis for holding that the payment made by the surety under circumstances, such as we have in this case, is wrongful. I may point out that in the present case it has been definitely found by the lower Courts that there was no collusion whatever between the surety and the original creditor. The only ground upon which it is suggested that the payment made by the surety under the decree against him is wrongful within the meaning of section 145, is that by his own act he has kept alive his liability which would otherwise have become unenforceable on account of limitation. That is not a sufficient ground for disallowing the right which is given to him under section 145 of the Indian Contract Act.

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I am unable to agree with the reasons given in *Suja* v. *Pahlwan*[1] for the contrary view. It is not necessary to attempt to generalize as to when a payment can be said to have been wrongfully made by the surety within the meaning of section 145. It is enough for the purposes of this case to observe that the act of the surety in keeping his liability alive by *bona fide* payments of interest within time is not such as could make the payment by him in pursuance of the decree obtained against him by the creditor wrongful within the meaning of the section.

No other point is urged in support of the appeal. It is not clear why there are different suits in respect of payments made by the plaintiff from time to time. As no point is made on that score before us, it is not necessary to consider it.

We, therefore, dismiss the appeal and confirm the decree of the lower appellate Court with costs to respondent No. 1.

KINCAID, J. :—I concur.

Decree confirmed.

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[1] (1877) P. R. No. 30 of 1878.

APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Kincaid.

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September 10.

BAI NOOR JAN BAGAM (ORIGINAL DEFENDANT NO. 2), APPELLANT *v.* HANSRAJ JETHAMAL & CO. AND OTHERS (ORIGINAL PLAINTIFFS NOS. 1 AND 2), RESPONDENTS*.

Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 14—Decree—Execution—Claim arising under mortgage—Sale of property covered by another mortgage.

The defendants executed in favour of the plaintiffs on different dates two distinct mortgages on two separate properties, A and B, remaining in possession in each case as tenants of the plaintiffs. The rent having fallen into

*Second Appeal No. 608 of 1923.