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support the charge of fraud, and, should he refuse to take the proper proceeding to enforce the decree, the plaintiff may, if so advised, seek redress by taking criminal proceedings against him or the defendant or both.

It is accordingly ordered that the order of the Civil Court, dated the 3rd April 1868, be, and the same hereby is, set aside as having been passed without jurisdiction.

Appellate Jurisdiction (a)

Special Appeal No. 311 *of* 1868.

TOTAKOT SHANGUNNI MENON the Dewan of Cochin ..... } *Special Appellant.*

KURUSINGAL KAKU VARID and another ..... } *Special Respondents.*

A suit may be maintained against a surety according to Hindu Law although the principal debtor has not been sued.

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THIS was a Special Appeal against the decree of G. R. Sharpe, the Civil Judge of Calicut, in Regular Appeal No. 428 of 1867, modifying the decree of the Court of the Principal Sadr Amin of Calicut in Original Suit No. 46 of 1865.

This was a suit to recover from the defendants as the sureties of one Punakel Parunji Kunhappa the sum of rupees 5,887-15-5 with interest.

The plaint set forth that the abkarry farm of the Cochin Circar was taken at an auction by Punakel Parunji Kunhappa on his agreeing to manage it for one year from the 1st Chingam 1040 to the 31st Karkedagam last, and to pay rupees 610 per mensem by two instalments ; that accordingly on the strength of two kachits executed by the 1st and 2nd defendants on the 29th and 30th of Karkidagam 1039 agreeing as sureties to pay the amount on the failure of Kunhappa to do so, the purchase of the farm was confirmed to him ; that accordingly Kunhappa managed the farm for a year from the said Chingam to Karridagam and surrendered the farm, leaving a balance on that account

(a) Present : Scotland, C. J., and Ellis, J.

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of rupees 5887-15-5. The defendants alleged that according to the contract the farm ought to have been taken from the contractor on his failure to pay one monthly instalment, but this course was not followed but delayed for 12 months; and that as the contractor was not made a party, the suit could not be maintained.

The Principal Sadr Amin gave the plaintiff a decree for the amount sued for.

In Appeal the Civil Judge modified the decree, holding that defendants were only liable to pay one month's rent upon the true construction of the contract.

The following extract is taken from the Judgment of the Civil Judge:—

"I entertain considerable doubts as to the regularity of this plaint (which does not include the principal) being brought against these defendants who are undoubtedly collateral sureties for the same debt, but are so under separate agreements executed on different dates.

"I entertain still stronger doubts whether these defendants are not entitled to what the Romans called *beneficium ordinis i. e.*, whether the plaintiff was not bound to have sued the principal debtor before the sureties. The rule of the Hindu Law is, that the principal must, in all cases, be first sued (*I Strange's Hindu Law* 301) and the same rule having been laid down by Justinian in one of his novels (*Novs.* 4 *C.* 1 *ut creditores primo loco conveniant principalem)* has been adopted in most countries deriving their jurisprudence from the Civil Law. (France, Holland, Scotland, &c.) Further upon this point no mean authority (Mr. Chancellor Kent) remarks "a rule of such general adoption shews that there is nothing in it inconsistent with the relative rights and duties of principal and sureties, and that it accords with a common sense of justice and the natural equity of mankind." I think, therefore, that were it necessary to decide the point, I should adopt the above rule in all cases, and more especially I should not decree against the sureties upon a plaint like this which offers no explanation whatever of why the principal is not proceeded against.

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"The chief question, however, for determination is the construction of the agreements entered into by these defendants, and upon that question I am quite unable to concur with the Principal Sadr Amin in adopting the interpretation put upon them by plaintiff.

"The pleadings in the case are somewhat loose and the issues recorded are looser still, nor, without further consideration, should I be prepared to concur with the Principal Sadr Amin of Calicut in his view of the *onus probandi.* To avoid, however, further litigation and annoyance, the defendants at my suggestion consented to a decree for one month's instalment and proportionate costs being passed against them, of course without any prejudice to their contentions should a higher Court adopt a different view of the contract and the whole case be re-opened. Unable to see how plaintiff can claim any higher sum, I accordingly decree, in modification of the decree of the Court below, that defendants do pay to plaintiff rupees 610 with interest thereon at 12 per cent. from date of plaint to date of this decree."

The plaintiff preferred a special appeal to the High Court against the decree of the Civil Judge, on the ground that the Civil Court had misconstrued the meaning of the instruments on which the claim was founded.

The Advocate General, for the special appellant, the plaintiff.

G. E. Branson, for the special respondents, the first and second defendants.

The Court delivered the following

JUDGMENT:—This is a suit against two sureties in an abkary contract to recover rupees 5,887-15-5, being the amount of several instalments which the principal had failed to pay at the termination of the contract, together with interest. The original Court decreed the liability of the defendants for the full amount claimed. But the Civil Court, differing on the construction of the contract, has held the amount of one instalment with interest to be the most that is recoverable and accordingly modified the decree of the original Court, the defendants consenting to pay that

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amount. It seems probable too from the judgment of the Civil Judge that, but for such consent, he would have decreed the dismissal of the suit on the ground that a suit against sureties is not maintainable until after the principal has been proceeded against.

From the decree of the Civil Court the plaintiff has appealed, and the objection on his part is that the contract has been misconstrued. On the other hand, it is contended for the respondents that the Civil Judge's view of the law in regard to their non-liability to be sued before the principal debtor is sound.

With respect to the appellant's objection, the question is whether the terms of the written contract import a general guarantee by the defendants of the payment of the monthly instalment by the principal during the term of the contract, or (as the Civil Judge has held) the limited undertaking to make good the amount of one month's instalment and of any loss that might be sustained on the re-letting of the farm for default in payment of an instalment. [Upon the construction of the contract the High Court held that the defendants had made themselves responsible for the amount due at the termination of the contract.]

Next as to the objection that the suit did not lie until after the principal debtor had been sued. The single authority for the position laid down in *Sir Thomas Strange's Treatise*, on which the Civil Judge has relied, appears to be the texts of *Vrihaspati* with the commentary of *Jagannada* in *Colebrooke's Digest Bk.* 1, *Ch.* 4, *Section* 2, *clause* 148 :— Let the creditor allow time for the surety to search for the debtor who has absconded, a fortnight, a month, or six weeks, according to the distance of the place where he may be supposed to lurk.

" Let no sureties be excessively harassed, let them gradually be compelled to pay the debt, let them not be attacked if the debtor be at hand and amenable : such is the law in favor of sureties."

The first of these injunctions evidently relates to suretyship for the appearance of a debtor which is according to

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Vrahaspati one of the four kinds of legal surety-ship, and renders the sureties liable on failure of their engagement to pay the debt (*See the same Chapter of Colebrooke's Digest Clause* 142); and it seems questionable whether the other injunctions have reference to any other kind of suretyship. At all events they do not, we think, imply the rule of law now contended for. The injunction " let them not be attacked if the debtor be at hand and amenable" alone imports that the principal should be proceeded against, and that, if a prohibition at all, amounts to an absolute prohibition of the liability of sureties when the debtor is at hand and amenable which is certainly not a benefit available to the present defendants. The terms in which the injunctions not to harass excessively and to compel payment gradually are expressed are too vague to admit of any definite construction. We are unable therefore to consider these texts as authority for the position that sureties cannot be proceeded against before the principal debtor has been separately sued, and all the other texts set forth in the same chapter of the *Digest* relating to the liability of sureties declare generally that sureties for payment by their principal are liable on his default.

The Hindu Law then being, in our view, not opposed to the rule of the English Law by which either the principal on the surety may be sued at the election of the party with whom they have contracted, is there any other ground on which its application to this and similar cases can be considered unjust ? The principle of the rule is that the contract imposes on the surety the obligation to see to payment or performance on the part of the principal, and this is no more than the just effect of a contract of surety-ship, such as the one in question. When the contract is silent in regard to a suit against the principal, suing the surety is but seeking to enforce the liability incurred by the undertaking of the latter. It is true that eventual indemnity from loss is the substantial object of the collateral contract of a surety; and therefore in accordance with perfect equity that the defaulting principal should be sued, but only when he is shewn to have the means of meeting his liability, and this appears to have been the extent of the benefit secured to the creditor by the *beneficium*

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ordinis or *excussionis* introduced into the Roman Law by the *Novellae Constitutiones of Justinian, Nov.* 4 *Ch.* 1. The surety was liable to be first sued, and the action being *stricti juris*, it was for him to plead the *exceptio ordinis*, otherwise the suit proceeded to judgment, and he could not successfully plead it when it appeared that the plaintiff would be prejudiced or that the suit against the principal would be ineffectual, for then *iniquum est eum condemnari* could not be declared. The effect of the law is concisely stated in *Colquhoun's Roman Civil Law, Vol.* 2, *Sec.* 1610.

The justice of such a rule of procedure lies in the sureties being secured the right to insist on the payment by the debtor in their discharge to the extent of his means. Now there is no doubt that in practice when the principal debtor is not sued, it is, at all events in the majority of instances, because he has no property available to meet his liability. It is most probably so in the present case. The positive general rule contended for would therefore not only be without the principle of equity in favor of sureties to support it, but would also subject creditors inequitably to the expense and delay of useless suits. Further in any case of the omission to sue a principal who possesses the means of paying, the Code of Civil Procedure supplies the surety with a remedy. He can, when sued, compel the creditor to obtain a decree against the principal debtor according to the justice of the case, by having him made a party to the suit under Section 73, and this remedy, we think, secures all just and reasonable protection consistent with the several rights and liabilities under the contract.

For these reasons we are of opinion that the rule of English law should govern our decision, and consequently that the respondent's objection is untenable. The result is that the decree of the Civil Court must be reversed, and the decree of the original Court affirmed. The plaintiff's costs in this and the Civil Court must be paid by the defendants.