1881 JULY 27. APPELLATE CIVIL. 5 B. 643.

discharged on the ground that, in the circumstances of the case, neither an attachment before judgment nor security were necessary.

On the 31st March, the Subordinate Judge refused this application on the ground that as defendants had given security it was not now competent to them to show cause against the conditional order made on the application of the plaintiff presented at the same time as the plaint.

But the Subordinate Court was wrong in so holding. The date fixed by the Subordinate Court for the defendants to show cause against the conditional order of the 10th March, 1881, was the 28th March, 1881. Until that date it was not open to the defendants to show cause against the order: but it was clearly within the right of the defendants, and the Subordinate Court so ruled on the petition of the defendants, to prevent the interim attachment of their property by giving the security required by the Court. The fact of the defendant giving this security at once in no way took away their right to show cause on the 28th March, 1881, why it was not necessary, in the circumstances of the case, to order the attachment of their property before judgment, nor for the defendants to be required to give security for the fulfilment of the decree of the Court.

The order of the Subordinate Court, dated 31st March, 1881, must, therefore, be set aside, and the Subordinate Court directed to allow the defendants to show cause why the order of the Subordinate Court, dated 10th March, 1881, requiring defendants to give security for the fulfilment of the decree of the Court, should not be discharged.

Costs of this application should be costs in the cause.

Order accordingly.

---

5 B. 647=6 Ind. Jur. 139.

[647] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Birdwood.

HAJARIMAL, (*Plaintiff*) *v.* KRISHNARAV AND ANOTHER (*Defendants*).* [29th March, 1881].

The Dekkhan Agriculturists' Relief Act XVII of 1879, *s.* 72—*Limitation Act XV of* 1877, *sch. II, art.* 59—*Non-agriculturist principal—Agriculturist surety—Remedy against principal barred, but surety held liable—The Indian Contract Act IX of* 1872, *ss.* 126 *to* 147.

On the 11th September, 1880, a suit was instituted against a non-agriculturist principal and agriculturist surety for Rs. 88-8-0, being principal and interest due on a bond dated the 5th August, 1877, and payable on demand. The action being barred against the principal debtor under the Limitation Act XV of 1877, sch. II, art. 59, the question was referred to the High Court, whether, under s. 72 of the Dekkhan Agriculturists' Relief Act XVII of 1879, the agriculturist surety was still liable for the amount sued for.

Held—that although the suit was barred as against the principal debtor under art. 59, sch. II of the Limitation Act, yet the surety, being an agriculturist, was still liable, inasmuch as s. 72 of the Dekkhan Agriculturists' Relief Act, which extends the period of limitation in the case of suits against agriculturists, applies to all agriculturists, whether principals or sureties, in the districts affected by that Act.

Sections 126 to 147 of the Indian Contract Act IX of 1872, relating to contracts of guarantee, considered in connection with the effect of s. 72 of the Dekkhan Agriculturists' Relief Act XVII of 1879.

---

* Civil Reference, No. 34 of 1880.

[N.F., 11 A. 310; 24 A. 504=A.W.N. (1902) 166; 2 N.L.R. 42; U.B.R. (1892—1896) Vol. II. 308; F., 9 Ind. Cas. 742=98 P.L.R. 1911=14 P.W.R. 1911; Appr., 12 C 330; R., 7 B. 146 (148); 9 B. 320; 28 B. 248=5 Bom. L.R. 1020 (1023); 33 M. 308=7 Ind. Cas. 898=20 M.L.J. 633 (638)=8 M.L.T. 321; 9 Ind. Cas. 204 (205)=21 M.L.J. 457=9 M.L.T. 215=(1911) M.W.N. 41; 16 Ind. Cas. 387 (389); U.B.R. (1897—1901) 331.]

1881
MARCH 29.

APPELLATE CIVIL.

5 B. 647=6 Ind. Jur. 139.

UNDER s. 617 of Act X of 1877, this case was referred for the decision of the High Court by Dr. A. D. Pollen, Special Judge under the Dekkhan Agriculturists' Relief Act. He stated the case, with his opinion thereon, as follows :—

"The suit was brought against a non-agriculturist principal and an agriculturist surety to recover Rs. 50 principal and Rs. 38-8-0 interest due on a bond dated 5th August, 1877, the condition of the loan being that it should be repayable on demand. The cause of action, therefore, accrued when the loan was made, namely, on the 5th August, 1877. The plaint was not presented till the 11th September 1880. It appears, therefore, that it was time-barred as against the non-agriculturist principal on that date; but as against the agriculturist surety the time is extended to six years by s. 72 of the Dekkhan Agriculturists' Relief Act. The question is, whether a decree can be passed against the surety, when the principal debtor is discharged by lapse of [648] time and the omission of the creditor to sue him before such lapse. Having regard to s. 134 of the Indian Contract Act and to the general principles regulating the relation of principal and surety, I think the surety is discharged. As I feel some doubt on this point, I have the honour to refer it for the decision of the High Court."

The parties did not appear.

JUDGMENT.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—The reference in this case arises in a suit upon a bond, dated the 8th of August, 1877, conditioned for payment of Rs. 50, principal, payable on demand. Under Act XV of 1877, sch. II, art. 59, the period of limitation on such a bond would be three years from the making of the loan, *i.e.*, in the present case, the date of the bond. The principal debtor is not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, but the surety is such an agriculturist. The plaint was presented on the 11th September, 1880, *i.e.*, more than three years after the date of the bond, which, accordingly, as against the non-agriculturist principal debtor was then barred by the enactment in the Limitation Act of 1877 just referred to. The question is, whether the effect of s. 72 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is to leave the surety still liable for the amount of principal and interest due on the bond. The learned Special Judge under that Act having some doubt on the point, referred it to this Court, his opinion, however, inclining against the liability of the agriculturist surety, notwithstanding s. 72 of the last-mentioned Act, which enacted that, "in any suit against an agriculturist under this Act for the recovery of money, the following periods of limitation shall be deemed to be substituted for those prescribed in the second column of the second schedule annexed to the Indian Limitation Act, 1877 (that is to say) :—(*a*) when such suit is based on a written instrument registered under this Act or any law in force at the date of the execution of such instrument,—twelve years; (*b*) in any other case, six years. Provided that nothing herein contained

1881
MARCH 29.

APPELLATE CIVIL.

5 B. 647 = 6 Ind. Jur. 139.

shall revive the right to bring any suit which would have been barred by limitation if it had been instituted immediately before this Act comes into force."

[649] That concluding proviso does not apply to the present case—the right of action on the bond not having been barred by Act XV of 1877, sch. II, art. 59, when the Dekkhan Agriculturists' Relief Act came into force, *viz.*, on the 1st of November, 1879 (s. 1)—the three years' period of limitation did not expire until the 8th of August, 1880. Section 72 of the Dekkhan Agriculturists' Relief Act occurs in its eleventh chapter, and contains no exception of a surety,—a circumstance rendered important by the fact that the case of a surety was evidently present in the mind of the Legislature when framing that Act, and is mentioned in two parts of it, *viz.*, in cl. (*y*) of the third section which occurs in chap. II of the Act; and, secondly, in the first passage of s. 12, which occurs in chap. III. In both of these instances the case of a defendant "not being merely a surety of the principal debtor" is excepted from the operation of the portions of the Act in which those exceptions are made, but those exceptions have not any bearing upon the enactment as to limitation contained in s. 72, save in rendering more remarkable the absence of any such exception from that section. Hence in accordance with the familiar rule of construction, *expressio unius est exclusio alterius*, we think that we are bound to infer that s. 72 was intended by the Legislature to apply to all agriculturists in the districts affected by the Dekkhan Agriculturists' Relief Act XVII of 1879, whether filling the character of principals or sureties. The intention of the Legislature in extending the period of limitation was to remove the frequent pressure on agriculturist debtors to execute fresh and probably more stringent deeds or bonds than those originally given by those debtors, and thus to benefit such agriculturists. The Legislature might perhaps have, advantageously to agriculturists, excepted sureties from the operation of s. 72, but it has not made any such exception. Were we to do so, we should be acting as legislators and not as judges.

Assuming that the result of the barring, by the Limitation Act of 1877, of the action against the principal debtor is that the right is gone as well as the remedy barred, or, in other words, that he is discharged from the debt to the obligee in the bond by virtue of s. 2, cl. (*j*), of the Indian Contract Act IX of 1872, **[650]** which enacts that "a contract, which ceases to be enforceable by law, becomes void when it ceases to be enforceable," (which enactment is however, qualified by s. 25, cl. 3, of the same Act, which treats a debt barred by the law for the limitation of suits, as a good consideration for a fresh promise in writing signed by the party to be charged or his agent to pay such debt in whole or in part), we proceed to consider such portion of the same Act (extending from s. 126 to s. 147) as relates to contracts of guarantee and is relevant to the present case.

The first of these which it is important to notice is s. 128, which enacts that "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract." This is merely a re-enactment of the Common Law—(see Theobald on Principal and Surety, chap. IV). Although this co-extensiveness is laid down in s. 128, the same Legislature, which there so enacted, might subsequently vary or modify that provision, and has done so by s. 72 of the Dekkhan Agriculturists' Relief Act in extending the period of limitation

1881 MARCH 29. APPELLATE CIVIL. 5 B. 647 = 6 Ind. Jur. 139.

of suits against all agriculturists—without regard to the distinction between principal and surety. If this can be regarded as a variance in the contract, yet not being a variance made by the principal debtor and the creditor, but by the Legislature, it does not fall within s.133, and, therefore, does not discharge the surety. Section 134 especially demands our consideration. It runs thus:—"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." The omission of the creditor to sue the principal debtor within three years from the date of the bond, has undoubtedly (having regard to s. 2, cl. *j*, already mentioned, and to the Limitation Act of 1877) produced the legal consequence of the discharge of the principal debtor; and, *prima facie*, if we were not to look beyond s. 134, we should hold the surety to be discharged. But this view is dispelled by s. 137, which qualifies s. 134 by enacting that "mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him, does not, in the absence of any [651] provision in the guarantee to the contrary, discharge the surety." Mere forbearance means a forbearance not resting upon or in consequence of such a promise to give time to, or not to sue the principal debtor, as is the subject of s. 135. The next section to be mentioned is s. 139, which as follows:—" 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, the surety is discharged." As to this section, Messrs. Cunningham and Shephard in their commentary upon the Contract Act, p. 214 (Ed. 1873), say: " It must be inferred from s. 137 that it is no part of the creditor's duty to sue the principal debtor at any particular time." That remark appears to us to be well founded. To hold otherwise would be to treat s. 137 as a dead letter. The illustrations to s. 139 are not inconsistent with that view. We may observe that, although the creditor's right to sue the principal debtor is barred, such will not be the case with the surety's right to sue the principal debtor, if the surety be compelled to pay the amount of the bond or any part of it to the creditor: inasmuch as the period of limitation to the surety's suit against the principal debtor would not commence to run until such payment. Even when the action against the surety has been commenced within the period of limitation applicable to the principal debtor (who may at the time of the institution of such action be beyond the jurisdiction, and, therefore, not joined as a defendant in the action) it must often happen that the decree or execution against the surety under which he is compelled to pay is not made until after the period of limitation has expired as against the principal debtor, yet the latter must recoup the surety whose cause of action does not accrue against the principal debtor until payment by the surety. The contract between the creditor on one side and the principal debtor and surety on the other, which as regards the principal debtor is avoided by expiration of the period of limitation, is distinct from the contract implied by law from the former on the part of the principal debtor to recoup the surety if he be compelled to pay the debt. That latter contract is still in full force.

[652] Our attention has been drawn to a passage in M. Merlin's Repertoire de Jurisprudence, Vol. II, page 445, Tit. Caution (Bail, Surety, Security). It occurs under the sub-division V, which treats of the manner in which contracts of suretyship (cautionnements) are terminated, and

1881
MARCH 29.

APPELLATE CIVIL.

5 B. 647 = 6 Ind. Jur. 139.

gives in pl. 5 an instance of one of the modes of such termination, which when translated is as follows :—"When the period of limitation has elapsed since the contract of suretyship. For example, I have guaranteed to a tradesman payment for trimmings which he has furnished to my friend for a dress. That tradesman, instead of compelling payment within the time which the law allowed to him, has permitted that period of limitation to run against him. It is certain that, although, according to custom, he may yet put my friend to his oath (1) as to the payment for what has been supplied to the latter, the affirmation which he may make as to his still owing the money, cannot injuriously affect me, because it is to be presumed that I had not any intention that any suretyship should endure longer than the time within which the right to bring the principal action existed. At the moment when the period of limitation accrued, I had the right to suppose that the tradesman was paid, and no longer to trouble myself as to the solvency of my friend." There is, between the case thus put by M. Merlin and the present case, this vital distinction, that, in the case of M. Merlin, the prolongation of the liability beyond the period of limitation was the act of the principal debtor, *i.e.*, his oath that he had not paid the price, and he could not by his act without the concurrence of the surety vary the liability of the latter, whereas the prolongation of the liability in the present case is the act of the Legislature, which may control alike the principal debtor, the surety, and the creditor.

Our reluctant reply to the Special Judge must be that the action as against the surety is not barred by reason of the action being barred as against the principal debtor by Act XV of 1877, sch. II, art. 59. Although upon our rendering of the Dekkhan Agriculturists' Relief Act, arrived at in conformity with **[653]** the settled principles of the construction of statutes, we have come to that conclusion, we have not any difficulty in supposing that the Legislature may not actually have contemplated or foreseen such a consequence of s. 72 of that Act. The remedy, however, is easy, and lies in its own hands. We understand that there either now is, or there is about to be submitted to it a bill for amending the Act. In that bill an exception of the case of a mere surety for a principal debtor may be introduced in s. 72, and it would not be any great hardship to creditors if such an amendment were made retrospective.

(1) See Pothier on Obligations by Evans, Vol. I, p. 470, pl. 684 to 688, and Merlin Rep., Vol. XVI, Tit. Serment, S. 2, Art. II, pp. 93, 94, and see Vol. VI. Tit. Exception, pp. 331, 332.