

Railway Co. (1). In the present case I am of opinion that the later acts of Nana are closely connected with his earlier statements as effect and cause, and naturally arose therefrom in the usual course of things, and are not remote and indirect consequences.

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

SHAIK ALLI (Plaintiff) v. MAHOMED AND ANOTHER (Defendants).^{*}
[30th September, 1889.]

Contract Act IX of 1872, s. 134—Surety, discharge of—Refusal of creditor to serve summons on the principal debtor—Civil Procedure Code (Act XIV of 1882), s. 99 A—Practice.

In a suit against the principal debtor and the surety, the omission of the creditor to effect service of summons on the principal debtor does not discharge the surety from his liability, under s. 134 of the Contract Act IX of 1872.

[F., 17 Ind. Cas. 893 = 8 N.L.R. 188; R., 16 Ind. Cas. 387; D., 1 L.B.R. 150.]

[268] THIS was a reference from Ray Saheb Anant Gopal Bhaye, Subordinate Judge of Dapoli, under s. 617 of the Code of Civil Procedure (Act XIV of 1882).

The suit was for money due upon a bond executed by defendant No. 1 as principal debtor and defendant No. 2 as his surety.

The first defendant's residence could not be found, and the plaintiff was unable to serve the summons upon him. The plaintiff therefore prayed for a decree against the surety (defendant No. 2) alone.

The Subordinate Judge referred the following question for the High Court's decision:—

Is the surety (defendant No. 2) released from liability to pay the debt, under s. 134 of the Indian Contract Act, in consequence of the plaintiff's declining to effect service of summons upon defendant No. 1 (the principal debtor)?

The Subordinate Judge's opinion was in the affirmative.

Shantaram Narayan (Government Pleader), for the plaintiff.—The suit was brought against the principal debtor and the surety, and as the principal debtor's residence could not be found, the plaintiff could not serve the summons. The inability of the plaintiff to serve the summons does not discharge the surety from his liability—*Krishto Kishori Chowdhrao v. Radha Romun Munshi* (2). The suit as against the principal debtor may be dismissed by the Court under s. 99A of the Civil Procedure Code (Act XIV of 1882), but the claim as against the surety must be awarded.

Narayan Ganesh Chandavarkar, for the defendant (surety).—Where the creditor sues the principal debtor and the surety jointly, and releases the principal debtor, he cannot hold the surety liable. The refusal by the plaintiff to serve the summons on the debtor justifies the discharge of the surety under s. 134 of the Contract Act IX of 1872. In omitting to

(1) L.R. 10 Q.B. 121.

* Civil Reference No. 12 of 1889.

(2) 12 C. 330.

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serve the summons, the plaintiff must be considered to have relinquished his claim as against him, and the surety stands discharged—*Narayan Govind Ok v. Ganesh Atmaram Fadke* (1).

JUDGMENT.

[269] SARGENT, C.J.—The declining by the plaintiff to effect service of the summons on defendant No. 1 would enable the Court to dismiss the suit as against defendant No. 1 after the expiration of one year, under s. 99A of Act XIV of 1882, leaving the plaintiff to bring a fresh suit, but has no effect in discharging the defendant No. 1 from his liability. The defendant No. 2 is, therefore, not discharged from his liability.

14 B. 269.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Parsons.

MANEKJI FRAMJI (*Original Plaintiff*), Appellant v. RUSTOMJI NASERWANJI MISTRY (*Original Defendant*), Respondent.*

[30th September, 1889.]

Mortgage—Equitable mortgage by deposit of title-deeds—Suit by equitable mortgagee for foreclosure and sale—Limitation—Limitation Act (XV of 1877), art. 147.

An equitable mortgagee by deposit of title-deeds is a mortgagee within the meaning of art. 147, sch. II of the Limitation Act (XV of 1877), and the period of limitation for a suit by such a mortgagee is sixty years, as therein prescribed.

A mortgagee by deposit of title-deeds has the right to sue for foreclosure or sale.

[F., 4 Bur. L.T. 169=11 Ind. Cas. 721=6 L.B.R. 23; Appr., 14 B. 577 (581); R., 14 A. 238; 15 B. 299 (305); 20 B. 409; L.B.R. (1872—1892) 555 (562); 70 P.R. 1903=160 P.L.R. 1903; 53 P.W.R. 1907.]

THE plaintiff sued to recover Rs. 2,500 and interest, at the rate of 12 per cent. *per annum*, on a promissory note executed by the defendant on the 5th February, 1872. He alleged that at the time of the execution of the note the defendant had created an equitable mortgage in his favour by a deposit of his title-deeds relating to certain immoveable property. The plaintiff, therefore, prayed for foreclosure or sale of the property mortgaged.

The suit was filed in 1887.

The defendant contended (*inter alia*) that the suit was barred by limitation.

The Subordinate Judge held that art. 147 of the Limitation Act (XV of 1877) did not apply to the case of an equitable mortgage, and rejected the plaintiff's claim as barred by limitation.

Against this decision the plaintiff appealed to the High Court.

[270] Latham, Advocate-General (with him Shamrao N. Bele), for appellant.—The lower Court erred in holding that an equitable mortgage by deposit of title-deeds is a mere charge. An equitable mortgage stands

* Appeal No. 41 of 1888.

(1) 7 B.H.C. R. A. C.J. 118.