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Small Cause Court jurisdiction entitling him to hear the particular suit: *Hari Kamayya* v. *Hari Venkayya*[1].

We think that in matters of this kind it is desirable that there should be uniformity of decision through the various Courts in different parts of India, and that we may well follow this decision of the Madras Full Bench Court.

It has been argued that the decision of this Bench in *Balchand* v. *Balaram*[2] requires that we should come to a different conclusion. But we think not: that case turns upon its own very special circumstances, and does not appear to us to be an authority on the facts with which we are at present dealing.

In our opinion, therefore, the rule should be made absolute, and the case should go back in order that the District Court may re-admit and deal with the appeal.

Cost of this rule will be costs in the appeal.

Rule made absolute.

(1) (1902) 26 Mad. 212. (2) (1903) 5 Bom. L. R. 398.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

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GOPAL DAJI SATHE (PLAINTIFF) *v.* GOPAL BIN SONU BAIT (DEFENDANT).*

Limitation Act (XV of 1877), section 20—Principal—Surety—Payment of interest by principal—Liability of surety.

The payment of interest by the debtor within limitation does not give fresh starting point for limitation against the surety under section 20 of the Limitation Act (XV of 1877) even in the absence of a prohibition by the surety against the payment of interest by the debtor on his account.

CIVIL reference made by K. S. Bodas, Subordinate Judge of Chiplun, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was in these terms:—

The plaintiff sues to recover Rs. 30 principal and interest due upon a simple unregistered money bond, dated 22nd October, 1891

* Civil Reference No. 12 of 1903.

executed by defendant 1 as the principal debtor and by deceased Gopal Sajnoji as surety for him. The bond provides for repayment by monthly instalments in eight months since 22nd March, 1892. Interest was only paid from time to time each time within limitation and these payments are endorsed on the bond and signed by both the principal debtor and surety. The last of these payments was made on 8th August, 1899. The surety then died, and after that the principal debtor paid interest on 23rd July, 1902. The suit was instituted on 12th January, 1903. Unless the payment made by the debtor on 23rd July, 1902, saves the claim from limitation against the surety also the claim would be barred against defendants 2 and 3. The question, therefore, for consideration is whether payment of interest by the principal debtor within limitation gives a new starting point against the surety also under section 20 of the Limitation Act. The previous payments made under the signatures of the debtor and the surety do not afford any proof that the debtor had authority from the surety to pay interest to the creditor. Nor does the death of the surety before the last payment was made alter the position. The surety was dead, but his estate continued to be liable. The authority of the debtor to pay interest was not affected by the surety's death. The former payments of interest by both the debtor and the surety and the death of the surety before the last payment was made by the debtor should, therefore, I think, be excluded from consideration in determining the question under consideration.

After the debt became payable under the terms of the bond the debtor and the surety became joint promisors, that is, joint contractors, within the meaning of section 21 of the Limitation Act. Under sections 20 and 21 one of joint contractors is not chargeable by reason only of a payment made by or by the agent of any other of them. But where from the nature of the business or relations between the joint contractors or otherwise the debtor paying the interest was to have the power to make the payment so as to be binding on the other contractors, a new period of limitation begins to run against these contractors also. This is so when a payment is made by the manager of a joint Hindu family or by a partner in a going concern (I. L. R.

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17 Cal. 951; I. L. R. 10 All. 418). The authority of a manager or of a partner in a firm to make a payment binding on the other coparceners or partners is presumed from the relations existing between them. Similarly, such authority in the principal debtor ought, I think, to be presumed from the relation existing between him and the surety. Both are indeed jointly liable to the creditor as all the coparceners and the partners are in the cases supposed. But as between themselves the debtor is liable to pay the debt, and if the surety is required to pay it, he can recover it from the principal debtor. Such being the relation, it ought, I think, to be presumed that, in the absence of any prohibition by the surety or debtor his authority to pay the interest binding upon the surety as well as himself for the purpose of section 20 of the Limitation Act, a creditor is entitled to look upon the payment made by the debtor as made by him on his own account and as agent of the surety. Under the English law, payment of interest by the debtor keeps the debt alive against the surety also: *Allison* v. *Frisby* (43 Ch. D. 106). There is nothing in the relation between a debtor and a surety as stated in the Indian Contract Act to show that the same principle should not be applicable here also. The question is not, however, free from doubt, and as it is of frequent occurrence and there does not appear to be any authoritative ruling upon it by the Indian Courts, I think it proper to refer it for the consideration of the Honourable the High Court. *Cockrill* v. *Sparkes* (1 H. & C. 699) seems not to be quite consistent with the English case quoted above. The question for consideration then is:—

In the absence of any prohibition by the surety against the payment of interest by the debtor on his account, does payment of interest by the debtor within limitation give a fresh starting point for limitation against the surety also under section 20 of Act XV of 1877?

My opinion on the point is in the affirmative.

Ratanlal Ranchhoddas (*amicus curiæ*), for the plaintiff, cited *In re Powers. Lindsell* v. *Phillips*,[1] and *In re Frisby. Allison* v. *Frisby*[2].

(1) (1885) 30 Ch. D. 291. (2) (1889) 43 Ch. D. 106.

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N. K. Metha (amicus curiæ), for the defendants, cited *Cockrill* v. *Sparkes*[1] and *Henton* v. *Paddison*[2].

JENKINS, C. J.:—Under section 617 of the Code of Civil Procedure the following point has been referred for our decision:—"In the absence of any prohibition by the surety against the payment of interest by the debtor on his account, does payment of interest by the debtor within limitation give a fresh starting point for limitation against the surety also under section 20 of Act XV of 1877?" It is by that section provided that when interest on a debt is before the expiration of the prescribed period paid as such by the person liable to pay the debt or by his agent duly authorized in this behalf, a new period of limitation according to the nature of the original liability shall be computed from the time when the payment was made.

We have therefore to see what was the debt on which interest was paid. It arises under the bond, dated the 22nd of October, 1891, whereby one Gopal Sonu Bait, stating that for his own necessity he had borrowed 20 rupees, stipulated that after five months from the day of the bond he would pay up the amount by eight instalments, paying 3 rupees a month, and that in default of payment of an instalment interest at 25 per cent. should be paid. By the same document Gopal Sajanojirao Jedde stood security for the due performance of the obligation, and agreed that if the principal failed to pay, he himself would pay up the amount without pleading excuse. Gopal Sajanojirao's liability therefore was that of a surety as defined by section 126 of the Contract Act. There are thus under this document two liabilities in two different persons, Gopal Sonu's liability as the principal, Gopal Sajanojirao's as the surety. How then can the payment of interest by Gopal Sonu, the principal debtor, create a new period of limitation for the surety's debt? Let us apply the words of section 20 to the case: the principal is not *the person liable to pay the debt* of the surety; so that even if the payment of interest could be regarded as a payment of interest on the debt of the surety, still it was not made by a person liable to pay the surety's debt. Can it then be said that there was a payment of

(1) (1863) 1 H. & C. 699. (2) (1893) 68 L. T. 405.

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interest on the surety's debt by an agent duly authorized in this behalf? Apart from the difficulty of treating the interest as due on the surety's debt, we think this must be answered in the negative: the question propounded in the reference excludes an express authority, and (in our opinion) the relation of principal and surety does not give rise to any implied authority (see *Cockrill* v. *Sparkes*[1] and *Henton* v. *Paddison*[2]).

The actual decisions in *Lindsell* v. *Phillips*[3] and *Allison* v. *Frisby*[4] do not (we think) involve any principle inconsistent with the conclusion at which we have arrived; they turned on a statute and considerations which have no place here, and, in the circumstances, did not invite the discussion necessary to the determination of the present case.

Those cases, however, are useful as a recognition of the view that the liabilities of a principal and his surety under circumstances like the present (whatever may be the case when they contract a joint and several debt) are distinct.

It is no doubt provided by section 128 of the Contract Act that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract, but that section must be read together with the Limitation Act, and not so as to nullify its provisions, limiting the time within which a suit must be brought after the accrual of a cause of action (see *Hajarimal* v. *Krishnarav*[5]).

The reference, therefore, must (in our opinion) be answered in the negative.

(1) (1863) 1 H. & C. 699.
(2) (1893) 68 L. T. 405.
(3) (1885) 30 Ch. D. 291.
(4) (1889) 43 Ch. D. 106.
(5) (1881) 5 Bom. 647.