Aziz Ahmad vs Sher Ali And Ors. on 26 August, 1955

Equivalent citations: AIR1956ALL8, AIR 1956 ALLAHABAD 8, ILR (1956) 1 ALL 173

JUDGMENT

Mootham, C.J.

1. The question which has been referred to this Bench is "Whether a surety is discharged when the creditor allows the execution of his decree against the principal debtor to be barred by limitation."

2. This Court has consistently taken the view that a surety is discharged when a creditor allows his remedy against the principal debtor to become baried under the law of limitation, but a different view has been taken by the other High Courts in India and by the former Chief Court of Oudh (see -- 'Hajarimal v. Krishnarav', 5 Bom 647 (A); --'Bireshwar Chatterji v. Saidpur Commercial Bank Ltd., 41 Cal WN 1361 (B); -- 'Subramania Aiyar v. Gopala Aiyar', 33 Mad 308 (C); -- 'Nur Din v. Allah Ditta', AIR 1932 Lah 419 (D); -- 'Jagdambika Pratap Narain Singh v. Tir Singh Bahadur Singh' 1941 Oudh WN 473 (E)) and in -- 'Mahant Singh v. U Ba Yi', AIR 1939 P. C. 110 (F) the Privy Council expressed its preference for the reasoning of the majority.

3. In England a failure to sue the principal debtor until recovery is barred by the Statute of Limitation does not operate as a discharge of the surety. In -- 'Carter v. White', (1885) 25 Ch D 666 (G) Lindlay, L. J., said, "Is it the law that a creditor who neglects to v sue his debtor till the Statute has run will thereby discharge his surety? There is no decision to that effect. On the contrary, the true principle is that mere omission to sue does not discharge the surety, because the surety can himself set the law in operation against the debtor."

We think that this also is the law in India.

4. The imporant sections of the Indian Contract Act are Sections 134 and 137. They read as follows:

> "134. 'Discharge of surety by release or discharge of principal debtor'. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any aet or omission of the creditor, the legal consequence of which is the discharge of | the principal debtor."
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> "137. 'Creditor's forbearance to sue does not discharge surety' -- 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 provision in the guarantee to the

contrary, discharge the surety."

5. The leading case of this Court is --

'Radha v. 'Kinlock', 11 All 310 (H). In this case it was held by Edge, C. J., and Tyrell, J., that under Section 134, Contract Act the omission by the creditor to sue the principal debtor within the period allowed by the law of limitation produced the legal consequence of the discharge of the principal debtor, and that Section 137 applied only to a forbearance during the time a creditor can be said to be forbearing to exercise a right which still is in existence. That view was reaffirmed or followed in -- 'Ranjit Singh v. Nanhat', 24 All 504 (I) and -- 'Salig Ram v.

Lachman Das', AIR 1928 All 46 (J).

6. With great respect to the learned Judges who decided these cases, we are of opinion that the Court erred in the meaning it has given to both Sections 134 & 137 of the Act. We think it now to be well established that the effect of the expiry of the period of limitation (except in the case of suits to establish a right to immoveable property) is to bar the remedy without extinguishing the right, and in our opinion the consequence is that the omission to sue a debtor within the period of limitation will not result in the debtor's discharge.

Section 25(3) of the Act makes it clear that a barred debt is a good foundation for a written promise to pay signed by the persons to be charged therewith, or by his agent; and Section 60 speaks or a barred debt as a lawful debt actually due and payable to the creditor. As pointed out in 33 Mad 308 at p. 311 (C) unless a law of limitation operates as well as a law of extinctive prescription, omission to sue cannot discharge the debtor.

7. Nor do we think the Court was justified in placing a restriction upon the provisions of Section 137. The phrase "mere forbearance" does not in our opinion mean forbearance for a limited time, namely that within which legal proceedings may be taken, but a forbearance not resting upon or in consequence oi such a promise to give time to, or not to sue the principal debtor, as is the subject of Section 135: 5 Bom 647 at p. 651 (A).

That section, as pointed out by the Privy Council in 'Mahant Singh's case (F)', is merey declaratory of the law and was enacted only to allay any doubts as to whether the same principles were applicable in India as in England.

8. Learned counsel for the respondent, in his careful argument, contended that the surety will be prejudiced if he is liable to be sued after the creditor's remedy against the principal debtor has become barred, as he will not then himself have any remedy against the latter; and he has referred to Sections 140 and 145.

It is true of course that in such event the surety will be deprived of certain rights, but the surety can guard himself against such a contingency for Section 140 in terms provides that as soon as the guaranteed debt becomes due the surety will, upon payment or performance of all that he is liable

for, be invested with all the rights which the creditor had against the principal debtor. Section 140 states the circumstances in which the surety may acquire the rights of the creditor against the principal debtor.

Section 145 deals with quite a different matter, namely the implied promise by the principal debtor to indemnify the surety; and it provides that the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee. Here again the surety can undoubtedly exercise his rights against the principal debtor as soon as the guaranteed debt becomes due by paying the debt himself; and as at present advised (the point not having been fully argued before us) we are not prepared to assent to the proposition that the payment by the surety of a debt which has become barred by time is not a sum rightfully paid.

9. Finally reference was made by learned counsel to Section 139 which provides that if the creditor does any act which is inconsistent with the right of the surety, or omits to do so 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. In our opinion a creditor has no duty to the surety (in the absence of an express provision in the guarantee) to pursue a legal remedy against the principal debtor, and his failure to take action will not in such circumstances discharge the surety.

10. Both on principle and authority we are of opinion that the question propounded must be answered in the negative and we answer it accordingly.