We, therefore, restore the decree of the Munsif, with this variation, that we only grant an injunction restraining the defendants from realizing *poolbundi* and *dak* charges from the plaintiffs in respect of the *putni*.

The plaintiffs must receive from the defendants their costs in all Courts.

MOOKERJEE J. I agree.

S. M. *Appeal allowed in part.*

LETTERS PATENT APPEAL.

Before Jenkins C.J., and Mookerjee J.

DEBNARAYAN DUTT

v.

CHUNILAL GHOSE.*

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June 16.

Debtor and Creditor—Acknowledgment of debtor's liability by another and acceptance of same by creditor—Rights of creditor—Novation—"Consideration"—Administration of justice in Courts in India on general principles of equity and justice—Contract Act (IX of 1872), ss. 2(d) and 62.

Where the transferee of a debtor's liability has acknowledged his obligation to the creditor for the debt to be paid by him, under the provisions of the registered instrument conveying to him all the moveable and immoveable properties of the original debtor, and the acknowledgment was communicated to the creditor and accepted by him.

Held, first, that the arrangement between the creditor and the transferee did not amount to a *novation* within the meaning of s. 62 of the Contract Act; *secondly*, that the obligation undertaken by the transferee was for, and intended to be for, the benefit of the creditor; and, *lastly*, that the creditor is entitled to sue the transferee on the registered instrument.

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*Letters Patent Appeal, No. 68 of 1911, in Appeal from Appellate Decree, No. 1778 of 1909.

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Tweddle v. *Atkinson* (1) is inapplicable in British Courts in India.

Khwaja Muhammad Khan v. *Husaini Begam* (2), *Gregory and Parker* v. *Williams* (3), *Touche* v. *Metropolitan Railway Warehousing Company* (4) and *Gandy* v. *Gandy* (5) referred to.

The definition of "consideration" in the Indian Contract Act is wider than the requirement of the English law.

The aim of the mofussil Courts of justice in British India is to do complete justice in one suit according to the general principles of justice, equity and good conscience.

Rambux Chittangee v. *Modoosoodhun Paul Chowdhry* (6) referred to.

LETTERS PATENT APPEAL by Debnarayan Dutt, the plaintiff, from the judgment of Coxe J.

Defendants Nos. 1 to 4 in this case executed a simple bond in favour of the plaintiff in July 1899. They appear to have deposited with him a *pattah* which seems to have been a title deed covering some of the properties. In August, 1903, these defendants conveyed all their properties, moveable and immoveable, to defendant No. 5 in the *benami* of defendant No. 6, and it was then arranged between all the defendants and the plaintiff that defendant No. 5 should pay off the plaintiff out of the purchase-money and that the plaintiff should accept defendant No. 5 as his debtor in the place of the first four defendants. The conveyance was a registered one.

Defendant No. 5 did not pay off the debt, and the plaintiff brought this suit against all the defendants. He recited in the plaint the circumstances under which he was entitled to hold defendant No. 5 responsible. The plaintiff further alleged a payment of interest by the first four defendants in April 1903, which he said saved his claim from being barred by limitation.

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(1) (1861) 1 B. & S. 393 ; 121 E. R. 762.
(2) (1910) I. L. R. 32 All. 410 ; L. R. 37 I. A. 152.
(3) (1817) 3 Mer. 582 ; 36 E. R. 224.
(4) (1871) L. R. 6 Ch. App. 671.
(5) (1885) 30 Ch. D. 57.
(6) (1867) B. L. R. Sup. Vol. 675 ; 7 W. R. 377.

The principal contending defendant was defendant No. 5. He denied his agreement with and liability to the plaintiff and contended, *inter alia*, that the suit was barred by limitation, that no interest on account of the bond was paid in April, 1903, as alleged by the plaintiff, and that he was not liable for the debt as, by the fraudulent conduct of the first four defendants, he was unable to obtain possession of the lands.

Defendants Nos. 1 to 4 denied their liability on the ground that plaintiff had accepted the liability of defendant No. 5 and absolved them from obligation under the bond.

The suit was dismissed with costs by both the lower Courts on the ground of limitation. It was held by these Courts that defendants Nos. 1 to 4 had no longer any liability to the plaintiff after the arrangement of 1903, and, as regards defendant No. 5, that he was liable only under an oral contract, and that consequently the suit was barred by limitation.

On appeal to the High Court, Coxe J., sitting singly, agreed with the Courts below and dismissed the appeal with costs.

Thereupon the plaintiff preferred this appeal under s. 15 of the Letters Patent.

Babu Mahendra Nath Roy (with him *Babu Manmatha Nath Roy*), for the appellant. The right of action against defendant No. 5 was based on the stipulation in the registered *kabala* for plaintiff's benefit. Article 116 of the Indian Limitation Act therefore applies. The Privy Council in *Khwaja Muhammad Khan* v. *Husaini Begam*(1) breaks through the common-law doctrine in *Tweddle* v. *Atkinson*(2). The Judicature Act having abolished common-law forms of

(1) (1910) I. L. R. 32 All. 410; L. R. 37 I. A. 152.

(2) (1861) 1 B. & S. 393; 121 E. R. 762.

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action, it is time for the Courts to steer clear through a principle based on those forms,—at any rate in this country. The case of *Gregory and Parker* v. *Williams*(1), quoted at p. 224 of Pollock's Principles of Contract, 8th Edition, is in my favour. Besides, the case of trusts or assignments for the discharge of debts is an exception to the doctrine in *Tweddle* v. *Atkinson* (2). A question like the present one arose in *Jahandar Baksh Mallik* v. *Ram Lal Hazrah*(3). See also Indian Contract Act, section 2 (*d*). Defendant No. 5 became a party to the present transaction by acceptance of the conveyance. Plaintiff, in accordance therewith, accepts defendant No. 5 as his debtor. A consideration may thus be said to proceed from plaintiff, and he, in a sense becomes a party to the conveyance.

Again, defendant No. 5 is a trustee for plaintiff; therefore, under section 10 of the Indian Limitation Act, no limitation runs in the present case: *Anund Moye Dabi* v. *Grish Chunder Myti*(4), *The Secretary of State for India* v. *Guru Proshad Dhur*(5) and *Thackersey Dewraj* v. *Hurbhum Nursey*(6). The last case shows that trust property includes trust money.

Even if it be a case of enforcing an oral contract—which I submit it is not—the Articles properly applicable are 113 or 83, but not 62.

I also rely upon the previous deposition of defendant No. 5 in a rent suit as an acknowledgment under section 19 of the Indian Limitation Act: *Venkata* v. *Parthasaradhi*(7) and *Periavenkan Udaya Tevar* v. *Subramanian Chetti*(8). On the question whether

(1) (1817) 3 Mer. 582; 36 E. R. 224.
(2) (1861) 1 B. & S. 393; 121 E. R. 762.
(3) (1910) I. L. R. 37 Calc. 449, 455.
(4) (1851) I. L. R. 7 Calc. 772.
(5) (1892) I. L. R. 20 Cal. 51.
(6) (1884) I. L. R. 8 Bom. 432, 468
(7) (1892) I. L. R. 16 Mad. 220.
(8) (1896) I. L. R. 20 Mad. 239.

section 19 requires an acknowledgment of a subsisting liability, I submit that it is not required under Act XV of 1877 or Act IX of 1908, as the words "liability as subsisting" in the Act of 1871 do not occur in the Acts of 1877 or 1908.

Finally, I submit that, at any rate, I am entitled to a decree against defendants Nos. 1 to 4. There has been no novation. There is no finding of the lower Appellate Court on this point.

Babu Harendranarayan Mitra (with him *Maulvi Nuruddin Ahmed*), for the respondent, defendant No. 5. The plaintiff can rely only upon the oral contract, after the conveyance. The rule of six years' limitation does not therefore apply. As a matter of fact, the plaintiff has based his action upon an oral contract. That being so, if Article 115 does not apply, Article 62 would. I rely upon *Gurudas Pyne* v. *Ram Narain Sahu*(1) and *Hanuman Kamat* v. *Hanuman Mandur*(2). Although there was no actual receipt of money, there was a receipt by fiction of law.

[JENKINS C.J. That would be a double fiction—money received and money received to plaintiff's uses. There must be a receipt.]

[MOOKERJEE J. In the cases cited by you, there were actual receipts.]

In any case, I rely on Article 115.

[JENKINS C.J. It does not appear to us that there was a novation. Defendant No. 5 certainly took an obligation for the debt. It was an obligation by way of trust. So the plaintiff can bring a suit not on the acceptance of the position, but on the registered contract. He is under the circumstances a *cestui que trust*.]

(1) (1884) I. L. R. 10 Calc. 860. (2) (1891) I. L. R. 19 Calc. 123.

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That would hardly be a trust : *Girish Chunder Maiti* v. *Anundmoyi Debi*(1) and the same case in the High Court(2).

[JENKINS C.J. See *Rambux Chittangeo* v. *Modoosoodhun Paul Chowdhry*(3). In such a case equity would afford relief.]

The reason why *Tweddle* v. *Atkinson*(4) was distinguished in *Khwaja Mahammad Khan* v. *Husaini Begam*(5) was that there was a "charge" in that case. That case cannot therefore help my friend. See Halsbury's 'Laws of England,' Vol. VII, pp. 342 to 344. There must be an agreement to pay "out of" certain property. The covenant is for the benefit of defendants Nos. 1 to 4 in this case. See *Kathiawar Trading Company* v. *Virchand Dipchand*(6) There must be a vesting. See *The Secretary of State for India in Council* v. *Guru Proshad Dhur*(7).

Babu Manmathanath Roy, in reply to a question from the Chief Justice, submitted that he preferred a decree against defendant No. 5.

JENKINS C.J. This is an appeal under clause 15 of the Letters Patent from a judgment of Mr. Justice Coxe, who has confirmed the decree of the lower Appellate Court, which in its turn confirmed that of the Court of first instance dismissing the suit with costs.

The facts are briefly these. On the 22nd of July, 1899, defendants Nos. 1 to 4 borrowed from the plaintiff a sum of Rs. 300, and, by way of security for this, they gave a personal covenant by a registered bond,

(1) (1887) I.L.R. 15 Calc. 66; L.R. 14 I.A. 137.
(2) (1881) I.L.R. 7 Calc. 772.
(3) (1867) B.L.R. Sup. Vol. 675; 7 W.R. 377.
(4) (1861) 1 B. & S. 393; 121 E.R. 762.
(5) (1910) I.L.R. 32 All. 410; L.R. 37 I.A. 152.
(6) (1893) I.L.R. 18 Bom. 119.
(7) (1892) I.L.R. 20 Calc. 51.

and also purported, though ineffectually, to create a charge, by deposit of a *pattah* relating to immoveable property. Interest was paid on this bond up to the 13th of April 1903; and, on the 18th August, 1903, defendants Nos. 1 to 4 executed a registered instrument of transfer of all their property, moveable and immoveable, to defendant No. 5 for a sum of Rs. 2,000, becoming thereby, as the plaint describes it, "rightless." This Rs. 2,000 was not all paid in cash, but there was a provision and declaration in the *kabala* that out of this consideration money of Rs. 2,000 amongst other things, the sum of Rs. 330 due to the plaintiff should be paid by defendant No. 5. On the very same day there was an arrangement between the plaintiff and defendant No. 5 by which the liability of defendant No. 5 under the transfer was acknowledged and accepted, and either then or in connection therewith this *pattah* was handed over to defendant No. 5. The plaintiff, having sought in vain payment of this money, which in common honesty is due from defendant No. 5, has now been compelled to bring this suit, whereby he prays against defendants Nos. 1 to 4 and defendant No. 5, but principally against defendant No. 5, a decree for payment of Rs. 613-14 annas, which represents this principal sum of Rs. 300 and the interest that accrued on it. As I have already indicated, he has failed in all Courts, and the only question now is whether he is to fail before us.

We are clearly of opinion that there was no *novation* within the meaning of section 62 of the Contract Act—no substitution of a new contract for an old contract—and the question to be decided is whether or not the plaintiff is entitled to sue on that registered instrument of the 18th of August, 1903, whereby defendant No. 5 undertook to pay the plaintiff what

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was due to him from defendants Nos. 1 to 4. Looking at it broadly, there can be no doubt that an obligation was undertaken by defendant No. 5 and that it was for, and intended to be for, the benefit of the plaintiff. There are expressions in the judgments of the Courts which are suggestive of an oral contract between the plaintiff and defendant No. 5, but that, I think, was a misconception of the position. Indeed, the findings of the lower Appellate Court do not justify the view that there was a contract, but there was, as I have already indicated, an acknowledgment on the part of defendant No. 5 communicated to the plaintiff, and accepted by him of an obligation on the part of defendant No. 5 towards the plaintiff, for the debt which was to be paid by defendant No. 5 under the provisions of the registered instrument of the 18th of August, 1903. It is material in this connection to observe, *first*, that defendants Nos. 1 to 4 parted with the whole of their property, moveable and immoveable, to defendant No. 5; *secondly*, that on the same date there was this arrangement between the plaintiff and defendant No. 5 which clearly points to a communication to the plaintiff of the transaction; and, *finally*, that as a result of this the *pattah* which was regarded by the parties at that time, erroneously perhaps, as constituting a charge on the property, was handed back by the plaintiff to defendant No. 5. It appears to me that one may fairly say that this sum of Rs. 330 mentioned in the registered instrument of August was allocated and held by defendant No. 5 for the benefit of the plaintiff, so that in a sense the money was reified and earmarked for this purpose. We have here then a position in which it would be, in accordance with the principles of justice, equity and good conscience, the abiding rule in these Courts, that the plaintiff should be entitled to enforce

this claim against defendant No. 5. If we were governed by *Tweddle* v. *Atkinson*(1) there might possibly be a difficulty in our way, but it has to be borne in mind that *Tweddle* v. *Atkinson*(1) was a decision on a form of action peculiar to the Common Law Courts in England and that the case was influenced by the rule that no action in *assumpsit* could be maintained upon a promise unless *consideration* moved from the party to whom it was made. Here we have a definition of *consideration* which is wider than the requirement of the English law: [Section 2 (*d*) of the Contract Act]. And it has been laid down by Sir Barnes Peacock in a Full Bench decision of this Court in relation to Courts in the mofussil [*Rambux Chittangeo's Case*(2)] that in those Courts the rights of parties are to be determined according to the general principles of equity and justice without any distinction, as in England, between that partial justice which is administered in the Courts of Law and the more full and complete justice for which it is frequently necessary to seek the assistance of a Court of Equity. The rules and the fictions which have been in many cases adopted by the Common Law Courts in England for the purpose of obtaining jurisdiction in cases which would otherwise have been cognizable only by the Courts of Equity, are not necessary to be followed in this country where the aim is to do complete justice in one suit. More than that we now have ample authority for saying that the administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle* v. *Atkinson*(1). That I take to be the result of the decision of the Privy Council in the recent case *Khwaja Muhammad*

(1) (1861) 1 B. & S. 393; 121 E. R. 762; 124 R. R. 610.

(2) (1867) B. L. R. Sup. Vol. 675: 7 W. R. 377.

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Khan v. *Husaini Begam*(1). In the report of that case, in 14 Calcutta Weekly Notes(2), there is an interlocutory remark of Lord Macnaghten which indicates the limits imposed on a Court of Common Law. He there says, "Supposing she (that is the plaintiff) were an English woman, it is true she could not bring an action in the King's Bench Division, but could she not bring a suit in Equity?" The answer of the learned counsel was "yes." It is possible that this distinction can be explained by the history of the action of *assumpsit* which was a development of the writ of trespass. In the old writ in *indebitatus assumpsit* it was alleged that the defendant "not regarding his said promise and undertaking but contriving and fraudulently intending craftily and subtilly to deceive and defraud," had not paid and so forth. The breach of contract was charged as deceit and it was only the person deceived who could sue. The bar then in the way of an action by the person not a direct party to the contract, was probably one of procedure and not of substance. In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience. The case with which we are now dealing finds a close parallel in *Gregory & Parkar* v. *Williams*(3) and also in the more recent cases of *Touche* v. *Metropolitan Railway Warehousing Company*(4), and *Gandy* v. *Gandy*(5). There is a valuable exposition of the law by Lord Hatherley in the first of these last two cases which was adopted by Lord Justice Cotton in the second. The Lord Chancellor said, "The case comes within the authority that where a sum is payable by A. B. for

(1) (1910) I.L.R. 32 All. 410; L.R. 37 I. A. 152.
(2) (1910) 14 C.W.N. 868.
(3) (1817) 3 Mer. 582; 36 E.R. 224.
(4) (1871) L.R. 6 Ch. App. 671, 677.
(5) (1885) 30 Ch. D. 57.

the benefit of C.D., C.D. can claim under the contract as if it had been made with himself." That appears to me to be a principle which is of distinct use in the consideration of this case. It appears to me that we have therefore, in the circumstances of this case, a condition of affairs in which it would be right to hold that the plaintiff is entitled to enforce his claim in this suit. The claim is one under the registered instrument of the 18th of August 1903: and it is unnecessary to consider whether the plaintiff is entitled to rely on the deposition as an acknowledgment for the purpose of taking this case out of the operation of the statute of Limitation, for admittedly, if this is a suit on the registered instrument of transfer, it is within time.

We, therefore, reverse the judgment of Mr. Justice Coxe, as also the decrees of the lower Appellate Court and of the Munsif so far as relates to defendant No. 5 and pass a decree in the plaintiff's favour for the sum of Rs. 613-14 annas with costs throughout. This decree will be against defendant No. 5 alone. As against defendants Nos. 1 to 4, the decree of dismissal will stand but without costs in this Court. Having regard to the disingenuousness of the defence made by defendant No. 5, interest should run at six per cent. per annum on the principal sum adjudged from the date of the suit to the date of the decree, and thenceforth on the decretal amount until payment.

MOOKERJEE, J. concurred.

S. M. *Appeal allowed.*