APPELLATE CIVIL.

Before Derbyshire C. J. and D. N. Mitter J.

1937

Jan. 13, 14.

MAIZ UDDIN MIYA

v.

NALINI BALA DEBEE*.

Mahomedan Law—Minor, Guardian of—Limitation—Acknowledgment of payment, when must be made—Admission, Rebuttal of presumption arising out of—Indian Limitation Act (IX of 1908), s. 20.

A brother is not a legal guardian under the Mahomedan law and cannot bind a minor by the execution of a promissory note, although it may be in respect of a debt which their father had contracted.

Imambandi v. *Mutsaddi* (1) followed.

What a party himself admits to be true must be presumed to be so and to rebut such presumption such party must give evidence to show that the admission is not true in fact or was made under such circumstances as not to make it binding on him.

Chandra Kunwar v. *Chaudhri Narpat Singh* (2) relied on.

Under s. 20 of the Indian Limitation Act, acknowledgment of payment in respect of a debt need not be made either when the payment is made or before the expiry of the period of limitation.

Venkatasubbu v. *Appusundram* (3); *Vishwanath Raghunath Kale* v. *Mahadeo Rajaram Saraf* (4) and *Lal Singh* v. *Gulab Rai* (5) approved of.

APPEAL by the defendants.

Relevant facts of the case appear from the judgment.

Arguments advanced by advocates have been fully considered by the Court and also appear from the judgment.

Atul Chandra Gupta, Manmatha Nath Das Gupta and *Abul Hossain* for the appellants.

Gunada Charan Sen, Kali Kinkar Chakrabarti and *Bhupendra Kishore Basu* for the respondent.

*Appeal from Original Decree No. 101 of 1935 (with cross objection) against the decree of Abinash Chandra Ghosh Hazra, Subordinate Judge of Dacca, dated Feb. 27, 1935.

(1) (1918) I.L.R. 45 Cal. 878; L.R. 45 I.A. 73.
(2) (1906) I.L.R. 29 All. 184; L.R. 34 I.A. 27.
(3) (1893) I.L.R. 17 Mad. 92.
(4) (1933) I.L.R. 57 Bom. 453.
(5) (1932) I.L.R. 55 All. 280.

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D. N. MITTER J. This is an appeal by the defendants from a decision of the Subordinate Judge of Dacca, dated February 27, 1935, by which he decreed the suit of the plaintiff respondent for recovery of money. The decree was not for the full amount claimed but for an amount less by Rs. 2,045 than what was claimed in the plaint.

In order to understand the points in controversy in the present appeal, the following relevant facts need be briefly stated. It appears that one Main Uddin Haji borrowed a certain amount of money from the plaintiff. He died on September 14, 1926. He died leaving behind him surviving eight heirs according to the Mahomedan law. The heirs were his three sons, who are defendants Nos. 1, 2 and 3 in the suit, his two adult daughters, who are defendants Nos. 4 and 5, his two minor daughters, who are defendants Nos. 6 and 7, and his widow, who is defendant No. 8 in the suit. Within seven days of the death of the Haji, on September 21, 1926, his adult heirs are said to have executed the handnote, on which the present suit is based, and the minors joined in the execution of the same through their brother. The present suit was instituted for recovery of the sum due on this handnote with interest on December 21, 1933.

The defences to the suit, so far as they have been stated to us, were, first, that the promissory note was a result of misrepresentation that a sum of about Rs. 7,500 was due from the Haji, whereas as a matter of fact the Haji did not borrow that sum. On this point, the finding of the Court below is that there was no misrepresentation and the money was due. The second defence taken was the defence of limitation and the third defence which concerns the two minor defendants Nos. 6 and 7 was that the handnote was not binding on them seeing that it was executed by their brother who was not a guardian under the Mahomedan law, as governing the Sunni Mahomedans. A question was also raised by way of defence

that the payment of Rs. 100 on *Bhâdra* 12, 1336, B. S., corresponding to August 28, 1929, was never made. This question is one of fact with reference to the plea of limitation and was raised also in argument before us.

The Subordinate Judge found against the defendants on all these points raised by way of defence and he has granted a decree to the plaintiff in part for the sum claimed less by a sum of Rs. 2,045. He has directed that the defendants Nos. 1 to 3 should be personally responsible for the said amount and the estate of Main Uddin in the hands of the other defendants would be liable for the amount decreed and that the decretal amount would carry interest at six per cent. per annum from date until realization.

It is against this decree that the present appeal has been brought and the points which have been taken by Mr. Gupta, who appears for the appellants, may be formulated as follows: first, that the Subordinate Judge was not right in coming to the conclusion that there was no misrepresentation at the time of the execution of the handnote by the heirs of the Haji and that he ought to have come to a different conclusion on the evidence which goes to show that the accounts were never looked into and that the accounts, which were somewhat difficult, were not taken into account at the time of the execution of the handnote. The second point which was raised is that the suit is barred by the statute of limitation seeing that the payment of Rs. 100 on August 28, 1929, was not made and if no such payment was made the suit would be barred by the provisions of the Limitation Act. It was argued, in the alternative, that even if such payment was made the payment was not one which could be taken into account having regard to the amended provisions of the Limitation Act to which detailed reference will hereafter be made. It was next contended that in any event, the decree against the minor sisters defendants Nos. 6

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and 7 could not possibly be maintained seeing that the handnote was executed by their brother who was unauthorised under the Mahomedan law to act as their guardian. These substantially were the three points which were raised before us.

It would be convenient to take the last point first, namely, that which deals with the liability of defendants Nos. 6 and 7, for we are of opinion, for reasons which we will presently give, that the Subordinate Judge has gone wrong in this part of the case in saddling the liability for the handnote on the said defendants. It is clear that a brother is not a legal guardian under the Mahomedan law. We have been referred to the very useful statement of the law in Sir Dinshaw Mulla's Principles of Mahomedan Law, 10th Ed., p. 226. In Art. 262 the learned author states the legal guardians of the property of a minor :—

> The following persons are entitled in the order mentioned below to be guardians of the property of a minor :—
>
> (1) the father,
>
> (2) the executor appointed by the father's will,
>
> (3) the father's father,
>
> (4) the executor appointed by the will of the father's father.

These are the four guardians who are legal guardians under the Mahomedan law. No other relation is entitled to the guardianship of the property of a minor as of right—not even the mother, brother, or uncle. In the present case, it was a brother of the minor sisters who was acting with reference to the handnote in question. He could not impose by any act of his any obligation on his sisters. The question as to the position of an unauthorised guardian who may be a *de facto* guardian was the subject of consideration by their Lordships of the Judicial Committee of the Privy Council in the case of *Imambandi* v. *Mutsaddi* (1). Mr. Ameer Ali who delivered the judgment of the Judicial Committee

(1) (1918) I. L. R. 45 Cal. 878 (892) ; L. R. 45 I.A. 73 (83).

made the following observations in that case which are pertinent to the present controversy. He said :—

It is perfectly clear that under Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian ; the father alone or if he be dead, his executor (under the Sunni law), is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. The term *de facto* guardian that has been applied to these persons is misleading ; it connotes the idea that people in charge of a child are by virtue of that fact invested with certain powers over the infant's property. This idea is quite erroneous ; and the judgment of the Board in *Mata Din* v. *Ahmad Ali* (1) clearly indicated it.

Then, in the judgment of the Judicial Committee, Mr. Ameer Ali quotes from a previous decision of the Board, in which Lord Robson, in delivering the judgment of the Board, observed as follows :—

It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a *de facto* guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal powers to sell it.

And he went on to add :—

There has been much argument in this case in the Courts below and before their Lordships, as to whether, according to Mahomedan law, a sale by a *de facto* guardian, if made of necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case.

This case is sufficient authority for the proposition that the brother could not impose any obligation on the sisters, *i.e.*, defendants Nos. 6 and 7, and could not bind them by the execution of the handnote, although it may be in respect of a debt which their father owed to the plaintiff. It is said on behalf of the respondent that a suit was imminent and that the brother who was a *de facto* guardian was really acting for the benefit of the minor sisters. We are not impressed by this argument and no case in support hereof has been shown. All that appears is that the brother

(1) (1912) I. L. R. 34 All. 213 ; L. R. 39 I. A. 49.

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undertook the liability on behalf of his sisters when there was no such emergent circumstances which would justify him in executing the handnote on their behalf seven days after their father's death. We are, therefore, of opinion that these minors should not be saddled with liability on the basis of this handnote and that the suit so far as the minors are concerned must be dismissed as against them.

It remains to consider the question of limitation so far as the other defendants are concerned. The question really turns on an interpretation of s. 20 of the Indian Limitation Act, as also on the determination of the question of fact as to whether the payment of Rs. 100 on August 28, 1929, which is relied on for the purpose of saving limitation, was really made. We have got the endorsement on the handnote signed by all the other defendants to the effect that the sum of Rs. 100 was paid on Bhadra 12, 1336, B. S., corresponding to August 28, 1929. It is an admission made by all the other defendants except defendants Nos. 6 and 7 whose case has already been dealt with. The admission is to the effect that this payment was made on that particular date. This admission must be presumed to be true, for it has been said that what a man admits to be true must reasonably be presumed to be so. This admission shifts the burden on the defendants of showing that this admission was untrue in fact or was made under circumstances which did not make the admission binding on them. That that is the true legal position has been laid down by their Lordships of the Judicial Committee of the Privy Council in the case which was cited to us, namely, the case of *Chandra Kunwar* v. *Chaudhri Narpat Singh* (1), where Lord Atkinson in delivering the judgment of the Judicial Committee quoted a passage from a judgment of Parke B. in *Slatterie* v. *Pooley* (2) to the following effect:—What a party himself admits to be true

(1) (1906) I. L. R. 29 All. 184 (195); L. R. 34 I. A. 27 (35).
(2) (1840) 6 M. & W. 664 (669); 151 E. R. 579 (581).

may reasonably be presumed to be so. Lord Atkinson went on to say—

> No doubt, in a case such as this, where the defendant is not a party to the deeds and there is therefore no estoppel, the party making the admission may give evidence to rebut this presumption, but unless and until that is satisfactorily done, the fact admitted must be taken to be established. The law upon the point is clear. In *Heane* v. *Rogers* (1) Bayley J., in delivering the judgment of the Court, lays it down that—
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> "There is no doubt but that the express admissions of a party to the suit, "or admissions implied from his conduct, are evidence, and strong evidence, "against him; but we think that he is at liberty to prove that such admissions "were mistaken or were untrue, and is not estopped or concluded by them, "unless another person has been induced by them to alter his condition."

We have heard nothing in the evidence of the defendants to show that this admission was made under circumstances which did not make the admission binding on them. This, in our opinion, is sufficient proof that payment was made of Rs. 100 on that date.

The next question which has been argued with reference to this point is that, even assuming that such payment was made, such payment having been made after January 1, 1928, was not effective. It was argued that the payment in order to be effective for the purpose of saving limitation must be one which must be acknowledged either on the date of payment or, at any rate, before the expiry of the period of limitation. It becomes necessary, therefore, to consider whether this contention is supported by the proper interpretation of s. 20 of the Indian Limitation Act as amended by Act I of 1927. The section, after the amendment, stands thus:—

> Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf,
>
> or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor by his agent duly authorised in this behalf,
>
> a fresh period of limitation shall be computed from the time when the payment was made.

(1) (1829) 9 B. & C. 577 (586); 109 E.R. 215 (218).

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Then follows the proviso which is important for our present purpose :—

> Provided that, save in the case of a payment of interest made before January 1, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

It is contended that the acknowledgment of this payment must be either contemporaneous with the date of the payment or must be before the period of the expiry of limitation. It is said by Mr. Gupta that unless this construction is adopted the result will be that it will be possible to revive a barred debt by a subsequent acknowledgment. We are unable to accede to this argument on behalf of the appellants, for if we are to adopt the construction contended for by the appellants we will have to import into the proviso to s. 20 words which do not exist there—we will have to import the words "acknowledgment of "the payment made on the date when the payment is "made or made before the expiry of the period of "limitation" into the words of the section. That would not be the right method of construing a statute. Indeed no authority has been cited to us in support of this construction. On the other hand, we have been referred to decisions of three High Courts in India to the effect that the acknowledgment may be even after the period of limitation has expired.

The earliest case on this point is one from the Madras High Court—the case of *Venkatasubbu* v. *Appusundram* (1). Sir Arthur Collins C. J. and Shephard J. in dealing with a Letters Patent Appeal put the matter very clearly in a very few words. At page 94 the learned Judges say this :—

> "The section" (referring to section 20) "does not require that the writing should be made before the expiration of the period. It only requires a writing as the mode of proving the fact of payment".

It is true that this decision was given before the amendment of the Act in 1927; but we do not think that the amendment by introducing the word

(1) (1893) I. L. R. 17 Mad. 92, 94.

"acknowledgment" makes any substantial difference in the sense of the proviso.

The same view has been adopted in Allahabad as well as in Bombay. In a very recent decision of the Bombay High Court in the case of *Vishwanath Raghunath Kale* v. *Mahadeo Rajaram Saraf* (1), Sir John Beaumount C. J. says this—

> It is true that the payment has to be made within the prescribed period, but the Act does not provide that the acknowledgment is to be made within that period. It is the payment, and not the acknowledgment, which extends the period of limitation. The acknowledgment is merely a matter of evidence, and provided it is signed before the suit is commenced, that appears to me to be sufficient.

The same view was taken in a recent case in Allahabad in the case of *Lal Singh* v. *Gulab Rai* (2), where Mr. Justice Iqbal Ahmad sitting singly came to the same conclusion.

We do not see any reason why we should dissent from these decisions as these decisions are in consonance with the clear language of the statute and the proper mode of interpreting the same. There is, therefore, no substance in this contention and we think that the plea of limitation must be overruled.

It remains now to consider the question about the handnote having been executed by misrepresentation. Although this point was indicated in the opening, we do not think that Mr. Gupta made any serious attempt to displace the finding of the Subordinate Judge in this behalf. There is abundant evidence on the record which goes to show that the debt was actually contracted by the Haji and although Mr. Gupta drew our attention to some of the items in the account, he did not pursue and develop the point which he stated at the outset with regard to the point of misrepresentation. We do not think that any case has been made out for displacing the finding of the lower Court in this behalf.

Another point has been made with reference to the *pârdânashin* ladies, namely, defendants Nos. 4 and 5 and defendant No. 8—Sreematee Majitan Bibi,

(1) (1933) I.L.R. 57 Bom. 453, 454-5. (2) (1932) I. L. R. 55 All. 280.

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Sreematee Majedan Bibi and Sreematee Maleka Bibi—and it is said that it has not been shown in this case that these three ladies did understand the nature of the transaction they were entering into at the time when they executed this handnote. Our attention has been drawn to the very well-established principle with regard to protection which is to be given to *pârdânashin* ladies in general. The rule which was stated in the very early case of *Sudisht Lal* (1) and has been reiterated over and over again till the recent decision of Sir George Rankin in the case of *Lala Kundan Lal* v. *Musharraf Begam* (2) is that before a *pârdânashin* lady can be fixed with liability with respect to a transaction in which she has entered it must be shown affirmatively that the document was explained to her and that she had full knowledge of the import of the transaction into which she was entering. It was stated that there was no evidence in this case that the document was read over and explained to the *pârdânashin* defendants but it appears that there is evidence in this case of the daughter of Nanda Lal which evidence unfortunately has not been printed and does not form part of the paper-book but which has been read over to us by Mr. Sen who appears for the respondent—which goes clearly to show that the document was read over to the three *pârdânashin* ladies who were behind the screen; and it is important in this connection to note that the defendants—the *pârdânashin* ladies, some of whom filed a written statement, although they denied that the document was read over to them did not choose to give their evidence either on commission or by appearing in Court in support of the statement made in their written defence. At page 40, for instance, Majedan Bibi and others in para. 5 of their written defence stated this :—

> These defendants were never aware of the purport or the contents of the document mentioned in the plaint.

(1) (1881) I.L.R. 7 Cal. 245; L.R. 8 I.A. 39.

(2) (1926) I. L. R. 11 Luck. 346; L.R. 63 I. A. 328.

It is natural enough to expect that these defendants would support this statement by their evidence in oath. Nothing of the kind was done, and in view of the unrebutted testimony given by Nanda Lal's daughter who stated that the document was explained by Maiz Uddin, eldest brother, we have no hesitation in coming to the conclusion that the document was properly explained to the adult *pârdânashin* women and understood by them. Besides it is important to note that this point was not seriously discussed in the Court below. It would not be right to allow this point to prevail in this Court.

These substantially were the four points which were raised before us. Except the point about the minor sisters, namely, defendants Nos. 6 and 7, the other points must fail.

The result is that the appeal will be allowed to this extent that the suit as against the defendants Nos. 6 and 7 will be dismissed and the rest of the judgment of the Subordinate Judge will stand.

As regards the costs we think that the respondent is entitled to two-thirds of the costs of this appeal, in view of the partial success of the defendants appellants.

The cross-objection is not pressed and is dismissed but without costs.

DERBYSHIRE C. J. I agree.

Appeal allowed in part.

S. M.