defendant was in possession on the strength of it from the date of Subhadrayama's death in 1841 till the institution of the present suit in 1890. According to first plaintiff's own evidence the property which stood in his father's name came to himself *exclusively* and first defendant was given no share in it. First plaintiff admits further that till the institution of this suit he described himself by his father's house name Silavamsam, and not as Vyricherla which is the description applicable to the zamindar's family. Plaintiff's third witness, who speaks to the maintenance of the late first defendant's brothers and sisters by that defendant, says that each of the brothers got half a measure of rice daily which first defendant "stopped when he was displeased," and that "some "servants got rations like the brothers." There is no evidence on behalf of plaintiffs that this maintenance was claimed as a right and that the grant of it was not an act of brotherly kindness on the part of first defendant. The Judge is right, therefore, in holding the suit to be time-barred.

A consideration of the issue whether the zamindari is partible is unnecessary under these circumstances, as on the finding that first plaintiff (the only appellant) was not born when the property vested in the late first defendant, plaintiffs' suit must fail. First defendant thus became the exclusive owner and on his death the property belongs to his son, now the sole respondent, as the nearer heir than appellant.

The appeal must be dismissed with costs.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.*

VELU PILLAI AND OTHERS (PLAINTIFFS), APPELLANTS,

*v.*

GHOSE MAHOMED AND OTHERS (DEFENDANTS), RESPONDENTS.*

1893. September 26. October 5.

*Limitation—Limitation Act—Act XV of 1877, sched. II, art. 85—Mutual account.*

To constitute a mutual account there must be transactions on each side creating independent obligations on the other, and not merely transactions which create

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* Appeal No. 89 of 1892.

VELU PILLAI v. GHOSE MAHOMED.

obligations on the one side, those on the other being merely complete or partial discharges of such obligations. Thus an account consisting of entries of payments made by one party in reduction of his debt to the other, and of payments made by the latter on behalf of the former party for the same purpose is not a mutual account within the meaning of art. 85 of sched. II of the Limitation Act.

*Hirada Basappa* v. *Gudiyi Muddappa*(1) cited and followed.

A shifting balance is a test of mutuality, but its absence is not conclusive proof against mutuality.

APPEAL against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in original suit No. 33 of 1890.

The plaintiffs sued as heirs to their father, a broker, who had had continuous dealings with the defendants, to recover from them the sum of Rs. 3,016-1-6. The plaintiffs' accounts (with which the defendants' accounts agreed) ran from the 23rd September 1885, on which date a balance was struck and a settlement made in favour of the plaintiffs, to the 7th October 1890, on which date they showed a balance of Rs. 3,016-1-6 in the plaintiffs' favour, the sum now sued for. Payments had been made from time to time and balances struck on both the plaintiffs' and defendants' accounts, but with one small exception in 1885 the account was invariably in favour of the plaintiffs. The District Judge held that the plaintiffs' account did not fall under article 85, schedule II of the Limitation Act, since to bring a case within that article there must be a fluctuating balance, at times in favour of one party and at times in favour of the other, and in the present case the solitary item referred to above being beyond the period of limitation, and therefore not availing the plaintiffs' case, the amounts prior to the 3rd November 1887 were barred, and passed a decree in favour of the plaintiffs for the amounts due between the 3rd November 1887 and the close of the accounts.

The plaintiffs preferred this appeal.

*Rama Rau* for appellants.

*T. Rangachariar* for respondents.

JUDGMENT.—The only point argued in this appeal is as to the correctness of the Judge in holding that the account on which plaintiffs rely is not a mutual account within the meaning of article 85 of schedule II of the Limitation Act.

The reason assigned by the District Judge is that, with one trifling exception, and that beyond the period of limitation, the

(1) 6 M.H.C.R., 142.

account has been invariably in favour of plaintiffs. He says: "although it may not be necessary in order to bring the case "within article 85 of Act XV of 1877 that there should be actual "demands, it is necessary that the balance should fluctuate, being "at times in favour of one party and at times in favour of the "other," and in support of this proposition he refers to *Harrandas Hemraj* v. *Vissandas Hemraj*(1) and *Hajee Syud Mahomed* v. *Mussamut Ashrufoonnissa*(2).

In the former case it was said by Sir Charles Sargent, C.J., that the corresponding clause of Act IX of 1871 appeared to have been intended to apply to "cases where the course of business "has been of such a nature as to give rise to reciprocal demands "between the parties; in other words, where the dealings between "the parties are such that sometimes the balance may be in favour "of one party and sometimes of the other." The meaning of which is not that there must have been such a shifting balance, but such was a possible and likely incident of the mutual transactions with regard to which the account was kept.

The decision in *Hajee Syud Mahomed* v. *Mussamut Ashrufoonnissa*(2) is authority for the proposition that the mere fact of the balance having been in favour of the defendant on some occasions is not sufficient to constitute the account a "mutual, open and current account."

A shifting balance may, no doubt, be a test of mutuality, but its absence cannot be taken to be conclusive proof against mutuality.

The reason assigned by the Judge for his finding is therefore not valid; but, nevertheless, his decision is correct. The rule to be applied is to be found in the judgment delivered by the late Mr. Justice Holloway in *Hirada Basappa* v. *Gadigi Muddappa* (3). "To be mutual there must be transactions on each side creating "independent obligations on the other, and not merely transac- "tions which create obligations on the one side, those on the other "being merely complete or partial discharges of such obligations." The amounts credited to defendant in the account kept by plaintiffs in the present case are merely payments made in reduction of the debt due from defendants to plaintiffs, and the two entries of amounts due to defendants from plaintiffs for oil, &c., pur-

(1) I.L.R., 6 Bom., 134. (2) I.L.R., 5 Calc., 759. (3) 6 M.H.C.R., 142.

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chased from defendants are also credited merely as items received in partial discharge of defendants' debt to the plaintiffs. We cannot accede to the contention that they are evidences of reciprocal demands. They are casual merely and not such as would imply a regular course of reciprocal dealings.

The lower Court's decision is, therefore, correct, and this appeal must be dismissed with costs.

Objection has been filed by respondent against that part of the lower Court's decree which awards to plaintiffs costs on the whole amount sued for, instead of limiting the same to the amount decreed. The general rule is that if a plaintiff recovers a less amount than he claimed in the plaint, his costs should be apportioned according to the amount recovered and not to the sum claimed. *Mudhan Mohan Doss* v. *Gopal Doss*(1). The Judge has given no reason for departing from this rule. The decree will be modified by awarding costs to plaintiffs only on the amount decreed. The circumstances of the case are such as to justify disallowance of costs to the second defendant (respondent).

In allowance of this objection the lower Court's decree will be modified as above.

There will be no order as to costs of this memorandum of objections.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar.*

1889. September 22, 25.

KUNHANUJAN (DEFENDANT No. 8), PETITIONER,

*v.*

ANJELU (PLAINTIFF), RESPONDENT.*

*Transfer of Property Act (Act IV of 1882), s. 108, cl. (j)—Lessor's right to sue both lessee and his transferee.*

The provision in section 108 of the Transfer of Property Act that a lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and that the lessee shall not, by reason of such transfer, cease to be subject to any of the liabilities attaching to the lease, does not prevent the transferee being also liable to the lessor, who may at the same time sue the

(1) 10 M.I.A., 563.

* Civil Revision Petition No. 414 of 1892.