and 20. At any rate, it is impossible not to give effect to an acknowledgment which fulfils the requirements of section 19 though the acknowledgment may evidence also an ineffectual payment under section 20. The two sections deal with two different matters. They can be read together and there is no inconsistency. I think therefore that the appeal must be allowed and the suit remanded to the First Court for a trial of the other issues.

VENKATA-KRISHNAIAH v. SUBBA-RAYUDU.

SRINIVASA AYYANGAR, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastriyar and Mr. Justice Phillips.

BALLAPRAGADA RAMAMURTHY (OF BALLAPRAGADA RAMAMURTHY & CO.), (PLAINTIFF), APPELLANT,

1916, April, 28.

v.

THAMMANA GOPAYYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation Act (IX of 1908), sec. 19—Letter of acknowledgment, construction of—Conditional acknowledgment, operation of—Performance of condition, necessity for—Contract not to plead limitation, legality of—Contract Act (IX of 1872), sec. 23—Estoppel against statute of limitation.

The plaintiff filed a suit on the 19th September, 1912, to recover damages for breach of an oral contract by the defendant, of which performance was due in 1906, and relied on a letter dated 20th September, 1909, written by the defendant to the plaintiff as saving the bar of limitation. The letter was to the effect that, if certain arbitrators should decide that the defendant should pay any amount he would immediately pay, but, if the arbitrators failed to decide, that the plaintiff might sue and that the defendant would not plead limitation. The arbitration failed. The plaintiff sued as aforesaid on the 19th September, 1912, but the defendant pleaded limitation in bar of the suit.

Held:

(1) that the letter amounted only to a conditional acknowledgment;

(2) that where there is a promise to pay on a condition, that condition, in order that the promise may operate as an acknowledgment, must be fulfilled;

In re River Steamer Company (1871) L.R., 6 Ch. App., 822; *Maniram Seth* v. *Seth Rupchand* (1906) I.L.R., 33 Calc., 1047 and *Arunachella Row* v. *Rangiah Appa Row* (1906) I.L.R., 29 Mad., 519, referred to.

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* Second Appeal No. 585 of 1915.

RAMA-MURTHY v. GOPAYYA.

(3) that the plaintiff was not entitled to a deduction of time which elapsed between the date of the agreement to refer to arbitration and the date of the failure of the arbitration;

(4) that an agreement by a debtor not to raise the plea of limitation is void under section 23 of the Contract Act as it would defeat the provisions of the Limitation Act; and

(5) that parties cannot estop themselves from pleading the provisions of the statute of limitation.

Sitharama v. *Krishnasami* (1915) I.L.R., 38 Mad., 374, referred to.

SECOND APPEAL against the decree of A. SAMBAMURTI AYYAR the Subordinate Judge of Rajahmundry in Appeal Suit No. 130 of 1914, preferred against the decree of E. J. S. WHITE, the District Munsif of Cocanada, in Original Suit No. 589 of 1912.

The following facts are taken from the judgment of the Lower Appellate Court:—

The plaintiff entered into an oral agreement with the defendants, for the purchase of 500 bags of boiled rice from them and paid an advance of Rs. 500. The time for performance of the contract was fixed to be 20th September, 1906. The delivery was not made. The parties charged each other with default. On the very last day when a suit for damages in respect of the breach could have been brought, both the parties agreed to refer the matter to certain arbitrators and exchanged between them letters (Exhibits B and I), dated 20th September, 1909. The material portion of Exhibit B which was the letter written to the plaintiff by the defendants was as follows:—

"As the business pertaining to the contract entered into between us for weighing boiled rice within the 20th September, is not settled up to date, and as you were making attempts to file a suit against me for the advance and as we both being reconciled, have referred the matter to Rajesri Nalem Ramalingayya, Bondada Lakshminarayana and Palukuri Venkatrajugarlu for their decision, I shall agree to the decision made by them. Without having to do anything with the limitation of time, if they decide that I should pay any amount to you, I shall pay it immediately to you. If, perhaps, for any reason, the said three mediators do not give their decision, it is settled that, on this letter, suit, etc., proper steps may be taken and conducted in the court without having anything to do with the time-bar."

"Please to consider.

(Signed) P. P. Tammana Gopiah.
(,,) T. Ramayya."

The arbitrators did not decide the dispute, and the plaintiff, having given notice to the arbitrators not to proceed further, filed the present suit on the 19th September, 1912 claiming Rs. 860 being the amount of advance given to the defendant and interest thereon by way of damages. The defendants pleaded *inter alia*, limitation as a bar to the suit. The plaintiff relied on Exhibit B as an acknowledgment to save the bar of limitation and on the stipulation made in the same document not to plead the bar of limitation. The Lower Courts, holding that the suit was barred by limitation and that the agreement not to plead limitation was not valid in law, dismissed the suit. The plaintiff preferred a second appeal to the High Court.

G. Venkataramayya for the appellant.

P. Venkataramana Rau for the respondent.

JUDGMENT.—Plaintiff is the appellant. He sued in 1912 to recover damages for breach of a contract of which performance was due before the 20th September, 1906 and relied upon a letter dated 20th September, 1909 to save the bar of limitation. Both the Lower Courts dismissed the plaintiff's suit on the ground that the letter did not contain an acknowledgment of liability sufficient to bring the case within section 19 of the Limitation Act.

The letter (Exhibit B) signed by the defendants states that, as disputes about the contract were not settled and a suit was threatened, both parties agreed to refer matters to the arbitration of the persons mentioned therein. The material part of the document runs as follows:—

"I shall agree to the decision made by them (arbitrators) without having to do anything with the limitation of time, if they decide that I should pay any amount to you, I shall pay it immediately to you. If, perhaps, for any reason, the said three mediators do not give their decision, it is settled that, on this letter, suit, etc., proper steps may be taken and conducted in the court without having anything to do with the time bar."

It is argued for the appellant that the letter contains a promise to pay whatever may be found due on arbitration and that there is an acknowledgment of liability. It is also argued that the agreement to refer to arbitration and not to plead limitation as a bar if the arbitration fell through, is valid and binding on the parties amounting, as it does, to a covenant by one party not to sue till the arbitration was over and by the

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KUMARA-SWAMI SASTRIYAR AND PHILLIPS, JJ.

other not to plead limitation, should it be necessary to file a suit.

We do not think that the terms of Exhibit B amount to an unconditional undertaking by the defendants to pay the debt. The plaintiff was setting up a claim for damages and the defendants were denying that they were liable to the plaintiff. When a suit was threatened, the parties agreed to refer the dispute to arbitration. Exhibit B is a conditional promise to pay whatever the arbitrators may find to be due. What the defendants in effect state is :

"We deny that anything is due to you, but as you threaten a suit, we shall agree to refer matters to arbitration and if the arbitrators give an award holding us liable to pay any sum, we shall pay it to you."

In cases of conditional acknowledgments of liability, the law is clear that where there is a promise to pay on a condition, that condition in order that the promise may operate as an acknowledgment, must be fulfilled. In *In re River Steamer Company*(1) which has been approved of by their Lordships of the Privy Council in *Maniram Seth* v. *Seth Rupchand*(2), Lord Justice MELLISH observed that in order to take the case out of the statute of limitation, there must either be an acknowledgment of the debt from which a promise to pay may be implied, or an unconditional promise to pay the debt, or a conditional promise to pay the debt and evidence that the condition has been performed. This case was referred to and followed in *Arunachella Row* v. *Rangiah Appa Row*(3), where SUBRAHMANYA AYYAR and BENSON, JJ., were of opinion that the English and Indian Law are the same as regards conditional promises and that an acknowledgment of a conditional liability would not give a fresh start so long as the condition remained unfulfilled.

It is well settled law that to operate as an acknowledgment, a subsisting jural relationship of debtor and creditor must be admitted. A mere reference to arbitration which *prima facie* is only a mode of settling disputes and not an admission of any liability by the parties, does not import any such relationship. No authority has been cited for the proposition that the mere fact that parties agree in writing to refer matters to arbitration

(1) (1871) L.R., 6 Ch. App., 822. (2) (1906) I.L.R., 33 Calc., 1047 (P.C.).
(3) (1906) I.L.R., 29 Mad., 519.

amounts to an acknowledgment. The result of the English authorities seems to be that a mere submission to arbitration containing a promise to pay whatever the arbitrators decide, is not available as an acknowledgment if the arbitration proves abortive unless the submission contains an unqualified acknowledgment of the debt (Halsbury's Laws of England, volume 19, page 66 and Banning on Limitation, page 45.) There is nothing in section 19 of the Limitation Act to suggest that the law in India is different.

We do not think that the promise of the defendants not to raise the plea of limitation, should a suit have to be filed, is valid. It is argued that the effect of the clause is not to restrict the time but to extend it and that section 28 of the Contract Act which only applies to cases where time is limited has no application. Reference has been made to the observations of Sir Frederick Pollock in his commentaries of the Contract Act at page 179.

Whatever doubts may exist as to the applicability of section 28, we think that the case falls under section 23. The effect of the covenant is, in our opinion, to defeat the provisions of the Limitation Act and falls under section 23 of the Contract Act as being an agreement which defeats the provisions of the Limitation Act.

It has been argued that the period between the date of the agreement to refer and the date when the plaintiff knew that the proceedings became abortive, should be excluded.

It is difficult to see how a reference to arbitration though it may imply a covenant not to sue, would prevent the operation of the law of limitation when once the period commences to run. Though parties to a contract may agree to postpone the accrual of any rights under it, they cannot postpone the period of limitation in case a suit should have to be filed for its breach. In the present case the agreement to refer was long after the period when limitation for a suit on a breach of contract began to run and section 9 of the Limitation Act is clear, as it enacts that when once limitation begins to run, it cannot be stopped by anything that happens subsequently. The case does not fall within the provisions relating to stay of suits by injunction.

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As regards the argument that the defendants are estopped from pleading limitation, there can be no question of estoppel as the parties cannot estop themselves from pleading the provisions of the statute: *Sitharama* v. *Krishnaswami*(1).

We are of opinion that the decree of the Lower Courts are right and dismiss the Second Appeal with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

1916, August, 14.

THE SOUTH INDIAN MILLS COMPANY, LIMITED (BY ITS MANAGING DIRECTOR T. SRIMAN KANTHIMATHINATHA PILLAI (RESPONDENT IN BOTH), APPELLANT IN BOTH,

v.

RAJA BAHADUR SHIVALAL MOTILAL BY AGENT GOVINDALAL PITTIE (PETITIONER IN BOTH), RESPONDENT IN BOTH.*

Indian Companies Act (VI of 1882), ss. 137 and 141—Appointment of Official Liquidator, after order for winding up company—Appeal by the Managing Director against order appointing official Liquidator, competency of.

A winding-up order terminates the appointment of directors except for certain special purposes, and a Managing Director is therefore not a competent person to file an appeal against a subsequent order appointing an official liquidator.

APPEALS against the orders of D. G. WALLER the District Judge of Tinnevelly, in Insolvency Application No. 582 of 1915 in Original Petition No. 116 of 1911 and Insolvency Application No. 566 of 1914 in the said Original Petition No. 116 of 1911, respectively.

A company was ordered to be wound up by an order dated the 21st February, 1913. An Official Liquidator was appointed by the District Judge by an order dated 27th July, 1915. An application for a Review of the Order appointing the Official Liquidator was dismissed by the District Judge on the 6th

(1) (1915) I.L.R., 38 Mad., 374.

* Appeals Against Orders Nos. 265 and 266 of 1915.