been fraudulently made for the express purpose of giving jurisdiction. There is no such allegation here. Jurisdiction does not depend upon the relief the Court finds itself able to give after trial. The jurisdiction of the Court in this case is, therefore, not affected by the view I am taking; but the decree so far as it gives relief against the property mortgaged must be set aside.

There will be a personal decree only against defendants 1 and 2 for the amount found due and interest at 6 per cent from date of suit to date of payment. The rest of the suit is dismissed. The order as to costs in the first Court will stand, but the parties will bear costs in this and the Lower Appellate Court.

NAPIER, J.—I agree. I had already prior to the hearing of the case before the Learned Chief Justice expressed my opinion in an unreported case I saw no reason to alter it during the argument in that case nor do I now.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Coutts-Trotter.

GOVINDASAMI PILLAI (ASSIGNEE-DECREE-HOLDER), PETITIONER, APPELLANT,

v.

DASAI GOUNDAN AND ANOTHER (JUDGMENT-DEBTORS), RESPONDENTS.*

1921, April, 19.

Limitation Act (IX of 1908), sec. 20—Execution of decree for sale—Part of the hypotheca taken up under the Land Acquisition Act—Compensation paid into Court—Payment of amount to decree-holder through Court—Paper showing payment, signed by Judge—Judge, whether an agent of judgment-debtor—Signature of Judge, whether sufficient under section 20.

After a decree for sale on a mortgage was passed in 1912, a part of the hypothecated property was taken up under the Land Acquisition Act, and the

* Appeal against Order No. 64 of 1920.

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Government paid the amount of compensation into Court to the credit of the suit; and the same was paid out to the decree-holder on the 11th August 1914. When the payment was made the Judge signed a paper showing that payment was made in his presence and through Court. On the decree-holder filing an application for execution of the decree on the 10th August 1917, the judgment-debtor pleaded the bar of limitation.

Held, that the Judge should be deemed to have been an agent duly authorized by the judgment-debtor to make the payment, and that the signature of the judge on the paper showing the payment satisfied the condition that the fact of payment should appear in the handwriting of the person making it, as required by section 20 of the Limitation Act; and that, consequently, the application for execution was not barred.

Chinnery v. *Evans*, (1864) 11 H.L. Cas., 115, applied; *Lakshmanan Chetty* v. *Sadayappa Chetty*, (1918) 35 M.L.J., 571, referred to.

APPEAL against the order of D. G. WALLER, District Judge of Coimbatore, in Execution Petition No. 15 of 1917, in Original Suit No. 60 of 1910.

The material facts are set out in the judgment of SADASIVA AYYAR, J.

N. S. Rangaswami Ayyangar, K. S. Krishnaswami Ayyangar and *P. S. Ramaswami Ayyangar* for appellant.

T. M. Krishnaswami Ayyar for respondents.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The assignee-decree-holder is the appellant. The following are the relevant facts and dates: On 20th September 1912 the final decree for sale of the hypothecated properties was passed. Items 4 and 5 of the hypothecated properties were afterwards acquired by the Government under the Land Acquisition Act and Rs. 3,400 (compensation money) was deposited in Court for the Government on 11th August 1914 to the credit of the suit. The decree amount with interest on that date amounted to Rs. 3,926 according to the decree-holder. The decree-holder drew the compensation amount of Rs. 3,400 from the Court on 11th August 1914 and he filed the present execution application for sale of two other hypothecated items on 10th August 1917. The questions for consideration are (1) whether the execution petition is barred by limitation and (2) what was the balance due under the decree, whether it was Rs. 500 and odd with interest from 11th August 1914 as claimed by the decree holder or a lesser sum, and if so, what sum?

The Lower Court on 30th September 1913 held on the second point that only Rs. 103-7-8 was the sum due on 11th August 1914 under the decree. On the first point it held that because on 11th August 1914 the compensation amount, Rs. 3,400, was paid to the decree-holder on account of the decree by consent of the judgment-debtors, section 20 of the Limitation Act gave a fresh starting point of limitation and hence the execution petition of 10th August 1917 was not barred by limitation. It accordingly directed execution to issue for the Rs. 103 and odd with interest. This Appeal by the decree-holder was based on the ground that really Rs. 500 and odd was due and not merely Rs. 103 and odd on 11th August 1914 under the decree. Having heard both sides and gone through the records I agree with the Lower Court in its conclusion that only Rs. 103 and odd was really due on the above date. So the Appeal fails and has to be dismissed with costs.

But there is a Memorandum of Objections filed by the first defendant (the judgment-debtor) and the contentions in that Memorandum are:

1. The learned Judge ought to have held that the payments made ex parte having reference to their nature and mode did not come within section 20 of the Limitation Act and the execution petition was therefore barred.

2. The Courts below ought to have held that even otherwise the decree has been fully satisfied by payments made.

As regards the second contention, that full satisfaction had been made, there is nothing in it and the District Judge was right in finding that Rs. 103 and odd still remained due on 11th August 1914.

The much more important contention remains, namely, that "the payment made ex parte" in August 1914 did not come within section 20 of the Limitation Act and could not therefore save limitation. Section 20 of the Limitation Act (omitting the words unnecessary for the decision of this case) is as follows:

"Where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made; provided that in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making

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SADASIVA AYYAR, J.

the same. Explanation. Debt includes money payable under a decree."

The payment of Rs. 3,400 was clearly part-payment of the principal of the decree debt. But two other questions remain to be considered, namely, (1) whether the fact of the payment appears in the handwriting of the person making the same, (2) whether the payment was made by the debtor or by his agent duly authorized in that behalf.

On the first question, the decree-holder in the case produced before us copies of Court records showing that when the Rs. 3,400 was paid out, the Judge signed a paper indicating that Rs. 3,400 was paid to the decree-holder in the presence of the Judge and through the Court. I think this record sufficiently satisfies the condition that the fact of payment should appear in the handwriting of the person making the same.

The only question that remains therefore for consideration is whether the Judge can be called an agent duly authorized by the judgment-debtor to make the payment.

Notwithstanding some obiter dicta of their Lordships of the Privy Council based on English decisions that the reason why an acknowledgment of indebtedness gives a fresh starting point for limitation is that it gives a fresh cause of action by reason of its implying a fresh promise to pay, I am clear that the provisions in sections 19 and 20 of the Indian Limitation Act could not have been based upon any such fiction of an implied new promise to pay. Under section 19, Explanation 1, an acknowledgment signed by the party liable is sufficient even when accompanied by a refusal to pay, whereas, in consequence of the fiction of an implied promise to pay being necessary under the English decisions, an acknowledgment accompanied by a refusal to pay is insufficient under the English law to afford a fresh starting point for limitation, as that fiction of an implied promise to pay becomes still-born in consequence of such refusal to pay. I think the Indian law must be held to have required the handwriting of the person making the payment merely in order to exclude fraudulent oral testimony as to such payment, just as the Statute of Frauds tried to prevent Courts being flooded with perjury in the case of sales of goods, etc. The fiction of an implied promise to pay and

the accrual of a new cause of action by an unregistered acknowledgment of a payment of interest as such would not help mortgage creditors to obtain decrees for sale as the new promise not being evidenced by a registered deed cannot be made to affect immoveable property. The law of limitation is partly intended to promote diligence on the part of creditors in the matter of recovery of their debts. The concessions made in favour of creditors by the provisions of sections 19 and 20 of the Limitation Act are intended to express the view of the legislature that a creditor will not be considered wanting in such diligence in bringing his suit, and he will not be penalised by the bar of limitation if he has been *diligent enough to get* the handwriting of the debtor to evidence an acknowledgment or the fact of part-payment within the period of limitation.

Provided therefore the evidence of the payment is in a writing binding on the debtor, it seems to me that the object of the legislature is satisfied, and in construing the words "agent duly authorized" the Courts ought, in my opinion, to be as liberal as possible. Section 21(1) of the Limitation Act says that the expression "agent duly authorized in this behalf" in sections 19 and 20 shall,

"in the case of a person under disability include his lawful guardian, committee or manager or an agent duly authorized by such guardian, committee or manager to sign the acknowledgment or make the payment."

This shows that the authorization need not be a voluntary authorization; for, the guardian of a person under disability does not get his authority through any voluntary act of the person under disability but by law. In *Rughoo Nath Doss Cookman* v. *Ranee Shiromanee Pat Mohadebee*(1) there is a sentence as follows:

"As regards the sale made on the 8th March 1869 from which a sum of Rs. 206 was realized we think that cannot be considered a part-payment under section 21 so as to give a new period of limitation."

Section 21 considered therein was section 21 of Act IX of 1871 which is similar to section 20 of the present Limitation Act, so far as the question under consideration is concerned.

(1) (1875) 24 W.R., 20.

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No reasons are given for the opinion. Further, the point whether the condition as to the payment appearing in the handwriting of the person making the payment or his duly authorized agent was not raised or considered in that case. In *Ramchandra Ganesh* v. *Devba*(1) no judgment was given and the Court discharged the rule granted in favour of the decree-holder without giving any reasons. Whether the Court intended to adopt all or only some of the arguments advanced by the vakil for the judgment-debtors as found in the report does not appear. One of such arguments was that an acknowledgment must have contained an express or implied promise to pay, quoting English decisions. I have shown that those decisions are inapplicable in construing the Indian Limitation Act. Of course from an involuntary payment a promise to pay the balance cannot be implied. *Rughoo Nath Doss Cookman* v. *Ranee Shiromanee Pat Mohadebee*(2) was also quoted in that case, not in the arguments before the High Court but only by the Lower Court in support of its opinion. It appears from the report that the payment relied upon was not part-payment of the principal in the handwriting of the person making the payment but payment of interest, and it was argued by the creditor that the recovery of rent decreed in a suit brought by the usufructuary mortgagee on a bond providing for payment of rent in lieu of interest was payment of interest on the mortgage bond. The defendants argued that the payment in satisfaction of the decree passed for rent is not a payment to the creditor of interest as such. It may be that this argument was accepted and so the rule was discharged by the Bombay High Court on that ground. I am unable therefore to accept the head-note of the Reporter as really representing the opinion of the Judges in that case. In *Oudh Bihari Pande* v. *Mahabir Sahai*(3), the only question decided was that because the part-payment by sale in execution of the judgment-debtor's property did not appear in the handwriting of the judgment-debtor it could not save limitation. In *Brew* v. *Brew*(4), decided by four Judges, on the language of a Statute which requires that,

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(1) (1882) I.L.R., 6 Bom., 626.
(2) (1875) 24 W.R., 20.
(3) (1909) I.L.R., 31 All., 590.
(4) [1899] 2 I.R., 163.

"some part of the principal money or some interest thereon shall have been paid or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent"

in order to save limitation, the Court followed the principle of the decision in *Chinnery* v. *Evans*(1). In that case, the payment by a Receiver appointed under the Mortgage Act was held to be payment by the agent of the person liable to pay, though the Receiver was appointed by the Court and not by the mortgagor and was appointed for the benefit of the mortgagee to receive "for him particularly" the rents of the mortgagor's property. JOHNSON, J., says in *Brew* v. *Brew*(2):

"Whether it is by the agency of a Receiver or Sheriff, the payment is made to the creditor on foot of the debt which the debtor is bound in law to pay, and of the debtor's rents or chattels as the case may be for the debtor and on his account; to the extent of such payment the debtor is discharged from so much of the judgment debt. I therefore think that such payments by a sheriff are not payments by a stranger to the judgment-debtor but are payments out of the debtor's chattels 'by a person paying for him and on his account what he is bound to pay.' [Lord CRANWORTH in *Chinnery* v. *Evans*(1).]"

In *Lakshmanan Chetty* v. *Sadayappa Chetty*(3), a Bench of this Court held that an acknowledgment of a debt made by a Receiver appointed by the Court on behalf of a firm under dissolution is a valid acknowledgment, saving limitation by reason of the provisions of section 19 of the Limitation Act, as he was an agent authorized to make the acknowledgment.

If a Sheriff of the Court making the payment can be considered an agent of the debtor I see nothing in principle or reason which should prevent me from holding that a Court paying in the course of its duty the money due by the judgment-debtor is also a legally constituted agent of the judgment-debtor for that purpose.

In the result I think that the requirements of section 20 are satisfied and I would dismiss the Memorandum of Objections also with costs.

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(1) (1864) 11 H.L.Cas., 115. (2) [1892] 2 I.R., 163.
(3) (1918) 35 M.L.J., 571.

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COUTTS-TROTTER, J.

COUTTS TROTTER, J.—I entirely agree. My lord has covered the ground so thoroughly that I only propose to add a word on the last point. I think the principle deducible from *Chinnery* v. *Evans*(1), is this : that if a debtor's assets are so placed either by his own act or by operation of law, that, if some one other than he alone can release them for the purpose of making payments due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the volition of the debtor in such a case being neither requisite nor relevant. If that be so, it appears to me that the words "his agent duly authorized in that behalf" in section 20 of the Limitation Act are satisfied by the act of the Judge of the Court which authorizes the payment ; and that his handwriting is rightly described as that of the person making the payment.

K.R.

APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Krishnan.

1921, May 4.

RAJAH MUTHU KRISHNA YACHENDRA BAHADUR (DEFENDANT), APPELLANT,

v.

W. H. NURSE (FIRST PLAINTIFF), RESPONDENT.*

Vakil—Suit on the Original Side of the High Court—Fees, non-payment of—Duty of vakil to take necessary steps in the suit—Written statement not filed in time—Refusal of vakil to file, because his fees were not paid—Refusal of vakil to consent to transfer of case to another vakil—Application for change of vakil—Order of Court—Delay in filing written statement, whether excusable—Rules of Practice, Original Side, of the High Court, rule 48.

A vakil engaged in a suit on the Original Side of the High Court is not entitled to refuse to take a necessary step in the suit on the ground that his own fees had not been paid, and at the same time refuse his consent to a change of vakalat to another vakil.

(1) (1864) 11 H.L. Cas., 115.

* Original Side Appeal No. 10 of 1921.