accountable at the hands of the plaintiff. For these reasons the appeal, in our opinion, must fail and is dismissed with costs.

Appeal dismissed.

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SUNDAR LAL v. FAKIR CHAND.

1902 *August* 2.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

FAKIR CHAND (PLAINTIFF) v. DAYA RAM AND OTHERS (DEFENDANTS).*

Act No. XV of 1877 *(Indian Limitation Act), schedule ii., articles* 64, 120—*Limitation—Suit against heirs of deceased debtor—Hindu law—Joint Hindu family.*

The plaintiff, on the 29th of August, 1898, sued to recover a sum alleged to be due on an account stated between himself and one Kashi Nath, since deceased, on the 15th of November, 1893. The contesting defendants were two sons of Kashi Nath and were sued as members of a joint Hindu family and as partners in the business carried on by Kashi Nath, and his third son, who did not defend the suit. It was found, however, that these defendants had separated from their father and brother before the date of the account sued upon, and that they were not partners in the business.

Held that the suit was governed as regards limitation by art. 64 of the second schedule to the Indian Limitation Act, 1877; that limitation, which had begun to run in favour of the deceased from the date of the account stated, continued running in favour of the heirs, and that in the absence of any valid agreement or part payment, such as would have the effect of extending the period of limitation, the suit was barred. *Narsingh Misra* v. *Lalji Misra* (1) distinguished. *Dagdusa Tilakchand* v. *Shamad* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal Nehru* and Babu *Durga Charan Banerji*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Meerut in so far as it dismissed the plaintiff's claim as against the defendants Ram Prasad and Kanhaya Lal. The defendants are the three sons of one Kashi Nath, who died in the year 1894. From the evidence it appears that Kashi Nath and his sons, prior to the year 1877, formed a joint Hindu family. In that year Kashi Nath divided the joint family property between himself and his sons, and from that time forward he and his sons

* First Appeal No. 15 of 1900, from a decree of A. Rahman, Esq., Subordinate Judge of Meerut, dated the 8th day of November 1899.

(1) (1901) I. L. R., 23 All., 206. (2) (1884) I. L. R., 8 Bom., 542.

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Kanhaya Lal and Ram Prasad, if not all his three sons, lived separate. Kashi Nath carried on a business at Meerut and other places under the style of Kashi Nath and Son, and after his death this business was carried on by Daya Ram. The defendants, Ram Prasad and Kanhaya Lal had no connection whatever with it. From time to time, beginning with the year 1885, the plaintiff made advances to this firm, and also to the defendant Daya Ram on his personal account. A settlement of accounts was made on the 15th of November, 1893, when a sum of upwards of Rs. 19,000 was found to be due to the plaintiff, partly on account of the advances made to the firm of Kashi Nath and Son, and partly on account of the personal debt of Daya Ram. Daya Ram sold a kothi to the plaintiff for the sum of Rs. 9,500, which was set off *pro tanto* against his debt. He also made some further payments, which left a sum of Rs. 4,600 due. In respect of this sum a verbal agreement was entered into between the plaintiff and Kashi Nath and Daya Ram for the payment of it with interest by annual instalments of a thousand rupees each. Kashi Nath died on the 30th of September, 1894, leaving a considerable amount of the plaintiff's debt unpaid. Upon his death the defendant Daya Ram continued to carry on the business of the firm of Kashi Nath and Son, and made some further payments to the plaintiff on foot of his debt; but having failed, when called upon, to pay the balance which remained owing, the present suit was instituted. In the plaint the plaintiff alleges that Kashi Nath divided his property among his sons and himself, but that up to his death, he and his son Daya Ram were joint owners of the firm of Kashi Nath and Son, and that after the death of Kashi Nath, Daya Ram carried on the business as before on behalf of all the defendants, and that all the defendants are the owners of the property of Kashi Nath as members of a joint Hindu family, and are therefore liable to pay the plaintiff's debt. Daya Ram did not defend the suit, and as against him a decree *ex parte* was passed for the amount claimed. The other defendants, Ram Prasad and Kanhaya Lal, filed a written statement, and in it alleged that they had not any connection with the firm of Kashi Nath and Son, and

had not inherited anything from Kashi Nath, and so were not liable for the debt. They also set up the plea of the statute of limitation as a bar to the suit. The learned Subordinate Judge held that the defendants, Ram Prasad and Kanhaya Lal, were not partners in the firm of Kashi Nath and Son, and that there was no satisfactory evidence that after the death of Kashi Nath they became partners with Daya Ram in the shop. He also held that the claim of the plaintiff as against them as heirs of Kashi Nath was barred by limitation, inasmuch as the suit was not brought until the 29th of August, 1898, more than three years after the death of Kashi Nath.

The plaintiff has appealed from this decree on several grounds, but the only ground which has been pressed in argument before us is, that the suit was not barred by limitation. It is not disputed that Kanhaya Lal and Ram Prasad were separate from their father, and consequently, as has been admitted, no pious duty rested upon them as sons to pay their father's liabilities. It is suggested, however—but of this there has been no proof—that after the death of Kashi Nath they took possession of a portion of his assets as his heirs, and consequently are liable to the extent of such assets. The contention of the appellant is, that the article of the Indian Limitation Act, which is applicable to the case, is article 120, which allows a period of six years from the time when the right to sue accrued in a suit for which no period of limitation is provided elsewhere in the schedule to the Act, and reliance for this contention is placed upon a ruling of this Court in the case of *Narsingh Misra* v. *Lalji Misra* (1). To this matter we shall refer later on in our judgment.

The contention on behalf of the respondents is that article 64 of the Indian Limitation Act governs the case, and that the suit not having been brought within three years from the settlement of the account in 1893 the claim is statute-barred. It is to be observed that the agreement which was entered into simultaneously with the settlement of accounts in 1893 was not committed to writing. It was merely a verbal agreement. In order to extend the period of limitation for a suit

(1) (1901) I. L. R., 23 All., 203.

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on an account stated by a simultaneous agreement, the simultaneous agreement must, under the provisions of article 64 of the schedule to the Limitation Act, be an agreement in writing signed by the defendant or his agent duly authorized, making the debt payable at a future time. See *Dagdusa Tilakchand* v. *Shamad* (1). There was no such written agreement in this case. Consequently the debt would have been statute-barred, so far as regards Kashi Nath, after the lapse of three years from the date of the settlement of the account. It is said, however, that this being a suit to recover the debt of their father against the sons out of assets alleged to have been received by them, the case comes within article 120, which allows a period of six years from the time when the right to sue accrued, and, as we have said above, reliance has been placed on behalf of the appellant on the ruling in the case of *Narsingh Misra* v. *Lalji Misra* mentioned above. In that case, however, the sons who were made liable for their father's debt formed with their father a joint Hindu family, and so the pious duty of Hindu sons to pay their father's debts lay upon them. Moreover, in that case the agreement to pay would have been enforceable against the father at the date of the suit had he been alive. Here no such pious duty can be alleged to exist, as has been admitted, inasmuch as the sons were separate from their father. The suit is brought against them, not by reason of any such pious duty, but as heirs of Kashi Nath. This being so, it appears to us that if the debt could not have been enforced against Kashi Nath had he been alive at the time when the suit was brought, it cannot be enforced against his heirs. The claim would clearly have been statute-barred as against Kashi Nath had he been alive. The cause of action as against the heirs is not a different cause of action from the cause of action which the plaintiff had against Kashi Nath. It is one and the same cause of action, namely the debt found to be due on an account stated in 1893. Once the statute began to run, it continued to run; and in the absence of proof sufficient to keep the debt alive of any payment or acknowledgment by Kashi Nath during his life-time, or after his death by his heirs or representatives, the claim became barred under article

(1) (1884) I. L. R., 8 Bom., 542.

64, after the lapse of three years from the time when the account was stated. For these reasons we are of opinion that the learned Subordinate Judge was correct in the view which he took in holding that the claim as against these defendants was statute-barred. Accordingly we dismiss the appeal with costs.

Appeal dismissed.

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FAKIR CHAND v. DAYA RAM.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

TULSA KUNWAR AND ANOTHER (DEFENDANTS) *v.* GAJRAJ SINGH AND ANOTHER (PLAINTIFFS).*

1902 *August 2.*

Act No. XV of 1877 Appeal—Civil Procedure Code, section 584—(Indian Limitation Act), section 5—Discretion of Court.

Held that no second appeal will lie where a Court of first appeal has disallowed the appellant's plea of excuse for not having filed his appeal within limitation, exercising therein a judicial discretion after consideration of the facts, and not arbitrarily.

THE suit out of which the present appeal arose was brought to have a deed of gift, executed by a Hindu widow, set aside in so far as it was prejudicial to the plaintiffs' interests in the property dealt with thereby. The suit was valued in the plaint at Rs. 4,000. The plaintiffs' claim was decreed by the officiating Subordinate Judge of Shahjahanpur on the 14th of July 1899. The defendants appealed to the District Judge, but their appeal was not filed until the 8th of November 1899. It was therefore apparently barred by limitation. It would appear that the plaintiffs had previously instituted a suit on the same cause of action which they valued at Rs. 9,500. That suit had been withdrawn with liberty to bring a fresh suit, which was done some few days after the order. After the suit was decreed on the 14th of July 1899, the defendants sent the papers to a vakil of the High Court at Allahabad with a view to having an appeal filed. It so happened that the copy of the plaint sent to the vakil omitted the statement as to the valuation of the claim, and thus the vakil was led to suppose that the appeal might lie to the High Court. When, however, a copy of the decree was sent for, the mistake was discovered. This was on the 7th of August, and up to that time the District Judge considered that the appellants

* Second Appeal No. 1228 of 1900, from a decree of C. D. Steel, Esq., District Judge of Shahjahanpur, dated the 12th day of July, 1900, confirming the order of Babu Nihal Chandar, Officiating Subordinate Judge of Shahjahanpur, dated the 14th day of July, 1899.