referred to as guides to the construction of the Indian Act. The respondents' application under order XXXIV, rule 6, was a continuation of their suit for the recovery of the mortgage money. A decree under order XXXIV, rule 6, is plainly a remedy within the meaning of section 16 of the Insolvency Act; therefore the respondents are not entitled to obtain such a decree against the appellant Mamraj. I would, therefore, allow this appeal in part and set aside the decree of the court below so far as it affects the appellant Mamraj or his property or the receiver, and leave the respondents to prove their claim in the insolvency proceedings against the estate of Mamraj. The decree of the court below should stand as against Hanuman Das but not so as to make him personally liable for the amount. I would make no order as regards the costs of this Court.

KARAMAT HUSAIN, J.—I agree.

BY THE COURT.—The order of the court is that the decree of the court below is set aside so far as it affects Mamraj or his property or the receiver. The respondents are left to prove their claim in the insolvency proceedings against the estate of Mamraj. The decree of the court below stands as against Hanuman Das, but he will not be personally liable for the amount decreed. We make no order as regards the costs of this court.

Decree modified.

Before the Hon'ble Mr. H. G. Richards, Chief Justice and Mr. Justice Banerji.

1911 *October* 30.

ZAIB-UN-NISSA BIBI (PLAINTIFF) v. THE MAHARAJA OF BENARES AND OTHERS (DEFENDANTS).*

Act No. IX of 1908 (Indian Limitation Act), section 19—Limitation—Acknowledgment by agent—Law to be applied to test the validity of an acknowledgment.

Held that the criterion to be applied to test the validity of an acknowledgment of liability put forward by a plaintiff as extending the period of limitation in his favour is the law in force at the time when the plaintiff's suit would otherwise have been time-barred and not that in force at the time when the acknowledgment relied upon was made. *Mohesh Lal* v. *Busunt Kumaree* (1), *Rahmani Bibi* v. *Hulasa Kuar* (2) and *Hanuman Prasad* v. *Raghunandan Singh* (3) referred to.

This was a suit for redemption of a mortgage, dated the 21st of November, 1823. The plaintiff instituted the suit on the 30th

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*Second Appeal No. 1116 of 1910, from a decree of Muhammad Ali, District Judge of Mirzapur, dated the 22nd of July, 1910, confirming a decree of Udit Narain Sinha, Subordinate Judge of Benares, dated the 21st of May, 1910.

(1) (1880) I. L. R., 6 Calc., 340. (2) (1878) I. L. R., 1 All., 642.
(3) (1904) 1 A. L. J., 355.

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September, 1909, whereas 60 years expired on the 21st of November, 1883. The plaintiff alleged that by reason of a certain acknowledgment made by the agent of the defendant the suit was within time. She relied on a plaint filed on behalf of the Maharaja on the 4th of March, 1868, for possession of this land on the ground that the defendant was a mortgagee of the part now claimed and vendee of the other. The courts below held that the acknowledgment was no acknowledgment in law and did not save limitation and dismissed the suit.

The plaintiff appealed.

The Hon'ble Pandit *Moti Lal Nehru*, for the appellant :—

The first question is whether the suit would be governed by Act No. XIV of 1859 or by Act No. XV of 1877. The latter Act clearly authorizes an agent to make the acknowledgment. The conditions are that the agent must be authorized to acknowledge and the debt at the time must not be barred by limitation. The two conditions have been fulfilled. The debt was not barred till 1883 when the Act of 1877 was in force. The law which governed the case was the one in force at the date of institution. We have nothing to do with the law which was in force at the date of the acknowledgment : *Mohesh Lal* v. *Busunt Kumaree* (1). The cases relied on by the court below are not applicable as they were cases of debts barred before the Act came into force. The moment the new Act came into force, it gave the plaintiff a fresh start. It was not giving retrospective effect to the Act. The case of *Rahmani Bibi* v. *Hulasa Kuar* (2) is against me on the assumption that the date of the mortgage was as alleged by the respondent in that case. If the correct date was that alleged by the defendant, viz., 70 years before the institution of the suit, the claim for redemption would be barred before the new Act came into force.

Munshi *Gokul Prasad* (with The Hon'ble Pandit *Sundar Lal*), for the respondent :—

The acknowledgment was made in 1868 when the Act of 1859 was in force. The plaintiff has to bring the acknowledgment within that Act. Acknowledgement under that Act by an agent did not save limitation. Then this acknowledgment was not legal.

(1) (1888) I. L. R., 6 Calc., 340. (2) (1878) I. L. R., 1 All., 642.

The cases lay down that the right will be gone. I rely on *Rahmani Bibi* v. *Hulasa Kuar* (1), and *Hanuman Prasad* v. *Raghunandan Singh* (2). In the Act of 1877, section 19 says that the acknowledgment must be made by an agent duly authorized in that behalf. Duly authorized agent must be authorized to make the acknowledgment. The power must be given in the power of attorney. General authority may be enough, but there must be an authority to do the act. The suit in which the acknowledgment is said to have been made was filed in the name of the agent who said that the mortgage was in favour of his master.

The Hon'ble Pandit *Moti Lal Nehru* was not called upon.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit for redemption of a mortgage, dated the 21st of November, 1823. The courts below have dismissed the suit on the ground that the claim is time-barred. No doubt having regard to the date of the mortgage the claim would be time-barred unless the plaintiff could invoke in aid, as he seeks to do, an acknowledgment said to have been made on the 4th of March, 1868, whereby the mortgage in question was acknowledged by an agent of the predecessor in title of the defendant. This acknowledgment was made when Act No XIV of 1859 was in force, and under that Act an acknowledgment by an agent was not sufficient to save the operation of limitation. This was held by their Lordships of the Privy Council, whose decision was followed by this and other courts.

It is, however, contended on behalf of the appellant that as the mortgage was made in 1823 and the right to bring a suit had not become extinct when Act No. IX of 1871 and Act No. XV of 1877 came into operation, the acknowledgment would, under the provisions of those Acts, give a new start for the computation of limitation if made by an agent duly authorized in that behalf. In our opinion this contention is well founded. No doubt if the plaintiff had to rely on the acknowledgment in a suit which was governed by Act XIV of 1859, an acknowledgment by an agent would not be sufficient, but at the time when the suit of the plaintiff was instituted, the present law of limitation was in force, an

(1) (1878) I. L. R., 1 All., 642. (2) (1904) 1 A. L. J. R., 355, 357.

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therefore the suit would be governed by that law. The provisions of the present Act, namely, Act No. IX of 1908, are similar to those of Act No. IX of 1871 and Act No. XV of 1877 in this respect. If Act No. XIV of 1859 had never been enacted, the plaintiff could, under the provisions of the later Act mentioned above take advantage of the acknowledgment made in 1868, if it was an acknowledgment by an agent duly authorized to make it. The mere fact that the Act of 1859 was for some time in force would not deprive the plaintiff of the benefit of the provisions of the later Acts. This was held by the High Court of Calcutta in *Mohesh Lal* v. *Busunt Kumaree* (1), in which the case law on the subject is set forth, including the case of *Valia Tamburatti* v. *Vira Rayan* (2).

The learned vakil for the respondent has relied on the case of *Rahmani Bibi* v. *Hulas Kuar* (3). In that case the point now raised was neither discussed nor decided. The case of *Hanuman Prasad* v. *Raghunandan Singh* (4) is distinguishable, as in that case the claim on the mortgage had become time-barred before the Limitation Acts of 1871 and 1877 came into operation.

For these reasons we are of opinion that the courts below were wrong in holding that the acknowledgment relied on by the plaintiff, namely, that of the 4th of March, 1868, could not, if made by an agent duly authorized, be availed of for the purpose of saving the operation of limitation. Assuming that the suit filed on the 4th of March, 1868, on behalf of the predecessor in title of the defendant was filed and verified by an agent of the plaintiff's predecessor in title, the statement therein contained would be an acknowledgment by an agent duly authorized within the meani ng of section 19 of the Limitation Act of 1908.

We accordingly allow the appeal, set aside the decrees of the courts below and remand the case to the court of first instance under order XLI, rule 23, of the Code of Civil Procedure, for trial on the merits. The court will have to determine whether the acknowledgment in question was an acknowledgment made by an agent of the plaintiff's predecessor in title duly authorized

(1) (1880) I. L. R. 6 Calc., 340.
(2) (1876) I. L. R., 1 Mad., 228.
(3) (1878) I. L. R., 1 All., 642.
(4) (1904) 1 A. L. J., 355.

in that behalf within the meaning of the Limitation Act, and in the event of finding that question in favour of the plaintiff it will try the other questions raised in the suit.

Appeal decreed.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

JAGANNATH PRASAD (PLAINTIFF) *v.* BADRI PRASAD AND OTHERS (DEFENDANTS.)*

Partition—Abadi not formally divided, but separate portions thereof taken possession of by the various owners—Agreement amongst owners—Rights of owners as to portions in possession of each.

A village was divided into three mahals, with the exception of the *abadi*, as to which it was found that it had not been divided between the mahals by demarcation on the village map, or on the spot, but the owners of the mahals had been in separate possession of portions of it.

Held that the only possible inference from this finding was that the parties had agreed among themselves as to their possession of the *abadi*, and that, so long as the agreement continued, each party was entitled to use the portion in his possession in any way he pleased, so long as such user or possession did not interfere with the user or possession of the owners of the other mahals. *Kumudini Mazumdar* v. *Rasik Lal Mazumdar* (1) followed.

THIS was an appeal under section 10 of the Letters Patent from a judgement of Karamat Husain, J. The facts of the case sufficiently appear from the judgement under appeal which was as follows :—

"The plaintiff brought an action against the defendants and asked for the following reliefs :—'It may be declared that the plaintiff is the owner and in possession of the land in dispute ; that the defendants have no right whatever to interfere with and offer obstructions to the plaintiff ; that they have no right to offer obstructions to the plaintiff in building walls, &c., on the land in dispute and that they have no right of any kind whatever against the plaintiff.' The main defence was that the property was joint. The court of first instance decreed the plaintiff's claim and that decree was affirmed by the lower appellate court. That court found as follows :—'I find that the land in suit is part of the *abadi* of mauza Sisolar, which consists of three mahals, and that this *abadi* has not been divided between the mahals by demarcation on the village map or on the spot ; but that the owners of the mahals have been in separate possession of portions of it, and that the plaintiff has been in possession of the land in suit. The defendants have no right to prevent him putting a wall round it.'

Appeal No. 42 of 1911, under section 10 of the Letters Patent.

(1) (1906) 11 C. W. N., 517.