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We refer in this connexion in particular to the decision of the Pre-emption Bench in *Kamta Prasad* v. *Ram Jag* (1), where the learned Judges state that the Full Bench case just referred to was decided on a misapprehension of the facts. For the reasons we have just given we are of opinion that the proper order to make in this case is that the plaintiffs were entitled to pre-empt a one-half share of the property on payment of one-half of the consideration. We, therefore, allow these appeals, set aside the decrees of the lower appellate court and restore the decrees of the court of first instance in each case. Parties will bear their own costs in all courts.

Appeal allowed.

FULL BENCH.

Before Sir Cecil Walsh, Acting Chief Justice, Mr. Justice Mukerji and Mr. Justice Banerji.

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UPPER INDIA RICE MILLS, LIMITED (APPLICANT) *v.* THE JAUNPUR SUGAR FACTORY, LIMITED (OPPOSITE PARTY).*

Principal and agent—Common agent of two companies—Money of one company used by the agent for the benefit of the other—Liability to refund—Limitation—"Money had and received."

Two companies, neither of whom did any regular business in the way of lending money, were managed by the same agents. From time to time sums of money belonging to the better-off of the two companies were used in the business of the other. Both companies went into liquidation and the liquidator of the company which had, so to speak, lent the money called upon the liquidator of the other company for re-payment. The claim was repudiated as time-barred.

Held, that the fact that the managing agents of the two companies were common to both would not exempt the

* Appeal No. 68 of 1926, under section 10 of the Letters Patent.
(1) (1913) I.L.R., 36 All., 60.

company which had had the use of the other's money from liability to refund; but the period of limitation would be three years from the date of each actual payment, and, in view of the fact that this period had already run when the debtor company went into liquidation, the claim was barred by time.

THIS was an appeal under section 10 of the Letters Patent from a judgement of MUKERJI, J. The facts of the case are fully stated in the judgements of the Court.

Babu *Benoy Kumar Mukerji* and Babu *Indu Bhushan Banerji*, for the appellant.

Mr. *A. Sanyal* and Munshi *Shiva Prasad Sinha*, for the respondent.

The following judgements were delivered :—

WALSH, A. C. J., and BANERJI, J. :—This is an appeal from a decision of the Judge in Companies (Winding Up). The claim is one made by the Jaunpur Sugar Factory, Limited (in liquidation), against the Upper India Rice Mills, Limited (in liquidation), for the sum of Rs. 8,514-0-10, and has been admitted by the learned Judge. The view that he took was that the money which belonged to the former company was taken from their coffers by their managing agents, Behari and Company, and applied for the benefit of the latter company, whose managing agents were also the same firm, under such circumstances as not to amount to a loan, and that it was not recoverable except upon demand, and that no demand having been made until after the liquidation, namely the 24th of January, 1925, there was no debt until that date, and that, therefore, limitation could not begin to run before that date. It was thought desirable that in the special circumstances the learned Judge himself should be a member of the Bench hearing the appeal. Certain additional facts were brought to our notice, which alter

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the complexion of the transaction. The series of transactions which actually took place clearly do not amount to an express loan. It was no part of the Jaunpur Sugar Factory's ordinary business to lend money. No formal application was ever made to them for a loan. The managing agents who in this and other company transactions have been shown by other proceedings to have been thoroughly dishonest and untrustworthy, did as they liked with the funds of all the companies managed by them, and the firm itself and the said companies were under the complete control of one Bose, the moving spirit in all of them, and a Director of the Jaunpur Sugar Factory, Limited. The moneys were taken from time to time in the form of cash, whenever it suited Bose to do so, and were entered as cash in the account of the Upper India Rice Mills, Limited, in the ledger. The fact that the agent was common to both principals would not, as the learned Judge has pointed out, exempt the principal, which took the benefit of money belonging to the other principal, from liability to return it. The real question is—when did that liability arise? The dates between which the moneys were taken were the 19th of April, 1920, to the 26th of September, 1921. In their report and revenue account for 1922, signed by Bose himself as Director, these moneys were described as advances or loans. It may, therefore, be said that Behari and Company, as agents representing both the creditor and the debtor, intended them to be so regarded. No doubt the true facts of the transaction had been deliberately kept from the Directors of both principals, but in such a case the law will always presume, or imply, a promise to repay. The Upper India Rice Mills Company, if they had been sued for the total amount due at the end of 1921, would have found themselves in this dilemma. Either they had received the money and

applied it to their own purposes, rightfully, in which case a promise to repay it must be implied against them, or they had received it wrongfully by the secret and deceitful misapplication by their own agent of the Sugar Factory's money, in which latter case the money would be recoverable from them as "money had and received" to the use of the true owner. In our view they would have had no defence to an alternative claim, if it had been so made, at the end of 1921. In either case the period of limitation would be three years from the date of each actual payment. The rule is that the liquidator of a company which is in liquidation being a trustee for the creditors, time does not run after an order, or resolution, for winding up. The date for testing the liability is the commencement of the winding up. But in this case three years had already run when the Upper India Rice Mills, Limited, went into liquidation, namely in October, 1924. The result, therefore, is that the whole claim is barred and must be rejected. Under the circumstances each liquidator must pay his own costs out of the assets of the company with which he is concerned.

MUKERJI, J. :—This is a Letters Patent Appeal and the question for decision is one of pure law.

The facts are given in the judgement under appeal and have to be reiterated for the purpose of considering the point of law involved. A few years back, several limited companies were started under the auspices of a firm known as Behari and Company. They were managing directors of these companies. We are concerned here with two companies—one, the appellant here, is the Upper India Rice Mills, Limited, and the other is the Jaunpur Sugar Factory, Limited. Both were managed by Behari and Company. The business for which these two companies were floated is indicated by their names and it was no

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part of the business of any of these two companies to lend money or to act as bankers. For some reasons, which need not be detailed here, there was more money in the Jaunpur Sugar Factory than in any of the other companies. In order to continue the business of the Rice Mills, Behari and Company found it expedient to employ the money, which came into their hands as agents of the Sugar Factory, in the business of the Rice Mills. The result was that from time to time, money, which was the property of the Jaunpur Sugar Factory, was used for the business of the Upper India Rice Mills, Limited. The directors of these companies were ignorant of these transactions. Money was so used for the appellant company between the dates April, 1920, and September, 1921. Some entries signifying these transactions were made in the books of both companies. Both the companies went into liquidation. The Rice Mills went into voluntary liquidation in October, 1924, and the Sugar Factory was ordered to be compulsorily wound up on the 28th of March, 1924. The liquidators of the Sugar Factory found that some money had been utilized by the Rice Mills and they, therefore, asked the voluntary liquidator of the Rice Mills to pay up the sum. This was in January, 1925. The claim was repudiated on the ground that it was time-barred. There can be no doubt that, if three years' rule of limitation be applied from each of the dates on which money was employed for the purposes of the Rice Mills, the claim would be time-barred. The voluntary liquidator having repudiated the claim of the Sugar Factory, the matter was referred to me, as the Company Judge, and I held that the claim was not time-barred. In appeal, it is contended that this decision was erroneous.

It may be conceded that one and the same man, acting as an agent for two principals may, by his act alone, bind his principals, in certain circumstances.

For example, a commission agent, acting as the seller and purchaser of goods, may purchase for one party goods brought to him for sale by another party. But in this case, as already stated, it was no part of the business of the Sugar Factory to lend money and it is common ground that in lending the money—I am using the expression "lending" in its general and non-legal sense—the agents exceeded their power. The Rice Mills, through their agents, must be taken to have known that such was the case. In the circumstances, I am still of opinion that there was, initially, no loan advanced by the Sugar Factory to the Rice Mills.

The act of the agent, in so lending out the money, was unauthorized. That being so, the Sugar Factory could sue to recover the money from the Rice Mills, only by adopting the transaction and by ratifying it. If the Sugar Factory repudiate the transaction, as it is entitled to do, they cannot sue the Rice Mills to refund. For, then there is no privity of contract between them and the Rice Mills. If the original transaction be ratified, it would become a good loan, and then all the consequences of a loan would follow and the claim would be time-barred.

If a claim be laid on the ground that, in using the money belonging to the Sugar Factory, the Rice Mills laid themselves liable to restore the benefit, on the principle involved in section 70 of the Contract Act, the Sugar Factory have to admit that what was done by their agent was done "lawfully," and article 62 of the Limitation Act would apply. In any view of the case, the present claim cannot be maintained by the Sugar Factory without an admission on their part that the act of the agent was good enough for being accepted and ratified.

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It was, no doubt, open to the Sugar Factory to tell the agents that they had misapplied the money and they must make it good. The liquidators can do the same. But in such a case, there would be cast no liability on the Rice Mills to pay. The Rice Mills may be liable to the agents of the Sugar Factory, but that is another matter.

On further consideration, I agree in thinking with my learned colleagues that my judgement on the question of limitation was wrong. But the reason is to be found in the fact that the source of the liability of the Rice Mills was not investigated, while I sat alone. It was not investigated even on appeal. Indeed, the point was not even touched. The liability was admitted throughout, except on the ground of limitation. The sole point argued in appeal, as in the original court, was that the same agent could make a valid contract binding the principals—a proposition which I could not accept before and which I cannot accept even now, in the circumstances of the present case.

I agree in the order proposed.