

## APPELLATE CIVIL.

1881  
May 5.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Straight.*

BILLINGS (DEFENDANT) v. THE UNCOVENANTED SERVICE  
BANK (PLAINTIFF).\*

*Promise to pay a debt barred by limitation—Act IX of 1872 (Contract Act), s. 25 (3)—  
Judgment-debt.*

The holder of a decree for money, dated the 22nd June, 1863, applied for execution on the 23rd February, 1869. In September 1869, before the decree had been executed, the judgment-debtor, admitting that a certain amount was due under the decree, agreed to pay such amount by instalments, and that, if default were made, the decree should be executed for the whole amount thereof. Default having been made early in 1873 the decree-holder applied at once for execution of the decree. On the 5th May, 1873, a petition, signed by the judgment-debtor, was preferred on his behalf to the Court executing the decree, such petition being in effect as follows:—"Execution-case for Rs. 6,839-15-3: in this case the decree-holder has filed an application for execution of his decree in consequence of a default in payment of instalments: the fact is that the petitioner has failed to pay the instalments simply owing to illness, otherwise he has no objection to the decree-holder's demand: in future he will not fail to pay instalments: he has written a letter to plaintiff asking him to pardon his breach of promise and to agree to realize the decree-money by the instalments formerly fixed, and to stay execution of the decree for the present: the decree-holder has granted this request: the petitioner therefore presents this petition and prays that monthly instalments of Rs. 150 may be fixed, and execution of the decree be postponed for the present: in case of default being made in payment of two instalments in succession, the decree-holder will be at liberty to realize the balance of the decree-money with interest at twelve per cent per annum." At the time such petition was preferred execution of the decree was barred by limitation. *Held* that a "debt" within the meaning of s. 25 (3) of Act IX of 1872 includes a "judgment-debt", and such petition was a promise to pay a debt barred by limitation within the meaning of that law, and a suit founded on such petition to recover the balance of the money due under the decree was maintainable.

THE facts of this case are sufficiently stated for the purposes of this report in the order of the High Court hereinafter set out.

Messrs. *Hill* and *Leach*, for the appellant,

Messrs. *Colvin* and *Conlan*, for the respondent.

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\* First Appeal, No. 2 of 1880, from a decree of J. Alone, Esq., Subordinate Judge of Agra, dated the 6th October, 1879.

1881

BILLINGS  
v.  
THE UNCOVENANTED  
SERVICE BANK.

The order of the High Court (STUART, C. J., and STRAIGHT, J.,) so far as it is material for the purposes of this report, was as follows:—

ORDER.—This was a suit brought by Mr. C. W. Stowell, the Manager at Agra of the Uncovenanted Service Bank, Limited, to recover Rs. 4,994-3-6, balance of Rs. 6,839-15-3, due from the defendant under an alleged agreement made between the parties on the 5th May, 1873, with interest at the rate of twelve per cent., amounting to Rs. 2,260-14-6, or in all Rs. 7,255-2-0. The defendant, William Alfred Billings, in the lower Court contested the plaintiff's claim on the following grounds:—(i) That the arrangement of the 5th May, 1873, was not a contract within s. 25, cl. (3), of the Contract Act, and could not revive a debt already barred by limitation; (ii) that even assuming it to be a fresh contract, the suit is barred by limitation, which began to run on the 5th January, 1876; (iii) that the letter of the 8th March, 1876, sent by defendant to the plaintiff, should not be admitted in evidence as an acknowledgment of liability within s. 20 of Act IX of 1871, being insufficiently stamped, and because it was written after limitation had run out, and also because it was obtained by fraud; (iv) that the cause of action, if any, accrued on the 5th January, 1876; (v) that the defendant is not indebted to the Bank, but on the contrary the Bank owes him a sum of Rs. 70. The Subordinate Judge of Agra decreed the plaintiff's claim, deciding all the points taken in the statement of defence against the defendant. The defendant now appeals to this Court, and the questions raised before the Subordinate Judge are substantially repeated here, these further contentions being urged:—(i) That, as the arrangement of the 5th May, 1873, is contained in the petition to the Court at Meerut, if it amounts to a fresh contract between the parties, it is inadmissible in evidence as not being stamped in accordance with law; (ii) that the acknowledgment of the 8th March, 1876, is equally inadmissible without a stamp.

The following facts must be recapitulated. For sometime prior to 1868 the defendant had been borrowing money of the Uncovenanted Service Bank, and on the 22nd June of that year a judgment for a considerable amount was obtained against him,

1881

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 BILLINGS  
 v.  
 THE UNCO  
 NANTED SI  
 VICE BAN

which, upon appeal, was confirmed by this Court on the 5th January, 1869. Application for execution was made to the Court at Agra on the 23rd February, 1869, and after inquiry Rs. 7,669-14-5 having been found to be due from defendant to the Bank, a certificate was granted to the decree-holder, Mr. Stowell, authorizing him to take out execution in the Court of the Judge of Meerut, within whose jurisdiction Mr. Billings was then residing. But before any active steps had been adopted to realize the decree Mr. Stowell and the defendant entered into an agreement on the 7th September, 1869, by which the latter, admitting the amount due from him to be Rs. 7,879-14-5, promised to pay it in monthly instalments of Rs. 150, and if he made default, the whole decree was to be executed at once. The instalments would appear to have been paid for sometime with regularity, but default having occurred early in 1873, application was at once made to execute the whole decree, and on the 15th April an order allowing it was made. But upon the 5th May, 1873, the pleader for the decree-holder filed a petition signed by the defendant to the following effect:—"Execution-case for Rs. 6,839-15-3: in this case the plaintiff, decree-holder, has filed an application for execution of his decree in consequence of a default in the payment of instalments: the fact is that the petitioner has failed to pay the instalments simply owing to illness, otherwise he has no objection to discharge the plaintiff's demand: in future he will not fail to pay any instalment: he has also written a letter to the plaintiff asking him to pardon his breach of promise, and agree to realize the decree-money by instalments formerly fixed, and to stay the execution of the decree for the present: the plaintiff has also granted this request of the petitioner: the petitioner therefore presents this petition and prays that monthly instalments of Rs. 150 may be fixed, and the execution of the decree be postponed for the present: in case of two defaults in payment of successive instalments, the plaintiff will be at liberty to realize the balance of the decree money with interest at twelve per cent. per annum: the execution case may be struck off." Upon this petition the execution was struck off. Again for sometime the defendant continued to pay his instalments, but having again made default on the 5th January, 1876, the decree-holder applied to the Court at Agra to execute

1881  
 BILLINGS  
 v.  
 THE UNCOVERED  
 SERVICE BANK.

his decree. The defendant thereupon pleaded that its execution was barred by limitation, and further that it had already been satisfied by payment. On the 16th May, 1876, the Judge disallowed the judgment-debtor's pleas, and ordered execution to proceed, but upon appeal to this Court his decision was reversed. The decree-holder being thus barred from enforcing his original decree brought the present suit on the 28th February, 1879, on the basis of an agreement of the 5th May, 1873, and he alleges his cause of action to have accrued in April, 1876, when two successive instalments remained unpaid, and more particularly on the 31st January, 1877, when this Court allowed his judgment-debtor's objection to the execution of his decree.

The case on the part of the appellant was very ably argued before us by Mr. Hill, and his substantial contentions were that the contract contained in the petition of 5th May, 1873, upon which he urged the plaintiff's suit was brought, was void, as being without consideration: that exception (3), s. 25 of the Contract Act did not apply to it, because the word "debt" used therein did not mean judgment-debt, and in support of this view he referred to the analogous provisions of s. 20, Act IX of 1871, and quoted two decisions of the Calcutta Court,—*Kally Prosonno Hazra v. Heera Lal Mundle* (1); *Mungol Prashad Dichit v. Shama Kanto Lahory Chowdhry* (2). He further argued that, assuming the petition of 5th May, 1873, to be a good contract, it must be regarded as in the nature of a bond, and being insufficiently stamped, that it was inadmissible in evidence; also that the letter of the 8th March, 1876, being written after limitation had run out, was not such an acknowledgment as would give the plaintiff a fresh start, and if it was looked upon as a new contract was insufficiently stamped, and therefore inadmissible. The plaintiff's cause of action, he contended, arose upon the 5th January, 1876, and the present suit not having been brought till the 28th February, 1879, is barred by limitation. Mr. Leach, who followed on the same side, directed his attention to the accounts, questioning the accuracy of the finding of the Subordinate Judge as to the balance due, and arguing, among other matters, that payments made by the defendant

(1) I. L. R., 2 Calc. 468. (2) I. L. R., 4 Calc. 708.

to the Bank on account of the principal debt had improperly been credited to the account of interest. For the respondent Mr. Conlan replied that the suit was not based upon the petition itself as a contract, but upon an agreement between the parties of which it was evidence, and in support of his contention as to its admissibility he quoted *Ramdeyal v. Jhannan Lal* (1); R. A. No. 82 of 1876 decided the 3rd May, 1877; R. A. No. 85 of 1876 decided the 9th May, 1877. For such an agreement he argued the barred judgment-debt was good consideration—*Heera Lal Mookhopadhya v. Dhunput Singh* (2); and moreover limitation had not run upon the agreement of the 7th September, 1869, and as the plaintiff might have sued the defendant under that, there was this further consideration. With regard to the letter of the 8th March, 1876, he contended that was a clear acknowledgment of liability under the agreement of the 5th May, 1873, and was given within three years from that date.

We are of opinion that this appeal should be dismissed and that the plaintiff should succeed. The only difficulty we have had is in determining whether the petition of 5th May, 1873, is to be regarded as the agreement itself, and therefore the basis of the suit, or whether it can be treated as evidence of a verbal arrangement between the parties. It appears to us that, in order to bring the plaintiff's case within exception (3), s. 25 of the Contract Act, it is necessary for him, before he can establish a good agreement, to show a promise in writing signed by the person to be charged therewith, and that it is only upon such written promise a suit can be maintained, when the consideration for it is a barred debt. We do not think that we can admit a parol understanding between the parties of which the petition is merely evidence. It either is or is not a promise in writing amounting to a contract within exception (3), cl. 25 of the Contract Act. If it is, then it must necessarily be the basis of the suit; if it is not, then the plaintiff's case must fail. In our judgment, however, the petition of the 5th May, 1873, distinctly falls within the terms of the section of the Contract Act already referred to, and is a promise in writing signed by the person to be charged therewith to pay a debt of which the creditor

1881

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 BILLINGI  
 V.  
 THE UNCOV  
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 VICE BANJ

(1) N.-W. P. H. C. Rep., 1871, p. 14. (2) I. L. R., 4 Calc 500.

1881

MR. BILLINGS  
 v.  
 THE GOVERNMENT  
 SAVINGS BANK.

might have enforced payment but for the law relating to the limitation of suits. We see no analogy in the terms of s. 20 of Act IX of 1871, for while they deal with an acknowledgment of a debt during the period limitation is running, the section of the Contract Act with which we are dealing makes a barred debt in specific terms good consideration for a promise in writing to pay. The plaintiff's suit therefore can properly be maintained on the petition of 5th May, 1873. But it is further contended that as a contract the petition is insufficiently stamped. The objection is taken for the first time in this Court, and were we constrained to give effect to it, we should certainly afford the plaintiff all the opportunities that could be given him to make up any deficiency. But it does not appear to us that the appellant's contention that the petition amounts to a bond can be maintained: on the contrary the document seems naturally to come within art. 11, sch. ii, Act XVIII of 1869.

(After holding that the letter of the 8th March, 1876, was an acknowledgment within s. 20 of Act IX of 1871 of the liability under the agreement of 5th May, 1873, and of the debt due to the Bank, and that being sufficiently stamped it was properly receivable in evidence in order to save limitation, and the suit had therefore been properly brought and was within time, the order continued as follows:—) The remaining question relates to the accounts and to the precise amount of principal and interest to be decreed to the plaintiff. We are not altogether satisfied at the mode in which the Subordinate Judge arrived at the sum decreed by him, and before finally disposing of this appeal we think that it would be desirable to submit the accounts to some person of experience and ability in banking matters, to be agreed upon between the parties and approved of by this Court, for him to determine what the balance is remaining due from Mr. Billings to the Bank. His starting point should be the 5th May, 1873, when the defendant admitted Rs. 6,839-15-3 was owing from him. When this inquiry has been made and a report sent in to us, we can then proceed finally to dispose of the case. For the present it would be sufficient to say that this appeal is dismissed in so far as objection was taken in appeal to the plaintiff's maintaining his suit, but the amount to be decreed to him and the question of costs are reserved.