APPELLATE CIVIL.

Before Terrell, C. J. and Jwala Prasad, J.

1929.

Dec., 14, Jan., 18.

DEORAJ TEWARI

v.

INDRASAN TEWARI.*

Limitation Act, 1908 (Act IX of 1908), section 19—acknowledgment of liability and promise to pay barred debt, distinction between—Contract Act, 1872 (Act IX of 1872), section 25(3)—barred debt, acknowledgment of—promise to pay, absence of—effect.

Held, on a review of the following decisions:

Maniram Seth v. *Seth Rupchand*(1), *Gobind Das* v. *Sarju Das*(2), *Nand Lal* v. *Partab Singh*(3), *Ganga Prasad* v. *Ram Dayal*(4), *Ramaswami Pillai* v. *Kuppuswami Pillai*(5), *Chowksi Himutlal Harivulubhdas* v. *Chowksi Achrutlal Harivulubhdas*(6), *Hargopal Premsukdas* v. *Abdul Khan Haji Muhammad*(7), *Shankar* v. *Mukta*(8), *Tribhovan Gangaram* v. *Amina*(9), *Debi Prasad* v. *Ram Ghulam Sahu*(10), *Prasanna Kumar Pal* v. *Panaulla Miji*(11), *Ram Bahadur Singh* v. *Babu Damodar Prasad Singh*(12) and *Spencer* v. *Hemmerde*(13),

(*i*) that an acknowledgment of debt within the meaning of section 19, Limitation Act, 1908, is distinguishable from a promise to pay a barred debt under section 25(*3*) of the Contract Act, 1872;

*Appeals from Appellate Decrees nos. 1187 and 1188 of 1926, from a decision of Maulavi Wali Muhammad, Subordinate Judge of Champaran, dated the 6th May, 1926, modifying a decision of Babu Girindranath Ganguli, Munsif of Bettiah, dated the 16th November, 1925.

(1) (1906) I. L. R. 33 Cal. 1047, P. C.
(2) (1908) I. L. R. 30 All. 268.
(3) (1922) I. L. R. 3 Lah. 326.
(4) (1901) I. L. R. 23 All. 502.
(5) (1910) 20 Mad. L. J. 656.
(6) (1884) I. L. R. 8 Bom. 194.
(7) (1872) 9 Bom. H. R. 429.
(8) (1898) I. L. R. 22 Bom. 513.
(9) (1885) I. L. R. 9 Bom. 516.
(10) (1914) 19 Cal. L. J. 263.
(11) (1923) A. I. R. (Cal.) 659.
(12) (1921) 2 Pat. L. T. 308.
(13) (1922) 2 A. C. 507.

(*ii*) that, in order to give a fresh start to limitation, an acknowledgment, in which there is no express promise implying a new contract to pay, must be made before the debt is barred by time.

Where, therefore, a chitha contained a series of items of debt, all taken by defendant from the plaintiff, with the dates of the loans mentioned therein, and in the end bore the following endorsement "Examined the account. It is correct", *held*, that each item was a separate debt in itself and that the endorsement was merely an acknowledgment of the existing debt, giving a fresh start to limitation in respect of such items only as were not, at the date of endorsement, barred by limitation.

Appeals by the plaintiff.

B. N. Mitter and *S. N. Banerji*, for the appellant.

N. C. Sinha and *Bhagwan Prasad*, for the respondent.

18th Jan., 1929.

JWALA PRASAD, J.: These two second appeals are by the plaintiff Deoraj Tewari. He instituted two suits in the Court of the Munsif of Bettiah: (*1*) no. 149 against Indrasan Tewari based on a chitha executed by Indrasan Tewari in favour of the plaintiff for Rs. 85-3-0 on 10th Chait 1329 (23rd March, 1922) and (*2*) no. 150 against Ramphal based on a chitha executed by Ramphal Tewari in favour of the plaintiff for Rs. 496 on 20th Phagun 1330 (21st February, 1923), and he claimed recovery of the amounts due under the said chithas with costs and interest. The defendants denied having taken any money from the plaintiff or having executed the chithas in question.

The Munsif by his judgment, dated the 16th November, 1925, overruled the contention of the defendants and decreed the plaintiff's suit. He disallowed the plaintiff's claim with respect to Rs. 77-7-6 with interest of Rs. 30 in the case against Indrasan Tewari (Suit no. 149), as being barred by limitation and gave a decree with respect to the remaining amount claimed. He decreed suit no. 150 in toto against Ramphal Tewari.

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On appeal by the defendants, the learned Subordinate Judge by his decision, dated the 6th May, 1926, reduced the plaintiff's claim still further. He agreed with the Munsif that the first item of Rs. 72-7-6 entered against 'date 6th Magh balance of the account of 1326' was barred by limitation, inasmuch as on the date of the execution of the chitha when the aforesaid item amongst others was acknowledged and admitted, the debt was already barred and the acknowledgment did not revive it. He also disallowed the last item in the chitha, namely, Rs. 359-4-0, the debt of Ramanand the liability whereof was taken by the defendant Indrasan, on the ground that the debt was not proved and the hand-note executed by Ramanand in respect of the original debt taken by him was not filed. Similarly, in suit no. 150 he disallowed the sum of Rs. 52, which was an adjustment of account up to 1328 Fasli mentioned in the chitha executed by Ramphal Tewari. He also disallowed Rs. 7-10-0 as road cess paid on behalf of Indrasan Tewari, as that was shown in Indrasan Tewari's account (Exhibit 1). He further disallowed Rs. 359-4-0, the amount of Ramanand's debt, on the same ground as in the case of Indrasan Tewari, namely, that this debt was not proved.

Now, so far as the debt of Ramanand is concerned, there is no doubt that the view of the learned Subordinate Judge is wrong. Ramanand was uncle of Indrasan Tewari and brother of Ramphal Tewari, and he owed to the plaintiff Rs. 718 and had executed a hand-note. Ramanand died in 1329, and both Indrasan Tewari and Ramphal Tewari agreed to pay each half the amount of the debt. The interest was remitted by the plaintiff. The defendants in their chithas acknowledged the amount to be correct and therefore the original debt of Ramanand need not have been proved.

The question is whether the Court below was wrong in disallowing any of the items as having been

barred by limitation. Now, the chithas in question contain a series of items with the dates of the loan mentioned therein and in the end it is subscribed as follows: "Examined the account. It is correct." This is an acknowledgment of the existence and correctness of the debt in question under section 19 of the Limitation Act which enacts that an acknowledgment of debt gives a fresh start for commutation of the period of limitation but that the acknowledgment must be before the debt acknowledged is actually barred by time. The effect of the endorsement is that all the items mentioned in the chithas are acknowledged to have been borrowed on the dates mentioned against each of them. Now, at the time when the acknowledgment was made if such of the items as happened to be not within three years of the date when the chithas were executed were acknowledged, the acknowledgment would not have the effect of reviving those debts. It only gives a fresh period of limitation from the date of acknowledgment in respect of such items only as were not already barred at the time when the acknowledgment was made. This is supported by a number of authorities of various High Courts most of which have been referred to in the case of *Suraj Prasad Panday* v. *Mr. W. W. Boucke*(1). The chithas are not in any sense "accounts stated" under Article 64 of the Limitation Act for want of mutuality. There are no reciprocal debits and credits in the chithas in question. The chithas consist of only one-sided debts all of which were taken by the defendants from the plaintiff. Each of the items is, therefore, a separate debt in itself and each of them will therefore be barred on different dates. In *Muniram Seth* v. *Seth Rupchand*(2) the items of debts were incurred between the 24th January, 1897, and the 12th of May, 1898, and the acknowledgment was made on the 28th September, 1899. The question there was of course whether the mention of the debt in a petition of objection in probate proceedings

(1) (1920) 1 Pat. L. T. 190. (2) (1906) I. L. R. 33 Cal. 1047, P. C.

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would be an acknowledgment or not. Their Lordships of the Judicial Committee observed as follows:— "The last item against the respondent in account between them is dated 12th May, 1898, and the indebtedness for principal must therefore have been incurred between 24th January, 1897, and 12th May, 1898, and the periods of limitation applicable to the several components of the total demand for principal would expire at various dates between 24th January, 1900, and 12th May, 1901, and in the absence of a sufficient acknowledgment before such periods had accrued the debt or debts would be barred. An acknowledgment according to the Indian Act must be signed by the party to be affected by it" and their Lordships explained the meaning of an acknowledgment as a party having acknowledged "his liability to pay his debt". Continuing their Lordships observe: "It has been clearly pointed out that the acknowledgment was made before the statutory period had been run out. Thus, one requisite of section 19 is complied with. The necessity of signature by the party to be charged is also complied with." No doubt, under the English Law an acknowledgment of a debt implies a promise to pay. But it is clear from the express provision in section 19 of the Limitation Act that an acknowledgment, in which there is no express promise implying a new contract to pay, must be made before the several components of the account at various dates are barred by time. Upon this footing an acknowledgment under section 19 of the Limitation Act was distinguished from a promise to pay a barred debt under clause (*3*) of section 25 of the Indian Contract Act in *Gobind Das* v. *Sarju Das*[1] and it was observed that their Lordships of the Judicial Committee in the aforesaid Privy Council decision had no intention of departing from the clear meaning of the language of section 19 of the Limitation Act, inasmuch as the acknowledgment in that case was

(1) (1908) I. L. R. 30 All. 268.

made before the statutory period had run out and their Lordships observed "Thus, one requisite of section 19 is complied with." Accordingly it was held by the Allahabad High Court that "under section 25, sub-section (*3*), of the Indian Contract Act, a promise made in writing and signed by the person to be charged therewith to pay a barred debt is a good consideration, but there must be a distinct promise and not a mere acknowledgment". In *Nand Lal* v. *Partab Singh*(1) LeRossignol, J., stated the distinction between the English Law and the Indian Law on the subject as follows:—"In English Law it is quite clear that an acknowledgment of debt has always been understood to connote and imply a promise to pay, but in India, probably by reason of the backward state of civilization, the profound ignorance of the indebted classes and the low state of commercial morality, this doctrine has never found favour and no authority has been shown to us for holding that a mere acknowledgment of debt has ever been held in this country to justify the implication of a promise to pay. In this case, however, it does not appear to us necessary to decide the point whether a promise to pay is to be inferred from the mere language of the bahi entry, for, having regard to the circumstances of the striking of the balance and the admitted antecedent relations of the parties, we have no hesitation in holding that the entry is an account stated between the parties and the suit, therefore, falls under Article 64 of the Limitation Act."

Vide also *Ganga Prasad* v. *Ram Dayal*(2). In *Ramaswami Pillai* v. *Kuppuswami Pillai*(3) the endorsement was made in the hand-writing of the defendant and signed by him to the effect that on settlement of account on that date it was found that Rs. 220 had been paid and the "balance due was

(1) (1922) I. L. R. 3 Lah. 326. (2) (1901) I. L. R. 23 All. 502.
(3) (1910) 20 Mad. L. J. 656.

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Rs. 80 " and it was held that it was a mere acknowledgment and not promise to pay under section 25, clause (3) of the Contract Act. In *Chowksi Himatlal Harivalubhdas* v. *Chowksi Achrutlal Harivalubhdas* (1) it was held that a khata or account bearing a stamp of one anna acknowledging the debt is not a promise to pay within the meaning of section 25, clause (3) of the Contract Act, but is merely an acknowledgment. In *Hargopal Premsukdas* v. *Abdul Khan Haji Muhammad*(2) it was pointed out that an endorsement like the following "read over item by item and compared the account and found it to be correct " is merely a settlement of the balance due on the examination of accounts of an antecedent debt, the parties agreeing as to how much of the debt remains due. In such a case there is plainly no new contract giving rise to a new cause of action under section 25(3) of the Contract Act. In *Shankar* v. *Mukta*(3) the khata showing entries with signature across a receipt stamp of the debtor was held to be merely an acknowledgment of the correctness of the account; so also in *Tribhovan Gangaram* v. *Amina*(4). In *Debi Prosad* v. *Ram Ghulam Sahu*(5) a sarkhat had an entry " Rs. 105 former cash " consisted of sums aggregating to Rs. 54-4-0 advanced on or before the 22nd April, 1909. It was held that the acknowledgment contained in the sarkhat, dated the 4th October, 1912, being more than three years from the date of the aforesaid advances amounting to Rs. 54-4-0, would not save the said sum from being barred by limitation under section 19 and the said sum of Rs. 54-4-0 was disallowed. There are cases in which an acknowledgment is not merely an admission of an existing debt but the words there are such from which a clear promise to pay is made out, such as fixing the date of payment and so on. Such an acknowledgment would come under section 25(3) of the Indian Contract Act and not only under section

(1) (1884) I. L. R. 8 Bom. 194.
(2) (1872) 9 Bom. H. R. 429.
(3) (1898) I. L. R. 22 Bom. 513.
(4) (1885) I. L. R. 9 Bom. 516.
(5) (1914) 19 Cal. L. J. 263.

19 of the Limitation Act: vide *Prasanna Kumar Pal and Sanatan Kunda* v. *Panaulla Miji and Umar Ali Miji*(1). The decision of a Division Bench of this Court (Das and Ross, JJ.) in *Ram Bahadur Singh* v. *Babu Damodar Prasad Singh*(2) is exactly on the point in question. In that case the money was advanced to a joint family some time before 1308 Fasli. In 1318, that is long after the debt had become barred by time, there was a settlement of accounts between the parties. The debt was split up into three equal parts and the managing members of each of the three branches acknowledged their several liability for that sum, stating that the account was made up up to 8th Jeth, 1318 Fasli and that the said sum had fallen due to the Kothi which is right and correct. The signature was on one anna stamp. Upon a review of the authorities on the subject it was held that "Under English Law the renewal of liability may be made before or after the debt is barred by the Statute of Limitation. But under the Indian Law, a distinction has always been drawn between 'an acknowledgment' under section 19 of the Limitation Act and 'a promise' under section 25 of the Contract Act. An acknowledgment no doubt, implies a promise to pay, but under section 25 the promise must be distinctly expressed and a mere acknowledgment is insufficient to create a new contract as is contemplated under section 25 to revive a barred liability." In the recent case of *Spencer* v. *Hemmerde*(3) the English Law on the doctrine of acknowledgment has been fully reviewed and elucidated in the House of Lords. It has received Statutory recognition in what is commonly called Lord Tenterden's Act (IX Geo., 4, Chapter 14) which provides that

"In actions of debt or upon the case grounded upon any simple contract no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them.

(1) (1923) A. I. R. (Cal.) 659. (2) (1921) 2 Pat. L. T. 308.
(3) (1922) 2 A. C. 507.

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or to deprive any party of the benefit thereof, only such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby."

Thus, all that is required in England is that there must be an acknowledgment, or promise to pay a debt whether it is barred by limitation or not in order to take the case out of the Statute of Limitation. Therefore, a simple or unconditional acknowledgment under the English Law of a debt already barred by limitation will be sufficient to take the case out of the Statute of Limitation provided there were no expressions qualifying or negativing the promise implied by the acknowledgment. The Statutory Law in India, on the other hand, has made two separate provisions with respect to a mere acknowledgment and a promise to pay. A mere acknowledgment, which no doubt implies a promise to pay, must be with respect to a debt not already barred at the time of the acknowledgment as provided by section 19 of the Limitation Act which opens out with the express words

"Before the expiration of the period prescribed for a suit or application in respect of any property or right."

Again, an acknowledgment gives a fresh period of limitation even if it is "accompanied by a refusal to pay" and is saddled with conditions laid down in *Explanation 1* of the section; whereas an acknowledgment which creates a new contract in respect of a barred debt under the English Law must not be qualified or conditioned, or accompanied by a refusal to pay thus negativing the implied promise to pay. In order to revive a barred debt there should be under the Indian Statute a promise to pay under section 25, clause (3) of the Contract Act. There is no such expression in that section such as acknowledgment or promise to pay as is in the English Law. The principle is the same both in the English and the Indian Law, namely, that an acknowledgment implies a promise to pay as naturally it would, but the distinction is made in the application of a mere acknowledgment and a promise to pay with respect to

debts barred or unbarred at the time of the acknowledgment or promise to pay, and this distinction has been made probably, as pointed out by LeRossignol, J., in *Nand Lal* v. *Partab Singh*(1), by reason of the backward state of civilization and the profound ignorance of the indebted classes and the low state of commercial morality. Be that as it may, there is the distinction.

Thus, the endorsements in the chithas in question in the present case are mere acknowledgments of the existing debt, and would not have the effect of reviving those items of debt which were already barred on the dates of the endorsements.

Therefore, the learned Subordinate Judge was right in excluding from the account such of the items as were already barred when the chithas were executed. The items in the account, therefore, beyond three years of the date of the chithas will be excluded, and the plaintiff will be entitled to a decree for the balance. Therefore, Rs. 72-7-6 in Suit no. 149 and Rs. 52 in Suit no. 150 were rightly disallowed as being barred by limitation. In the latter Suit no. 150 Rs. 7-10-0 as road cess was also rightly disallowed, as that sum was already charged against Indrasan Tewari in Suit no. 149.

The question now is as regards Rs. 359-4-0 charged in each of the suits as the ijmali debt of the deceased relation of the defendants, namely, Ramanand Tewari. The learned Subordinate Judge has disallowed it upon the ground that the debt was not proved and the hand-note executed by Ramanand Tewari in respect of the original debt was not filed. The learned Subordinate Judge has clearly erred in his view, for after the admission of the liability by the defendants the necessity to prove the debt of Ramanand ceased. The acknowledgement is a clear and sufficient admission of the debt. The debt of

(1) (1922) I. L. R. 3 Lah. 326.

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Ramanand consisted of a hand-note which was executed in Asin, 1327 (corresponding to September-October, 1919). The account due under the hand-note was made up and both the defendants in suits nos. 149 and 150 accepted their liability after remission to the extent of half, that is, Rs. 359 each. It was included in the account of the defendant in Suit no. 149 in the chitha (Exhibit 1), dated 10th Chait, 1329 (23rd March, 1922) and in the account of the defendant in Suit no. 150 in the chitha (Exhibit 2—1), dated the 21st Baisakh, 1329 (2nd May, 1922) and subsequent in the second chitha (Exhibit 2), dated the 20th Fagun, 1330 (21st March 1923). The acknowledgments in the aforesaid chithas (Exhibits 1 and 2—1) by the defendants in both the suits were made when the debt was not barred by limitation, and under section 19 of the Limitation Act a fresh start to limitation was thus given and the suit being within three years from the dates of the aforesaid acknowledgments the claim with respect to this item of Rs. 359 in each of the suits is not barred by limitation and the plaintiff is entitled to it, and the decision of the Court below on this point is set aside.

In the result Rs. 72-7-6 only should be deducted from the amount mentioned in the chitha (Exhibit 1) in Suit no. 149, with interest calculated from the date of the chitha at the rate of Re. 1 per cent. per mensem up to the date of the suit and future interest at 6 per cent. per annum till realisation. In Suit no. 150 the plaintiff is entitled to the amount mentioned in the chitha (Exhibit 2) minus Rs. 59-10-0 (that is, Rs. 52 plus Rs. 7-10-0) with interest at Re. 1 per cent. per mensem from the date of the chitha up to the date of the suit. The payments shown on the back of the chitha (Exhibit 2) will also be deducted with interest from the date of payments up to the date of the suit. The net amount found due on the date of the suit will beaf interest at 6 per cent. per annum up to the date of realisation. The plaintiff is entitled

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to proportionate costs on the amount found due throughout. The decree of the Court below is modified accordingly.

COURTNEY TERRELL, C. J.: I agree, and I would only add that if there had been evidence that the account of the antecedent debts had been acknowledged by Indrasan and Ramphal in one and the same transaction as the adoption of liability for their deceased uncle's debt then it might have been held that such a settlement of account was effected with good consideration on both sides as to create a new contract which would have taken the place of all the separate items of debt, whether or not considered separately, they were statute barred. It is clear, however, that the adoption by the nephews of the uncle's debt with a reduction of interest was effected long before the adjustment of account. The adjustment therefore was not in the nature of a new contract, but a mere acknowledgment of a series of items each of which must be considered on its own merits.

S. A. K.

Decree modified.

REVISIONAL CIVIL.

Before Fazl Ali, J.

MUSAMMAT MADHO BIBI

v.

HAZARI MAL MARWARI.*

1929.

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Code of Civil Procedure, 1908 (Act V of 1908), section 47 and Order XXI, rule 58—suit dismissed against defendant, whether he remains a party to the suit—objection to attachment, whether maintainable under Order XXI, rule 58—objection under section 47 dealt with under Order XXI, rule 58—Order, whether operates as a decree—appeal.

*Civil Revision no. 302 of 1928, against an order of Babu Harihar Prasad, Subordinate Judge of Monghyr, dated the 9th June, 1928.