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DAS, J.

Order IX, rule 9. As the matter stands, the plaintiff had no opportunity to have the order of dismissal set aside. This being so, the order of the learned District Judge must be set aside.

The result of this is that the probate case must be taken to be pending, and the learned District Judge will fix a date and then proceed with the hearing of the suit. If the plaintiff refuses or fails to appear on that date, then it will be open to him to dismiss the suit under Order IX, rule 8, of the Code. The appellant is entitled to the costs of this appeal.

KULWANT SAHAY, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

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Dec., 15.

JOHARMAL MATHURADAS FIRM

v.

HIRA LAL SHEWCHAND ROY.*

Limitation Act, 1908 (*Act IX of* 1908), *section* 19 *and Schedule* 1, *Articles* 85 *and* 115—"*mutual open and current account*," *what constitutes—suit for balance due—Article* 85, *applicability of—promise to pay what is found due on examination of accounts—whether is an acknowledgment—section* 19.

The term "mutual open and current account" as used in Article 85, Schedule 1, Limitation Act, 1908, means an account which consists in reciprocity of dealings between the parties and not merely of items on one side though made up of debits and credits.

Although a shifting balance is a test of mutuality, its absence is not conclusive proof against mutuality.

*Second Appeal no. 1143 of 1925, from a decision of J. A. Saunders, Esq., I.C.S., District Judge of Manbhum-Sambalpur, dated the 12th May, 1925, reversing a decision of Maulavi Najabat Husain, Munsif of Purulia, dated the 31st March, 1924.

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Where, therefore, the parties were dealing under an agreement whereunder the plaintiff was acting under instructions from the defendant and was purchasing and selling shellac on account of the defendant, sometimes the transaction resulting in profits and at other times in losses, and the plaintiff brought a suit for the recovery of the balance in his favour in respect of those transactions;

Held, that the suit was governed by Article 85 and not by Article 115 of the first Schedule to the Limitation Act, 1908.

Fyzabad Bank Ltd. v. *Ramdayal Marwari* (1), followed.

An expression of willingness to pay what might be found to be really due, on the taking of an account, is a sufficient acknowledgment under section 19, Limitation Act, 1908.

Maniram Seth v. *Seth Rupchand* (2) and *Arumuga Chettiar* v. *Ramanadan* (3), followed.

V. Andiappa Chetty v. *P. Devarajuly Naidu* (4), distinguished.

Appeal by the defendant.

This was an appeal by the defendant against the decision of the District Judge of Manbhum-Sambalpur whereby he reversed the decision of the Munsif of Purulia and made a decree for a sum of money in favour of the plaintiff.

The plaintiff was a firm carrying on the business of commission-agents at Balrampur in the district of Manbhum; and the defendant was a firm carrying on business at Sambalpur. The plaintiff claimed a sum of money on account of brokerage, interest and other expenses in relation to certain transactions entered into under an agreement between him and the defendant firm by which the plaintiff was to buy and sell shellac at Balrampur for the defendant according to the latter's instructions.

(1) (1923) 4 Pat. L.T. 571.

(2) (1906) I. L. R. 33 Cal. 1047, P. C.

(3) (1921) 59 Ind. Cas. 898.

(4) (1913) I. L. R. 36 Mad. 68.

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The subject-matter of the suit related to four transactions, the particulars whereof were set out in the judgment of the District Judge.

The plaintiff firm purchased shellac at Balrampur under instructions from the defendant and sold them on different dates. In the first transaction there was a profit; but in the remaining three transactions there was a loss, and according to the plaintiff he was entitled to a sum of Rs. 2,136-8-0 from the defendant on account of these transactions.

The only point taken in the appeal was the question of limitation, the defence being that the suit was barred by limitation. The plaintiff contended that the suit was governed by Article 85 of the First Schedule to the Indian Limitation Act; whereas the defendant's contention was that it was governed by Article 115. The plaintiff further contended that, even if the suit was governed by Article 115, the bar of limitation was saved on account of certain acknowledgments made by the defendant contained in certain letters produced in the suit. The District Judge held that the letters produced by the plaintiff did amount to an acknowledgment within the provisions of section 19 of the Indian Limitation Act, and the bar of limitation, therefore, did not apply. In this view of the case he did not think it necessary to decide the question whether the suit was governed by Article 85 or by Article 115 of the First Schedule to the Indian Limitation Act.

A. K. Roy, for the appellant.

N. C. Sinha and *S. C. Mazumdar*, for the respondent.

KULWANT SAHAY, J. (after stating the facts set out above proceeded as follows): It is contended on behalf of the appellant that the learned Judge was wrong in holding that there was an acknowledgment within the meaning of section 19 of the Indian Limitation Act in the present suit. On the other

hand, it is contended on behalf of the respondent that the learned Judge was right in holding that there was an acknowledgment which saved limitation and it is further contended that Article 85 applied to the present suit, and that the question of acknowledgment did not, therefore, arise. In my opinion the contention of the learned Advocate for the respondent is correct. In the first place, I am of opinion that Article 85 of the Indian Limitation Act applies to the present suit. This article provides for a suit for a balance due on a mutual open and current account where there have been reciprocal demands between parties and the period of limitation is three years from the close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account. The question is whether there was a mutual open and current account between parties where there have been reciprocal demands between them.

The first transaction forming the subject-matter of the suit consisted of the purchase of 75 maunds of shellac on the 29th December, 1919, which was sold by the plaintiff on account of the defendant on the 25th January, 1920. The second item consisted of the purchase by the plaintiff of 100 maunds of shellac on the 19th January, 1920; and the third a purchase of 125 maunds of shellac on the 21st January, 1920. Both these quantities of shellac were sold by the plaintiff on account of the defendant on the 25th of February, 1920. The last item consisted of the purchase of 75 maunds of shellac on the 16th March, 1920, which was sold on the 25th April, 1920. If, therefore, the transaction between the parties amounted to a mutual open and current account, then the period of limitation began to run from the close of the year 1920. The suit was instituted on the 3rd April, 1923, and was therefore within three years.

It is contended, however, on behalf of the appellant that the transactions between the parties did not amount to a mutual open and current account. The question as to what constitutes a mutual open and

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current account was considered by me in *Fyzabad Bank, Ltd.* v. *Ramdayal Marwari* (1) and there I held that a mutual open and current account between the parties is such as consist in reciprocity of dealings between them and not merely of items on one side though made up of debits and credits. In such an account each party should be able to say to the other: "I have an account against you." Although a shifting balance is a test of mutuality its absence is not a conclusive proof against mutuality. These observations apply to the facts of the present case.

In the first transaction there was a profit amounting to Rs. 3,187-8-0 and there was, therefore, a balance in favour of the defendant against the plaintiff on account of that transaction. The subsequent transactions resulted in a loss and the balance on account of those transactions was in favour of the plaintiff. There was thus a reciprocity of demands between the parties and the account was not made up of items on one side. The defendant was in a position to say to the plaintiff at one time that he had an account against him. The parties were dealing under an agreement under which the plaintiff was acting under instructions from the defendant and was purchasing and selling shellac on account of the defendant, sometimes the transactions resulting in profits and at other times in loss. At one time the accounts stood in favour of the defendant, at another time in favour of the plaintiff, and the last item in this account which was a mutual open and current account was entered on the 25th April, 1920, and was therefore within three years of the date of the suit.

Article 115 of the First Schedule to the Indian Limitation Act deals with cases relating to compensation for breach of any contract, express or implied, not in writing registered and not specially provided for in the Act. This Article, to my mind, has no application to the facts of the present case. It is clear, therefore, that the suit was not barred by limitation. In

(1) (1923) 4 P. L. T. 571.

this view of the case it is not necessary to consider as to whether there was an acknowledgment within the meaning of section 19 of the Indian Limitation Act. I am, however, of opinion that the view taken by the learned District Judge was correct and the letters relied upon by the plaintiff do amount to an acknowledgment.

The first letter, Ex. 4 (*u*), dated the 25th May, 1920, runs thus:

"Best compliments to brother Hiralalji Seo Chand Rai of Balrampur from Joharmalji Mathura Das of Sambalpur. You have written to me that you have drawn a Hundi for Rs. 1,675 on me so my man will go to you within five or six days and on looking into your account he will settle your account. Please take note of it. Please write to me in reply and let me know the market rates."

The second letter, Ex. 4(*k*), dated the 4th June, 1920, runs thus:

"Best compliment of Joharmalji Mathura Das of Sambalpur to beloved brother Hiralalji Seo Chand of Balrampur. Why have you written in this way? I write to you that within five or seven days my man will come to you. By looking into your account he will settle your account. You should also see your account carefully if there be any mistake in the same. On seeing if there be any mistake or not the account will then be settled. You should take every thing into consideration. Kindly write letters informing me of the market rate."

The word "settle" in these two letters is a translation of the vernacular word "chookti" which means "clear" or satisfy."

The learned District Judge has interpreted these letters as an expression of willingness to pay what might be found to be really due on an examination of the accounts. He was of opinion that the defendant's readiness to settle the account after verification was an unequivocal acknowledgment of his indebtedness to the plaintiff. I am of opinion that the learned Judge was correct in his interpretation of these letters.

Various cases have been cited before us; but the true interpretation to be placed upon a document cannot be determined on a reference to the interpretations placed upon other documents, unless the words used

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are the same. There are numerous authorities in the books relating to acknowledgments having the effect of saving limitation; and what will have to be considered is, whether the letters under consideration contained either an express promise to pay or a clear acknowledgment of the debt which would imply a promise to pay, because, if a debt is acknowledged, it carries with it the legal liability to pay that debt. In *Maniram Seth* v. *Seth Rupchand* (1) it was held by the Privy Council that an acknowledgment of liability, should the balance turn out to be against the person making it, is a sufficient acknowledgment under section 19 of the Indian Limitation Act, and an unconditional acknowledgment implies a promise to pay it. In *Arumuga Chettiar* v. *Ramanadan* (2) it was held that a statement contained in a letter that if upon a comparison of accounts any amount is found due by the writer of the letter he is prepared to pay it, is a sufficient acknowledgment of liability under section 19 of the Indian Limitation Act. I am of opinion that the letters do contain an admission of liability and do amount to an acknowledgment.

It is, however, contended on behalf of the appellant on the authority of *V. Andiappa Chetty* v. *P. Devarajuly Naidu* (3) that where there is an acknowledgment of liability in respect of a right and it is sought to use such acknowledgment for starting a fresh period of limitation, the right acknowledged must be of the same description as the right which is the subject of the suit, and that in the present case the right acknowledged was only the right to the taking of an account and not to the existence of a debt. I am of opinion that this contention has no substance. The right acknowledged was the existence of a debt which might be found on the taking of an account and not the right to the taking of an account. Indeed there was no liability upon the defendant to render any account:

(1) (1906) I. L. R. 33 Cal. 1047 P. C. (2) (1921) 59 Ind. Cas. 898.
(3) (1913) I. L. R. 36 Mad. 68.

the account was to be rendered by the plaintiff and there was no acknowledgment of any liability by the defendant to render an account.

The other cases cited on behalf of the appellant are not of any help in the decision of the present case inasmuch as they turn on the terms of the acknowledgment made in those cases which are not similar to the terms in this case. I am of opinion, therefore, that, even if the case was governed by Article 115 and not by Article 85 of the First Schedule to the Indian Limitation Act, the suit was not barred by limitation.

This appeal is dismissed with costs.

MACPHERSON, J.—I agree.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Ross and Wort, JJ.

RAJENDRA PRASAD BOSE

v.

GOPAL PRASAD SEN.*

1927.

Dec., 16.

Hindu Law—adoption—anumati-patra, construction of—"Shastras," whether include Dattaka Mimansa—power given to adopt step-brother, if no obstacle—obstacle, meaning of—adoption, deed of, should be construed liberally—consent, failure to obtain, whether invalidates adoption— intention to adopt must be given effect to—Kayesthas, whether are Sudras.

R died after having executed an anumati-patra in favour of his wife empowering her to take in adoption his step-brother *C* and to deliver to him possession of the executant's property, and the deed further provided :

"if there be any obstacle to take him in adoption according to the Shastras, then he will be made a Sneha-putra or she may adopt anyone else whom she wants with the permission of my father and deliver him possession."

*Appeal from Original Decree no. 3 of 1925, from a decision of Babu Sures Chandra Sen, Subordinate Judge of Cuttack, dated the 6th of August, 1923.