ORIGINAL CIVIL.

Before Mr. Justice Scott.

1886.

May 4 ; *June* 14 *and* 15.

PREMJI LUDHA', PLAINTIFF, *v.* DOSSA' DOONGERSEY, LOWJI NA'NJI AND PREMJI LUDHA', DEFENDANTS.*

Limitation—Limitation Act XV of 1877, *Sec.* 21—*Acknowledgment given by one partner when binding on the firm—Partnership—Practice—Parties—Same person both plaintiff and defendant.*

The plaintiff, as heir of his mother, sued a firm, in which he was himself a partner, to recover the amount of certain loans which he alleged that his mother in her life-time had made to the said firm. The plaintiff was made a defendant in the suit along with the other partners. The alleged loans were made on the 2nd November, 1881, and the 12th October, 1882. The present suit was not filed until December, 1885. The plaintiff, however, relied on an acknowledgment signed in his mother's account book by himself as partner in the firm on the 1st November, 1883. The first defendant did not appear, or put in any defence. The second defendant pleaded limitation, and alleged that on the 2nd November, 1880, prior to the date of the alleged loans, he had retired from the firm, and, therefore, was not liable. From the evidence given at the hearing it appeared that the business stopped, so far as buying and selling and fresh trading were concerned, at the end of the year 1881, and that subsequently to that date the partners were occupied solely in winding up the affairs of the firm.

Held, that, under the circumstances, the acknowledgment given by the plaintiff did not bind the other partners, and that the claim against them was barred. If, at the time the acknowledgment was given, the firm had been a going concern, the plaintiff's authority to make such an acknowledgment on behalf of the firm might have been presumed; but in this case the business had been closed, and the partnership entirely dissolved. The presumption, therefore, which arises in active partnership no longer existed, and there was no evidence that the plaintiff had been expressly authorized to act for the other partners in making an acknowledgment.

The meaning of the word "only" in section 21 of the Limitation Act XV of 1877 is that it must also be shown that the partner signing the acknowledgment had authority, express or implied, to do so. In a going mercantile concern such agency is to be presumed as an ordinary rule.

It was objected that the suit was improperly framed, inasmuch as the plaintiff was also made a defendant.

Held, that the objection was not maintainable, the plaintiff being a defendant in a different capacity.

THE plaintiff sued as heir and legal representative of his mother, Ruttonbái, to recover from the defendants the sum of Rs. 9,151-3-0.

* Suit No. 520 of 1885.

1886.

PREMJI LUDHÁ v. DOSSÁ DOONGERSEY.

The plaint stated that the plaintiff was partner with the first and second defendants, who carried on business in Bombay under the firm of Rághoji, Nathu & Co., and alleged that his mother, Ruttonbái, on the 2nd November, 1881, (*11th Kártik Shudh, Samvat* 1937), lent to the said firm the sum of Rs. 1,300, and on the 12th October, 1882, (*30th Bhádrapad Vadya, Samvat* 1938), a further sum of Rs. 5,500, both of which sums were to bear interest at the rate of 9 per cent. per annum. The amount sued for consisted of the said two sums with the accumulated interest. The plaintiff alleged that he on behalf of the firm had adjusted his mother's accounts on the 1st November, 1883, and the balance then found to be due to her was Rs. 8,254.

Ruttonbái died on the 4th October, 1885, and the plaintiff stated that since her death he had frequently applied to his partners, the defendants, for payment of the amount due, but they had paid nothing. The present suit was filed in December, 1885. The plaintiff relied on an acknowledgment signed by himself as partner in the defendants' firm on the 1st November 1883.

The first defendant did not put in any defence, and did not appear at the hearing. The second defendant filed a written statement, in which he pleaded that the plaintiff's claim was barred by limitation, and stated that he knew nothing of the alleged loans, and was not liable in respect of them, even if they had been made, inasmuch as at the date of the said advances he was not a partner in the firm, having retired from the partnership on the 2nd November, 1880, (*30th A'shwin Vadya, Samvat* 1937).

At the hearing it appeared that the defendants' firm had traded in rice, but that at the end of the year 1881 (*Samvat* 1938) all active business was stopped, and that since that time the partners had been engaged in recovering outstandings and in winding up the affairs of the firm.

Telang (with *Lang*) for the defendants.—The suit is improperly framed, inasmuch as Premji Ludhá, the plaintiff, is also a defendant. Further, the suit is barred, having been brought more than three years after the date of the alleged loans. The

1886.

PREMJI LUDHÁ v. DOSSÁ DOONGERSEY.

adjustment of the 1st November, 1883, is inoperative to keep alive the debt as against the first and second defendants: see Limitation Act XV of 1877, secs. 19 and 21.

Kirkpatrick and *Anderson* for plaintiff:—Premji Ludhá is a plaintiff as heir of his mother; he is a defendant as partner in the defendants' firm. He is a party to the suit in two different capacities, and is rightly made a defendant, although he is plaintiff. If, however, the objection is a good one, his name can be struck out as defendant, and the suit is maintainable against the other defendants under section 43 of the Contract Act IX of 1872. With regard to limitation, section 21 of Act XV of 1877 does not apply to a case like this, where, as the evidence shows, all the partners were authorised to settle accounts on behalf of the firm. We do not, therefore, seek to make the defendants liable by reason "*only*" of the acknowledgment. Counsel cited *Watson* v. *Woodman*[1]; *Goodwin* v. *Parton*[2]; Lindley on Partnership (ed., 1878), p. 459.

SCOTT, J.:—In this case the defendants traded in conjunction with the plaintiff under the name of Rághoji, Nathu & Co. The only defendant who has appeared and defended the suit is Lowji Nánji. The business consisted in trading in rice. It is admitted that the business stopped, so far as buying and selling and fresh trading were concerned, at the close of 1881, which is equivalent to the native date *Samvat* 1938. Lowji admits that he was a partner down to the close of *Samvat* 1937 (13th October, 1881), two months and a half before the formal closing of the business. But he says that he then retired, and was not responsible for transactions after that date. In the course of the winding up it appears that it became necessary to raise money to meet liabilities, and two sums were borrowed from Ruttonbái, the plaintiff's mother, one of Rs. 1,300 on the 2nd November, 1881, immediately after the close of the business, and another sum of Rs. 5,500 on the 12th October, 1882. Ruttonbái died on the 4th October, 1885, without any of the money being repaid, and plaintiff as her son and heir has brought this suit for the two sums with interest. The defendant, Lowji,

(1) L. R., 20 Eq., 721. (2) 41 Law Times, N. S., 91.

1886.

PREMJI LUDHÁ v. DOSSÁ DOONGERSEY.

in his written statement repudiates all liability on the ground that he was not a partner when the loans were made. He further puts the plaintiff to the proof of the loans, and he also raises two defences in law: one that the same person cannot be both plaintiff and defendant, and the other that the claim is barred by the Act for the limitation of suits.

To begin with the question of fact,—first, I am of opinion that Lowji failed to establish his retirement from the firm before the firm came to an end as a going concern. His contention rests wholly on his own word. His other evidence only shows that he embarked in another business, not that he retired from this. On the other side, then, is the presumption arising from his having been a partner for many years. This is supported by the continuance of his account in the partnership books in the same form, by the absence of any entry of the retirement or of any public announcement, by the absence of any settlement at the date of the retirement, and by his own subsequent conduct in assisting actively in the winding up.

I am also of opinion that the evidence of the loans from the books and from the plaintiff must be held sufficient in the absence of any negative proof, save the denial of the defendant Lowji, At the same time it would have been much more satisfactory if the plaintiff, considering his double relation to the firm and to the lender of the money, had called the *mehtá*, or one of the partners, to corroborate his story and the books.

I must next consider the legal defences. The first is not maintainable. A suit in the name of a firm can, I think, under our procedure, be maintained by or against one of its members in a capacity different to that of partner. Moreover, section 43 of the Contract Act IX of 1872 clearly establishes the right to sue for this money. The rule on which the defence is based only applied in its fullness in the days when common law and equity were strictly separate.

But the second legal defence, that the claim is barred, has much more value. Clearly, the original loans are time-barred. The plaintiff relies on an acknowledgment of the indebtedness made in the deceased lender's book, and signed by the plaintiff,

1886.

PREMJI LUDHÁ v. DOSSÁ DOONGERSEY.

not as her son, but as a partner acting for the firm on the 1st November, 1883. At that time the firm had stopped all trading for over two years. Mr. Telang argued that the case was governed by section 21 of the Limitation Act XV of 1877, which says that nothing in sections 19 and 20 of the Act, (which create a new period of limitation from the date of an acknowledgment or a part payment of the principal), renders one of several partners chargeable by reason *only* of a written acknowledgment signed, or of a payment made by, or by the agent of, any other partner. It will be noticed that this goes further than the English law, which does not expressly mention partners, but only includes contractors or co-debtors—Mercantile Law Amendment Act, 1856, sec. 14. I think, however, the meaning of the word "only" in section 21 is that it must also be shown that the partner signing the acknowledgment had the authority, express or implied, to do so. In a going mercantile concern such agency is, I think, to be presumed as an ordinary rule: see Lindley on Partnership and *Goodwin* v. *Parton*[1].

Indeed, the defendant Lowji himself admitted that whilst the firm was actively trading, borrowing money for trade purposes and settling up accounts was done by the partners indiscriminately. But both Lindley, L.J., and the case cited from the Law Times contemplate a going concern. This concern, however, was no longer a trading concern at the time these loans were effected. The business was closed and the partnership at an end for trading purposes. The money was borrowed for the sole purpose of meeting liabilities in the winding up. This was admitted in evidence, and it is noteworthy that the plaintiff himself says the loans now in dispute were raised after consultation, and all the partners, or at least the plaintiff and Lowji, went to fetch the money. If the original liability was created only on the joint action of the partners, would not renewal of the liability require the same joint action? In my opinion, whichever partner was told off to manage the winding up, was clothed with authority merely to liquidate the debts of the partnership, and had no power to involve his co-partners in any new legal liability. I think the presumption

(1) 41 Law Times, 91.

1886.

PREMJI LUDHÁ v. DOSSÁ DOONGERSEY.

of agency, which arises in active partnership, no longer existed. The partnership was virtually dissolved as regards any active trading, and in cases of dissolution the rule I now lay down is to be found in more than one decided case—*Bristow* v. *Miller*(1); *Watson* v. *Woodman*(2) and other cases there cited.

In short, I think section 21 must apply, unless it were shown, and it has not been shown, that the plaintiff was, in point of fact, authorized to act for the others in making the acknowledgment. The particular circumstances of this case must also not be overlooked. Here the plaintiff, as heir of his mother, seeks to recover from his own firm money lent by his mother, and he relies, not on the original loan, but wholly on an acknowledgment signed by himself, not in the firm's books, but in his mother's unpaged book, and this acknowledgment, he maintains, is binding on his co-partners, although the firm had ceased to be a going concern for two years. Under these circumstances I think mother and son ought to have taken care that the debt was acknowledged by the other partners, and I cannot give the weight of an implied authority to the plaintiff's own acknowledgment. I am, therefore, of opinion that the case is covered by section 21 and the claim time-barred.

Judgment for defendants with costs.

Attorneys for plaintiff:—Messrs. *Tyabji and Dáyábhái.*

Attorneys for defendants:—Messrs. *Little, Smith, Frere and Nicholson.*

(1) 11 Ir. L. R., 461. (2) L. R., 20 Eq., 721.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Kemball.

1884.
December 17.

PA'TIL HARI PREMJI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* HAKAMCHAND AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage—Hindu law—Joint family—Mortgage of family property by son during father's temporary absence how far binding on the family—Subsequent sale of such mortgaged property in execution of a money decree against father—Rights of purchaser at such a sale.

* Second Appeal, No. 505 of 1883.