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That being our conclusion on the second point argued before us, it is unnecessary to decide the first point.

The decree must, therefore, be confirmed with costs.

Decree confirmed.

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APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

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SHRINIWAS KRISHNA SHRIRALKAR (ORIGINAL DECREE-HOLDER), APPELLANT, *v.* NARHAR KHANDO KHANVILKAR (ORIGINAL JUDGMENT-DEBTOR), RESPONDENT.*

Limitation Act (XV of 1877), section 19—Acknowledgment—Essentials of a valid acknowledgment—Acknowledgment contained in a written statement—It need not be addressed to any one.

On the 11th July 1900, a decree was passed against the defendant directing him to pay a certain amount in fixed instalments: the whole amount became payable on default of paying three instalments. The plaintiff presented an application on the 14th July 1903 for execution of the decree for the whole amount alleging that the default contemplated had occurred. To this, the defendant submitted a written statement signed by himself, bearing date the 28th September 1903, wherein he contended that the decree for the whole amount could not be executed, inasmuch as with reference to the second instalment he had deposited its amount with a third person and had given a notice to the plaintiff asking him to take the amount from the third person. As to the third instalment, his submission was that he had no means to pay its amount then and time should therefore be granted to him. The Court held that three defaults had not occurred and dismissed the darkhast.

On the 24th September 1906, the plaintiff gave another darkhast to recover the amount of the aforesaid two instalments, which remained unpaid. The Subordinate Judge dismissed the darkhast as time-barred.

Held, that the statement by the defendant as to the second instalment was an acknowledgment of liability within the meaning of section 19 of the Limitation Act (XV of 1877).

Held, further, that the statement by the defendant as to the third instalment that he was unable to pay and that he would pay if time were given to him, was a distinct acknowledgment of his liability.

Held, therefore, that the second darkhast was within time.

* First Appeal No. 22 of 1907.

There is nothing in the language of section 19 of the Limitation Act (XV of 1877) to justify the narrow interpretation that the acknowledgment under the section must be addressed to the creditor or some one on his behalf.

APPEAL from the decision of Vaman M. Bodas, First Class Subordinate Judge of Sátára.

Proceedings in execution.

The appellant obtained a decree on the 11th July 1901 against the respondent. It ran as follows:—

"The defendant do pay to the plaintiff the sum of Rs. 8,000 in respect of the amount of the claim, without interest, by yearly instalments of Rs. 300 each. The first instalment should be paid at the end of Falgun Shake 1822 and the further instalments should be paid in the month of Falgun in the subsequent years: on an instalment in default interest to be paid at 8 annas per month. If there be three instalments in default, all the sum remaining due together with interest on the instalments in default should be recovered by proceeding to sell the mortgaged property and in case of deficiency, from the other property of the defendant."

On the 14th July 1903, the plaintiff presented an application in execution of his decree for an order absolute and for sale of the mortgaged property, inasmuch as there had been default in paying three instalments.

In answer to this, the defendant put in his written objections signed by himself on the 28th September 1903. He said therein that there had been default in paying two instalments only. As for the second instalment, he had deposited Rs. 300 with a third person and had given a notice to the plaintiff asking him to take away the amount, and he was consequently not liable for the amount. The defendant admitted his liability to pay the third instalment, but urged that he had no means to pay and time should therefore be granted to him to enable him to pay the amount.

The Subordinate Judge held that there were no three defaults in payment and dismissed the darkhast on the 1st February 1904.

On the 24th September 1906 the plaintiff gave another darkhast to recover the two instalments and the plaintiff relied upon the signed written statement put in by the defendant in the former darkhast, as an acknowledgment of his liability to pay them.

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The Subordinate Judge dismissed the darkhast holding that it was barred by limitation.

The plaintiff appealed to the High Court.

G. K. Dandekar, for the appellant:—The written statement, dated the 28th September 1903, which was signed by the defendant, is an acknowledgment within the meaning of section 19 of the Limitation Act, 1877. It gave a fresh starting point of limitation. The present darkhast being within three years of the date of the written statement is clearly within time.

The defendant's statement that the amount of Rs. 300 had been lodged with a third person to be paid to the plaintiff amounts to acknowledgment, as provided from Explanation I to section 19 of the Limitation Act (XV of 1877). See *Maniram* v. *Seth Rupchand*(1).

B. N. Bhajekar, for the respondent:—The statement as to the second instalment does not amount to an acknowledgment within the meaning of section 19 of the Limitation Act (XV of 1877). To amount to an acknowledgment, the statement must contain a promise express or implied. It must further be addressed to plaintiff. See also *Mylapore* v. *Yeo Kay*(2).

CHANDAVARKAR, J.:—We think that in this case the appeal must be allowed. The question is whether the first and second instalments are saved by the words relied upon as acknowledgment under section 19 of the Limitation Act of 1877. There can be no doubt as to the first instalment. The acknowledgment relied upon is contained in the application put in by the judgment-debtor by way of a written statement in the Darkhast No. 717 of 1903, presented on the 27th of July 1903. In that application, which was filed on the 28th of September 1903, the judgment-debtor said that he was unable to pay that instalment but that he would pay if time were given to him. That was a distinct acknowledgment of his liability, and as the present darkhast was presented on the 24th of September 1906, the said instalment is within time. The question is then as regards the

(1) (1906) L. R. 33 I. A. 165. (2) (1887) L. R. 14 I. A. 168.

second instalment. What is relied upon as an acknowledgment as to that is contained in the second paragraph of the same application and runs in these words: (translated from the Marathi) "I have asked plaintiff by a written notice to take away the sum of Rs. 300 relating to the second instalment, from a third party with whom I have deposited that sum. Therefore I am not responsible to pay the said amount." This in effect means:— "I am liable to pay the second instalment; but I have deposited the amount of that instalment with a third person and let the plaintiff take it from him. But so far as I am concerned I refuse to pay." In other words, there is an acknowledgment of the liability, coupled, however with a refusal to pay on the ground that the amount is deposited with a third party. We think that is the natural construction of the words. We must, therefore, hold that the second instalment is not barred. But it is contended in support of the decree of the lower Court by the learned pleader for the respondent that an acknowledgment within the meaning of section 19 must be addressed to the creditor or some one on his behalf. But there is nothing in the language of that section which would justify that narrow interpretation. On the other hand, Explanation I to section 19 expressly provides that an acknowledgment would be sufficient, even if made to some person other than the creditor. Besides here there was an acknowledgment made to the knowledge of the creditor before the Court.

Lastly, it is contended that as in Darkhast No. 717 of 1903 the decree-holder had prayed for execution of the decree in respect of these two instalments but the Court rejected his prayer, his present application for the same relief must be held barred on the principle of *res judicata*. What happened in that darkhast was this. There the Subordinate Judge held that the right to execute the whole decree in default of payment of three instalments having not accrued to the decree-holder, he was not entitled to execute the whole decree. Then the question was whether the decree-holder was entitled to execute the decree in respect of the two instalments now in dispute. In the darkhast he had asked for that relief as an alternative, but it appears that when the Court asked him whether he would accept that

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relief he declined to accept it. That is what the Subordinate Judge says in express terms in his judgment. That means, so far as the relief claimed in respect of the two instalments was concerned, the decree-holder was unwilling to proceed with the darkhast and therefore it was dismissed without any adjudication on the merits. Under these circumstances, we think, having regard to the observations in *Hari Ganesh* v. *Yamunabai*(1), and having regard to the ruling of the Privy Council in *Delhi and London Bank* v. *Orchard*(2), that the present darkhast is not barred on the ground of *res judicata*. We must reverse the decree of the Court below and send back the darkhast to that Court for disposal according to law on the merits. Costs of this appeal on the respondent. Costs in the lower Courts to abide the result.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1908. *January* 20.

BHAGWAN VITHOBA (ORIGINAL APPLICANT), APPELLANT, *v.* WARUBAI KOM BABURAO MUDKE (ORIGINAL APPELLANT), RESPONDENT.*

Hindu law—Succession—Competition between full sister and half-brother's son—Mitakshara—Sister's place in the line of heirs—Vyavahara Mayukha, views of, on the point—Value of the commentaries of Balambhatta and Nanda Pandita—Conflict between Mitakshara and Vyavahara Mayukha—Rule as to harmonising the difference.

In cases governed by the Mitakshara, a sister comes in as heir to a deceased Hindu immediately after the grandmother, so that, where the competition is between her and a half-brother's son, the latter, being higher in the line among heirs specifically mentioned in the Mitakshara, is entitled to preference over her as heir, though it would be otherwise in cases governed purely by the law of the Vyavahara Mayukha.

The interpretation put by Westropp, C. J., upon Balambhatta's texts in *Sakharam Sadashiv Adhikari* v. *Sitabai*(3) commented upon and dissented from except in cases where the Vyavahara Mayukha alone is applicable.

* First Appeal No. 73 of 1907.

(1) (1897) 23 Bom. 35.

(2) (1877) L. R. 4 I. A. 127.

(3) (1879) 3 Bom. 353.