1903 JUNE 1.

CIVIL RULE.

30 C. 696.

applied to the District Judge for an order directing the defendants to pay his salary. The District Judge made the following order : " It does not seem that this Court has any power to order the remuneration of the Receiver to be met otherwise than from the rents and receipts of the property in his hand ; no order can, therefore, be passed as prayed for by the Receiver."

Thereafter the plaintiff instituted the present suit without any leave from the District Judge and obtained a decree against defendants Nos. 1 and 2 for two-thirds of his salary calculated up to the date of the institution of the suit. Now, the defendant No. 2 is a minor ; and even if the plaintiff could recover under the promise made on the 22nd February 1902, there could be no decree passed against the minor. The Court below, however, gave a decree for two-thirds of the salary, mainly relying upon this promise made on the 22nd February.

It seems to us that even if defendant No. 1 had made a promise to pay, and even if it was not conditional, yet it was not binding, as it was made in contravention of the law. Under section 503 of the Code of Civil Procedure, the Court is to determine what fee or commission a Receiver is entitled to by way of remuneration. The Receiver is an officer of the Court, and the parties cannot by any act of theirs add to or derogate from, the functions of the Court without authority from the Court itself. In the case of *Manick Lall Seal* v. *Surrut Coomaree Dassee*(1), this Court held that an agreement between a Receiver and a party without the knowledge of the Court was a gross contempt of Court.

We are of opinion that the parties in the present case entered into a contract which was not valid, and, therefore, the suit was not maintainable. We, therefore, set aside the decree complained of and make the Rule absolute with costs.

Rule absolute.

30 C. 699 (=7 C. W. N. 651).

[699] ORIGINAL CIVIL.

BENODE BEHARY MOOKERJEE *v.* RAJ NARAIN MITTER.*

[25th February, 1903.]

Plaint, Amendment of—Mistake—Limitation—Power of Receiver to sue—Limitation Act (XV of 1877) s. 19—Acknowledgment of liability.

By an order of the Court the plaintiff was appointed Receiver in a certain suit with authority to sue for and recover an attached debt. Through some mistake in the office of the attorneys of the plaintiff in that suit, the money sought to be attached was wrongly described in the Tabular Statement as money due under the agreement of the 25th October 1895, whereas it should have been the agreement of the 26th August 1895, and the Court, acting on this representation, made the order, which applied to the alleged agreement of the 26th October 1895. On application to amend the order and the plaint or in the alternative to read the existing order as if it were in reality applicable to the right agreement :—

Held, that no order for amending the plaint or the order could be made ; the amendment of the order would operate only as a new order, taking effect from the date on which it is made, and could not therefore operate as the basis or authority for the present suit. The plaintiff's authority to maintain this suit depends solely upon the order appointing him Receiver : if it has been made under any mistake, it cannot by any course of construction be regarded as applying to anything other than the subject-matter specified by the order itself, the intention of the parties being immaterial.

* Original Civil Suit No. 447 of 1899.

(1) (1895) I. L. R. 22 Cal. 648.

Way v. *Hearn* (1) distinguished.

1903
FEB. 25.

ORIGINAL CIVIL.

30 C. 699=7 C. W. N. 651.

In order to satisfy the requirements of s. 19 of the Limitation Act, though a promise to pay need not be made out, it is necessary when the right claimed is a debt that an unequivocal and unqualified admission of the debt or a part of it or of the subsisting relationship of debtor and creditor should be established. There is a distinction in this respect between the law of limitation applicable in England and that in force in this country.

Fink v. *Buldeo Dass* (2); distinguished *Venkata* v. *Parthasaradhi* (3) approved of.

Quære: Whether, having regard to the terms of s. 50 of the Code of Civil Procedure, a plaintiff can be allowed to take advantage of any ground of exemption from the ordinary law of limitation which has not been pleaded in the plaint.

[(1) C. P. C., O. 7, rr. 1, 2, 4, 5, 6, **Ref.** 6 C. L. J. 544; 14 C. W. N. 128; 32 I. C. 548.
(2) Limitation Act—S. 19—Acknowledgment—Requisites, **Ref**: 34 Cal. 305; 11 C. L. J. 34; 6 C. L. J. 544; 5 N. L. R. 8.
(3) Leave to amend, **Ref.** 14 C. W. N. 128=2 I. C. 77=11 C. L. J. 34; **Dist.** 34 Cal. 305=5 C. L. J. 270.
(4) C. P. C., O. 21, rr. 12, 91; **Dist.** 9 I. C. 729=9 M. L. T. 319=(1911) 1 M.W. N. 183]

ORIGINAL SUIT.

One Jogeshwar Roy, a builder and contractor, had entered into an agreement on the 26th August 1895 with the defendant to do [700] some building works for the settled sum of Rs. 29,500 and to finish the same by the 16th November 1895 and to pay, in the event of his not so finishing in due time, Rs. 30 per day as compensation from the due date until actual completion. The work was done under the supervision of Hari Charan Pal, an engineer employed by the defendant, who on the 26th of July 1896 gave a certificate by which he certified that the work had been satisfactorily completed.

On the 25th October 1895 the said Jogeshwar Roy in consideration of the sum of Rs. 3,000 executed a promissory note in favour of one Girdhari Lall, and as security for the amount hypothecated the debt due and owing to him (Jogeshwar Roy) by the defendant under the said agreement of 25th August 1895. The said Girdhari Lall instituted a suit in this Court, being suit No. 377 of 1897, against the said Jogeshwar Roy for the amount due under the promissory note, and this Court by its decree dated the 5th of May 1898 ordered and decreed the said Jogeshwar Roy to pay the amount claimed to the said Girdhari Lall, and further ordered that the amount claimed and decreed should form a charge on the debt due under the agreement mentioned in the plaint therein. Girdhari Lall, then proceeded to execute the decree by attaching the money in the hands of the defendant, Raj Narain Mitter, but through some mistake made in the office of the attorneys of Girdhari Lall, the money was wrongly described in the Tabular Statement as money due under the agreement of the 25th October 1895, whereas it should have been described as money due under the agreement of the 26th August 1895. In the Tabular Statement the mode in which the assistance of the Court is sought was described in this manner:—"By attachment of the moneys in the hands of R. Mitter, Barrister-at-Law, belonging to the defendant, Jogeshwar Roy, for work done and materials supplied under an agreement made between the said Mr. Mitter and the defendant, Jogeshwar Roy, and dated the 25th day of October 1895, upon which the decretal amount forms a charge under the decree in this suit." Acting upon this representation, on the 1st of September 1898 this

(1) (1862) 13 C. B. (N. S.) 292, 304.
(2) (1899) I. L. R. 26 Cal. 715.
(3) (1892) I. L. R. 16 Mad. 220.

1903
FEB. 25.

ORIGINAL CIVIL.

30 C. 699=7 C. W. N. 651.

Court by its order of that date prohibited and restrained the said Jogeshwar Roy from receiving from the defendant the moneys due under "an agreement dated [701] the 25th October 1895," and the defendant from making payment of the said moneys or any portion thereof to any person whomsoever. This prohibitory order was followed by an order of the 8th March 1899 in the said suit No. 377 of 1897, which gave liberty to the defendant under s. 268 of the Civil Procedure Code to pay into Court the amount due from him and in default of payment appointed the present plaintiff as Receiver to realise the said moneys with power to institute a suit in his own name.

The plaintiff as such Receiver on the 14th of July 1899 instituted this suit for an account of what is due by the defendant to the said Jogeshwar Roy in respect of the agreement dated the 25th August 1895, and in order to establish that the cause of action was within the period prescribed by the Statute of Limitation, he relied upon an alleged acknowledgment in writing by the defendant of the 18th June 1898. The terms of the writing are given in the judgment.

Mr. *Pugh* (Mr. *Garth* with him), for the defendant, contended (i) that the suit could not be maintained in its present form because the plaintiff had no authority to institute this suit; he was authorised to bring a suit in respect of the contract dated the 25th October 1895 and no other contract. He could not be allowed to succeed upon a different cause of action: *Govindrav Desumukh* v. *Ragho Deshmukh* (1), and *Sheo Prasad* v. *Lalit Kuar* (2). And (ii) that the plaintiff's right to sue, if any, was barred by the law of limitation. The acknowledgment relied on in the plaint as furnishing a new period of limitation was not an acknowledgment of such express and unambiguous character as would satisfy s. 19 of the Limitation Act: *Venkata* v. *Parthasaradhi* (3); nor is it stamped: Art. 1 of Sch. I to the Stamp Act; *Binja Ram* v. *Rajmohun Roy* (4) and *Mulji Lala* v. *Lingu Makaji* (5).

Mr. *Avetoom* (Mr. *Gregory* with him) for the plaintiff. I ask for leave to amend the order authorising the plaintiff to sue or, [702] in the alternative, I invite the Court to read the existing order as if it were in reality applicable to the right agreement see: *Way* v. *Hearn* (6).

The acknowledgment relied upon in the plaint is a proper acknowledgment under s. 19 of the Limitation Act: *Fink* v. *Buldeo Dass* (7). It does not require to be stamped: *Fatechand Harchand* v. *Kisan* (8).

SALE, J. This is a suit brought by the plaintiff as the Receiver appointed by this Court in Suit No. 377 of 1897 by way of equitable execution to recover from the defendant a debt alleged to be due from him to one Jogeshwar Roy whom the defendant employed as a builder to do certain work for him.

Two grounds of objection have been taken to the suit being maintained in its present form, and in dealing with them it will be necessary to examine with some minuteness the special circumstances material to the case. The first objection is as to the power or authority of the plaintiff to maintain this suit, and the second ground of defence is limitation. It appears that in 1897 a suit was instituted by Girdhari Lall Dhananiah against the builder Jogeshwar Roy to recover Rs. 3,000 due on a promissory note executed by Jogeshwar Roy in favour of the

(1) (1884) I. L. R. 8 Bom. 543.
(2) (1896) I. L. R. 18 All. 403.
(3) (1892) I. L. R. 16 Mad. 220.
(4) (1881) I. L. R. 8 Cal. 282.
(5) (1896) I. L. R. 21 Bom 201.
(6) (1862) 13 C. B. (N. S.) 292, 304.
(7) (1899) I. L. R. 26 Cal. 715.
(8) (1893) I. L. R. 18 Bom. 614.

1903
FEB. 25.

ORIGINAL CIVIL.

30 C. 699=7 C. W. N. 651.

plaintiff Girdhari Lall Dhananiah, and in the plaint the plaintiff alleged that as security for the amount due under the promissory note the defendant had hypothecated the debt due to him by the present defendant Raj Narain Mitter, and the plaintiff in that suit claimed that the amount due to him under the promissory note should be declared by the decree to be a charge upon the debt. The debt from Mr. Mitter is alleged in the plaint to be due in respect of an agreement of the 26th August 1895, and the date of the promissory note is 25th October 1895. A decree was made in this suit substantially in the terms of the prayer of the plaint, and the amount of the debt alleged by the plaintiff to be due under the agreement of the 26th August 1895 was alleged in the plaint to be a sum of Rs. 11,500. The plaintiff Girdhari Lall Dhananiah then, in order to realize the debt due from the [703] defendant, proceeded to attach the money in the hands of Mr. Mitter sought to be charged by him; but through some mistake made in the office of the attorneys of the plaintiff Girdhari Lall Dhananiah, the money sought to be attached was wrongly described in the Tabular Statement as money due under the agreement of the 25th October 1895, whereas it should have been described as money due under the agreement of the 26th August 1895. In the column relating to the mode in which the assistance of the Court is sought the plaintiff asked for the assistance of the Court to be rendered in this manner:—

"By attachment of the moneys in the hands of R. Mitter, Barrister-at-Law, belonging to the defendant Jogeshwar Roy for work done and materials supplied at the premises No. 15-3, Gopal Lall Tagore's Road, Baranagore, under an agreement made between the said R. Mitter and the defendant Jogeshwar Roy and dated the 25th day of October 1895, upon which the decretal amount forms a charge under the decree in this suit." The Court, acting upon the representations contained in the plaintiff's Tabular Statement, attached the money alleged to be due under the agreement of the 25th October 1895 by prohibitory order on Mr. Mitter, directing him not to part with the moneys due to Jogeshwar Roy under that agreement. Subsequently and pursuant to the order of attachment, the Court was applied to, and did, under sections 268 and 503 of the Code and by way of equitable execution, appoint the present plaintiff as Receiver to recover by suit the attached money in the hands of Mr. Mitter. It is not necessary to refer further to the order appointing the plaintiff Receiver. Suffice it to say that the order of appointment authorized the Receiver to sue for and recover the attached debt. Pursuant to the authority contained in the order of appointment the plaintiff filed the present suit on the 14th July 1899. In the paragraphs of the plaint relating to the order of appointment and the agreement under which the money is alleged to be due the recitals are full of mistakes. The mistake as to the date of the agreement does not appear to have been discovered until a late stage in the proceedings in the suit. In a further written statement filed by the defendant the defence was taken that the plaintiff has no authority to maintain this suit by reason of the fact that the money sought to be recovered [704] was not the money which had been attached in the hands of the defendant. Subsequently to the filing of the further written statement, an application was made to me in chambers by the attorney for the plaintiff upon a petition for leave to amend the Tabular Statement and prohibitory order. This application was made in the suit in which Girdhari Lall Dhananiah was plaintiff. I declined to make any order on

1903
FEB. 25.

ORIGINAL CIVIL.

30 C. 699=7 C. W. N. 651.

that application. I thought the amendment could not be made at that stage, and I directed that the application should be mentioned in the present suit when the defendant would have an opportunity of being heard. The matter has now been fully discussed, and there can be no question that the mistake, for such it undoubtedly was, originated in the application for execution made by the plaintiff in the earlier suit.

The Court is always unwilling to allow a mistake made inadvertently to operate prejudicially against a party, and accordingly I have carefully considered the question now raised with a view to see whether it would be possible to give plaintiff leave to amend the present plaint, and for that purpose whether I ought not to adjourn the case so as to enable the plaintiff to obtain a fresh order of attachment so as to make it applicable to the money due under the agreement of the 26th August 1895. I am clearly of opinion that no such order for amendment can be made in this case. The matters complained of are not such as can be set right by amendment. The question is one which goes to the root of the authority of the plaintiff to maintain this suit; and if I were to make an order for amendment of the order for attachment of the money due to Jogeshwar Roy under the agreement of the 26th August 1895, the amendment would operate only as a new order of attachment and a new order for appointment of Receiver, and such orders would only operate from the date on which they were made. They could not therefore operate as the basis or authority for the present suit. But another view of the question has been presented to the Court. It is this that there is no necessity to make a new order of attachment. I am invited to read the existing order as if it were in reality applicable to the right agreement, notwithstanding the fact that the agreement is wrongly described [705] as the agreement of the 25th October, and reliance is placed on the case of *Way* v. *Hearn* (1), where in construing an agreement which, though clear in its terms, is not applicable to existing facts, the Court allowed evidence to be given so as to show what the actual facts were to which it was intended that the agreement should refer. This principle is embodied in section 95 of the Evidence Act, but it seems to me that this principle cannot be invoked to assist the plaintiff in the present suit. In this case the Court has not to find the intention of the parties. Here we have to do with an order of Court which is the sole authority of the plaintiff to maintain the suit, and it seems that the intention of the parties is immaterial to the question as to the title or authority of the plaintiff to maintain this suit, which must solely depend upon the order appointing the Receiver. However regrettable the mistake may be under which the prohibitory order was made it is impossible, I think, by any course of construction, to regard the order as applying to anything other than the subject-matter specified by the order itself. The effect of the mistake is to make the prohibitory order a nullity, and it follows that the order for the appointment of the plaintiff as Receiver to recover the money alleged to be due under an agreement which does not exist must be a nullity also. That being so there is nothing to prevent the plaintiff from obtaining a new order for attachment and a new order for the appointment of a Receiver.

But supposing this objection could be surmounted, it appears to me that there is another grave difficulty in the way of the plaintiff created by the defence of limitation set up. The money that the plaintiff seeks

(1) (1862) 13 C. B. (N. S.) 292, 304.

1903
FEB. 25.

ORIGINAL CIVIL.

30 C. 699=7 C. W. N. 651.

to recover is claimed in respect of work done under the agreement of the 26th August 1895. It is admitted that certain extra and additional work was done which was outside the agreement mentioned, which work is not the subject of the present suit which is confined to work done under the agreement and not otherwise. By a clause in the agreement it is provided that the work done thereunder must be finished before the 1st Aughran 1302, corresponding with the 16th November 1895, and it being alleged that the work under the agreement was duly executed and completed, the suit on the face [706] of the plaint would appear to be barred unless some special case is shown extending the period of limitation.

In the last paragraph of the plaint the special case is shown which is relied upon as an answer to the plea of limitation which would otherwise be maintainable. The paragraph runs thus:—"The plaintiff's cause of action arose within the jurisdiction of this Hon'ble Court and is within the period prescribed by the Statute of Limitation, as the defendant acknowledged in writing the debt on the 18th day of June 1898." Section 50 of the Code of Civil Procedure provides that the plaint must show the ground upon which exemption in respect of the law of limitation is claimed. The words are:—"If the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the plaint must show the ground upon which exemption from such law is claimed," and there is no doubt that under that provision of the law the express acknowledgment relied upon was set out in the 12th paragraph of the plaint. Now the acknowledgment referred to in the 12th paragraph of the plaint is contained in a certain writing by the defendant which was made upon a receipt relating to a letter and bill for works and repairs done to the defendant's house at Baranagore. The receipt is dated the 9th June 1898, and the writing thereon by the defendant is in these terms:—"The bill glanced over is incorrect; large amounts have been wrongly introduced. I will first have the work examined although I know that the whole of the work is not yet finished. Then I will examine the estimates and after deducting what has to be deducted, I will see what is due." Now it has been contended that the writing is an acknowledgment of liability within the meaning of section 19 of the Limitation Act. An acknowledgment to fall within this section must be an acknowledgment of liability in respect of the right claimed. Now it is difficult to say that the defendant intended in any sense to admit liability in respect of any portion of the amount of the bill. He had paid large sums to the builder, and he was even claiming the right to exact a penalty for the non-completion of the work within the contract period. It seems to me that the writing is so expressed as to avoid any admission of liability. The defendant does not, I think, admit that anything is due [707] on the bill. What he says is, he will examine the bill and deduct what has to be deducted, and then he will see what the result is. But it is said it is sufficient if the acknowledgment amounts to an admission of an open account, because if it is an acknowledgment of an unsettled account, then a promise is implied from such acknowledgment to pay what may be due on that account. There is no doubt that an acknowledgment of that partial or conditional character would be sufficient under English law to prevent the operation of the English law of limitation, because the suit is based not on the acknowledgment, but upon the implied promise to pay. The law is different in this country, and an

1903
FEB. 25.
ORIGINAL CIVIL.
30 C. 699=7 C. W. N. 651.

acknowledgment to save limitation in respect of a debt must be an express acknowledgment of liability in respect of the debt claimed or of some part of it. The right claimed in this case was a debt—not a right to an account based upon a mutual open and current account. Reference has been made to the decision of this Court in the case of *W. R. Fink* v. *Buldeo Dass* (1). There is no doubt an expression in the judgment of the learned Judge who decided that case which would seem to show that in the opinion of the learned Judge the law in England was the same as the law in this country, but the question did not, strictly speaking, arise. The matter really in issue was whether certain letters written by the defendant to the plaintiff did contain an acknowledgment of debt. In this respect the decision to which I have referred is distinguishable from the present case; nor does it appear that the Judge's attention was directed to the decisions of this Court under section 19 of the Limitation Act and to the distinction existing between the law of limitation applicable in England and that in force in this country; while the law in this country does not require that a promise to pay should be made out to avoid limitation, it is necessary when the right claimed is a debt that an unequivocal and unqualified admission of the debt or a part of it or of the subsisting relationship of debtor and creditor should be established to satisfy section 19 of the Limitation Act: see *Venkata* v. *Parthasaradhi* (2). It seems to me therefore that the acknowledgment relied on in the plaint as furnishing a new period of limitation [708] is not an acknowledgment of that express and unambiguous character to satisfy s. 19 of the Limitation Act. But apart from the ground relied on in the plaint, it has been sought to avoid limitation in two other ways. First, it is said there is another acknowledgment not made by the defendant himself, but by an agent appointed by him to supervise the work done by Jogeshwar Roy; this acknowledgment is not referred to in the plaint at all; and then in the alternative it is argued as the second mode of avoiding limitation that no acknowledgment of liability is necessary, as the work, the subject of the suit, was not completed, as the plaint implies, in November 1895 but continued for some time afterwards. This raises the question whether the plaintiff can be allowed to take advantage of any express ground of exemption from the ordinary law of limitation which has not been pleaded in the plaint, having regard to the terms of section 50 of the Civil Procedure Code.

If it had been shown that any reasonable ground existed for giving the plaintiff an opportunity for proving a later acknowledgment of liability by the defendant or his agent and had I been asked to do so, I should probably have given the plaintiff leave to amend his plaint so as to enable him to plead and prove the new ground of exemption. I have heard the evidence of Jogeshwar Roy, the builder, and of the engineer who was engaged by Mr. Mitter to supervise the work, and who, it is alleged, made an acknowledgment of liability which the plaintiff now seeks to take advantage of.

The evidence of Hari Charan Pal, the engineer, was of a very unsatisfactory character. The shuffling manner in which he gave his evidence makes it impossible to place any reliance upon it at all, and it is quite impossible to say when, according to this witness it was that the work agreed to be done under the agreement of the 26th August was completed, or whether it was not completed as the plaint implies at or

(1) (1899) I. L. R. 26 Cal. 715. (2) (1892) I. L. R. 16 Mad. 220.

1903
FEB. 25.

ORIGINAL CIVIL.

30 C. 699=7 C. W. N. 651.

before November 1895. Moreover, it appears that the acknowledgment relied on as being given by this witness was in reality given by him not as agent of the defendant, but under circumstances which show that the object was to give an unfair advantage to Jogeshwar Roy and to prejudice the defendant. In no sense can it be said that the [709] certificate relied on by the plaintiff is a genuine certificate, and, moreover, at the time the so-called certificate was given, the witness was obliged to admit that he had ceased to be employed by the defendant. I am satisfied he was acting in collusion with Jogeshwar Roy at the time when the certificate sought to be relied on was granted. Jogeshwar Roy has been called, and no doubt states the work under the agreement of the 26th August 1895 was not done within the period mentioned in the contract, but he is unable to fix the time when the work to be done under the agreement was in fact completed.

It appears to me that the case attempted to be made by Jogeshwar Roy and Hari Charan Pal as regards the non-completion of the work is an after-thought. It is not the case made originally in the plaint. The plaint was framed in a very different way, and there is no doubt it was so framed deliberately in order to avoid payment of the penalty which Mr. Mitter was claiming for non-completion of the work.

The plaintiff ought not to be allowed to put forward a new case inconsistent with the plaint to enable him to avoid limitation.

That being so, it seems to me that the plea of limitation has also been established. I must, therefore, dismiss the suit with costs.

Attorneys for the plaintiff: *Leslie* and *Hinds*.

Attorney for the defendant: *U. C. Dutt*.

---

30 C. 710.

[710] CIVIL RULE.

IBRAHIM MULLICK *v.* RAMJADU RAKSHIT.* [29th May, 1903.]

Dispossession—Symbolical possession, effect of—Civil Procedure Code (Act XIV of 1882) ss. 318, 335—Jurisdiction.

Symbolical possession does not amount to dispossession as contemplated by s. 335 of the Code of Civil Procedure.

[**Ref.** 16 C. P. L. R. 107; 27 Mad. 67 F. B.; 15 M. L. T. 163=24 I. C. 771=1 L. W. 31; **Expl. and Dist.** 33 Cal. 487=3 C. L. J. 293; (1914) M. W. N. 897=27 I. C. 90.]

RULE granted to Ramjadu Rakshit and other decree-holders.

Ramjadu Rakshit and others obtained a decree for arrears of rent against their tenants, Lachmi and Golap. In execution of that decree they brought the defaulting tenure to sale and purchased it themselves on the 12th February 1902. The sale was confirmed on the 18th March 1902, and formal possession was delivered to the purchasers on the 16th November 1902. One Ibrahim Mullick and another made an application on the 5th December 1902 in the Court of the 3rd Munsif of Serampore under s. 335 of the Civil Procedure Code on the allegation that, by the delivery of possession, formal possession of a tank belonging to them was given to the purchasers. They stated in their application that the object of it was to protect themselves against any disturbance

* Civil Rule No. 1440 of 1903, against the order of Kali Das Mukerjee, Munsif of Serampore, dated Feb. 14, 1903.