

ing the appeal to the Sudder Court, and affirming the decree of the Zilla Court with costs. The appellant in this suit, and the respondent in the other suit, must have the costs of both the appeals.

First appeal dismissed ; second appeal allowed.

Agent for appellant : Mr. *Wilson*.

Agents for respondents : Messrs. *Cunliffe* and *Beaumont*.

1871

—————
 KOOR
 GOLAB SING
 v.
 RAO KURUN
 SING.
 —————
 RAO KURUN
 SING.
 v.
 NOWAB
 MAHOMED
 FYAZ ALEE

—————
 P. C.*
 1871
 July. 17.
 —————

OKOOR PERSAUD BUSTOOREE (PLAINTIFF) v. MUSSAMUT FOOL-
 KOOMAREE DABEE (DEFENDANT).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Act XIV of 1859, s. 1, cl. 9—Del credere Agent—Breach of Contract.

Where a broker was sued for a balance of account, his liability being based on the receipt of a *del credere* commission, held that the suit was for breach of contract within the meaning of cl. 9, s. 1 of Act XIV of 1859 (1), and the period of limitation must be calculated from the date of the last item in the account. The contract not being in writing, the suit, which was brought more than three years from such date, was barred.

THIS was an appeal from a decision of the High Court (Peacock, C. J., and L. S. Jackson, J.), dated the 24th January 1867 (2).

The suit was instituted by the appellant as the gomastah of the *kothee* of Lalla Bunsheedhur against the respondent, who carried on business as a commission agent, or factor, in succession to her husband, to recover the Sum of Rs. 16,000 as the balance of an account current between the two firms.

The alleged liability of the defendant was based upon her having received a *del credere* commission for the sale of goods,

Present :—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, LORD JUSTICE JAMES,
 LORD JUSTICE MELLISH, AND SIR LAWRENCE PEEL.

1871
 OKROO
 PERSAUD
 BUSTOOREE
 v.
 MUSSAMUT
 FOOLKOO-
 MAREE
 DABEE.

and not on the ground of her actually having received the money for the goods.

Although the suit was commenced as upon an account stated shortly before action, the plaintiff, at the settlement of the issues, abandoned that and sued for an adjustment of the accounts, but on the trial she relied on evidence of an account stated in September 1858.

The plaint was filed on the 17th July 1863, the last item of charge against the defendant being in September 1858.

The High Court held that the suit was within the scope of, and barred by, cl. 9 of s. 1 of Act XIV of 1859.

Mr. *Leith*, for the appellant, contended, that this was a case in which the accounts showed charges against the defendant for goods supplied to her; and payment received from her, and some such payments appearing in an account stated within three years, s. 8 of Act XIV of 1859 applied, there being an account current between the parties as merchants and traders having mutual dealings. He cited *Chitty on Contracts*, 7th edit. p. 722, and referred to the English Statutes, 21 Jac. I., c. 16, s. 3, and 19 & 20 Vict., c. 97, s. 9. These constitute current accounts; see 2 Wms' Saund, 127a, note f. This is not a breach of contract within the meaning of s. 1, cl. 9 of Act XIV of 1859. The cases decided in the Courts of India are conflicting—*Sonatan Goolo v. Parbutty Churn Roy* (1) and *Gopal Chunder Shaha v. Sinaes* (2).

Mr. *Doyne*, for the respondent, contended, that there was clearly a breach of contract, and not a case of mutual dealing—*Lal Mohun Haldar v. Mahadeb Katec* (3). Though there have been conflicting decisions in India, there can be no doubt as to a selling under a *del credere* commission that there is an express contract under which the agent is liable whether he sell or not.

Their LORDSHIPS gave the following judgment:—

This was a suit brought by the appellant, who was the manager of a factory in Moorshedabad, against the respondent.

(1) Thom. Law of Limit., 129.

(2) 8 W. R., 4.

(3) 9 W. R., 193.

ent, who carried on an old established business of broker, to recover a sum of Rs. 16,051 and interest, alleged to be due on the balance of an account. The defendant had for several years sold the goods of the plaintiff's firm, and according to the finding of the principal Sudder Ameen, the correctness of which was not disputed before us, had received a *pakkà* or *del credere* commission, which made her liable to the plaintiff for all goods sold which were not paid for by the purchasers. As there was no proof that any part of the price of the goods, in respect of which this suit was brought, had been received by the defendant the claim against the defendant, was only supported upon the ground that, as she received a *del credere* commission, she was liable for the price of all goods sold by her for the plaintiff. It was admitted that the cause of action for the last item in the account had accrued more than three years, but that there were items in the account which had occurred within six years from the commencement of the suit. The Statute of Limitation was pleaded, and the sole question to be determined is whether, under the circumstances previously stated, the suit is barred by the Indian Statute of Limitations, Act XIV of 1859. The High Court held that the case came within cl. 9 of s. 1 as a suit brought for the breach of a contract, and the Chief Justice in giving judgment says:—"Although no express contract was proved to have been entered into between the parties, still their dealings were evidence from which it might properly be assumed they had agreed to carry on business on the terms upon which we find them carrying it on." It was an engagement on the part of the defendant that she would sell the plaintiff's cotton, and that she would guarantee the purchasers. There was a liability on the part of the defendant not arising from a wrong, but a liability arising out of an engagement which she must be assumed to have entered into with the plaintiff. It therefore falls within cl. 9 of s. 1. It is a suit for a breach of contract not in writing. It was urged before us on the part of the appellant that the High Court had put a wrong construction on the words "breach of any contract," as used in the clause; that these words are not there used for the purpose of distinguishing actions founded on contract from actions founded

1871

OKOOR
PERSAUD
BUSTOOREE
v.
MUSSAMUT
FOOLKOO-
MAREE
DABEE.

1871
 OKOOR
 PERSAUD
 BUSTOOREE
 v.
 MUSSAMUT
 FOOLKOO-
 MAREE
 DABEE.

on tort, but for the purpose of distinguishing actions to recover unliquidated damages for breach of contract from actions to recover debts ; and that the enumeration in the clause itself and in cl. 8 of several debts, with respect to which the period of limitation is to be three years, proves that it could not have been intended to make the limitation for all debts three years under the words "suit for the breach of any contract ;" and that the present suit was in substance a suit to recover a debt or liquidated sum of money ; and that the period of limitation was six years under cl. 16 of s. 1. Several cases were cited from the Indian Courts, and it appears from them that much difference of opinion has prevailed among the Judges in India respecting the proper construction to be put on the words "for the breach of any contract" in the cl. 9. Their Lordships do not think it necessary or advisable that they should attempt on the present occasion to lay down what is the proper construction of these words as applicable to all cases. It is sufficient to say that it appears impossible to them to put so narrow a construction upon them as not to include the case now before them. The real debtors for the price of the goods sold are the purchasers of the goods, and the broker is only sued upon his collateral undertaking that, in consideration of the commission paid to him, he will pay the price of the goods if the purchaser fails to do so. An action on such an undertaking is an action on an express contract, and the sums which can be recovered under it are damages for a breach of contract.

Their Lordships, therefore, are of opinion that the judgment of the High Court was correct, and they will recommend to Her Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Agents for appellant : Messrs. *Woolaston and Davison.*

Agents for respondent : Messrs. *Bailey, Shaw, Smith, and Bailey.*
