APPELLATE JURISDICTION (*a*)

Referred Case No. 67 of 1870.

V. KITTAPPA *against* K. SOMANNA and 3 others.

In a suit by the plaintiff to recover money lent more than three years before suit, the plaintiff alleged an express verbal promise by the debtor to pay the amount sued for made upon a settlement of accounts.

Held, by HOLLOWAY and KINDERSLEY, JJ.—That a verbal promise was not sufficient to prevent the application of the Act of Limitation.

Per KINDERSLEY, J.—If the debtor and creditor enter into a new contract, the debtor promising to pay a barred debt, that would seem to be a new cause of action, and it is doubtful whether it was the intention of the Limitation Act to insist that the new promise should be in writing.

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THE following was a case referred for the opinion of the High Court, by C. V. Chengulva Row, the District Munsif of Bimlipatam, in Suit No. 64 of 1870 :—

This is an action of debt. The plaint alleges that one Sannayasi, father to the first and second defendants, had, on three different occasions, between the 9th October 1865 and 4th January 1866, borrowed sums of money from the plaintiff, amounting in all to Rupees 99-8-0 at 18 per cent. interest, and that the third defendant had been surety for the same. On the 18th May 1867, the obligee having delivered a garce of paddy valued at 70 Rupees, a balance of Rupees 29-8-0 was struck against him on account of the principal. The original obligee has since died, leaving some property, which the first and second defendants and fourth defendant, who is a partner in cultivation with the two former, have taken possession of. The plaintiff therefore seeks to recover from all the defendants the balance still due to him, viz. Rupees 60 as follows :—

	RS.	A.	P.		
Amount lent on the 5th Oct. 1865...	50	0	0		
„ 4th Nov.	24	0	0		
„ 4th Jan. 1866...	25	0	0		
				99	8 0
Interest on the above sums from their respective dates up to 18th May 1867 at 18 per cent. per annum				26	1 0
Total...				125	9 0

(*a*) Present : Holloway and Kindersley, JJ.

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Deduct		
Value of one garce of paddy delivered by the original obligee on the 18th May 1867	70	0 0
	55	9 0
Interest on Rupees 29-8-0 being balance on account of principal, from the 18th May 1867 to 15th February 1870 at 18 per cent. per annum.	14	1 0
	69	10 0
Amount foregone by plaintiff	9	10 0
Balance claimed... ...	60	0 0

The plaint was presented on the 16th February 1870.

The defendants, among other things, pleaded the Law of Limitation, and stated that under Section 4, Act XIV of 1859, an acknowledgment of debt should have been in writing to give a new period of limitation ; that in the absence of such acknowledgment the limitation should be considered to run from the time when the original debt became due ; that Clause 9, Section 1 of the Limitation Act, is applicable to the present case ; and that, as the three years time allowed by that clause had elapsed before the date of plaint, the plaintiff's claim was barred.

It has been argued for plaintiff that in the present case, the original obligee had, when the balance was struck against him on the 18th May 1867, both acknowledged the debt and promised to pay it ; that, as Section 4 of the Limitation Act does not require a promise, but an acknowledgment, to be in writing, the verbal promise made on the 18th May 1867 constituted a new contract, for which the money then due was the consideration ; that the plaintiff had a fresh time of three years from that date, and that the plaint was put in within that time. In support of this the plaintiff's Vakil relied upon a decision of the Judicial Commis-

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sioner of Mysore in Referred Case No. 2 of 1869, reported at page 181 of the *Madras Jurist*, *Volume* V.

The defendants, on the other hand, pleaded, that to acknowledge a subsisting debt and to promise to pay it are virtually the same, and that the word promise was introduced by plaintiff merely to evade the requirements of Section 4.

The point for determination therefore is, whether a verbal promise by an obligee to pay an existing debt would constitute a new contract, so as to give the obligor a new period of limitation under Act XIV of 1859 from the date of that promise.

As the question is of importance, and one likely to be frequently raised, and as great doubts are entertained regarding it, I beg to submit it for the decision of the High Court.

The following is my own view of the matter :—

The Indian Limitation Act does not provide for any other mode of revival of right to sue in cases of legacy or debt than that laid down in Section 4 of that Act, and the following extract from the decision of the High Court in *Khavajah Mahammad Janula* v. *Venkataroyer and another*, *High Court Reports*, *Vol. II*, *page* 81, may, I think, be consulted here with advantage. It runs thus : "Now the 4th Section of the Act provides expressly for the acknowledgment of debts that would otherwise be barred, and it gives to a writtten acknowledgment all the effect of a new promise giving rise to a fresh cause of suit. The reasonable construction of this Section, we think, is that a written acknowledgment alone was intended to have that effect, and that impliedly a new period of limitation is excluded in any other case." The case of *Ram Narain Choudry* v. *Bhagwam Jogey* (Thomson's Law of Limitation, Edition 1866, pp. 54,55) is exactly in point. There " the plaintiff lent money to the defendant without receiving any written document. Payments were made to the defendant from time to time which were deducted from the account, and a balance against him was eventually struck in his presence which he orally promised to pay to the plaintiff, with interest. More than three years after date

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of the original loan, but within three years from the date of the alleged adjustment and oral promise, the plaintiff sued the defendant for the balance of the money lent with interest. Defendant pleaded limitation, denying at the same time that he owed any balance, or that he ever adjusted accounts as stated in the plaint. It was held by the Lower Court, and on reference by the High Court (Calcutta) that the case being a suit to recover money lent fell to be disposed of under this Clause (9 of Section 1), and that when there is no written and signed acknowledgment as provided by Section 4 of this Act, the mere fact of payment having been made on account does not keep alive the claim so as to enable the creditor to bring an action after three years from the time when the debt became due." Part payment and a verbal promise to pay were both duly asserted in this case, but neither the Lower Court nor the High Court have taken any notice of the assertion of the "promise to pay," and considered the case to be fully governed by Section 4 of the Act. That shows that a verbal promise to pay an existing debt does not take the case out of the Statute.

On the other hand the decision of the Judicial Commissioner of Mysore, above referred to, clearly recognizes a difference under the Indian Limitation Act between a promise to pay and an acknowledgment, and rules that the plaintiff may sue upon a verbal promise made in consideration of the barred claim if that promise was made within the period of limitation. That a promise to pay is distinct from acknowledgment under the English Law of Limitation is a known thing, and the following extract from the judgment of the Privy Council reported at pages 335 and 336, *Madras Jurist, Volume IV*, supports this view. It runs thus: "The authorities which have been relied on in order to show that there has not been a sufficient acknowledgment within the period of limitation in the present case were cases of actions on promises decided on the Statutes of 21 James I and 9 Geo. IV, Cap. 14. The principle of these decisions is not applicable to a case like the present. They depend not upon the effect of an exception in the Statute, but upon the principles of the Common law with respect to the cause of action. The issue joined made it incumbent on the plain-

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tiff to prove a promise made within six years, and such as to agree with that laid down in the declaration. In such cases acknowledgments, whether by words or acts, are of no avail, save so far as they sustain the promise alleged, there is no exception within which they come, and these cases are to be regarded simply as actions brought on promises made within six years. But the cases in which acknowledgments are operative by way of exception are of a different character. In these the action must be maintained on the original security, and an acknowledgment within the prescribed period of limitation shows that the obligation was then subsisting and unsatisfied, and a promise to pay is required."

Moreover, it is believed that the Legislature when framing the Indian Law of Limitation had before them the 9th George IV,Chap. XIV,which was extended to the Territories of the East India Company by Act XIV of 1840, and all the other English Statutes on Limitation. The words "acknowledgment and promise to pay" are constantly met with in these Statutes, and yet the Legislature refrained from using the phrase "promise to pay" in Section 4 of the Indian Act. It may be, therefore, maintained that they have purposely left the phrase out, and that a promise to pay is not covered by Section 4.

I am, however, of a different opinion. In the 9th Geo. IV,Chap. XIV,Section 1, it was provided that "in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof,unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." Having this enactment before them for their guidance, and considering as they did that an acknowledgment of debt which under the old Indian Law of Limitation was not necessarily to be in writing, should for the future be in writing, it is impossible to believe that the Legislature would have thought it safe to exempt

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promises to pay old debts from the necessity of being written. It may be questioned then, why did they not introduce the words 'promise to pay' into Section 4? The answer is, that a written promise would not be more useful than a written acknowledgment, and that the latter would be quite sufficient for all the purposes of the Limitation Law, for it is provided in Section 4 that a new period of limitation according to the nature of the original liability should be computed from date of a written acknowledgment. Besides, if a verbal promise to pay an old debt should be considered as constituting a new contract, and seeing how prone the people are to perjury, rights to sue for barred claims can be revived at any time and the object of the Limitation Act will be quite defeated.

Under these circumstances I would decide the question against the plaintiff.

No Counsel were instructed.

The Court delivered the following judgments :—

HOLLOWAY, J.—I am of opinion that this action for money lent is clearly barred. The suit is for money lent and the periods applicable are those of 9th and 10th clauses.

Section IV prescribes the only mode of extending the period. This new law had to operate upon clause 4th, Section XVIII, Regulation II of 1802, and has designedly omitted promise to pay and substituted a written acknowledgment. The promise to pay might be perfectly good evidence of an acknowledgment sufficient to satisfy the exception if it had been in writing, but in my judgment no verbal promise could have any effect whatever.

It has been decided that part payment is not enough, because the promise implied is not in writing, yet promises implied, when once the implication has been made, can have no different effect from express promises. I do not wish to say anything of the grounds upon which it is said that the new promise is a new cause of action. To assume that, here, would be inconsistent with the provision that the acknowledgment is to give a new period in accordance with the original liability, whereas the period would be, if the acknowledgment gave a new cause of action, the same in all cases.

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It seems to me that the construction proposed is inconsistent with the words and the object of the Statute. In substituting a new mode of revival for that contained in the old Regulations, it distinctly narrows the mode to a written acknowledgment. I would say that the suit was clearly barred.

KINDERSLEY, J.—I understand the question put by the Munsif to be "whether a verbal promise to pay an "existing debt would constitute a new contract so as to give "the obligor a new period of limitation." The present suit being brought upon the old debt, I agree with Mr. Justice Holloway that the promise (not being an acknowledgment in writing) would not extend the period. In England it has been repeatedly held that a barred claim may be a good consideration for a promise, and if debtor and creditor deliberately enter into a new contract, the debtor promising to pay a barred debt, that would seem to be a new cause of action, and I am not sure whether it was the intention of the Limitation Act to insist that such new promise should be in writing. The question, however, does not seem to arise out of the present case, in which the claim was based, not on the new promise, but on the old debt.