

Appeal No. 117.

1868.
March 13.

U'MEDCHAND HUKAMCHAND *et al.* *Appellants.*
SHA' BULA'KIDA'S LALCHAND *et al.* *Respondents.*

*Account Stated—Implied Contract—Limitation—Act XIV. of 1859,
Sec. 1., Cl. 9, 10, and 16.*

A suit to recover the balance of an account adjusted and signed by the defendant, may be brought at any time within six years from the date of the adjustment, the contract to pay the amount found due on the adjustment being an implied contract, and, therefore, falling under Cl. 16 of Sec. 1. of Act XIV. of 1859, and not under Cl. 9, Sec. 1. of that Act.

Semble, that the adjustment and signing of an account by the defendant is a sufficient contract in writing to satisfy the requirements of Cl. 9 of Sec. 1.

APPEAL from the decision of Arnould, J.

The Original Suit (No. 796 of 1867) was tried in the First Division Court on the 13th of August 1867, when judgment was given for the defendants.

The plaint (filed on the 22nd of July 1867) claimed to recover Rs. 11,217-3-4 on an account stated and signed by the defendants.

The following is a translation of the account sued upon, taken from the books of the plaintiffs :—

“ Interest on the account of Shá Bulákidás Lálchand.
Per S. 1919 (1862-63).

<p>Dr.</p> <p>Rs. 10,717$\frac{3}{4}$-24$\frac{1}{4}$ cents. Kartik Sud 1st, Friday (24th October 1862), Rs. 29-2. Rs. 10,688$\frac{3}{4}$ - 11$\frac{3}{4}$ cents., 12$\frac{1}{2}$ months and 9 days. } 1,368-17$\frac{1}{4}$.</p>	<p>Rs. 29 as. 2 Kártik Sud 1st, Friday (24th October 1862), for balance up to Ashvin Vad 30th, Wednesday (11th November 1863), Rs. 10,683$\frac{1}{2}$-11$\frac{3}{4}$ cents.</p>	<p>Cr.</p>
<p>1,368-17$\frac{1}{4}$</p>		

Abstract.

<p>Dr.</p> <p>Principal due Interest, cents 136,817$\frac{1}{4}$ at $\frac{2}{4}$ per cent. amounting to</p>	<p>10,688$\frac{3}{4}$-11$\frac{3}{4}$. 1,026-12$\frac{3}{4}$.</p>	<p>Cr.</p>
<p>11,714$\frac{3}{4}$-24$\frac{1}{4}$</p>		
<p>Due on Kartik Sud 1st, 1920, Thurs- day (12th November 1863). }</p>		<p>11,714$\frac{3}{4}$-24$\frac{1}{4}$</p>

Written by Shá Bulákidás Lálchand; Rs. 11,714 $\frac{3}{4}$ -24 $\frac{1}{4}$ are duly found to be due to you on account on Kartik Sud 1st, Thursday (12th November 1863), by the hand of Rávechand.”

The plaintiffs, in their particulars of demand, gave the defendants credit for Rs. 497-12-7, being the price of tea and sugar purchased from the defendants on several days subsequent to the adjustment of the account. They claimed interest on the balance from the 13th of November 1863 till payment. The defendants set up as their defence the law of limitation.

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The appeal was argued before COUCH, C. J., and WESTROPP, J., on the 23rd of December 1867, and the 14th and 15th of February 1868.

White (with him *Marriott*); for the appellants:—The question to be determined is whether the non-payment of an account stated and signed falls within the words “breach of any contract” in Cl. 9 of Sec. I. of Act XIV. of 1859. I contend that it does not. The word “contract” in that section means express contract, and that Cl. 9 does not apply to an implied contract is clear from the decisions. *Doorga Monee Dossee et al. v. Doorga Mohun Doss* (a) decided that the limitation prescribed by Cl. 16 applied to a suit for reimbursement of rateable shares of a joint decree. *Radhanath Dutt v. Gobind Chunder Chatterjee* (b) lays down the limitation which applies in a suit brought by a principal, to recover money received by his agent for his use, as six years. To the same effect is *Sheikh Amjud Ali v. Syud Ali Buksh* (c). In the case of *Noboo Kristo Bhunj v. Raj Bullubh Bhunj* (d), it was decided that a suit for contribution by a person who became surety for the repayment of advances received by himself and the defendant from Government for manufacturing salt, and who was obliged by an execution against him to pay the whole sum advanced, was governed by Cl. 16. [WESTROPP, J., referred to *Heera Monee Dossia v. Promothonath Ghose* (e), which was a suit on a foreign judgment, and in which it was decided that the period of limitation was six years.] The conclusion to be drawn from all these, which are all cases in which the obligation to pay arises from a promise implied by law, is that implied contracts do not come within the mean-

(a) 2 Calc. W. Rep., Civ. R. 266. (b) 4 Calc. W. Rep., S. C. C. R. 19.

(c) 2 Calc. W. Rep., Civ. R. 122.

(d) 3 Calc. W. Rep., Civ. R. 134. (e) 8 Calc. W. Rep., Civ. R. 32.

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ing of Sec. 9. The meaning of an account stated is clearly shown in *Ashby v. James* (f), *Irving v. Veitch* (g), and *Laycock v. Pickles* (h). [COUCH, C.J., referred to *Tannerv. Smart* (i).]

It is a contract in which obligation to pay is raised by implication of law from the fact of the parties stating the account. It has already been decided in this court, by the late Chief Justice, Sir Matthew Sausse (Suit No. 316 of 1863), that the limitation in cases of money paid to the use of another is six years. What intelligible distinction can be drawn between that case and this? The decision relied upon on the other side, *Nobin Chander Sahoo v. Sureop Chunder Doss* (j), seems to have been decided on the authority of two earlier cases, *Doyle v. Khooseal Khan* (k), and *Doyle v. Allum Biswas* (l), in neither of which are the reasons for the decisions given. Even if it should be held that an implied contract comes within the meaning of Cl. 9, there is a sufficient written contract here to bring the case within the exception: *Villiappen Ghetty v. Nootoo* (m), *Syed Ali Saib v. Sri Raja Saniviasiraj Pedda* (n).

The Advocate General (the Honorable L. H. Bayley) (with him *Dunbar*), *contra*:—All the cases in which the exact point now before the Court was decided are decisions in my favour. The decisions relied upon on the other side are, properly speaking, not actions of contract at all. They are obligations *quasi ex delicto*. The obligation to pay is imposed by the law upon the defendant *in invitum*,—particularly so in the case of payment of money under a decree of court. It would be absurd to suppose the Legislature had such a case as that in mind when framing Cl. 9.

The case of “money paid” is certainly opposed to this view, but that was decided in a Division Court, before a single Judge, and the authorities in Calcutta conflict with it. Whether the adjustment of an account be looked upon as a

(f) 11 M. & W. 542.

(g) 3 M. & W. 107.

(h) 33 L. J., Q. B. 43.

(i) 6 B. & C. 603.

(j) 6 Calc. W. Rep., Civ. R. 328.

(k) 3 Calc. W. Rep., S. C. C. R. 1.

(l) 4 Calc. W. Rep., S. C. C. R. 1.

(m) 2 Ind. Jur. 1.

(n) 2 Mad. H. C. Rep. 401.

contract or not, it comes within the three years' limitation. Taking it as a contract, it is one in which the parties have omitted to insert the obligatory portion: it is partly verbal and partly in writing, but as the verbal portion—that is, the promise to pay—is that which the plaintiff sues upon, it is a suit for the breach of a contract not in writing. I, however, contend that it is not a contract, but only the acknowledgment of a debt; and, as there is no engagement to pay, it does not come within the exception. The Court will not, unless compelled, limit the word “contract” by the insertion of the word “express” before it, as contended for on the other side. He cited *Rann v. Hughes (o)*; *Chitty on Contracts*, p. 14; *Phillimore's Roman Private Law* 271.

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White was heard in reply.

Cur. adv. vult.

COUCH, C. J.:—The plaint in this suit claimed Rupees 11,217-3-4, for money found to be due from the defendants to the plaintiff on an account stated between them, and signed by the defendants, after giving credit in the particulars of demand for a sum of Rs. 497-12-7, the price of tea and sugar purchased from the defendants, and also claimed interest on the first-mentioned sum from the 13th of November 1863.

The plaintiff relied upon a statement of account in the following terms, written by one of the defendants, the name used therein being the name of the defendants' firm:—“Written by Shá Bulákidás Lálchand. Rs. 11,714 $\frac{3}{4}$ -24 $\frac{1}{2}$ are duly found to be due to you on account, on Kártik Sud 1st, Thursday (12th November 1863), by the hand of Rávchand.” And it was in evidence that the account adjusted was what is called a Shroff's account, namely, for money paid and commission.

The plaint was filed on the 22nd of July 1867, and the suit came on for hearing before Sir Joseph Arnould on the 13th of August, who held that it was barred by Sec. 1, Cl. 9, of Act XIV. of 1859, following a decision of the High Court at

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Calcutta (*p*). From this decision the plaintiff has appealed, and the question which we have to determine is, whether the suit comes within that clause.

The nature of an account stated is described by Lord Abinger in delivering judgment in *Irving v. Veitch* (*q*), where he says: "The account stated is nothing more than the admission of a balance due from one party to another, and, that balance being due, there is a debt; and when a man is indebted, there is always a good consideration for his promise. The very statement of the account, and admission of the balance, implies a promise in law to pay it."

The action upon an account stated is founded upon a contract implied by the law, "that he against whom the balance appears has engaged to pay it to the other, though there be not any actual promise;" and belongs to the class of implied contracts, which are described as arising from the "general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires:" 3 Blk. Com. 163, 164.

Writers on English law, as well as the courts in England, have not made a distinction between a genuine tacit, or implied contract—that is, a contract to be inferred from the words, or from the position, or conduct of the obligor previous to the completion of the obligatory incident—and an obligation resembling that created by contract, the instances of which are given in Secs. 54 to 61 of the Indian Contract Bill prepared under the superintendence of the Indian Law Commissioners; and have, for the purpose of enforcing the obligation, treated both as contracts. It appears to us to be necessary to bear this in mind when we come to consider what construction is to be put upon Act XIV. of 1859. The Act was, by Sec. 24, to take effect throughout the Presidencies of Bengal, Madras, and Bombay, and was to be applicable not only to suits in the Supreme Courts, which were to be decided according to English law, but to suits in the other courts in the Presidencies, which were not to be gov-

erned by that law. We think it must have been the intention of the Legislature that the law of limitation, which is a law of procedure, should be uniform in all the courts, and that the language used in any of the sections cannot have one meaning given to it in a suit which is to be decided according to the English law, and another in a suit in which the court is not bound to follow that law, or, as in cases of contract or succession even in the Supreme Courts, may be bound to follow another.

Before examining the language of Cl. 9 it will be well to notice the clause immediately preceding it. By that it is enacted that to suits to recover the hire of animals, vehicles, boats, or household furniture; or the amount of bills for any articles sold by retail; and to all suits for the rents of any buildings or lands (except certain summary suits), the period of limitation shall be three years from the time the cause of action arose. Now we have here a special provision for suits which in very many cases are founded on an implied contract, and will come within Cl. 9 if that extends to implied contracts; and it would seem that the Legislature did not look upon these as suits for the breach of a contract.

Cl. 9 commences: "To suits brought to recover money lent or interest" [both of which are cases in which the contract or promise to pay is only implied], and continues: "or for the breach of any contract, the period of three years from the time when the debt became due, or when the breach of contract in respect of which the suit is brought took place, unless there is a written engagement to pay the money lent or interest, or a contract in writing signed by the party to be bound thereby, or by his duly authorised agent." If the words "any contract" are to be taken as meaning "any implied contract" in the sense in which the term is used in the English law, they will include not only genuine contracts, but the obligations resembling those created by contract to which we have alluded. We think this was not intended, and that such a construction cannot be put upon an Act applicable to suits in any court in the Presidencies.

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Then as regards implied contracts, properly so called, the reasons for thinking that they were not intended by those words are, that two of them, the obligations to pay money lent, and interest—are expressly provided for; and also that the words “breach of contract” would be ordinarily understood as meaning the non-performance of an agreement made by the parties, and not of a promise created by law, or, to use the words of a learned writer, “resting on a mere construction of law:” 2 Steph. Com. 56. In many of these cases—accounts stated and money paid, for instance—the liability would ordinarily be described as a debt, and not for a breach of a contract; and it is so described in Cl. 9 in the cases of money lent, and interest. It is only by a precise and scientific use of legal language that the non-payment of money due on an account stated can be described as a breach of contract.

The late Chief Justice of this court, Sir Matthew Sausse, on the 31st of August 1865, in a case which has not been reported, but of which we have seen his note, held that a suit for money paid fell within Cl. 16 of Sec. 1; and might be brought within six years; and the High Court at Calcutta (4 W. Rep., S. C. C. R. 19) held that a suit to recover a payment made on behalf of the defendant, which he was bound in law to reimburse to the plaintiff, was governed by Cl. 16. The same court (8 W. Rep., Civ. R. 32) has held that a suit on a foreign judgment may be brought within six years from the day when the decree was made. Looking to the principle on which actions on foreign judgments are supported (*Williams v. Jones*, 13 M. & W. 628, 634; 2 Blk. Com. 160), it seems impossible to reconcile this decision with the view that Cl. 9 applies to contracts which are merely implied by law.

For the above reasons, we are of opinion that the present suit is not one for a breach of contract within the meaning of Cl. 9. Supposing we had not been of this opinion, we think there might have been good grounds for contending that there was here a sufficient writing signed by the party to be bound: as the writing by mere force of law, and with-

out any further act on his part, had the effect of a contract; but it is unnecessary for us to decide this. We must reverse the decision of the learned Judge; and, as there may be a defence to the suit on other grounds, we must remand it for re-trial: and the costs of this appeal will be costs in the suit.

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Decree reversed and suit remanded.

Attorney for the plaintiffs: *C. Tyabji.*

Attorneys for the defendants: *Hearn, Cleveland, and Peile.*

Appeal No. 115.

In re *The Indian Companies' Act, 1866.*

March 13.

THE SECRETARY OF STATE IN COUNCIL OF

INDIA *Appellant.*

THE BOMBAY LANDING AND SHIPPING COM-

PANY (LIMITED) *Respondents.*

Crown Debts—Judgment Debts due to the Crown—Precedence in Execution—Judgment Debts due to the Secretary of State in Council for India—Indian Companies' Act—Stay of Execution—Cession of Bassein to the Portuguese.

A judgment debt due to the Crown is in Bombay entitled to the same precedence in execution as a like judgment debt in England, if there be no special legislative provision affecting that right in the particular case.

Under similar circumstances a judgment debt due to the Secretary of State in Council for India is in Bombay entitled to the like precedence, and the reason is that such debt is vested in the Crown, and when realised falls into the State Treasury.

The nature of the cause of action in respect of which the judgment was recovered does not affect the right of the Crown or of the Secretary of State in Council for India to priority.

As the Crown is not, either expressly or by implication, bound by the Indian Companies' Act (X. of 1866), and as an order made under that Act for the winding up of a company does not work any alteration of property, such an order does not enable the Court to stay the execution of a judgment debt due to the Crown, or to the Secretary of State in Council for India.

The cession of Bassein and its dependencies (including Bombay and Salsette) by Sultán Bahádur of Gujarát to the Portuguese, and the treaty made thereupon, mentioned.