

The plaintiffs have relied on the decision of Sir Charles Sargent in *His Highness Tukoji Maharáj Holkar v. Pitámbar Náráyan*; in that decision I concur. I, therefore, think that Sudasuk Chaturbhuj was duly authorized to act as the agent of His Highness Tukoji Maharáj Holkar in bringing this suit, and I find the only issue that has been raised in the affirmative and for the plaintiff, who must have his costs upon this part of the case. There must be a reference to the Commissioner to take the account in the usual form and as prayed in the plaint.

1872.

HIS HIGH-  
NESS TUKOJI  
MAHA'RAJ  
HOLKAR  
v.  
PITA'MBA'R  
DAS  
NA'RANJL.

*Decree accordingly.*

Attorneys for the plaintiff :—*Hearn, Cleveland and Peile.*

Attorneys for the defendant :—*Dallas and Lynch.*

[ORIGINAL CIVIL JURISDICTION.]

*Original Suit No. 746 of 1870.*

Nov. 11.

HARGOPÁL PREMSUKDA'S and another...*Plaintiffs.*  
ABDUL KHA'N HA'JI MUHAMMAD.....*Defendant.*

*Limitation—Adjustment of accounts—Fresh starting-point—Cause of action—Jurisdiction—Letters Patent of High Court, Cl. 12.*

In order that an unsigned adjustment and settlement of accounts may operate to give a fresh starting-point from which limitation commences to run, there must be cross-demands, the striking of the balance between which constitutes a new consideration for the promise on the part of the person against whom the balance is found to pay the balance so settled.

*Mulchand Gulábchand v. Girdhar Mádhav* (8 Bom. H. C. Rep. A. C. J. 6) followed.

H. died at Ajmere, his representative then and at the time of suit brought, being resident there. Previously to the death of H., a cause of action had accrued against him in Bombay.

*Held* that it was not necessary to obtain the leave of the court under Clause 12 of the Letters Patent before instituting a suit against H's representative in respect of such cause of action.

**T**HIS was a suit brought to recover from the defendant, as the heir and legal representative of Háji Muhammad Khan (deceased), the sum of Rs. 6,761, which was alleged to

1872. HARGOPAL  
PREMSUK  
DAS  
v.  
ABDUL  
KHA'N HA'JI  
MUHAMMAD.

be the balance due on an account adjusted in Bombay, and dated the 15th March 1866, after giving credit for certain sums received on account after the adjustment. The entry in the books of the plaintiff, from which the adjustment appeared, was as follows :—

“Balance claimable on the 1st of Chaitar Sud of Samvat 1923 (17th March 1866), after adjusting (the account) the balance was drawn, and a promissory note was executed..... Rs. 10,000.” The suit was filed on the 8th of October 1870.

The facts of the case appear from the judgment of the Court.

The suit was tried before BAYLEY, J., in a Division Court.

*Latham* (with him *Pigot*) for the defendant contended that the cause of action, upon which the suit was brought, did not arise wholly within the local limits of the High Court's Jurisdiction, as the inheritance to his father's estate had devolved upon the defendant at Ajmere. He also contended that the adjustment, upon which the suit was brought, was not of such a nature as to give a fresh starting-point from which limitation might be calculated. He cited *Umedchand Hukamchand v. Sha Bulakidas Lalchand (a)*, *Mulchand Gulabchand v. Girdhur Madhav (b)*, *Kunhyalal v. Bunsee (c)*, *Sabharama v. Eastulu (d)*, *Doyle v. Allum Biswas (e)*, *H. D. Tripp v. Kubeer Mundul (f)*, *Hirada v. Gadigi (g)*, *Ashby v. James (h)*, *Jones v. Ryder (i)*, *Clark v. Alexander (j)*, *Reeves v. Hearne (k)*, *Irving v. Veitch (l)*.

*Marriott* (with him *Leith*) contended that the suit was not barred, and that, in fact, there had been such a setting off of cross-demands at the adjustment of accounts as to raise an implied contract on the part of Háji Muhammad Khán to pay the balance. On the point as to jurisdiction, he cited *Todd v. Parbutti (m)*.

(a) 5 Bom. H. C. Rep. O. C. J. 16.

(b) 8 Bom. H. C. Rep. A. C. J. 6.

(c) 1 Agra F. B. R. 94.

(d) 3 Mad. H. C. Rep. 378.

(e) 4 Calc. W. Rep. S. C. C. 1.

(f) 9 Calc. W. Rep. Civ. R. 209.

(g) 6 Mad. H. C. Rep. 197.

(h) 11 M. & W. 542.

(i) 4 M. & W. 32.

(j) 13 L. J. C. P. 133.

(k) 1 M. & W. 323.

(l) 3 M. & W. 90, 107. (m) 2 Hyde 17.

*Latham* referred to *Story's Conflict of Laws* 514 a, and to *Pott v. Clegg* (n).

1872

HARGOPA'L  
PREMSUK-  
DA'S

*Cur. adv. vult.*

v.  
ABDUL  
KHA'N HA'JI  
MUHAMMAD.

11 Nov. 1872. BAYLEY, J. :—The plaintiffs in this suit, who are Márvádi Bankers of Hyderabad in the Deccan and carry on business in Bombay and elsewhere in India, sue the defendant, an infant of the age of eight years, as the legal heir and representative of his father, the late Háji Muhammed Khán Munshi, to recover Rs. 6,761, being the balance alleged to be due in respect of certain money-transactions between the plaintiffs and the said Háji Muhammad Khán in Bombay, in the years 1865 and 1866. The said Háji Muhammed Khán died in or about February 1868, it was alleged, at Ajmeer, where the present defendant now resides.

The particulars of demand annexed to the plaint, show the above balance, after giving credit for certain payments alleged to have been made on account in 1866 and 1867.

The suit came on for hearing before me in August last when the following issues were framed :—

- (1.) Whether this suit is barred by the Act to provide for the Limitation of Suits (Act XIV. of 1859) ;
- (2.) Whether this Court has jurisdiction to try and determine this suit ;
- (3.) Whether the plaintiffs are entitled to recover the amount claimed, or any part thereof.

Upon the question raised by the second issue, I entertain no doubt that this Court has jurisdiction to try and determine this suit.

The amount sued for is the balance alleged to be now due in respect of two sums of Rs. 5,000 each lent, in Bombay, by the plaintiffs to Háji Muhammad Khán. The cause of action, in respect thereof, was complete in his lifetime, and, indeed, the plaintiffs rely upon an adjustment of his account made by him with the plaintiffs' servants on or about the 17th March 1866. An action might unquestionably have been

1872. brought against him in this court in his lifetime, and his death, by the act of God, does not deprive his creditors of the right, which, by his contract with them in Bombay, they had acquired to have their claims against him or his estate, wherever it might be situated, adjudicated upon in the High Court of Bombay. \* \* \* The representative of a deceased person may be sued in that court within the jurisdiction of which the cause of action with the deceased person arose : *Todd v. Parbutty (o)*, a decision of PEACOCK, C.J., and NORMAN, J.

HARGOPA'L  
PREMSUK-  
DA'S  
v.  
ABDUL  
KHA'N HA'JI  
MUHAMMAD.

The second issue must, therefore, be found in the affirmative and for the plaintiffs.

The defence, however, was mainly rested upon the issue as to the Act for the Limitation of Suits ; and the facts upon this point lie in a very small compass.

Háji Khán Muhammad, who appears to have been a native of Ajmere, being in Bombay in the year 1865, borrowed from the plaintiffs upon his personal security, first, a sum of Rs. 5,000, either on the 24th September 1865, the date given in the plaintiffs' journal entry, or on the 28th September 1865, the date given in the cash-book entry ; and he borrowed another sum of Rs. 5,000 on the 15th March 1866. The money was paid in currency notes, but no receipt or acknowledgment was taken by the plaintiffs on either occasion.

The plaintiffs sent their man, Ganeshdás Rámnáth, a few days after the 17th March 1866, to Háji Muhammad Khán's residence, near Byculla, to obtain an acknowledgment or promissory note from him. Ganeshdás Rámnáth took the firm's account books with him, which he showed to Háji Muhammad Khán, who compared them with his own accounts and found them correct. He, thereupon, wrote a receipt for the balance ; but as it was not stamped, and by the provisions of the Stamp Act could not be stamped or the penalty taken at the hearing, the Court was compelled to reject the document. Had it, however, been received in evidence, it would not have influenced the opinion at which I have arrived on this branch of the case.

Besides the interest, which appears throughout to have been calculated at  $7\frac{3}{4}$  annas per cent., there were two small items in the account, one of Rs. 79-25 and the other of Rs. 65. (His Lordship stated the facts with reference to these items, which shortly were, that Hájí Muhammad Khan handed to the plaintiffs certain silver ornaments. These the plaintiffs sold by the directions of Hájí Muhammad Khán, and credited him with their proceeds before the accounts were adjusted. His Lordship proceeded):—

1872.

HARGOPAL  
PREMSUK-  
DA'S  
v.  
ABDUL  
KHA'N HA'JI  
MUHAMMAD.

Now, it was upon these items, namely, of Rs. 79-25, and Rs. 65, that the learned counsel for the plaintiffs endeavoured to shew that the adjustment, which took place with Hájí Muhammad Khán Munshi one or two or three days after the 17th March 1866, was in fact a set-off and appropriation of cross-demands, and that the balance struck and the payment thereby impliedly promised constituted a new consideration for the promise to pay the settled balance, and consequently that the present suit was brought in time.

I think it clear that there was no mutual account, nothing in the nature of a real set-off on the side of Hájí Muhammad Khán. The evidence amounts to this: The plaintiffs make up their account and send their servant, Ganeshdás Rámnáth to Hájí Muhammad Khán, who compared his accounts with those of the plaintiffs, and found them to agree. The parties are agreed as to the calculation of interest, and Hájí Muhammad Khán accepts, without any dispute or dissent, the item of Rs. 79-25, the amount realized by the sale of the pair of wristlets, and also apparently the item of Rs. 65, the amount realized by the sale of the other ornaments.

Mr. Marriott, on behalf of the plaintiffs, argued that those two items were in the nature of cross-demands, and that if omitted in the particulars of demand in the present suit, the defendant could only have pleaded them by way of set-off. I do not think such is the proper mode of regarding those items.

Had Hájí Muhammad Khán handed to the *munim* of the plaintiffs those two sums in cash, the argument would have

1872.  
 HARGOPA'L  
 PREMSUK-  
 DA'S  
 v.  
 ABDUL  
 KHAN HAJI  
 MUHAMMAD.

had no foundation whatever. Instead, however, of doing that, Háji Muhammad Khán, to quote Ganeshdás Rámnáth's evidence in his examination-in-chief, "gave certain silver ornaments to the *munim* with instructions to sell them and credit them to his account." \* \* \* Háji Muhammad Khán constituted the plaintiffs' firm his agents to dispose of the ornaments for what they were worth and to credit the proceeds to his account. That was done, and Háji Muhammad Khán, on being told the amount they had realized, appears at once to have assented.

The transaction seems in substance the same as if Háji Muhammad Khán had actually paid the two sums of Rs. 79-25 and Rs. 65 in cash to the plaintiffs' *munim*. These two items seem to me to stand in the same category as payments from time to time made on account. Háji Muhammad Khán had, in truth, no claim or cross-demand whatever against the plaintiffs' firm. He had borrowed two sums of Rs. 5,000 each from them, and all that was required to be done, was to see how much had been paid or credited on account and to calculate the interest.

Ganeshdás Rámnáth, in his cross-examination, said: "He (Háji Muhammad Khán) read over item by item and said 'I have compared your account and it is correct?'"

This case appears to me to be governed by the decision, on the 17th January 1871, of Mr. Justice Melvill and Mr. Justice Kembal in *Mulchand Gulabchand v. Girdhar Mádhar* (p), in which case the court said, that there were no mutual transactions, and nothing in the nature of a set-off, but only the plaintiffs' accounts showing a debt due, and payments from time to time made by the defendant.

I also think the present case falls within the principle of the decision of Scotland, C.J., and Innes, J., in the High Court of Madras in the case of *Hirada Karibasappah v. Gadigi Muddappa* (q).

That was in substance a case of part payment at intervals of a varying debt and the admission of the correctness of

(p) 8 Bom. H. C. Rep. A. C. J. 6.

(q) 6 Mad. H. C. Rep. 197.

the entries in the plaintiffs' books and the balance shown by them.

1872.

HARGOPAL  
PREMSUK-  
DA'S  
v.  
ABDUL  
KHA'N HA'JI  
MUHAMMAD.

The Court say at page 200 : " To render an arrangement, come to orally for the payment of the balance of an antecedent debt on a settlement of accounts, available here in support of a suit brought after the expiration of the period of limitation applicable to such debt, it must, we are of opinion, be clearly shown to have amounted to a new valid contract to pay the balance, which extinguished the original cause of action. As observed by Parke, B., in *Jones v. Ryder*, 4 M. & W. 32, 'a mere acknowledgment within the six years of an antecedent debt cannot be sufficient. There must be a new contract.' In England such an arrangement might also be made available in answer to a plea of the Statute of Limitations on the ground of part payment evidencing a promise to pay the balance : See on this point *Worthington v. Grimsditch*, 7 Q. B. 479, and the judgment of Alderson B. in *Ashby v. James*, 11 M. & W. 542. But that ground is excluded by the provisions of the Indian Act of Limitations. \* \* \* What we must look to see is, whether the arrangement involved any new consideration for the promise to pay the balance. Now, where there are cross-demands, and on a settlement of accounts, items, agreed to on one side, are wiped out by an appropriation to their discharge of admitted items of claim on the other side, and thereupon a balance is struck and payment promised, the mutual agreement to set-off, *pro tanto*, one set of items against the other, constitutes a new consideration for the promise to pay the settled balance, and both make a new contract. For this, *Ashby v. James*, 11 M. & W. 542, is a direct authority. But where there is no cross-claim to be set-off, and no new agreement of appropriation, a settlement of the balance due on the examination of accounts is merely a statement of an antecedent debt. The parties simply agree as to how much of the debt remains due. In such a case there is plainly no new contract. \* \* \*

" It appears to us that the arrangement in the present case was not such a real settlement," (namely, as that in the

1872.  
 HARGOPAL  
 PREMSUK-  
 DA'S  
 v.  
 ABDUL  
 KHA'N HA'JI  
 MUHAMMAD.

cited case of *Laycock v. Pickles*, 33 L. J. Q. B. 43). "There were no cross-demands to be set-off or appropriated, but only the plaintiffs' accounts of debts and payments made on account of the amount of those debts; and the parties, agreeing as to the correctness of the items in those accounts, ascertained therefrom the balance of the antecedent debt remaining due which the respondents promised to pay. In effect they merely settled how much was the antecedent debt left undischarged by the payments. Immediately after the settlement, the appellant might have sued on the original cause of action, and, that remaining, the period of limitation, in the absence of a writing, continued to run against it. The cases of *Reeves v. Hearne*, 1 M. & W. 326 and *Clarke v. Alexander* 8 Scott, N. R. 147, are authorities bearing in support of this conclusion; and the case of *Subarama v. Eastulú Muttusámi*, 3 Madras H. C. Rep. 378, is in principle not distinguishable. We do not think that it makes any difference in the decision of the question that the alleged settlement took place before the period of limitation had elapsed."

I have already mentioned that if the receipt, given by Háji Muhammad Khán on or shortly after the 17th March 1866 for the balance then found due on the adjustment, had been received in evidence, my opinion would still have been the same.

By Sec. 4 of Act XIV. of 1859, it was enacted that if in respect of any debt the person, who but for the law of limitation would be liable to pay the same, shall have admitted that such debt or any part thereof is due by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission.

The nature of the original liability in the present case was money lent by a firm of Márvádís to Háji Muhammad Khán, and profoundly ignorant of the habits and customs of India must that person be, who would suppose that Márvádís would lend money without interest.

By Clause 9 of Sec. 1 of Act XIV. of 1859, suits brought to recover money lent or interest must be brought within three years. Assuming, therefore, that Hájí Muhammad Khán gave a receipt in writing on or within a few days of the 17th March 1866 for the balance then found due on the adjustment of accounts, the three years from that date, within which the plaintiffs ought to have brought their suit, would have expired before they brought the present suit, the plaint in which was not filed until the 8th October 1870.

1872.  
 HARGOPA'L  
 PREMSUK-  
 DA'S  
 v.  
 ABDUL  
 KHAN HA'JI  
 MUHAMMAD.

The issue, therefore, whether this suit is barred by the Act to provide for the Limitation of Suits (Act XIV. of 1859), must be found in the affirmative and for the defendant.

The third issue, whether the plaintiffs are entitled to recover the amount claimed or any part thereof, must be found in the negative and for the defendant.

And I pass a decree for the defendant, but, looking at all the circumstances of the case, without costs, of which each party must bear his own.

Attorneys for the plaintiffs :—*Macfarlane and Skipsey.*

Attorneys for the defendant :—*Craigie, Lynch, and Owen.*