

## APPELLATE CIVIL.

( 46 )

*Before Mr. Justice Melvill and Mr. Justice Kemball.*1879  
February 17.HANMANTMAL MOTICHAND (ORIGINAL DEFENDANT), APPELLANT, v.  
RAMBABAL (ORIGINAL PLAINTIFF), RESPONDENT.\**Limitation Act No. IX of 1871, Sec. 21—Payment of Interest—Contract in writing*

The defendant at different times made payments to the plaintiff, who was his creditor, in reduction of the general balance of account against him, but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt.

*Held* that there had been no payment of interest "as such" by the defendant so as to bring the case within clause I of section 21 of the Limitation Act (No. IX) of 1871, and that the plaintiff's claim was barred.

*Held* also, following *Amritlal v. Manikkal* (10 Bom. H. C. Rep. 375), that an entry of an account stated made by the defendant in the plaintiff's book was not a contract in writing within the meaning of the proviso to section 21 of the Limitation Act (IX) of 1871, and that, consequently, the payments made by the defendant on account were not such payments of the principal of the debt due by him as would bar the operation of the Act.

This was an appeal from the decision of P. S. Binivale, First Class Subordinate Judge at Ahmednagar.

The plaintiff brought this suit to recover Rs. 10,000 on an account stated and signed by the defendant. The plaint was filed on the 12th March, 1877. The defendant pleaded the Statute of Limitation. The Subordinate Judge held that the plaintiff's claim was not barred under section 21 of Act IX of 1871, and made a decree in her favour.

The facts of the case and the Subordinate Judge's reasons for his decision fully appear from the following extract from his judgment :—

"The account (exhibit 3) and the correctness of the advances and re-payments shown therein are admitted by the defendant (exhibit 22).

"It is argued on behalf of the plaintiff, in reply to the plea of limitation, that the payment of interest within the prescribed period of limitation takes his case out of the operation of the statute of limitation (Act IX of 1871, sec. 21).

"The account between the parties stands as follows :—

\* Appeal No. 9 of 1878.

“The debit entries of Rs. 6,653 and Rs. 1,334 aggregating Rs. 7,987, dated 19th October, 1873, in the account (exhibit 3) represent the balance of principal and interest admitted to be due by the defendant on that date on account of previous dealings between him and the plaintiff, these entries being signed by the defendant. The other two entries of Rs. 2,400 and 150, dated 8th November 1873 and 12th September 1876, respectively, which have also been signed by the defendant, represent each advances made to him on the dates specified. Now, on the other hand, the credit side of the same account shows that the following payments were made by the defendant in liquidation of the debt generally on the dates specified, viz., Rs. 1,000 on 14th October 1875; Rs. 1,000 on 11th December 1875; Rs. 16 on 31st March 1876; Rs. 150 on the 12th September 1876.

“It appears from exhibits 3, 4, and 23, that the payments entered in exhibits 3 and 4 were made by the defendant in reduction of the general balance of principal and interest due on the date of each payment, and I am of opinion that plaintiff has a right to apply them to the reduction of such balance, notwithstanding that the right to recover the balance due at a particular date was time-barred.

“The account must be taken on the above principle, and the plaintiff is entitled to recover the balance due on the date of each payment, if not barred on the date of the institution of the suit, the computation of the time being made from the date of each payment on account of interest by the defendant.

“The defendant contends that these payments were made by him, not in reduction of the general balance of account, but with an intimation that they were to be applied to the reduction of the particular advances, viz., Rs. 2,400 and 150; but there is no evidence to substantiate this allegation except his own statement, nor are there any circumstances implying that the payments were to be applied to the discharge of that particular debt as alleged by him.

“Under these circumstances I hold that a part of each item paid by defendant was paid in satisfaction of the interest due and the balance in reduction of the principal amount.

1879  
HANMANT-  
MAL  
MOTICHAND  
v.  
RAMBABAI.

1879  
 HANMANT-  
 MAL  
 MOTICHAND  
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 RAMBAHAL.

"Moreover, I do not consider it possible that the plaintiff would accept these payments in satisfaction or part satisfaction of the later advances, allowing the earlier debts actually due and payable to him with the interest thereon to remain unsatisfied.

"I, therefore, find that section 21 of the Limitation Act applies to this case, and that the claim is not barred by time. The amount claimed in the plaint on account of the principal and interest not being disputed, the Court must give judgment for the whole amount claimed."

*Inverarity* (with him *Shivshankar Govindram* and *Ghanasham Nilkuntth Nadkarni*) for the appellant.—The suit, brought as it is on an account stated, is barred on the face of the plaint itself. The Sudordinate Judge awarded the claim on the ground that section 51 of Act IX of 1871 saved it from the operation of the law of limitation. That section, however, does not apply to the present case, as there was no payment of interest, *as such*, by Hanmantmal, nor any contract in writing to bring the case under the proviso to that section relating to part payment of the principal. It has already been decided by this Court that an entry of an account stated made by a debtor in his creditors' books is not a contract in writing within the meaning of section 21—*Amritlal v. Manilal*. (1) It is one thing to acknowledge a debt and another to promise to pay it. This distinction between the acknowledgment of a debt and a promise to pay it, is clearly illustrated in *Gopeekishen Goshamee v. Brinbadunchunder*. (2)

*Farran* (with him Rao Sabeo *V. N. Mandlik*) for the respondent

MELVILL, J.—It is clear, on the plaintiff's own statement, that there has been no payment of interest "as such." In other words, there was no intimation by the defendant that any payment made by him was to be appropriated to interest. The plaintiff cannot, therefore, claim the benefit of the first clause of section 21 of Act IX of 1871.

Neither, I regret to say, am I able to hold that the second clause of the section operates in the plaintiff's favour. The proviso at the end of the section excludes the operation of that clause, unless the debt has arisen from a contract in writing. I have

already decided, in *Amritlal v. Maniklal*,<sup>(1)</sup> that an entry of an account stated, made by a debtor in his creditor's books, is not a contract in writing within the meaning of section 21 of Act IX of 1871; and to that decision I adhere. I should have been glad if I could have seen good grounds for changing my opinion, more especially because the legislature, by omitting from the new Limitation Act the restriction of the benefit of part payments to contracts in writing, has virtually admitted that that restriction was unfair to creditors.

I find the plaintiff's claim to be barred by lapse of time, except in respect of the advance of Rs. 150 made on the 12th September 1876, and I find on the evidence that the payment of Rs. 150, made by the defendant on the 19th September 1876, was appropriated by him to the discharge of that debt, and, consequently, that nothing remains due in respect thereof.

I would, therefore, reverse the decree of the Subordinate Judge, and reject the claim, making the plaintiff bear the costs in the Court below, and directing each party to bear his own costs in appeal.

KEMBALL, J.—I concur. I have had considerable hesitation in arriving at the conclusion that an account stated is not a contract in writing within the meaning of section 21, Act IX of 1871. No doubt such a writing has, as observed in *Umedchand Hukamchand v. Sha Bulakidas Lalchand*,<sup>(2)</sup> "by mere force of law and without any further act" on the part of the implied promisor, the effect of a contract; still, I think, the terms of the contract must be fully defined in writing to render the proviso to the section applicable.

*Decree reversed.*

(1) 10 Bom. H. C. Rep. 375. (2) 5 Bom. H. C. Rep. 16, O.C.J.