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86.

The defendant *(inter alia)* answered that the suit was not maintainable until the partnership between Kuber and himself was wound up and an account taken of the partnership transactions, and that Kuber owed money to the partnership.

The Subordinate Judge dismissed the plaintiffs' claim on the ground that the suit was not brought in the proper form. He held that the plaintiffs could not claim any specific amount till the partnership account was adjusted.

The plaintiffs appealed to the High Court. One of the points urged in appeal was that the lower Court ought to have allowed the plaintiffs to amend their plaint and to make it a suit for a dissolution of partnership and account.

The appeal was heard on 10th July 1876 by M. Melvill and Kemball, JJ.

JUDGMENT.

M. MELVILL, J.—What ought to have been sold in execution of the decree against Kuber Bhula, was the right, title and interest of Kuber Bhula in the business of the ginning factory. What was actually sold, was Kuber Bhula's share in certain buildings and implements belonging to the business. The plaintiffs, as purchasers of this share, now sue to have these buildings and implements sold, and a half share of the proceeds paid over to them. The defendant, who was a co-partner with Kuber Bhula in the business, objects to a decree being made as asked for by the plaintiffs, on the ground that Kuber Bhula was indebted to the firm, and that, at all events, his share in the buildings and implements cannot be ascertained until an account has been taken of the debts due by the business. The objection is undoubtedly well founded. The sale of partnership joint-property in execution of a decree against one partner, does not transfer any part of the joint-property to the purchaser so as to entitle him [230] exclusively to take it or withhold it from the other partner. "But it gives him a right to a bill in equity, calling for an account and settlement of the partnership concerns, and thus to entitle himself to that interest in the property which, upon the final adjustment and settlement of the partnership concerns, shall be ascertained to belong to the execution partner, and nothing more"—(Story on Partnership, s. 262). The plaintiffs must amend their plaint, and the Subordinate Judge must then ascertain, after taking all the accounts of the business, whether Kuber Bhula would have been entitled, on the date of the auction-sale, to any and what interest in the buildings and implements sold in execution; and if it be found that Kuber Bhula would have been entitled to such an interest, then a decree should be made, enabling the plaintiffs to realize the value of such interest. We, accordingly, reverse the Subordinate Judge's decree, and remand the case, in order that the plaintiffs may amend their plaint, and that the suit may be disposed of in accordance with the view above expressed. The plaintiffs must bear the costs of this appeal. [This case is also referred to in 4 B. 222.]

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4 B. 230=5 Ind. Jur. 90.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Pinhey.

VINAYAK GOVIND AND NARAYAN, *(Original Defendants), Appellants v.* BABAJI, *(Original Plaintiffs), Respondent.**

[8th October, 1879.]

Promissory note payable on demand—Limitation—Act XIV of 1859—*Act IX of* 1871.

On the 12th December 1864, the plaintiff sold seven bars of gold to the defendants, and deposited with them the value thereof, to run at interest, and payable on demand. The defendants entered the amount in their own books, and furnished the plaintiff with a pass-book, which contained this entry: "The account of the amount deposited by B (th e plaintiff) with V (the defendants) of the city of Poona. The details of it are as follows: We have debited the amount to ourselves, and will return it whenever you demand it, *Shake* 1786 (A. D. 1864)." The defendants adjusted the account in the plaintiff's pass-book in July 1865 in these words: "Balance this day the 1st *Jyest vadya*, *Shake* 1787, Rs. 1,159-2-0. Interest on this sum will run from 1st *Jyest vadya*, *Shake* 1787, (A. D. 1865)." This entry was signed by the defendants. The plaintiff drew several times

* Second Appeal, No. 291 of 1879.

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against this account within the first year, sometimes taking cash and sometimes gold. On the plaintiff's demanding the money in April 1877, the defendants refused to pay it. The plaintiff, therefore, filed a suit against them on the 25th June 1877. The defendants pleaded limitation.

Held, that, regarding the entry made by the defendants in the plaintiff's book as a promissory note, the suit was barred by the law of limitation.

Under Act XIV of 1859 the period of limitation on a promissory note payable on demand, commenced to run from the date of the note and not from the date of demand.

A claim barred by limitation, when Act IX of 1871 came into force, was not revived by the passing of that Act.

[F., 14 Bom.L.R. 908=17 Ind. Cas. 629; R., 53 P.L.R. 1901=39 P.R. 1901.]

[231] THIS was a second appeal from the decision of W. H. Newnham, Judge of the District Court at Poona, in appeal No. 40 of 1879, reversing the decree of C. S. Chitniss, Subordinate Judge (First Class) at the same place, in original suit No. 786 of 1877.

The plaintiff brought this suit against Vinayak Ramchandra and his two brothers, Govind and Narayan, in the Court of the First Class Subordinate Judge at Poona, to recover from the defendants the sum of Rs. 1,909-2-0, being the balance, with interest, of money deposited by the plaintiff with the defendants' firm. The plaintiff alleged that on the 12th December 1864 he sold seven bars of gold to the defendants' firm for Rs. 2,878-8-0, and deposited the money with them to run at interest at 8 annas per cent. per mensem; that the defendants promised to pay the amount on demand; that they duly entered the money in their books to the credit of the plaintiff, and furnished him with a pass-book (Ex. No. 24) containing this entry: "The account of the amount deposited by Babaji with Vinayak Ramchandra Tapre, of the Kashbe Peth of the city of Poona. The details of it are as follows: We have debited the amount to ourselves, and will return it whenever you demand it, *Shake* 1786" (then follow several debit and credit entries); that the defendants adjusted this account in the plaintiff's pass-book in these words: "Balance this day the 1st of *Jyest vadya*, *Shake* 1787, Rs. 1,159-2-0. Interest on this sum will run from 1st *Jyest vadya*, *Shake* 1787. Signed Vinayak Ramchandra Tapre by the hand of Govind Ramchandra Tapre;" that he drew several times against this account, sometimes by taking cash and sometimes gold, within a year of the opening of the account; that he demanded the money from the defendants in April 1877, but that they refused to pay it. The plaint was filed on the 25th June 1877.

The defendants denied the deposit, and pleaded limitation.

The Subordinate Judge held that the limitation of three years applied to the suit, and that it was barred, whether the period was counted from the date of the deposit, 12th December 1864, or from the date on which the account was adjusted in July 1865. He found, however, that if the suit were not barred by limitation, the plaintiff would be entitled to recover the amount claimed by him. [232] He, accordingly, dismissed the plaintiff's claim on the 27th January 1879.

In appeal, the District Judge reversed the decree of the first Court, holding that the suit was not barred. He held that Act IX of 1871 applied to the case, and that, as the money was payable on demand, limitation did not begin to run till a demand was made, and that such demand was made by the plaintiff within a year of the suit. He, therefore, on the 2nd July 1879, made a decree in favour of the plaintiff for the

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whole amount claimed, with interest at 9 per cent. from date of suit to date of payment.

In both the lower Courts it was contended for the plaintiff that, as the money was a deposit in the hands of the defendants, the limitation of thirty years applied to the case. But the Courts overruled the contention, and held that it was not a deposit in the sense in which the word is used in the Limitation Acts. On the 18th July 1879, the defendants preferred an appeal to the High Court against the decision of the District Judge.

Latham (with him *Nanabhai Hari Das*, Government Pleader, Rao Saheb *V. N. Mandlik*, and *G. R. Kirloskar*), for the appellants.—The District Judge was wrong in holding that Act No. IX of 1871 governed the case. That Act came into force on the 1st April 1873 with respect to suits. But the plaintiff's claim was completely barred before that date. He deposited the money with the defendants on the 12th December 1864, when Act XIV of 1859 was in force. Under that Act the limitation of three years applied to a case like the present, and the period commenced to run from the date of the deposit, and not from the date of demand. Such is the rule laid down in *Parbati Charan Mukerji* v. *Ramnarayan Motilal*(1), *Nocoor Chunder Bose* v. *Kally Kumar Ghose*(2), *Dosabhai* v. *Kherbadji*(3), *Hempammal* v. *Hanuman*(4), *Vencataramanier* v. *Manche Reddy* (5), *Chinnasami Iyengar* v. *Gopalachary* (6). Some of these cases also show that a claim once barred under Act XIV of 1859 cannot be revived under the subsequent Act No. IX of 1871. [233] No doubt, the Calcutta decisions are conflicting on this point. But the Madras decisions have uniformly held that, in a case of money payable on demand, limitation began to run under Act XIV of 1859 from the date of the note, and not from the date of demand. Although some doubt may appear on this point from the guarded expressions of Westropp, C.J., in *Madhavbhai* v. *Fattesing*(7), yet that doubt is cleared up by his distinctly laying down the rule in *Ramchandra* v. *Soma* (8).

Macpherson (with him *Shantaram Narayan*), for the respondent.—The money is payable on demand, as appears clearly from the entry made by the defendant in the plaintiff's book. No cause of action, therefore, accrued to the plaintiff till a demand was made. In *Tarini Prasad Ghose* v. *Ramkrishna Banerji* (9), which was a case of a deposit, like the present, payable on demand, the Calcutta High Court held the cause of action to arise, not on the date of the deposit but on the date of demand. The same Court laid down a similar rule in *Brammamayi Dasi* v. *Abhai Charan Chowdhry* (10). Both of those cases were under Act XIV of 1859. In *Parbati Charan Mukerji* v. *Ramnarayan Motilal* (1) Macpherson, J. followed the rule of English law applicable to cases of money payable on demand. But he did so with great reluctance. The Judge has found that plaintiff demanded the money within a year of his suit. The claim, therefore, is not barred.

JUDGMENTS.

The following are the judgments of the Court:—

M. MELVILL, J.—Regarding the entry in the plaintiff's book (Ex. 24) as a promissory note payable on demand, I think that we must hold that

(1) 5 B. L. R. 396. (2) 1 C. 328. (3) 7 B. H. C. R. A.C. J. 181.
(4) 2 M. H. C. R. 472. (5) 7 M. H. C. R. 298. (6) 7 M. H. C. R. 392.
(7) 10 B.H. C. R. 487. (8) 1 B. 305, note.
(9) 6 B. L. R. 160=14 W. R. C. R. 124. (10) 7 B. L. R. 489.

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the period of limitation commenced to run from the date of the note, and not from the date of demand. There is some conflict on the point in the Calcutta decisions, *Parbati Charan Mukerji* v. *Ramnarayan Motilal* (1), *Tarini Prasad Ghose* v. *Ramkrishna Banerji* (2), *Brammamayi Dasi* v. *Abhai Charan Chowdhry* (3), *Nocoor Chunder Bose* v. *Kallykumar Ghose* (4); but the [234] Madras Court has uniformly followed the English cases: *Hempammal* v. *Hanuman*(5), *C. Vencataramanier* v. *Manche Reddy*(6), *Chinnasami Iyengar* v. *Gopalacharry* (7). This Court, in its original jurisdiction, adopted the same view in *Dosabhai* v. *Kherbadji*(8); and though in *Madhavbhai* v. *Fattesing* (9), the learned Chief Justice guarded himself against holding that the same rule would extend to the Mofussil, yet in a later case, *Ramchandra* v. *Soma*(10), we find him distinctly ruling that, under Act XIV of 1859, the period of limitation applicable to a promissory note payable on demand commences to run from the date of the note. I believe that there are other decisions of this Court to the same effect, to which I have myself been a party. On the whole, I think that we are bound by authority to hold that the plaintiff's claim was barred by limitation when Act IX of 1871 came into force; and that being so, I have no doubt that it could not be revived by the passing of that Act. The decision of the District Court must be reversed, and the claim rejected. The parties to bear their own costs in this appeal. The plaintiff to bear all costs in the Courts below.

PINHEY, J.—The plaintiff on 14th *Margashirsh Shudh* 1786 (12th December 1864) took 162 *tolas* and 2 *masas* of gold to the shop of the defendants, who are gold merchants and money-lenders, and sold it for Rs. 2,878-8-0. Instead of receiving the money in cash, plaintiff left it with the defendants to run at 8 annas per cent. interest. On this being done, a current account was opened in the plaintiff's name in the defendants' books, and, according to the not unusual custom of natives in the Mofussil, a counterpart of the account was entered in a book of plaintiff by the defendants' karkun, the entry being signed by the second defendant in the name of the first defendant. The particulars entered in plaintiff's books are set forth at page 2 of the Subordinate Judge's judgment. Within a year of the account being opened, plaintiff drew against this account seven times, sometimes taking cash, sometimes gold.

[235] On 1st *Jyest vadya*, *Shake* 1787 (July 1865) the account in plaintiff's book was made up, interest being credited to him, and the balance due to plaintiff was struck as Rs. 1,159-2-0. At the foot of the account so made up, the second defendant, in the name of the first defendant, signed an endorsement certifying the amount found due, and that interest was to run on the balance.

Whether, therefore, the entry in Ex. 24, on which plaintiff sues, is an ordinary native account current, as I hold it to be, or whether either of the promises, one at the head and the other at the foot of the entry, converts the document into a promissory note, it appears to me clear that Act XIV of 1859 applies to the case, and I agree with the Subordinate Judge in considering that "the three years" period of limitation must be counted, either from the date of the deposit (12th December 1864), or

(1) 5 B.L.R. 396. (2) 6 B.L.R. 160. (3) 7 B.L.R. 489.
(4) 1 C. 328. (5) 2 M. H. C. R. 472. (6) 7 M. H.C.R. 298.
(7) 7 M. H. C. R. 392. (8) 7 B H. C. R. A. C.J. 181.
(9) 10 B. H. C. R. 487. (10) 1 B. 305, note.

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from the date on which the balance of Rs. 1,159-2-0 was struck in July 1865; and that the suit is barred by the law of limitation."

Decree reversed.

Note.—See *Hingun Lal* v. *Debee Parsad*, 24 C.W.R. C.R. 42.

4 B. 230 = 5 Ind. Jur. 90.

4 B. 235 = 5 Ind. Jur. 143.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Officiating Chief Justice, and Mr. Justice M. Melvill.

SHIDLINGAPA AND ANOTHER (*Original Defendants*), *Appellants* v. CHENBASAPA (*Original Plaintiff*), *Respondent.**

[19th December, 1879.]

Registration—Act No. III of 1877, *s.* 17, *cls.* (*b*) *and* (*c*)—*Receipts by mortgagee.*

Receipts passed by a mortgagee for sums paid on account of the mortgage-debt, and exceeding Rs. 100 each, are not inadmissible in evidence, for want of registration, under Act III of 1877, s. 17.

The technical term "consideration" implies that the person to whom the money is paid, himself limits or extinguishes his interest in the land in consideration of such payment. Such limitation or extinction (if there can be said to be any) as results from the payment on account of the mortgage-debt, is the legal consequence of such payment, and not the act of the mortgagee.

The payment reduces the sum due at the time on the mortgage, and thus modifies the account between the mortgagor and mortgagee. But it does [236] not operate to limit or confine within narrower limits the right or interest of the mortgagee in the land, which is simply to have the payment of the principal and interest secured on the mortgaged premises by some one or other of the remedies available for that purpose.

Money paid on account of a mortgage-debt is not the consideration for the limitation or extinction of so much of the interest in the land created by the mortgage, and a receipt for such a payment need not, therefore, be registered under s. 17, cl. (*b*) of the Registration Act III of 1877.

Dalip Sing v. *Durga Prasad* (1) not followed.

[**Diss.**, 6 A. 335; **F.**, 5 B. 181; **R.**, 19 B. 36 (42); 24 B. 609; 103 P.L.R. 1905; **D.**, 7 B. 123.]

THIS was a second appeal from the decision of M. H. Scott, Acting Judge of the District Court of Dharwar, in appeal No. 111 of 1878, affirming the decree of G. V. Bhanap, Subordinate Judge (Second Class) at Gadag, in original suit No. 769 of 1877.

The plaintiff brought this suit against Shidlingapa and four others to recover Rs. 3,344, being principal and interest due on a mortgage bond executed to him on the 9th December 1877 by Mudibasapa, deceased, father of defendants 1, 2, 3, and 4, and grandfather of defendant No. 5. The plaintiff prayed that his claim might be decreed to be satisfied by the sale of the mortgaged property.

Shidlingapa and Andanapa (defendants 2 and 5) answered that the debt for which the property had been mortgaged by Mudibasapa, was not contracted for a family necessity; that the property, therefore, being ancestral, was not liable after his death; that he (Mudibasapa had paid

* Second Appeal No. 288 of 1879.

(1) 1 A. 442.