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alone or in conjunction with the plaintiff, in carrying out the charities and bequests to charity in the testator's will; and let the Commissioner frame a scheme for the future management of such charitable bequests and charities as have been duly made and established according to the law and usage in force in relation to the same.

As the testator has made a will, the provisions of which require the assistance of this Court to construe and determine the meaning of it, the costs of all the parties to this suit of and incidental thereto, as well as the costs reserved by the order of the 28th July, 1884, must come out of the estate; the same to be taxed as between attorney and client. Leave to apply as advised. Further costs and further directions reserved.

Attorneys for the plaintiff.—Messrs. *Thákurdás and Dharamsi*.

Attorneys for the defendants.—Messrs. *Little, Smith, Frere and Nicholson; Tobin and Roughton; and M. Munshi*.

## APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Birdwood.

TRIBHOVAN GANGA'RA'M, PLAINTIFF, v. AMINA', DEFENDANT.\*

Account stated—*Kháta*, suit on a—Limitation—Acknowledgment—Construction.

A *kháta* consisting of one item only on the debit side, and bearing the mark of the debtor, held to be a mere acknowledgment, and not an account stated.

THIS was a reference by Ráv Sáheb Sakháram M. Chitale, Subordinate Judge of Mahád, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was stated as follows :—

“ The plaintiff sues to recover from the defendant Rs. 16 as principal, and one rupee and six annas as interest, on a *kháta* executed to the plaintiff by the defendant on the 10th of March, 1882.

“ Copy of an account signed by the defendant in a book belonging to the plaintiff, Tribhovan Gangáram Gujar, deceased.

\* Civil Reference, No. 14 of 1885.

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“The account of Aminá *alias* Bendu, wife of Dhakalya Mánkar, inhabitant of Dhavli, under date the 5th of *Fálgun Vadya* in *Shake* 1803 (10th March, 1882).

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Rs. 16 0 0 Balance, claimable, as taken from page 15.

Rs. 16 0 0 Sixteen in cash through herself.

Amina *alias* Bendu, wife of Dhakalya Mánkar, The mark of a rosary made by her own hand. The handwriting of Rámshet Jairám Shet Marwe.

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“The plaintiff’s pleader has contended that a suit will lie on such a *kháta*. He has argued that an implied promise to pay the amount mentioned in the *kháta* must be presumed. It has, however, been often held that a *kháta*, like the original of exhibit A, is nothing more than an acknowledgment of a debt—*Chowksi Himutlál Harivulubhdás v. Chowksi Achrutlál Harivulubhdás*<sup>(1)</sup> and *Rámji v. Dharmá*<sup>(2)</sup>. It follows from this that the *kháta* is not a contract, and the plaintiff can, therefore, have no right of action on that document. If the *kháta* is to be relied upon as an acknowledgment of a debt, and for showing that it gave to the plaintiff a fresh period of limitation, the suit must be brought on the original cause of action, and not on the acknowledgment. The plaintiff has produced a copy of a former *kháta*, and the copy has been recorded as exhibit B. What I have said above as to the copy marked A applies also to this copy. I am, therefore, of opinion that the plaintiff cannot sue on the *kháta*, of which exhibit A is a copy. In the judgment recorded in Civil Reference No. 36 of 1883 it has been said as follows:—‘The plaintiff sought to recover a debt due to him. The *kháta* might serve as evidence of the existence of that debt, although not as the basis of it \* \* \*’—*Mathur Dámodar Gujúr v. Krishnashet Bábshet*<sup>(3)</sup>. The

(1) Printed Judgments for 1883, p. 50.

(2) I. L. R., 6 Bom., 683.

(3) Printed Judgments for 1883, p. 297.

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plaintiff's pleader has next contended that the *kháta*, of which exhibit A is a copy, is an account stated, and that a suit will lie on it. The question as to whether a *kháta*, like the original of exhibit A, is an 'account stated', has been considered by the Honourable High Court in application No. 99 of 1882, under its extraordinary jurisdiction—*Náhánibái v. Nathu Bháu*<sup>(1)</sup>. I am, therefore, of opinion that the *kháta*, of which exhibit A is a copy, is not an 'account stated', and the plaintiff cannot sue on that document. The plaintiff must sue on the original cause of action, and may give such *khátás* in evidence to show that his suit is within time.

"Suits on such *khátás* are often brought, and the plaintiffs in their complaints say that causes of action accrued to them on the days on which such *khátás* are executed. I, however, entertain a doubt as to the correctness of what I have said above. This is a small cause suit, and I, therefore, refer the following points to the Honourable High Court for their decision, under section 617 of the Civil Procedure Code of 1882."

There was no appearance for the parties.

SARGENT, C.J.—The Subordinate Judge is right, in our opinion, in treating the *kháta* in question, which consists of only one item, as a mere acknowledgment, and as not amounting to an account stated. See the case of *Náhánibái v. Nathu Bháu*<sup>(1)</sup>.

(1) I. L. R., 7 Bom., 414.

## APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Birdwood.

WA'LA HIRÁJI, PLAINTIFF v. HIRA' PA'TEL, DEFENDANT.\*

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Civil Procedure Code (Act XIV of 1882), Sec. 266—Attachment and sale of arms in execution of a decree by *Názir* of the Court—Arms Act XI of 1878, Sec. 1, Cl. (b), and Sec. 5—Public servant, sale of arms by.

The sale of arms by the *Názir* of the Court, in execution of a decree, is a sale by a public servant in discharge of his duty, and is, therefore, excluded by section 1, cl. (b), from the operation of the Indian Arms Act XI of 1878.

\* Civil Reference, No. 16 of 1885.