ALLAHABAD HIGH COURT

Shah Gur Saran

Vs.

Shib Singh

(Collister, J.)

18.10.1943

JUDGMENT

Collister, J.

1. These are two appeals under the Letters Patent from a decision of a learned Judge of this Court. The appeals arise out of two suits for redemption of two sets of property said to have been usufructuarily mortgaged in or about 1836. It was alleged that one of the mortgages was executed by Tulsi and Dilsukh in favour of Lachhman, Maharam and Mahasukh for ₹ 278-4-0 and that the other was executed by Natha and Hira in favour of the same mortgagees for ₹ 883. Actually the mortgagees were probably Lachman's ancestors. It was contended that limitation was saved by two acknowledgments, made in 1269 Fasli, equivalent to the year 1852, and in 1285 Fasli, equivalent to 1878, respectively. Plaintiff 2 is a transferee from the heirs of the original mortgagors and plaintiff 1 is the adopted son of the deceased husband of plaintiff 2. It was alleged that the income from the property was more than sufficient to discharge the interest, that the principal amount in each case has been paid up, and that the defendants--the representatives of the mortgagees --are liable to account. The defense of the heirs of the mortgagees was, inter alia, that there was no relationship of mortgagor and mortgagee between the parties and that the suit was barred by limitation. The trial Court upheld the plea of limitation and dismissed the suit. This decree was affirmed by the lower appellate Court and a second appeal from that decision has been dismissed by a learned Judge of this Court.

2. In the khewat of 1259 Fasli, equivalent to the year 1852, there was a mention of two areas of 6 biswansis odd being in possession of Lachhman, Maharam and Mahasukh as mortgagees, the mortgage money being shown as ₹ 278-4-0 and ₹ 383, respectively. In the settlement khewat of 1285, equivalent to the year 1878, Mahasukh and Maharam are shown as mortgagees of these two properties in equal shares. A reference is made to the earlier khewat prepared at the time of revision settlement, and it is further stated that the interest was equal to profits and that the mortgage was redeemable at Dasehra in the month of Jeth. These entries, both in 1852 and in

1878, were admittedly attested by the mortgagors and the mortgagees or their representatives; and what we have to decide is whether or not limitation for a suit for redemption is saved by these acknowledgments. I may mention that apart from these entries, we know little about the mortgages.

3. The first decision which calls for our consideration is *Daia Chand v. Sarfraz*[1] in which case it was held by three out of four Judges that where the defendants attested as correct the record of rights prepared at a settlement with them in 1841 of an estate in which they were described as mortgagees -- but which did not mention the name of the mortgagor -- there was an acknowledgment of the mortgagor's right to redeem within the meaning of Article 148 of Schedule 2 of Act 9 of 1871. The entry apparently contained a bare description of the defendants as mortgagees; there was no record of the names of the mortgagors. At page 123 Turner A. C. J. and Oldfield J. observe :

> The acknowledgment must be in writing, signed by the mortgagee or a person claiming under him, and it must acknowledge the title of the mortgagor or his right to redeem. In the case before us the settlement officer had prepared the record of rights, a record which by law he was bound to prepare, showing the interests in the village of which he found persons in possession. From the records of preceding settlements he ascertained that the appellants, or rather their predecessors-in-title, had obtained possession in virtue of a mortgage, and he entered them accordingly in his record as mortgagees. To this record, for the purpose of certifying to its correctness, he obtained the signature of those whom he found in possession and, amongst others, of the appellants.... Here there is not a mere description of the estate as a mortgaged estate, but a subscription to a record purporting to show the extent of the rights which the persons in possession enjoyed. For this reason we hold the acknowledgment sufficient...

4. At page 124 Pearson J. says :

> It is not reasonable to suppose that any one would allow himself to be described as the mortgagee of a property of which the mortgage had ceased to be redeemable at law, and the names of the owners thereof had been lost to knowledge by lapse of time without any mention of those circumstances.

5. Spankie J. disagreed with the view taken by the other three Judges; he held that the signatures of the ancestors of the defendants did not, in the circumstances, amount to an acknowledgment of the title of the mortgagor or of his right to redemption within the meaning of Article 148 of Schedule 2 of Act 9 of 1871. The learned Judge says :

> The record shows that the appellants did not acknowledge any right of redemption anywhere. They contested in 1863 an attempt of the heirs of the mortgagors to establish their right of redemption, and ultimately in 1872 they succeeded in obtaining an order

from the revenue authorities for the erasure of the word 'mortgagees.'

6. The lower appellate Court had by its order remanded that suit to the trial Court for dis-posal on merits and after remand the case again came before the High Court, and it is reported at page 425 of the same volume. *Daia Chand v. Sarfraz*[2] Pearson J. observes :

> Before the enactment of Clause (15), Section 1, Act 14 of 1859, there was

[1](75-77) 1 All. 117 (F.B)
[2](75-77) 1 All 426 At page 427

> no limitation to suits for the redemption of mortgage of landed property. In 1841 therefore when the acknowledgment found in the settlement record of that year was made by the defendants in this suit or their fore-fathers that they held the property in suit as mortgagees, there was nothing in the law to preclude the mortgagors from suing for the redemption of the mortgage. In other words, the right acknowledged was a right not extinguished by lapse of time, but still subsisting; the acknowledgment fulfils the intention and satisfies the requisition of the clause in Article 148, Schedule 2, Act 9 of 1871, modifying the provisions of Clause 15, Section 1, Act 14 of 1859, and renders it unnecessary to enquire and ascertain when the mortgage acknowledged in 1841 was actually made.

7. The other learned Judge was Spankie. J. and he concurred with the view expressed by Pearson J. In *Shankar v. Dharmon*[3] there was an entry in the waji-bul-arz of 1863 very similar to the entry in the khewat of 1878, which is under our consideration except that the amount of the debt was not specified. The mortgage was alleged to have been executed in 1860, but this fact the plaintiff failed to establish. At page 78 the learned Judge says :

> I hold that the entries in the waji-bul-arz of 1863 set forth in the judgment of the lower appellate Court operated as a sufficient acknowledgment to save limitation within the meaning of Section 19 of Act 15 of 1877. I might have felt some doubt on this point owing to the fact that the waji-bul-arz relied on in this case is subsequent in date to the passing of Act 14 of 1859, which for the first time prescribed a period of limitation for suits for redemption of mortgage of landed property, if it were not for the express admission in the wajib-ul-arz now under consideration that the mortgage was one redeemable in the month of Jeth in any year. This involves an admission that the mortgagor then recorded had a subsisting right to redeem in the year 1863 when this record was framed, a right which he would be entitled to exercise in the month of Jeth next following should he , deem fit to do so.

8. The learned Judge referred inter alia to the two cases in *Daia Chand v. Sarfraz* and *Daia Chand v. Sarfraz*[5] In *Kamla Devi v. Gur Dayal*[6], there were entries about a mortgage in the wajib-ul-arz from 1866 to 1900 and, it was in evidence that in 1913 the defendant described himself as the mortgagee. The wajib ul-arz contained a description of the land, the amount of the

mortgage money and the names of the mortgagor and mortgagee. It was argued that the plaintiff was bound to show that these acknowledgments were given within sixty years of the date of the mort-gage and that, as the plaintiff had failed to prove the exact date of the mortgage, the acknowledgments were of no avail. The learned Judges--Richards C. J., and Banerji J.--after mentioning that the mortgage deed would naturally be in the possession of the appellant, who was the mortgagee's representative, observed, at page 333 :

> The evidence therefore as to the exact date of the mortgage was a matter within the peculiar knowledge of the defendant and not of the plaintiff. We think that the acknowledgments, assuming them to have been given in time, were sufficient

[3](10) 5 I. C. 77 [5](75-77) 1 All 426
[4](75-77) 1 All 117 [6] AIR 1919 All 227 : 51 Ind. Cas. 283

> acknowledgments of the subsistence of the mortgage and we think under the circumstances of this case that we ought to hold that the acknowledgments were given before the expiration of 60 years from the date of the mortgage. We therefore think that the plaintiff ought to have got a decree for redemption.

9. It appears that in that case a mortgage bond had admittedly been executed, which is not so in the suits out of which the two appeals now under our consideration have arisen. We now come to another Full Bench decision of this Court, *Anup Singh v. Fateh Chand*[7], The plaintiff sued for redemption of a mortgage alleged to have been made in or about the year 1833. In the khatauni of 1833, there was a mention of the property and of the amount of the mortgage money and it was also stated that the mortgage was redeemable in the month of Jeth of any year. In 1863, there was a settlement and a wajib-ul-arz was drawn up containing a list of all the mortgages in that village. In that list, the mortgaged property in question was specified, the names of the mortgagors and mortgagees and the amount of mortgage money were mentioned and it was stated that the mortgage was redeemable in the month of Jeth of any year, and this entry was signed by the mortgagees. The date of the mortgage was not stated. It was held by Piggott and Walsh JJ. that no substantial inference could be drawn from the acknowledgment in question that the mortgage was in 1863 a subsisting mortgage not barred by limitation and it was for the plaintiff relying on the acknowledgment to show that it was made before the period of limitation had expired. At page 588 Piggott J. says :

10. I do not feel myself able to infer from those documents that the question whether or not any mortgage entered in this list was at that moment 60 years old was present at all to the mind of the settlement officer.

11. Then the learned Judge goes on to say:

> I do not believe that he intended to record an admission that each and every one of these mort-gages was necessarily redeemable in view of the recently passed statute on the subject on the date on which he drew up that list. His silence on the point, the absence of

any enquiry as to the date of any of the mortgages, seem to me almost conclusive. I am of opinion, therefore, that the admission of the mortgagees in this particular is no more than an admission that their possession in the year 1863 had its origin in a contract of mortgage to which certain persons had been parties and of which the covenanted mortgage debt was a certain specified sum.

12. At page 592 Walsh J. says :

> I agree with my brother Piggott that the express language of Section 19, Limitation Act, contemplates the possibility of an acknowledgment of liability given after the expiration of the statutory period and shows by its terms that a plaintiff, before he can succeed upon an acknowledgment at all, must establish that it was made before the expiration of the statutory period. In this case it is not suggested that he has established that fact by any direct evidence. In my opinion no inference can be drawn from the acknowledgment, however fully it may have admitted liability, so

[7] AIR 1920 All 92 : 56 Ind. Cas. 986

> far as the actual date of the original mortgage is concerned. It ought not to be presumed that people the agricultural class in 1863 could not have done otherwise than know the terms of the recent statute of limitation of 1859.

13. Banerji J. dissented. He held that the acknowledgment of 1863 saved limitation. At page 581 the learned Judge observes :

> ...where in respect of a mortgage, the creation of which was established, the mortgagees acknowledged that the mortgage existed, that acknowledgment is in my opinion, prima facie, evidence that it was a mortgage which subsisted at the time when the acknowledgment was made and was not a mortgage which had become extinct by lapse of time.

14. The learned Judge then cites with approval the observation of Pearson J., in *Daia Chand v. Sarfraz*[8] which I have already reproduced in this judgment. The next decision to which I will refer is *Mihi Lal v. Soni Ram*[9], In that case there was an attested entry in the khewat of 1258 Fasli relating to a mortgage which had been orally effected, and it was stated that the mortgage was "redeemable at any time when the mortgage money is paid up." Niamatullah J. held that this acknowledgment saved limitation. He says:

> It is conceivable that there may be an acknowledgment couched in language not amounting to an admission as regards the time when the mortgage was made. In such a case the mortgagor must furnish evidence aliunde to prove that his right of redemption subsisted when the first acknowledgment was made. But where the acknowledgment relied on is not only such an acknowledgment as is required by Section 19, Limitation Act, but goes further and contains an admission in

> unequivocal terms that the mortgagor's right subsisted till the date of the acknowledgment, the mortgagor should be deemed to have established that the mortgage was made some time within 60 years before the date of such admission.

15. The Pull Bench decision in *Anup Singh v. Fateh Chand*[10], was not referred to by the learned Judge, but it was considered in *Abdul Rafiq v. Bhajan*[11], after referring to that decision and after pointing out that the occasion on which the acknowledgment was made was merely an inquiry into the origin of the defendant's possession, Niamatullah J. observes :

> The mortgagee did not say, and there was no occasion for him to declare, that his position at the date of the acknowledgment continued to be that of a mortgagee liable to be redeemed.

16. At the bottom of p. 983 Sulaiman Ag. C. J. says:

> Apart from anything that there may be in the language of the acknowledgment itself, I see absolutely no justification for holding that a simple acknowledgment

[8](75-77) 1 All. 117 (F.B) [10] AIR 1920 Alla 92 : 56 Ind. Cas. 986
[9] AIR 1929 All 209 [11] AIR 1932 All 199 : (1931) ILR 53 All 963. At page 972

> of a liability to pay a debt throws the burden of proof that the debt was barred on the person who has acknowledged it. Such a conclusion would in my opinion be directly opposed to the express intention of the legislature as shown by Section 19. There is no rule which allows of any common law principle to circumvent a statute law. The burden of proof cannot be made to shift by supposing not only that there was an implied promise to pay, but further supposing that there was an admission that the debt had really not become barred by time and was still capable of being enforced in a Court of law. When Section 19, Limitation Act, requires proof that the period had not expired, it would be contrary to the provisions of Sections 101 to 104, Evidence Act, to require that the burden lies on the defendant who acknowledged the liability.

17. The learned Judge relied upon the view expressed by Piggott and Walsh JJ. in *Anup Singh v. Fateh Chand*[12], I have now cited the more important decisions of our own Court, and it will be seen that there is a formidable divergence of opinion. I do not think it is necessary to go further a field. I will proceed to consider the attested entries in the khewats of 1852 and 1878. The entries were apparently attested by the mortgagors and the mortgagees or their representatives-in-interest; but before 1859 there was no limitation for a suit for redemption: vide proviso 4 to Section 3, Bengal Regulation 2 of 1805. Then came Act 14 of 1859. Clause (15) of Section 1 of that Act provided that a suit for redemption of immovable property must be brought within 60 years from the date of mortgage, or if in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption had been given in writing by the mortgagee, then 60 years from the date of such acknowledgment in writing. Under Section 18 a period of grace of two years was allowed to save limitation in cases where the bar provided by Section 1(15) would

otherwise defeat the suit. As I read Clause (15) of Section 1, it means that with effect from the date when the Act came into force any person who wished to redeem immovable property must institute a suit within 60 years of the date of mortgage and, if such suit would otherwise be already time-barred by these provisions, he was allowed a period of two years by Section 18 within which to institute his suit. But if "in the meantime" an acknowledgment was made as required by the section, a fresh starting point of limitation would begin; and the words "in the meantime" must mean within 60 years from the date of the mortgage. This is the significance which the High Court of Madras gave to these words in 5 Mad. 182 and this view was confirmed by the Judicial Committee in *Fatimatulnissa Begam v. Sundar Das*[13]."

18. The entries in the khewat of 1852 were merely to the effect that Lachhman and others were in possession as mortgagees and that the mortgage money was ₹ 274-4-0 in one case and ₹ 383 in the other. As I have already said, there was at that time no rule of law whereby limitation would be saved by an acknowledgment of liability, the reason being that until 1859 there was no limitation for a suit for redemption; but I need not discuss at this stage the question whether and to what extent that circumstance will affect the decision of these appeals. The entries in 1878 are undoubtedly more favorable to the appellants inasmuch as it is recited therein that the mortgage is redeemable at Dasehra in the month of Jeth. I will first consider the entries of 1878, which I have already set out in

[12] AIR 1920 All 92 : 56 Ind. Cas. 986
[13](1900) 27 Cal. 1004

this judgment. The revenue officer who recorded these entries and had them attested by the persons concerned was presumably investigating the character and origin of the holdings of land by proprietors and possessory mortgagees. What ho was mainly interested in was the liability to pay revenue. There is no mention in the khewats of the dates of the two mortgages and I do not suppose for a moment that the revenue officer was applying his mind to the question whether redemption of the mortgages was or was not barred by limitation. It is, of course, a fact that the entries were attested by the mortgagees or their representatives and it was recited therein that the mortgages were redeemable at Dasehra in the month of Jeth, and 1 can appreciate the view that by reason of this recital it should be held that the entries contained an acknowledgment of liability. But for my own part I very much doubt whether the mortgagees were consciously acknowledging a liability to redemption and I am strongly inclined to agree with the view expressed by Piggott J. in *Anup Singh v. Fateh Chand*[14], that the attestation by the mortgagees amounted to no more than an admission that their possession originated in a contract of mortgage, the amount of mortgage money being shown in the khewat. It is true that in the case under our consideration the entry of 1878 was made 19 years after the passing of Act 14 of 1859, whereas in *Anup Singh v. Fateh Chand*[15], a period of only four years had elapsed from the passing of that Act and it may, therefore, be said that in 1878 the villagers must be presumed to have known about the law of limitation; but knowledge of the law must always be presumed and I would hesitate to hold that in the entries of 1878 there was any conscious acknowledgment of

liability in the sense that it was present to the mind of the mortgagees or their representatives that they were acknowledging a subsisting and enforceable liability against themselves.

19. Assuming, however, that this view is wrong--and I concede that an arguable ease can be made out for the opposite view--we still have to consider whether the acknowledgment of liability amounts to proof of a subsisting liability enforceable at law. Section 19, Limitation Act of 1908--which is the Act we have to apply in this case--requires that the acknowledgment must be made within the prescribed period of limitation. A person may acknowledge liability, but such acknowledgment will not operate to give a fresh period of limitation for a suit for redemption if it is made beyond the prescribed 60 years. The onus lies on a plaintiff to show that his suit is not barred by limitation. There is some conflict of opinion, however, as to whether, if an acknowledgment of liability is proved, the onus is on the plaintiff to show that the acknowledgment was made within the period of limitation or whether the onus is on the defendant to establish that it was made beyond the period of limitation, I can well understand that, where it is proved or admitted that there was a deed of mortgage, the mortgagee will ordinarily be in a position to disclose its date and it is possible to think of other circumstances also in which the onus might shift to the defendant; but in the case before us it is common ground that no mortgage deed was ever executed : vide the judgment of the learned Judge of this Court. In a suit for redemption of an oral mortgage in which limitation is allegedly saved by an acknowledgment I can see no reason whatsoever why the onus should not lie on the plaintiff to establish that the acknowledgment was made within the period prescribed for limitation. An acknowledgment of liability does not necessarily imply an admission that a suit is not barred by limitation and I am of opinion that in the case before us it was for the plaintiff

[14] AIR 1920 All 92 : 56 Ind. Cas. 986

[15] AIR 1920 All 92 : 56 Ind. Cas. 986

to show that the acknowledgment of 1878 -- always assuming that it amounted to an acknowledgment of liability -- was made within the period of limitation; and the circumstance that in the entry there is a recital of the right to redeem in the month of Jeth does not relieve the plaintiff of the duty of proving that the acknowledgment was made within 60 years of the mortgage or within sixty years of an earlier acknowledgment and that the liability was, therefore, subsisting.

20. The appellants have undoubtedly proved that the acknowledgment of 1878 was made within sixty years of the earlier acknowledgment which finds place in the khewat of 1852. In 1852 there was no period of limitation for a suit for redemption, but by Section 1(15) of Act 14 of 1859, it was provided that a suit for redemption of immovable property should be brought within sixty years of the date of the mortgage or within sixty years of an acknowledgment of the title of the mortgagor or of his right to redemption if such acknowledgment were made within sixty years of the mortgage. The entry in 1852 contains no mention of the right of redemption and I do not think that it amounts to an acknowledgment of liability at all. But if the contrary view be held, it was for the plaintiff to show that such liability was subsisting and this he has failed to do inasmuch as he is unable to establish the date of the mortgage.

21. My findings therefore are as follows : (1) The attested entry in the khewat of 1878 is not an acknowledgment of liability (2) If it be held to be an acknowledgment of liability, the onus was on the plaintiff to show that the liability was legally subsisting and he has failed to discharge this onus by establishing that there was a subsisting liability either [in 1878 or in 1852. I would dismiss these appeals.

Allsop, J.

22. There are two questions in this case. The first is whether the acknowledgment in 1852 saved limitation in the year 1878 when the second acknowledgment was made. If the matter had been res integra I should have been inclined to hold that it did because it was made at a time when the mortgagors' right to redeem was subsisting, but the decision of their Lordships of the Privy Council in *Fatimatulnissa Begam v. Sundar Das*[16] is to the contrary effect and is conclusive. The second question is whether the acknowledgment in 1878 amounted to an admission that a suit for redemption was not barred by limitation on the date when the acknowledgment was made. In my judgment, this question does not involve any general point of law. It is a question of construction. If the statement could be construed to mean that the mortgagees admitted that the mortgage had been executed within sixty years or that there had been an acknowledgment within sixty years which saved limitation the admission would have been evidence against them, but I do not think in the circumstances it can be assumed that the question of limitation was present to their minds at all or that they intended to make any admission on the point. I agree that the appeal must fail.

Bajpai, J.

23. I agree with my brothers Collister and Dar that these appeals should be dismissed. They arise out of two suits brought by the plaintiffs for possession of certain zamindari

[16](1900) 27 Cal. 1004

property by redemption of two usufructuary mortgages. Every Court which has had to deal with these cases so far has agreed that the plaintiffs' claim ought to be dismissed. It is not necessary for me to state the facts at any length or even to discuss the case law for the facts and the case law are all contained in the judgments of my brothers. The plaintiffs brought two suits for redemption of two mortgages. They alleged that they were the representatives of the mortgagors and the defendants were the representatives of the mortgagees. The mortgages were alleged to be of the year 1836 or thereabouts, and it is obvious that the plaintiffs have to prove the specific mortgage which they set up. There is no writing or any other contemporaneous document evidencing the mortgage and the burden lies heavily on the plaintiffs to establish the terms of the specific mortgage which they allege. In *Sheo Prasad v. Lalit Kuar*[17] it was held that the burden lay on the plaintiffs in a suit of this kind to establish the specific mortgage which they set up and if they failed to discharge this burden their suit was liable to be dismissed. In the present case, the date of the mortgage and the names of . the mortgagors and mortgagees and certain other

particulars cannot be said to be proved even from the khewat entries upon which reliance is placed. There is yet another ground, and that is the ground which has found favor with the Courts below including the learned single Judge of this Court, on which the plaintiffs can be non-suited. Their claim is barred by time. Under Section 8, Limitation Act, 1908, every suit instituted after the period of limitation prescribed therefore by Schedule 1 of the Act, shall be dismissed even though limitation has not been set up as a defense. The onus, therefore, lies on the plaintiffs to prove that their suits have been instituted within 60 years of the mortgage. If, therefore, there be nothing else, the claim of the plaintiffs having been made, on their own showing, more than 60 years after the date of the mortgage is liable to be dismissed. If the plaintiffs allege any ground on which limitation is to be saved, the burden again is on them to establish the same.

24. In the present cases, it is said, that there was no limitation for redemption of mortgages prior to 1859 and the mortgages must, therefore, be, by some fiction of law, considered to be the mortgages of 1859. I am not prepared to accede to this contention. For the first time a period of limitation was provided in respect to mortgages by Act 14 of 1859. Clause (15) of Section 1 of that Act provides as follows:

> To suits against a depositary, pawnee or mortgagee of any property moveable or immovable for the recovery of the same -- a period of 30 years if the property be moveable and 60 years if it be immovable, from the time of the deposit, pawn, or mortgage ; or if in the meantime an acknowledgment of the title of the depositor, pawner, or mortgagor, or of his right of redemption, shall have been given in writing signed by the depositary, pawnee or mortgagee or some person claiming under him, from the date of such acknowledgment in writing.

25. Section 18 of the same Act, gave a period of two years grace for filing suits on old mortgages which ordinarily would be barred by time under the above statute. According to my mind, on the proper construction of the above two provisions, it is clear that, if there was an old mortgage which under the law prevailing prior to the Limitation Act of 1859, could not be barred by limitation it would be so barred if 60 years had elapsed from the date of the mortgage and if the suit was not brought within the two years period of grace. If however the two years period of grace was not availed of, then the mortgagor

[17]('96) 18 All. 403

would have to show that his suit was within 60 years of the date of the mort-gage. This is clear from the words of Clause (15) to Section 1. Another saving was however enacted for the benefit of the mortgagors and that was contained in the words if in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given in writing signed by the mortgagee or some person claiming under him, and under those circumstances it was said that the time of 60 years would run from the date of such acknowledgment in writing. I have, therefore, got to see whether there was any such acknowledgment in writing. It is pleaded on behalf of the mortgagors that there were two such acknowledgments, one of the year 1852 and

the other of the year 1878, both contained in khewats of those years. So far as the khewat of 1852 is concerned, it is almost irrelevant because it is prior to 1859 and the question is only about the khewat of 1878. It has got to be proved even under the Act of 1859 that the acknowledgment in the khewat of 1878 was made within 60 years of the mortgage. This is clear from the words "in the meantime." The date of the mortgage has not been proved in any manner whatsoever, and that being so, the acknowledgment cannot be said to have been made within 60 years of the date of the mortgage. Coming to the Limitation Act of 1908, we find that the relevant section is Section 19 which says:

> Where, before the expiration of the period prescribed for a suit ... in respect of any property ... an acknowledgment of liability in respect of such property ... has been made in writing signed by the party against whom such property ... is claimed ... a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

26. The provision of law is quite specific. The acknowledgment must be made before the expiration of the period prescribed before a fresh period of limitation can be computed. It may be contended although it is doubtful if the contention is correct that the entry in the khewat of 1878 can be construed as an acknowledgment of the title of the mortgagor inasmuch as the khewat entry is signed by the mortgagee, but the onus still lies on the plaintiffs mortgagors to prove that the entry was made before the expiration of the period of limitation. Once again the burden is upon the plaintiffs to prove that the acknowledgment was made either within 60 years of the mortgage or within 60 years of an earlier acknowledgment. Paying due regard to the Limitation Act of 1908, the khewat entry of 1852 might become irrelevant because it cannot be construed as an acknowledgment of liability, much less can it be said that it was made within 60 years of the mortgage. If one looks at the khewat entry of 1878, it is doubtful if it can be said to be an acknowledgment of the title of the mortgagor. Even if it were possible to interpret it as such an acknowledgment, the difficulty still remains that the said khewat entry has not been proved to have been made within 60 years of the mortgage.

27. It is then said that the khewat entries of 1852 and 1878 must be construed as an acknowledgment of a subsisting liability, because a mortgagee is not expected to speak of a mortgage unless it were a subsisting mortgage. This overlooks the clear provision of law that the acknowledgment must be made before the expiration of the period of limitation. In *Anup Singh v. Fateh Chand*[18] and in *Abdul Rafiq v. Bhajan*[19], it was laid down that no inference of a subsisting liability could be inferred in circumstances like

[18]('20) A. I. R. 1920 All. 92

[19] AIR 1932 All 199 : (1931) ILR 53 All 963

these in relation to an ancient mortgage.

The khewat entries of 1852 and 1878 do not give the dates of the mortgages, and it is impossible to draw an inference that they were made within sixty years of the mortgages.

28. The case law that has been discussed by my learned brothers is more in favor of the defendants than in favor of the plaintiffs. Although I am aware that some learned Judges of some High Courts have taken the view that from the mere entry of a mortgage in a khewat signed by the mortgagee a presumption as to the existence of a subsisting mortgage can be drawn, but I am not prepared to draw any such inference where the date of the mortgage and the specific terms thereof are surrounded in mystery. The plaintiffs are not entitled to any sympathy and they or their predecessors are themselves to blame for not asserting their rights (if there are any) earlier. For the reasons given above, I dismiss this appeal with costs.

Hamilton, J.

29. I agree that if the entries of 1852 and 1878 can be considered to be acknowledgments they do not for reasons given by my learned brothers start a new period of limitation. I am further not satisfied that these entries constitute acknowledgments. Learned Counsel has informed us that the signatures of all the cosharers are to be found together somewhere at the end of the record of rights, but the actual signatures have not been shown to us. Copies of the entries referring to the shares which are material in the suit have been supplied but there are no signatures there. The signatures, therefore, are not against the entries which mention the mortgages which we have to consider in this appeal. Under the present instructions to settlement officers which are to be found in the first volume of the Board's Circulars, Department 1, a settlement officer should take the signatures of all cosharers: (1) in connexion with the engagement to pay revenue and (2) in connexion with the memorandum which he has to prepare under Sections 84 and 85 of the Revenue Act. Board's Circulars, Department 1, Chap. 1, para. 1 lays down that a settlement officer shall record in a memorandum the arrangements agreed to by the cosharers, or made by himself, in regard to the matters specified in Section 84, and he will cause any agreement made in respect of any of the matters to be recorded to be attested by the parties concerned. He shall also record in the memorandum the arrangements determined by him in regard to the matters specified in Section 85(a) to (c). If a revision of records under Chap. 4 of the Act is being carried out the memorandum will be appended to the revised khewat. These instructions are subsequent to the year 1878, but I have examined the instructions then in force which are to be found in directions for settlement officers in the North-Western Provinces of the Bengal Presidency, Edition of 1858. In para. 33 of Appendix 20 the khewat and wajib-ularz are mentioned, and I have referred to this Appendix because I have been unable to find the word 'khewat' in the actual Instructions. At that time too signatures had to be taken as regards the engagement to pay revenue and under para. 167(6), Clause (9) which is as follows :

> The signatures of all the lumbardars and as many as possible of the putteedars should be attached to the paper, and it should also be attested by the putwaree and the canoongos, and be always read out before the settlement officer in open Court and in presence of the subscribing parties, and should be tested and approved by him, and receive his signature

in full.

30. This para. 167 starts as follows :

> The engagement entered into by the malgoozars and coparceners, otherwise called the administration paper, and in the vernacular, the ikrarnamah or wajib-ool-urz. In coparcenary mahals, this is the most important of all the papers, for it is intended to show the whole of the constitution of the village. The principles on which it is to be compiled have been already laid down in paras. 146-149. No specimen is given, because it has been found that the mention of any specimen leads to its too general adoption as a form, whereas it is not to be expected that any one form should suit more than a very few cases. It is better to enumerate the principal topics on which the paper should be implicit, so that the settlement officer may see that no necessary subject has been overlooked. The paper should contain complete information on the following points.

31. There are then eight points and they are too long for me to quote in full. I will merely say that they include the mode of paying the Government revenue, how in holdings in common separation of interest may take place, what are the functions of the lambardars and the advantages to which they are entitled in virtue of their office, what are the items of sayer and the rules regarding fruit or timber trees, what are the rights of irrigation, what is to happen to waste land, how many are the village servants and what are their fees and allowances. It appears to me that what would naturally have happened at the time that these signatures were taken in 1852 and 1878 was that a meeting of proprietors was called and the settlement officer read out to them this memorandum and the signatures of all those persons were taken at one and. the same time. Even if these signatures were taken on the document part of which, at any rate, may now be called the khewat, I do not think that one can say that the entries about mortgages plus signatures taken as above would amount to an acknowledgment in unequivocal terms that those mortgages were existing. It is impossible to say on what the attention of the various persons who have affixed their signatures was focussed, but it seems to me that the most unlikely thing on which it would have been focussed was whether the mortgages entered in what we would now call the khewat were still subsisting or not. I am not prepared, therefore, to hold that the entries of 1852 and 1878 amounted to an acknowledgment. I agree, therefore, that the appeal must fail.

Dar, J.

32. These are two connected appeals under Clause 10, Letters Patent, against a judgment, dated 23rd January 1939, of Ismail J. by which he affirmed concurrent judgments and decrees of the two Courts below in two suits for redemption of two mortgages. The alleged two usufructuary mortgages which are the subject-matter of these two redemption suits are said to be of the year 1836 or near about that time and were made in favour of three persons, Lachhman, Maharam and Mahasukh. By each of these mortgages a six biswansi odd share out of eight biswansi odd share

held by the mortgagors in village Paigon in Muttra district was transferred to the mortgagees subject to the condition that the mortgagees would be entitled to take the usufruct of the mortgaged property in lieu of the interest on the mortgage money without any liability to account. The mortgagors in one mortgage were two brothers, Tulsi and Dilsukh and the mortgage money was ₹ 278-4-0. In the second mortgage the mortgagors were a father and son, Nathha and Hira and the mortgage money was ₹ 383. There exists no contemporaneous record of these alleged mortgages, at any rate none was relied on or produced at the trial. There is a judgment of the Munsif of Muttra, dated 11th March 1937, which shows that these mortgages were of some unknown and earlier dates and the mortgagees were not the persons mentioned above but their ancestors. In the khewats which were prepared at the revised settlement in the year 1852 and in the settlement of the year 1878 there are certain entries in relation to these mortgages. In the earlier khewat of 1852, Hira Singh, son of Nathha, and Khamani and Ram Prasad, sons of Dilsukh, are shown as possessed of eight biswansi odd share each and out of this one biswansi odd share is shown in possession of Hira Singh and Khamani and Ram Prasad each and six biswansi odd share of each is shown in possession of Lachhman, Maharam and Mahasukh, "mortgagees, " for ₹ 383 and ₹ 278-4-0, respectively. In the later khewat of 1878, Khamani and Earn Prasad, sons of Dilsukh; and Tora and Kalloo, sons of Hira Singh, are shown as holding one biswansi odd share each and Mahasukh and Maharam between them are shown as holding one-half, and Thakuria, one grandson of Lachhman, Dalpat and Narain, two other grandsons of Lachhman and Bijai Singh, a son of Lachhman, are shown as holding one-half share in six biswansi odd share, and it is also stated that these persons were the mortgagees of the property of Khamani and Ram Prasad and of Tora and Kalloo aforesaid mortgagors in equal shares for ₹ 278-4-0 and ₹ 383-0-0, respectively, by virtue of the writing made at the time of the amended settlement, interest equal to profits, condition of redemption--when there is no harvest in the month of Jeth on Dasehra day.

33. The plaintiffs, who are mere speculators and who purchased this litigation by two sales of 1914 and of 1915 of the equity of redemption from a son of Khamani and Tora, allege that under the Usury Regulations which governed usufructuary mortgages up to the year 1855 the condition in the mortgages with regard to the profits of the property being equal to interest is void; and as the income of the property far exceeds the twelve per cent. interest which the Usury Regulations allowed to the mortgagee on the mortgage money, the plaintiffs are entitled to recover from the defendants, who are numerous descendants of Lachhman, Maharam and Mahasukh, not only possession of the property mortgaged but a large amount of mense profits. On their own showing the plaintiffs seek to disturb a possession which has gone on for one hundred years and for several generations and which may well be even more ancient than this.

34. The Munsif of Muttra, who tried these redemption suits found that the specific mortgages set up by the plaintiffs were not proved and that although at one time the relation of mortgagor and

mortgagee might have subsisted between the predecessors-in-interest of the plaintiffs and defendants the mortgages were of some unknown and o much earlier dates and they were made not in favour of the persons who were alleged to be the mortgagees in the plaints but in favour of their ancestors, and holding that there was no evidence to show that the acknowledgments of the mortgages contained in the khewats of 1852 and of 1878 were made within sixty years of the mortgages he dismissed the claims as barred by limitation and also because the mortgages sued upon were not subsisting mortgages and did not exist in fact. On successive appeals this decision was affirmed by the Additional Civil Judge of Muttra and by my brother, Ismail J, The entries in the khewats mentioned above do not prove the time of the mortgages to be the year 1836 or near about it. They do not prove that the two brothers, Tulsi and Dilsukh, and the father and son, Nathha and Hira, were the original mortgagors. Nor do they prove that Lachhman, Maharam and Mahasukh were the original mortgagees. It is a matter of evidence whether the persons who are mentioned in the said khewats were the original mortgagors or mortgagees or only their successors-in-interest. In either of the two khewats Nathha is not shown anywhere as the mortgagor and the judgment of the Munsif of Muttra of 1836 negatives the theory that Lachhman, Maharam and Mahasukh were the original mortgagees and shows that the mortgagees were the ancestors of Lachhman. There is thus no evidence in support of the specific portgages set up by the plaintiffs in their plaints, and on the authority of *Sheo Prasad v. Lalit Kuar*[20] I should have been prepared to dismiss these claims on the short ground that the plaintiffs have failed to prove the specific mortgages which they set up in their plaints : see also *Zingari v. Bhagwan*[21] and *Parmanand Misr v. Sahib Ali*[22]

35. But as an elaborate argument was addressed to us on the question of limitation and the case was decided by Ismail J. and by the lower appellate Court mainly on the plea of limitation I now proceed to examine it. This argument in brief is that under Section 19, Limitation Act (9 of 1908) where before the expiration of the period prescribed for a redemption suit an acknowledgment of liability is given by the mortgagee, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. Prior to the enactment of Act 14 of 1859, no period was prescribed for redemption suits of usufructuary mortgages and mortgages, however, old, were deemed to be subsisting up to 1st January 1862, which was the limit given to these mortgages by Section 18 of Act 14 of 1859. The acknowledgment contained in the khewat of 1852 was made at the time when there was no period prescribed for a redemption suit and all mortgages, however old, were subsisting and, therefore, it was given before the expiration of the period prescribed for a redemption suit. The effect of this acknowledgment was to give a fresh period of sixty years. Before this period expired a fresh acknowledgment was given in the khewat of 1878 which again extended the time for another sixty years and before the expiration of this time the present actions were raised. If for some reason the acknowledgment of 1852 does not save time and is inoperative, then the acknowledgment of 1878 by itself can save time. The language of the acknowledgment of 1878 shows that the mortgagees acknowledged a subsisting liability and the necessary result of an acknowledgment of a subsisting liability is that it was made while the liability subsisted and before the period prescribed had expired.

36. It may be taken as generally correct that the law of limitation applicable to a redemption suit of a usufructuary mortgage is the law of limitation which is in force on the date when the action is raised and not the law of limitation which was in force when the mortgage was made or when the acknowledgment was made. But this rule is subject to one well-established exception that if before coming into force of any particular law of limitation, any right or title to the property had been extinguished, the subsequent passing of any Limitation Act would not revive the extinguished right or title unless the new Act

[20](96) 18 All. 403 [22](89) 11 All.438

[21]1889 A.W.N.187

expressly does so. It is therefore necessary to see whether any right of redemption was in existence before the present Limitation Act (9 of 1908) came into force or even when the preceding Acts 15 of 1877 and 9 of 1871 were enacted. A period of limitation was provided for the first time in regard to usufructuary mortgages by Act 14 of 1859. Clause (15) to Section 1 of that Act is as follows :

> To suits against a depositary, pawnee or mortgagee of any property moveable or immovable for the recovery of the same--a period of 30 years if the property be moveable and 60 years if it be immovable, from the time of the deposit, pawn, or mortgage; or if in the meantime an acknowledgment of the title of the depositor, pawner, or mortgagor, or of his right of redemption, shall have been given in writing signed by the depositary, pawnee or mortgagee or some person claiming under him, from the date of such acknowledgment in writing.

37. By Section 18 of the said Act a period of grace of two years was granted for filing suits on all old mortgages which were affected by this new enactment. The Limitation Act 14 of 1859 was substituted by the Limitation Act 9 of 1871 and Article 148 of Schedule 2 provided a period of 60 years for a redemption suit from the date of the mortgage, unless where an acknowledgment of the title of the mortgagor, or of his right of redemption, has, before the expiration of the prescribed period, been made in writing, signed by the mortgagee, or some other person claiming under him; and, in such case, the date of the acknowledgment. And by Section 29 of this Act it was provided that at the determination of the period hereby limited to any person for instituting a suit for possession of any land ... his right to such land shall be extinguished.

38. The mortgages in suit were of some unknown dates prior to the passing of Act 14 of 1859. If they were more than 60 years old when that Act was passed they had only life up to the period of grace given by that Act up to 1st January 1862. Any acknowledgment which could save them must comply with the requirements of Clause (15) of Section 1 of Act 14 of 1859, and if such an acknowledgment is not available then all rights of redemption were extinguished by the year

1871 when Section 29 of Act 9 of 1871 came into force and no fresh Limitation Act could revive those rights again. It is therefore incumbent upon the plaintiffs to establish that the acknowledgment in the khewat of 1852 was a valid acknowledgment under Act 14 of 1859. The conditions for a valid acknowledgment under Act 14 of 1859 are materially different from the conditions for a valid acknowledgment under subsequent Limitation Acts, 9 of 1871, 15 of 1877 and 9 of 1908. One noticeable change is that under Act 14 of 1859 an agent's acknowledgment was not recognized and the acknowledgment had to be by the mortgagee or by some person claiming under him. Under the present Act the acknowledgment of an agent is sufficient as also of the party against whom right is claimed or by some person through whom he derives title and liability. The other noticeable change is that under Clause (15) of Section 1 of Act 14 of 1859, the acknowledgment was to be given "in the meantime," whereas under the present Act and other preceding Acts it is sufficient if it was given "before the expiration of the period prescribed."

39. There are only two points of time mentioned in Clause (15) of Section 1 of Act 14 of 1859. One point of time is the date of the mortgage and the other point of time is the period of sixty years, and the acknowledgment has to be made "in the meantime." The obvious meaning of the statute, therefore, is that the acknowledgment has to be made between the date of the mortgage and before the expiration of sixty years from the date of the mortgage, and the question whether the mortgage was a subsisting mortgage or not a subsisting mortgage is wholly irrelevant for the purposes of Clause (15). If a mortgage is more than sixty years old and an acknowledgment was made about it after the period of sixty years though at a time when the mortgage was subsisting either because at that time there was no period of limitation for mortgages or because the period of grace of two years given under the Act of 1859 had not expired or because there were a series of acknowledgments which had kept alive the mortgage, such an acknowledgment whatever may be its effect under other Limitation Acts did not satisfy the condition of the statute as laid down in Clause (15) of Section 1 of Act 14 of 1859.

40. There is high authority on the interpretation of the material words "in the meantime" which occur in Clause (15) of Section 1 of Act 14 of 1859, both in England and in this country. At Madras, Bombay and at Lahore the High Courts have consistently held that an acknowledgment to be valid under Clause (15) has to be made within sixty years of the date of the mortgage and an acknowledgment made more than sixty years after the date of the mortgage though made at a time when there was no period of limitation prescribed for redemption suits or when the mortgage was subsisting on account of period of grace granted by Section 18 of Act 14 of 1859, is not a valid acknowledgment within the meaning of Clause (15) and cannot save time for redemption suits beyond the period of grace given by Section 18 of Act 14 of 1859; and a right of redemption not en-forced within the period of grace was extinguished by Section 29 of Act 9 of 1871, when that Act came into force and the right thus extinguished could never be revived by enactment of subsequent Limitation Acts : see *Vasudavan Nambudiri v. Mussa Kutti*[23] *Mukkanni v. Manan Bhatta* [24]*Raman Kurup v. Chappan Nair*[25] *Sheodan v. Surjit*[26] *Dhondi v. Lakshman*[27],

Haji Yoonus v. Sheik Hasan[28], and *Indurai v. Shivlal*[29],

41. Clause (15) of Section 1 of Act 14 of 1859 with certain variations was borrowed from the English Statute, the Real Property Limitation Act, 1833 (3 and 4 Will. IV, C. 27, Section 28). At one time in England, it was assumed without discussion that an acknowledgment given by the mortgagee after twenty years of the mortgage -- that being the period in England for a redemption suit -- was a valid acknowledgment : see *Stansfield v. Hobaon*[30] But this view was adversely criticised and was finally overruled by the Court of Appeal in *Sanders v. Sanders*[31] and the law has since then been well settled in England that a valid acknowledgment by the mortgagee has to be made within twenty years under the old or within twelve years under the current English statute from the date of the mortgage : see Halsbury's Laws of England, vol. 20 2nd. Edn.735, and Fisher on Mortgage, End. 7. 591. In *Fatimatulnissa Begam v. Sundar Das*[32] the Privy Council interpreting Clause (15) of Section 1 of Act 14 of 1859, as requiring an acknowledgment

[23]('99) 6 Mad. H. C. R. 138 [25]('18) 5 A. I. R. 1918 Mad. 86
[27] AIR 1930 Bom 55: (1929) 31 BOMBAY LR 1287 : 122 Ind. Cas. 862;
[24]('82) 5 Mad. 182 [26]('84) 109 P. R. 1884, p. 305 [28] AIR 1941 Bom178: (1941) 43 BOM LR 194
[29] AIR 1925 Bom 339 : (1925) 27 BOM LR 467 [31](1881) 19 Ch. D. 373
[30](1852) 3 De. G. M. & G. 620 [32](1900) 27 Cal. 1004,

within sixty years of the date of the mortgage held that a mortgage which had expired under Act 14 of 1859, and a right of redemption which had been extinguished under Section 29 of Act 9 of 1871, could not be revived by an acknowledgment made in 1872. There was some conflict of authority at one time in this Court on the interpretation of Clause (15) of Section 1 of Act 14 of 1859. In *Mahomed Abdool Ruzzah v. Syud Asif Ali Shah*[33] and in *Muniruddin v. Muhammad Kaim*[34] the clause was interpreted as requiring an acknowledgment within 60 years of the date of the mortgage, while in *Daia Chand v. Sarfraz*[35] Pearson J. expressed the view that an acknowledgment made 60 years after the mortgage, but at a time when there was no period of limitation for redemption suits, was a good acknowledgment, and in this view Spankie J. also concurred although at an earlier stage of that case he had held against validity of the acknowledgment which was the subject-matter of consideration in that case: see *Daia Chand v. Sarfraz* [36] And *Daia Chand v. Sarfraz*[37] was followed by Tyrrell. J. in *Jamna Prasad v. Gokla*[38] *Daia Chand v. Sarfraz*[39] was decided before *Stansfield v. Hobaon*[40] was overruled in England. Since then a strong current of judicial authority has flown against the interpretation approved by Pearson J. and Lord Hobhouse's pronouncement in 27 Cal. 1004 is now generally regarded in this country as decisive in favour of the interpretation that under Clause (15), a valid acknowledgment can only be made within 60 years of the actual date of the mortgage. In my opinion *Daia Chand v. Sarfraz*[41] must be taken to have been overruled by *Fatimatulnissa Begam v. Sundar Das*[42] by necessary implication and should now be expressly overruled.

42. There is no evidence that the acknowledgment contained in the khewat of 1852 was made within 60 years of the dates of the mortgages. There is no evidence as to who the mortgagors and the mortgagees were and whether the mortgagee rights were the joint family property or the self-

acquired property of the mortgagees. There is no evidence that the persons who made the acknowledgments in 1852, were the mortgagees themselves or were persons claiming under the mortgagees. And if they were managers of a joint Hindu family, as they well might have been, they had no power to bind the then existing or future coparceners as the acknowledgment of a manager or of an agent was not a good acknowledgment under Act 14 of 1859: see *Narayan v. Govind*[43], It is also doubtful whether the entry in the khewat of 1852 contains a sufficient acknowledgment and whether from the bare use of the word "mortgagee" after the names of Lachhman, Mahasukh and Maharam a subsisting mortgage or a liability to redeem can be legitimately and properly inferred. For these reasons, I would hold that the alleged acknowledgment contained in the khewat of 1852 was wholly ineffective to save time,

43. The controversy with regard to the acknowledgment contained in the settlement khewat of 1878 is of a somewhat different nature and it centres round the question whether from the language of an acknowledgment contained in the settlement khewat, a presumption can be raised to the effect that the acknowledgment by the mortgagee, as a matter of fact, was made at a time when the liability of redemption subsisted and 60 years had not elapsed from the date of the mortgage so as to cast the burden of proving on the mortgagor that the acknowledgment was made after the period of limitation had run out.

[33](71) 3 N. W. P. H. C. R. 119 [35](75-77) 1 All 426, 37('75-77) 1 All 426 [39](75-77) 1 All. 117 (F.B)
[34](85) 1885 A. W. N. 194 [36] (75-77) 1 All.117 (F.B.) at pp. 120, 126 [38]('94) 1894 A.W.N. 87
[40](1852) 3 De. G. M. & G. 620 [42](1900) 27 Cal. 1004 43
[41]('75-77) 1 All 426 [43] AIR 1928 Bom 28 : (1927) 29 BOM LR 1563

There is undoubtedly a conflict of judicial authority on this question and this conflict is best illustrated by the majority and minority decisions in *Anup Singh v. Fateh Chand*[44], The main arguments in support of the majority view are that Section 19, Limitation Act, itself contemplates the possibility of both kinds of acknowledgments, those made before the period of limitation and those made after the period of limitation and it enjoins that the former kind of acknowledgments only shall be valid and puts the burden of proof upon the person who relies on the acknowledgment and as between the mortgagor and mortgagee in a redemption suit upon the mortgagor. Secondly, the entry in the settlement record, where no date is given of the mortgage, is a good evidence of the factum of the mortgage and of its terms, but it is no evidence of the date of the mortgage or of the fact that on the date of the entry the mortgage was subsisting or the mortgagee was liable to be redeemed or that the entry was made within 60 years of the date of the mortgage. It is not the duty of a settlement officer to record only subsisting mortgages in the khewat; his duty consists in showing in the khewat how much land comprised in it is in possession of owners and how much is in possession of mortgagees for the payment of Government revenue and if he finds as a fact some land of the khewat in possession of the mortgagees, he would make an entry about it without going into the question of subsistence of the mortgage or of its date. As a matter of practice, if not as a matter of law, the settlement officers leave the question of subsistence of mortgage for determination to civil Courts and the fact that no date or time of the mortgage was mentioned in the settlement record itself suggests that the mortgage was an ancient mortgage of some unknown date and the settlement officer did

not apply his mind to the question of subsistence of mortgage or of its age. The main argument in support of the minority view is that persons as a rule do not make acknowledgments of liability when against them the liability has ceased to be enforceable at law and if, in fact, an acknowledgment of liability is made, the presumption is that it was made because the liability was enforceable and on the date of acknowledgment the period of limitation had not run out. The majority view was approved by Sir Shah Sulaiman C. J. in *Abdul Rafiq v. Bhajan*[45], and the minority view was approved by Niamatullah J. in the same case at pp. 971-972 and he also without referring to *Anup Singh v. Fateh Chand*[46] followed the minority view in *Mihi Lal v. Soni Ram*[47],

44. We are now dealing in the words of Piggott J., in *Anup Singh v. Fateh Chand*[48], with a problem of circumstantial evidence, of drawing an inference from certain facts proved, of raising a presumption under Section 114, Evidence Act. When dealing with such a problem a distinction may well be drawn between an acknowledgment of debt and liability made a few years before the suit in relation to a recent transaction and an acknowledgment of liability of redemption made over 65 years ago in relation to an ancient mortgage. The Court may with some degree of accuracy be able to re-construct conditions which prevailed in a society a few years back and may be able to determine with some degree of certainty the knowledge of law in relation to the transaction which prevailed in the society at the time when the acknowledgment was made and draw a reasonably correct inference as to the probable reasons which influenced the conduct of the persons making the acknowledgment. But it is not so easy to reconstruct the condition of society as it existed sixty-five years ago and there is both danger and temptation to judge the past by present conditions and standard.

[44] AIR 1920 All 92 : 56 Ind. Cas. 986 [46]('20) 7 A. I. R. 1920 All. 92 48 AIR 1920 All 92 : 56 Ind. Cas. 986
[45] AIR 1932 All 199 : (1931) ILR 53 All 963 [47] AIR 1929 All209

The entire basis of the argument that an acknowledgment of liability imports an acknowledgment of a subsisting liability is that persons do not admit liability when it is extinguished by law. This may be a legitimate inference in the present condition of society in relation to commercial transactions, in relation to loans and debts having regard to knowledge of law of limitation and standard of morality which prevails in society in these days. But can it be said with equal certainty that sixty-five years ago ignorant villagers living in the interior of the districts of United Provinces were equally familiar with the law of limitation in relation to redemption of old mort gages and in relation to validity of their acknowledgments when a period of limitation was for the first time introduced with regard to mortgages by Act 14 of 1859 and when the law relating to their acknowledgments was the subject of such conflicting decisions as are shown by *Mahomed Abdool Ruzzah v. Syud Asif Ali Shah*[48] *Daia Chand v. Sarfraz*[49] and *Daia Chand v. Sarfraz*[50] and can it be said with equal certainty that the persons in those days were as anxious to take advantage of the plea of limitation as they are at present ? It seems to me that the utmost inference that can be drawn from an acknowledgment of an old mortgage of an unknown date is that the mortgagee making the acknowledgment believed at the time that the mortgage was subsisting or that he did not wish to dispute its redemption, but no inference can be drawn from

the acknowledgment as to the date of the mortgage or as to the question whether the acknowledgment was made before the period or after the period had expired, and in relation to such old mortgages it is for the plaintiff who seeks redemption to prove that the acknowledgment was made before the period had run out. As a matter of law I would, therefore, hold that the majority view in *Anup Singh v. Fateh Chand*[51], is sounder of the two in relation to old mortgages and should be followed.

45. But even if the minority view in *Anup Singh v. Fateh Chand*[52], be accepted it does not help much the plaintiffs' case. Whether a presumption as to the date of a mortgage or as to its subsistence be made or not in favour of the mortgagor in any particular case falls to be determined upon the language of the acknowledgment in the light of the surrounding circumstances of the case. There are two judgments on the record of the year 1837 given forty, two years before the acknowledgment inter partes which show that the mortgages were made to the ancestors of Lachhman and they were, there-; fore, in all probability, more than sixty years old in 1878. The trial Court relying upon the surrounding circumstances of the case and the language of the acknowledgment refused to raise a presumption in plaintiffs' favour and its judgment was upheld in appeals successively by the Additional Civil Judge of Muttra and by my brother Ismail J. I do not consider it my duty sitting here in these Letters Patent appeals to examine the validity of grounds upon which they refuse to raise the presumption, but should it be necessary to do so I am prepared to hold that on the facts and circumstances of this case no presumption should be raised.

46. The acknowledgment contained in the khewat of 1878 does not give the date of the mortgage, it merely describes certain persons as the mortgagors and the mortgagees and states the amount of mortgage money and the terms of redemption. Admittedly the persons so described were not the original mortgagors or mortgagees, but they were only

[48](71) 3 N. W. P. H. C. R. 119 [50]('75-77) 1 All 426 [52] AIR 1920 All 92 : 56 Ind. Cas. 986
[49](75-77) 1 All. 117 (F.B) [51] AIR 1920 All 92 : 56 Ind. Cas. 986

their successors-in-interest. And the entry in the khewat of 1878 expressly states that it was made by virtue of the writing made at the amended settlement of 1852. One can almost visualise the circumstances in which these mortgages came to be recorded in the settlement khewats. In 1852, at the time of the revised settlement, no period was fixed by law for redemption of mortgages. If the settlement officer of 1852 found an entry about these mortgages in previous revenue records or even if he found no such entry but he found the mortgagees in possession of the land comprised in the khewat, it was his duty to record the mortgages in the khewat which he prepared for the revised settlement and it was wholly unnecessary for him to ascertain the date of the mortgage and he could not possibly enter into the question of subsistence of the mortgages as there was no period for redemption of mortgages prescribed by law in those days. Twenty-six years later another settlement took place in 1878 and in between no redemption had taken place and the mortgagees continued in possession of the land. Relying upon the entry in the settlement khewat of 1852, the settlement officer of 1878 copied the entry made by his predecessor in the settlement khewat of 1878. The settlement officer would not consider it his duty to question the

entry of 1852, when the parties had not done so in a civil Court, nor would he consider it his duty to ascertain the date or time of these mortgages or to investigate the fact whether the mortgages on that date were more or less than sixty years old.

47. On what basis is it contended that a presumption should be made that at the time of the settlement of 1878 the mortgages in suit were less than sixty years old or were subsisting mortgages? The entire basis of this contention is that if the mortgages had been more than sixty years old or if they had not been subsisting the mortgagees would not have acknowledged them. This presupposes that the mortgagees knew the correct law about the validity of acknowledgment of 1852, they knew that the said acknowledgment of 1852 was invalid and without taking that acknowledgment into consideration they considered the mortgages to be subsisting and if the mortgagees treated the mortgages as subsisting they must have been less than sixty years old. I can find no justification whatever for taking the view that the son and grandsons of Lachhman and Mahasukh and Maharam when they made the acknowledgment of 1878 knew or must have known that the acknowledgment of 1852 was invalid in law. If Pearson and Spankie JJ. in *Daia Chand v. Sarfraz* [52]could lay down as correct law in 1877 that an acknowledgment before the year 1859 given sixty years after the date of mortgage was a valid acknowledgment because there was no period of limitation prescribed for redemption suits at that time, is there any reason to suppose that these ignorant Jat villagers living in the interior of Muttra District knew law any better ? And if they regarded or must have regarded that the acknowledgment of 1852 was a good acknowledgment, then it might well have been that the acknowledgment of 1870 was made not because the mortgages on that date were less than sixty years old or that the mortgages were subsisting but because the mortgagees believed--which belief now appears to be erroneous in law--that the acknowledgment of 1852 was a good acknowledgment and the liability of redemption subsisted against them by virtue of the acknowledgment of 1352 though the mortgages themselves were more than sixty years old. Prom the acknowledgment of 1878, one may if he likes raise a presumption that the mortgagees regarded the mortgages to be subsisting, but no presumption can be made as to the dates of the mortgages, nor as to whether the mortgages in law were subsisting or not. On the contrary, having regard to the judgments of (sic) and the surrounding circumstances of the case a presumption may well be drawn

[52](75-77) 1 All 426

that the mortgages were more than sixty years old on the date of the acknowledgment. In my opinion, the acknowledgment of 1878, as also equally ineffective to save time and (sic) claims were rightly dismissed as barred by limitation and these appeals also should be dismissed with costs.

48. For reasons given in (sic) separate judgments these appeals fail (sic) are dismissed with costs.

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