PATNA HIGH COURT

Ramdin Singh

Vs

Ramparichan Singh

(Varma and Manohar Lall, JJ.)

02.05.1941

JUDGMENT

Manohar Lall, JJ.

1. This is an appeal by the plaintiffs against the decision of the Subordinate Judge of Saran, dated 31st August 1938 by which he dismissed their suit which was instituted on 12th June 1937, to recover their dues based upon bahi khata account upon the view that the suit was barred by limitation and that the acknowledgement of 15th June 1934 did not save limitation. This is the principal question which falls to be determined in this appeal. There were other issues which have all been decided in favour of the appellants but the correctness of that part of the judgment has been challenged by the respondents.

2. The facts which gave rise to this litigation may be briefly stated. The case of the plaintiff is that they carried on large money-lending business and their ancestor Baba Dalsingar Singh advanced on 15th September 1932 a sum of L 7196-5 0 to Rai Bahadur Chhatrapati Singh, the karta of the joint family of the defendants, for the legal necessities of that family, that on three other occasions in 1933small sums of L 70, L 30-7-0 and L 73 were advanced, that all these amounts were entered in their memorandum bahi in due course of business, that after giving credit for the sums paid back by the Rai Bahadur a sum of L 7062-10-0 was found due from him at the end of Bhado. 1340 fasli which included the principal sum then found due together with interest thereon at 1 per cent, per month, that on 15th June 1934 by Ex. 3 the Bai Bahadur made an acknowledgment by which; ha admitted that a sum of L 7965 was due from him to Babu Dalsingar Singh out of which Babu Dalsingar Singh remitted L 65, and the Rai Bahadur acknowledged that as karta and manager of the joint family, L 7900 was due from him (the effect of this acknowledgment will have to be examined at length later on). The present suit has been instituted to recover this sum of L 7900 together with interest thereon after giving credit for Rupees 627-15-0 being the amount paid from time to time as detailed in para. 14 of the plaint.

3. In order to appreciate the defence to the action it is necessary to state that the defendants are the descendants of one Babu Bamnath Singh, who left three sons, Babu Dawar Singh, Babu Dund Bahadur Singh and Babu Sri Kishun Singh. Defendant 1, Babu Ramparichhan Singh, is the sole descendant of Babu Dawar Singh. Rai Bahadur Chhatrapati Singh, who died on 2nd February 1936, was the son of Dund Bahadur Singh and the uncle of defendants 5, 6 and 7.

Defendants 2,3 and 4 are the sons of Babu Srikishun Singh. The case of the plaintiffs as already stated was that Rai Bahadur Chhatrapati Singh was karta and manager of the joint Hindu family consisting of all the descendants of Dawar Singh, Dund Bahadur Singh and Sri Kishun Singh.

4. Three written statements were filed in this case, one on behalf of defendant 1, one on behalf of defendants 2 and 3 (the guardian ad litem of the minor defendant 4, brother of defendants 2 and 3, simply prayed that the plaintiff may be put to a strict proof of his claim before a decree is passed against the minor) and the third written statement was filed on behalf of defendants 5, 6 and 7. All the defendants agreed in asserting that the defendants were not members of a joint Hindu family at the date of the transactions in suit and that Rai Bahadur Chhatrapati Singh was not the managing member of the properties of the defendants, the advances taken by Rai Bahadur Chhatrapati Singh on 15th September 1932 and on the other dates in 1933 were denied in fact and it was also asserted that there was no legal necessity for the advances even if they are established to have been made, and lastly, that Rai Bahadur Chhatrapati Singh had no power to acknowledge the said debt on behalf of the other members of the family nor is the acknowledgment binding upon these defendants. The payments which were said to have been made from time to time to discharge the advances taken by the Rai Bahadur were also denied.

5. It will be noticed, therefore, that the principal questions which fell for determination were whether the sums were advanced to the Rai Bahadur in fact, whether the acknowledgment made on 15th June 1934was genuine and binding upon the defendants and whether, if the defendants are found to be joint on the dates of the transactions in suit, the loan was for legal necessity and for the benefit of the defendants.

6. The learned Subordinate Judge came to the conclusion that there was no reliable evidence to prove that the defendants were separate on the dates of the transactions in suit, that the plaintiffs' memorandum book and the writing in Ex. 3 are both genuine and that the loans stated therein were taken by Rai Bahadur Chhatrapati Singh from Babu Dalsingar Singh. He also held that out of the total amount of the loan, namely L 7900, L 328-7-0 was not for legal necessity or for the benefit of the family of the defendants, but that the remaining amount of L 7196-5-0 was taken for the necessity of the family and therefore binding upon the defendants. He, however, held that the suit was barred by limitation because in his view the acknowledgment on 15th June 1934 cannot be construed as an acknowledgment of liability within the meaning of Section 19, Limitation Act, so as to extend the period of limitation.

7. The appellants, as all the other findings were in their favour, challenged the correctness in law of the finding on the question of limitation. The learned Advocate General and the learned Assistant Government Advocate, who appeared for the defendants, while supporting the decree of the learned Subordinate Judge challenged the findings that the family of the defendants was joint or that the loans were taken for the legal necessity or benefit of the family.

8. It is convenient to deal first with the question of jointness of and the benefit to the family of the defendants. As has been pointed out by the learned Subordinate Judge, the presumption of Hindu law being one of jointness between the members of the family the onus was on the defendants to prove the separation that they alleged. In the written statement filed by the defendants the date or the year of separation of the defendants is not disclosed. All that is asserted is that although the defendants have been separate they have not actually partitioned

their properties by metes and bounds. We have been taken through the oral evidence in the case and having examined it, we are unable to differ from the learned Subordinate Judge when he held that he could not find any reliable evidence to prove the separation urged by the defendants. (His Lordship then examined the oral evidence and proceeded.) The question of legal necessity for the loans covered by the memorandum book and by the acknowledgment Ex. 3 was the subject of issue 2. The evidence on behalf of the plaintiff is that the money was advanced for repairs of a house and for the construction of additional portions to that house in which all the defendants live and also that the creditor advanced money on a representation made to him by Rai Bahadur Chhatrapati Singh which he believed upon making such enquiry as was under the circumstances sufficient. The plaintiffs have examined Bhagelu Mia who says that he made a compound wall and a latrine and did repairs to the house of the defendants four or five years ago and that eight to ten masons used to work.

9. The learned Advocate General criticised this evidence on the ground that even if the evidence of this witness should be accepted in full the expenditure incurred for the construction for 2 or 2J months could not extend to L 7000 but as was submitted by the learned advocate for the plaintiffs the defendants have not produced their account books and an inference adverse to them must be drawn; as the defendants should and could have produced their account books to show that all the constructions of their house had been finished by 1928 as was their case. It is significant, as was pointed out by the learned Subordinate Judge, that neither of the defendants who have examined themselves nor any of their witnesses could show which portion of the house was constructed at what time. The learned Subordinate Judge has accepted the plaintiffs' evidence that the compound wall, the gate, the stable, the godown and the latrine were constructed with the money taken from the plaintiffs in the years 1932-33. lam unable to hold upon the evidence that the learned Subordinate Judge was wrong in taking the view which he did that with the exception of L 328-7-0 the remaining amount was taken for the necessity and the benefit of the family of the defendants. The argument that the properties o| the defendants which were in charge of the Rai Bahadur fetched an income of L 15,000 to 16,000 J a year (besides large sums from ferry business) is not relevant because when it is established that the Rai Bahadur did take loan from the plaintiffs it is not the business of the creditor to find out why the Rai Bahadur stood in need of money owing to antecedent mismanagement of the estate unless the creditor himself was a party to that mismanagement. If the necessity exists, the creditor, if he honestly advanced the money, must be protected. Nor was the money taken for any luxurious purposes the construction of the house and of the wall, gate, stable, godown and the latrine are necessary appendages in a house the construction whereof has admittedly cost the family about L 58,000 to 60,000. For these reasons, we agree that the learned Subordinate Judge took the correct view in deciding issue 2.

10. There remains then the question as to whether the plaintiffs suit is within time, or in other words whether the acknowledgment, Ex. 3 sufficiently satisfies the requirements of Section 19, Limitation Act. It should be stated at the outset that the findings of the learned Subordinate Judge that the memorandum book of the plaintiffs and the writing in Ex. 3 are both genuine and that the loans stated in them were taken by the Rai Bahadur from Dalsingar Singh were not challenged. The only controversy is as to the effect of the acknowledgment. The acknowledgment is on a piece of paper signed by Rai Bahadur Chhatrapati Singh and Dalsingar Singh and bears a cancelled one anna revenue stamp and runs as follows:

To

Babu Dalsingar Singh, son of Babu Dhanraj Singh, resident of Sonepur.

Please note that this day, 15th June 1934 I give you the documents, noted below, in lieu of the dues principal with interest, payable by me. Now I have no claim to all these documents.

	₹ a. p.
1. Sahdeo Singh and Bamruch Singh dated the 12th July 1932.	3500-0-0
2. Lachhmi Prashad Singh sdn of Gopal Singh deceased resident of Sonepur dated 14th December 1927.	2600-0-0
3. Baghunandan Singh and Dhanraj Singh two zarpeshgi deeds dated 9th May 1927.	1800-0-0
	7900-0-0 (Rupees seven thousand and nine hundred only)

11. After this there is a word "bhuktan" which has been translated as satisfied in full, then there are the signatures of Chhatrapati Singh and Dalsingar Singh. The argument on behalf of the appellants is that this document shows that on that date Rai Bahadur Chhatrapati Singh acknowledged that a sum of L 7965 was due from him to Dalsingar Singh and that after making a remission of L 65 he promised to pay L 7900. The argument on behalf of the respondents on the other hand is that the document, Ex.3 instead of admitting any liability on that date expressly states that all the liability of Rai Bahadur Chhatrapati Singh to Dalsingar Singh had been wiped off or had been satisfied in full by handing over the documents of the face value of L 7900.

12. In order to decide the correctness of these contentions, it is necessary to find the surrounding circumstances under which this acknowledgment came to be made. In paras. 12 and 13 of the plaint the plaintiffs have stated that in order to stop the future interest on the said acknowledged amount of debt, Rai Bahadur Chhatrapati Singh asked Babu Dalsingar Singh to keep the deeds and bonds detailed therein and made them over to Babu Dalsingar Singh and he verbally made a

promise that he would duly execute and get registered a deed of assignment in respect of the said bonds and deeds according to the provisions of law; but the Rai Bahadur for want of time and on account of illness could not execute a deed of assignment and died (on 2nd February 1936 as already stated). The defendants' case on the other hand is that no acknowledgment was made in fact.

13. What then is the evidence on this point? The plaintiffs witness Sripati Singh states at page 21 that the Rai Bahadur made the acknowledgment and made over four deeds to Dalsingar Singh and stated that he would execute the deed of assignment in respect of them afterwards. Plaintiff 1, Ramdin Singh, also stated in his evidence that at the time the acknowledgment was made Rai Bahadur Chhatrapati Singh made over four documents to Dalsingar Singh by way of security agreeing to assign them if the dues could not be paid shortly and that out of four documents one was lost by Satnarain Singh. The plaintiffs' witness 10, Deoki Singh, also states that at the time when Ex. 3 was signed by the Rai Bahadur he made over four documents to Dalsingar Singh but it is noticeable that he does not say that there was any promise by the Rai Bahadur that he would execute a regular deed of transfer later on in favour of Dalsingar Singh. Although the evidence has been severely commented upon by the learned Advocate-General, it is difficult to disbelieve the plaintiff and his witnesses and we must hold that the surrounding circumstances in which the acknowledgment was made were that the documents were handed over to Dalsingar Singh together with the acknowledgment, Ex. 3 in order to assure him that his dues wife were being fixed on that date would be paid off. It was argued that by Section 19(2) oral evidence of the contents of the writing cannot be received except as provided by the Evidence Act, 1872. But this provision does not apply in this case where the document itself is available and is being construed to find out its meaning as a question of fact as we shall show later. Evidence is always admissible to prove the surrounding circumstances in which the document came to be executed. The learned Subordinate Judge placed great emphasis on the use of the word 'bhuktan' and thought that this implied that the debt was being paid up or discharged absolutely and that "the remedy of the plaintiffs thereafter lay in a suit for specific performance of the contract as to execution of a registered deed of assignment in respect of the four mortgage and zarpeshgi deeds that were made over to them," which, as he says, was attempted to be shown by the evidence adduced on the plaintiffs' behalf but the defendants flatly denied that any such contract was entered into. Indeed they suggested that the writing was a forgery.

14. Before construing the writing in Ex. 3 it is necessary to ascertain the principle and rule of law to be applied. The leading case on the subject is *Maniram v. Seth Rupchand* [1]That case lays down that an acknowledgment to take the case out of. the statute of limitation must be either one from which an absolute promise to pay can be inferred or, secondly, an unconditional promise to pay the specific debt, or thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed and further that the Limitation Act, Section 19, says nothing about a promise to pay, but requires only a definite admission of liability, as to which there can be no reason for departing from the English principle that an unqualified admission and an admission qualified by a condition which is fulfilled stand upon precisely the same footing. An attempt ' to distinguish the English law from the Indian law was not approved by their Lordships and Sir Alfred Willis, who delivered the judgment of the Board, pointed out at p. 174 that:

> In English law it is the acknowledgment of liability which is the ground upon which a promise to pay is inferred, so that the requirements of English law are, if anything, more,

> and not less, stringent than those of Indian law, which seems to be a bad reason for holding that the English cases have no application to the present inquiry.

15. In the year 1922 the House of Lords examined the position in a most elaborate judgment reported in *Spencer v. Hemmerde*[2] Viscount Cave gives the following summary of the law at p. 513:

> It must be held to be settled law (1) that a written promise to pay a debt given within six years before action is sufficient to take the case out of the operation of the statute of James. I; (2) that such a promise is implied in a simple acknowledgment of the debt, but (3) that where an acknowledgment is coupled with other expressions, such as a promise to pay at a future time or on a condition or an absolute refusal to pay, it is for the Court to say whether those other expressions are sufficient to qualify or negative the implied promise to pay.

16. To this must be added that by Expln. 1 to Section 19, Limitation Act, an acknowledgment may be sufficient even if it is accompanied by a refusal to pay or is coupled with a claim to a set-off. But as has been observed by Lord Wren bury in his speech in *Spencer v. Hemmerde*[3] the difficulty lies not in ascertaining the principle and rule of law to be applied but in applying it when ascertained to the language to be construed in the particular case. The numerous cases which have been cited at the bar illustrate the difficulty that has arisen in applying the observations of their Lordships of the Judicial Committee in *Maniram v. Seth Rupchand*[4] to the facts of the case before the Court.

17. Another question which arises is whether the Court has to construe the acknowledgment as a question of law or as a question of fact. Although there is some divergence of opinion on this point, we think the better view is that taken by Ramesam, J. in *Swaminatha Odayar v. Subbarama Ayyar*[5] namely, that the admission must be one which can be implied from the facts and surrounding circumstances and is not one which is implied as a matter of law. Reference may i also be made to *Andiappa chetty v. Devarajulu Naidu*[6] that each case must be treated on its own merits and to *Kandasami Reddi v. Suppammal*[7] that from the language used and the circumstances in which the acknowledgment is made, it must be decided whether it amounts to an implied acknowledgment of subsisting liability. In the latter case, Ayling J. refers to *Hingam Lal v. Mansa Ram*[8] as an instance in which the Court declined to draw an inference desired by the parties wishing to save limitation. To these observations must be added the remarks of West J. in *Dharma Vithal v. Govind Sadvalkar*[9] that the intention of the law is to make an admission in writing of an existing jural relation equivalent for the purposes of limitation to a new contract, but for this purpose the consciousness and intention must be as clear as they would be in a contract itself.

18. With these principles in view, we proceed to consider the effect of the writing in Ex. 3, which has been quoted already. The writing contains details of the account of the dues of Babu Dalsingar Singh on 15th June 1934 amounting to L 7965 from which after remitting a small amount L 7900 was found due to Babu Dalsingar Singh. This statement is signed by Rai Bahadur Chhatrapati Singh. If there was nothing else in the document, it is unquestionable that the writing satisfies all the requirements of Section 19, Limitation Act. But it is suggested that as

the word 'bhuktan' and the words "in lieu of the dues payable by Chhatrapati Singh certain documents were handed over" are there, the admission is not an admission of any subsisting liability or of an existing jural relation but of its absence. But as a Court of fact, having in view the surrounding circumstances under which the writing was given, the conclusion which we draw is that the admission was that an amount of L 7900 is due by Rai Bahadur Chhatrapati Singh to Babu Dalsingar Singh and he proposed to hand over the documents on account of his dues which would be satisfied by the assignment thereof. The very language and form of the acknowledgment shows that something more was to be done before the documents would be held to have satisfied the debt. The account therein shows that the document of Sahdeo Singh and Ramruch Singh dated 12th July 1932 was taken as equivalent to a sum of L 3500; the document of Lachhmi Prasad Singh son of Gopal Singh, deceased, resident of Sonepur, dated 14th December 1927, was taken as equivalent to a sum of L 2600; and the two zarpeshgi deeds dated 9th May 1927, of Raghunandan Singh and Dhanraj Singh was taken as equivalent to a sum of L 1800. In this way the total of L 7900 was reached. The principal with interest under the bahi khata on this, day after some remission was also fixed at L 7900. It seems to us that when sums of money were mentioned against the documents, it was assumed that each of the documents was capable of realising those sums, and in order that the documents in the hands of the creditor should be capable of realising, the amount mentioned against each document a formal assignment would be necessary, otherwise the document cannot be said to be equal to the amount mentioned against it.

19. We, therefore, conclude that the writing, Ex. 3, contains a clear acknowledgment of the debt due to the plaintiff and also suggests an inchoate proposition on arrangement for the liquidation thereof. Nothing further has been done to induce the Court to hold that there was a novation of contract within the meaning of Section 62, Contract Act, to which reference will be made hereinafter. In *Salig Ram v. Radhay Shiam*[10], a promissory note dated 10th November 1922, was renewed by the debtor on 7th November 1925, and it contained an endorsement on the back of the first promissory note that "on 7th November 1925 in lieu of the first promissory a second promissory note of the amount of L 1350 was being executed and the first one became void."

20. The second promissory note being unstamped was inadmissible in evidence and could not be sued upon. Nevertheless, it was held that in the circumstances the plaintiff was entitled to enforce the first promissory note and limitation was saved because of the writing satisfying the requirements of Section 19, Limitation Act. The learned Subordinate Judge, before whom this case was cited, sought to distinguish it on the ground that there was no suggestion in that case that the debt which had previously been due had been paid up or was being paid up-by executing the subsequent promissory note. We do not think the distinction drawn is sound. As a matter of fact, it was written on the back of the first promissory note that that note had become void arid that the amount due on it was no longer payable but that the amount was henceforth due on the second promissory note. Similarly, in the present case, although the word 'bhuktan' ordinarily means settled or adjusted but in the circumstances we would construe the meaning of the word 'bhuktan' as proposed to be satisfied. It is to be remembered that the evidence as to the circumstances in which the writing, Ex. 3, came to be written is one sided the defendants did not accept the genuineness thereof and did not give any assistance to the-Court as to the circumstances under which it came to be written.

21. An argument was advanced that the remedy of the plaintiffs was in a suit for specific

performance of the contract to execute a registered deed of. assignment in respect of the four mortgage and zarpeshgi deeds that were made over to them. But the answer to this argument is to be found in *Har Chandi Lal v. Sheoraj Singh*[11] The facts of that case were that one Jai Chand had executed a mortgage in November 1876 in favour of one Lala Chatrilal giving in security five-sixths share in village Nagaria Bikrampur. Upon his death, his widow Mt. Nandan succeeded to this estate and Phul Singh, ft separated nephew, who was the owner of the remaining one-sixth share of the village, was the reversioner on her death. In 1879 and 1881 Phul Singh mortgaged his one-sixth share to the same mortgagee. Later on on 9th September and 30th October 1887, Mt. Nandan and Phul Singh both executed two mortgages in favour of Lala Chatrilal, each mortgage purporting to affect the entire inouza, the first being in respect of the principal and interest due on Jai Chand's mortgage of 13th November 1876, and the second being in respect of the principal and interest due on Phul Singh's mortgages of 1879 and 1881. The mortgagee instituted a ult on the basis of the two deeds of 1887 and obtained a decree in full for the whole amount of the indebtedness both of Phul Singh and Jai Cband against the entire village Bikrampur. As a result of appeals to the High Court and the Privy Council, it was held that assuming Mt. Nandan had in fact executed the deeds of 1887 they were not binding on her so that the real effect of these deeds must be determined on the footing that Mt. Nandan had never been made a party thereto. But the decree so far as it decreed the suit regarding the indebtedness of Phul Singh was not altered. However, the mortgagee in execution of his decree sold only the one-sixth share of Phul Singh in the village, but the amount realised was insufficient even to meet the indebtedness of Phul Singh. In these circumstances on the death of Phul Singh and Mt. Nandan, the mortgagee brought a suit to enforce the mortgage of 1876 against the defendants who, as the reversioners, became the owners of Jai Chand's five-sixth share in the village. Lord Parker of Waddington in delivering the judgment of their Lordships expressed himself thus at page 63:

> It is, of course, true that the mortgagee's intention at the time when the two deeds of 1887 were executed was to accept a new security, extending to the whole mauza, for the indebtedness both of Jai Chand and Phul Singh in lieu (inter alia) of the security of 13th November 1876. Pursuant to this intention he appears to have handed over the mortgage of 13th November 1876, to Phul Singh. But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on Mt. Nandan, and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants, having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on Mt. Nandan, and consequently did not bind them as heirs of Jai Chand, should now claim the benefit of the transaction as a release of the mortgage of 13th November 1876.

22. It will be noticed that the mortgagee had actually handed over the mortgage bond of 13th November 1876 to Phul Singh in pursuance of the substituted agreement. The case in *Babulal Marwari v. Tulsi Singh*[12] may be referred to in this connexion.

23. In the present case the mere handing over of the title deeds without any assignment and without delivery of possession of the zarpeshgi properties did not transfer any right to the appellants. If a regular deed of assignment had been executed and registered then and then alone could the plaintiffs be said to have been bound by a regularly effected and substituted agreement.

The matter did not proceed beyond the stage of partly carried out negotiations in the present case.

24. For these reasons we are of opinion that the effect of the writing in Ex. 3 was (1) that the correctness of the dues to the plaintiffs was acknowledged in writing; (2) that there was a proposal to give a substituted security provided something further was done. "We therefore hold that the plaintiffs' suit must be held to be within time as it has been brought within three years of the date of the acknowledgment in writing.

25. It was argued that the plaintiffs are not entitled to recover any interest from the date of the acknowledgment. But as the plaintiffs have never been put in possession of the properties covered by the usufructuary mortgages, ana when the defendants have continued in possession of these properties, we do not see any reason why the plaintiffs should be deprived of the interest on the sums which have been found due to them. The defendants did not plead any contract by which the plaintiffs agreed to forego that interest. In the circumstances and also having, regard to the rate of interest claimed, we would allow the plaintiffs interest only at the rate of 6 per cent, from the date of acknowledgment till realisation.

26. The result is that the appeal is allowed, the judgment and the decree of the Court below are set aside, and the plaintiffs will be awarded a decree for L 7196-5-0 (being the amount found to have been advanced for legal necessity) after, giving credit for the sum of L 627-15-0 received by them as stated in para. 14 of the plaint, that is to say, for a sum of L 6568-6-0 together with interest thereon as indicated just above. The plaintiff s are also entitled to proportionate costs both in this Court and in the Court below.

Cases Referred.

1('06) 33 Cal. 1047
22 A.C. 507
32 A.C. 507
433 Cal. 1047
5A.I.R. 1927 Mad. 219 at p. 558
6('13) 36 Mad. 68
7A.I.R. 1922 Mad. 104 at p. 447
8('96) 18 All. 384
9(84) 8 Bom. 99
10AIR 1931 All560
11('16) 3 A.I.R1916 P.C. 68
12A.I.R 1940 Pat. 121