

# RAJASTHAN HIGH COURT

Hanuman Mal

Vs.

Jatan Mal

D.B. Special Appeal No. 68 of 1986  
(Rajesh Balia & O.P. Bishnoi, JJ.)

15.07.2003

## JUDGMENT

### **Rajesh Balia, J.**

1. The plaintiff-appellant had filed a suit in the Court of learned District Judge, Bikaner on 22.4.1968 against the respondent-defendant alleging that defendant has taken a loan of Rs. 37,000/- from the plaintiff and executed a mortgage-deed in his favor in respect of a house situated in Mohalla Rangadi and Bothra in the city of Bikaner on 9.4.1949. As per the terms of mortgage-deed, which was a simple mortgage, the amount was payable with interest @ 9 Annas (56 p.) per hundred per month. The mortgage-deed dated 9.4.1949 (Ex.-2) recites that the mortgage amount was payable on demand.

2. The appellant also averred in the plaint that the defendant paid Rs. 1,000/- through cheque dated 12.10.1960 in respect of which a letter was also written by him in his favor. According to the plaint averments, the payment of Rs. 1,000/- as well as the written document dated 11.12.1960 (Poha Badi 8 Samwat 2017) acknowledging sending of cheque of Rs. 1,000/- against mortgage debt resulted in renewal of the period of limitation under Sections 18 and 19 of the Limitation Act, 1963. He further stated in the plaint that plaintiff sues for a decree for Rs. 40,000/- consisting of Rs. 37,000/- as principal and Rs. 3,000/- by way of interest until the date of filing of the suit, though the amount of interest is much more as per the mortgage-deed. Claim for interest amount exceeding Rs. 3,000/- up to the date of suit was given up.

3. A decree for Rs. 40,000/- was sought against the defendant and it was also prayed that in case the decree is not satisfied, the property under mortgage may be attached and sold for recovery of the aforesaid amount; and in case, the proceeds of mortgaged

property are not sufficient to satisfy the decree, the decree-holder may be permitted to execute decree against other properties of the defendant.

4. The defendant in his written statement dated 3.3.1969, while admitting the execution of mortgage-deed dated 9.4.1949, denied receipt of consideration and also denied proper attestation of the mortgage-deed. He denied to have received Rs. 37,000/- as consideration and denied the payment of Rs. 1,000/- by him to the plaintiff. He further denied having written any letter in respect of the aforesaid transaction to the plaintiff. He also denied that the plaintiff ever demanded repayment of the amount.

5. In additional pleas, the defendant apart from pleading that the suit is barred by time, stated that the mortgage-deed was executed by him on 9.4.1949 on the advice of his uncle Rawatmal, who is also father of the plaintiff, in order to protect the property of the defendant from being withered away by losses incurred by the defendant, or that may be incurred by him in the speculation of silver, shares and jute, in which he was indulging. It is also stated that though in the mortgage-deed it was stated that Rs. 37,000/- were paid to the defendant, but in fact, the amount in a bag was produced before the Sub-Registrar only for the purpose to provide a cloak of real transaction but it was returned to Rawat Mal, father of the plaintiff, after registration of the mortgage-deed. He also alleged that to this effect a writing was made by Rawat Mal on 4.2.1955 and given to the defendant. However, the said document was not presented along with the written statement, but it was stated that the same shall be produced later on. He alleged that Rs. 37,000/- debited in the account of the defendant in the account books of the plaintiff were subsequently credited in account.

6. On the pleadings of the parties following three Issues were framed:

"1. Whether mortgage-deed in dispute is sham, ostensible and without consideration and is not duly attested. Burden of proving of this issue was on the defendant?

2. Whether the defendant paid Rs. 1,000/- through cheque on 12.10.1960 to the plaintiff and wrote a document and gave it to the plaintiff on 12.10.60 and for that reason, the suit is within limitation? Burden of proving this issue was passed on plaintiff ?

3. About relief?"

7. The documentary evidence on behalf of the plaintiff consisted of registered

mortgage-deed Ex.-2 and the letter dated 12.10.1960 Ex.-1. The defendant produced Ex.-A/2 the document allegedly executed by Rawat Mal on Magh Sudi 12 dated 4.2.1955. Apart from this substantive documentary evidence, the expert opinion was also produced by both the parties. Ex.-7 is the opinion of Sri K.S. Puri opining in favor of the plaintiff that Ex.-1 the letter dated 11.12.1960 was in the handwriting of defendant Jatan Mal. The expert opinion of A.S. Kapoor was produced; on behalf of the defendant opining in favor of the defendant that the letter was not in the handwriting of defendant. That opinion came on record as Ex. DW/3/3. Apart from the aforesaid material documents, the other documents on record are vakalatnama Ex.-3 dated 7.11.68, which admittedly bears signatures of the defendant Jatan Mal Bothra on 7.11.1968 authorizing Hanuman Das Khatri, Advocate to appear on his behalf in this very suit filed by the plaintiff Ex.-P/4 the document executed by the defendant as his specimen handwriting produced in the Court for the purpose of examination by the handwriting expert.

8. Apart from the aforesaid documentary evidence, the plaintiff as PW/1, K.S. Puri, the handwriting expert as PW/2, and Kishan Chand PW/3 were examined. On behalf of the defendant, he himself was examined as DW/1 and Manak Chand Bothra DW/2, Handwriting expert Ashok Kapoor as DW/3 were also examined.

9. The trial Court after examining the entire evidence, documentary as well as oral, decided Issue No. 1 in favor of the plaintiff by holding that the mortgage-deed was executed by the defendant and that it bears the signatures of the defendant. Issue No. 2 about the payment of Rs. 1,000/- made by the defendant against the debt in question and writing of note dated 11.12.1960 by the defendant acknowledging the right of the plaintiff in respect of the mortgage dated 9.4.1949 was decided in favor of the plaintiff by holding the payment through Bank Draft of Rs. 1,000/- was made by the defendant to the plaintiff and writing of the document Ex.-1, the letter acknowledging the right of the plaintiff in respect of mortgage in question also stands proved by the testimony of Kishan Chand read in the light of attending circumstances. With these two findings the question of limitation was decided in favor of the plaintiff and the suit was decreed for Rs. 40,000/- with cost and *pendente lite* and future interest @ 60/- p.a. on 29.1.1972. It was further decreed that if the defendant fails to make payment of decretal amount on or before 28.7.1972, the plaintiff shall be entitled to apply for final decree directing that the mortgage property or a sufficient part thereof be sold and proceeds of the sale (after deduction, there from the expenses of the sale) be paid into the Court and applied towards payment of the decretal amount, costs and *pendente lite*

and future interest due to the plaintiff together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or any other person entitled to receive the same. It was also ordered that if the net proceeds of the sale held under Order 34, Rule 5, C.P.C. are found insufficient to pay the amount due to the plaintiff, the plaintiff shall be entitled to recover the balance, if any, which is legally recoverable from the defendant from the other properties and the person of the defendant by making an application under Order 34, Rule 5, Civil Procedure Code. The defendant was required to pay sufficient stamps and penalty on Ex.-A/2.

10. Aggrieved with the aforesaid preliminary decree and judgment dated 29.1.1972, the defendant preferred S.B. Civil Regular First Appeal No. 84/72. The learned single Judge by his judgment dated 13.8.85 allowed the appeal. While upholding the finding on issue No. 1 in favor of the plaintiff about due execution of mortgage for consideration by the defendant in favor of the plaintiff on 9.4.1999, the learned single Judge held the suit filed on 22.4.1962 to be barred by time. He did not agree with findings of trial Court on issue No. 2.

11. It was found by the learned single Judge that plaintiff has failed to prove the receipt of sum of Rs. 1,000/- made by the defendant on 12.10.60. The learned single Judge further found that the document Ex.-1 has not been proved to be executed by defendant Jatan Lal solely on the basis of his own ocular comparison of the admitted handwriting of the defendant on Ex.P/4 with the disputed document. Thus, finding that neither the acknowledgment of the right of the plaintiff under mortgage has been proved nor the payment alleged by the plaintiff has been proved so as to derive assistance of Sections 18 and 19 of the Limitation Act to give a fresh starting point of limitation in favour of the plaintiff before the expiry of limitation on the basis of original cause of action.

12. In view of these findings the appeal was allowed and the suit of the plaintiff was dismissed as barred by limitation.

13. Hence, this appeal is before us by the plaintiff.

14. No contention has been raised about the finding on issue No. 1 by the learned counsel for the respondent-defendant. Thus, we proceed on the premise that the plaintiff-appellant advanced a loan of Rs. 37,000/- on 9.4.1949 to the defendant and in consideration thereof to secure repayment of loan, the defendant had executed a simple mortgage in favor of the plaintiff on 9.4.49 which was duly registered and the

said debt has not been discharged by the defendant.

15. The only controversy raised before us centered around the finding on the question of limitation depending on the finding about payment of Rs. 1,000/- as alleged by the plaintiff and writing of the document Ex.1 by the defendant on 11.12.60. Article 62 provides a limitation of 12 years for filing a suit from the date the money sued for became due, in case the suit is for payment of money secured by a mortgage or otherwise charged upon immovable property. Therefore, if money sued became due immediately on execution of mortgage to be paid to the plaintiff, a period of 12 years would ordinarily expire on expiry of 12 years from the date of mortgage. It is on that premise that the money became due immediately on execution of mortgage, that period of limitation will commence with effect from the date of execution of mortgage under which the debt was secured and if it becomes payable later on, the period will commence with effect from later date when the money becomes due under the transaction.

16. On the premise money becomes due on 9.4.1949, the suit will be barred if not filed on or before 9.4.1961, unless the period for filing of the suit is extended either as a result of part payment of the debt as envisaged under Section 19 of the Limitation Act or there is acknowledgment in writing by the debtor of his liability in respect of such property or right, which may result in commencement of a fresh period with effect from the date of such payment or acknowledgment.

17. The plaintiff has alleged both payment and acknowledgment. The defendant has denied both. The plaintiff in his statement has stood by his averment in the plaint. The defendant denied the payment of installment in his written statement. In these circumstances considering the attending circumstances and also other evidence available on record about the aforesaid facts, the answer to the aforesaid question lies in finding whether Ex.-1 document alleged to be written by the defendant is proved to be written by him on 11.12.1960 to bring the suit within the purview of Section 18 of the Limitation Act, 1963. If the document is proved to be executed by the defendant, it also supports the plea of the plaintiff about the part payment so as to take the benefit of such payment under Section 19 also.

18. It will, therefore, be apposite to reproduce the document in its full to understand its true import:-

(Matter in vernacular omitted - Ed.)

19. It will be also apposite here to reproduce Section 18 of the Limitation Act to consider whether the aforesaid document, if accepted to be written by the defendant, amounts to acknowledgment of the defendant's liability as claimed by the plaintiff against the defendant :-

*"18. Effect of acknowledgment in writing. - (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.*

*(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received."*

20. A perusal of the document leaves no manner of doubt, that if it were to be proved in handwriting of the defendant, it amounts to acknowledgment of plaintiff's right and defendant's liability under the mortgage for repayment of loan. The document referred to the mortgage of defendant's house with plaintiff and sending of draft of Rs. 1,000/- as payment against mortgage money to the plaintiff. The acknowledgment of existence of mortgage and request for deposit of amount stated to be sent to the plaintiff through Bank draft against the mortgage money undoubtedly amounts to acknowledgment of defendant's liability to repay the loan payable under mortgage and the plaintiff's right to receive such payment from the defendant. Therefore, this contention of the defendant's counsel that even if Ex.-1 is held to be proved, it does not amount to acknowledgment unless the receipt of amount is also proved, Section 18 or 19 cannot be invoked, cannot be accepted.

21. While actual payment of money towards accepted liability is not essential ingredient of Section 18 for commencement of period of limitation afresh with effect from the date of acknowledgment, the proof of payment is an essential condition under Section 19 where the claim to fresh commencement of limitation is founded on payment. Requirements of Sections 18 and 19 are not cumulative but are independent. While part payment of a debt inheres in its acknowledgment of liability by the payer, an acknowledgment of right/liability in writing need not be accompanied with

payment. In the given case, both the requirements may stand fulfilled. But it is not correct to say that where there is acknowledgment in writing and a part payment of debt is claimed to have been paid towards existing debt, failure to prove, one must necessarily negate the other, or both facts must be proved before provisions of Sections 18 and 19 can be invoked. In either case, the only precondition is that acknowledgment in writing or part payment of debt must have been made before expiry of limitation for enforcing such right.

22. With the aforesaid background, if we examine the attending circumstances and the credibility of the witnesses, it is very much apparent that the defendant is not at all a creditworthy witness. Apart from the fact that he has put forward a spurious story about execution of a sham mortgage on 9-4- 1949 without consideration, which on the face of his own statement cannot be accepted and has not been accepted both by learned trial Judge and learned single Judge. His statement further reveals that he has tendency of using different handwriting and different script at different times to suit the occasion. While he has denied the fact of Kishan Chand coming to Lashkar requesting him to make the payment to plaintiff and making of any payment pursuant thereof, in the first instance, he stated that Kishan Chand PW/2 did not come to him at Lashkar and he did not make any payment of amount to the plaintiff. The witness hastened to add on his own :-

(Matter in vernacular omitted - Ed.)

23. Literally, translation of it, means that perhaps Kishan Chand may have come to Lashkar and taken Bank drafts, he does not know.

24. From the statement also, it is clear that he was at Lashkar at the relevant time and the plaintiff was at Calcutta. While he has categorically stated in his cross-examination that he does not know Hindi and the document is not in his handwriting, but when he was cross-examined, he admitted signatures on different documents including Vakalatnama filed in this very proceeding which was executed in Devnagri script. He had to admit that he signed in Hindi at many places. The specimen written in the Court has been written in "Banika". He has conveniently stated that he was not asked to write in Hindi also forgetting that his specimen writings have been taken for being compared with that of document Ex.-1 which is not in Devnagri script and he was signing at various places in different manner. By resorting to this subterfuge, he was trying to infructuate the efficacy of getting disputed handwriting compared with admitted handwriting by the expert, knowing that disputed document is written in

Hindi or Devnagri, he has resorted to give specimen writing in 'Banika'.

25. The other aspect is about the story woven about Ex.-A/2, which has been held by both the Courts below to be unreliable, by creating the evidence of Manak Chand, who is none other than defendant's real nephew. His identity was sought to be hidden by projecting him in his statement, to be a member of Rawatmal's community without stating that he is directly related to himself as his brother's son. This fact has come from the statement of Manak Chand DW/2 wherein he stated that the defendant-Jatanmal is his real baba that is to say that his father's elder brother.

26. The veracity of Manakchand's statement is further doubted. When he was cross-examined, he had to admit that he was heavily indebted to number of persons by admitting that he has many decrees against him though he added that at present there is only one decree against him. When suggestion was made in regard to his indebtedness to Rawatmal, father of the plaintiff, he stated that there were no dues on him, but he could not say whether he had any transaction with the father of the defendant or not. The graphic detailing of writing of Ex.-A/2 which has been in handwriting of Manak Chand himself, after almost 17 years of the alleged execution of document, also raises doubt about his truthfulness and appears to be self-serving. He claims to remember about taking out of a piece of paper from drawer, cutting into two pieces and preparing a draft on one and then final scripting on another and taking out a stamp from the chest box. With such sharp memory, he makes it convenient to evade straight answer to his dealings with said Rawatmal. It is strange that while mortgage deed was in favor of the plaintiff and not in favor of his father Rawatmal, yet in the absence of plaintiff, said Rawat Mal would be confiding in a person who is not in communication with him for long and not connected with transaction at all in a matter like this.

27. Apart from the above fact, the defendant has put forward the story that device of executing mortgage-deed was resorted to on account of necessity arising out of the losses caused and likely to be caused in the speculation in which the defendant was indulging. But the statement of Jatan Lal in this respect reveals to what extent he can build up the story. According to him, he was indulging in speculation since he was of 12 years. According to his own statement, at the time of executing mortgage-deed Ex.2, he had not incurred any loss and he has not lost any money in the speculation at any time thereafter nor there was any other debt, secured or unsecured, for the recovery of which property in question could be pursued. According to his own case, defendant was not in any financial difficulty in 1949 nor in 1955 when allegedly

Rawatmal wrote the letter, nor since 1965 he had any such difficult period which may affect his properties. According to his own version, no such necessity ever existed which could have prompted Rawatmal to advise him to mortgage his property in 1949, or could make defendant to agree to such proposal at all to mortgage his property for a specific sum by receiving cash consideration in the presence of the Registering Authority. The whole story of creating an ostensible transaction with such precision as to make a show of actual payment in the presence of the Sub-Registrar and then to write a letter like Ex.-A/2 after about 18 years sounds so unnatural that no credence can be given to it. It can lead to only one conclusion about the defendant deliberately conniving with his nephew Manakchand who claims to be scribe of Ex.A/2 and himself indebted to the defendant, to create false evidence and goes to show that no reliance can be placed on defendant DW/1 as a witness, who is out to defeat his liability by any means.

28. Therefore his mere denial on oath as such cannot be a reason to discard the otherwise credible testimony of PW-3 Kishan Chand available on record about execution of Ex.P/1 by the defendant. Kishan Chand is younger brother of the plaintiff. He has categorically stated that he has income from the firm of which members of his family are partners and he usually resides at Bikaner and also doing his business at Bikaner. He further stated that while he was at Calcutta, he was asked by plaintiff for reminding to the defendant for repayment of money due to plaintiff. It is in these circumstances that he went to Lashkar to request the defendant to repay the debt. It is pertinent to note that he has never stated that money was carried by him. It was on his request to make payment to plaintiff that the defendant, who is also a relation of the plaintiff and in common relation to Kishan Chand, wrote a letter Ex.-1 in his presence which was read by him and he sent the letter along with cheque to the plaintiff at Calcutta. We see no good reason that this evidence which trial Court has relied on could be discarded. Ex.-1 was written by defendant Jatan Lal, which is a first hand account by a person in whose presence the document was written by the defendant and it was dispatched to Calcutta to the plaintiff. This appears to be most natural in ordinary course of conduct that a common relative has been asked by plaintiff to secure repayment of his money by the defendant, when all the three are of common descent, and he while returning from Calcutta, has stopped over to Lashkar for the purpose.

29. The rejection of his testimony by the learned single Judge on his own ocular comparison of admitted specimen writing with disputed document suffers from a

serious error in the present circumstances. In the light of defendant's own statement, which has been discussed in detail by the trial Judge for discarding his statement and not relying on the expert opinion produced by him, cannot be accepted, in the presence of the direct evidence about its execution and in the presence of the admission of the defendant that he writes different script at different time and he has not written specimen in both types of scripts makes the method of coming to the conclusion by ocular comparison with the admitted specimen document was inexpedient and inadequate.

30. We have also undertaken the exercise of finding the comparable handwriting from the record. It is very pertinent to notice that while in the vakalatnama referred to above Ex.-P/3, signature of the defendant is in Hindi, which is also an admitted signature, entirely different signatures appear on verification of written statement. It cannot be doubted that the written statement bears the signatures of defendant himself. That apart, while he has given specimen in Banika script, it appears that he has deliberately used 'lining' atop the words, contrary to practice of writing in "Banika" but is the practice, while writing Devnagri script. Significantly his signatures in Banika in written statement and his signature in Hindi on vakalatnama Ex.-P/3 does not have any where any such line topping the words. This also explains that the defendant has a tendency to manipulate his handwriting according to the requirement of occasion which may keep him put of any commitment on this count. At any rate, in the aforesaid circumstances, the learned single Judge has clearly erred in reversing the well-reasoned finding by the trial Court by discarding the testimony of Kishan Chand solely on the basis of his own ocular comparison of specimen writings on record and overlooks the total lack of credibility of the defendant, who has shown little regard for truth.

31. In view of the aforesaid, we have no hesitation to hold, on the basis of testimony of Kishan Chand and other attending circumstances referred to above, that Ex.-1 has been duly proved to be in the handwriting of the defendant as found by the trial Court.

32. As a consequence of the aforesaid conclusion, as we have noticed above, the plaintiff is entitled to the benefit of Section 18 of Limitation Act as it amounts to his unequivocal acknowledgment of his liability to pay the debt secured under the mortgage of the property in question and the plaintiff's right to claim under the mortgage the money paid there under and this acknowledgment before the expiry of limitation counting from 9.4.1949, results in commencement of a fresh period of limitation from the date of execution of Ex.-1.

33. It has been contended by the learned counsel for the defendant that since as per finding of learned single Judge, the plaintiff has failed to prove the payment of Rs. 1000/- made by the defendant as alleged by the plaintiff in his plaint, the document Ex.-1 cannot be read in piecemeal only to sustain the acknowledgment. In the absence of any proof of payment of Rs. 1000/- the document Ex.-1 is to be rejected in its entirety.

34. We have already noticed above that part payment of a sum due is not essential ingredient of acknowledgment in writing of the liability by a debtor. The admission of the fact that the property is mortgaged with the plaintiff and the payment is being remitted to the plaintiff against such debt, is sufficient to invoke Section 18. The actual payment if proved can independently be a ground for commencement of fresh period of limitation with effect from the date of such payment. If the acknowledgment is proved and the payment is not proved, it will not take away the effect of Section 18 on fulfillment of the terms and conditions of Section 18.

35. Moreover, the learned single Judge has reached his conclusion about non-payment of Rs. 1,000/- without considering Ex.-1 as relevant piece of evidence as the learned single Judge has found against the plaintiff about execution of the Ex.-1 to be in the handwriting of the defendant. But, if Ex.-1 is held to be proved to be in the hand-writing of the defendant, as we have reached in agreement with the learned trial Judge, the relevance of this evidence cannot be undermined while considering about the payment. Ex.-1 contains the admission of defendant about the payment having been remitted by him against amount due to the Plaintiff under mortgage, the receipt of which is admitted by the plaintiff, the finding of the learned single Judge that the plaintiff has failed to prove the payment as alleged by him also cannot be sustained. The admission of the defendant in Ex.-1 is sufficient to prove the payment in part also. In that event, the admission remains unexplained. In the light of the admission the non-production of the account books or other evidence about the encashment of said draft referred to in Ex.-1 is of little consequence.

36. In view of our aforesaid discussion, the judgment of the learned single Judge which is solely founded on the finding on Issue No. 2 cannot be sustained.

37. Accordingly, the appeal is allowed. The judgment and decree under appeal is set aside and the judgment and decree of the trial Court is restored. The respondents shall pay the costs throughout.

Appeal allowed.

