

(1936) 04 MAD CK 0059
In the Madras High Court

Kuppuswami Aiyar and Others

APPELLANT

Vs

Sabapathy Pathan and Others

RESPONDENT

Date of Decision : 01-04-1936

Acts Referred:

Citation : AIR 1936 Mad 943 : (1936) 44 LW 362 : (1937) 2 MLJ 24

Judgement

1. This second appeal raises limitation. The main facts are not in dispute. 3 and the father of the second plaintiff sold the suit property to one Chidambara Pathan and his brother Vaithyalinga Pathan, by a sale-deed dated the 16th October, 1911, and as on the said date the second plaintiff was a minor, a sum of Rs. 800 was retained with the vendees to be paid either on the second plaintiff attaining majority or on the vendors giving security. On the said date a mortgage-deed was executed by both Vaithyalinga Pathan and Chidambara Pathan in favour of the first plaintiff and the father of the second plaintiff for Rs. 800 securing that amount. The recital as regards payment under the said mortgage is to this effect:

We will pay you the said sum of Rs. 800 without any objection together with interest at 11 as. per cent, per mensem at any time whenever you demand us to pay after giving security for the sum.

2. On the 19th December, 1915, the vendees appear to have usufructually mortgaged the said property to one Kandaswami Pillai by a deed in and by which it was stipulated that the usufructuary mortgagee should pay the said sum of Rs. 800 secured by the mortgage as aforesaid in accordance with the directions contained therein. In August, 1916, a demand appears to have been made by the mortgagees to pay the amount due under the mortgage dated the 16th October, 1911. In answer thereto Vaithyalinga Pathan and Chidambara Pathan gave a reply dated the 3rd October, 1916, to the effect that they had arranged for the payment of the mortgage amount with the usufructuary mortgagee under the mortgage-deed dated the 19th December, 1915. This suit was filed on the 31st March, 1928, to enforce the mortgage dated the 16th October, 1911.

3. In the plaint the reply notice dated the 3rd October, 1916, which is marked as

Ex. C in the case is relied on for the purpose of saving limitation. Ex. C is in the following terms:

On 19th December, 1915, we have usufructuarily mortgaged our lands to one Darasuram Kandaswami Nayanakkar, and we have therein directed that after giving security to him for minor's share you should receive the amount of principal and interest due in respect of the mortgage executed in favour of both of you. It is a mistake that you have given me this notice on Nala year Ani 9th without receiving the said amount from him. Since we have directed on 19th December, 1915, in the abovesaid manner, please take notice that we will not be liable for any Court costs or damages as claimed by you in your notice.

4. Both the lower Courts came to the conclusion that there was no acknowledgment of liability in Ex. C and that therefore the suit was barred. It is contended before me in second appeal that that view is wrong. I think the contention must prevail. u/s 19 of the Limitation Act the words relied on, in order to constitute a valid acknowledgment, must be such as to show an existing jural relationship of debtor and creditor. From Ex. C it is clear that there is an admission of a debt due and payable under the mortgage which would prima facie import an acknowledgment of liability. It is not denied that there is an admission of liability, but what is contended is, that the concluding portion of the letter makes it clear that the mortgagors repudiated their liability. I am unable to agree with this view. There is nothing in the document which amounts to a repudiation of liability or to a statement that the mortgagors would never discharge the debt. Reading the document as a whole, what the mortgagors say is this:

No doubt there is an amount due and payable under the mortgage; but we have arranged for payment with Kandaswami Pillai and it is your (mortgagees") primary duty to apply to that Kandaswami Pillai for payment and if without recourse to him you file a suit, we would not be liable either for costs or any loss incurred by an unnecessary action.

5. There is therefore an admission of a present debt but coupled with a refusal to pay because they have arranged for payment elsewhere. u/s 19 of the Limitation Act, Explanation 1, an acknowledgment may be sufficient though accompanied by a refusal to pay. In my opinion this case is covered by the decision of the Bombay High Court in Shrinivas v. Narhar ILR (1908) 32 Bom. 296. In that case a decree provided for the payment of the amount decreed in instalments. The question arose whether the second instalment payable under the said decree was barred by limitation. A statement made by the judgment-debtor in answer to an execution application was relied on, and it was to this effect:

I have asked plaintiff by a written notice to take away the sum of Rs. 300 relating to the second instalment from a third party with whom I have deposited that sum. Therefore I am not responsible to pay the said amount.

6. This was held to be sufficient acknowledgment within the meaning of the

Limitation Act for saving the bar of limitation. Chandavarkar, J., observed thus:

This in effect means " I am liable to pay the second instalment; but I have deposited the amount of that instalment with a third person and let the plaintiff take it from him. But so far as I am concerned I refuse to pay". In other words, there is an acknowledgment of the liability coupled, however, with a refusal to pay on the ground that the amount is deposited with a third party. We think that is the natural construction of the words. We must therefore hold that the second instalment is not barred.

7. I am inclined to take a similar view of the document in question. I would therefore follow the above decision and hold that Ex. C is sufficient acknowledgment within the meaning of Section 19 of the Limitation Act and that the suit is not barred.

8. I shall now deal with the cases relied on by Mr. Sitarama Rao for the respondent. The first case on which he places very strong reliance is the case reported in *Chhaterdhari Mahto v. Nasib Singh* (1923) 78 I.C. 919 : AIR 1924 Pat. 806. In that case in answer to a suit on a mortgage the statement made by the mortgagors in a written statement in a suit was relied on. That statement was to the effect that in order to pay off the mortgage debt they sold half of the mortgaged property and from the said date the vendees have been in possession thereof. This was held not to be a sufficient acknowledgment. The learned Judges drew this inference on a construction of the document as a whole, but I am not inclined to agree with the reasoning on which their decision is based. Their Lordships, observe, that there is an acknowledgment of the debt, but then they proceed to consider whether it is a sufficient acknowledgment of liability and state:

On the other hand, the statement that there was a debt due but it has been discharged is not sufficient. The present case seems to stand somewhere between these two....There is no express statement that it was discharged, but there is a statement that that in order to pay it off a sale was effected on the 13th July, 1903, and since that date the vendees have been in possession of the property. The inference to be drawn from this will at least negative the implication of a promise to pay.

9. It is well settled that under the Indian law in order to constitute an acknowledgment there need neither be an express nor an implied promise to pay, whatever may be the English law on the point. I dissent from the view of the learned Judges that in order to constitute an acknowledgment there must be an implied promise to pay. The next case relied on by Mr. Sitarama Rao is the case in *Kandaswami Reddi v. Suppammal* (1921) 42 M.L.J. 268: ILR 45 Mad. 443. What that case decided was that from a mere admission of a past liability it cannot be inferred that there is a subsisting debt and the learned Judges declined to follow the ruling of Miller, J., in *Ranganayakalu Aiya v. Subbayan* (1908) 5 M.L.T. 71 to the effect that an admission of past liability unaccompanied

by an allegation of discharge should in all cases be interpreted as an admission of subsisting liability. The learned Judges cite with approval the case in *V. Andiappa Chetty Vs. P. Devarajulu Naidu deceased*, by his son and legal representative *Alagasinga Naidu and Another*, and observe that "each case must be treated on its own merits and 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 this case, as I have pointed out, there is no question of there being an acknowledgment of subsisting liability, though it was accompanied by a refusal to pay. The case in *Venkata v. Parthasaradhi* (1892) 3 M.L.J. 36: ILR 16 Mad. 220 is also distinguishable. In that case the statement in a deposition where the deponent had admitted the execution of a certain bond, but stated that that bond was superseded, was held not to be a sufficient acknowledgment, on the ground that there was no acknowledgment of a subsisting right. There are on the other hand cases to show that where a debtor states that for the debt due a different security was given, that statement was held to operate as a good acknowledgment. In *Pandit Salig Ram Vs. Radhay Shiam* a renewed promissory note was found to be inadmissible in evidence on the ground that it was unstamped. The plaintiff in that case wanted to rely upon an earlier promissory note which on the date of suit would admittedly be barred by limitation but for an endorsement on the back thereof which was to the following effect:

On the 7th November, 1925, in lieu of the present promissory note, a second promissory note of the amount of Rs. 1,350 has been executed and this promissory note has become void.

10. This endorsement was held to be a sufficient acknowledgment of the note in spite of the fact that it was stated in the endorsement that the promissory note had become void. The ground on which it was held to be so is, because the allegation is not that the liability had terminated but that a different form of security for the subsisting liability had been created. Similarly, as I have pointed out, it was never intended to repudiate the liability. Ex. C indicates that a method of payment had been provided which it was the duty of the creditors to resort to before seeking to enforce their remedy against the debtors.

11. I am therefore of opinion that Ex. C operates as a sufficient acknowledgment of the mortgage in question and that the suit is not barred by limitation. In the result, I reverse the decrees of the lower Courts and pass a preliminary decree for sale. Interest shall be allowed on Rs. 772 at six per cent, from date of plaint up-to-date fixed for redemption and thereafter at six per cent, on the aggregate amount. Time four months. I direct each party to bear their own costs in the second appeal. I direct the first Court costs to be included in the mortgage decree. I direct the Lower Appellate Court's cost to be paid by defendants 3 to 6 and not to be added in the mortgage decree.

12. Leave refused.