(1939) 02 PAT CK 0023

In the Patna High Court

Madho Prasad and Others		APPELLANT
	Vs	
Gouri Dutt Genesh Lal and Others		RESPONDENT

Date of Decision : 06-02-1939

Acts Referred:

Companies Act, 1882 — Section 4
Contract Act, 1872 — Section 249, 25

Citation : AIR 1939 Patna 323

Hon'ble Judges : Manohar Lall, J;Fazl Ali, J;Chatterji, J

Bench : Full Bench

Judgement

Manohar Lall, J.—This is an appeal by defendants 3 to 7 against the judgment and decree of the learned Subordinate Judge of Chaibassa dated 29th July 1933, by which he decreed the suit of the plaintiffs which was brought to recover a sum of Rupees 65,756-3-0 as the amount due to them from the appellants as well as from other defendants (who have not appealed). The plaintiffs are a firm carrying on money-lending business at Jugselai in this province and at Kharagpur in the neighbouring province and in other places. Defendant 1 with his son defendant 2 constitute a joint Hindu family. Defendant 3, along with his sons defendants 4 to 7, also constitute among themselves a joint Hindu family. The appellant Ram Sagar (defendant 6) is married to the daughter of defendant 1. (His Lordship then stated the circumstances which led to the institution of this suit and proceeded.) In the result I reject the contention of the learned Counsel that this appellant never made the acknowledgment on 19th March 1928 by which he accepted the liability for Rs. 47,637-3-3. I now proceed to consider whether it has been established to our satisfaction that defendant 3 was a partner of Bholanath from 1923 as alleged by the plaintiffs or from some later date in April 1926, as is the case of the defendants and in particular whether he undertook the liability for Rs. 47,637-3-3 on 19th March 1928 in his capacity as a partner for the partnership dues which were binding upon him.

2. It was strenuously contended on behalf of the respondent that the documentary evidence upon the record of this case leaves no manner of doubt

that the appellant was a partner with Bholanath in Jharbera and other concerns from the beginning of 1923 and in particular it was pointed out that the appellant himself had admitted in his evidence and in the written statement that he was a partner with Bholanath from April 1926. Reliance was placed upon the statement in para. 10 of the written statement of the appellant and in particular upon his cross-examination at page 49 at line 4 where the appellant stated:

For Jharbera my advances were not as loans but were for carrying on work--Canposh work went on in name of Bhola for a few months in 1026 and so in 1927. In 1928, Bhola did work Shere as his own exclusively in his khas name. For karbar in his name in 1926 and 1927 I was a partner. I can''t Bay if he worked in 1925. I made advances these years 1926-27 as partner for carrying on work.... I have khatas and bills showing my disbursements on Jharbera; they will show the date on which I became partner.

3. By the consent of the parties, the issue which was raised on this topic was Issue 5 which distinctly admitted that defendant 3 was a partner from April 1926; otherwise I do not see why the issue was framed as "Was defendants a partner before April 1926." Mr. Mahabir Prasad relying upon the case in Bhaggu Lal v. De Gruyther (1881) 4 All. 74 contended that a man may erroneously think that he is a partner and even state he is a partner but such statements are not enough and that the test in every case is whether the person has acquired the rights of a partner or is a mere creditor. He argued that it was true that the appellant was anxious to be called a partner although in this case all the facts and circumstances pointed to the conclusion that his client was no more than a creditor however erroneously he thought himself to be a partner and however foolishly he prevailed upon the plaintiffs to put in his name as a partner in the books of the account by which he acknowledged the debts of Bhola as partnership debts. His further argument was based upon the fact that there could be no partnership in law because the terms of the lease, granted by the Gangpur Estate to Bholanath and B.K. Sanyal, themselves admittedly contained an express stipulation that no partner could be introduced without the sanction of the estate and the previous sanction of the Bihar Government; in other words the argument of the learned Counsel was that the appellant was neither in law nor in fact at any material time a partner with Bholanath however erroneously he believed it himself or represented to others by his assertion that he was a partner and that all that the evidence conclusively established was that Madho was really given 9 annas share in the profits and 9 per cent, interest on his advances in the capacity of a creditor. Before dealing with the facts which are established to our satisfaction in this case it is desirable to state that the law upon this point is very clear.

4. It was decided as long ago as 1872 by their Lordships of the Judicial Committee in Mollwo March & Co. v. The Court of Wards (1872) . 4 P.C. 419 that:

It appears to be now established that although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such participation alone, it may; as a presumption, not of law but of fact, be inferred; yet that whether that relation does or does not exist must depend on the real intention, and contract of the parties.... Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held as a partner by estoppel. Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract.... It is sufficient for the present decision to say, that to constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common.

5. These weighty observations must be carefully kept in view. (His Lordship then discussed evidence and proceeded.) But the appellant argues that he could never be a partner in law so long as the sanction of the Bihar Government and the Gangpur Estate was not taken and relies on the case in Bipul Chandra Guppta v. Nasib Ali 13 C.W.N. 638. In that case the plaintiff instituted a suit asking for a decree against defendant 1 and his brothers, for an account and for the money that might be found due to the plaintiff; the defence to the action was that Section 4, Companies Act, 1882, was a bar to the suit as the partnership consisted of more than 20 persons and was not registered under the Act. The learned Judges found that there was no partnership in that case at all, that the deed of partnership relied upon was not a deed executed by all the partners in favour of all, but one between defendant 1 on the one side and the other partners on the other and they pointed out that defendant 1 alone was the partner, who alone had the authority to carry on the business and that the business had commenced before the other partners were taken in and that these persons were taken under the express condition that they would have no power to interfere with regard to the carrying on of the business and that the other defendants had only a share in the profits. Upon these facts, it was found that the association carried on no business as an association and so did not come within the scope of the Companies Act; the judgment of the lower Court dismissing the suit was set aside and the case was remanded for disposal on the other points.

6. But what are the facts here? This is not a partnership action but an action by a creditor to recover moneys due from the appellant who has acknowledged the debt as a partnership debt. Whether there was a valid consideration in law to support this acknowledgment will be considered later. (His Lordship after discussing evidence proceeded.) The important questions which present themselves at this stage for consideration are, firstly whether the defendant is liable to the plaintiffs to pay the sum which he acknowledged by reason of the fact that as found by me above he was a partner on the date of the acknowledgment irrespective of the fact that the sum which he acknowledged was not a partnership debt; and in the alternative whether the acknowledgment

can itself be made the basis of the suit, in other words whether the acknowledgment was for a valid consideration that can be recognized by law.

To take up the first question: the provisions of the Contract Act, embodied in Section 249 make it quite clear that although each partner is liable for debts and obligations incurred, while he is a partner, in the usual course of business by or on behalf of the partnership, the person who is admitted as a partner into the existing firm (like the position of defendant 3) does not thereby become liable to the creditors of such firm for anything done before he became a partner. In the present case, I have held that the plaintiffs were merely the creditors of Bholanath before the appellant was agreed by him to be taken into partnership after April 1926. Upon this finding, it is unnecessary to consider the interesting argument which was advanced at great length before us as to what the position of the appellant would have been if it had been held that the debts due to the plaintiffs which amounted to Rs. 36,076-7-3 on 6th November 1926 were the partnership debts. It was argued however that it was not open to the appellant to contend that the debts which he acknowledged were not partnership debts by reason of the acknowledgment which he made on 19th March 1928 especially when it was one of the terms of the partnership that he would be taken in and treated as a partner only and in case only if he under, took to pay the debts of Bholanath. In my opinion, this argument cannot be accepted.

7. There is no clear evidence upon the record as to the terms of the partnership which were agreed upon between defendant 1 and defendant 3. Unfortunately, Bholanath and Madho fell out and although the officer of the Gangpur Estate (P. W. 1) intervened he could not arrive at any final decision or settlement beyond interim negotiations or attempted settlement; in the course of such attempted settlements a draft agreement was prepared on some date in 1929 which is to be found at page 171 as Ex. 54. It shows that Bholanath (who is stated to be the first party in that agreement) had taken a lease from the Gangpur Estate on 11th September 1925 and started a business with his own capital and later thinking it desirable to introduce a financing partner he had agreed to admit Madho into the partnership and that the sums which defendant 1 had already spent should be fixed at Rs. 1,50,000 subject to the fixing of an exact figure after going through the account books and that he (Madho) will also deposit in a bank a further sum of Rs. 75,000 as a loan or advance to the partnership carrying interest at 9 per cent, annually, The only oral evidence on this point is the evidence of Bhola''s son Brij Behari at p. 42 already quoted above in these words:

He (Madho) was taken in on the condition that be would pay off all our previous liability and investments to the tune of 1? lakhs of rupees.

But it lacks corroboration, is contrary to the case set up by the plaintiff and is interested. In my opinion, it is impossible to determine accurately the terms of the (partnership and whether it was one of the conditions which was finally agreed upon between the parties that Bholanath would take in Madho as a" partner only if he undertook to pay the liabilities of Bholanath. It is noticeable that this case is at variance with the entire case of the plaintiffs. It may be that Madho undertook to pay some of the liabilities of Bholanath to the creditors which were incurred in enlarging the Jharbera business in which he was being taken in as a partner, (as appears from the terms of the draft agreement which I have just quoted) or it may be that Bholanath being a samdhi of Madho prevailed upon Madho to pay all his private dues also. But be that what it may, I am unable to hold upon the materials now properly before me that when Madho acknowledged the debt on 19th March 1928, he was doing anything beyond merely acknowledging the correctness of the amount which stood in Bhola''s khata.

8. This acknowledgment of debt by Madho on 19th March 1928 is a mere acknowledgment. By it and in it no promise to pay can be inferred on behalf of Madho to pay this debt. The true effect of an acknowledgment was pointed out by this Court in Deoraj Tewari v. Indrasan Tewari A.I.R (1929) . Pat. 258 and it was held that there must be a distinct promise and not a mere acknowledgment before the party acknowledging can be saddled with any liability and that the rule which prevails in this country departs from the rule of English law where an acknowledgment of debt has always been understood to connote and imply a promise to pay but this doctrine has never found favour in India. It was also pointed out that there may be cases in which an acknowledgment is not merely an acknowledgment of the existing debt but the words there may be such from which a clear promise to pay may be made out thereby bringing the acknowledgment within the (provisions of Section 25(3), Contract Act, and that although an acknowledgment implies a promise to pay u/s 25, Contract Act, nevertheless a promise must be distinctly expressed and a mere acknowledgment is insufficient to create a new contract as is contemplated u/s 25. I cannot forget the case of the plaintiffs that this was a mere acknowledgment of a pre-existing debt "of Madho (jointly with Bhola). The case of the plaintiff on this point has already been indicated and it may be repeated here. The second witness for the plaintiff Suraj Mai, when cross-examined with respect to this acknowledgment stated as follows at page 33:

I cannot give any reason for adding the name of Madho in the khata. Madho asked us to do so--we would not have added had he not so requested; he did not give any reason.

The deceased partner of the plaintiff in his evidence in the Midnapur suit which is Ex. 56 stated to the same effect. At p. 116 he states as follows:

If Madho Prasad did not sign this hathchitta (new account) on 19th March 1928 we could have still made him liable for the Rs. 47,637 odd.

9. It is clear then that the case of the plaintiff is and has always been, that all the dues in this account which came up to Rs. 47,637-3-3 on 26th October 1927 were really the dues of Madho and Bhola and he simply acknowledged his own debt. But, as stated above, I have found that the facts established are just to the

contrary, namely that Bhola was indebted on that date in a certain sum to the plaintiff and Madho simply acknowledged that debt as a debt due from Bhola. The important question which now arises for determination is what is the consideration which was the foundation of this new contract of the plaintiff with Madho assuming that the acknowledgment can be construed as a promise to pay the debt of another. The learned Subordinate Judge dealt with this matter at p. 75 and he sought to find some sort of consideration in the fact that Madho was getting nine-annas share in the Jharbera concern, that the initial outlay was to be Rupees 1,50,000 which sum he was to pay to Bhola and by executing that hatchitha he incurred no more liability than he had already undertaken orally in 1925 or 1926 or under the draft agreement (Ex. 54). I am unable to agree. Unless the terms of the partner, ship are accurately known, it would be dangerous to speculate. Indeed the plaintiffs did not suggest any consideration for this new contract which was made by Madho with them on 19th March 1928 by stating that they had abstained from doing anything by reason of this acknowledgment by Madho. This was the foundation of a serious contention raised by the learned Counsel for the appellant before us that the plaintiff ought not to be allowed to make out a new case in the Appellate Court because he submitted that the plaintiff must succeed or fail upon proof that the liability of Rs. 47,637-3-3 was the old continuing liability of Madho (along with Bhola) and if the appellant was able to establish that this was never the liability of Madho the plaintiff''s suit must be dismissed as against him. Sir Manmatha Nath Mukherji appearing for the respondent on the other hand argued that the appellant must be confined to his case, that he never signed this acknowledgment and that it was a forgery and that if we come to the conclusion that the acknowledgment was genuine we should not embark on a consideration of any other case and he pointed to para. 17 of the written statement of the appellant wherein he stated as follows:

That it is equally untrue to state that Rupees 47,687-3-3 or any money, was found due to the plaintiffs and by the defendants up to 26th October 1927, That the acknowledgment of this liability is not admitted. Even if it was so admitted by defendant 1 it was a collusive and fraudulent affair.

10. In my opinion, we should adopt the course accepted by their Lordships of the Judicial Committee in Umrao Singh v. Lachman Singh (1911) 33 All. 344. The real question in the case before us is whether the plaintiff is entitled to recover the entire sum acknowledged by defendant 3 on 19th March 1928 or any portion thereof and it is open to this Court to consider this question so long as and only so far it is not inconsistent with the pleadings or with such of the evidence adduced by the parties which we may hold to be trustworthy. It was also pointed out by the appellant that the plaintiffs had based their cause of action in para. 13 of the plaint as the date of acknowledgment and therefore it was argued that if it is found that there was no consideration for this acknowledgment as suggested by the plaintiffs in their plaint and in evidence then the suit of the plain, tiffs should fail. It was argued by Sir Manmatha Nath Mukherji in reply that the

acknowledgment must be construed as a new contract or novation within the meaning of Section 62, Contract Act, and that the consideration for this contract was the wiping off of all the old liabilities of Bholanath by the undertaking of a new liability by the appellant and Bhola in which the rate of interest was reduced from 2 per cent, to 1? per cent, as mentioned in para. 10 of the plaint. The learned Counsel for the appellant replied that the liability of Bholanath or his son was never wiped off, that their liabilities remained intact and that the case would have been different if Madho had undertaken the whole of the liability of Bholanath upon the plaintiffs discharging Bholanath and his son from their old liabilities or agreeing to reduce the rate of interest in consequence of his acknowledgment by Madho, and pointed out that this case was never, sought to be made out by the plaintiffs throughout the protracted trial. This argument of the appellant must be accepted. It was then argued that the case falls within the provision of Section 127, Contract Act, which provides that

anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

In the present case nothing was done nor was any promise made for the benefit of the principal debtor. The case appears to be covered by illustration (c) which is as follows:

A sells and delivers goods to B.C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

11. I ask myself where is the consideration for this agreement and is this agreement not void? Upon the facts found there can only be one answer to this question. There is no consideration for this agreement and therefore the agreement must be held to be void (see the case in Janki Nath v. Dhokar Mall Kedar Bux A.I.R (1935) . Pat. 376.) It would have been open to the plaintiff to allege and prove that were it not for this agreement of 19th March 1928, he would not have waited any longer but would, have proceeded to sue Bholanath or that he reduced the rate of interest from 2 per, cent, to 1? per cent, only because Madho, undertook the joint liability, but that is not the case made out: either in the pleadings or in the evidence. It is impossible, for this Court to spell out this case (argued:'' as an alternative in the argument before us) without any trace thereof in the pleadings and evidence and resting on no substantial evidence which I can believe. It is against the pleadings and not supported: by the evidence. Sir Manmatha Mukherji relied upon a case which is quoted in

Lindley on Partnership, Edn. 8, at pp. 252- 253. It is the case in Ex parte Whitmore 3 Deac 365. The report of that case is not available here. It is stated at pp. 252-253 that in that case Warwick and Clagett became partners. Warwick, who had had dealings with merchants in America, informed them that he had taken Clagett into partnership, and requested them to make up their accounts, and transfer any balance due to or from him (Warwick) to the new firm. These instructions were repeated and confirmed by Warwick and Clagett, and were acted on. A debt owing from Warwick was placed to the debit of the new firm, and a bill was drawn on the firm for the amount of the debt and was accepted, but was dishonoured. On the bankruptcy of the firm, it was held that the debt in question had become the joint debt of Warwick and Clagett; and not only so, but that the joint liability of the two had been accepted in lieu of the sole liability of Warwick.

It is impossible for me to say anything more about this case (the report not being available) than this, that the law which prevails in this country as embodied in Section 43, Contract Act, is entirely different from the state of law in England or in America. In this country

when two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any (one or more) of such joint promisors to perform the whole of the promise.

12. In other Words, the liability of joint promisors in India is both joint and several. It may be that in Ex parte Whitmore 3 Deac 365 the reason for the decision was that in respect of the liability of Warwick the creditor had to look to the joint liability of the two persons and thereby the sole liability of Warwick was considerably reduced and that was the reason why this question was so decided in bankruptcy proceedings. In any event, I refuse to consider the applicability of a decision pronounced under a different state of law when this practice has been repeatedly condemned by their Lordships of the Privy Council who have pointed out that the citation of English authorities to consider Indian Statutes which are not in pari materia is not proper: see Raghunath Prasad v. Sarju Prasad A.I.R (1924) . P.C. 60 , AIR 1930 59 (Privy Council) and AIR 1932 161 (Privy Council) .

13. I therefore come to the unhesitating conclusion that there was ho consideration at all in law and in fact to support the acknowledgment of 19th March 1928 and that the plaintiffs cannot enforce any liability against the appellant by reason of that acknowledgment beyond the sums, if any, which may be proved to have been taken by him from the plaintiffs and which may be included in this account. It would be convenient to discuss here if any such items have been proved in this case to have been taken by the appellant. [His Lordship then discussed evidence and proceeded.] It is now necessary to deal with two other matters, It was argued by the learned Counsel for the appellants that the rate of interest charged by the respondent was very high and that a relief should be given under the provisions of the Usurious Loans Act on the ground that the claim of the plaintiff includes over Rs. 47,000 by way of interest and in particular that the sum of Rupees 9027-2-0 was calculated as interest for one year only up to October 1927. The learned Subordinate Judge granted partial relief to the defendants when he decreed the suit with simple interest on the hatchitta amount at 1? per cent, per mensem simple and up to the date of the suit only. The interest is no doubt high but I am unable to hold that the learned Subordinate Judge has not exercised his discretion wisely considering all the circumstances of the case.

14. The oral evidence given on behalf of the plaintiff is overwhelming to show that the customary rate of interest which was charged from the borrowers was in the neighbourhood of what was charged by the plaintiffs. It also appears to have been proved that compound interest was calculated only when the debtor came to meet his his as on the Diwali for each year (see evidence of P. W. 5 at p. 37). The learned advocate for the respondent on the other hand contended that there was no reason why his client should be deprived of interest pendente lite or till the date of realization on the decretal amount. It is enough to say that the trial Court has a discretion in the matter as clearly provided in Section 34, Civil P.C. Here the circumstances undoubtedly point to the conclusion that the interest as claimed was excessive but as it could not be held that the transaction was unfair as between the parties to the suit no relief could be given under the Usurious Loans Act. The trial Court therefore in my view correctly appreciated the position and granted such relief to the defendants as he could from the time that the matter of interest came within the domain of the Court. The circumstances which I find to exist in the present case are quite sufficient for us to refuse to interfere with the discretion exercised by the trial Court: see Isri Prasad Singh and Others Vs. Jagat Prasad Singh and Others, . I think therefore there is no ground made out for interfering with the decision of the learned Subordinate Judge on this point and that the contention of the appellants and the respondents, must both be rejected.

15. It was lastly contended by the learned Counsel for the appellant that the sons of Madho should not have been made liable personally for the debt which was said to have been incurred by their father because this was an illegal debt not for the benefit of the joint family but in the nature of a speculative transaction. It is unnecessary to pronounce court opinion on this matter because the learned advocate for the respondent frankly stated that in case a decree is passed against the appellant Madho the plaintiff would be content to have the decree executed against the sons for such of the property as they will inherit from the father relying upon the doctrine of pious obligation of the sons to pay the father''s debt and that the plaintiff would not ask for personal decree against the sons. This declaration therefore would be embodied in the decree that will be passed against the appellant.

16. For the reasons already indicated above, I hold that this appeal must be allowed in part and it should be declared that the plaintiff is entitled to realize from the appellant Madho only the sum of Rs. 7000 with interest at the rate of 1? per cent per mensem simple being calculated from 19th March 1928 up to the date of the suit. This is a personal liability of Madho as indicated above. As the appellants were themselves to blame for this litigation on account of defendant 3 deliberately signing the acknowledgment on 19th March 1928, the appellants and the respondents will bear their own costs of this litigation throughout as between themselves.

Chatterji J.

[His Lordship after stating facts proceeded.] Every partner is liable for all debts and obligations incurred while he is a partner in the usual course by or on behalf of the partnership (Section 249, part I, Contract Act). Madho will therefore be liable for the loans that were taken from the plaintiffs for the partnership during the period from April 1926 to 28th December 1927. The total amount of these loans is, as already stated, Rs. 3200. The manner in which each particular item is entered in the partnership accounts may be relevant for the purpose of settling accounts as between the partners themselves, but it does not in any way affect the creditor''s rights. On behalf of the appellants, it is contended on the authority in Karamali Abdulla Allarakhia v. Karimji Jiwanji AIR (1914) P.C. 132 that as the plaintiffs advanced the amounts to Bhola on his own responsibility the fact that he spent the same for the partnership does not make the partnership liable for those debts. This contention is apparently in conflict with the provisions of Section 249 (part I), Contract Act. Nor does it receive any real support from the decision in Karamali Abdulla Allarakhia v. Karimji Jiwanji A.I.R (1914) . P.C. 132 the proposition is thus stated:

Where goods are purchased or money raised for the joint adventures, and the dealing though ostensibly by an individual is truly and substantially a dealing of the joint adventure, the adventurers are liable as partners. But there is no such responsibility for goods, etc purchased on the credit of an individual adventurer previously to the contract though afterwards brought into stock as his contribution.

17. Exactly the same principle is laid down, though expressed differently, in Section 249, Contract Act. In the present case the advances, though made ostensibly to Bhola, were taken by him truly for the partnership and therefore the partners are liable. It is worth mentioning here that in the plaintiffs'' own account books the amounts are debited not against Bhola individually but against Bholanath Brijbihari, the firm as it was then named. The second part of the proposition quoted above as is evident from the words underlined (here italicized) by me, refer to prepartnership debts and does not touch the point now under consideration.

18. As to the appellants'' liability for the sum of Rs. 47,637-3-3 based on the acknowledgment Ex. 5, it is repudiated by their learned Counsel on the following grounds: firstly, that the acknowledgment is not genuine, secondly, that it is a mere acknowledgment without any express promise to pay amounting to a new contract and as such it is ineffective to charge them with liability and thirdly, that even if it be regarded as a contract, it is without consideration and therefore void. [After discussing evidence the judgment proceeded.] So far as the adjustment is concerned, it implies a contract to pay the sum of Rs. 47,637-3-3 found due with interest at 1? per cent. The former rate of interest was 2 per cent, per mensem. The effect of this adjustment is not merely to ascertain the amount due and acknowledge liability for it but to substitute for it a new liability with a reduced rate of interest. After this adjustment, could the plaintiffs enforce

the bid liability at the old rate of interest? The answer is, No. The adjustment thus creates a new liability and it cannot be regarded as a mere acknowledgment. Now the question is whether the position is different with regard to the acknowledgment Ex. 5. If it had stood by itself it would have been difficult to construe it as being in the nature of a new contract. But it cannot be considered independently of the adjustment, Ex. 4 because the two are parts of the same transaction.

19. Though the acknowledgment, Ex. 5 was executed later, on 19th March 1928, it was intended to operate as if Madho himself was a party to the adjustment, Ex. 4. In this view the acknowledgment will have the same legal consequences as the adjustment and will therefore be regarded as creating a new contract. Now supposing that the acknowledgment, Ex. 5 does not create a new contract let us see how the plaintiffs'' rights are affected. One consequence that will follow is that no suit will lie on the basis of the acknowledgment. The law on this subject is well settled: vide Suraj Prasad v. W.W. Boucke AIR (1920) Pat. 161. This won''t affect the suit so far as it is based on the adjustment Ex. 4. The question then arises whether the plaintiffs will be entitled to any relief on the strength of the acknowledgment. I have already held that Madho was not a partner before April 1926. He cannot therefore be liable for the debts incurred previous to that period. This is expressly provided in Section 249 (second part) of the Contract Act which runs thus:

A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such firms for anything done before he became a partner.

It is contended by the learned Advocate for the respondents that all that this part of the section means is that the mere fact of a person being admitted as a partner does not make him liable for debts incurred before his admission but it does not prevent him being liable under a contract to the contrary. Reliance is placed on P.D. Sarma v. Phanindra Nath Mukherji 35 C.W.N. 593 where it has been laid down that when a person is admitted as a partner into an existing firm he does not thereby become liable for any debt incurred prior to his admission, but he will be so liable if (1) the firm as constituted after his admission has assumed the liability to pay the old debts and (2) if the creditor has agreed to accept the new firm as his debtor and to discharge the old partnership from its liability. This decision has for its support the following statement of law to be found in Lindley on Partnership, Edn. 8 at p 825:

A creditor of one person does not become the joint creditor of him and another who enters into partnership with him merely because the two partners have agreed between themselves that the debts of each shall be the debts of both. Unless the creditor accedes to that arrangement he is not bound by it, nor can he avail himself of it; his position in fact is unaltered, he does not lose his old right, nor does he gain any one.

20. Let us now apply these principles to the present case. I have already shown that Madho as a condition of his admission as a partner in the Jharbera concern had under, taken the liability for past, debts of the partnership. This arrangement was between the partners themselves and could not be binding against the creditors so long as they did not accede to it. But the plaintiffs as creditors acceded to the arrangement when after the adjustment of accounts up to 26th October 1927 (the Dewali day) closed the account in the name of the old firm "Bholanath Brijbihari," opened a new account in the name of the new firm "Madho Prasad and Bholanath Brijbihari" with a debit balance of Rs. 47,637-3-3, the amount found due on adjustment from the old firm, and took a hatchitta on 28th December 1927 from Bhola as representing a new firm for that amount. Lastly, Madho acknowledged the liability for that amount by making the entry Ex. 5 dated 19th March 1928 in the same hatchitta. Thus the old and new partners and the creditors all accepted the arrangement by which the partners as constituting the new firm assumed the liabilities of the old firm. In this view it is immaterial whether the acknowledgment Ex. 5 creates a new contract or not.

It is quite enough if it implies a promise to pay as every acknowledgment does: Maniram Seth v. Seth Rupchand (1906) 33 Cal. 1047 and Deoraj Tewari v. Indrasan Tewari A.I.R (1929). Pat. 258. The principles laid down in P.D. Sarma v. Phanindra Nath Mukherji 35 C.W.N. 593 and also in Lindley on Partnership are fully applicable to the facts of the present case, Consequently Madho and with him his sons are liable for the sum of Rs. 47,637-3-3.

21. The next question'' is whether there is any consideration for the contract that is supposed to be created by the acknowledgment Ex. 5. It cannot be disputed that there was good consideration as between Bhola and Madho because as the evidence shows the latter was taken in as a partner with nine annas share in the partnership business in consideration of his undertaking the liability for the past debts of the partnership. The learned Counsel for the appellants however contends that to support the contract there must be consideration moving from the plaintiffs which is not even pleaded, much less proved. This argument loses sight of the fact that under the Indian law as enacted in Section 2(d), Contract Act, consideration need not necessarily move from the promisee; it may move from any other person. Section 2(d) runs as follows:

When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something such act or abstinence or promise is called a consideration for the promise.

This affords a complete answer to the learned Counsel''s argument. He also refers to the following Illus. (c) u/s 127, Contract Act:

A sells and delivers goods to B.C afterwards without consideration agrees to pay for them in default of B. The agreement is void.

22. But if in this Illustration, B agrees to give G a share in the profits to be

derived from the goods can the agreement by G to pay A be said to be without consideration? Certainly not. The position in the present case is almost similar. The plaintiffs advanced loans to Bhola. Bhola agreed to take Madho as a partner in the business for which the loans were taken. Madho in his turn agreed to repay the loans to the plain, tiffs. Even assuming that some consideration directly moving from the plaintiffs was necessary, I think this is well established by the admitted or proved facts. The plaintiffs opened a new khata in the name of Madho jointly with Bhola and Brijbihari and accepted Madho as a joint debtor. The old liability was wiped off and a new liability substituted instead at a lower rate of interest. This situation is sought to be met by the learned Counsel for the appellants by pointing out that in view of the provisions of Section 43, Contract Act, Bhola andi Brijbihari still remained liable. In other words, the contention is that there could be no novation of contract unless the old debtors Bhola and Brijbihari were altogether discharged. But on a reference to Section 62, Contract Act, which provides that

if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it the original contract need not be performed,

it will appear that a new contract may be substituted either between the same parties or between different parties, the consideration being the discharge of the old contract. In the present case, as I have already shown elsewhere, the plaintiffs in the face of the new contract as embodied) in the adjustment, Ex. 4 could not enforce the old liability. As regards parties to the contract, no doubt Bhola and Brijbihari are still there but under the old contract they were exclusively liable whereas under the new contract they are jointly and severally liable with Madho. The learned Counsel for the appellants has drawn our attention to the following statement of the plaintiffs'' munim P. W. 2.

I cannot give any reason for adding name of Madho in the khata. Madho asked us to do so; we would not have added had he not so requested; he did not give any reason;

and also to the following statement fromGaneshlal''s evidence (Ex. 66) in the Midnapur suit:

If Madho Prasad did not sign this hatohitta. (new contract) on 19th March 1928 we could, have still made him liable for Rs. 47,637 odd.

23. Upon these statements it is argued that on the plaintiffs'' own showing there was no consideration moving from them for the new contract. So far as Ganeshlal''s statement is concerned, it was just in keeping, with his case that Madho was a partner from the very beginning. As regards the statement of P. W. 2, although he cannot give any reason for adding Madho''s name in the khata he does say that this was done at Madho''s request. Whatever may be the implication of these statements, the'' adjustment of accounts, the opening of the new khata and the acknowledgment by Madho are established facts and from these facts it is for the Court to draw the legitimate inference. With reference to

the contention of the learned Counsel for the appellants that consideration was not pleaded, I should observe that the relevant facts are set forth in para. 10 of the plaint. It is stated there that

defendant 3 requested the plaintiffs to open an account in the joint names of defendants 1, 2 and 3 and square up the previous account standing in the names of defendants 1 and 2. Accordingly the plaintiffs opened an account in the names of defendants 1, 2 and 3 with an opening balance of Rupees 47,63,7-8-3 and squared up the previous account on 28th December 1927 Subsequently defendant 3 signed the hatchitta himself and thereby acknowledged his liability to the extent of Rs. 47,637-3-3. The defendants toy the said hatchitta promised to pay interest at the reduced rate of Rs. 1-8-0 per cent, per mensem.

The defendants on the other hand in their written statement did not plead want of consideration. Considering the broad facts established in the case I am of opinion that there was good consideration for the contract represented by the acknowledgment, Ex. 5.

24. The plaintiffs'' claim with regard to the aum of Rs. 7000 advanced on 19th March 1928 stands on a different footing because it was taken by Madho himself. Madho''s case is that he borrowed this sum at the request of Bhola and made it over to him. The entry, Ex. 5a regarding this amount shows that it was taken for paying royalty to the State. The learned Subordinate Judge has shown in his judgment how Madho made various coflicting statements regarding the circumstances under which he borrowed this amount. The entry, Ex. 5a also is inconsistent with Madho''s case that he borrowed the amount on behalf of Bhola. I have no hesitation in holding that his statement on the point is false and that he did borrow the sum of Rs. 7000. Even assuming that the sum was borrowed on behalf of Bhola it was obviously for the purpose of the partnership; in that view also Madho will be liable as a partner. Thus the appellants are liable for both the items of the plaintiffs'' claim, namely Rs. 47,637-3-3 and Rs. 7000.

25. The next contention advanced by the learned Counsel for the appellants relates to interest. The plaintiffs claimed com. pound interest with yearly rests at 1? per cent, on the sum of Rs. 47,637-3-3 from 26th October 1927 and on Rs. 7000 from 19th March 1928. The sum of Rupees 47,637-3-3 itself included compound interest at the rate of 2 per cent, with yearly rests. The plaintiffs'' evidence shows that interest was compounded at the time of its adjustment. As there was no adjustment subsequent to 28th December 1927 the learned Subordinate Judge has allowed simple interest only at 1? per cent, per mensem on Rs. 47,637-3-3 and Rs. 7000. As regards the sum of Rs. 47,637-3-3 the learned Counsel''s contention is that it in. eludes a large amount of interest and that compound interest at 2 per cent, with yearly rests is usurious. The plaintiffs have adduced overwhelming evidence to show that according to the Mahajani practice interest is charged at not less than 2 per cent, per mensem and is compounded at the time of adjustment on the Dewali day of every year. That evidence has been accepted by the learned Subordinate Judge and nothing has

been shown to us from which we can say that he was wrong. It cannot be said as a matter of general rule that 2 per cent, compound interest in the case of unsecured loans is necessarily high.

26. There is a cross objection by the plaintiffs relating to interest because the learned Subordinate Judge disallowed compound interest on the sums of Rs. 47,637-3-3 and Rs. 7000 and also because he has refused pendente lite and future interest. As regards refusal of compound interest the learned Subordinate Judge has given very good reasons. The granting of pendente lite and future interest lies in the discretion of the Court. In view of the fact that the sum of Rs. 47,637-3-3 includes a large amount of compound interest the learned Subordinate Judge was quite right in exercising his discretion not to allow pendente lite and future interest. The cross-objection must therefore fail.

27. There is another small point. Defendants 4 to 7 are sons of defendant 3 and for his debts there cannot be a personal decree against them. The learned advocate for the plaintiffs-respondents concedes this. Therefore in the decree it should be made clear that it cannot be a personal decree against defendants 4 to 7. Subject to this modification I would dismiss the appeal and also the cross-objection. But in view of the fact that I have not accepted the plaintiffs'' case that Madho was a partner from the very beginning of the transaction with the plaintiffs I would order that parties do bear their own costs in this Court. (On account of the difference of opinion, the case was placed before a third Judge who delivered the following judgment.)

Fazl Ali J.

This appeal was originally heard by a Division Bench of this Court, but owing to a difference of opinion between the learned Judges who constituted the Bench the following point has been referred to me for decision:

Whether appellant 1 is liable by virtue of the acknowledgment dated 19th March 1928 (Ex. 5).

18. In order to explain this point I shall briefly refer to certain facts. Appellant 1 Madho Prasad and his four sons (appellants 2 to 5) have preferred this appeal against a decree passed by the Subordinate Judge of Man. bhum-Sambalpur under which they have been held to be liable along with respondents 2 to 4 to pay a sum of Rs. 61,070-7-6 besides the costs of the suit to the plaintiffs who are a firm of money-lenders. The plaintiffs have impleaded in the suit two groups of defendants, namely the appellant and respondents 2 to 4 who belong to different families. Madho Prasad (appellant 1) is the head of one of the families and Bholanath (now dead), who was defendant 1, was the head of the other family, when the suit was instituted. The two families are connected by marriage as appellant 4 Ramsagar is married to the daughter, of Bholanath and Madho Prasad and Bhola, nath jointly carried on certain business at Panposh, a place in the District of Singhbhum. The question to be decided by me is whether a sum of Rs. 47,637 odd to which Ex. 5 relates and which is the largest item in the

plaintiffs'' claim is payable by both sets of defendants or by respondents 2 to 4 only. It may be stated here that the principal amount claimed by the plaintiffs in the suit consisted of two main items, one of Rs. 47,637 odd and another of Rs. 7000. So far as the latter amount is concerned, both the learned Judges are agreed that it is payable by both sets of defendants.

29. It appears that Bholanath and his son Brij Bihari used to carry on business as contractors not only at Panposh but at two other places also, namely Amghat and Chakradharpur. For the purpose of con, ducting their business they had to borrow large sums of money from time to time since 1923 from the plaintiffs and the sums which they borrowed from and those which they paid to the plaintiffs towards their debts used to be entered in the plaintiffs'' books under a khata which stood in some years in the name of Bholanath alone and in some years in the names of Bholanath and Brij Bihari. The account between these persons and the plaintiffs used to be adjusted periodically and the amount found due against them used to be noted in a book called "hatchitta bahi". Previous to 1927 the entries in the hatchitta bahi were signed by Bholanath alone in acknowledgment of his liability for the amount stated therein. At the beginning of the year 1984 Sambat which corresponds to 26th October 1927 a khata was opened by the plaintiffs in the name of Bholanath Brij Bihari as well as Madho Prasad. The heading of this khata which precedes the relevant entries reads as follows:

The account of Madho Prasad and Bholanath Brij Bihari at present residents of Panposh dated 1st Kartik Sudi 1984 corresponds to 28th October 1927.

On 28th December 1927, Bholanath made the following entry in this bahi and put his signature below the entry across four stamps of one anna each.

The accounts having been compared the balance due up to 1st Kartik Sudi 1984 Sambat corresponding to 26th October 1927 is in words Rupees forty seven thousand six hundred thirty seven, annas three pies three only, on which interest will run at 1? p.c.p.m. Rs. 47,637-3-3.

(Sd). Madho Prasad and Bholanath Brij Bihari by the pen of Bholanath dated 26-10-27. Signed on 28-12-27.

30. The whole of the entry which was made on 28th December 1927 is marked as Ex. 4. On 19th March 1928 Madho Prasad wrote just below the entry Ex. 4 as follows:

Signed Madho Prasad by my own pen, 26th October 1927. Amount Rupees forty seven thousand six hundred thirty seven, annas three and pies three only, interest at one and a half per cent. Rs. 47,637-3-3. Date of signature 19-3-28.

This entry is Ex. 5 and is followed by a third entry showing that a sum of Rs. 7,000 was borrowed by Madho Prasad and Bholanath and Brij Bihari on the same day and below that entry are the signatures of Madho Prasad and Bholanath Madho Prasad signing for himself and Bholanath signing for himself and Brij Bihari. A question here arises as to why Madho Prasad''s name was introduced for the first time in the hatchitta account book on 26th October 1927. The plaintiffs'' case was that though the accounts previous to 1927 stood in the name of Bholanath and Brij Bihari only, all the loans entered therein had in fact been contracted both by Bholanath and Madho Prasad and it was at the request of Madho Prasad himself that his name was not disclosed in the books. It was stated on their behalf that Madho Prasad being in the service of the Bengal Nagpur Railway feared that the railway authorities would not approve of his carrying on contract work on his own account and so he asked the plaintiffs not to enter his name in their books. It was also the case of the plaintiffs that Bholanath and Madho Prasad had taken a lease in respect of a limestone quarry at Jharbera from the Feudatory Chief of the Gangpur State within which Jharbera is situated and the sums of money borrowed by the defendants from the plaintiffs were all invested in that business which was jointly carried on by all the defendants.

31. The case of Madho Prasad (appellant 1) on the other hand was that Ex. 5 was not in his handwriting nor did it bear his signature and that the sum of money to which Ex. 5 related was the exclusive debt of Bholanath and he was not liable for them. The learned Judges who originally heard this appeal have disbelieved both the plaintiffs and Madho Prasad on certain important points. The evidence on the record shows that in the year 1925 a lease was taken by defendant 1 and one B.K. Sanyal of a limestone quarry at Jharbera and both the learned Judges have held that defendant 3 became a partner of Jharbera business since April 1926. Thus the plaintiffs'' case that all the debts for which the adjustment took place in 1927 were debts contracted for Jharbera business has been disbelieved and their case that the loans had been contracted by defendants 1 and 2 as well as defendant 3 since 1923 has also not been accepted. The learned Judges have further found that the entry Ex. 5 is in Madho''s own handwriting and bears his signature.

32. Upon the findings of the learned Judges the points which are now beyond controversy are: (1) that respondents 2 to 4 who have not appealed from the decree of the trial Court are in any event liable for Rs. 47,637-3-3 and (2) that the appellant and respondents 2 to 4 are joint and severally liable for the sum of Rs. 7000 which was borrowed on 19th March 1928 by Madho Prasad and Bholanath expressly for the purpose of the business at Jharbera. The learned Judges, however, are not agreed as to the legal effect of Ex. 5 or in other words on the question as to whether by making the entry Ex. 5 Madho Prasad made himself in law liable jointly and severally with the other defendants for the sum of Rs. 47,637 odd. Manohar Lall J. has expressed the view that the words written by Madho Prasad did not imply a promise to pay and even if they did, the promise being without consideration cannot be enforced against him and. his sons. Chatterji J. has on the other hand given a number of reasons in support of the opposite view, namely that Madho Prasad has by means of the acknowledgment (Ex. 5) made himself liable for the entire amount stated therein.

33. It may be stated here that one of the points raised on behalf of the appellants was that even though Madho Prasad might have erroneously thought that he was a partner in the Jharbera business, his true position was that of a creditor and not that of a partner and this contention was based on the fact that under the terms of the lease relating to the Jharbera quarry no one could be taken in as a partner with the lessees except with the sanction of the Local Government obtained through the lessor and the Political Agent. That point has been decided against the appellant, but it does appear that after Madho Prasad had invested a large sum of money in the Jharbera business he and defendant 1 quarrelled with each other and in spite of the intervention of Mr. Christian, the Superintendent of the GangpUr State, they could not be reconciled. The result is that no deed of partnership has yet been executed and there is evidence on the record to show that Bholanath has been trying to take in another person Jairam Walji as his partner in'' preference to the appellant.

34. Upon these facts the view which has been expressed by Manohar Lall J. as to why Madho Prasad acknowledged a debt for which Bholanath and Brij Bihari were liable is as follows:

But later on his evidence discloses that owing to some difference the appellant ceased to invest further sums before he got the written sanction of the Gangpur State which was to be granted on the settlement of the agreement of partnership, a draft whereof was actually reduced into writing, but unfortunately the agreement was never completed; the appellant being perhaps anxious to obtain some documentary proof as he suggested in the argument deliberately went and acknowledged the debt which was not his debt nor the debt of the partnership into which he thought he had entered and for which he was not getting any documentary evidence, but was a personal debt of Bhola. The plaintiff himself knew that Madho was being approached by Bhola as a financier even in May 1929 [see Ex. F (14) at p. 54]; this entirely demolishes the case of the plaintiffs that from 1923 onwards the moneys which he had advanoed to Bhola were being advanced both to Bhola and Madho on account of Jharbera concern. It is also established that there was never any representation to the plaintiff (upon which he ever acted to his detriment) by or on behalf of Madho that he was a partner with Bhola; I have already stated more than once that it has been fully established that the plaintiff never started advancing money to Bhola from 1923 onwards on the distinct under-standing that Madho was to be held liable for these advances.

35. The learned Judges have stated in their order by which they desired this case to be referred to a third Judge, that they agree on all points except the point on which the reference has been made, but it appears that while Manohar Lall J. has proceeded on the assumption that the entire debt covered by Ex. 5 was the debt of Bholanath and Brij Bihari, Chatterji J. has expressed the view that Madho Prasad was liable for a small sum of Es. 3500 which was borrowed from the plaintiffs for the (purpose of the Jharbera business between April 1926 and 28th

December 1927. The point of difference however is small and on the findings of both the Judges the debt as a whole may be regarded as essentially the debt of Bholanath. The question therefore which I have to answer is whether by virtue of Ex. 5 Madho Prasad is liable to pay a sum the whole or by far the greater part of which had been borrowed by Bholanath and his son Brij Bihari. The entry Ex. 5 which may be reproduced once more runs thus:

Sd. Madho Prasad. By my own pen, 26th November 1927. Amount, Rupees forty seven thousand six hundred thirty seven, annas three and pies three only, interest at (sic) one and a half per cent... Rs. 47,637-3-3. Date of Signature 19th March 1928.

36. In this entry Madho Prasad has nowhere expressly stated that he was personally liable for the sum of Es. 47,637-3-3 or that he had taken over the liability for the payment of this sum upon himself and so the entry standing by itself does not help the plaintiffs. Referring to this entry Chatterji J. says as follows:

If the acknowledgment had stood by itself that is without adjustment, it would have been difficult to construe it as being in the nature of a new contract.

Chatterji J. has rightly pointed out that this entry does not stand alone, but follows an entry in the handwriting of Bholanath under the heading "The account of Madho Prasad and Bholanath Brij Bihari." All these entries however must be read in the light of the case put forward on behalf of the plaintiffs to explain them. The plaintiffs'' case on the point has been throughout quite a clear and consistent one, namely that the debts to which the entries Exs. 4 and 5 relate were not only the debts of Bholanath and Brij Bihari but the debts of these persons as well as Madho Prasad and the plaintiffs relied on the entries Exs. 4 and 5 as a strong piece of evidence in support, of their case. That case however having been disbelieved Madho Prasad can be rhade liable only upon certain assumptions which are not warranted by the pleadings and which must necessarily be based more or less upon surmises. Ex. 5 has been called an acknowledgment, but it is not clear what is acknowledged therein. Does it acknowledge merely an existing liability or does it create a new liability? If the latter be the case, the entry does not show in what capacity Madho made himself liable for the large sum of money to which the entry refers nor does it show what consideration there was for his undertaking to become liable for that sum. In the course of the argument before me, it was contended among other things on behalf of the respondent that the present case is governed by Section 62, Contract Act, which provides that if the parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed. In Scarf v. Jardine (1882) 7 AC 345 Lord Belbourne explained novation as follows:

There being a contract in existence some new contract is substituted for it either between the same parties or between different parties, the consideration mutually being the discharge of the old contract.

37. But the question is whether there was really and truly a discharge of the old contract in the present case. Now novation of contract to have any real meaning is not consistent with the original debtor remaining liable in any form. But what we find here is that Bholanath and Brij Bihari were liable under the old contract and they continued to be liable under the new contract. It has been argued that whereas formerly Brij Bihari and Bholanath only were liable, they are now liable jointly and severally with Madho Prasad. But this simply shows that the creditor instead of having only two persons as his debtors agreed by Ex. 5 to have three persons without forgoing any rights which he had against his old debtors. On the whole therefore I am inclined to agree with the view expressed by Manohar Lall J. on this point.

38. It was next contended on behalf of the respondent that the appellant is liable on the principle enunciated in Ex parte Whitmore 3 Deac. 365 which has been referred to in Lindley on Partnership as an instance where an incoming partner can make himself liable even for debts contracted by a firm before he joined it. The facts of the case have been set out in the judgment of Manohar Lall J., and I do not wish to reproduce them here. I wish however to emphasize that the case does not mark any departure from the law on the subject which is set out clearly in Lindley on Partnership as follows:

If an incoming partner chooses to make himself liable for the debts incurred by the firm prior to his admission therein, there is nothing to prevent him doing so. But it must be borne in mind, that even if an incoming partner agrees with his copartners that the debts of the old shall be taken by the new firm, this, although valid and binding between the partners, is, as regards strangers, res inter alias acta, and does not confer upon them any right to fix the old debts on the new partner. In order to render an incoming partner liable to the creditors of the old firm, there must be some agreement, express or tacit, to that effect entered into between him and the creditors, and founded on some sufficient consideration. If there be any such agreement, the incoming partner will be, bound by it, but his liabilities in respect of the old debts will attach by virtue of the new agreement, and not by reason of his having become a partner.

39. Now, before the law so stated can be correctly applied, the facts of the present case must be clearly borne in mind. It appears to me that Bholanath and Brij Bihari borrowed money from the plaintiffs not as a firm but as members of a joint family for several enterprises in which they were interested. There is very little evidence to show that Bholanath Brij Bihari was the name of any firm, but on the other hand, there is evidence to the effect that these persons had business at least in four places, namely Amghat, Chakradharpur, Panposh and Jharbera and the business at some of these places was conducted under the name of Brij Bihari & Co., while the business at Jharbera was conducted in the name of Pioneer Trading Co. Even assuming however that Bholanath Brij Bihari was the name of a firm, it cannot be said upon the findings, which I must accept

that when Madho Prasad acknowledged his liability, he did so as a partner of that firm. That firm, as the evidence shows, carried on business at four places including Amghat and Chakradharpur, but Madho had no concern with the business at these two places. Therefore apart from the question whether the agreement entered into between Madho Prasad and the creditors was founded on some sufficient consideration or not, it is clear that the principle enunciated in Ex parte Whitmore 3 Deac 365 is not applicable firstly, because the debt acknowledged by Madho Prasad was not the debt of a firm but of two indi. viduals who were interested in a number of enterprises and secondly, because he never became a partner in the firm of Bholanath Brij Bihari, even assuming that there was a firm of that name in existence. The question therefore has to be examined purely on the footing as to whether an acknowledgment by one person of the debt owed by two other persons is by itself sufficient to make him liable for those debts in an action brought by the creditor to realize them from him.

40. To answer this question in the affirmative, we will have to assume in the first place that the acknowledgment implied a contract on the part of Madho Prasad to pay the amount acknowledged and secondly, that this contract was supported by sufficient consideration. In finding out what was the consideration for the alleged contract, we shall have to bear in mind that the plaintiffs'' case upon which they wanted totmake defendant 3 liable has failed, that else being that Madho Prasad was liable for every single debt contracted between 1923 and the date of the acknowledgment Ex. 5 and so Madho Prasad bad merely acknowledged his own debt. Ex. 5 was used by the plaintiffs not merely as the basis of their claim but as a strong piece of evidence to support their case that all the loans which constituted the sums to which Ex. 5 relates had been taken jointly by Madho Prasad and Bholanath. This was undoubtedly a plausible case but it has failed and if the plaintiffs are to succeed now, we must make out a new case for them, a case quite different from that put forward by them in their plaint or evidence.

41. In this connexion various alternative cases were put forward before the learned Judges who originally heard the appeal as well as before me as to the nature of consideration and I shall briefly deal with them. It was pointed out in the first place that at least under the terms of the agreement which gave Madho Prasad a share in the Jharbera business, he was bound to pay off the debts of that business amounting to a lakh and a half of rupees. This is a fact and is borne out by Ex. 54 in which, it is stated.

that the second party will refund to the first, party the sum of Rs. 1,50,000 or thereabouts as will be found due after going through the account books, the cash book and ledger kept by the first party in carrying on the mining business concern together with the interest thereon and that sum will be deemed the present liability of the first party.

42. It is however to be remembered that Madho Prasad had undertaken to pay off the liabilities of Jharbera concern only. He had not undertaken to pay off the liabilities incurred by Bholanath and Brij Bihari not only on account of Jharbera

business but also on account of some of their private enterprises. It is true that Brij Bihari has stated in his evidence that this was the contract but his statement is neither borne out by the'' draft agreement Ex. 54 nor has it been accepted by the learned Judges by whom the case was originally heard. Thus, it cannot be said that Madho Prasad acknowledged the debts in pursuance of the terms on which he was admitted as a partner in Jharbera concern. It was also suggested that a sum of Rupees 7000 had been taken by Madho Prasad and Bholanath jointly after Madho Prasad had signed Ex. 5 on 19th Mareh 1928 and that might furnish the consideration in question. It is however not the plaintiffs'' case that they would not have advanced Rupees 7000 to Bholanath if Madho Prasad had not signed Ex. 5. It has also been suggested that the plaintiffs had been induced to reduce the rate of interest from Rs. 2 to Rs. 1-8-0 on account of Madho Prasad acknowledging the liability. This also is not fully supported by the evidence adduced in the case.

43. The plaintiffs'' witness (P. W. 2) has stated that after the date of the hatchitta interest was reduced in rate at the request of "these persons" and as the dues had become heavy. By "these persons" the witness undoubtedly meant Bholanath and Madho Prasad, but he did not state that if Madho Prasad had not agreed to sign the hatchitta, the interest would not have been reduced. On the other hand one of his statements is to the following effect:

I cannot give any reason for adding the name of Madho in the khata. Madho asked us to do so. We would not have added had he not so requested. He did not give any reason.

Again he stated:

If Madho did not come for Rs. 7000 on 19th March 1928 his signature would not have been there and the chita would have been without it. We did not think it essential to get his signature. When he came, he signed of his own accord; we did not request.

Similarly, plaintiff 1 who is now dead made the following statement in his deposition in "another action which has been admitted in the present case u/s 33, Evidence Act.

I do not remember if any intimation was given to Madho Prasad about opening the new account in the three names according to his request. If Madho Prasad did not sign the hatchitta (new account) on 19th March 1928, we could have still made him liable for Rs. 47,637 odd.

44. In view of these statements which imply that Ex. 5 did not alter the legal position of the parties, the contentions advanced by the learned Counsel for the appellants are (1) that on the plaintiffs'' own case, Ex. 51 must be construed as mere acknowledgment of an existing liability and not as a contract j creating a new liability; (2) that once it is j found that the debt acknowledged by Ex. 51 was the debt of Bholanath and Brijbihari, j the case against Madho must fail and

the question of consideration does not arise and (3) that if there was any new contract between the plaintiffs and Madho Prasad by which the latter made himself liable for a sum which he would not have been liable''; to pay otherwise, that contract should have; been put in proper legal form and should have been sufficiently explicit in its terms to enable a Court of law to determine what exactly Madho Prasad''s liabilities were'' under it. In my opinion, these contentions cannot be lightly passed over.

45. The points in favour of the plaintiffs are (1) that Ex. 5 is in Madho''s own handwriting; (2) that his case as to this document being a spurious one has been found to be untrue and (3) that he being a man of business it is not probable that he would have signed the document without understanding it or knowing the implication of what he was doing. Therefore if Ex. 5 is construed (sic) as a contract even slight evidence as to consideration, provided that it was reliable, would have been sufficient to make Madho liable for the sum referred to therein. In my judgment however the difficulty which the plaintiffs are confronted with is that inasmuch as the evidence adduced by them has been disbelieved as to the essential part of their case it is difficult now to find with any degree of certainty under what circumstances and with what motive Madho Prasad became a party to the transaction evidenced by Ex. 5. It may be that he wrote Ex. 5 for a good and sufficient consideration as would be expected'' from a shrewd man of business that he is represented to be; or he may have been duped by Bholanath who, as appears from the evidence, became his avowed enemy afterwards with the result that no agreement of partnership has yet been concludeed. Indeed, if one is permitted to indulge in speculation, it may be difficult to rule out of consideration the theory suggested by Manohar Lall J. to which reference has already been made as well as several other theories which were put forward in the course of the argument as to why Ex. 5 was written and signed by Madho.

46. For these reasons after carefully considering the elaborate and instructive judgments of Manohar Lall and Chatterji JJ., I am on the whole inclined to agree with the view expressed by Manohar Lall J., and answer the difficult question, referred to me in the negative. (The record of the case was then placed before Manohar Lall and Chatter, ji JJ. for passing final order.)