

(1994) 06 SHI CK 0001
In the High Court Of Himachal Pradesh
Case No : First Appeal No. 424 of 1978

Roshan Lal Kuthiala and Another

APPELLANT

Vs

Raja Rana Yogendra Chandra and Others

RESPONDENT

Date of Decision : 09-06-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 1 , Order 7 Rule 6
Limitation Act, 1963 — Article 1, 22, 18

Citation : AIR 1996 HP 14 : (1995) 1 ShimLC 23

Hon'ble Judges : V. Ratnam, C.J.;A.L. Vaidya, J

Bench : Division Bench

Advocate : Chhabil Dass and Tarlok Chauhan, for the Appellant; Prem Goel, for the Respondent

Final Decision : Allowed

Judgement

A.L. Vaidya, J.—This appeal has been directed against the judgment and decree dated 24th August, 1977, passed by learned single Judge of this Court, whereby it was ordered that the plaintiff was entitled to recover, from defendants No. 1 to 7, the principal amount of Rs. 3,50,771.67 (Rupees three lacs fifty thousand seven hundred seventy one and paise sixty seven) and interest up to the date of the suit amounting to Rs. 56,122/- (Rupees fifty six thousand one hundred twenty two) and subsequent interest at the rate of six per cent per annum from the date of the suit, till the date of realisation of the decretal amount. The plaintiff was also held to be entitled to costs of the suit from defendants No. 1 to 7.

2. The case of Raja" Rana Yogendra Chandra of Jubbal, as pleaded, had been that his father, during his life time, and thereafter, he had money transactions with defendant No. 1-Firm M/s. Roshan Lal Kuthiala, mainly through Shri Roshan Lal Kuthiala acting on behalf of the firm. According to the plaintiff, initially an amount of Rs. 1,00,000/-(Rupees one lac) was deposited by the father of the plaintiff with defendant No. 1-Firm through a cheque drawn on Imperial Bank,

Shimla, and this amount of the cheque was drawn and credited in the books of accounts maintained by defendant No. 1-Firm. It was also pleaded that the payments, which were made to the plaintiff and his father, were debited in the books of accounts maintained by defendant No. 1-Firm. According to the plaintiff, the statements of accounts were sent on behalf of defendant No. 1-Firm from time to time and as such, the accounts between the parties were mutual, current and open. These transactions of credit and debit commenced from 1955. the plaintiff also pleaded that as per the statements of accounts, given by defendant No. 1-Firm as on 31st March, 1970, an amount of Rs. 3,85,771.61 (Rupees three lacs eighty five thousand seven hundred seventy one and paise sixty one) was shown to the credit of the plaintiff and thereafter certain payments were made to the plaintiff, through cheques on behalf of defendant No. 1-Firm, totalling Rs. 35,000/- (Rupees thirty five thousand), which payments have been reflected in the statements of accounts furnished by defendant No. 1-Firm till 18th January, 1971. Thus, statements of accounts, as per the plaintiff, rendered to him by defendant No. 1 have been filed with the plaint. This Roshan Lal Kuthiala expired in the end of December, 1972, at Shimla, leaving behind defendants No. 2 to 7 as his successors-in-interest and legal representatives.

3. The plaintiff further pleaded that he had certain doubts about the accuracy of the statements of accounts furnished by defendant No. 1-Firm. Accordingly, he asked the partners of defendant No. 1 to satisfy him about the accuracy of accounts and the partners of defendant No. 1-Firm assured and promised the plaintiff that they would show him all the relevant records and would also explain the accounts to him precisely and in this behalf there had been correspondence between the plaintiff and late Shri Roshan Lal Kuthiala. It was also pleaded that Shri Roshan Lal Kuthiala, in spite of repeated assurances and promises, till his death could not fulfil his assurances and promises given by him. Thereafter, Shri Ravinder Lal Kuthiala, defendant No. 2, who happened to be the son of late Shri Roshan Lal Kuthiala, assured the plaintiff to satisfy him as to the accuracy of the accounts and also square up the accounts. Shri Ravinder Lal Kuthiala, through his letter dated 27th June, 1973 as partner of defendant No. 1-Firm, assured the plaintiff that the last statement of accounts would be furnished by the month of December, 1973. According to the plaintiff, the defendants had been avoiding to render the accounts, as per assurances given by them. The plaintiff, as such, submitted that as per the accounts submitted on behalf of defendant No. 1-Firm, to the plaintiff till 18th January, 1971, and taking into consideration the payments made by defendant No. 1-Firm, the plaintiff was entitled to the recovery of amount of Rs. 3,50,771.67 (Rupees three lacs fifty thousand seven hundred seventy one and sixty seven paise) from the defendants. The plaintiff also sued for the recovery of interest from 18th January, 1971, till the filing of the suit at the rate of six per cent per annum, amounting to Rs. 56,122/- (Rupees fifty six thousand one hundred and twenty two) and, according to the plaintiff, he was in all entitled to Rs. 4,06,893.67 (Rupees four lacs six thousand eight hundred ninety three and paise sixty seven) from the defendants till the

filing of the suit. The plaintiffs prayer has been for passing of the decree for the aforesaid amount against defendant No. 1-Firm and also against defendants Nos. 2 to 8 in their personal capacity and also as partners of defendant No. 1-Firm.

4. All the defendants, obviously, contested the suit. Defendants Nos. 1 to 7, in their separate written statement, raised a preliminary objection that the court had no jurisdiction to try the suit and that the same was barred by statute of limitation. On merit, these defendants denied all the allegations made in the plaint, including the deposit of Rs. one lac by the father of the plaintiff with Firm-defendant No. 1, They also denied that any statement of accounts, as pleaded, had been supplied to the plaintiff by defendant No. 1-Firm. In so far as defendant No. 8 is concerned, he also denied the pleadings of the plaintiff and specifically pleaded that he was not a partner of defendant No. 1-Firm. He also took the objection of limitation.

5. Parties were put to trial on the following Issues :

"1. Whether the Court has jurisdiction to try the suit?

2. Is the suit barred by limitation?

3. Whether the Firm-defendant No. 1 opened mutual, current and open account with the plaintiff or his father. Whether the father of the plaintiff deposited initially rupees one lac with the firm defendant No. 1 and various transactions of credit and debit commenced from the year 1955?

4. Whether any statement of accounts was given by defendant No. 1 to the plaintiff showing the credit and debit until 18th January 1971? If so, its effect.

5. Whether defendant No. 2 as partner of the firm defendant No. 1 made a loan payment to the plaintiff on 18th January 1971 and promised to render the accounts by the month of December 1973, as alleged? If so, its effect.

6. Whether defendants 2 to 7 are successors-in-interest and legal representatives of deceased Roshan Lal Kuthiala, one of the partners, of defendant No. 1? Are they liable to pay the amount relating to the alleged dealings of Roshan Lal Kuthiala with the plaintiff or his father?

8. Whether defendants 2 to 8 are personally liable to pay the amount due to the plaintiff or they are liable to pay that amount as successors-in-interest and legal representatives of late Roshan Lal Kuthiala?

9. Whether the plaintiff is entitled to claim any interest? If so, how much.

10. To what amount, if any, is the plaintiff entitled to and from which of the defendants?"

6. Issue No. 1 was decided in affirmative and with respect to the remaining Issues, the learned single Judge held that defendant No. 8 could not be held liable for any part of the plaintiff's claim and, therefore, the suit as against him stood dismissed. On the point of limitation, the learned Judge held that the

transaction was one of deposit, covered by Article 60 of the Old Limitation Act of 1908 and the suit was, accordingly, covered by Article 22 of the Schedule attached to the amended Limitation Act. It was further held that even if it was believed that Article 22 had no application to the facts of the case, the suit could not be brought out as barred by time as, according to the learned Judge, on the basis of various credit entries in the account books of defendant No. 1 and of subsequent years, accounting from 1970-71, more so, two letters of deceased Roshan Lal Kuthiala Ex. P 14 and Ex. P. 15, contained acknowledgement of the plaintiffs dues and taking the dates of these letters and latest account entries, for the accounting year 1970-71, it was obvious that the suit; which was filed on 28th September, 1973, was within time. Under Issue No. 3, the learned Judge held that so far as this Issue was concerned, it was answered in affirmative and it was, therefore, held that it was sufficiently proved that the father of the plaintiff initially deposited rupees one lac in the year 1955 with defendant No. 1-Firm. Issue No. 4 was also decided in the affirmative and its effect, as per the learned Judge, would make the suit within time. Under Issue No. 5 it was held that there was no evidence to show that the payment made to the plaintiff on 18th January, 1971, was actually made by defendant No. 2, but this payment was found to have been made on behalf of defendant No. 1-Firm and it was further held that the plaintiff had proved, through letter Ex. P 17 dated 27th June, 1973, that defendant No. 2 had promised to render accounts, as alleged, and the effect of this letter was that the plaintiffs claim was not barred by limitation. In so far as Issue No. 6 was concerned, according to the learned Judge, defendants Nos. 3, 5, 6 and 7 were found to be the legal representatives of late Shri Roshan Lal Kuthiala, who was one of the partners of defendant No. 1-Firm, and, as such, they were liable to pay the debt out of the estate of the deceased inherited by them. In so far as Issue No. 8 was concerned, it was held that only defendants Nos. 2 and 4, who were found to be the partners of defendant No. 1-Firm, were personally liable to pay the amount to the plaintiff while defendants Nos. 3, 5, 6 and 7 were held liable to the extent of the estate of Roshan Lal, which was inherited by them. In so far as defendant No. 8 was concerned, he was not held liable, in any manner, for the plaintiffs claim. Under Issue No. 9 it was held that the plaintiff was entitled to claim interest at the rate of six per cent per annum. In so far as Issue No. 10 was concerned, it was ordered that the plaintiff was entitled to recover from defendants Nos. 1 to 7, principal amount of Rs. 3,50,771.67 (Rupees three lacs fifty thousand seven hundred and seventy one and paise sixty seven) and interest up to the date of suit amounting to Rs. 56,122/- (Rupees fifty six thousand one hundred and twenty two) and subsequent interest at the rate of six per cent per annum from the date of the suit till the date of realisation of the decretal amount.

7. The aforesaid judgment and decree have been assailed on various grounds, the main being as follows :

(a) That the learned single Judge erred in holding that Ex. P 1 to Ex. P 13 were genuine documents or were given by an authorised person of the defendant firm

to the plaintiff;

(b) That it was wrongly held that the defendant-firm had been regularly sending any statements of accounts to the plaintiff and his father. On the other hand, the admissions of the plaintiff himself clearly showed that he had not been receiving any accounts whatsoever;

(c) That the learned single Judge erred in holding that the defendants were acting as bankers of the plaintiff and the transaction was a deposit; and

(d) That the learned single Judge erred in holding that the case was governed by Article 22 of the Limitation Act.

It has been vehemently submitted on behalf of the appellants that, on the basis of the pleadings as well as on the basis of the evidence examined during the trial, it stood legally established that the transaction, at the first instance, has not been legally proved and in case it stood validly established, the transaction, at the most, could be termed as a simple loan, the suit for recovery of which was clearly beyond limitation inasmuch as the plaintiff neither pleaded nor proved the effect of exemption from limitation, more so, to bring the case within the provision of acknowledging the liability of the debt by the defendants.

8. On the other learned counsel for the plaintiff-respondent's line of arguments has been three fold. According to him, the pleadings as well as the evidence examined during the trial legally established the transaction to be a mutual, open and current account and the period of limitation for such transaction would commence from the close of the year in which the last item, admitted or proved, was entered in the accounts and in the present case, with that background, the suit, having been instituted within three years was within limitation and, thus, the suit stood covered under Article 1 of the Schedule of the Limitation Act. The second alternative, submitted on behalf of the plaintiff, has been that the transaction, being money deposit with the defendants and, as such, was covered under Article 22 of the Schedule whereby the limitation of three years would start when the demand was made. According to the learned counsel, the suit having been preferred within three years of the demand and, therefore, was within time. Lastly, it has been contended that even if the transaction is held to be a simple loan advanced by the plaintiff in favour of the defendants, such a loan would be recoverable within three years when the loan was paid but, as per evidence brought on record and pleadings referred to in the plaint, exemption from limitation could be legally availed of by the plaintiff inasmuch as the defendants had acknowledged the liability of the payment of this loan through their letters written to the plaintiff which acknowledgment extended the period of limitation.

9. The aforesaid contentions put forth on behalf of the parties could be appreciated after going through the evidence examined by the parties in this particular behalf. Even the point of limitation, which has been the main bone of contention between the parties on this appeal, being mixed question of law and

facts, has to be appreciated with the background of the facts established during the trial.

10. The onus of proving the case lay heavily upon the plaintiff but where the parties have tendered oral as well as documentary evidence, the onus of proving a particular issue by a particular party loses all significance and the issue, accordingly, has to be gone into by taking into account the evidence examined by both the parties. So at the first instance the evidence examined during the trial by the parties has to be appreciated.

11. P W 1 is Raja Rana Yogendra Chandra of Jubbal, the plaintiff in the present case, who deposed on oath that his father and grandfather had business dealings with Roshan Lal Kuthiala and Raj Bahadur Jodha Mal Kuthiala. According to him, on behalf of defendant No. 1-Firm Shri Roshan Lal Kuthiala used to visit his father and he also visited him in this behalf. The plaintiff also deposed that in March 1955 his father had given a cheque of rupees one lac, drawn on the Imperial Bank of India, Shimla Branch to Shri Roshan Lal Kuthiala and this cheque was handed over to Shimla. According to the plaintiff, the headquarters of the defendants was at Shimla and, therefore, most of the accounts were rendered at Shimla and sometimes these accounts were also rendered at Dehra Dun. He also deposed that the defendants had their property at Rohru, Kharapathar and also at Shimla. The plaintiff further added that the accounts Ex. P. 1 to EX. P. 13 were received from the defendants by him at Shimla and some person on behalf of Shri Roshan Lal Kuthiala brought those accounts to him. These documents were exhibited subject to the objection raised by the learned counsel for the defendants regarding the mode of proof of these documents. At this stage it may be referred that the original of these documents are in Urdu and are in different types of papers. It may also be noticed that there is no forwarding letter with these accounts Ex. P. 1 to Ex. P. 13. It is also not clear from these documents as to who had tendered them on behalf of the defendants and on which date and who received them on behalf of the plaintiff and on which date.

12. The witness further disclosed that these accounts Ex. P. 1 to Ex. P. 13 were the original accounts received by him and that the defendants had made some payments to his father as well as to him at Shimla. According to the plaintiff, the defendants paid the amounts through cheques drawn on banks at Shimla and whatever payments were made by the plaintiff and defendants used to be made from Shimla office of the defendants.

13. Ex. P. 14 and Ex. P. 16 were the letters received by the witness from late Shri Roshan Lal Kuthiala whose signatures have been identified by the plaintiff. He has also proved letter Ex. P. 17, written by Sh. Ravinder Lal Kuthiala.

14. During cross-examination the plaintiff stated that he was not conversant with urdu language and he could not read or write in Urdu. Documents Ex. P. 1 to Ex. P. 13 were shown to the witness who stated that he could not read them. He

further added that he could not tell who was the scribe of Ex. P. 1 to Ex. P. 13. The witness stated that he knew Shri Chadha who was Income Tax practitioner and he could identify his signatures in English. The witness added that he was not sure if these accounts Ex. P 1 to Ex. P 13 were brought by Lala Barib Chand on behalf of Lal Roshan Lal Kuthiala. He further disclosed that he must have brought them. The plaintiff admitted that Shri Chadha for sometime was under the employment of Rai Bahadur Jodha Mal Kuthiala who was father of late Shri Roshan Lal Kuthiala. He denied the suggestion that documents Ex. P. 4 to Ex. P. 6 were not handed over to him by Lala Garib Chand on behalf of the defendants but were handed over to him by Shri Chadha. The plaintiff was specific in deposing that these documents were handed over to him by the defendants and thereafter he showed these documents to Shri Chadha who returned them to the plaintiff. According to the plaintiff, he handed over these documents to Shri Chadha for compiling his Income Tax return. He admitted that English figures on Ex. P4 and Ex. P6 were in the hand of Shri H. L. Chadha. The Income Tax returns prepared on the basis of these documents on behalf of the plaintiff by Shri Chadha have not been produced.

15. The plaintiff further disclosed that in 1955 an amount of rupees one lac, by means of cheque, was advanced by his father and this was loan in the form of deposit with interest at the rate of 6 per cent, per annum. The plaintiff has made an important disclosure during his cross-examination and in this behalf he deposed on oath that Uwas true that so far as the suit amount was concerned, it was loan amount of Rs. 1 lac and whatever amount was received by the plaintiff towards suit amount was taken towards payment of interest on this loan. He also stated that the suit loan was advanced to the firm of Roshan Lal Kuthiala at Yamuna Nagar.

16. P W 2 is one D. Section Thakur, an Upper Division Clerk of the office of the Income Tax Officer Pathankot. He had brought the original Income Tax returns, submitted by the firm M/s. Roshan Lal Kuthiala. On the basis of those returns, this witness stated that in the returns four partners were shown of the firm who were ; Roshan Lal Kuthiala, Bipal Lal Kuthiala, Rajinder Lal Kuthiala and Ravinder Lal Kuthiala. According to him, in the Return for the year 1966-67 liability for the amount of Rs. 4,87,804.60 has been shown in favour of Raja Rana Digvijay Chandra. Thereafter, the witness referred to the return for the assessment year 1967-68 wherein the same partners were shown and liability of Rs. 6,68,130.36 was shown in favour of Raja Rana Digvijay Chandra. The witness thereafter referred to the Income Tax return of the firm for the year 1968-69 in which the liability, which was shown was for Rs. 5,10,061.38 paise in favour of Raja Rana Digvijay Chandra and for the assessment year 1969-70 same liability in favour of the same person was shown which was repeated in the assessment years 1970-71 and 1971-72 also.

17. Similarly, P W 3 is one Jai Prakash Verma, Upper Division Clerk, Office of the Income Tax Officer, Yamuna Nagar. This witness had also brought the original

record pertaining to the Income Tax returns filed by Roshan Lal Kuthiala at Yamuna Nagar. According to him, the Income Tax return for the assessment year 1966-67 showed that the firm was constituted by three partners, namely, Roshan Lal Kuthiala, Rajinder Lal and Ravinder Lal. According to this witness, the liability in this return in favour of Raja Rana Digvijay Chandra of Jubbal was shown to the extent of following amounts:

1. Rs. 22,257.10 2. Rs. 71,209.19 3. Rs. 3,60,400.00.

He further added that this return was filed on 9-9-1966 which was signed by Roshan Lal Kuthiala on behalf of the firm. He also referred to the return filed by the same firm for the assessment year 1967-68, showing the same three partners, and the liability referred to in the return was of the following amount:

1. Rs. 22,257.19 2. Rs. 74,812.13 3. Rs. 4,28,846.67.

This liability was shown in favour of Raja Rana Digvijay Chandra of Jubbal. The witness also added that the accounts filed along with this return were in Urdu showing this liability and this return was also signed by Roshan Lal Kuthiala. Similarly, for the assessment years 1968-69, 1969-70 and 1970-71 the liability of the firm in favour of Raja Rana Digvijay Chandra was as under:

Assessment Year 1968-69

1. Rs. 22,257.10 2. Rs. 74,812.13 3. Rs. 3,94,846.67.

Assessment Year 1969-70

1. Rs. 22,257.10 2. Rs. 74,812.13 3. Rs. 3,90,771.67.

Assessment Year 1970-71

1. Rs. 22,257.19 2. Rs. 74,812.13 3. Rs. 8,83,178.77.

18. According to this witness, the last Return was filed on 1-8-1972, which was signed by Roshan Lal Kuthiala on behalf of the firm.

19. It may be very specifically pointed out here that, no doubt, the aforesaid two witnesses have stated on oath the aforesaid facts on the basis of the record brought by them but no documentary evidence -- either the original returns or its certified copies -- have been brought on record. The details of the liabilities, in the absence of returns, have not been proved.

PW 4 is Shri Bhagat Ram Sharma, who was serving as secretary to the company of Digvijay Talkies Pvt. Ltd., Dehra Dun of which, according to this witness, shareholders were late Lala Roshan Lal Kuthiala, Raja Rana Yoginder Chandra and others. According to this witness, there were lending transactions between the plaintiff and the defendants. This witness also stated that he was holding power of attorney for the plaintiff and his father. According to him, late Lala Roshan Lal Kuthiala, his son Ravinder Lal and the plaintiff and his father used to mention to him about these dealings. He further added that between 1969-70

the plaintiff had sent him to Lala Roshan Lal Kuthiala for demanding the dues of the plaintiff from the defendants as well as for the final accounts and Roshan Lal Kuthiala used to tell him that he had asked his man to prepare the accounts and those would be sent. This witness also disclosed that Lala Roshan Lal had also told him that he would be arranging for the payment of the dues. The witness further disclosed that in the month of January 1973, he had gone to make demand from Ravinder Lal Kuthiala who promised to write in this behalf to the plaintiff. The witness then added that these accounts were in the hand-writing of Trilok Chand who was the Munim of Roshan Lal Kuthiala and he was conversant with his hand-writing. This witness has proved letter Ex. D 7 dated 27-4- 1960 written by Roshan Lal Kuthiala to this witness. He has also produced Ex. D 8, the statement of accounts written by Sohan Lal and signed by him which was dated 31-3-1966.

20. P W 5 is one Shri Rama Nand, who has been in the service of the plaintiff as well as ancestors of the plaintiff since 1931. This witness stated that he had maintained accounts on behalf of the plaintiff, his father and his grandfather. He stated that whatever dealings the plaintiff had with M/s. Roshan Lal Kuthiala, those were through their Shimla office and not through any other office of that firm. This witness was shown the letters Ex. P 14 and Ex. P 15, written by late Shri Roshan Lal Kuthiala. He had identified the hand-writing and signatures of Roshan Lal Kuthiala on these letters. The witness also added that Lala Roshan Lal Kuthiala used to render the accounts of the dealings at Shimla. He also added that the plaintiffs father had given a cheque for Rs. one lac to Roshan Lal Kuthiala which was handed over to him at Shimla. The witness stated that he could not tell if the accounts Ex. P 1 to Ex. P 13 were noted down by the plaintiff in his books. He also added that Ex. P 1 to Ex. P 13 were read over by him to the plaintiff when they were received by the plaintiff. He also stated that accounts of the plaintiff were used to be maintained by him on note books and those note books were not sent to the Income Tax Office but on the other hand the Income Tax advisor used to see those note books. He stated that accounts Ex. P 1 to Ex. P 13 were received by the plaintiff at his Shimla office from the office of the defendants. This witness has been very specific in deposing that the plaintiffs father had given Rs. 1 lac to Roshan Lal Kuthiala for business. He further added that in the year 1955 the father of the plaintiff had given to Roshan Lal at Shimla an amount of Rs. I lac by a cheque and it was advanced as a loan to the firm of Lala Roshan Lal Kuthiala. This witness stated that at that time he was personally present. He also stated that Roshan Lal was a timber merchant who had been sending the accounts to the plaintiff and his father.

21. This is the oral evidence examined on behalf of the plaintiff.

22. The defendants examined for witnesses in support of their case. DW I is Garib Chand who had been in the employment of Roshan Lal Kuthiala since 1946. He stated that late Lala Roshan Lal Kuthiala was not having any business but again added that he was not running any business at Shimla since 1968. He

admitted that late Roshan Lal Kuthiala owned and possessed property at Shimla which was managed by the witness. According to the witness, defendants Nos. 1 to 7 were the heirs of late Lala Roshan Lal Kuthiala who resided at Yamuna Nagar, Dehra Dun and Hoshiarpur while Ravinder Kuthiala was doing business at Pathankot. He stated that he knew the parties and he did not submit any accounts on behalf of Roshan Lal Kuthiala or on behalf of any defendant to the plaintiff or his predecessors Raja Rana Digvijay Chand and Raja Rana Bhagat Chand. According to him, neither he nor other Munim of Roshan Lal Kuthiala had the authority to acknowledge the debt on behalf of the firm. The witness was shown accounts Ext. P 1 to Ex. P 13 and he stated that these accounts papers were not in his hand-writing and he never handed over Ex. P 1 to Ex. P 13 to the plaintiff or his father. The witness stated that he knew the Income Tax advisor, H. L. Chadha and could identify his writings and signatures. This witness has stated that Ex. P 6/A and Ex. P 6/ B, Ex. P 4/C were in the handwriting of said Shri H. L. Chadha. He further told that he did not know about the accounts pertaining to the present suit and for that purpose he had seen no documents either with late Roshan Lal Kuthiala or with the defendants. The witness has identified the handwriting and signatures of late Shri Roshan Lal Kuthiala on Ex. P 14 and Ex. P 15.

23. D W 2 is Ravinder Lal Kuthiala (defendant No. 2). He is the son of late Lala Roshan Lal Kuthiala. The witness has been very specific in deposing that he did not meet the plaintiff at Shimla nor had he any talk with him that the payment of the debt would be made at Shimla. The witness was shown letter Ex. P 17. He has admitted that the letter was sent by him which bears his signature. According to this witness, the plaintiff had some dealings with Hari Singh Mehra and so a reference was made in the letter Ex. P 17. He also stated that the plaintiff had asked certain information from him and the plaintiff had been telling that he should send him the accounts of certain money dealings but, according to the witness, he had no knowledge of this account. The witness was shown Ex. P 1 to Ex. P 13 and he stated that those were in Urdu and he was not familiar with that language. He very clearly stated that these accounts were not sent under his authority and he could not tell whether Ex. P 1 to Ex. P 13 belonged to his firm. He also added that neither Roshan Lal Kuthiala nor he had given any authority to any Munim to acknowledge the debt on their behalf. He admitted that Shri H. L. Chadha was Income Tax advisor for the defendants. He has identified Ex. P6/ A, P4/ B and Ex. P4/ C -- figure work -- to be in the handwriting of Shri H. L. Chadha.

24. D W 3 is Vipin Lal Kuthiala, defendant No. 8. He stated that he had never done any business with defendant No. 1-firm and he had been doing business in Srinagar since 1943.

25. DW 4 is Shri Trilok Chand, who had been serving, from 1954 to 1968, with the firm of Lala Roshan Lal Kuthiala at Yamuna Nagar as an accountant. He stated that Bipin Lal was not a partner of defendant No. 1 -firm. He stated that

he did not know Bhagat Ram Sharma (P W 4) and he never handed over any accounts of the firm to Bhagat Ramor to the plaintiff. The witness stated that he has seen Ex. P I to Ex. P 6 and they were in his hand-writing. The witness was also shown Ex. P 7 to Ex. P 13 and they were not in his handwriting. The witness further added that documents Ex. P 1 to Ex. P 6 were prepared by him at the instance of Roshan Lal Kuthiala and were handed over by him to Shri Harbans Lal Chadha, who was Income Tax advisor of defendant No. 1 -firm and these were prepared for the purpose of filing them with the Income Tax department. He stated that Ex. P2/ 1, Ex. P4/ B, Ex. P4/ C and Ex. P6/ A which were encircled by red pencil, were in the hand-writing of Shri Harbans Lal Chadha. He also stated that he did not know Rama Nand (P W 5), who had never come to take accounts nor he had ever given him any accounts. He admitted that the entries found at Ex. P 1 Ex. P 6 are accounts which are in accordance with the original account books. He stated that he did not know who had written Ex. P 7 to Ex. P 13. He has identified the hand-writing of Roshan Lal Kuthiala on Ex. P 14 and Ex. P 15.

26. That was the entire oral evidence examined on behalf of the defendants.

27. The relevant documentary evidence consisted of Ex. P 1 to Ex. P 13. Ex. P 1 was the copy of accounts pertaining to the period from 1954-55 to 31st March, 1967. The first entry made therein was dated 31-3-1955 which was with respect to the amount credited in favour of the plaintiff of Rs. 1 lac, through some cheque of Imperial Bank, Shimla. There are various entries in Ex. P 1 showing the amount debited and amount credited in the name of the plaintiff and always the net amount, after every year, has been in credit for the plaintiff. At no point of time any amount was in debit in the name of the plaintiff, meaning thereby that after the first entry of Rs. 1 lac various other amounts have been shown to be credited in favour of the plaintiff and the amount debited pertained to the amount paid in the accounts of the plaintiff by firm-defendant No. I but the net result had always been the amount remained in credit in favour of the plaintiff. On 31-3-1967, on the basis of Ex. P 1, the amount in credit in favour of the plaintiff shown was Rs. 5,03,866.29. Similarly, in Ex. P2, which was the copy of Khata pertaining to the plaintiff for the year 1958-59 from the accounts of M/s. Roshan Lal Kuthiala, Yamuna Nagar. In this Ex. P2, the balance amount in credit in favour of the plaintiff on 31-3-1969 was Rs. 3,37,280/-. Ex. P 3 contained the account for the year 1959-60 and the lone entry dated 31-3-1960 was pertaining to the amount of Rs. 4,00,861.36 in credit for the plaintiff. Similarly, copies of accounts Ex. P 4 to Ex. P 13 were accounts for the intervening period and the last entry was on 18-1-1971. In Ex. P 13, which was for the year 1970-71, Rs. 35,000/- only has been shown to be in the debit side for the plaintiff while in Ex. P 12 the total amount in credit in favour of the plaintiff, as it stood at the end of 1970-71 was Rs. 3,90,771.67. It may again be pointed out here, as has been observed above Ex. PI, that all these entries in Ex. P 1 to Ex. P 13, at no time showed the plaintiff to be in debit towards the defendants. All the entries, even after payment of some amounts by the defendants to the plaintiff, always have been in credit of the plaintiff. This aspect only reflected that money was paid by

the plaintiff alone and the defendants had been returning the same, either as a part of principal or interest referred to in the accounts. Another important document Ex. P 15 is a letter dated 14-12-1970 written by late Shri Roshan Lal Kuthiala in favour of the plaintiff which recorded that a cheque of Rs. 10,000/-, drawn on Lakshmi Commercial Bank, Pathankot was being sent along with the letter and it was requested that the plaintiff may credit it in the Yamuna Nagar Account. It was also recorded in this letter that in addition a cheque for Rs. 5,000/- would be sent to the plaintiff in three four days. The writer of the letter regretted the delay in sending the cheque and for that he begged to be excused. The other contents of the letter of personal nature. Ex. P 17 is the letter written by Rajinder Lal Kuthiala in favour of the plaintiff in which it was referred that some letter dated 7th June of the plaintiff was received. It was in this letter that there was a reference regarding Hari Singh Mehra. It was mentioned in this letter that Rajinder Lal Kuthiala was trying to collect information regarding him. Shri Rajinder Lal also mentioned in this letter that he tried to go to Shimla several times but on one pretext or the other he could not reach Shimla. He also mentioned in the letter and requested the plaintiff to wait till December 1973 when he hoped to be free from work and would sit with the plaintiff freely to complete the task referred to in the letter. Shri Kuthiala also wrote that he understood all the inconvenience that was being caused to the plaintiff and, according to him, it was all unintentional as he had been placed in helpless circumstances.

28. In this letter there is some reference to one Shri Hari Singh Mehra but nothing specific pertaining to the transaction under suit. It could be inferred from the contents of the letter that the writer wanted to convey that he would try to reach Shimla and meet the plaintiff. The writer also felt sorry for the inconvenience being caused to the plaintiff. The matter has not been very specifically clear and even if it is taken in the context of the present transaction, it could only be inferred that the writer wanted to approach the plaintiff which he failed to do earlier. There is nothing in this letter, either acknowledging the liability of the present transaction or admitting any aspect of the matter in specific terms.

29. There were various letters written by the plaintiff to late Lala Roshan La) Kuthiala and other defendants which are Ex. D1 to Ex. D7. These letters only reflected that the plaintiff had been writing to the defendant time and again for settling the accounts. There is nothing specific in these letters that as per accounts of the plaintiff some specific amount was due to him from the defendants.

30. The submissions put forth on behalf of the parties by their respective counsel have to be appreciated and disposed of in the background of the aforesaid evidence.

31. It has come on record that, according to the plaintiff, the accounts Ex. P1 to Ex. P13 were delivered by the defendants to him. As pointed out earlier, Ex. P1

to Ex. P13/were in Urdu, written on different types of papers, without there being any forwarding letter with any of those entries. The defendants contention that these documents were procured from Shri H. L. Chadha, who was common Income Tax advisor of the parties, cannot be ruled out especially when some part of the entries made in those documents have been proved to be in the handwriting of Shri Chadha. These entries coupled with the statements of two officials of the Income Tax Department are the sole evidence brought on record, pertaining to disputed transactions. Certified copies of the Returns, alleged to have been submitted by defendant No. 1-firm, have not been brought on record, as observed earlier.

32. It has been contended on behalf of the plaintiff that on the basis of the evidence brought on record, it could be established that some transactions were there between the parties and the first one pertained to Rs. 1 lac, which were given to defendant No. 1 by the plaintiffs predecessor as far back as the year 1955 and, with that background, it was for the defendants to have brought on record the original accounts they have failed to produce and on that account adverse inference should be drawn against them. It is not so simple a matter, as has been contended by the learned counsel for the plaintiff.

33. It has come on record that the plaintiff was also an Income Tax assessee and he was also maintaining some accounts. The plaintiff has not produced any accounts maintained by him pertaining to the transaction under reference. There is absolutely no explanation coming forward on behalf of the plaintiff to behave in that manner. The original accounts maintained by the plaintiff have not been brought on record, the returns, alleged to have been submitted by the plaintiff showing the transactions under reference, have also not been produced. During the trial no attempt was made on behalf of the plaintiff to serve upon the defendants, a notice to produce those documents containing the original accounts. This aspect of the matter cannot be ignored at all. Both the parties appeared to have not brought on record the original documents pertaining to any money transaction which had taken place between the parties, more so, the transaction under reference. Thus, in such circumstances it will not be a case where some adverse inference against the defendants can be drawn for non-production of the original accounts. But on the other hand the lapses appearing in the plaintiffs case, as referred to above, have also to be taken note of. Thus, the evidence, as it stood, has to be appreciated in its right " perspective.

34. On the basis of the evidence discussed above, the main attack on the judgment and decree passed by the learned single Judge has been pertaining to the point of limitation.

35. It is well known that the Limitation Act, with regard to personal action bars the remedy without extinguishing the right. It is meant to see that the plaintiff does not resort to dilatory tactics to seek his remedy within a time fixed by the legislature. A debtor may pay time barred debt to the creditor. He cannot claim it back on the plea that it was time barred.

36. Whether a suit is barred by limitation or not should be decided on the facts, as they stood on the presentation of the plaint. Section 3 of the Limitation Act provides for the dismissal of the suit on the point of limitation although limitation has not been set up a defence. A reference, at this stage, can safely be made to AIR 1956 Mad 15 (Thayammal v. Rangaswami) wherein the matter had been considered as to how this question of limitation has to be decided and the following observations made, in the aforesaid ruling, are most relevant (para 9):

"For the purpose of deciding the question of limitation, the allegations in the plaint and the reliefs claimed must be analysed to ascertain the real nature and scope of the suit."

37. In the present case, according to the appellants, the learned single Judge came to a wrong conclusion that the suit under reference was covered by Article 22 of the Schedule attached to the Limitation Act as, according to the learned Judge, the transactions were in the nature of deposits. Before this aspect of the matter is taken care of the plaintiffs first submission, in order to bring the suit within the period of limitation, has to be considered, which has been that the suit was covered under Article 1 of the Limitation Act which provided limitation to be three years for the suit relating to accounts and suit for the balance due on a mutual, open and current account where there have been reciprocal demands between the parties and in such like suit the close of the year in which last item admitted or proved is entered in the accounts, would be the time running for the start of limitation.

38. There is no doubt that, as per pleadings, as reflected from para 1 and para 7 of the plaint, the transactions under reference have been pleaded to be accounts between the parties, which were mutual, current and open. An account is mutual, open and current when it is an account between two parties, having mutual dealings which is running or current, that is, not closed, and open, that is, not settled. Thus, where one person supplies to other person one kind of goods or work and obtains from him another kind, debiting him with the cost of the former and crediting him with the cost of the latter, the account is mutual. There must, as such, be a mutual credit founded on a subsisting debt on the other side or an express or an implied agreement for a set off of mutual debts. Where there was obligation only on one side and at no time was there over payment, it cannot be said that there was mutual, open and current account. In the present case, as the evidence has been discussed above, this case does not come under Article 1 of the Limitation Act inasmuch as even if the evidence or" the accounts statements Ex. PI to Ex. PIS are believed to be correct, at no point of time, the present plaintiff has been in debit of any amount towards the defendants. But on the other hand the part payment of the interest or the principal amount in favour of the plaintiff by the defendants, without there being any over payment in favour of the plaintiff does not bring this transaction under Article 1 of the Limitation Act. Thus, in order that the account liability was mutual, there must be transactions on each side, creating independent

obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. In the present case, as per accounts referred to above and the evidence discussed in this behalf, those do not fulfil the aforesaid essential requirements to bring the suit within the ambit of Article 1 of the Limitation Act.

39. The other limb of the argument advanced on behalf of the plaintiff has been that these transactions can safely be termed as deposits and on that account Article 22 of the Limitation Act shall have the applicability in this behalf and from the date of demand of the deposits by the plaintiff, the present suit having been instituted within three years, would be within the period of limitation. The learned single Judge has also come to this conclusion which is being assailed very vehemently by the appellants in this appeal.

40. Ram Janki Devi and Another Vs. Juggilal Kamlapat, can safely be relied upon in order to dispose of the controversy between the parties in this particular regard. Following observations contained in the ruling would be very much relevant in order to appreciate the proposition in this case also (para 12):

"The case of a deposit is something more than a mere loan of money. It will depend on the facts of each case whether the transaction is clothed with the character of a deposit of money. The surrounding circumstances, the relationship and character of the transaction and the manner in which parties treated the transaction will throw light on the true form of the transaction."

41. Admittedly, there is no specific pleading to bring the case within the ambit of deposit. Even otherwise, in the absence of the pleadings, this matter may be looked into on the basis of the evidence examined by the parties.

42. The conduct of the parties, more so, the deposition made by the plaintiff himself on oath would be very much relevant in order to come to a conclusion whether the transactions were deposits or loan. The plaintiff stated that his father and grandfather had business dealings with late Shri Roshan Lal Kuthiala and Rai Bahadur Jodha Mal Kuthiala. He has been very specific in stating, while making statement on oath, that so far as the suit amount was concerned, it was loan amount of Rs. 1 lac and whatever amount was received by the plaintiff towards the suit amount was taken towards payment of interest on this loan. He also stated that the suit loan was advanced to the firm M/s. Roshan Lal Kuthiala of Yamuna Nagar. The plaintiff also deposed that in 1955 they advanced amount of Rs. 1 lac by means of a cheque to Roshan Lal Kuthiala, which was advanced by his father and it was loan in the form of deposit with interest of 6 per cent per annum.

43. P W 5, Shri Rama Nand, who was examined on behalf of the plaintiff, also deposed that the plaintiff's father had given rupees one lac to Roshan Lal Kuthiala for business and that this amount was advanced as loan to the firm of Roshan Lal Kuthiala.

44. On the basis of the aforesaid assertions made by the witnesses of the plaintiff, it is being argued on behalf of the plaintiff that as plaintiff termed this transaction "to be a loan in the form of deposit", therefore, this transaction should be taken as a deposit and not loan. We think such an inference is not available on the basis of the specific assertion made by the plaintiff on oath that this rupees one lac, advanced to the defendants, was a loan amount and whatever amount was received back, it was appropriated towards the interest of that loan. This statement of the plaintiff himself makes the transaction as a simple loan and cannot, on the basis of conduct of the parties and on the basis of the evidence examined, be termed as a deposit. There is no such term as has been used at one stage by this plaintiff, "loan in the form of deposit". Either the transaction is a deposit or a loan and for that purpose all the surrounding circumstances have to be taken note of and in the present case the plaintiffs own conduct and admission referred to above cannot be ignored and the plaintiff cannot come out of that web. Thus, the evidence reflected that the transaction was a loan and not a deposit, as has been held by the learned single Judge.

45. It has been contended on behalf of the appellants that even if the transaction is held to be a loan, the present suit would be within limitation inasmuch as the defendants have acknowledged the liability of the amount due in the year 1971 and, from that date, the suit would be within three years which was filed on 28th September, 1973, as has been correctly held by the learned single Judge.

46. The learned single Judge has observed that Ex. P14 and Ex. P15, the letters written by late Shri Roshan Lal Kuthiala, contained acknowledgment of the plaintiffs dues and taking the dates of these letters and the latest accounts entries for the accounting year 1970-71 into consideration, it was obvious that the suit which was filed on 28th September, 1973, was filed within time.

47. There is no dispute to the proposition that where, before the expiration of the prescribed period for a suit 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. Whether this provision of law has been complied with in order to extend the limitation, it is a matter of fact of each individual case and has to be disposed of on the basis thereof.

48. Ex. P14 is a letter dated 20-11-1970, written by Lala Roshan Lal Kuthiala to the plaintiff whereby a cheque amounting to Rs. 10,000/- has been remitted. Ex. P15 is another letter dated 14-12-1970 written to the plaintiff by late Shri Roshan Lal Kuthiala. In this letter reference is made regarding the remittance of a cheque for Rs. 10,000 / - drawn on Lakshmi Commercial Bank, Pathankot and it has also been mentioned in the letter that in addition, a cheque for Rs. 5000/- will be sent to the plaintiff within three-four days. The delay in sending the cheque was regretted.

49. The aforesaid two letters cannot, on any account, be termed to be acknowledgment, as referred u/s 18 of the Indian Limitation Act. There is nothing in these two letters that late Shri Roshan Lal Kuthiala had acknowledged the liability to pay back the suit amount. These letters only reflected the payment of some amounts through cheques. Moreover, even if for arguments sake it could be termed as acknowledgment, there is nothing on record to suggest that this was so done within the period of limitation when the amount was due from the defendants. The accounts Ex. P1 to Ex. P13 appeared to have been procured from the Income Tax advisor, as has been discussed above and not sent by the defendants, as pleaded by the plaintiff. On the other hand the details of the returns, submitted before the Income Tax authorities have not been brought on record and only oral evidence to that effect has been examined which will not serve the purpose in order to prove that defendants had acknowledged the liability of the loan under reference.

49-A. In a case of present nature, where some exemption from limitation is prayed for, it is essential for the plaintiff to plead such an exemption in the plaint very specifically. It has been held in *Sha Manmall Misrimall Vs. K. Radhakrishnan*, that in such a case under Order 7, Rule 6, C.P.C. it is obligatory, as a matter of pleading, to show the ground on which the exemption from limitation is claimed and it was held that consequently, unless the plaint is amended, it would not be open to the parties to rely on an exemption not pleaded in the plaint.

50. There is no doubt that u/s 3 of the Indian Limitation Act it is the duty of the Court to dismiss the suit in case it is barred by time and even if no such plea had been taken by the opposite party, but where exemption of acknowledgment of the liability for extending the period of limitation has been prayed for, it is obligatory upon the plaintiff to plead such an exemption in the plaint itself. In the present case it has not been so done specifically. Otherwise also these letters Ex. P14 and Ex. P 15, alleged to have been written by late Shri Roshan Lal Kuthiala did not acknowledge the liability to " pay the amount under reference.

51. Section 18 of the Limitation Act deals with the requirement for an authority of acknowledgment which can be summarized as under:

1. An admission of the acknowledgment;
2. Such acknowledgment must be in respect of a liability in respect of property or right;
3. It must be made before the expiry of the period of limitation; and
4. It should be in writing and signed by the party against whom such property or right is claimed.

In the present case the aforesaid essentials are not at all legally proved. The pleadings in this regard are not specific and the evidence examined during trial did not establish the requirement of law in this behalf.

52. Thus, on the basis of the aforesaid discussion, the appellants contention that the learned single Judge's findings that the suit was within limitation were not only factually wrong but also legally unsustainable, has to be considered favourably. The learned single Judge, on the basis of the facts established in this case, came to an incorrect and illegal conclusion in this particular behalf. otherwise also, the plaintiff has not been successful, even on merit, to produce the legally competent evidence, as has already been discussed above, in support of the claim submitted by him.

53. In view of the foregoing reasons, the present appeal is accepted, the judgment and decree passed by the learned single Judge are hereby set aside and the suit of the plaintiff is dismissed. In the peculiar circumstances of this case, the parties are left to bear their own costs.