Mt. Bittan Bibi And Anr. vs Kuntu Lal And Anr. on 8 February, 1952

Equivalent citations: AIR1952ALL996, AIR 1952 ALLAHABAD 996

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Raghubar Dayal J.

1. The facts of the case are fully narrated in the judgment of my brother Desai J. I agree with him that the appeal of Smt. Bittan Bibi be dismissed as she is clearly liable to pay the amount decreed against her and Kailash Nath. I differ about the appeal of Kailash Nath and agree with the finding of the Court below that Kailash Nath is liable to pay the joint decretal amount.

2. The learned District Judge did not record any definite finding about Kailash Nath's being the joint borrower of the various loans or not. I, however, agree with my brother Desai J. that in view of the statement of Smt. Pratap Dei the loans were taken by Smt. Bittan Bibi alone though the actual transactions were at times through Kailash Nath or Seoti Bibi and Manno Bibi. The liability of Kailash Nath to pay the amounts borrowed by his mother depends on the effect of the letter EX. 14 written by Kailash Nath alone with the other aforesaid persons. In this letter these persons stated that they had borrowed the various sums, that they had promised to pay the amounts on insistent demands but had been unable in spite of best efforts to pay anything, that interest was increasing day by day and that therefore, they considered it proper and right to authorise them to sell the pawned ornaments in the market to appropriate the sale proceeds towards the amounts loaned on the security of ornaments and interest thereon and to appropriate any surplus towards the debt of Rs. 1300. They further said in this letter that if any amount still remained due from them they would pay that amount very early.

3. The learned District Judge dealt with the question of liability of Kailash Nath in this manner :

> "But whether the loan was actually obtained by Bittan Bibi or not, any person who takes full responsibility for the loan would also be liable. A person who is a mere surety to a loan is always liable although the loan is not in fact taken by him. No doubt Kailash Nath was a young lad at the time and had just attained his majority. But if he undertook the responsibility for the loans I see no reason why he should not be held liable for their payments."

I am of the opinion that he was perfectly right in this view.

4. Several objections have been taken against the view of the learned District Judge.

5. One is that this letter is unstamped and therefore, cannot be acted upon in spite of the fact that it has been admitted in evidence by the trial Court and that if acted upon, such acting upon can be questioned later. In view of Section 36, Stamp Act, the admissibility of a document, once admitted in evidence, cannot be questioned at any stage of the same suit on the ground that it had not been duly stamped. I fail to see what purpose it would serve to admit a document in evidence on record if no action is taken on the basis of that document.

6. Section 35, Stamp Act, prohibits persons authorised to receive evidence to admit in evidence documents unless they are duly stamped. It also forbids such persons or any public officer to act upon, register or authenticate any document which is not duly stamped. Admitting in evidence is certainly different from acting on the document. I am of the opinion that admitting in evidence means the receiving of the document on record as a piece of evidence for taking action on its basis. Din Mohammad J. contemplated this when he observed at p. 264 in Gopi Mal v. Vidya Wanti, A. I. R. 1942 Lah. 260 :

> "The making of a decree consequent upon the admission in evidence of a certain instrument may be one form of acting upon the document : but this is not the only form of acting upon it and while the former may ba included in admitting in evidence, it does not follow that every kind of acting upon an instrument is covered by the words 'admitted in evidence' as used in Section 36."

Documents can be presented to persons authorised to receive evidence for action to be taken thereon without their being treated as evidence. It is with respect to these cases that the provisions of Section 35 with reference to the acting on documents, would apply when those documents are presented to such persons who were authorised to receive evidence.

7. It is argued that such documents admitted in evidence can be used for collateral purposes though not for the very purpose for which those documents were executed and for which they were sought to be produced in evidence. Such use too would amount to "acting upon" the document. I do not see why such a limited action be held to be permitted. If such action be considered to be included in the expression "admitted in evidence" on account of the irresistible inference that a document is admitted in evidence for some action, I can see no reasonable objection to this expression contemplating all such action as can be taken on that document if it had been duly stamped. Section 36 bars an objection on the ground that the document was not duly stamped and therefore means that it can be treated as duly stamped. If so treated, no limitation is to be put on the nature of action to be taken upon a document which has been admitted in evidence. I am, therefore, of the opinion that when a document insufficiently stamped or unstamped at all has been admitted in evidence its admission in evidence cannot be questioned by the appellate Court in view of Section 36, Stamp Act, and that consequently the appellate Court must treat the document as good evidence and take it into consideration for arriving at a proper decision in the case. There is no bar on the manner in which the Court has to use the evidence of such a document.

8. The view I have expressed finds support from the cases noted below : Rung Lal Kaloo Ram v. Kedar Nath, 27 Cal. W. N. 513; Alagappa Chetti v. Narayanan, A. I. R. 1932 Mad. 765; Venkata Reddi v. Vitta Hussain Setti, 57 Mad. 779; Venkatakrishna Reddi v. Batcha Reddi, 57 Mad. 783; U Pan Nyo v. U Tint, A. I. R. 1936 Rang. 498 and Bhagwandas v. Chhaganlal, 46 Bom. l. r. 411.

9. The second question that is raised is that Kailash Nath was not sued as surety, and therefore he should not be made liable as a surety. The plaintiff narrated all the facts in the plaint. They alleged that the defendants had been borrowing money from the plaintiffs on the security of ornaments and sometimes without any security, and that they promised to pay the amounts by letters the last of which EX. 14 was dated 25-5-1937. In para. 9 of the plaint the plaintiffs further alleged :

> "Defendant 1 is the mother of defendants 2 to 4. Sometimes defendant 1 borrowed herself and sometimes through her son and daughters and sometimes defendants 2 to 4 borrowed money in the name of their mother on the security of ornaments. The defendants jointly and severally took npon themselves the responsibility to pay the debt. But as in the reply to the notice the ornaments have been alleged as belonging to different defendants the names of particular defendants who took the loan on the security of particular ornaments are shown against these ornaments at the foot of the plaint. If all the defendants are not proved to be jointly liable for payment then the amount which may be found due from a particular defendant may be awarded against him."

They thus alleged that the defendants including Kailash Nath had taken upon themselves the responsibility to pay the debt. This allegation to my mind does not exclude the liability of Kailash Nath as surety for the loans which in the earlier part of para. 9 were said to have been borrowed by Smt. Bittan Bibi sometimes herself, sometimes through her son and daughters and sometimes had been borrowed in her name by her son and daughters. In his written statement, Kailash Nath did not dispute that he had taken upon himself the responsibility to pay the amounts by signing the letter EX. 14. In Para. 25 of the written statement he gave a version, which has been disbelieved by the Court below, about the execution of this letter and alleged that in those circumstances the signatures were not binding upon him. No defence was pleaded on the ground that if the letter was voluntarily written by him he was not bound by that letter and was not responsible to pay the amount. I am, therefore, of opinion that the mere fact that it was not pleaded in clear and specific terms that Kailash Nath had stood surety for the payment of the amounts borrowed by his mother should not stand in the way of the plaintiffs getting a decree against Kailash Nath if he be otherwise liable.

10. Kailash Nath knew at the time of writing this letter that the loans had been taken by his mother and that insistent demands were being made for their payment. He knew that his mother was unable to satisfy the demands. He contemplated along with the mother that the sale proceeds of the pawned ornaments might not be sufficient to meet the entire claim against her. He therefore by this letter promised to pay the amount found due from her mother in case she failed to pay it. It is true that he has not said all this in clear terms in the form in which a surety would say. But such is the effect of this letter, to my mind once it is held that Kailash Nath was not the actual borrower. The

letter used a different phraseology because it was written on the basis that he was one of the joint borrowers. I see no reason why in view of the finding that he was not a joint borrower in the strict sense of the term, his promise in this letter be not taken to be the promise of a surety.

11. The next argument is that there is no consideration for this agreement by Kailash Nath. Section 176, Contract Act, entitles a pawnee to bring a suit against a pawner upon the debt or promise in case of default in payment retaining the goods pledged as a collateral security or to sell the things pledged on giving the pawner reasonable notice of the sale. It was open to the plaintiffs to sue Smt. Bittan Bibi for the debt she owned. They were making insistent demands for the payment. By this letter Ex. 14 Kailash Nath and the other signatories to the letter in a way proposed to the plaintiff not to sue but to exercise the other right they had, i.e. to exercise the right to sell the pledged things. They further proposed to them to await their actually paying such amounts which might still be due if the sale proceeds of the pawned ornaments be found to be insufficient to meet the total demand and not to sue for such balance. No actual request by expression is made to the plaintiffs not to sue. But the proposals contained in the letter did amount, in my opinion, to an implied request to the plaintiffs not to exercise their alternative right to sue.

It may be noted that the plaintiffs had nothing else to do prior to the institution of the suit. They could simply institute it without giving any warning to Smt. Bittan Bibi. For bringing the pawned articles to sale they were not quite free. They had to give a notice to Smt. Bittan Bibi which they eventually did in June 1937. Further it is to be noted that to recover their claim for Rs. 1300 their only remedy was to bring a suit as RS. 1300 were not advanced on the security of any ornaments or other property. A request to realise that amount from the sale proceeds of the ornaments is certainly a request not to sue for the recovery of that amount. Without such an authority from Smt. Bittan Bibi the plaintiffs could not have utilised any surplus proceeds from the sale of ornaments towards the debt of Rs. 1300 advanced by them to Smt. Bittan Bibi. I am, therefore, of opinion that this letter contained an implied request to the plaintiffs not to sue for their claim.

The plaintiffs did not actually sue Smt. Bittan Bibi. They first gave notice to her and others in June 1937 to the effect that the amount might be paid upto a certain date or they would put the ornaments to sale. They actually sold the ornaments between the 29th July and 1-8-1938. Actual forbearance to sue subsequent to the implied request in the letter EX. 14 provides good consideration for the contract of guarantee given by Kailash Nath as a surety. Reference may be made to Crears v. Hunter, (1887) 19 Q. B. D. 341. A son joined his father in executing a promissory note. The son was not bound to pay any amount. He had no conversation with the creditor. There was nothing in the note to indicate that the creditor was to forbear from suing the father. The pronote provided for future interest. In these circumstances the jury held and it was considered that the jury had material to hold that there was an implied request by the son to the creditor to forbear from suing and that the creditor's conduct in forbearing to sue amounted to good consideration for the son's becoming surety for the debt. I consider the case to be fairly opposite to the present case. There again the son did not state in the promissory note that he was standing surety for his father. In fact the promissory note showed him to be a joint borrower just as the letter Ex. 14 shows Kailash Nath to be a joint debtor with his mother.

12. I am, therefore, of the opinion that Kailash Nath is equally liable to pay the amount due from Smt. Bittan Bibi to the plaintiffs and his appeal is also to be dismissed.

13. In view of the above I would dismiss the appeal with costs.

Desai J.

14. The respondents filed a suit for recovery of money against Smt. Bittan Bibi, wife of Kedar Nath, legal practitioner, and her daughters Manno Bibi and Seoti Bibi and son, Kailash Nath. The trial Court decreed the suit for a part of the amount claimed and only against the mother (Bittan Bibi). The respondents filed an appeal from that decree and the mother also filed a cross-objection. The District Judge allowed the appeal, passed a decree for a larger sum and against the mother and Kailash Nath, and dismissed the cross-objection of the mother. The mother and Kailash Nath have filed this second appeal from the decree of the learned District Judge.

15. It is admitted that the plaintiffs, who are husband and wife, live just in front of Kedar Nath's house, that the mother is an illiterate lady, that the relations between her and Smt. Partab Dei, plaintiff-respondent, were very cordial up to 1937 and that she had been borrowing money off and on from Partab Dei after pawning ornaments. It is further admitted that Kedar Nath and Bittan Bibi have three more issues, namely Bishambhar Nath, who is the eldest issue, Shambhu Nath and Amar Nath.

16. The plaintiffs sued the mother and her children on the following allegations:

> The defendants borrowed Rs. 7900 odd on various dates on the security of ornaments and Rs. 1300 more without any security. They did not pay anything. On 20-5-37 they allowed the plaintiffs to sell the pawned ornaments and promised to pay the balance if there was any. The plaintiffs sold the ornaments for Rs. 8800 odd leaving a balance of Rs. 2058-13-9 still due to them. The defendants jointly and severally took upon themselves the responsibility to repay the debt but have not paid anything. If they are not proved to be jointly liable then individual decrees may be passed against them for the amounts found due from each.

17. Two separate but almost identical written statements were filed, one by the mother and the other by Seoti Bibi and Kailash Nath. The mother admitted having pawned ornaments with Smt. Partab Dei. The other allegations were denied by her and her children. All of them pleaded that Bishambhar Nath was a libertine and gambler, and pestered his mother for money for his nefarious activities. As relations between the mother and Smt. Partab Dei were cordial the latter taking undue advantage of the former's simplicity and illiteracy persuaded her to pawn her ornaments and borrow money on interest. The mother kept everything secret from her husband and was under the thumb of Smt. Partab Dei, who got writings from her according to her dictation. The mother did not borrow anything after 1935; in particular she did not borrow Rs. 1300, said to have been borrowed without security. The writing Ex. 14, on which the plaintiffs relied as constituting an acknowledgment by Kailash Nath to pay the debt was extorted from him by Smt. Partab Dei by threatening to commit

suicide during the marriage ceremony of Shanti Devi, another daughter of Kedar Nath and Bittan Bibi.

18. The findings of the trial Court were that there was no truth in the allegation of the respondents that Rs. 1300 were advanced without any security that the mother was the sole debtor and that the acknowledgment EX. 14, had been obtained by the plaintiffs by exerting undue influence upon Kailash Nath and the mother.

19. The learned District Judge held that the lending of Rs. 1300 was proved, that no undue pressure was exerted by the plaintiffs to obtain the written acknowledgment EX. 14, that the loans were all taken by the mother and that Kailash Nath made himself liable as a surety for their repayment. So he increased the amount for which the trial Court had passed the decree and made Kailash Nath also bound by it.

20. The concurrent finding of the Courts below that the mother was the sole debtor and that the loans were always made to her is of fact and cannot be challenged in second appeal. Even if it were liable to be challenged, the challenge would not have succeeded because there is overwhelming evidence to prove that the mother was the real and actual borrower and there is nothing in rebuttal. Smt. Partab Dei herself admitted that the mother was the real debtor and that she always thought that she was advancing the loans to her. The plaintiffs have filed a number of parchas which acknowledge receipt of money from Smt. Partab Dei on the security of ornaments. These parchas have been written in the name of the mother though signed by one daughter or another of hers on her behalf, she being illiterate. It was admitted by Smt. Partab Dei that the parchas were written and signed by the daughters because the mother was illiterate, and that they and Kailash Nath used to go to her to borrow the money in the name of their mother. In the plaint itself it is said that :

> "sometimes defendant 1 borrowed herself and sometimes through her son and daughters and sometimes defendants 2 to 4 borrowed money in the name of their mother on the security of ornaments."

There is undoubtedly truth in the evidence of the appellants that the money was borrowed because the mother could not resist the demands of her extravagant son, Bishambhar Nath. There was no need otherwise to borrow the money because Kedar Nath was earning sufficiently for the purposes of the family. Smt. Partab Dei admitted that Bishambhar Nath was a man of bad character. Kailash Nath had just emerged out of infancy and neither he nor his sisters could have stood in need of borrowing money. There is nothing to differentiate one loan from another taken from the respondents, they admittedly stand on the same footing except that sum which was taken without any security on a higher rate of interest. It is therefore clear that the mother was the actual debtor liable to repay the money to the respondents.

21. The finding of the learned District Judge that the respondents had advanced Rs. 1300 also is again a finding of fact and nothing was urged against it.

22. The main dispute centres round the liability of Kailash Nath. That liability arose, if at all, only under the letter EX. 14, written by him and his mother and his sister Seoti Bibi on 20-5-37 to the respondents. Its gist is as follows:

> ". . . . have borrowed Rs. 7100 odd on pawning ornaments. You have been making persistent demands for a long time for your money. We promised several times to pay it but have not been able to pay it so far. We made best efforts to raise money but unsuccessfully. As the interest is accumulating day by day we think it proper to authorise you to sell the pawned ornaments in the market, and appropriate the sale proceeds towards the amount due to you and if anything still remains due to you we would pay it very soon.

23. The learned District Judge treated this letter as a security deed executed by Kailash Nath. He rightly remarked that a person who is a surety to a loan is also liable though the loan was not in fact taken by him. Though Kailash Nath did not borrow any money himself, he would be liable if he became a surety for its repayment. Where the learned District Judge went wrong is in holding that Kailash Nath became a surety when he appended his signature to the letter. A surety is a person who gives a guarantee and a guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default: see Section 126 of Contract Act. Kailash Nath did not give any guarantee through the writing; he did not say that if his mother did not pay the money he would pay it. Nor is there anything in the evidence to suggest that he undertook the liability not as a joint debtor but as a surety.

There is no evidence at all of any negotiations or talk between the parties for security of the debt. As a matter of fact when the debt was secured by ornaments, there was no necessity of any surety. The learned District Judge did not make Seoti Devi also liable as a surety. Under the letter her liability was exactly the same as Kailash Nath's and if she did not become a surety Kailash Nath also did not. The learned District Judge has not explained why he differentiated Seoti Devi's case from Kailash Nath's. It was not the respondents' case that the mother was the principal debtor and Kailash Nath her surety, and the learned District Judge does not appear to be justified in setting up a new case contrary to the pleadings. The respondents could not get any relief on the footing that Kailash Nath was a surety unless they amended their pleadings. There could be no departure from the pleadings without an amendment. The question whether Kailash Nath was a surety or not was one of fact and could not be decided in the respondents' favour unless they pleaded, and led evidence to prove, it. Kailash Nath ought to have had timely notice that he had to meet the case that his liability was that of a surety; he could not be taken by surprise, as he has been.

24. I now proceed to the question whether Kailash Nath can be made liable on his promise contained in the letter that he would pay the balance, if any, left after the sale of the ornaments. There is undoubtedly a promise by him and the promise can be said to have been accepted by the respondents. Consequently, there is an agreement; but in order that it should have the force of a contract, it should have been supported by consideration. So the question arises whether there was consideration behind the promise or it was a nudum pactum ex cuo non oritur actio. Before I come to that question, another question arises, whether the letter, which is unstamped, required to be

stamped and if so what is the effect of its being unstamped. I shall take up the second question first.

25. The letter is certainly an agreement or a promissory note. It is signed by the makers, is in favour of certain persons, namely, the respondents and contains a promise to pay. If the amount of money to be paid was certain, the letter would have been a promissory note as defined in the Stamp Act. Here the promise was to pay the balance of money left due after the sale of the ornaments. It can be said that the amount of money is not certain and so the letter does not amount to a promissory note. But in that case it would amount to an agreement because it contains definite promise and the terms on which it is made. It should have been stamped either as a promissory note or as an agreement. Had there been no promise, the letter would have amounted to an acknowledgment and, again, liable to be stamped as such.

26. Section 35, Stamp Act, lays down that no instrument chargeable with duty, "shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon by any such person or by any public officer, unless such instrument is duly stamped:

> Provided that--"(a) any such instrument not being an instrument chargeable with a duty of one anna only, or a bill of exchange or promissory note shall be admitted in evidence on payment of the duty with which the same is chargeable."
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> "Where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped." This is Section 36.
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> Section 61 lays down that when any Court, "makes an order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and penalty under Section 35", the appellate Court may "take such order into consideration"; if it is of the opinion that the instrument should not have been admitted in evidence without the payment of duty and penalty it may record a declaration to that effect, determine the amount of duty, impound the document and send a copy of the declaration together with the instrument to the Collector.

27. Section 35 prohibits two acts, one of admitting a document, and the other of acting upon it. There is a distinction between the two acts; this is obvious from the very fact that the Legislature has dealt with them separately. Sundaram Chetti J. stated in Allagappa Chetti v. Narayanan, A. I. R. 1932 Mad. 765 that a distinction does exist between admission and acting upon. A Court is prohibited from admitting an instrument in evidence and a Court and a public officer both are prohibited from acting upon it. Thus a Court is prohibited from both admitting it in evidence and acting upon it. It follows that the acting upon is not included in the admission and that a document can be admitted in evidence but not be acted upon. Of course it cannot be acted upon without its being admitted, but it can be admitted and yet be not acted upon. If every document, upon admission, became automatically liable to be acted upon, the provision in Section 35 that an

instrument chargeable with duty but not duly stamped, shall not be acted upon by the Court, would be rendered redundant by the provision that it shall not be admitted in evidence for any purpose. To act upon an instrument is to give effect to it or to enforce it. When in a suit to recover money on a Hundi or promissory note a decree is passed, the hundi or promissory note is said to be acted upon; see Chenbasappa v. Lakshman Ram Chandra, 18 Bom. 369, Thaji Beebi v. Tirumaliappa, 30 Mad. 386, Lachhmi Narayan v. Braja Mohan, 51 Ind. App. 332 (P.c.), in which case Lord Dune-observed at p. 334 that "... cannot be acted upon, that is to say, nothing can be recovered under it" : Achhutaramanna v. Jagannadham, 64 Mad. L. J. 79, Sohan Lal v. Raghunath Singh, A. I. R. 1934 Lah. 606 and Maung Po Chein v. C.R.V. V.V. Chettiyar Firm, A. I. R. 1935 Rang. 282.

When there is an agreement to refer a dispute to arbitration and the agreement is produced before the arbitrator who makes an award, the agreement is said to have been acted upon: see Hurdwary Mul v. Ahmed Musaji, 1 Ind. Cas. 371 (Cal.). On the other hand, when an instrument is admitted in evidence, it may be admitted not only for the purpose of being acted upon but also for other purposes. It may be admitted for a collateral purpose or to prove an ingredient of the cause of action on which the suit is filed. Sargent C. J. said in Fateh Chand Har Chand v. Kisan, 18 Bom. 614 that though an acknowledgment cannot be acted upon, it can be used for the collateral purpose of showing an acknowledgment. In Runqlal Kalloo Ram v. Kedar Nath, A. I. R. 1921 Cal. 613, it was held that once a document is admitted in evidence, it becomes available in that proceeding for all purposes as if it had been properly stamped. This is correct, provided there is no limitation on the use to which the document may be put upon admission into evidence. It is possible for its use to be restricted. If a statute lays down that a document should not be acted upon, its use upon admission is restricted and, while it can be used for a collateral purpose, it cannot be used for the purpose of being given effect to or specifically enforced. In Lakshmappa v. Masud Sahib, A. I. R. 1934 Mad. 700, Venkatasubbarao J. observed that Section 34 "necessarily implies that it must also be acted upon; to hold differently would be to nullify the section."

I agree that an instrument that is admitted in evidence may be acted upon if there is nothing to the contrary in the law, but I cannot agree that it is not possible even for the Legislature to restrict the use to which it may be put upon admission and that Sections 35 and 36 do not restrict its use. The first proviso to Section 35 only permits an instrument to be admitted, in evidence but does not permit its being acted upon; out of the two bars imposed by the main body of the section only one bar, namely, that on the admission in evidence is removed by the proviso, and the other bar, namely, that on the acting upon is left intact. Similarly, Section 36 prevents the calling in question of only the admission of the instrument in evidence and not that of the acting upon it. It is to be read with Section 35; if a Court has wrongly admitted an instrument in evidence and wrongly acted upon it, only the wrong admission in evidence cannot be called in question except as provided in Section 61, but the wrong acting upon can be questioned as any other wrong act or finding of the Court. As admitting in evidence and acting upon are different acts, though the latter act may be permitted on the former act being done, it cannot be said to be included in the former act and it cannot be contended that when the former act cannot be challenged the latter act also cannot be challenged. Stone C. J. and Vivian Bose J. repelled the argument that Section 36 prevents the questioning of only the admission and not that of the acting upon, by observing, at p. 221, that:

> "When the document has been admitted, then Section 36 comes into play and thereafter Court should proceed as though it were properly admitted, see : Ram Chandra Krishnaji v. Zolba Balaji, A. I. R. 1939 Nag. 220;"

There are several cases in which the admission of an instrument by the trial Court has been held to be not liable to be challenged subsequently, but without any discussion of the question whether the trial Court's acting upon it can be challenged in appeal or not; see for instance Avadh Singh v. Bandhir Singh, 1938 oudh W. n. 1085, Prakasam v. Nagabhushanam, A. I. R. 1938 Mad. 938, Collector of Peshawar v. Mohammad Ashraf Khan, A. I. R. 1936 Pesh. 186, Lakshmi Das v. Lakho Ram, A. I. R. 1935 ALL. 410, Deva Chand v. Hira Chand, 13 Bom. 449 and Alimane v. Subbarayadu, A. I. R. 1932 Mad. 693. They were all suits for recovery of money on an unstamped promissory note or hundi, the instrument was admitted in evidence by the trial Court which passed a decree and the appellate Court was held to be incompetent to question the admission and set aside the decree. As there was no discussion of the question whether the acting upon can be called in question or not, they are of no assistance.

In Mimi v. Sohan Singh, 33 Ind. Cas. 695 (U.b.), the Judicial Commissioner of Upper Burma took the view that the reason why Section 36 deals with only the admission is that it includes such action as necessarily follows upon admission in evidence including the passing of a decree and that to admit a document in evidence is to act upon it. With great respect to the learned Judicial Commissioner, I am of the opinion that the view is erroneous because it fails to distinguish between admission in evidence and acting upon. The distinction between acting upon and using the instrument for a collateral purpose is real and has been recognised in the English law also. In Ponsford v. Walton, (1868) 3 C.P. 167, at p. 171 Bovill C. J. approved of Lord Denman's statement in R. v. Gompertz, (1882) 9 Q. B. 824 at p. 839 that:

> "Where the object of the evidence is not to enforce or set up the instrument as a valid instrument, but merely to show that it was part of a scheme of fraud, and so to use it for a purpose collateral to the object apparent upon the face of it, there are many cases in which it has been held that a written instrument, requiring a stamp but unstamped, is admissible."

In that case an unstamped deed of assignment was received in evidence not to be acted upon but for the purpose of showing that the executant had by executing it committed an act of bankruptcy. Section 14, British Stamp Act, 54 and 55 vic., c. 39, by Sub-section (1) allowed an unstamped instrument to be received in evidence, on payment of the duty and penalty and by Sub-section (4) prohibited that otherwise no unstamped instrument that should have been stamped should be given in evidence, or be available for any purpose whatever.

The Indian Stamp Act was enacted just after the British Stamp Act, but it used different language and the question that has arisen before us could not arise under the British Act. The British Act might have allowed an unstamped instrument to be received in evidence for the purpose of being acted upon on payment of the duty and penalty but in that case it has done so by using appropriate language. When there is a real distinction between acting upon and using the instrument for a

collateral purpose, Section 36 prohibits only the admission in evidence being challenged subsequently and no absurdity or repugnance results from holding that admission in evidence may not be challenged but acting upon can be. I consider that it is not open to a Court to hold that the bar imposed under Section 36 covers a challenge to the acting upon as well. It is not difficult to understand why the Legislature laid down in Section 36 that the admission in evidence shall not be called in question and left the acting upon to be called in question. The maximum use to which the instrument can be put is by acting upon it and there is nothing unreasonable or far-fetched in presuming that the Legislature did not intend that an unstamped document should ever be acted upon.

The Stamp Act is a fiscal enactment; its sole object is to get in revenue. As stated by Richardson J., at p. 615, in Runglal Kalloo Ram's case, "the object of the Legislature appears to have been to secure the public revenue". In the words of Parsons J. in Deva Chand's case (at p. 455), with whom the Full Bench agreed on Letters Patent Appeal, "the Stamp Act is a purely fiscal regulation. Its sole object is to increase the revenue, and all its provisions must be construed as having in view the protection of the revenue."

The best way in which the revenue could be protected was by laying down that an unstamped instrument, which should have been stamped, should not be acted upon, though it can be used for a collateral purpose. The Legislature had no intention of subjecting an instrument to a stamp duty when it was to be used for a collateral purpose; so it allowed it to be received in evidence as an unstamped instrument on payment of the duty and penalty. It is a matter only between the parties to the suit whether an unstamped instrument is used for a collateral purpose or not. If they themselves do not object to the collateral use, Legislature did dot think it advisable that the admission should be allowed to be questioned subsequently. But when it came to acting upon the instrument, that is its being used to achieve the object for which it was executed, the Legislature put its foot down and prohibited the acting upon. That explains why it allowed an unstamped instrument to be admitted in evidence on the payment of the duty and penalty under the first proviso to Section 35 and prohibited the calling in question of the admission.

The words "admitted in evidence" occurring in the proviso and in Section 36 must have exactly the same meaning as in the body of Section 35. If they do not include "acting upon" in the body of Section 35, they do not include it when used in the proviso to that section and in Section 36. I do not agree with the statement of Sundaram Chetti J. in the case of Allagappa Chetti that the words "acting upon" do not merely indicate the passing of a decree upon the instrument, that passing a decree on its basis is only one way of acting upon it and that if only the admission were free from challenge, it would be practically a dead letter. I respectfully differ from the interpretation of the words "acting upon"; I have already explained how an instrument after admission can be used for purposes other than that of being acting upon; so it would not be right to say that if the acting upon were prohibited, the admission in evidence would be entirely nugatory.

28. The opinion that I have formed receives support from several authorities laying down that even when the execution of an unstamped instrument is admitted by the defendant it cannot be acted upon and no decree can he passed on its basis. Those authorities are Chenbasappa v. Lakshman

Ram Chandra, 18 Bom. 369; Sohan Lal v. Raghunath Singh, A. I. R. 1934 Lah. 606 and Maung Po Chein v. C. R. V. V. V. Chettyar Firm, A. I. R. 1935 Rang. 282. They establish the distinction between admission in evidence and acting upon and indicate that though an instrument may be admitted in evidence it may still be not acted upon on the ground that it is not stamped.

29. It is laid down in proviso (b) to Section 35 that an unstamped receipt would be admissible in evidence against the person granting it on payment of a penalty by the person tendering it in evidence. As a receipt is to be used for a purpose other than that of being acted upon, this proviso does not go against the view expressed above. The last proviso (e) undoubtedly creates difficulty. It lays down that nothing contained in Section 35 shall prevent the admission of any document which has been executed by or on behalf of the Crown or which bears the certificate of the Collector as provided by Section 32 or any other provision of the Stamp Act. It cannot be said with certainty that the Legislature intended that an unstamped document by or on behalf of the Crown shall be admitted in evidence but be not acted upon.

The position would become more anomalous in respect of a document which has been certified by the Collector to be duly stamped. Any person can take an instrument, whether executed or not and obtain the Collector's opinion about the duty with which it is chargeable and if he has already paid the duty or pays the duty determined by the Collector, the Collector is bound to certify the instrument as duly stamped. If still a Court in which it is tendered in evidence finds that it is not duly stamped, the main provision of Section 35 would prevent its admission in evidence and also its being acted upon. The proviso (e) removes the bar on the admission but says nothing about the acting upon. It would be absurd if inspite of the person's paying the stamp duty in accordance with the opinion of the Collector, he were to suffer on account of the instrument being prevented from being acted upon. The Legislature must be credited with the intention that when an instrument bears the Collector's certificate, it must not only be admitted in evidence but also be acted upon by the Court, notwithstanding its opinion that it is not duly stamped. If the instrument was not duly stamped, it was not due to any fault of the person and it would be unjust to penalise him. This is the only provision in the whole Act which would support the view that the act of admitting an instrument in evidence includes acting upon it. As there are strong reasons for the contrary view, I would accept it and would construe the proviso (e) as containing an omission by way of a drafting mistake. I would supply the words "and acting upon" after the word "admission" in it.

30. The words "admitted in evidence" simply mean that the instrument has been received by the Court with the intention of treating it as "evidence. Mere physical act of receiving it without the intention of treating it as evidence, does not amount to admitting it in evidence. A document is physically received by a Court or its official as soon as it is presented; the questions whether it is relevant or admissible in evidence and whether it is duly stamped and registered are decided later on. The admission of documents is dealt with in Order 13, Civil P. C., which distinguishes between the physical act of receiving a document and the judicial act of admitting it in evidence. Rules 1 (2) and 2 deal with receiving a document, while Rule 4 deals with admitting it in evidence. A document that is admitted in evidence must be endorsed in the manner prescribed in Rules 4, etc. section 33, Stamp Act, casts a duty upon every Court to examine every document chargeable with stamp duty. If it is not duly stamped, Section 35 debars it from admitting in evidence, and acting upon it. If this

law is correctly observed, an unstamped document that should have been stamped would not be admitted in evidence at all. But neither does every Court perfrom its duty in every case, nor does it always perform it correctly, with the consequence that some unstamped documents are admitted in evidence though they should have been stamped. Where a Court considers the question of the chargeability of a document with stamp duty, there is no doubt that when it holds that it is duly stamped and receives it in evidence, it admits it in evidence within the meaning of Section 36. A doubt is created when a Court, without considering the question of the chargeability at all, receives it in evidence and even endorses it as admitted in evidence; the doubt is whether in that case it can be said that it has admitted it in evidence within the meaning of Section 36 or not. There is overwhelming support for the view that the Court would be deemed to have admitted it in evidence. Provided that its act is not merely the physical act of receiving the document and that it has intended to read it in evidence, it has admitted it in evidence even though it has not given any thought to the question of its chargeability with stamp duty. It is not essential at all that it should pass a specific order admitting it in evidence; even the endorsement made in compliance with Order 13, Rule 4, Civil P. C., would amount to admission in evidence.

Sir N.G. Chandavarkar and Heaton, JJ. stated in Chunilal Tulsiram v. Mulabai, 6 Ind. Cas 903 at p. 904 (Bom.) :

> " 'Admitted in evidence' means the act of letting the document in as part of the evidence; but it must be letting in as a result of judicial determination of the question whether it can be admitted in evidence or not for want of stamp. In other words, the Court admitting it must have applied its mind consciously to the question whether the document is admissible or not. It may, of course, happen in some cases that a document, which is not admissible for want of stamp, is allowed by the Court to go in, the question of stamp escaping its notice as well as the attention of the parties. In such cases the admission is a judicial determination of the question, because the Court let in the document on its view that there was nothing against its admission."

In Runglal Kalloo Ram v. Kedar Nath (A. I. R. 1921 Cal. 613), Joyman Bewa v. Easin Sarcar, 53 Ccal. 515, Piran Ditta v. Mangal Singh, 108 Pun. Re. 1908 at p. 498, Lakshmi Das v. Lakho Ram, A.I. R. 1935 All. 410, Collector of Peshawar v. Mohammad Ashraf Khan (A.I. R. 1936 Pesh. 186), M.K. Lodhi v. Ziaul Huq, A. I. R. 1939 ALL. 588, Prakasam v. Nagabhushanam, A. I. R. 1938 Mad. 938 and Awadh Singh v. Randhir Singh, 1938 Oudh W.N. 1085, a document was held to have been admitted in evidence without any specific order of the Court disposing of the question of its chargeability with stamp duty. Iqbal Ahmad J. stated in Lodhi's case at p. 590, with reference to Section 36, that :

> "There is nothing in the Section to warrant the conclusion that the Section has application only to cases in which the Court had admitted the document after consciously applying its mind to the question of admissibility."

In Abdul Wahab v. Kanaka Anjaneyalu, A. I. R. 1935 Mad. 888 there was only the physical act of receiving a document done by the commissioner who expressly left the question of its admissibility

to be decided by the Court and so the act was held not to be one of admitting it in evidence. Pandrang Row J. observed at p. 889:

> "Admission in evidence obviously implies some mental decision regarding the question of admitting in evidence. Of course it would not involve the decision of an objection if any objection is raised. But even if no objection is raised, it involves a decision to the effect that the evidence should be admitted as such."

Madhavan Nair J. in Prakashanam's case held that Section 36 does not explicitly say that there must be a judicial determination of the question of the chargeability of the document and that if it is admitted in evidence in accordance with the Rules of the Civil Procedure Code, the plain meaning of its words is satisfied. The observation of Iqbal Ahmad, J. in the case of Lodhi seems to go too far; a decision of the Court that the instrument should be read in evidence must be there, though not a decision that it has been duly stamped or is not chargeable with stamp duty. The act of admitting a document in evidence is clearly a judicial act. I, therefore, cannot agree with him that no decision about the admissibility is essential. In the present case the trial Court did not consider the question of the chargeability of the letter under discussion. But it endorsed it, treated it as evidence and also allowed witnesses to be cross-examined with regard to it; therefore there can be no doubt about its having been admitted in evidence.

31. The letter has been erroneously admitted in evidence. Its admission in evidence cannot be questioned, except as provided in Section 61. The first requisite for the applicability of Section 61 is the making of an order by the Court admitting a document in evidence as duly stamped. While the legislature used the words "admitted in evidence" in Sections 35 and 36, it used the words "makes an order admitting in evidence" in Section 61. This difference in the words used in the three sections is not accidental but deliberate. What may amount to admitting a document in evidence within the meaning of Sections 35 and 36 will not necessarily amount to making an order admitting it in evidence. No specific order admitting it in evidence is essential for the applicability of Sections 35 and 36, but it is essential for the applicability of Section 61. When the words used are "makes an order', it means that there is in existence a specific order; an implied order is not an order made.

This interpretation receives support from the provision that the appellate Court may "take such order into consideration". Unless there is in existence an actual order, there is nothing which can be taken into consideration. An implied order is impossible to be taken into consideration. I respectfully agree with the following observation of Abdul Rashid J. in Mirza Faridun Beg v. Emperor, A. I. R. 1935 Lah. 909 :

> "Such an order must have a real existence. An order by implication cannot be taken into consideration by an appellate Court."

Middleton J. C. dissented, in the case of Collector of Peshawar, A. I. R. 1936 Pesh. 186, from the view of Abdul Bashid J., but the learned Judicial Commissioner did not at all consider the difference in the words used in Sections 36 and 61. The view of Abdul Rashid J., was confirmed by him and Mahajan J., (now a Judge of the Supreme Court) in Emperor v. Gian Chand, A. I. R. 1946 Lah. 265.

In the present case there is no order admitting the letter in evidence; the endorsement is not an order but only a recital of the fact that it has been admitted in evidence. As there is no order which can be taken into consideration, we cannot do the act contemplated by Section 61. We, therefore, cannot question the admission of the letter in evidence. It was not argued that the words "at any stage of the same suit" do not include the appeal stage. All High Courts are unanimous in laying down that the words include the appeal stage and that once a document has been admitted in evidence the admission cannot be questioned even in the appeal, (except as provided in Section 61).

32. I do not see any force in the argument that the words "where an instrument has been admitted in evidence" refer only to such instruments as can be admitted in evidence under proviso (a) to Section 35 and exclude other documents such as promissory notes and receipts. The words used in the section are quite general and there is nothing in any other provision of the Act to support the view that they contemplate only those documents which can be admitted in evidence under the proviso (a). In the case of Lakhmi Das (A.I.R. 1935 ALL. 410), Bennett J., decided that Section 61 does not give the Court any jurisdiction to deal with an instrument which was prohibited from being admitted in evidence even on payment of the duty and penalty, but that view has been dissented from by other High Courts; for example see Nagappa Chetti v. V.A.A.R. Firm, A. I. R. 1925 Mad. 1215 ; Collector of Peshawar v. Mahammad Ashraf Khan, (A. I. R. 1936 Pesh. 186) ; Lakshmappa v. Masud, (A. I. R. 1934 Mad. 700) and Krishna Kumar v. Gajapati Kuer, (16 pat. 84). Section 36 refers to all instruments that have been admitted in evidence, whether on payment of the deficit duty and penalty or on the ground that they have been duly stamped or are not chargeable with stamp duty. It contemplates all cases of erroneous admission in evidence; a document may be erroneously admitted in evidence as much by saying that it is not a promissory note but an acknowledgment or agreement as by saying that it does not require to be stamped at all. It would be a fallacy to argue that it cannot refer to instruments which cannot possibly be admitted in evidence after realising the deficit duty and penalty.

33. Though we cannot question the admission of the letter in evidence, we can certainly question, in exercise of our ordinary appellate powers, its being acted upon. The trial Court, after admitting it in evidence, could have used it for any purpose short of acting upon it by passing a decree on it. As it hag passed a decree on it, it has acted erroneously and we can set right the error by question of the decree passed on its basis. The liability of Bittan Bibi exists independently of the letter; so the decree against her must stand. The liability of Kedar Nath only arises under the letter and we must not enforce that liability. In other words, we must pass the decree only against Bittan Bibi.

34. Kedar Nath succeeds on the other ground also, namely, that there was no consideration for his promise to pay the balance. There is absolutely no evidence of any consideration. No consideration was even pleaded. The money was always borrowed by Bittan Bibi and never by Kailash Nath. Partabi Dei in her deposition offered no explanation whatsoever for the writing of the letter. Had there been any consideration, she would have been the first witness to depose about it. There is thus no oral evidence of any consideration.

35. The letter is the only document which could contain the evidence of consideration, if any. But it also does not contain evidence of any consideration.

36. We have borrowed the doctrine of consideration from the English Common Law. The doctrine has been attacked in England, but we are not concerned with the attack because the doctrine finds place in the statute and our dependence on the English Common Law ceased (except as regards interpretation) as soon as the Contract Act was brought on the statute book. Lord Mansfield equated consideration with moral obligation, but his view was repudiated in Eastwood v. Kenyon, (1840) 11 Ad. & El. 438. Consideration is "not to be identified with the intention of the parties to affect their legal relations nor with the idea of moral obligation nor with the motive which may have induced the defendant to give his promise" ; see Cheshire and Fifoot's Law of Contracts, (1945) p. 45.

Forbearance to sue is undoubtedly a consideration and if Kailash Nath gave the promise in return for the respondents' forbearing to sue, the promise would have to be upheld as a contract with consideration. It is stated by Cheshire and Pifoot, at p. 65, that there need not be any actual promise to forbear, "if such an understanding can be inferred from the circumstances and is followed by a forbearance in fact."

But there must be real and not illusory consideration :

> "Before any act, forbearance or promise which is offered in exchange for a promise can be regarded as consideration for the offeree's promise, if given, it must appear that the offeree gave his promise as the price of and to secure what was offered. The notion of something appearing to have been bargained for and bought with the promise is essential in the doctrine of consideration." (Salmond and Williams on Contracts, 2nd Edn. p. 101).
>
> It is a question of fact whether in any particular case that element of bargaining is present in the agreement. If the agreement contains an express statement in the matter, i. e. expressly declares a nominal consideration, there will be no difficulty in answering it. Otherwise one will have to ascertain the meaning of the acts and words by which the parties arrived at their agreement. One factor which will indicate that the conduct of one party was consideration for the promise of the other is that that conduct was requested by the latter in offering his promise. If at the request of the guarantor the creditor does in fact forbear, there is in fact sufficient consideration to bind the guarantor who has promised to pay the debt. If the request is to be implied from the circumstances, it is the same as if there were an express request. (See Salmond and Williams, at pp. 104 and 105).

37. Considering the letter in the light of the above statement of law, I find that there was no consideration. The letter contains no evidence of any bargaining, and one cannot say on reading it that there was ever any request by Kailash Nath that the respondents should forbear to sue on return for his guarenteeing the payment of the balance. There was admittedly no express request, but there was no implied request also. Neither of the Courts below has found that an implied request existed. I do not think it is open to us to find as a matter of fact that it existed, when there was no plea to that effect and the appellants were given no opportunity of producing any evidence to prove that really there was no request. The respondents might have forborne to sue, but that must have

been of their own volition. When the appellants asked, through the letter, the respondents to sell the ornaments and realise their dues there would not remain any question of forbearance to sue. Even for the balance, there was no suggestion at all that they should forbear to sue; on the other hand the appellants promised to pay the balance "very soon". Thus there was no talk whatsoever between the parties about suing and forbearing to sue. The only thing is that the respondents demanded their money. They did not even threaten to sue; at least there is no evidence of any such threat. It is stated in the letter that the respondents demanded their money from all those who signed it. Thus Kailash Nath signed the letter because he considered himself to be a joint debtor and not because of the respondents accepting any request of his to forbear to sue. Kailash Nath's considering himself to be a joint debtor would certainly not support his promise in the letter to pay the debt. Past forbearance also would not have served as consideration for want of request and bargaining; it would be only past consideration and not executed consideration. Executed consideration is valid consideration but not past consideration. It was stated in Lampleigh v. Brathwait, (1615), 1 Sm. L.C., (13th Ed.) p. 148, that :

> "a mere voluntary courtesy will not have a consideration to uphold an Assumpsit", and that "if the courtesy were moved by a suit or request of the party that gives the Assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before."

The previous request and the subsequent promise are to be treated as part of the same transaction. So, had the past forbearance been due to a request by Kailash Nath, the subsequent promise by him would have been supported by the past forbearance. But there is no evidence of any previous request also. After the decision in Lampleigh v. Brathwait, another condition has been added for the validity of past consideration and it is that both the parties must have assumed throughout their past negotiations that the services were ultimately to be paid for; i. e., they must have been performed in the way of business, not as an office of friendship. There is no evidence that the parties assumed throughout their negotiations resulting in the past forbearance that the forbearance would have to be ultimately paid for. It is stated in the letter that the appellants had made several promises to pay the debt but were unable to pay them. This does not mean that they requested and were requesting the respondents to forbear to sue. Making a demand does not always include a threat to sue if the demand is not satisfied at once or within a reasonable time. It would appear from the letter that Kailash Nath signed it because the demand was made from him and for no other reason. He probably considered himself under a moral obligation to repay the debt, but really he was under no obligation at all.

Learned counsel for the respondents relied upon Crears v. Hunter, (1887) 19 Q. b. D. 341. The facts of that case are different from those in the instant case. There F had borrowed money from C, promising that his son H, when of age, would become surety for the debt. When H attained majority, C took a promissory note stamp to the house of F where H was and a promissory note was drawn up by both F and H, jointly and severally promising to pay to C the money which had been borrowed by F. On several occasions interest was paid in the presence of H and C issued receipts in the joint names of F and H. Later C sued H and the executor of F (who was dead) for the principal due to him. It was contended on behalf of H that there was no consideration for his promise contained in the

promissory note. No talk had taken place between the parties when it was drawn up. But Lord Esher, M.R. relied upon the fact that the note contained a promise to pay interest in future thereby indicating that the parties contemplated that it might not be sued on for some time. Though there was no express request by H that C should forbear to sue F, that was the substance of the transaction.

Lord Esher conceded that the mere fact of forbearance would not be a consideration for a person's becoming surety for a debt. His judgment proceeded on the basis that there was an implied request by H that C should forbear to sue F. There was no promise by C to forbear to sue, but the mere act of forbearance by him meant that he had given the promise. Of course in the instant case had there been any request on the part of Kailash Nath to the respondents to forbear to sue, the very act of forbearance would have amounted to acceptance of the request and the promise of Kailash Nath would have been found to be supported by a consideration. It is the absence of any request, express or implied by Kailash Nath, that distinguishes the instant case from that of Crears. Further, the question in that case was whether there was sufficient evidence to entitle the jury to infer that the understanding between C and H was that if C gave time to F, H would make himself responsible and this question was answered by the Court of appeal in the affirmative. The question was not whether the jury's finding, which was in favour of C, was correct or not. As there were circumstances from which the jury could have inferred that there was the necessary understanding between C and H, the charge to the jury was upheld as correct. Of course, Lord Esher agreed with the inference of the jury, but that was besides the point.

Lindley L.J., who agreed with Lord Esher, distinguished the case from Crofts v. Beals, (1851) 11 C.b. 172, on the ground that in the latter case there was no request and no consideration. Lopes L. J., also remarked that actual forbearance by itself would not be sufficient and that it must have been at the request, express or implied, of the promisor. I have already found that there was no evidence of any request, express or implied, by Kailash Nath, and I have also found that it is too late for the respondents to ask us to give a decision on this question.

38. I find that the respondents could get no decree on the basis of the letter EX. 14, firstly, because it is unstamped, and, secondly, because the promise contained in it does not amount to a contract. I would, therefore, partly allow this appeal and modify the decree passed by the lower appellate Court to this extent that only Shrimati Bittan Bibi will be liable under it, the suit will be dismissed as against Kailash Nath and Shrimati Bittan Bibi will pay the respondents' costs of the Courts below and the respondents will pay Kailash Nath's costs of the Courts below. As regards the costs of this Court, the respondents will get half of theirs from Shrimati Bittan Bibi and will pay Kailash Nath his costs. When the decree is prepared the costs due to the respondents from Shrimati Bittan Bibi will be set off against the costs due to Kailash Nath from them and the actual decree will be for the balance of the costs in favour of the respondents as against Shrimati Bittan Bibi or in favour of Kailash Nath as against the respondents, depending upon whether the balance is in favour of the respondents or Kailash Nath.

The Court

39. In view of the difference of opinion between us, the following questions of law are referred to a third Judge for opinion :

> 1. If a trial Court erroneously admits in evidence an unstamped promissory note or agreement and passes a decree on its basis, is an appellate Court debarred by Section 36 from setting aside the decree on the ground that the document should not have been acted upon ?
>
> 2. Does the letter EX. 14 make Kailash Nath surety for the loans which his mother Smt. Bittan Bibi and other signatories to the letter were liable to pay ?

3A. Did the contents of the letter EX. 14 considered in the surrounding circumstances imply a request by Kailash Nath to the plaintiffs to forbear from suing Smt. Bittan Bibi for the recovery of the amount due on account of the debts advanced on the security of ornaments or otherwise ?

3B. Is it open to the plaintiff to take this plea in second appeal for the first time ?

4. Can the plaintiff be given a decree against Kailash Nath on the basis of his liability as surety, in this suit without there being any such plea ?

Brij Mohan Lall J.

40. Consequent on a difference of opinion between Dayal J. and Desai J., the following questions have been referred to me for opinion, viz :

> "1. If a trial Court erroneously admits in evidence an unstamped promissory note or agreement and passes a decree on its basis, is an appellate Court debarred by Section 36 from setting aside the decree on the ground that the document should not have been acted upon ?
>
> 2. Does the letter Ex. 14 make Kailash Nath surety for the loans which his mother, Smt. Bittan Bibi and other signatories to the letter were liable to pay ?
>
> 3A. Did the contents of the letter Ex. 14 considered in the surrounding circumstances imply a request by Kailash Nath to the plaintiffs to forbear from suing Smt. Bittan Bibi for the recovery of the amount due on account Of the debts advanced on the security of ornaments or otherwise?
>
> 3B. Is it open to the plaintiff to take this plea in second appeal for the first time ?
>
> 4. Can the plaintiff be given a decree against Kailash Nath on the basis of his liability as surety in this suit without there being any such plea ?"

41. The first question is a pure problem of law. Dayal J. answered it in the affirmative, while Desai J. answered it in the negative.

42. To appreciate the real question, it is necessary to refer to Sections 35 and 36, Stamp Act. They are as follows :

> "35. No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped :
>
> Provided that--
>
> (a) any such instrument not being an instrument chargeable with a duty of one anna or half an anna only, or a bill of exchange or promissory note shall subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;
>
> (b) where any person from whom a stamp receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;
>
> (c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters, and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped :
>
> (d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chap. XII or Chap. XXXVI, Criminal P. C., 1898;
>
> (e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Crown, or where it bears the certificate of the Collector as provided by Section 32 or any other provision of this Act."

36. Where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

43. It will appear from the language of Section 35 that it imposes two kinds of prohibitions, viz. that a document shall not be "admitted in evidence" and shall not be "acted upon." Section 36 prevents an appellate Court from challenging the admission in evidence of such a document. The argument which has appealed to Desai J. is that since Section 36 does not, in express language, debar the appellate Court from questioning the "acting upon" of a document, the said Court may, while keeping the document admitted in evidence, refuse to act upon it. The argument is plausible. But a close scrutiny of the provisions of the aforesaid two sections will make it clear that this was not the intention of law.

44. A document may be filed either as evidence or otherwise. In the former case, it is treated as an exhibit in the case and it must, of necessity, foe filed before a Court or any other person who by law or consent of parties has authority to receive evidence, e. g. an arbitrator or a commissioner. Instances of documents filed otherwise than as evidence are security bonds filed by an appellant for the costs of the respondent, security bonds filed by a judgment-debtor for obtaining stay of execution, security bonds filed by Nazirs, on their appointment as such, for the due discharge of the duties of their office and sale deeds presented for registration before the Sub-registrar. The intention of law is that all such documents are not to be taken into consideration and no action is to be taken on them if they are not properly stamped. The Legislature expressed this intention by classifying the documents in the aforesaid two categories and by saying in respect of the former that they shall not be admitted in evidence and by laying down in respect of the latter that they shall not be acted upon. One phrase alone could not govern both classes of documents. Had the Legislature simply stated that documents not duly stamped shall not be admitted in evidence, the second class of documents could not be excluded from consideration. The Nazir could easily say that he was not filing any evidence and therefore his security bond, though not duly stamped, should be acted upon. For similar reasons other persons enumerated above could insist that their security bonds should not be excluded from consideration.

45. The Legislature could not exclude all such documents by simply using the phrase "(shall not) be acted upon." Had that clause stood alone, the party producing in evidence a document, not properly stamped could argue that, although his document might not be acted upon in the sense that no decree could be passed on its basis, it could be used for some subsidiary purpose. But the intention of the law was that such a document should not be used "for any purpose." Therefore, it is obvious that the use of the clause "(shall not) be acted upon" also would not have covered all documents. The Legislature consequently felt the need of using the phrase "(shall not) be admitted in evidence for any purpose" in respect of documents produced in evidence and the clause "(shall not) be acted upon" in respect of other documents. It was considered unnecessary to use both clauses, viz. "not admitted in evidence" and "not acted upon" in respect of documents produced in evidence because if the documents were not admitted in evidence, they could not possibly he acted upon.

46. The object of enacting Section 36 was to debar an appellate Court from excluding from consideration a document not duly stamped which had been wrongly admitted in evidence by the lower. Court. Since the only ban which the Legislature had imposed by Section 35 against such a document was that it shall not "be admitted in evidence " the Legislature thought it fit to remove that ban alone by Section 36. The clause, "shall not be acted upon," had not, for the reasons already

stated, been used in respect of documents produced in evidence and therefore it was considered unnecessary to use any words to remove the ban of "not acting upon" in respect of documents admitted in evidence. It will, therefore, follow that once a document has been admitted by the lower. Court in evidence, the appellate Court has no power to prevent its being used for all purposes.

47. A contrary view will lead to anomalous results. For instance, proviso (a) to Section 35 says that when the duty and penalty have been paid in respect of a document not duly stamped, it shall be "admitted in evidence." According to the view of Desai J., such a document may be admitted in evidence but cannot be acted upon. But such is not the law. Their Lordships of the Privy Council have held in the case of Lachhmi Narayan v. Rameshwar Prasad, A. I. R. 1924 P. c. 221 (1) that on payment of duty and penalty such a document "becomes effective" meaning thereby that it can be acted upon. Their Lordships affirmed the decision of the Patna High Court in the case of Braj Mohan Singh v. Lachmi Narain, 58 Ind. Cas. 99 (Pat.). That was a case in which a lessor had sued the lessee of a mine for royalty and commission. The lease had been executed on a stamp paper of Rs. 40. Out of this sum of Rs. 40 a sum of Rs. 20 was paid in respect of Salami and the balance of Rs. 20 was intended to cover the commission and royalty. The plaintiff (lessor) had sued to recover a large sum of money. But the defence was that, since the stamp duty paid on the original lease in respect of commission and royalty was Rs. 20 only, not more than a sum of Rs. 2,000 could be recovered as commission and royalty by virtue of the provisions of Section 26, Stamp Act, because that was the highest amount which was covered by the stamp duty of Rs. 20. The plaintiff's argument, however, was that he could, by paying extra duty and penalty under Section 35, enforce the lease and recover the entire amount due to him. The learned Civil Judge held that "under Section 35, Stamp Act, the plaintiff was entitled, upon paying the deficit duty and penalty, amounting in all to Rs. 1980, to enforce his contract to the full amount of the commission payable under the lease."

This decision was upheld by the Patna High Court which decreed the claim for the full amount. Their Lordships of the Privy Council affirmed the judgment of the Patna High Court. In other words, their Lordships held that by payment of duty and penalty the document, which was not originally duly stamped, could not only be admitted in evidence but also acted upon.

48. Another inconvenient result which will follow from the opposite view is that pointed out by Desai J. himself, viz., that instruments executed by or on behalf of the State and instruments in respect of which the Collector has given a certificate under Section 82 or other provisions of the Act will also not be acted upon notwithstanding the fact that they will be admitted in evidence. It could not have been the intention of proviso (e) to Section 35 that such instruments will not be acted upon. The Privy Council case of Ma Pwa May v. Chettiar Firm, A. I. R. 1929 P. C. 279, is a clear authority on the subject. In that case, a mortgage deed had been executed on a stamp paper of improper description. It was therefore not a "duly stamped" instrument within the meaning of the phrase as defined in Section 2(11), Stamp Act. The Collector had, however, issued the necessary certificate under Section 38(2). Their Lordships decreed the suit which meant that they "acted upon" the document. Further, they referred to Section 36, Stamp Act, and, relying upon it, decreed the suit.

49. The same question arose for decision in the case of Ramchandra Krishnaji v. Zolba Balaji, A. I. R. 1939 Nag. 220 where the argument, viz., that a document might be admitted in evidence but be not acted upon, was overruled. A similar view was taken by the Madras High Court in the case of Lakshmappa v. Masud Sahib, A. I. R. 1934 Mad. 700 and Alagappa Chetti v. Narayanan Chettiar, A. I. R. 1932 Mad. 765. In the case of Mi Mi v. Sohan Singh, 33 Ind. Cas. 595 (F.b.) the Judicial Commissioner of Burma also took a similar view.

50. Had it been the intention of the legislature that a document should be admitted in evidence but should not be given its full effect, it would have used more explicit language than what is found in Section 36. I am, therefore, of the opinion that Section 36 prohibits an appellate Court not only from challenging the admission of a document in evidence but also from questioning the "acting upon" of the document.

51. Consequently, agreeing with Dayal J. I will answer the first question in the affirmative.

52. The second question formulated by the Bench for opinion runs thus :

> "Does the letter Ex. 14 make Kailash Nath surety for the loans which his mother, Shrimati Bittan Bibi and other signatories to the letter were liable to pay?"

In answering this question I have to confine my attention to letter EX. 14 only. This letter begins with a recital of the fact that loans have been taken on the security of pawned articles and also as unsecured debt. It then goes on to say that :

> "You have been insistently demanding the principal and interest for a long time. We made oral as well as written promises to pay but have not yet been able to pay anything. We made serious efforts for payment but failed. The interest is mounting up. In the circumstances, we consider it proper--and we write accordingly--that you should sell the pawned ornaments according to market rates and pay off the secured debt. The surplus may be appropriated to wards the payment of the sum of Rs. 1300--'(unsecured debt).' We shall have no objection. Whatever amount is left unpaid, we shall pay very soon."

53. This letter is signed, inter alia, by Kailash Nath. In order to determine whether or not he constituted himself as surety for his mother by writing this letter, it is necessary to see the definition of the term "surety." It is contained in Section 126, Contract Act. It is as follows :

> "A 'contract, of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety;' the person in respect of whose default the guarantee is given is called 'the principal debtor;' and the person to whom the guarantee is given is called the 'creditor.' A guarantee may be either oral or written."

54. It will follow from this definition that the person sought to be made liable as a surety should undertake to perform the promise or discharge the liability of a third person in case of his default Kailash Nath has nowhere stated, neither expressly nor impliedly, that he would be liable to pay the liability of his mother in case she fails to discharge it. The whole trend of the letter is that Kailash Nath himself is the principal debtor, a fact which has been found to be untrue. Kailash Nath was a lad who had just come of age. A document was secured from him containing facts which have been found to be untrue. If the facts contained in the letter have been found to be incorrect, it is not possible to read in the letter a different contract of which there is not the least mention in the document itself. In order to constitute Kailash Nath a surety for his mother, one has to read in the aforesaid document terms which do not exist.

55. Under Section 176, Contract Act, it was open to the creditors to sell the pledged goods on giving pawnors reasonable notice of the same. The object of writing the aforesaid letter was to confer the authority of sale on the creditors and thus to dispense with the necessity of giving a notice. Another object was to enable the creditors to appropriate towards the unsecured debt the surplus of the sale proceeds of the pledged ornaments. It was not the intention to constitute Kailash Nath a surety for his mother. I will, therefore, answer this question in the negative.

56. Questions 3A and 3B.--In order to constitute a forbearance there should be a request by a debtor to a creditor to refrain from suing and an acceptance by him of that request. The aforesaid letter, Ex. 14, indicates that the debtor and his children were anxious to have the debt repaid and were suggesting the device of selling the pledged ornaments in order to clear off the debt. But one does not find in the said letter the least indication of a request to refrain from suing. As the question has been formulated, I have to take into consideration the surrounding circumstances also in deciding as to whether or not there has been a request by Kailash Nath to the plaintiffs to forbear from suing. The only surrounding circumstance is that about five months earlier Kailash Nath had written a letter promising to clear the debt within two months. But this too did not contain a request to the plaintiffs to refrain from suing. Reference was made in this connection to the case of Crears v. Hunter, (1887) 19 Q. B. d. 341. In that case there was a finding of fact that the defendant had made a request to the plaintiff to forbear from suing his father. The Court held that this constituted a good consideration for the defendant's liability. The findings of fact recorded in this case were sufficient to justify the imposing of a liability on the defendant. But the question whether there has or has not been a request by a defendant to the plaintiff to forbear from suing is a question of fact and is to be determined in the particular circumstances of each case. The aforesaid ruling is of no help to determine the question of fact involved in the present case.

57. It is also to be remembered that had it been made clear to Kailash Nath during the pendency of the case in the trial Court that liability would be fastened on him because his letter was liable to be construed to contain a request for forbearance from suing, he might have given an explanation and might have cleared his position. He might have produced certain other evidence to negative the suggestion that he made any requests to the plaintiffs to refrain from suing. He has been deprived of that opportunity. It will not be proper to saddle him with liability without giving him the said opportunity. I am, therefore, of the opinion that, in the first place, there was no request by Kailash Nath to the plaintiffs to forbear from suing Shrimati Bittan Bibi and, secondly, that it is not open to

the plaintiffs to take this stand for the first time in second appeal.

58. Question 4.--As has been stated above, it was the plaintiffs' case in the plaint that all the defendants, including Kailash Nath, were principal debtors. The whole plaint has been read out to me and there is not one word in it to suggest that Kailash Nath was a surety. Paragraph 9 of the plaint, on which the learned counsel for the respondents relies, runs as follows :

> "Defendant 1 is the mother of defendants 2 to 4. Sometimes defendant 1 borrowed herself and sometimes through her son and daughters and sometimes defendants 2 to 4 borrowed money in the name of their mother on the security of ornaments. The defendants jointly and severally took upon themselves the responsibility to pay the debt. But as in the reply to the notice the ornaments have been alleged as belonging to different defendants the names of particular defendants who took the loan on the security of particular ornaments are shown against these ornaments at the foot of the plaint. If all the defendants are not proved to be jointly liable for payment then the amount which may be found due from a particular defendant may be awarded against him."

This paragraph does not, in my opinion, contain a single word to suggest that Kailash Nath was a surety and not a principal debtor.

59. Had it been made known to Kailash Nath that he would be made liable as a surety, he might have taken any defence appropriate to his character as a surety. Sections 142 to 144, Contract Act, lay down the circumstances in which a contract of guarantee, even if made, is invalid. Kailash Nath might have taken any one of these pleas. Similarly, Sections 133 to 135, 139 and 141 lay down the circumstances in which a surety, even if validly constituted, is discharged. It was open to Kailash Nath to plead any one of those circumstances in defence if he had been told in the trial Court that he was being treated as a surety. He has been deprived of all these opportunities. In the circumstances, it is not possible to raise this new question at a stage when Kailash Nath has no opportunity to give evidence. I will, therefore, answer this question in the negative.

60. The result is that on the first question I agree with Dayal J. and on others with Desai J.

61. Let the record be placed before the Bench concerned.