The word "chargeable" in section 21 must *prima facie* mean every kind of chargeability possible by reason of sections 19 and 20 of the Act, that is, every kind of chargeability under the original contract, and the term cannot be limited to personal liability only.

The result is, we think, that the suit is barred so far as the third defendant is concerned. We allow his appeal, and the suit is dismissed as against him with costs throughout. Half the pleader's fee only is allowed. But the appeal of defendants 1 and 2 is dismissed with costs. Time for payment is extended to four months from this date.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

BALASUNDARA NAIKER AND ANOTHER PLAINTIFFS 2 AND 3), APPELLANTS,

1929, April 15.

v.

RANGANATHA AIYAR AND OTHERS (DEFENDANTS 1 TO 17 AND FIRST PLAINTIFF), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 92, cl. (4)—Mortgage-bond —Discharge on payment of a portion of amount due, whether provable—Indian Contract Act (IX of 1872), sec. 63.—Registration Act (XVI of 1908), sec. 17.

Where a mortgagee agreed to take a payment by the debtor as a complete discharge, that is, not only promised previous to the payment to take it in complete discharge, but at the time of payment gave a discharge, such a discharge is not an agreement within section 92, clause (4) of the Evidence Act; consequently the discharge can be proved by oral evidence.

Mohin Chandra Dey v. *Ram Dayal Dutta*, (1925) 30 C.W.N., 371; and *Srimati Bhaba Sundari* v. *Ram Kamal Dutta*, (1926)

---

* Appeal No. 394 of 1924.

BALA-SUNDARA NAIKER v. RANGANATHA AIYAR.

44 Cal. L.J., 269, followed; *Jagannath* v. *Shankar*, (1919) I.L.R., 44 Bom., 55, dissented from.

Section 63 of the Indian Contract Act provides that no consideration is necessary, not for an agreement to remit, but for an actual remission.

APPEAL against the decree of the Court of the Additional Subordinate Judge of Tanjore in O.S. No. 42 of 1924.

The plaintiffs sued to recover a sum of money alleged to be the balance due on a mortgage bond executed by some of the defendants. The latter pleaded that the bond was discharged by the payment of a smaller amount as agreed to by the mortgagees. The plaintiffs contended, *inter alia*, that the discharge could not be legally proved. The Sub-Judge, who tried the suit, upheld the plea of the defendants and dismissed the suit. The plaintiffs appealed.

K. V. Krishnaswami Ayyar for appellants.—An oral agreement for discharge by payment of a lesser amount due on a registered mortgage bond, is not provable in law under section 92, clause (4) of the Evidence Act. A registered document is necessary. The agreement, being anterior to payment, is certainly invalid even though an agreement immediately before actual payment may be valid. See *Jagannath* v. *Shankar*(1), *Malappa* v. *Matum Nagu Chetty*(2), *Yegnanarayana Aiyar* v. *Suppan Chetty*(3), *Namagiri Lakshmi Ammal* v. *Srinivasa Ayyangar*(4).

T. R. Venkatarama Sastri for respondent.—There are three Acts to be considered: (1) Registration Act, (2) Contract Act, (3) Evidence Act. The Registration Act only says than an agreement, if in writing, should be registered, otherwise it would be inadmissible; (2) section 63 of the Indian Contract Act does not require consideration for a discharge (3). If there is an oral agreement previously made, and, at the time of payment by the mortgagor, the parties continued to abide by the agreement, section 92, clause (4) of the Evidence Act or the Registration

(1) (1919) I.L.R., 44 Bom., 55. (2) (1918) I.L.R., 42 Mad., 41.
(3) (1926) 52 M.L.J., 224. (4) (1915) 27 I.C., 239.

Act does not operate to prevent proof of the circumstances under which the payment was made. Oral evidence of an oral agreement as to full discharge by payment of an amount smaller than what was due, can be proved: See *Neelamani Patnaik Mussudi* v. *Sukaduvu Beharu*(1), *Gopalasami Ayyar* v. *Kalyana-rangappa*(2).

The decision in *Jagannath* v. *Shanker*(3) is dissented from in *Mohin Chandra Dey* v. *Ram Dayal Dutta*(4) and in *Srimati Bhaba Sundari* v. *Ram Kamal Dutta*(5).

JUDGMENT.

The suit out of which this appeal arises was filed on the footing of a mortgage bond, Exhibit A, for Rs. 8,000, dated 11th January 1903, executed in favour of four persons, namely, (1) father of third plaintiff, (2) father of seventeenth defendant, (3) father of second plaintiff and (4) the first plaintiff, by defendants 1 to 3 and their undivided father. Fourth defendant is the son of the first defendant. Defendants 5 to 9 are sons of second defendant. Defendants 10 to 16 are subsequent vendees and mortgagees of defendants 1 to 9. The four obligees of the bond belong to one family. The first two belong to one branch of the family. The third and the fourth who are sons of brothers belong to another branch. The two branches were separated even before 1909. Under the terms of the mortgage bond, the interest was to be paid at 9 per cent per annum on the 11th January of each year, and if it was not so paid the interest should be compounded and bear further interest at 10½ per cent per annum with annual rests. The whole amount was to be paid on 11th January 1906. In default, it should carry further compound interest at 10½ per cent per annum with annual rests. Some amounts were paid on 2nd May, 31st August, 21st October, 12th November

(1) (1919) I.L.R., 43 Mad., 803. (2) (1925) 48 M.L.J., 155.
(3) (1919) I.L.R., 44 Bom., 55. (4) (1925) 30 C.W.N., 371.
(5) (1926) 44 C.L.J., 269.

BALA-SUNDARA NAIKER v. RANGANATHA AIYAR.

1905 and were all endorsed on the bond on the last of these dates. Again, some amount was paid on 15th April 1906 and 19th January 1907 and these payments were endorsed on the latter date. In the year 1909, there was some litigation between the third plaintiff and the seventeenth defendant. This was O.S. No. 3 of 1909. That was a suit filed by the seventeenth defendant against the third plaintiff for partition of the properties belonging to their branch. Pending the suit, two Receivers were appointed in October 1909 for the purpose of collecting the assets due to the family. The Receivers were vakils of the Sub-Court of Mayavaram at Kumbakonam where the suit was filed. In 1912, while the suit was pending, the Court was transferred to Mayavaram, but before the transfer, the Receivers had collected more than one lakh and fifty thousand rupees and they were discharged in April 1912. One of the debts which they collected as Receivers was the debt due on the suit mortgage bond. As the debt was due not only to the two parties in that suit but also to two others, namely, plaintiffs 1 and 2, the collection was made with the co-operation of the two persons. The third plaintiff is a natural son of the second plaintiff but was adopted into a different branch and the second plaintiff conducted O.S. No. 3 of 1909 on behalf of the defendant therein, namely, the present third plaintiff. In his evidence, he admits that he used to go to the Receivers whenever sent for, and that in respect of the realization of the common debts the Receiver used to consult him and the first plaintiff. There is no doubt, therefore, that the work of collection was made by the Receivers with the co-operation of plaintiffs 1 and 2. The defendants' case now is that the Receivers filed some suits and the debtors pleaded in those suits that the provisions regarding interest were penal and unenforceable. The

Receivers compromised those suits agreeing to some reasonable rate of compensation and not insisting on the original rate of interest in the bond. This was done with the sanction of the Court. Similarly, in respect of the present suit bond, the Receivers and plaintiffs 1 and 2 agreed to take interest which would roughly work out compound interest at 9 per cent per annum and did not insist on the higher rate of $10\frac{1}{2}$ per cent per annum. They calculated the amount due on the bond on that footing and found that nearly a sum of Rs. 12,960 was due up to 20th March 1911. The amount was to be paid by the various obligors of the bond in proportion to their respective shares, they themselves being divided. Accordingly, the following sums were paid towards the suit mortgage bond, namely, (1) Rs. 4,300 on 29th March 1911 by the first defendant, (2) Rs. 4,300 on the same date by the third defendant, (3) Rs. 2,000 by second defendant on the same date and (4) Rs. 2,000 on 12th April 1911 by the second defendant. There still remained due a sum of Rs. 360 which was afterwards paid by the second defendant. These payments were accepted in full discharge of the debt due on the mortgage bond. Therefore the defendants pleaded that there was nothing due on the mortgage. The Subordinate Judge accepted the defendants' plea and dismissed the suit. The plaintiffs appeal.

On behalf of the appellants, it was contended that there was really no evidence to support the agreement and the subsequent discharge as pleaded by the defendants.

[Their Lordships then dealt with the evidence and then proceeded as follows :—]

Having regard to all the circumstances of the case, we are inclined to believe as a question of fact the plea raised by the defendants that the obligees of the bond

BALA-SUNDARA NAIKER v. RANGANATHA AIYAR.

took Rs. 12,960 in 1911 in complete discharge of the mortgage bond. It is immaterial on what basis the amount was really arrived at. But it adds a little more to the probabilities of the case that it works out practically to the sum due on the footing of 9 per cent compound interest.

It is next argued by the learned Advocate for the appellants that, assuming all the facts are in favour of the defendants, such a plea as that raised by the defendants is futile as the evidence adduced to support such a plea is inadmissible in evidence with reference to section 92, clause 4 of the Evidence Act. He relied on *Yegnanarayana Aiyar* v. *Suppan Chetty*(1), a decision of our brother, WALLER, J. We are informed that that decision is now under appeal under clause 15 of the Letters Patent. But we can consider the authorities relied on in that case. WALLER, J., has relied on the following cases:—*Namagiri Lakshmi Ammal* v. *Srinivasa Ayyangar*(2): In this case what was held by SESHAGIRI AYYAR, J., and KUMARASWAMI SASTRI, J., was that an endorsement on a mortgage bond reciting that the bond was cancelled and returned as the amount due was paid was inadmissible in evidence In that case, the endorsement was made with a view to defeat creditors though the amount was not really received and it was found that the endorsement was not admissible with reference to the language of section 17 (*n*) of the Registration Act. *Lakshmana Setti* v. *Chenchuramayya*(3): Here also the defendants relied on an agreement in writing by the mortgagee to relinquish a sum of money more than Rs. 100 due under the mortgage bond and it was held that it was inadmissible for want of registration under section 17. *Malappa* v. *Matum Nagu Chetty*(4): This was

(1) (1926) 52 M.L.J., 224.
(2) (1915) 27 I.C., 269.
(3) (1918) 34 M.L.J., 79.
(4) (1918) I.L.R., 42 Mad., 41.

a judgment of three Judges on a Letters Patent Appeal, and they unanimously held that a subsequent oral agreement to take less than what was due under the registered mortgage bond, being admitted in the pleadings, could be considered in the case and on this ground the appeal was dismissed and the mortgagee failed and the further remarks in the judgment with reference to section 92, clause 4, are strictly *obiter dicta*, but we agree that an oral agreement to take less than what is due under a registered mortgage bond would be inadmissible under section 92 (4); and *Jagannath* v. *Shankar*(1), which is a case like the present one supporting the appellant.

With reference to the first two cases, we observe that the question in them was whether a writing purporting to extinguish a mortgage bond was admissible under the Registration Act and it was held it was not admissible. In the case before us, there is no question of any writing being admissible or inadmissible with reference to the provisions of the Registration Act. If the writing itself does not purport to extinguish the mortgage bond, it would be admissible in evidence, and a plea of discharge based on the fact that the sum shown in the endorsement was taken in full discharge and the discharge was given to the obligors orally would stand on a different footing from the admission of a writing evidencing the payment. This is the view taken in *Neelamani Patnaik Mussadi* v. *Sukaduvu Beharu*(2) by SPENCER and KRISHNAN, JJ. In *Gopalaswami Aiyar* v. *Kalyana Rangappa*(3), VENKATASUBBA RAO and SRINIVASA AYYANGAR, JJ., went further and held that an endorsement and a receipt purporting to completely

(1) (1919) I.L.R., 44 Bom., 55. (2) (1919) I.L.R., 43 Mad., 803.
(3) (1925) 48 M.L.J., 155.

BALA-SUNDARA NAIKER v. RANGANATHA AIYAR.

discharge the debt were admissible in evidence. It is unnecessary for us to go so far though possibly their decision also may be supported.

As to the third decision relied on by WALLER, J., namely 42 Mad., 41, that decision really supports the respondent for it shows the possibility of the mortgage being extinguished by the payment of a smaller sum than that due on the bond.

As to the last case, 44 Bom., 55, we see that it has been dissented from in the Calcutta High Court (1) in *Mohin Chandra Dey* v. *Ram Dayal Dutta*(1) by GREAVES and GHOSE, JJ., where they held that oral evidence to prove a discharge was admissible, and again (2) in *Srimati Bhaba Sundari* v. *Ram Kamal Dutta*(2), by GREAVES and PANTON, JJ. The question that now arises before us is whether we should follow the two Calcutta cases or the Bombay case. For this purpose, we have to consider the three provisions of law, (1) section 63 of the Contract Act, (2) section 17 of the Registration Act and (3) section 92, clause 4, of the Evidence Act. The first of these shows that a creditor in India can remit the balance of a debt without any consideration. Where the debt is a mortgage debt, it may be that a document in writing purporting to extinguish the mortgage is inadmissible in evidence under the Registration Act, but the payment itself cannot be inadmissible, and if the creditor agreed to take the payment as a complete discharge, that is, not only promises, previously to the payment, to take it in complete discharge but at the time of the payment gives a discharge, the question arises whether such a discharge is an agreement within section 92, clause 4 of the Evidence Act. There is no doubt that any agreement which seeks to substitute

(1) (1925) 30 Calc. W.N., 371. (2) (1926) 44 C. L.J., 269.

terms different from those in the bond so as to enable the mortgagor to insist on the working out of the obligations on the lines of the substituted terms would be inadmissible. Strictly, therefore, an agreement promising the debtor that he would be discharged if he makes a certain payment less than that indicated on the mortgage bond is, standing alone, inadmissible to prove the discharge itself, both under section 92 (4) and also otherwise, for such an agreement is without consideration. What section 63 of the Contract Act permits is not an agreement to remit but an actual remission. That is, when a portion of the sum is paid, the creditor may say, "I do not want the rest. You need not pay any more." This last thing is therefore the essence of the transaction. A discharge extinguishing a debt, though on receipt of a smaller sum than that strictly due, is not an agreement substituting different terms for the original terms which will govern the further working out of the obligation but an extinction of the obligation itself. Though such a discharge extinguishing a debt is generally effected by creditors on the importunity or the request of the debtors, still it cannot be said to amount to a contract which binds two persons and puts them to further obligations. Where there is nothing more to be done, the whole thing is practically an act of grace on the part of the creditor. The request of the debtor is immaterial, and in law it is not a case of consensus of two minds ending in a contract, but merely a liberal act on the part of the creditor only. Looked at from this point of view, we think that section 92 (4) does not touch any act of a creditor which extinguishes a debt by taking a smaller sum of money. We agree with the view taken by GREAVES, PANTON and GHOSE, JJ., in the two Calcutta decisions abovementioned and dissent from the decision in

BALA-SUNDARA NAIKER v. RANGANATHA AIYAR.

Jagannatha v. *Shanker*(1). Where the act of the creditor does not extinguish the debt but gives only better terms than before, which have yet to be worked out, the principle does not help the debtor, and section 92 (4) prevents the admission of such an agreement. The observations of the Privy Council in *Firm Chhunna Mal Ram Nath* v. *Firm Mool Chand Ram Bhangal*(2), disapproving the decision in *Abaji Sitaram* v. *Trimbak Municipality*(3), show that a remission of debt under section 63 is not an agreement between two persons. It is really the act of one person discharging at his will and pleasure the obligation of another. There is also the view of our brothers MADHAVAN NAIR and CURGENVEN, JJ., in *Ramanathan Chettiar* v. *Sethuram Madige Rao Sahib*(4), where they observe that the discharge of a debt is different from the extinguishment of a mortgage, though one may be the result of the other. We think, therefore, the plea is admissible, and, once the plea is admissible, whether it is actually proved is merely a matter of evidence on the facts appearing in a particular case. We have already found, as a question of fact, that there is a complete discharge of the debt. The extinction of the mortgage followed the discharge of the debt. We therefore dismiss the appeal with costs.

K.R.

(1) (1919) I.L.R., 44 Bom., 55.
(2) (1928) 55 M L.J., 1 at p. 6.
(3) (1903) I.L.R., 28 Bom., 67.
(4) (1927) 27 L.W., 47.