MANU/MH/0252/2007

**Equivalent Citation:** 2007(4)ALLMR718, 2007(3)BomCR772, 2007(4)CTC257, 2007(4)MhLj517

## IN THE HIGH COURT OF BOMBAY

Summons for Judgment No. 1117 of 2003 in Summary Suit No. 1551 of 2003 and Summons for Judgment No. 10 of 1994 in Summary Suit No. 2402 of 1993, Summons For Judgment No. 11 of 1994 in Summary Suit No. 2403 of 1993, Summons For Judgment No. 12 of 1994 in Summary Suit No. 2404 of 1993, Summons For Judgment No. 90 of 1995 in Summary Suit No. 4549 of 1994, Summons For Judgment No. 347 of 1998 in Summary Suit No. 978 of 1997, Summons For Judgment No. 968 of 2003 in Summary Suit No. 1482 of 2003, Summons For Judgment No. 999 of 2003 in Summary Suit No. 2074 of 2003, Summons For Judgment No. 1002 of 2003 in Summary Suit No. 1779 of 2003, Summons For Judgment No. 1021 of 2003 in Summary Suit No. 3040 of 2003, Summons For Judgment No. 685 of 2002 in Summary Suit No. 2123 of 2002, Summons For Judgment No. 999 of 2003 in Summary Suit No. 2074 of 2003, Summary Suit No. 185 of 2005, Summons For Judgment No. 140 of 2004 in Summary Suit No. 2387 of 2003, Summons For Judgment No. 189 of 2004 in Summary Suit No. 145 of 2004, Summons For Judgment No. 351 of 2004 in Summary Suit No. 586 of 2004, Summons For Judgment No. 352 of 2004 in Summary Suit No. 607 of 2004, Summons For Judgment No. 430 of 2004 in Summary Suit No. 1007 of 2004, Summons For Judgment No. 435 of 2004 in Summary Suit No. 1119 of 2004, Summons For Judgment No. 436 of 2004 in Summary Suit No. 3470 of 2003, Summons For Judgment No. 464 of 2004 in Summary Suit No. 1461 of 2002, Summons For Judgment No. 570 of 2004 in Summary Suit No. 1643 of 2004, Summons For Judgment No. 571 of 2004 in Summary Suit No. 1732 of 2004, Summons For Judgment No. 600 of 2004 in Summary Suit No. 1976 of 2004, Summons For Judgment No. 601 of 2004 in Summary Suit No. 1962 of 2004, Summons For Judgment No. 602 of 2004 in Summary Suit No. 1975 of 2004, Summons For Judgment No. 606 of 2004 in Summary Suit No. 1987 of 2004, Summons For Judgment No. 625 of 2004 in Summary Suit No. 1709 of 2004, Summons For Judgment No. 626 of 2004 in Summary Suit No. 1885 of 2004, Summons For Judgment No. 644 of 2004 in Summary Suit No. 2065 of 2004, Summons For Judgment No. 656 of 2004 in Summary Suit No. 1044 of 2004, Summons For Judgment No. 657 of 2004 in Summary Suit No. 1379 of 2004, Summons For Judgment No. 658 of 2004 in Summary Suit No. 995 of 2004, Summons For Judgment No. 697 of 2004 in Summary Suit No. 1672 of 2004, Summons For Judgment No. 720 of 2004 in Summary Suit No. 2155 of 2004, Summons For Judgment No. 730 of 2004 in Summary Suit No. 2358 of 2004, Summons For Judgment No. 731 of 2004 in Summary Suit No. 2394 of 2004, Summons For Judgment No. 732 of 2004 in Summary Suit No. 2336 of 2004, Summons For Judgment No. 733 of 2004 in Summary Suit No. 2357 of 2004, Summons For Judgment No. 735 of 2004 in Summary Suit No. 1964 of 2004, Summons For Judgment No. 738 of 2004 in Summary Suit No. 2224 of 2004, Summons For Judgment No. 740 of 2004 in Summary Suit No. 1965 of 2004, Summons For Judgment No. 762 of 2004 in Summary Suit No. 1138 of 2004, Summons For Judgment No. 778 of 2004 in Summary Suit No. 2353 of 2004, Summons For Judgment No. 779 of 2004 in Summary Suit No. 2354 of 2004, Summons For Judgment No. 780 of 2004 in Summary Suit No. 2426 of 2004, (In S.J. Nos. 778 of 2004, 779 and 780 of 2004) Summons For Judgment No. 797 of 2004 in Summary Suit No. 2402 of 2004,

Summons For Judgment No. 810 of 2004 in Summary Suit No. 2588 of 2003,
Summons For Judgment No. 831 of 2004 in Summary Suit No. 2183 of 2004,
Summons For Judgment No. 832 of 2004 in Summary Suit No. 2049 of 2004,
Summons For Judgment No. 833 of 2004 in Summary Suit No. 2184 of 2004,
Summons For Judgment No. 920 of 2004 ub in Summary Suit No. 2688 of 2004Summons For Judgment No. 941 of 2004 in Summary Suit No. 2876 of 2004
Summons For Judgment No. 44 of 2005 in Summary Suit No. 1174 of 2004,
Summons For Judgment No. 275 of 2005 in Summary Suit No. 3486 of 2002,
Summons For Judgment No. 355 of 2005 in Summary Suit No. 459 Of 2005,
Summons For Judgment No. 356 of 2005 in Summary Suit No. 257 of 2005,
Summons For Judgment No. 357 of 2005 in Summary Suit No. 586 of 2005,
Summons For Judgment No. 358 of 2005 in Summary Suit No. 414 of 2005,
Summons For Judgment No. 359 of 2005 in Summary Suit No. 409 of 2005,
Summons For Judgment No. 360 of 2005 in Summary Suit No. 259 of 2005,
Summons For Judgment No. 361 of 2005 in Summary Suit No. 413 of 2005,
Summons For Judgment No. 362 of 2005 in Summary Suit No. 260 of 2005,
Summons For Judgment No. 363 of 2005 in Summary Suit No. 406 of 2005,
Summons For Judgment No. 364 of 2005 in Summary Suit No. 259 of 2005,
Summons For Judgment No. 365 of 2005 in Summary Suit No. 438 of 2005,
Summons For Judgment No. 366 of 2005 in Summary Suit No. 544 of 2005,
Summons For Judgment No. 367 of 2005 in Summary Suit No. 258 of 2005,
Summons For Judgment No. 368 of 2005 in Summary Suit No. 410 of 2005,
Summons For Judgment No. 369 of 2005 in Summary Suit No. 438 of 2005,
Summons For Judgment No. 370 of 2005 in Summary Suit No. 411 of 2005,
Summons For Judgment No. 371 of 2005 in Summary Suit No. 407 of 2005,
Summons For Judgment No. 372 of 2005 in Summary Suit No. 255 of 2005,
Summons For Judgment No. 373 of 2005 in Summary Suit No. 448 of 2005,
Summons For Judgment No. 396 of 2005 in Summary Suit No. 1301 of 2005,
Summons For Judgment No. 397 of 2005 in Summary Suit No. 1271 of 2005,
Summons For Judgment No. 398 of 2005 in Summary Suit No. 1165 of 2005,
Summons For Judgment No. 399 of 2005 in Summary Suit No. 1091 of 2005,
Summons For Judgment No. 400 of 2005 in Summary Suit No. 1154 of 2005,
Summons For Judgment No. 401 of 2005 in Summary Suit No. 1153 of 2005,
Summons For Judgment No. 402 of 2005 in Summary Suit No. 1270 of 2005,
Summons For Judgment No. 449 of 2005 in Summary Suit No. 1273 of 2005,
Summons For Judgment No. 452 of 2005 in Summary Suit No. 1272 of 2005,
Summons For Judgment No. 522 of 2005 in Summary Suit No. 3714 of 2004,
Summons For Judgment No. 524 of 2005 in Summary Suit No. 1126 of 2005,
Summons For Judgment No. 546 of 2005 in Summary Suit No. 2015 of 2005,
Summons For Judgment No. 549 of 2005 in Summary Suit No. 1691 of 2005,
Summons For Judgment No. 568 of 2005 in Summary Suit No. 1261 of 2005,
Summons For Judgment No. 570 of 2005 in Summary Suit No. 606 of 2004,
Summons For Judgment No. 571 of 2005 in Summary Suit No. 438 of 2004,
Summons For Judgment No. 600 of 2005 in Summary Suit No. 1744 of 2005 and
Summons For Judgment No. 605 of 2005 in Summary Suit No. 1579 of 2005

Decided On: 26.04.2007

Appellants: **Jyotsna K. Valia**
**Vs.**
Respondent: **T.S. Parekh and Co.**

**AND**

Appellants: **Maharaj Jai Singhji Etc. Etc.**
**Vs.**
Respondent: **Sanjay Co. and Ors. Etc. Etc.**

**Hon'ble Judges/Coram:**
*F.I. Rebello, V.K. Tahilramani and Abhay Shreeniwas Oka, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: A.R. Gyani and Vatsal Verma, Advs., i/b., Halwasia, & Co. Summons, for Judgment No. 1117 of 2003 in Summary Suit No. 1551 of 2003, Ketan Parekh and Somya Srikrishna, Advs.,i/b., Kanga & Co. In S.J. Nos. 10 of 1994, 11 of 1994 and 12 of 1994, N.C. Parekh, Adv., Mansukhlal Hiralali/b., & Co. Summons, for Judgment No. 90 of 1995 In Summary Suit No. 4549 OF 1994,Suchi Halvasia, Adv.,i/b., Halvasia and Co. Summons for Judgment No. 347 of 1998 in Summary Suit No. 978 of 1997, H. Toor and Sohaib Khan, Advs., P.J. Rangai/b., & Co. in Summons for Judgment No. 968 of 2003 in Summary Suit No. 1482 of 2003, Sachin Satpute, Adv.,i/b., S. Ashwinkumar, & Co. in Summons, For Judgment No. 140 of 2004 in Summary Suit No. 2387 of 2003 M.G. Mimani, Adv.in Summons For Judgment No. 189 of 2004 in Summary Suit No. 145 of 2004, H.V. Chande, Adv. in S.J. Nos. 351 and 352 of 2004, S.C. Naidu, Adv., C.R. Naidui/b.,& Co. in S.J. Nos. 656, 657 and 658 of Preeti Shah, Adv. in Summons for Judgment No. 762 of 2004 in Summary Suit No. 1138 of 2004, L.H. Rambhai, Adv. in S.J. Nos. 778, 779 and 780 of 2004, Preeti Shah, Adv. in Summons For Judgment No. 275 of 2005 in Summary Suit No. 3486 of 2002, Y.R. John and Ajay K.J. Panicker, Advs. in S.J. Nos. 355 to 373 of 2004, L.H. Rambhia, Adv. in Summons for Judgment No. 402 of 2005 in Summary Suit No. 1270 of 2005, Virag Tulzapurkar, Sr. Counsel, Somya Srikrishna, Adv., Little & Co. in Summons For Judgment No. 524 of 2005 in Summary Suit No. 1126 of 2005, i/b., Naushad Engineer, Adv., Desai and Diwanji,i/b., in Summons For Judgment No. 549 of 2005 in Summary Suit No. 1691 of 2005*

*For Respondents/Defendant: P.K. Vora., Pramodkumar, i/b., & Co. for Defendant No. 1 in Summons For Judgment No. 968 of 2003 in Summary Suit No. 1482 of 2003, Birendra Saraf, Adv., Nankani,i/b., and Associaes in Summons for Judgment No. 1021 of 2003 in Summary Suit No. 3040 of 2003, R.J. Majra, Adv.,i/b. , M.g. Gawde, Adv. in Summons For Judgment No. 140 of 2004 in Summary Suit No. 2387 of 2003,B. Dalal, Adv., i/b., Dalal T.N. Tripathi, Adv. in S.J. Nos. 656, 657 and 658 of 2004, Dipti Das, Adv.,i/b., Dunmorr Sett, Adv. in Summons for Judgment No. 697 of 2004 in Summary Suit No. 1672 of 2004, Tushar Bhavasar, Adv.,i/b., Manoj Bhatt, Adv. for Defendant Nos. 1 and 3 in Summons for Judgment No. 810 of 2004 in Summary Suit No. 2588 of 2003, Arif Bookwala, Sr. Counsel, i/b., Ranjit & Co. for Defendants in Sr. Nos. 56, 57, 61 and 69 in S.J. Nos. 355 to 373 of 2004, H.V. Chande, Adv. for Defendant Nos. 1 and 5 in Summons for Judgment No. 452 of 2005 in Summary Suit No. 1272 of 2005, Shyam Mehta, Adv.,i/b., Kanga & Co. in Summons for Judgment No. 524 of 2005 in Summary Suit No. 1126 of 2005, Anoop Sharma, Adv. in Summons for Judgment No. 549 of 2005 in Summary Suit No. 1691 of 2005,C.S. Balsara and P.S. Colabawala, Advs.,i/b., Ramesh Makhija& Co. in Summons for Judgment No. 568 of 2005 in Summary Suit No. 1261 of 2005*

**Case Note:**
**Civil - Maintainability of Summary Suit - Order 37, Rule 2 of Code of Civil Procedure, 1908 - Hon'ble Chief Justice placed present Reference, pursuant to conflicting views of Single Judges and Division Benches - "Whether Summary Suit under Order 37, Rule 2 lies on (i) a settled account duly**

**confirmed by Defendants; (ii) On a settled account which is not confirmed by Defendants; (iii) On an acknowledgment of liability; (iv) On honoured cheque; and (v) On a mere writing or a receipt - Held, summary suit would not lie on 'a settled account', which is not confirmed by Defendant and "on honoured cheque" - Summary suit lies where concluded contract exist in writing containing express or implied promise to pay - Written contract as contemplated in Order 37 need not be signed by both parties but then writing between parties must be such that certain agreement has been brought into existence and that claim made under such agreement to be indisputable - Where document is not duly stamped and defect is curable, summary suit will be maintainable - To imply a term, in contract as implied term, test laid down by Kim Lewison in 'Interpretation of Contract" is relevant, however, Court must take note that general presumption is, against implying of terms into written contract - Issue of implied promise to pay, necessarily depend on facts of each case - Summary suit lie on 'Settled accounts duly confirmed by Defendants in view of observations of Apex Court in Hiralal and Ors. v. Badkulal and Ors - Not possible to lay down any precise test as to when Summary Suit would lie on an acknowledgement, writing or receipt, which depend firstly on document itself, practice, usage and customs of trade as also facts of each case - By so holding it is not as if Defendant is denuded of his defences when he applies for leave to defend in view of judgments of Apex Court in Machalec Engineering and Manufacturers v. Basic Equipment Corporation and Sunil Enterprises v. S.B.I. Commercial and International Bank Ltd - Reference answered**

**JUDGMENT**

**F.I. Rebello, J.**

**1.** A learned Single Judge noticing apparent inconsistencies or conflicts in judgments of learned Single Judges and of the Division Benches, as to whether a suit based on a writing or a receipt or an acknowledgement of liability, or honoured cheque or a settled account is maintainable as a summary suit, referred the matter to the Hon'ble the Chief Justice, who has placed the matter for consideration before the Full Bench. The issues which arise for our consideration and as referred to us, arise under Order XXXVII, Rule 2 (Summary Suit), in cases where the suit is based : i) On a settled account duly confirmed by the Defendants;

ii) On a settled account which is not confirmed by the Defendants;

iii) On an acknowledgment of liability;

iv) On honoured cheque; and

v) On a mere writing or a receipt;

**2 .** Before we proceed to answer the reference, we may consider the legislative history of the relevant rule of Order XXXVII. Order XXXVII Rule 2, the relevant rule as originally enacted read as under:

> All suits upon bills of exchange, hundies and promissory notes, may, in case the Plaintiff desires to proceed hereunder, be instituted by presenting the plaint in the form prescribed, but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

**3.** This High Court amended Order XXXVII Rule 2(2) by a notification on 29.9.1936. The rule read as under:

> (1) All suits upon bills of exchange, hundies or promissory notes and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising on a contract express or implied, or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of debt other than a penalty, or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only, or in suits in which the landlord seeks to recover possession of immovable property, with or without a claim for the rent or mesne profits against a tenant whose term has expired or has been duly determined by notice to quite, or as become liable to forfeiture for non-payment of rent or against persons claiming under such tenant may in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed, but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

**4.** By a further amendment dated 1st November, 1966 by this Court, the provisions of Order XXXVII Rule 2 of the Code of Civil Procedure was substituted as under:

> 2. Institution of Summary suits upon bills of exchange, etc.-- (1) All suits upon bills of exchange, hundies or promissory notes, and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising on a written contract or on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only, may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint with a specific averment therein that the suit is filed under this Order, and that no relief not falling within the ambit of this rule has been claimed, and with the inscription within brackets "(Under Order XXXVII of the Code of Civil Procedure, 1908)" just below the number of the suit in the title of the suit, but the summons shall be in Form No. 4, in Appendix B or in such other form as may be from time to time prescribed.

**5 .** The Code of Civil Procedure, 1908, subsequently came to be amended by amendment of the Code of Civil Procedure in 1976. The relevant amended provision of Order XXXVII rule (1)(2) reads as under:

> (2) Subject to the provisions of Sub-rule (1), the Order applies to the following classes of suits, namely:
>
> (a) suits upon bills of exchange, hundies and promissory notes;
>
> (b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,
>
> (i) on a written contract; or
>
> (ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than

a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

**6.** Various counsel have been heard in the matter and they have also submitted their written submissions. A preliminary submission was made on behalf of the Plaintiffs that the very question, whether a Summary Suit will be maintainable in respect of the documents mentioned earlier is not appropriate and the exercise of laying down, as a matter of law whether Summary Suit lies on the types of documents described, ought not to be gone into. It is submitted that there is no standard format for the four documents in respect of which the present reference has been made. They are not well-defined legal terms. Whether a particular document is a receipt of acknowledgment of liability on which a Summary Suit would lie, would depend on the contents and language of the document and not on the nomenclature thereof.

It is next submitted that no useful purpose will be served to lay down, as a matter of law, whether a Summary Suit will or will not lie on a document solely based on a particular type of document. This kind of compartmentalization will not solve future controversy on the issue, on the contrary it is likely to create further controversy on the question whether a particular document falls within the category of 'receipt' or 'accounts stated' or 'acknowledgment of liability', etc. In all these matters, it is submitted, what is required to be seen is the substance of the document and not the nomenclature. A document may be titled as a receipt but, in fact, may not be a receipt. Similarly, a document may not be titled 'receipt' or may be titled with some other word, but may actually be a receipt. Hence, the Court ought not to lay down rules based on the title of the document. The only test should be the one which is laid down in Order XXXVII, viz. whether the claim made arises on the written contract in question, or not. The test laid down in Order XXXVII is sufficient.

**7 .** Considering the arguments advanced by the counsel for the parties and as considerable doubt has been expressed, in our opinion, and, as the matter has been referred to us, we shall have to answer the issues referred for our consideration. The issue whether the reference has to be answered, in its entirety or in some aspects will be considered with reference to the provisions of Order XXXVII, the statement of objects and reasons, the law declared by the Hon'ble Supreme Court, precedents of this Court, the opinions of other High Courts and the various commentaries which would shed light on the subject, to which our attention was invited.

**8.** The notes on clauses in so far as Order XXXVII, reads as under:

> Clause 87-Sub-clause (i). Order XXXVII provides for a summary procedure in respect of certain suits. The essence of the summary suit is that the defendant is not, as in any ordinary suit, entitled as of right to defend the suit. He must apply for leave to defend within ten days from the date of the service of the summons upon him and such leave will be granted only if the affidavit filed by the defendant discloses such facts as will make it incumbent upon the plaintiff to prove consideration or such other facts as the Court may deem sufficient for granting leave to the defendant to appear and defend the suit. If no leave to defend is granted, the plaintiff is entitled to a decree. The object underlying the summary procedure is to prevent unreasonable obstruction by a defendant who has no defence. The Order is, however, confined to suits of negotiable instruments and is confined to the superior

Courts. Rule 1 is being substituted to provide for extending the summary procedure to the trial of the specific classes of suits by all Courts.

**9.** The terminology used in the Bombay amendment and the 1976 amendment to the Code of Civil Procedure, is similar. In answering the reference we shall consider the predicates of Order XXXVII under the Bombay amendment. The said rule itself provides that the debt or liquidated demand in money payable by the defendant, with or without interest, must arise on a written contract.

The rule before the 1966 Bombay amendment and the 1976 Central amendment to the Civil Procedure Code used the expression "arising on a contract express or implied" and this was substituted by the words "arising on a written contract". There can be therefore no dispute that after the 1966 Bombay amendment and the 1976 amendment to the Civil Procedure Code, the summary suit can only be filed if there be on a written contract. In other words, no Summary Suit can lie on an implied contract. There seems however some confusion as to the expression an implied contract and "implied terms in a written contract". The expression "implied term in a written contract" in law is distinct and different from an implied contract. We will consider this aspect of the matter whilst construing the legislative changes.

**10.** In this interpretive process, this Court must consider the effect of deletion of words. Gainful reference may be made to paragraphs 89 to 93, In Bombay Dyeing & Manufacturing Company Ltd. v. Bombay Environmental Action Group and Ors. MANU/SC/1197/2006 : AIR2006SC1489 :

> **89.** In Venkata Subamma v. Ramayya, it is stated that an Act should be interpreted having regard to its history and the meaning given to a word cannot be read in a different way than what was interpreted in the earlier repealed section.
>
> **90.** It is also a fundamental proposition of construction that the effect of deletion of words must receive serious consideration while interpreting a statute as this has been repeatedly affirmed by this Court in a series of judgments. (See CIT v. Bhogila Laherchand, Mangalore Electric Supply Co. Ltd. v. CIT, Kesavananda Bharati v. State of Kerala and Onkarlal Nandlal v. State of Rajasthan.)
>
> **91.** It is furthermore well known that when the statute makes a distinction between two phrases and one of the two is expressly deleted, it is contrary to the cardinal principle of statutory construction to hold that what is deleted is brought back into the statute and finds place in words which were already there in the first place.
>
> **92.** In Charles Bradlaugh v. Henry Lewis Clarke, Lord Watson as regards conscious omission from the statute stated the law, thus:
>
> > I see no reason to suppose that all these omissions were accidental, and as little reason to suppose that the enactments with regard to personal disabilities were intentionally left out, whilst the express mention made of common informers was omitted through accident or inadvertence.
>
> **93.** It is also a well-settled principle of law that common-sense construction rule should be taken recourse to in certain cases as has been adumbrated in

Halsburys Laws of England, (4th Edn.), Vol. 44(1) (Reissue). We would refer to the said principle in some detail later.

**11.** On behalf of the Plaintiffs, it has been submitted, that a perusal of Order XXXVII would reveal, that the requirements of the order are satisfied if a suit is filed on a claim arising on a written contract. Order XXXVII, does not require that there should be a written promise to pay. This it is submitted is an obvious distinction between the two. Order XXXVII, requires no promise to pay at all - whether express or implied. If so held, it would amount to adding words to the statute. If the legislature intended that a Summary Suit be maintainable only on an express written promise to pay, words to that effect would and could have been easily incorporated in Order XXXVII. This it is submitted, is evident from a reading of the provision of Section 25 of the Indian Contract Act. Section 25 requires a written promise to pay a debt. Thus, the legislature was conscious of the difference and has not used the same language that is found in Section 25. Dealing with Sections 18 of the Limitation Act and 25 of the Contract Act and reliance placed on the judgments, it is argued that the ratio that emerges from all those cases is that Section 25 of the Contract Act requires a promise in writing to pay, and hence, a mere acknowledgement under Section 18 of the Limitation Act, does not comply with the requirements of Section 25 of the Contract Act, as it does not contain a promise in writing to pay. The Plaintiffs', do not dispute the proposition. It is next submitted that a Summary Suit is maintainable on written contract with implied promise to pay. Reference is made to judgments which have also been referred to earlier. Relying on Chitty on the Law of Contracts, it is pointed out that an implied term is a matter of law for the court to decide and that in most cases it has nothing to do with the intention of the parties. In many cases, the terms to be implied are well settled. In these circumstances, as far as acknowledgment, receipt or accounts stated are concerned, it is now settled that they contain an implied promise to pay. This position does not require any evidence. It is an implication which the law draws from the terms of such a document. From this it is submitted that when a Defendant executes an acknowledgment, receipt or account stated, a term is implied, whereby the Defendant promises to pay the amount inserted in the document. When the defendants send the document to the Plaintiff, and when the Plaintiff accepts the same, the Plaintiff accepts the contents of the said document with all the legal implication contained therein. Thus, the implied promise to pay, which accompanies that document is accepted by the Plaintiff, giving rise to a contract. It is submitted that it is not correct to look at a document ignoring the legal implication thereof. The contract is in writing inasmuch as the implied promise arises directly from the written document and does not stand alone or de-hors the written document. In a contract to pay money, the ingredients required are (i) the amount that is agreed to be paid (ii) the time when it is agreed to be paid; (iii) interest, if any, payable on the amount; and (iv) the obligation to pay. The first three ingredients out of the above four are contained in the written document of acknowledgement, receipt or accounts stated. It is only the fourth ingredient of obligation to pay which is implied by law. The consideration for such a written contract is what flows to the Defendant prior to his executing the receipt, acknowledgement or accounts stated. The money that the Defendant acknowledges to be due is for some consideration that he received before the execution of the document, say, for example, goods sold by the Plaintiff to him, or money advanced by the Plaintiff to him. That is the consideration, for which the Defendant executes the receipt, acknowledgement or accounts stated. Hence, such a written contract is supported by valid and adequate consideration.

Dealing with the subject of Accounts Stated, it is pointed out that Accounts Stated

stands on a different footing from an acknowledgement or a promissory note. Accounts Stated gives rise to a new contract between the parties and gives rise to a fresh cause of action. As far as the 'Accounts Stated' in a document accepted by both parties constitutes a written contract by which both the parties have agreed that the amount mentioned at the foot thereof is the only amount that is due and payable by the debtor to the creditor. A summary suit is maintainable.

On the aspect of the document being properly stamped, it is submitted that considering Sections 33 and 37 of the Bombay Stamp Act, in respect of the documents not sufficiently stamped, on paying the penalty, the documents can be admitted in evidence. However, considering Section 35 of the Indian Stamp Act, if a promissory note or a bill of exchange is not stamped or not sufficiently stamped, then, it is not possible to pay the stamp duty and penalty in the court to make them admissible in evidence.

**12.** On behalf of the Defendants their Counsel contend, that the primary question the Court must answer is whether the different documents which are the subject matter of reference constitute written contracts.

The submissions are as under : The documents in question do not constitute contracts at all, at best they are admissions of liability. Once it established that the documents in question do not constitute contracts at all it follows that they also do not constitute written contracts. As a result summary suit cannot be filed on the basis of these documents. The judgment in Hiralal and Ors. v. Badkulal and Ors. MANU/SC/0042/1993 : AIR1993SC225 , it is submitted, has no applicability to the present case, as the Supreme Court therein was considering whether an ordinary suit is maintainable on an account stated and not a summary suit. There is no issue as to whether the document in question was a written contract or not. The Supreme Court in fact observed that the suit therein was not merely based on acknowledgement of liability, but was based on mutual dealings and the account stated between the parties and was therefore maintainable. Whilst holding that an unconditional acknowledgement implied a promise to pay the Supreme Court did not say that each and every such unconditional acknowledgement carried with it an implied promise to pay. In that case it was concealed by the Defendant that some amount was payable and it only question was with regard to the quantum. It is submitted that it is a settled position that every acknowledgement of liability does not carry an implied promise to pay.

An implied promise is not a written contract and, therefore, the implied promise to pay is not a written contract. This becomes clearer on considering the provisions of Section 9 of the Contract Act which reads as under:

> 9. Promises, express and implied : In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

Section 9 makes it clear that there are basically two types of contract, express and implied. Express contracts can be further divided into written and oral contracts. Since implied contracts are not express contracts, they are neither written nor oral contracts. Reference is made to various judgments which will be referred to the extent necessary. It is, therefore, submitted that phrases like "balance due", "balance to be paid", baki deva", "baki dena rahe", "I remain liable", "I admit my liability",

"amount due", etc., were mere acknowledgements of liability carrying an implied promise to pay and did not amount to express promises/promises in writing.

An implied term in a written contract is also not a written contract. Every term in contract including an implied term is as much a promise as the whole of the contract itself. In fact by definition "every promise and every set of promises, forming the consideration for each other, is an Agreement"; See Section 2(e) of the Contract Act. The reasoning, therefore, in respect of an implied promise to pay/implied contract applies equally and squarely to an implied term in a contract as if it were an implied contract. If a summary suit is filed on the basis of an implied promise in a written contract, it presupposes that there is no express promise to pay in the written contract. In other words, there is no promise to pay in writing. Accordingly a summary suit, purely based on an implied promise to pay in a written contract is really no different and is in fact the same as a summary suit based on an implied promise to pay arising from a document which does not amount to a written contract. If in the later kind summary suit is not maintainable then even the former is not. Referring to the arguments advanced on behalf of the petitioners on the words "arising on a written contract" it is submitted that the words used are "arising on" and not "arising out of" or "arising in respect of" or "arising in connection with" which are words of wide import. It becomes clear that by using the word "on" it was intended that the class of suits that could be filed as summary suits should be restricted to only those which were directly based on the written contract.

A Summary Suit is also not maintainable on the basis of an implied promise to pay. Several consequences would follow if it is held that a summary suit is maintainable on an implied promise to pay. If the expression "written contract" in Order 37 Rule 2 is construed to cover implied contracts, it must follow the summary suit can be filed on an implied promise to pay whether it arises out of a document or on an oral contract or otherwise as there will be no justification for excluding any particular kind of implied contract and all the various kinds of implied contracts will also be covered. These are the consequences that will follow if it is held that summary suit is maintainable as an implied promise to pay.

Dealing with the issue of the effect of a document not being duly stamped, it is submitted that the document which is not duly stamped is inadmissible in evidence. A document may in certain circumstances be admitted in evidence after payment of stamp duty and penalty. However, bills of exchange and promissory notes, if not duly stamped, cannot at all be admitted in evidence, as the defect is incurable. (See Section 34 of the Bombay Stamp Act, 1958 and Section 35 of the Indian Stamp Act, 1899). Consequently no summary suit would be maintainable on the Bill of Exchange or promissory note not duly stamped. In so far as other documents are concerned, if a document is not properly stamped by following the procedure it would be admitted in evidence. If the document is not duly stamped and the defect is curable a summary suit will be maintainable. However, if the defect is incurable on account of not being duly stamped, the summary suit will not be maintainable.

**13.** The learned Single Judge referred to various judgments. In Appeal No. 902 of 1990 in Summons for Judgment No. 205 of 1990 in Summary Suit No. 551 of 1990 (Racharaman Motilal Ladiwal v. Rajesh Enterprises) dated 28.8.1990, the suit was based on the receipt of Rs. 37,000/- as a loan. There were two acknowledgments. The Court there held that neither the receipt nor the acknowledgment made for an agreement in writing. The Court also observed that Order XXXVII is a drastic provision. The learned single Judge, placing reliance on this judgment, was pleased

to observe that the judgment would indicate that a suit on a receipt for a loan or an acknowledgment of a loan would not fall within the purview and scope of Order 37 Rule 2. In our opinion, it is not possible to draw the ratio decidendi of the judgment in that context. On the facts, there the Court had come to the conclusion that the documents produced would make not amount to an agreement in writing.

**14.** Let us now consider the other judgments of the Appellate Benches which were considered by the learned Single Judge.

Reliance was placed on an unreported judgment in Appeal No. 186 of 1994 in Summons for Judgment No. 718 of 1991 in Summary Suit No. 2372 of 1991, decided on 3.13.1994. This judgment was a judgment on confirmation of accounts. On the facts the Court found that the only document in connection with the claims, is form "C", being a form of declaration under Central Sales Tax Act. On facts, the Court held that it would not constitute a contract between the parties.

The next judgment which was considered by the learned Judge was in Appeal No. 178 of 2000 dated 1.3.2000 in respect of an honoured cheque. Considering the facts there, the Court noted that the suit was based on Section 70 of the Contract Act. The Court recorded a finding, that the nature of transaction was strictly not of contract but refers to general quasi contract. The Court held so far as the procedural aspect is concerned, the plaint cannot be treated as a Summary Suit.

The third judgment considered by the Division Bench was in Special Civil Application No. 938 of 1967 decided on 28.9.1967. On the facts there, the learned Division Bench found that the intention of the Plaintiff was to sue for recovery of the loan and not to sue for the moneys due on the dishonoured cheques. The Court further noted that it was common ground that there is no written contract between the parties. In the light of that the Court held that the Summary Suit was not maintainable.

The fourth judgment was in Appeal No. 865 of 1994 in Summons for Judgment No. 411 of 1992 in Summary Suit No. 1742 of 1997 decided on 31.8.1995. The contention urged was that a letter saying that a sum of Rs. 6,00,000/- was sent as a deposit to be kept by the Appellants towards the purchase of grey cloth from time to time for the quantities, specifications and other details as may be finalised by the Sales Department by itself does not bring the suit within the scope of Order XXXVII CPC. On behalf of the Respondents, it was contended, that on a proper interpretation, Order XXXVI has to embrace all sorts of business transactions which may sometime arise only out of correspondence acknowledgements or merely receipts. Again, on facts, the Court while answering the issue in paragraph 15, was pleased to observe as under:

> We agree with Mr.Kadam, learned Counsel for the respondents that the written contract as contemplated in Order XXXVII need not be signed by both the parties but then the writing between the parties must be such that certain agreement has been brought into existence and that the claim made under such an agreement out to be indisputable. We will certainly apply the principle when we come to the pleadings in the suit a little later after viewing some authorities cited across the bar by Mr. Kadam.

A perusal of the findings would indicate that the issue was as to what constitutes an agreement in writing.

**15.** Based on a reading of these judgements, the learned Judge was pleased to hold

that there was a direct conflict as to whether a suit on a writing or a receipt or a settled account would be maintainable as a Summary Suit. The learned Judge thereafter recorded his findings as under:

> (1) Neither of the aforesaid judgments were arising under Order 37 Rule 2 of the Civil Procedure Code nor an issue came up before the Apex Court pertaining to the scope and meaning of Order 37 Rule
>
> (2) The judgment of the Apex Court was considering whether a suit on account can be filed without going back to the original transaction as contained in the said set of accounts.
>
> (3) The Supreme Court has merely held in the aforesaid two judgments that a category exists under the regular law in which a suit on account can be filed because it contains an implied promise to pay.
>
> (4) The judgment of the Apex Court in the case of Gordon Woodroffe and Co. v. Shaik M.A. Majid and Co. (supra) in fact holds that suit on account can be filed even if it is not confirmed by the opposite party or even if it is not in writing. Thus if the aforesaid judgements of the Supreme Court are held to be applicable to the provisions of Order 37 Rule 2 of Civil Procedure Code then a further issue will arise whether such a suit on an unwritten account or an unconfirmed account also could be held to be maintainable under Order 37 Rule 2 if the view of the Apex Court is held to apply to the provisions of Order 37 Rule 2 of the Civil Procedure Code.

After so saying, the learned Judge was pleased to hold, that considering the change in the legislative history the expression "contract" either on express or implied promise has been substituted by the words "written contract". The learned Judge then purported to consider some ancillary issues by referring to some other judgments. In our opinion, it is not required to go into those aspects considering the issue referred.

**16.** To answer the questions raised certain provisions and expressions need to be considered. Let us first understand the expression 'Contract in Writing' Section 10 of the Indian Contract Act, 1872 as reproduced below sets out, what agreements are contracts:

> **10.** What agreements are contracts. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Nothing herein contained shall affect any law in force in 1[India] and not hereby expressly repealed, by which any contract is required to be made in writing 2 or in the presence of witnesses, or any law relating to the registration of documents.
>
> Contract has been defined under Section 2(1) as "an agreement enforceable by law". Agreement has been defined in Section 2(e) as "every promise or every set of promises forming the consideration of each other is an agreement. Written contract" in Black's Law Dictionary (8th Ed.) means as under:
>
> > "written contract" - A contract whose terms has been reduced in writing.

A written contract or a contract in writing need not always be a contract signed by both the parties and may consist of exchange of correspondence of a letter or letters written by one and assented to by the promisor without signature or even of a memorandum or printed document not signed by either party. In T.A. Ruf and Company Ltd. v. Pauwels (1919) 1 K.B. 660, Duke, L.J. observed as under:

> As to the suggestion which was made that the words "contract in writing" import a contract made by means of a writing or writings signed by both parties, I do not think the words necessarily have that meaning. A document purporting to be an agreement may be an agreement in writing sufficient to satisfy the requirements of an Act of Parliament though it is only verified by the signature of one of the parties: In Re Jones (1895) 2 Ch. 719. Here the question is one of a bargain for the sale of goods. I doubt whether the objection which is here set up to avoid a business transaction would have been sufficient to support a special demurrer before the passing of the Common Law Procedure Acts,

Relying on these observations, the Madras High Court in Lucky Electrical Stores, by Partner Mahendra Kumar Shah and Anr. v. Ramesh Steel House, by Partner Babulal 1988 M L R 187 in a case where the invoice of the bill was not signed by the other party to the contract, however, as a result of the acceptance of the goods delivered in pursuance of the invoice, on the demand for the price of goods admittedly received by the purchaser on the basis of the invoice, observed that it must be held, to arise on a "written contract".

A written contract therefore need not be evidenced in a single document written by the parties since the written document can be by exchange of documents in writing between the parties. On the other hand an implied contract would arise by the acts of parties to indicate an implied contract. A written contract, contemplated under Order XXXVII need not be necessarily signed by both the parties. However, the writing must be such to arrive at a conclusion that an agreement certainly has been brought into existence and that the claim made under such an agreement ought to be indisputable. In Jugal Kishore Rameshwardas v. Mrs. Goolbai Hormusji MANU/SC/0006/1955 : [1955]2SCR857 , while construing Section 2(a) of the Arbitration Act, 1940, the Supreme Court observed that it is well settled law that to constitute an arbitration agreement in writing it is not necessary that it should be signed by the parties and it is sufficient if the terms are reduced to writing and the agreement of the parties is established. In the Arbitration Act of 1966, Section 7 specifically provides that the arbitration agreement shall be in writing.

A learned Single Judge in an unreported judgment in Jaishree Chemicals v. Esskay Dyeing and Printing Works Summons for Judgment No. 23/1976 In Suit No. 1405 of 1975, decided on 19th April, 1976, considering the expression "written contract", under the amended provision, held that it must be given an extended meaning and if it is possible to spell out an agreement enforceable at law to do something to be found in the writing, which binds the parties, it is possible to hold that such an agreement is a contract in writing.

These are some indicators of understanding the expression "a contract in writing".

**17.** We may now consider the expression "implied term of a contract". Whether or not a term is implied is usually said to depend upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances. In

many classes of contract, however, implied terms have become standardised, and it is somewhat artificial to attribute such terms to the unexpressed intention of the parties. Courts in fact in such cases have laid down a general rule of law that in all contracts of a defined type-for example, sale of goods, landlord and tenant, employment, the carriage of goods by land or sea, certain terms will be implied, unless the implication of such a terms would be contrary to the express words of the agreement. (Johnstone v. Bloomsbury H.A. (1992) Q.B., 333.

A term ought not to be implied unless it is, in all the circumstances equitable and reasonable. But this does not mean that a term will be implied merely because in all the circumstances it would be reasonable to do so or because it would improve the contract or make its carrying out more convenient. "The touchstone is always necessity and not merely unreasonableness.

(See Liverpool City Council v. Irwin) 1977 A.C.239.

Similarly, a term will not be implied if it would be inconsistent with the express wording of the contract.

**18.** Lord Wright in Luxor (Eastbourne) Ltd. v. Cooper 1941 A.C 108 said:

> The expression 'implied term' is used in different senses. Sometimes it denotes some term which does not depend on the actual intention of the parties but on a rule of law such as the terms, warranties or conditions which, if not expressly excluded, the law imports, as for instance under the Sale of Goods Act and the Marine Insurance Act. But a case like the present is different because what it is sought to imply is based on an intention imputed to the parties from their actual circumstances.

Professor Glanville Williams in "Language and the Law"(1945) 61 L.Q.R., 71 observes:

> (i) terms that the parties probably had in mind but did not trouble to express;
>
> (ii) terms that the parties, whether or not they actually had them in mind, would probably have expressed if the question had been brought to their attention; and
>
> (iii) terms that, whether or not the parties they had them in mind or would have expressed them if they had foreseen the difficulty, are implied by the court because of the court's view of fairness or policy or in consequence of rules of law.

He further points out that "these three kinds of implied term,

> (i) is an effort to arrive at actual intention; (ii) is an effort to arrive at hypothetical or conditional intention-the intention that the parties would have had if they had foreseen the difficulty; (iii) is not concerned with the intention of the parties except to the extent that the term implied by the court may be excluded by an expression of positive intention to the contrary.

We may note a distinction between the two types of 'implied term' in the speech of Lord Cross of Chelsea in House of Lords in Liverpool City Council v. Irvin(1977) A.C., 239, as under:

> When it implies a term in a contract the court is sometimes laying down a general rule that in all contracts of a certain type-sale of goods, master and servant, landlord and tenant, and so on-some provision is to be implied unless the parties have expressly excluded it. In deciding whether or not to lay down such a prima facie rule the court will naturally ask itself whether in the general run of such cases the term in question would be one which it would be reasonable to insert. Sometimes, however, there is no question of laying down any prima facie rule applicable to all cases of a defined type but what the court is being in effect asked to do is to rectify a particular-often a very detailed-contract by inserting in it a term which the parties have not expressed. Here it is not enough for the court to say that the suggested term is one the presence of which would make the contract a better or fairer one; it must be able to say that the insertion of the term is necessary to give-as it is put-business efficacy to the contract and that if its absence had been pointed out at the time both parties-assuming them to have been reasonable men-would have agreed without hesitation to its insertion.

In Mosvolds Rederi A/S v. Ford Corporation of India [1986] 2 L R 68, Steyn, J. spoke of three categories of implied term. He said:

> Sometimes it is said that a term is implied into the contract when in truth a positive rule of law of contract is applied because of the category in which a particular contract falls. Another type of implied term is a term in order to give business efficacy to the contract. The basis of such an implication is that the contract is unworkable without it. There is, however, another form of implication. It is not permissible to imply a term simply because the court considers it to be reasonable. On the other hand, it is possible to imply a term, if the court or arbitrator, as the case may be, is satisfied that reasonable men faced with the suggested term which ex hypothesis was not expressed in the contract, would without hesitation say: 'yes, of course that is so obvious that it goes without saying.'

**19.** In "The Interpretation of Contracts" by Kim Lewison, Q.C., there is extensive discussion on "implied terms". At paragraph 6.03 it is set out that in order for a term to be implied, the following conditions must be fulfilled:

> (1) it must be reasonable and equitable;
>
> (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
>
> (3) it must be so obvious that it goes without saying;
>
> (4) it must be capable of clear expression;
>
> (5) it must not contradict any express term of the contract. These conditions may overlap. It is not clear whether conditions (2) and (3) are alternative or cumulative.

Pollock and Mulla, Indian Contract And Specific Relief Acts 236, Vo.I, points out:

> The necessity for implying a term into the contract may arise because the parties have not expressly stated them, out of forgetfulness, or because of bad drafting, or because they may have thought the obligation so 'obvious'

> that it 'went without saying'. They may be content to state expressly only the most important terms agreed between them, leaving the others to be understood. They may have had the terms in their mind but did not express them or would probably have expressed them if the question had been brought to their attention. Otherwise, they may have understood the obligations according to the practices already established between them, or arising out of custom or trade usage applicable to their business. Later disputes will show that they did not provide for some contingencies in their contract. It may then become necessary to find out whether terms can be implied to provide for the contingency. Courts are required to imply a term to give efficacy to the contract to prevent 'the enjoyment of the rights conferred by the contract (being) rendered nugatory, worthless, or, perhaps,...seriously undermined'. (Nullagine Investments Pty Ltd. v. Western Australia Club Inc. (1993) 177 CLR 635

**20.** The general presumption is however against implying of terms into a written contract. If the agreement apparently is to complete the contract, the stronger the presumption.

> The presumption against adding terms is stronger where the contract is a written contract which represents an apparently complete bargain between the parties. Where, however, the bargain is obviously not complete, the court is less reluctant to supply the missing terms.

In Aspdin v. Austin (1844) 5 Q.B., 671, Lord Denman, C.J. said:

> Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implication; the presumption is that having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument.

In Churchward v. R., Cockburn (1865) L.R. 1 Q.B. 173, Cockburn C.J. said:

> ...where a contract is silent, the court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent; and above all that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract was the intention of the parties.

Lord Wright in Luxor (Eastbourne) Ltd. v. Cooper [1941] A.C. 108, said:

> It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing.

From the discussion there are sufficient guidelines to hold as to what would be an 'implied term' of the contract. From the above discussion if follows, that these will be some of the tests to be applied whilst considering whether from the written contract it can be held that there is an implied term to pay.

**21.** The next expression requiring consideration is the word "Debt". Black's Law Dictionary (8th Ed.) defines "Debt" as under:

A sum of money due by certain and express agreement. A specified sum of money owning to the person from another, including not only obligations of debtor to pay but right of creditor to receive and enforce payment". (State v. Ducey) 25 Dhio App. 2d 50, 266 N.E. 2d. 233, 235....

A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future. In a still more general sense, that which is due from one person to another, whether money, goods or services.

The essential requirement of a debt are:

(1) an ascertained or readily calculable amount;

(2) an absolute unqualified and present liability in regard to the amount with the obligation to pay forthwith or in future within a time certain;

(3) the obligation must have accrued and be subsisting and should not be that which is merely accruing. A contingent liability or a contingency debt is, therefore, neither a liability nor a debt. A debt is a 'debitum in present solvendum in future.' We therefore hold that the amount covered by the suit is an ascertained amount payable liability. The obligation has accrued and subsists. It is a debt accruing under a written contract.

See Commissioner of Wealth Tax v. Pierce Leslie & Co. Ltd. AIR 1963 Med. referred in Webb v. Stention 1883 (3) Q.B.D. 518.

In J. Jermons v. Aliammal and Ors. MANU/SC/0477/1999 : AIR1999SC3041 , the Supreme Court was considering the ordinary meaning of the word "debt". While answering the issue, the Court held as under:

Ordinarily, "debt" means none that is owned; an existing obligation to pa a certain amount; a sum of mone due from one person to another. Debts can be classified having regard to the criteria for payment, into three categories:

(i) debt which has become due and is payable at present (debitum in present )e.e. in monthly tenancy rent becomes due after the expiry of each month like rent for the month of January becoming due and payable on February 1;

(ii) debt which has; become due but is payable at a future date (debitum in praesenti solvendum in futuro) in the above example if under an agreement of tenancy rent is payable on the 15th of the following month, the rent for January becomes due on February 1, but is payable on February 15; and

(iii) contingent debt which becomes payable on the happening of a certain event which may or may not occur; in the above instance the rent for the month of January will not be a debt in the preceding month of December for the tenant may or may not reside in the next month.

**22.** The expression, "acknowledgment" may now be considered. In Black's Law Dictionary, Eighth Edition, "acknowledgment" has been described as under:

> acknowledgment. 1. A recognition of something as being factual. 2. An acceptance of responsibility. 3. The act of making it known that one has received...something...acknowledgment of debt. Recognition by a debtor of the existence of a debt.

In P. Ramanatha Aiyar's, The Law Lexicon, Reprint, 2001, "acknowledgment" has been stated thus:

> Acknowledgment, is a proceeding whereby a person who has executed an instrument may, by declaring it to be his act and deed, entitle it to be received in evidence without further proof of execution, or Oath
>
> The action of acknowledging : a thing done or given in recognition of something received
>
> Acknowledgment of debt. An admission in writing that a debt is due or that some claim or liability is still in existence
>
> Acknowledgment of debt or liability means an admission in writing that a debt is due or that some claim or liability is still in existence.

In Devi Prasad v. Bhagwanti Prasad and Anr. MANU/UP/0023/1942 : AIR1943All63 , considering the provisions of Section 25(3) of the Contract Act, the Court noted that the Section requires an express promise to pay and not merely an implied promise. The Court held ;

> An acknowledgment of a debt is a unilateral act of the debtor; it is not an agreement or a contract; it merely states that a debt is due and it contains no express promise to pay the debt acknowledged and, indeed, under Article 1, Schedule 1, Stamp Act, such a promise is excluded from the scope of an acknowledgment.

The Court also noted that

> There is a clear distinction between an acknowledgment of a debt simpliciter and an acknowledgment coupled with a statement that the debt acknowledged shall in future carry a certain rate of interest. In the former case there is no promise to pay the debt and the promise to pay the debt can only be implied; in the latter case the statement that the debt shall bear interest means and can only mean that the interest shall be paid and therefore exhibits a promise to pay the interest in express terms, and if there is a promise to pay interest there exists clearly an agreement to pay principal. Taking this view, it is now generally held that when an acknowledgment of debt also contains a statement that the acknowledged debt will bear future interest at a certain rate it ceases to be a mere acknowledgment and becomes an agreement within the meaning of the Stamp Act

**23.** A learned Division Bench of this Court in Balkrishna Mansukhram v. Jayshankar Narayan AIR 1938, Bombay 460 was considering the distinction between mere acknowledgment under Section 19 of the Limitation Act and a promise under Section 25(3) of the Contract Act. The Court observed:

> We think for the purpose of Section 25(3), Contract Act, there must be an

> express promise as opposed to an unconditional acknowledgment involving an implied promise to pay. There seems to be practically a consensus of judicial opinion on the point that a mere implied promise to pay, which may be conveyed by an unconditional acknowledgment, would not be sufficient for the purposes of Section 25(3),

In Hiralal and Ors. v. Badkulal and Ors. MANU/SC/0004/1953 : [1953]4SCR758 , the suit, was filed as a regular suit. One of the issues however was whether an unqualified acknowledgment contained in the entry and the statement of accounts under which the entry was made were sufficient to furnish a cause of action to the plaintiff for maintaining the suit. Considering Section 19 and Article 64 of the Limitation Act, 1908, while considering the judgment of the Judicial Commissioner, which was appealed before it, the Supreme Court observed as under:

> The Judicial Commissioner took the view that an unqualified acknowledgment like the one in the suit, and the statement of the account under which the entry had been made, were sufficient to furnish a cause of action to the plaintiffs for maintaining the present suit. We are satisfied that no exception can be taken to this conclusion. It was held by the Privy Council in Maniram v. Seth Rupchand 33 I. A. 165 (C) that an unconditional acknowledgment implies a promise to pay because that is the natural inference if nothing is said to the contrary. It is what every honest man would mean to do. In Fateh Mohomed v. Ganga Singh A.I.R. 1929 Lah. 264, the same view was taken. It was held that a suit on the basis of a balance was competent. In Kahanchand Dularam v. Dayaram Amritlal A.I.R. 1929, Lah. 263, the same view was expressed and it was observed that the three expressions "balance due," "account adjusted" and "balance struck" must mean that the parties had been through the account.

In Shapoor Fredoom Mazda v. Durga Prasad Chamaria and Ors. MANU/SC/0254/1961 : [1962]1SCR140 the issue again was of maintainability of a suit on acknowledgment considering Section 19 of the Limitation Act, 1908. While answering the issue, the Supreme Court in paragraph 7 observed as under:

> (7) It is often said that in deciding the question as to whether any particular writing amounts to an acknowledgment as in constructing wills, for instance it is not very useful to refer to judicial decisions on the point. The effect of the words used in a particular document must inevitably depend upon the context in which the words are used and would always be conditioned by the tenor of the said document, and so unless words used in a given document are identical with words used in a document judicially considered it would not serve any useful purpose to refer to judicial precedents in the matter.

The Court then posed to itself a question as to what is an acknowledgment and referring to English authorities, held as under:

> (8) The question as to what is an acknowledgment has been answered by Fry, L.J. as early as 1884 A.D. in Green v. Humphreys 1884 26 Ch D 474. This answer is often quoted with approval. "What is an acknowledgment... he proceeded, "in my view an acknowledgment is an admission by the writer that there is a debt owing by him, either to the receiver of the letter or to some other person on whose behalf the letter is received but it is not enough that he refers to a debt as being due from somebody. In order to take the

case out of the statute there must upon the fair construction of the letter, read by the light of the surrounding circumstances, be an admission that the writer owes the debt." With respect, it may be added, that this statement succinctly and tersely gives the substance of the provisions contained in Section 19 of the Limitation Act.

**24.** A learned Single Judge of this Court -K.K. Deasi in Manekchand Mohanlal Poonawala v. Shah Bhimji Kundanmal & Co. and Ors. 1968 Vol.LXX1, 370 was considering whether "Khata Pete Receipt" constitutes not only an acknowledgment for receipt of money but to contain an implied promise that money has been received. The Court was considering the provisions of Order XXXVII Rule 2 as amended by the Bombay Amendment Act, 1966. (The learned referring Judge erroneously proceeded on the footing that this judgment was delivered before the amendment to Order XXXVII Rule 2). After considering the various contentions consequent upon the Summary Suit having to be filed on a written contract, the learned Judge after referring to several judgments held:

The ratio of the decisions in those cases was that mere accounts stated or mere writings of acknowledgments which did not contain express promise for making payments were insufficient to complete a cause of action for a suit on the basis of the provisions of Sub-section (3) of Section 25. Apparently, the ratio of these decisions is that a promise to revive a time-barred debt must be an express promise in writing for payment of the same. That was the condition required to be fulfilled having regard to the provisions of Sub-section (3) of Section 25. Some observations in these cases are relied upon by Mr. Karanee in connection with the true construction to be given to the writing annexed to the plaint. It is not necessary to refer to facts of these cases in that connection. Now, the writing relied upon on behalf of the plaintiffs, in my view, is what is ordinarily known as a "Khata Pete receipt". This kind of writing has been known and understood to constitute not only an acknowledgement for receipt of the money but to contain an implied promise that the money having been received "Khata Pte" i.e. "on account" would be repaid by the debtor signing the writing.

The learned Judge thereafter while considering 'implied obligation' and the effect of Rule 2, held as under:

It is quite clear that previously a written contract was not a necessary condition for institution of a summary suit to recover debt or liquidated demand in money. Where express or implied obligation to pay debt or liquidated demand in money arose, even on an oral contract, a summary suit could be instituted. Under the amended Rule, summary suits cannot be instituted when such debt or demand in money arises on oral contracts. Mr. Karanee, however, is not right in his submission that the deletion of the phrase "express or implied" from amended Rule 2 indicates that when implied obligation to pay debt or liquidated demand in money arises on a written contract, a summary suit cannot be filed. Obligations arising on a written contract can in some parts be express and in other parts be implied by law or otherwise. Such implied obligations, if they create a liability to pay debt or liquidated demand in money, can be enforced by instituting a summary suit having regard to the language of the amended Rule 2. In my view, it is not correct that implied obligations to pay debt or liquidated demand in money when they arise on a written contract cannot be good

causes of action for institution of summary suits.

Therefore expressions understated in mercantile trade or practice based on usages and customs can be relied upon to consider whether the written contract contains an implied term to pay.

**25.** With that, let us consider what constitutes a "settled account" or "account stated". Before further discussing the issue, it would be relevant to refer to some judgments which, in our opinion, shed light on the issue and can be said to have conclusively decided that aspect of the matter. In Tulsiram Shrikisan Marwadi v. Zaboo Bhima Shankar MANU/NA/0041/1947, learned Division Bench was considering as to what would be an account stated. After relying on various judgments, the Court observed as under:

> that a real account stated is a very different thing from an acknowledgment. In a real account stated there is consideration in the shape of an agreement that items on one side of the account be taken as paid by items on the other side. In an account stated it does not matter if some of the items are time-barred. It would be different thing if all the items are time-barred, and we see no reason to depart from the view expressed on this point in Ganesh prasad v. Rambati Bai I.L.R. (1942) Nag.369 : MANU/NA/0022/1941 .

The Privy Council had an occasion to deal with the issue in the case of (Elvira Rodrigues) Siqueira v. (Godnicalo Hypolito Construction) Noronha A.I.R. 1934 P C 144. The Privy Council was considering Section 25(3) of the Contract Act, 1872 and Article 64 of the Limitation Act, 1908 whether - a suit could be maintained on a settled account. It is in that context, that Lord Atkin, speaking for the Privy Council, held as under:

> Their Lordships think that what has been forgotten is that there are two forms of account stated. An account stated may only take the form of a mere acknowledgment of a debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise.
>
> But on the other hand, there is another form of account stated which is a very usual form as between merchants in business in which the account stated is an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid in the way described.

This judgment was considered by the Supreme Court, in Gordon Woodroffe & Co. (Madras) Ltd. v. Shaikh M.A. Majid & Co. A.I.R. 1976 Sup Cou 181. The second question in issue before the Supreme Court was whether there was a settled account between the parties and whether it was open for the Plaintiff to reopen it. It was an admitted fact that to the statement of accounts, no objections were raised by the Plaintiff any time nor was a single document produced to show that the Plaintiff ever wrote to the Defendant raising an objection to the statements of account. At one

stage, the Plaintiff sent a memorandum to the Defendant, accepting the accuracy of the accounts. It is in that context that the Court was considering the concept of "account settled" or "stated" We may gainfully refer to a portion of paragraph 14:

> (14) The legal position is that the accounts are settled or stated if they are submitted and accepted as correct by the other side to whom the accounts have been rendered. Such a statement of accounts need not be in writing, nor is it necessary that before the accounts are settled, they should be gone into by the parties and scrutinised and supported by vouchers. It is sufficient if the accounts are accepted and such acceptance may be inferred by conduct of the parties. As observed in Daniell's Chancery Practice, eighth edition, Vol. I, p. 419:
>
> > The mere delivery of an account will not constitute a stated account without some evidence of acquiescence which may afford sufficient legal presumption of a settlement.

There is also the following passage in Bullenn and Leake's Precedents of Pleadings ninth edition, p. 584:

> It is not enough for the accounting party merely to deliver his account; there must be some evidence that the other party has accepted it as correct. But such acceptance need not be express, contemporaneous or subsequent conduct may amount to a sufficient acquiescence.

After so observing, considering the contention of the Defendants that there has been a stated or settled account, the Court in paragraph 15 held as under:

> In this connection it is necessary to state that the expression "account stated" has more than one meaning. It sometimes means a claim to payment made by one party and admitted by the other to be correct. An account stated in this sense is no more than an admission of a debt out of Court: while it is no doubt cogent evidence against the admitting party, and throws upon him the burden of proving that the debt is not due, it may, like any other admission, be shown to have been made in error. Where the transaction is of this character, it makes no difference whether the account is said to be "stated" or to be "stated and agreed": the so-called agreement is without consideration and amounts to no more than an admission. There is, however, a second kind of account stated where the account contains items both of credit and debit, and the figures on both sides are adjusted between the parties and a balance stuck.

Accounts stated which contains entries on both sides and parties who have stated the account between them have agreed that the items on one side should be set off against the items on the other side and the balance amount should be paid, would amount to a written contract for good consideration arising from the fact that the items have been so set off. Such an account stated gives cause to a contract in writing on a fresh cause of action, with an implied promise to pay.

**26.** Reference may now be made to a judgment on honoured cheque, in the case of Purnima Jaitly v. Ravi Bansi Jaisingh MANU/MH/0690/2003 : AIR2003Bom494 . In that case, it was contended that a suit for recovery of loan which was advanced by a Plaintiff by a cheque, would be a suit based on a bill of exchange. Negating the said contention, the Court held that ; "It is true that a cheque is a bill of exchange, a

special type of bill of exchange which is drawn on a bank. However, a suit upon a cheque (bill of exchange) means a suit to recover money due on a cheque (bill of exchange) drawn by the defendant, which is dishonoured."

In such a case, the suit must be for recovery of money on a cheque drawn in favour of or endorsed to the plaintiff. A suit, however for recovery of a loan which was advanced by the plaintiff by a cheque is not a suit upon a cheque or a bill of exchange and as such is not maintainable as a summary suit. The contention of the Plaintiff that the suit is upon a bill of exchange was rejected.

Reference may also be made to to the judgment in the case of The Central Railway Employees Co-operative Credit Society v. Bank of Baroda MANU/MH/0065/1996 : AIR1996Bom386 . In that case, the Plaintiff had issued crossed cheques for Rs. 1,75,000/- for short term deposit by the bank. The bank encashed the cheque but the amount of cheque was siphoned by the bank officials. A learned Single Judge whilst holding that a Summary Suit was maintainable, held that the Plaintiff society seeks to recover a debt payable by the Defendants bank with interest, arising on a written contract. The Court held that to hold otherwise, would be to cause loss of faith and confidence of the business community and the ordinary citizens in the banking system. This however was not a case of honoured cheque.

**27.** From the above discussion it is clear that a summary suit would not lie on a settled account which is not confirmed by the Defendant and "on honoured cheque". Items (II) and (IV) of para 2 are answered accordingly.

**28.** The issues which remain to be answered would be (a) on settled accounts which are confirmed by the Defendants (b) on acknowledgement of liability, on a mere writing or receipt. We have classified these under two heads as acknowledgement of liabilities or mere writing or a receipt, many a time have to be read together.

Before answering the issue we must note that there must be the following requirements before a summary suit would lie:

(1) There must be a concluded contract;

(2) The contract must be in writing;

(3) The contract must contain an express or implied promise to pay.

There is no dispute in respect of the first two predicates. The only issue is in respect of the third predicate. As we have noted earlier, we are not concerned here with an implied contract, but an implied term in a written contract. The Defendants would be right to contend that an implied contract is not a written contract. Is a summary suit maintainable on an implied term in a written contract with an implied term to pay. In our discussion we have noted that the expression "implied" term is used in different senses. In some contract it would not depend on actual intention of the parties, but on a rule of law, such as the terms, warranties or conditions, which if not expressly excluded the law imports, as for instance under the Sale of Goods Act, Marine Insurance Act, Master and Servant and Landlord and Tenant. To imply a term in the contract as implied term in our opinion the test laid down by Kim Lewison in 'Interpretation of Contract" would be relevant. At the same time the Court would have to note that the general presumption is, however, against the implying of terms into a written contract. It is, therefore, again not possible to lay down a general Rule as to when an implied term in a contract can be the subject matter of a summary suit.

The issue before us is limited to an implied promise to pay. That would necessarily depend on the facts of each case. The two issues as formulated may now be answered.

**29.** In so far as the 'settled account is concerned,' it is no doubt true as noticed by the learned single Judge, that the various judgments adverted to, for holding that the summary suit would lie on a settled account, either of the Privy Council or of the Supreme Court did not arise from suits filed as summary suits. However, after the judgment of the Privy Council (Elvira L. Rodrigues) Sequeira (supra) which has been considered by the Supreme Court in Hiralal & Ors. (supra), a summary suit on a settled account, duly confirmed by the Defendant is maintainable as it is an acknowledgement by the Defendant in the ledger in which mutual accounts have been entered and the accounts settled between them. Such settling of accounts gives rise to a written contract on a fresh cause of action, with an implied promise to pay the amount settled. A summary suit would therefore lie on 'Settled accounts duly confirmed by the defendants. Issue (1) is answered accordingly.

**30.** In so far as acknowledgements writing or receipt are concerned, considering the various judgments adverted to earlier on behalf of the plaintiffs and Defendants and the discussion, it is not possible to lay down any precise test as to when a Summary Suit would lie on an acknowledgement writing or receipt. That would depend firstly on the document itself, the practice, usage and customs of the trade as also the facts of each case.

**31.** By so holding it is not as if the Defendant is denuded of his defences when he applies for leave to defend. The Supreme Court in Machalec Engineering and Manufacturers v. Basic Equipment Corporation MANU/SC/0043/1976 : [1977]1SCR1060 has laid down the tests, which thereafter have been reiterated by the Supreme Court in Sunil Enterprises v. S.B.I. Commercial and International Bank Ltd. MANU/SC/0334/1998 : AIR1998SC2317 . The tests laid down are as under:

> (a) If the defendant satisfies the Court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.
>
> (b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.
>
> (c) If the defendant discloses such facts may be sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiffs claim the Court may impose conditions at the time of granting leave to defend the conditions being as to time of trial or mode of trial but not as to payment in to Court or furnishing security.
>
> (d) If the defendant has no defence, or if the defence is sham or illusory or practically moon-shine, the defendant is not entitled to leave to defend.
>
> (e) If the defendant has no defence or the defence is illusory or sham or practically moon-shine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured.

**32.** For all the aforesaid reasons the issues referred to us are accordingly answered.

The Registry to place the matters before the Learned Bench assigned to hear the matters.

**33.** In the circumstances of the case there shall be no orders as to costs.