
(2005) 06 AP CK 0035
In the Andhra Pradesh High Court
Case No : First Appeal No. 89 of 1995

Appana Pullam Raju

APPELLANT

Vs

Central Bank of India and Others

RESPONDENT

Date of Decision : 20-06-2005

Acts Referred:

Banking Regulation Act, 1935 — Section 139, 141, 21, 35(A)
Civil Procedure Code, 1908 (CPC) — Order 34 Rule 11, 100(1), 34

Citation : (2005) 5 ALT 421 : (2006) 1 CivCC 262

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : M.S. Ramachandra Rao, for the Appellant; C.V. Rajeeva Reddy and N.V. Suryanarayana Murthy, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—The Central Bank of India, the 1st respondent herein/plaintiff instituted the suit O.S.No.78/81 on the file of Subordinate Judge, Ramachandrapuram, as against M/s. East Coast Oil Expellers Limited, and others for recovery of amount by passing a preliminary mortgage decree and also the other suitable reliefs inclusive of personal decree as against certain of the defendants and the learned Subordinate Judge on appreciation of the evidence available on record decreed the suit by Judgment dated 25-8-1994 as against all the defendants and the same had attained finality as against all the other defendants except the 7th defendant since the other defendants had not chosen to challenge the said Judgment and decree. However, aggrieved by the same, the 7th defendant alone had preferred the present Appeal.

2. Sri Ramachander Rao, the learned Counsel representing the appellant/7th defendant had taken this Court through the respective pleadings of the parties and the issues settled and the findings recorded by the trial Court and would maintain that there are several serious infirmities which had lost sight of by the trial Court and in view of those infirmities, the suit as against the 7th defendant

should have been dismissed. The learned Counsel in all fairness would maintain that the 7th defendant also had not seriously controverted about the original guarantee letter dated 13-4-1970 since the execution of the same had been admitted and at the best the 7th defendant can be fastened with liability to a tune of Rs. 60,000/- and not beyond thereto. The learned Counsel also pointed out that even as per para-11 of the plaint it is clear that the negligence had been on the part of the Bank inasmuch as there was failure on the part of the Bank to protect the security and in this view of the matter guarantors' liability came to an end. The learned Counsel also pointed out the memo filed by the plaintiff in this regard to the effect that there are no stocks either in the key godowns or the open loan premises. The learned Counsel also laid emphasis on the aspect that Mutyala Srihari Rao at the relevant point of time was not one of the Directors and as per Ex. A-10 it is clear that the 3rd defendant came in the place of the said Mutyala Srihari Rao and the fact that several documents referred to the name of Mutyala Sri Hari Rao would go to show that the 2nd defendant in collusion with the Bank had manipulated these records and hence on the strength of such documents, the 7th defendant cannot be fastened with liability. The learned Counsel while further elaborating his submissions commented that Ex.A-24 would go to show that this is a document to be executed by borrowers only and not by guarantors but however surprisingly the signature of the 7th defendant also is found. The learned Counsel also had taken this Court through the evidence of D.W.5 and had commented that the trial Court had not attached much importance to the evidence of the expert who had given categorical opinion about the difference of signatures. The Counsel also pointed out the infirmities in Exs.A-25, 52, 53, 57, and A-58. The learned Counsel had pointed out that even if the amounts mentioned in the promissory notes are to be taken as they are, the total amount had not been borrowed even as per the stand taken by the Bank. The learned Counsel also would point out the difference of signatures even to the naked eye apart from the expert evidence in this regard. The learned Counsel pointed out the difference of dates in the seriatim in the documents produced by the Bank and would comment that all these aspects would go to show that these records had been manipulated by the Bank at the instance of the 2nd defendant. The Counsel would maintain that the 2nd defendant obtained the signatures of the 7th defendant in blank papers and could have manipulated all the records in collusion with the Bank to his advantage. The learned Counsel also pointed out the interpolation in the documents and the clear negligence especially on the part of the Bank by virtue of which it can be inferred that there had been collusion between the 2nd defendant and the Bank officials. The learned Counsel made elaborate submissions on the liability of the surety and the liability of the guarantor and when it would come to an end or when it should have been deemed to have been terminated vis-avis the negligence on the part of the Bank in this regard. The learned Counsel also would submit that merely because the signature had been admitted it does not mean that the execution had been admitted. Admission of signature is something different from admitting the execution of a document and the Bank miserably failed in proving the execution

of the relevant documents in general and Ex.A-58 in particular by the 7th defendant and hence the plaintiff is bound to fail as far as the claim as against the appellant/ 7th defendant is concerned. The learned Counsel also pointed out that in view of Order 34 Rule 11 of the CPC and inasmuch as this Court can exercise the discretion, interest to be granted at 6%. Ultimately the Counsel would conclude that in the light of the facts and circumstances at the best the 7th defendant can be fastened with the liability limited to Rs. 60,000/- covered by the original guarantee letter and nothing beyond thereto and the interest granted by the trial Court also is excessive and the discretion had not been exercised properly and hence the Appeal may have to be allowed in toto or at least to the extent as indicated above. The learned Counsel also placed reliance on certain decisions to substantiate his contentions.

3. Percontra, Sri Rajiva Reddy, the learned Counsel representing the Central Bank of India, hereinafter in short referred to as Bank for the purpose of convenience made the following submissions. The learned Counsel had taken this Court through the evidence of P.W.1, P.W.2 and P.W.6 and had explained that P.W.6 categorically deposed about the execution of the documents inclusive of Ex.A-58 by the 7th defendant and P.W.1, P.W.2 and P.W.6 are disinterested witnesses, just officials of the Bank and their evidence cannot be doubted in any way. The learned Counsel also would maintain that the stand taken by the appellant/7th defendant that the Bank had colluded with the 2nd defendant definitely cannot be sustained. There was absolutely no negligence on the part of the Bank. The Bank only had pleaded what had happened and how in a high handed manner the 2nd defendant had acted and this will not amount to negligence on the part of the Bank so as to have the effect of discharging the guarantor's liability. The learned Counsel also had drawn the attention of this Court to relevant provisions of the CPC and the Banking Regulation Act and would comment that this being a commercial transaction, the trial Court in fact had exercised the discretion properly and the same need not be disturbed by reducing the interest in any way. The learned Counsel also had taken this Court through the evidence available on record in general and the evidence of P.W.1, P.W.2 and P.W.6 and D.W.2 in particular and would submit that in the light of the stand taken by the 7th defendant putting forth the theory of obtaining signatures in blank papers, the variance of signatures and the other aspects which had been pointed out by the learned Counsel for the appellant would fall into insignificance. The Bank is not at all concerned with the internal problems inter se between the defendants as such from the bickering in between those parties. The original borrowers or the guarantors as the case may be and the Bank is interested in recovering the loan which had been advanced to the 1st defendant Company and inasmuch as the 7th defendant also stood as a guarantor, he cannot escape the liability. The Counsel also commented that the evidence of D.W.5 is only that of an expert. However, P.W.1, P.W.2 and P.W.6 had well deposed relating to execution of the documents and the filling up of the printed forms by the concerned Bank officials for the execution of the documents by the

guarantors and they had well established and proved and the minor discrepancies pointed out cannot be seriously considered so as to reverse the well considered findings recorded by the trial Court and hence the Appeal is liable to be dismissed.

4. Heard the Counsel on record and perused the respective pleadings of the parties, the oral and documentary evidence available on record and the findings recorded by the trial Court relating to the Issues which had been settled by the trial Court.

5. The parties hereinafter would be referred to as plaintiff and the 7th defendant respectively for the purpose of convenience.

6. As already referred to supra, the Bank instituted the suit for recovery of amount on the strength of mortgage. The 7th defendant alone had preferred the present Appeal who examined himself as D.W.2 before the trial Court. The plaintiff pleaded in the plaint as hereunder:

The 1st defendant is a limited Company incorporated under the Companies Act, 1956 with its Head Office and Factory at Vemulapalli, Dwarapudi Railway Station, East Godavary District engaged in the manufacture and sale of vegetable oils, soaps, cosmetics etc. The 1st defendant Company after receipt of industrial licences and other relevant licences and the project feasibility report, duly obtained the Certificate of Incorporation, the letter of commencement of business and held the statutory meeting as required by the Companies Act. Defendants 2 to 4 are the Directors of the 1st defendant Company and the 2nd defendant is its Managing Director. Defendants 5 to 7 are the guarantors for the various facilities granted to the 1st defendant, the scope and extent of guarantee being the total amount of principal sums in addition to interest, costs etc., for all the facilities. The 8th defendant is also a guarantor, the extent to which he stood guarantee being a maximum principal sum of Rs. 60,000/- in addition to interest and costs. Late A.B.T. Sundaram, another guarantor who stood guarantee to the maximum principal sum of Rs. 1,25,000/- in addition to interest and costs, having passed away leaving defendants 8, 9 and 10 as her only heirs related as son, daughter and son respectively, liability of 8 to 10 defendants is limited to the assets of A.B.T. Sundaram in their possession and enjoyment.

It is further pleaded that the 1st defendant applied for and obtained provisional facilities by way of two term loans each for Rs. 30,000/- for purposes of purchase of machinery and construction of factory sheds respectively and Rs. 30,000/- under open loan facility from the plaintiff at its Branch Office, Kakinada, East Godavari District in April 1970 and after availing the two term loan facilities fully, requested for transfer of the accounts to the Rajahmundry Branch after applying for enhanced limits of the existing facilities and requesting for grant of fresh facilities. The two term loan accounts were transferred to Rajahmundry Branch in June 1970 and thereafter accounts for the various facilities were being operated at Rajahmundry branch only. While the term loan for machinery was

paid and the account closed on 17-7-1970, the account with reference to the other term loan for building continued to be operated by the 1st defendant taking further amounts by way of fresh advances. The further limits sanctioned namely Rupees one lakh for construction of Factory Sheds by way of a term loan; Rs. 65,000/- for purchase of machinery; Rs. 1,50,000/- for key loan; Rs. 30,000/- under open loan and Rs. 85,000/- against documentary demand bills were also transferred on 11-6-1970 to Rajahmundry branch. The said sanction of enhanced limits was made on condition that the 1st defendant deposits title deeds of the factory by way of equitable mortgage and defendants 5 to 7 agreeing to be guarantors. For the provisional limits already sanctioned and availed at Kakinada a demand promissory note by way of a collateral security for Rs. 30,000/- on 13-4-1970 towards term loan for building and another by way of collateral security for Rs. 30,000/- on 16-4-1970 towards the term loan for machinery were executed in favour of the plaintiff by the 1st defendant and the guarantors 5 to 7 defendants executed the letter of guarantee dated 13-4-1970 in favour of the plaintiff limiting their liability to the maximum principal sum of Rs. 60,000/-. The charge for Rs. 30,000/- on the loan against machinery was registered on 2-6-1970 with the Registrar of Companies, Andhra Pradesh purporting to be one in pursuance of the resolution of the Board of Directors dated 5-7-1970. The title deed of the Factory dated 1-6-1970 was sent to Rajahmundry office on 28-7-1970. In view of the sanction of higher limits the 1st defendant drew amounts both in the term loan account for machinery commenced at Kakinada and transferred to Rajahmundry and continued at Rajahmundry and the term loan account for construction of factory sheds besides the open loan account and the key loan account for the total limits of Rs. 3,45,000/- sanctioned under the various heads of accounts excepting the limit of Rs. 85,000/- for bills purchased for which a separate agreement was taken on 25-8-1970 from the Directors and guarantors the demand promissory note by way of collateral security for Rs. 3,45,000/- dated 25-8-1970, the letter of application, continuing, letter accompanying the demand promissory note, waiver and letter undertaking not to create a charge were executed by the Directors 2 to 4 and the 1st defendant Company and also the guarantors, 5 to 7 defendants on 25-8-1970. The 1st defendant also executed letter of hypothecation dated 25-8-1970 for Rs. 30,000/- through its Directors, defendants 2 to 4, and the same was registered on 16-11-1970 with the Registrar of Companies. The letter of hypothecation of the same dated 25-8-1970 for Rs. 65,000/- creating a charge over the machinery was also executed and the same was registered on 28-11-1970 with the Registrar of Companies. The 1st defendant also executed the letter of pledge for Rs. 1,50,000/- dated 25-8-1970 delivering possession of the seeds, groundnuts etc. A copy of the resolution of the 1st defendant Company authorizing the Managing Director, 2nd defendant, to operate the account was also furnished. It was also further pleaded that there was a further enhancement granted increasing the limit of open loan from Rs. 30,000/- to Rs. 50,000/-. Also there was a further enhancement of the key loan limit by raising the same to Rs. 3 lakhs and the amount of the total facilities came to Rs. 6 lakhs, the break up

being:

Rs. 50,000/- Open loan

Rs. 3,00,000/- Key loan

Rs. 1,00,000/- Factory constructions

Rs. 65,000/- for Machinery, and

Rs. 85,000/- for Bills discounting facility

The accounts in respect of each of the facilities were being operated by drawing monies and making payments in the accounts. The 1st defendant represented by defendants 2 to 4, its Directors and defendants 2 to 4 individually on 31-10-1970 executed the demand promissory note by way of collateral security for Rs. 5,15,000/- the limits for the bills discounting facility having been secured by a separate agreement earlier on 25-8-1970, the letter of waiver and the letter of continuity etc. The 1st defendant represented by defendants 2 to 4, its Directors and defendants 2 to 4 individually also executed the same day the demand promissory note dated 31-10-1970 by way of collateral security for the said total limits of Rs. 6 lakhs which included the amount of Rs. 85,000/- representing the facility for bills purchase in favour of the plaintiff promising to pay plaintiff or order the said sum with interest at 4 1/4% over the Reserve Bank of India rate with a minimum of 9 1/4% per annum with quarterly rests and the 1st defendant through the 2nd defendant executed the letter of waiver, the letter of continuity etc., besides the letter of hypothecation for Rs. 50,000/- creating a charge over the stock-in-trade such as copra, coconuts, groundnuts etc., and oils in tins, drums and loose which charge was registered with the Registrar of Companies, another letter of hypothecation for the amount of Rs. 65,000/- advanced against the security of the machinery of the 1st defendant. The 2nd, 3rd and 4th defendants also executed the letter of application dated 31-10-1970 giving details of the various facilities allowed by the plaintiff and offering defendants 5 to 7 as guarantors for the limits sanctioned. Defendants 5 to 7 also executed the letter of guarantee dated 6-11-1970 promising payment of the amount advanced to the 1st defendant upto the maximum principal amount of Rs. 6 lakhs in addition to interest and costs making themselves jointly and severally liable. The documents of pledge of goods for the enhanced limits of Rs. 3 lakhs was also executed the same day i.e., 6-11-1970. Earlier as per the conditions of sanction of higher limits paid by the plaintiff, the 1st defendant represented by defendants 2 to 3, deposited on 31-10-1970 sale deed of the factory site dated 1-6-1970 along with earlier documents of predecessor-in-title with the plaintiff at Rajahmundry and thereby created an equitable mortgage to cover the entire limits of Rs. 6 lakhs. Defendants 2 to 4 as per letter dated 3-11-1970 requested the plaintiff to furnish the list of title deeds deposited on 31-10-1970 and the plaintiff gave the necessary information. Thus the 1st defendant Company and its Directors, defendants 2 to 4, and guarantors defendants 5 to 7, became jointly and severally liable for all the amounts due under the various loan accounts

besides the 1st defendant being liable on the basis of the equitable mortgage dated 31-10-1970 created for the total loan limits of Rs. 6 lakhs. The relevant resolution of the Board of Directors authorizing this transaction is herewith filed. The said charge for the total amount of facilities of Rs. 6 lakhs was registered with the Registrar of Companies as per certificate dated 8-11-1971.

It was further pleaded that while so it came to the notice of the officers of the plaintiff Bank in February 1971 that defendants 2 and 3 and their henchmen tampered with the goods in the key godown and furtively removed the goods in both open loan and key loan godowns. The inspection by the officers of the Bank revealed that the reports and stock statements given on behalf of the 1st defendant were false, misleading and that there were severe shortages both in the open loan goods and the key godown goods and that goods of different description from that of those mentioned in the lodgment and of value far less than declared were kept in the key godowns and that the Directors and their henchmen were responsible for the mess. The plaintiff Bank demanded payment of all amounts due and sealed the premises of the factory on 1-3-1971 by locking the outer door of the building housing machinery by virtue of the provisions in the letter of hypothecation empowering plaintiff to take possession at his option. Confronted with such a situation and for some time avoiding being present in the factory premises even after receipt of the telegraphic notice, the 2nd and 3rd defendants having been detected by the external auditors in the inspection and inventory by them in the presence of the 2nd defendant on 10th and 11th March 1971 while admitting by letter dated 16-3-1971 that shortages and irregularities occurred in the stocks and owning the liability to make good for the loss without reference to the reasons for the said shortages, offered additional securities by making 8th defendant and late A.B.T. Sundaram, his mother stand guarantee for payment of maximum principal sums of Rs. 60,000/- and Rs. 1,25,000/- respectively as per letters of guarantee dated 25-3-1971 and 26-3-1971 respectively executed by them. Defendants 2 and 3 passed a letter to the plaintiff requesting time for payment and release of factory for working the same. A letter of hypothecation creating charge over the machinery to secure an amount of Rs. 60,500/- was also executed by 1st defendant on 26-3-1971 which charge was also registered on 6-5-1971 with the Registrar of Companies. The 2nd defendant also deposited his title deed dated 18-9-1969 pertaining to his individual immovable property with the plaintiff on 26-3-1971 at Rajahmundry as further security for all the amounts due. As the plaintiff did not agree to release the factory for fear of losing its security, the 2nd defendant confirming the misgivings of the plaintiff, actually trespassed into the factory breaking open the seals of the plaintiff Bank and committed theft of contents therein on 1-4-1971 and again on 27-9-1971 for which criminal cases are now pending. In the said circumstances the plaintiff Bank was left with no option except to institute the present suit.

7. Defendants 3,5,6,7 and 8 filed separate written statements though in substance the pleas raised are virtually the same. As against the respective

written statements filed by the parties referred to supra, the plaintiff Bank filed specific rejoinder statements in reply to the written statements filed by the respective parties. In substance the stand taken by the guarantors is that the 2nd defendant had collected the blank papers with their signatures and had taken advantage of the situation and had manipulated these records in collusion with the Bank. Inasmuch as the other defendants had not preferred any Appeal as against the Judgment and decree of the trial Court it may be appropriate to have a look at the pleading, the written statement of the 7th defendant alone who is at present contesting the matter by preferring the present Appeal. It was pleaded by the 7th defendant at paras 4 to 11 as hereunder:

The 2nd defendant casually got acquainted with this defendant. Taking advantage of the same, the 2nd defendant obtained signature of the 7th defendant on some papers. He was assured by the 2nd defendant that defendants 5 and 6 are also joining the execution on the said papers and that the said documents are a mere formality to be given in a routine way so as to enable the local officers of the plaintiff Bank to satisfy their higher officials in the matter of financial assistance to be extended to the 1st defendant Company. The 7th defendant never met any officials in the plaintiff Bank and they never explained to him anything about the document in question. Relying solely on the assurances of the 2nd defendant that there can be possibly no liability and that for whatever might come to pass defendants 5 and 6 will also be there to share any burden and also in the belief that defendants 2 to 4 are primarily, principally and ultimately liable this defendant put his signatures on some papers brought to him by the 2nd defendant. The 7th defendant learns that the signatures purporting to be that of the 5th defendant on the papers on which this defendant signed are not his signatures. The 7th defendant further learns that the signature purporting to be that of the 4th defendant on one of the documents signed by the 7th defendant is not his signature. The 7th defendant states that the assumption of liability on the part of defendants 2 to 4 and defendants 5 and 6 were a condition precedent and was the basis for the 7th defendant's consent to sign the papers brought to him by the 2nd defendant and in the absence of liability on the part of defendants 2 to 4 or any of them or of defendants 5 and 6 or either of them, the 7th defendant will not be liable for any part of the suit claim. It was further pleaded that the 7th defendant was informed by the 2nd defendant that his co-directors were substantially rich and as a matter of pure formality the plaintiff bank was asking for some documents to be signed by his friends. It was also further pleaded that defendants 2 and 4 and one Mutyala Sreehari were Directors of the 1st defendant Company for some time and thereafter the said Sree Hari resigned and 3rd defendant was appointed in his place. The 7th defendant is not aware as to what amount the 1st defendant Company was borrowing from the plaintiff Bank and what facilitates the plaintiff Bank was providing the 1st defendant Company. The 7th defendant applied for permission to inspect the documents and on inspecting the same, the signatures purporting to be his on (1) Agreement for Bills dated 25-6-1970 and (2) Letter of

application dated 25-6-1970 and (3) letter of guarantee dated 6-11-1970 are not his signatures.

The 7th defendant is therefore not liable under the said documents. The signatures on (1) letter of guarantee dated 13-4-1970 and (2) letter of application dated 31-10-1970 were affixed in the circumstances and on the representations set out supra. It was further pleaded that the 7th defendant learns that the signature purporting to be that of the 5th defendant on letter of guarantee dated 13-4-1970 and of defendants 4 and 5 and letter of application dated 31-10-1970 are not theirs. Hence as stated supra, in the absence of liability of defendants 5 and 6 or either of them, the 7th defendant is not liable by virtue of the aforesaid documents. It was pleaded that the 7th defendant never borrowed any sums from the plaintiff Bank and hence the 7th defendant is not liable either as a borrower or guarantor. The 7th defendant also learns that there is no personal liability of the Directors under any of the documents listed in the plaint. Even on that ground the 7th defendant is not liable for the suit claim or any part thereof. The 7th defendant is not aware of the alleged enhanced limits that were sanctioned by the plaintiff Bank to the 1st defendant Company or the conditions on which they were sanctioned. The 7th defendant is not aware of the alleged execution of the various documents on 25-6-1970 and the signatures purporting to be that of the 7th defendant on letter of application dated 25-6-1970 and the agreement for bills dated 25-8-1970 are not the signatures of the 7th defendant and he does not incur any liability under the said documents.

It was further pleaded by the 7th defendant that he is not aware of the various documents said to have been executed on 31-10-1970. The signatures of the 7th defendant on the letter of guarantee dated 6-11-1970 and on the stamped paper attached to it are not his signatures and therefore he cannot be held liable on documents (1) agreement for bills dated 25-8-1970, (2) letter of application dated 25-6-1970 (3) letter of guarantee dated 6-11-1970. It was further pleaded that the 7th defendant learns that defendants 2 to 4 joined the execution of various documents only in their capacity as Directors and not as individuals. As stated supra the 7th defendant affixed his signatures to the letter of guarantee dated 13-4-1970 and on letter of application 31-10-1970 on the assurance that defendants 2 to 4 as also defendants 5 and 6 will be joining the execution of those documents and that defendants 2 to 4 would be the persons that will be primarily, principally and ultimately liable if at all. Since defendants 2 to 4 have not joined the execution of the said documents in their individual capacity and that the signatures purporting to be that of 5th defendant is not his signature on the letter of guarantee dated 13-4-1970, the 7th defendant is not liable either under the letter of guarantee dated 13-4-1970 on which the 7th defendant affixed his signatures and other documents on which the signatures purporting to be those of the 7th defendant are not his. The 7th defendant also learns that the signatures purporting to be those of defendants 4 and 5 on letters of application dated 31-10-1970 are not theirs and so the 7th defendant also cannot be made

liable. The 7th defendant is not aware of the various resolutions of the Board of Directors of the 1st defendant.

At para-13 the 7th defendant also pleaded that the plaintiff Bank is bound to check open loan and key loan stocks periodically and also has to keep watch over the open loan account till they are in tact put in the godowns. They have to keep track of the honouring or dishonouring the documentary demand bills and take immediate and necessary action. They have also to get insured all the insurable goods and the Company's movable and immovable properties. They obviously failed awfully in discharging their duties and are grossly negligent. But for their gross negligence the shortage and irregularities referred to in para (11) of the plaint would not have occurred. Even after the discovery that the goods in key godown were tampered with as alleged by the plaintiff Bank and those in open loan and key loan godowns were removed the plaintiff Bank did not take any immediate action. It should have taken immediate precautions to safeguard Company's premises, machines and other property by employing additional watchmen and should have also alerted defendants 5 to 7 to enable them to safeguard their interest and mitigated their alleged liability as far as possible. The goods are of perishable nature and steps should have been taken immediately to sell the available stock by exercising the right of sale. This would have mitigated the alleged liability of defendants 5 to 7. Nothing is known about the fate of those goods till now. The plaintiff Bank is guilty of gross negligence and on that account the 7th defendant is discharged of his liability even if any. In any view not taking immediate action against the 1st defendant amounts to gross negligence and on that account also the 7th defendant stands discharged of the alleged liability. The plaintiff Bank gave time by extending to the 2nd defendant some respite in return for the security of his mother and brother. In the said circumstances, the plaintiff Bank must be deemed to have waived its claims on defendants 5 to 7. Certain other pleas relating to the bar of limitation and cause of action also had been taken.

8. In the rejoinder statement filed by the plaintiff as against the written statement of the 7th defendant, the allegations were denied and it was pleaded that the normal practice of the Bank officials taking documents from the parties calling on them during office hours and the filling up of blanks by the bank officials in the presence of the parties to the documents and the parties then signing was followed in taking documents from the 7th defendant also. Further, it was pleaded it is the 7th defendant that signed the agreement of bills of 25-8-1970, letter of application dated 25-8-1970 and the letter of guarantee dated 6-11-1970. The alleged negligence on the part of the staff had been specifically denied. Specific stand was taken that the interest claimed is fair and reasonable as per the agreement between the bank and the parties with due regard to the variation in rates of the Reserve Bank of India from time to time.

9. On the strength of these pleadings, the following Issues and Additional Issue were settled:

1. Whether the 1st defendant Company is validly constituted and liable for the suit claim?
2. Whether the defendants 5 to 7 are guarantors for the liability of the 1st defendant Company?
3. Whether the condition precedent pleaded by defendant 5, 6 and 7 for liability of each of them separately springing up is true and valid?
4. Whether the Directors of the 1st defendant Company D-2 to D-4 are not personally liable and if so whether defendants 5 to 7 are also not liable?
5. Whether the letter of guarantee dated 13-4-1970, letter of application dated 31-10-1970 and the letter of guarantee dated 6-11-1970 were signed by the 5th defendant?
6. Whether the agreement for bills dated 25-8-1970 was signed by the defendants 6 and 7?
7. Whether the agreement for bills dated 25-8-1970 and letter of application dated 25-8-1970 and the letter of guarantee dated 6-11-1970 were signed by the 7th defendant?
8. Whether the letter of guarantee dated 6-11-1970 is valid for the reason it is not a tripartite agreement?
9. Whether the waiver pleaded by the defendants 5 to 7 is true or valid?
10. Whether interest is claimed is usurious or penal?
11. Whether amounts debited to Travelling Expenses are not recoverable?
12. Whether signatures of the 3rd defendants were obtained by the 2nd defendant under misrepresentation or fraud and whether plaintiff is answerable for the same?
13. Whether the 3rd and 4th defendants are not personally liable for the suit debt?
14. Whether the plea that suit claim is recoverable only against 1st defendant is true and valid?
15. Whether documents dt.31-10-1970 viz., the demand promissory note for Rs. 5,15,000/- and Rs. 6,00,000/-and the letter of application etc., are not genuine?
16. Whether the 8th defendant is not a guarantor for the limit of Rs. 60,000/-
17. Whether the deceased A.B.T. Sundaram is a guarantor for the limit of Rs. 1,25,000/- and if so whether defendants 8 to 10 are liable as heirs?
18. Whether the 18th defendant is not a necessary party to the suit?
19. To what relief is the plaintiff entitled and against whom?

Additional Issue:

Whether the 11th defendant is entitled to claim charge of Rs. 19,160/- as contended in the written statement of D-11?

10. The trial Court recorded the findings in detail and passed a preliminary decree on the strength of the mortgage and also the personal decree as against the respective parties and the findings recorded and the decree made as against all the other defendants had attained finality and the 7th defendant alone is challenging the said findings by preferring the present Appeal. In the light of the peculiar facts of the case and inasmuch as the contest is limited to the 7th defendant only, the appellant herein, all the Issues and all the findings recorded by the trial Court need not be seriously adverted to and hence the following Points for consideration fall for consideration so far as they relate to the appellant/7th defendant:

1. Whether the appellant/7th defendant stood as guarantor for the loan and facilities advanced to the 1st defendant Company as contended by the 1st respondent/plaintiff?

2. Whether the agreement of bills dated 25-8-1970 and the letter of application dated 25-8-1970 and the letter of guarantee dated 16-11-1970 were signed by the 7th defendant as contended by the plaintiff?

3. Whether the findings recorded by the trial Court so far as they relate to the 7th defendant are liable to be confirmed or to be disturbed or in any way to be set aside by the appellate Court?

4. Whether the interest granted by the trial Court is to be disturbed or to be confirmed?

5. If so, to what relief the parties are entitled to?

11. Point Nos. 1 to 3: The trial Court recorded the evidence of P.W.1 to P.W.8 and D.W.1 to D.W.6 and also Exs.A-1 to A-94 and Exs.B-1 to B-32 were marked. There is no serious controversy to certain of the documents and findings in detail had been recorded by the trial Court. The findings in relation to the other defendants need not be seriously considered since, the other defendants had not preferred any Appeal. However, it may be appropriate to have a glance at the nature of documentary evidence relied upon by the respective parties which is as hereunder:

Ex.A-1/13-4-1970 Demand promissory note for Rs. 30,000/- executed by D-1 East Coast Oil Expellers, through its Managing Director, the 2nd defendant. Ex.A-2/16-4-1970 Demand promissory note for Rs. 30,000/- executed by D-1 through the 2nd defendant. Ex.A-3/ Guarantee deed executed by defendants 2 to 4 in favour of the plaintiff Bank. Ex. A-4/16-4-1970 Certificate of registration of mortgage issued by the Registrar of Companies stating that the 1st defendant has mortgaged the Company's property shown in the schedule referred to

therein. Ex.A-5 & A-6 True copies of statement of accounts Ex.A-7 Certificate of incorporation issued by the Registrar of Companies in respect of D-1 Company. Ex.A-8 Certificate for commencement of business issued by the Registrar of Companies in respect of D-1 Company. Ex.A-9 Registration certificate issued by the Assistant Director of Industries in respect of 1st defendant Company. Ex.A-10/15-6-1970 True copy of the resolution passed by the Directors of the 1st defendant Company authorizing the 3 Directors namely, defendants 2, 3 and 4 to attest the common seal to the documents. Ex. A-11/20-6-1970 True copy of the resolution passed by the Directors of the 1st defendant Company authorizing the Managing Director i.e., 2nd defendant to act on behalf of the 1st defendant Company. Ex.A-12 & A-13 Resolution passed by the Directors of the 1st defendant Company stating that all the resolutions dated 20-6-1970 have been recovered in the minutes book of the Company. Ex. A-14/15-7-1970 True copy of the resolution of 1st defendant Company authorizing the 2nd defendant to draw the term and short term loans advanced by the bank. Ex. A-15/13-4-1970 Application to the plaintiff bank at Kakinada to open account to do business, signed by all the three Directors. Ex.A-16/19-3-1970 Declaration of assets and liabilities by 2nd defendant. Ex. A-17/19-3-1970 Declaration of assets and liabilities executed by 3rd defendant. Ex. A-18/18-3-1970 Declaration of assets and liabilities of 5th defendant. Ex. A-19/18-3-1970 Declaration of assets and liabilities by a person called Mutyala Sriharirao in whose place 3rd defendant co-opted. Ex.A-20/14-3-1970 Declaration of assets and liabilities by 4th defendant. Ex.A-21 Memorandum of Association of East Coast Oil Expellers Ltd and as per R-6 under the Bye-laws at page No. 4 the liability of the Members of 1st defendant Company is limited. Ex.A-22/1-5-1970 Letter addressed to the plaintiff Bank at Kakinada by D.W. 1 Company requesting to transfer the accounts to the branch at Rajahmundry. Ex.A-23/14-5-1970 Letter from Kakinada branch office to the Chief Agent, Hyderabad showing the details of the loan sanctioned to the 1st defendant Company on the guarantee given by defendants 5 to 7. Ex.A-24/25-8-1970 Agreement executed by the defendants 5 to 7 in favour of the plaintiff Bank at Rajahmundry to the Bill discounting facility. Ex.A-25 Letter of application addressed to the plaintiff Bank by defendants 2 to 7 in respect of the credit facility provided by the plaintiff Bank. Ex.A-26 Agreement of hypothecation executed by defendant 2 to 4 on behalf of the 1st defendant. Ex.A-27 Certificate of registration of mortgage dated 31-10-1970 Ex.A-28/26-3-1971 Agreement of hypothecation executed by 2nd defendant the Managing Director of the 1st defendant Company in favour of the plaintiff Bank. Ex.A-29/28-3-1971 Certificate of registration of mortgage Ex.A-30/20-7-1972 Office copy of the legal notice issued on behalf of the plaintiff Bank to the defendants 1 to 9 calling upon to liquidate the outstanding loan. Ex.A-31 Power of Attorney in favour of Marthandaraao, the then Manager of the plaintiff Bank. Ex.A-32 to A-34 True copies of statement of accounts Ex.A-35 Statement of bills purchased and outstanding adjustments by the plaintiff Bank on behalf of the 1st defendant Company. Ex. A-36/16-3-1971 Letter addressed to the plaintiff Bank by all the Directors admitting the responsibility for

shortages in the stocks in the godown and the premises of the Company and undertaking to repay the entire amount due to the plaintiff Bank under open loan and key loan accounts and document bills. Ex.A-37/25-3-1971 Form of guarantee for advances and credit generally executed by 9th defendant standing as additional surety for Rs. 60,000/-. Ex.A-38/26-3-1971 Form of guarantee for advances and credit generally dated 26-3-1971 executed by A.S.T. Sundaram offering additional surety for Rs. 1,25,000/- to the plaintiff Bank. Ex.A-39 Registered sale deed in favour of 2nd defendant deposited towards the equitable mortgage securing the outstanding loan amount to the plaintiff Bank. Ex.A-40 Letter addressed to the plaintiff Bank requesting to furnish the details of the deposit of title deeds by 2nd defendant on 26-3-1971. Ex.A-41/25-8-1970 Demand promissory note for Rs. 3,45,000/- executed in favour of the plaintiff Bank for 1st defendant by its Managing Director and other Directors. Ex.A-42/25-8-1970 Letter of continuity executed by the Directors defendants 2 to 4. Ex.A-43/21-7-1970 Letter of accompanying the demand promissory note executed by defendants 2 to 4. Ex.A-44 Letter of waiver by defendants 2 to 4. Ex.A-45/25-8-1970 Letter undertaking the liability executed by Managing Director i.e., 2nd defendant. Ex.A-46/25-8-1970 Agreement of hypothecation to secure demand cash credit against goods executed by defendants 2 to 4. Ex.A-47 Certificate of registration of mortgage Ex.A-48/5-11-1970 Agreement of hypothecation securing demand cash credit against goods dated 5-11-1970 executed by defendants 2 to 4. Ex.A-49/25-8-1970 Certificate of registration of mortgage Ex.A-50 Deed of pledge of goods to secure the demand cash credit executed by defendants 2 to 4 in favour of the plaintiff Bank. Ex.A-51 Letter addressed to the plaintiff Bank by defendants 2 to 4 informing the resolution passed, authorizing the 2nd defendant to operate the Bank account, on behalf of the 1st defendant. Ex.A-52/31 -10-1970 Demand promissory note for Rs. 5, 15, 000/- said to have been executed by defendants 2 to 4. Ex.A-53/31 -10-1970 Demand promissory note for Rs. 6 lakhs said to have been executed by defendants 2 to 4. Ex.A-54/31 -10-1970 Letter of waiver executed by 2nd defendant in favour of plaintiff Bank. Ex.A-55/31 -10-1970 Letter of continuity executed by 2nd defendant. Ex.A-56 Agreement of hypothecation to secure demand cash credit against goods executed by defendants 2 to 4. Ex.A-57 Letter of application admitting the loan facilities sanctioned to defendants 1 to 4 executed by defendants 5 to 7. Ex.A-58/6-11-1970 Form of guarantee for advance and credits generally executed by defendants 5 to 7 Ex.A-59 Pledge of goods to secure demand cash credit for Rs. 3 lakhs executed by 2nd defendant for the 1st defendant Company. Ex.A-60 Title deed in respect of the land where the 1st defendant Company is situate and which was deposited with the plaintiff bank towards equitable mortgage Ex.A-61/3-11-1970 Letter addressed to the plaintiff Bank by defendants 2 to 4 acknowledging the deposit of title deed of the factory premises on 31-10-1970 Ex.A-62 Copy of resolution showing the various kinds of loans granted to 1st defendant Company and also authorizing the 2nd defendant who is the Managing Director of 1st defendant Company to open various accounts with the plaintiff Bank and to operate. Ex.A-63/31

-10-1970 Certificate of registration of mortgage Ex.A-64/24-12-1970 Letter addressed to M/s. K.V.N. Murthy & Co. asking to pay to the plaintiff Bank on demand Rs. 3484-69 ps. Ex.A-65 Letter addressed to M/s. K.V.N. Murthy & Co. to pay Rs. 3700/- on demand to the plaintiff bank. Ex.A-66/24-12-1970 Way bill Ex.A-67 Letter of communication addressed to the plaintiff Bank by Andhra Bank, Narsipatnam Ex.A-68 Railway receipt Ex.A-69/24-12-1970 Letter addressed to K.V.N. Murthy & Co. to pay Rs. 3484-69 on demand to the plaintiff. Ex.70/26-12-1970 Parcel way bill Ex.A-71 Letter of communication from Andhra Bank, Parvathipuram to the plaintiff Bank Ex.A-72/26-1-1970 Lorry receipt issued by S.R.M.T. parcel service. Ex.A-73/22-1-1971 Letter of communication from S.B.I. Rajahmundry to the plaintiff Bank Ex.A-74 Acquaintance Roll Register of the plaintiff Bank, Rajahmundry Ex.A-75/19-3-1970 Declaration of assets and liabilities by 6th defendant Ex.A-76 True copy of statement of account of open loan Ex.A-77/11-7-1973 Statement of bills purchased and outstanding adjustment account of 1st defendant Company Ex.A-78 Statement of account of term loan Ex.A-79 Statement of account of term loan Ex.A-80 Statement of account of key loan Ex.A-81, A-82, A-83 Returned registered postal covers addressed to the defendants. Ex.A-84 to A-88 Postal acknowledgements Ex.A-89/25-10-1972 Reply notice issued by 3rd defendant to the notice dated 20-7-1972 under Ex.A-30 by the plaintiff Bank Ex.A-90/6-8-1972 Reply notice issued on behalf of 5th defendant to the notice Ex.A-30 Ex. A-91/6-8-1972 Reply notice issued on behalf of the 6th defendant to the notice Ex.A-30 Ex.A-92/20-8-1972 Reply notice issued on behalf of the 7th defendant in reply notice to the notice dated 16-8-1972 Ex.A-93 Reply notice issued on behalf of the 8th defendant to the notice Ex.A-30 dated 20-7-1992 Ex.A-94 Reply notice issued on behalf of the 9th defendant in reply to Ex.A-30. Likewise, the particulars of Exs.B-1 to B-32 are as hereunder: Ex.B-1/5-9-1969 Articles of agreement to 1st Company Ex.B-2/1-4-1971 Letter addressed to M/s. Appana Satyanarayana Rajarao & Company by the 2nd defendant Ex.B-3/20-1-1972 Letter addressed by 2nd defendant to M/s. Appana Satyanarayana & Company Ex.B-4/2-3-1971 Cheque for Rs. 20,000/- drawn in the name of Appana Satyanarayanamurthy & Co. by 2nd defendant Ex.B-5 Reference from the Andhra Bank, Dwarapudi stating that the cheque Ex.B-4 was referred to the drawer Ex.B-6 Returned registered cover Ex.B-7 Returned registered cover Ex.B-8 Share certificate in the name of 4th defendant Ex.B-9 Assessment proceedings of the C.T.O. Kakinada in respect of 1st defendant Company. Ex.B-10 Assessment proceedings of the Commercial Tax Officer, Kakinada of 1st defendant Company Ex.B-11 Letter addressed to the Commercial Tax Officer, Kakinada by 4th defendant Ex.B-12 Postal acknowledgement Ex.B-13 Assessment order of the Commercial Tax Officer, Kakinada in respect of the 1st defendant Company. Ex.B-14 Show cause notice of the 2nd assessment for the year 1970-71 issued to the 1st defendant Company by the Commercial Tax Officer, Kakinada Ex.B-15 Letter addressed to the Commercial Tax Officer by 4th defendant Ex.B-16 Letter addressed to the Commercial Tax Officer, Kakinada for further extension of time to 4th defendant Ex.B-17 Form D-3 under A.P. General Sales Tax Act Ex.B-18

Postal acknowledgement of 4th defendant Ex.B-19 Diary in the hand-writing of 6th defendant Ex.B-20 Admitted signature of 4th defendant taken in the public Court Ex.B-21 Admitted signature of 4th defendant taken in the public Court Ex.B-22 Photo of the signature Ex.B-23 Opinion given by Sri Y. Sidhareddi, handwriting expert Ex.B-24 Admitted signature of 5th defendant taken in the public Court Ex.B-25 Admitted signatures of 5th defendant taken in the public Court Ex.B-26 Photo of signatures Ex.B-27 Admitted signatures of 6th defendant taken in the public Court Ex.B-28 Admitted signatures of 6th defendant taken in public Court Ex.B-29 Photo of signature Ex.B-30 Admitted signatures of 7th defendant taken in the public Court Ex.B-31 Admitted signatures of 7th defendant taken in the public Court Ex.B-32 Photo of signature

In the evidence of P.W.1 he deposed that the 1st defendant Company was sanctioned with certain limits initially by the Manager, Kakinada Branch. P.W.1 worked at Kakinada during 1968-71 and the 1st defendant Company was to start oil mill business and therefore two term loans were granted, one for construction of factory shed and another loan for purchase of machinery for Rs. 30,000/- the evidence of P.W.1 also makes it clear that defendants 2 to 4 were the Directors of the Company and defendants 5 to 7 stood as guarantors for the facilities provided by the plaintiff. Subsequent thereto the amounts were transferred to the Branch at Rajahmundry. The Directors executed promissory note for Rs. 30,000/-, Ex.A-1 and yet another promissory note for Rs. 30,000/-marked as Ex.A-2. Defendants 5 to 7 executed Ex.A-3 guarantee letter for Rs. 60,000/- on 13-4-1970. It is pertinent to note that there is no serious controversy relating to this document even by the appellant/7th defendant. This witness also specifically deposed that defendants 2 to 4 and all the guarantors defendants 5 to 7 approached the plaintiff Bank for these facilities and also executed all the relevant documents in his presence. This witness deposed about Exs.A-7 to A-23 and he was cross-examined. In cross-examination this witness deposed that there is no separate letter in token of acceptance. The three guarantors signed in his presence and he had denied the suggestion that none of the guarantors had not signed in his presence. This suggestion put to this witness P.W.1 is contrary to the stand taken by the 7th defendant now fairly admitting the initial guarantee agreement.

12. P.W.2 is yet another witness who deposed that he is the Branch Manager of Central Bank of India, Mylavaram and he worked at Rajahmundry as Clerk from 1957 to 1973 and the 1st defendant had account in the branch at Rajahmundry and he was in-charge of filling of documents and they filled up documents in the office in the presence of parties and they are having facilities of discounting and there was an agreement for bills discounting and he filled up the blanks in Ex. A-24 and in his presence the parties signed in Ex.A-24 and there are two sets of parties, one falling under Directors and other under guarantors and all of them signed before him and he put in the date 25-8-1970 in the letter of application Ex.A-25 which gives the break up facilities the Bank sanctioned and they were signed before him. The Directors and guarantors signed in his presence in

Ex.A-25. This witness also deposed that there is an open loan facility at Rajahmundry and he filled up Ex.A-26, the letter of hypothecation creating charge of the stock and it was signed before him by the Directors and put up the seal of the Company and the seal was affixed in the presence of three Directors who signed it. The schedule therein also was filled up by him. Ex.A-27 is the registration of the charge. He also filled up Ex.A-28, the letter of hypothecation forms on 26-3-1971. The schedule of the documents charged contains machinery. He deposed that he wrote the schedule and the Managing Director signed it. It was also registered before the Registrar of Companies and the certain of registration is Ex.A-29. This witness was cross-examined and certain suggestions put to him were denied. It was specifically put to him that the signatures of defendants 6 and 7 are forged in Ex.A-25, but P.W.2 had specifically denied the said suggestion.

13. P.W.3 is yet another witness, Branch Manager, Central Bank of India, Warangal Branch who was the Manager of the Bank from June 1971 to April 1976. This witness deposed about the copies of notice Ex.A-30 and he has got Power of Attorney to file the suit i.e., Ex.A-31 and he signed the plaint on behalf of the Bank. This witness deposed about Exs.A-32 to A-35. P.W.4, Venkata Rao was examined who had supported the version of the Bank.

14. P.W.5 is the Industrial Finance Officer looking after small industries and he deposed about the advances given to the 1st defendant which falls under small industries. He deposed about the giving of additional security. He called on mother and brother of the 2nd defendant who gave additional security. They executed hypothecation bond Ex.A-38. Ex. A-37 is the guarantee letter. He executed the letter of hypothecation Ex.A-28. He gave security for deficiency in the deed. He passed a letter Ex.A-40 and deposited documents Ex.A-39. This witness also deposed that they told him that it is a serious matter and even before they got advice from the Head Office, the 2nd defendant transferred and broke open the lock etc. This witness was cross-examined.

15. Apart from the evidence of P.W.1 and P.W.2, the evidence of P.W.6 also is important since P.W.6 deposed several details about the present transactions. P.W.6 deposed about the transfer of accounts from Kakinada to Rajahmundry and he also deposed about agreement the agreement of discounting facility as per Ex.A-24. The total loans sanctioned to the 1st defendant is to a tune of Rs. 3,45,000/- in addition to the bill discounting facility. The A.D.P. note for Rs. 3,45,000/- was also executed by the 1st defendant in favour of the Bank. Ex.A-41 is the pronote executed by defendants 2 to 4 who were Directors of the 1st defendant Company. Ex.A-25 is the loan application signed by defendants 2 to 4 and defendants 5 to 7. He also deposed that at the time of execution of all the documents when fresh limit was sanctioned he was present and the Directors executed a letter of continuity. Ex. A-42 is the letter of continuity dated 25-8-1970. Ex.A-43 is the letter accompanying the DP. note showing the break up of the loan limits executed by all the Directors, defendants 2 to 4. They also

executed a letter of waiver dispensed with the presentation of the DP. note. Ex.A-44 is the letter of waiver. At the time of execution of DP. note defendants 2 to 4 also executed a letter not to create charge as per Ex.A-45. This witness also deposed about Ex.A-46, A-48, A-51, A-52, A-53, A-55 and also Ex.A-56. the details of these documents already had been referred to supra. Ex.A-57 is the loan application for break up figures executed by defendants 2 to 4 and defendants 5 to 7. Defendants 5 to 7 executed a guarantee agreement in favour of the Bank as per Ex.A-58. Thus it is pertinent to note that P.W.6 specifically deposed about Ex.A-57, the loan application and also Ex.A-58. This witness also deposed about Ex.A-27, A-37, A-38, A-39, A-40 and also Ex.A-59, A-60, A-61, A-62, A-63 and all other details relating to the transactions. It is recorded that the cross-examination for defendants 5,7,8 and 11 as Nil and there are cross-examination on behalf of defendants 6 and 8. Subsequent thereto it was recorded that cross-examination for 7th defendant is adopted as above. This witness, P.W.6, no doubt deposed that he knows the 2nd defendant personally since his childhood and they studied in the same school. The 2nd defendant is one of the Directors and he was working as a School Teacher as per his information. Ex.A-41 was executed in Rajahmundry Branch and he was present when Ex.A-41 was executed. Ex.A-41 does not contain his hand-writing. Ex.A-42 to A-63 also do not contain his hand-writing. Unless he verifies the record, he cannot say the names of other customers who treated similar documents at Rajahmundry branch. On behalf of the 6th defendant also, this witness was cross-examined and suggestions put to him had been denied.

16. The Manager, Central Bank of India, Mandapeta was examined as P.W.7 who deposed about the facility of discounting of bills given by the Bank to the 1st defendant Company. He also deposed about Exs.A-64 to A-74. This witness was cross-examined but nothing serious had been elicited.

17. P.W.8 is yet another Branch Manager of the Bank at Rajahmundry from 26-5-1990. This witness deposed about the verification of the open loan account and the other account afresh and preparation of copies of the account with due verification. This witness deposed about Exs.A-76, A-77, A-78, A-79, A-80. The cross-examination of this witness on behalf of the defendants had been recorded as Nil.

18. The 3rd defendant in the suit was examined as D.W.1 who no doubt deposed that in the year 1969 or 1970 the 2nd defendant informed him that he removed Mutyala Sriharirao from the Directorship and appointed D.W.1 as a Director in his place. The 2nd defendant is the Managing Director of the firm and the 2nd defendant is in charge of the affairs of the 1st defendant Company. This witness no doubt substantially had taken the same stand as other defendants had taken. This witness in cross-examination admitted that all the documents which were filed by the plaintiff into Court purported to be signed were signed by him and he had admitted the signatures shown to him also. This witness was cross-examined at length. It is needless to say that this defendant had not preferred any Appeal.

19. The 7th defendant in the suit, the present appellant, had examined himself as D.W.2 who had deposed that his father used to deal in coconut and his father is a partner in Appanna Satyanarayana Murthy and Raja Rao and Co. and he used to assist his father in his business and his father died in 1974. D.W.2 also deposed that the 2nd defendant used to visit their firm and the 2nd defendant informed him that he started a mill in Vemulapalli and that they were to supply coconut to his mill and he said that the Company is on large scale and they have to supply the coconut on large scale and they have to take purchasing agency. The 2nd defendant assured to give Rs. 2.75 ps. per bag of 50 Kgs. of coconut and they have to purchase the coconut on behalf of the Company and supply the same to the Company. They also made a deposit of Rs. 10,000/- with the 2nd defendant. The agreement also was prepared on a stamp paper and the draft copy was supplied to them. Ex.B-1 is the draft copy of the agreement, but the 2nd defendant did not give them any order appointing them as commission agents but he used to visit their firm on his car and purchase coconut bags on credit basis. The 2nd defendant also is indebted to their firm to a tune of Rs. 31,976.33 ps.... He also addressed two letters to their firm as per Ex.B-2 and Ex.B-3 and he also gave a cheque dated 2-3-1971 as per Ex.B-4 for Rs. 20,000/-. The cheque was dishonoured as per the Bank endorsement as per Ex.B-5. They also got issued a notice to defendants 1 and 2 as per Exs.B-6 and B-7, the returned covers. The amount was not realized. This witness also deposed that at the instance of the 2nd defendant, his father purchased shares worth about Rs. 6000/- in his name. Ex.B-8 is the shares certificate. He got acquaintance with the 2nd defendant due to the business dealings and when he happened to visit Dwarapudi the 2nd defendant obtained his signatures on blank typed papers and printed papers. He also said that he obtained signatures likewise from two or three persons and out of confidence he blindly signed the blank papers. He does not remember whether the other persons already signed besides him. He further deposed that by the time he signed the blank papers there were no other signatures and before taking his signatures on blank papers, the 2nd defendant informed him that he is applying for loans. The 2nd defendant always assured him that he need not worry about it and that he never visited the Bank. He never informed that for what particular purpose the 2nd defendant was obtaining his signatures on those particular papers. The 2nd defendant informed him that the Directors in the firm are multi-millionaires and he need not worry and that the Directors primarily are responsible for Company affairs. This witness denied the signatures shown to him in Exs.A-24, A-25 and A-58. The 2nd defendant told him that all of them collectively would be liable to repayment. The 2nd defendant said that he would make this witness a Director of the Company. He also received sales tax assessment notice and order as per Ex.B-9 and Ex.B-10 in which he was described as a Director. Ex.B-11 is the office copy of the letter. Ex.B-12 is the postal acknowledgement. This witness was cross-examined by the plaintiff and no doubt several suggestions were denied by this witness put to him in the cross-examination. This witness admitted that the signatures on Ex.A-57 and Ex.A-3 guarantee letter for advances and loans are his signatures

and the other signatures might have been present by the time he signed on Exs.A-57 and Ex.A-3. He also further deposed that nobody objected him to read the contents of the documents before signing them. This witness also deposed that the signatures in Ex.A-58 belong to him and the signatures in Exs.A-24 and A-25 do not belong to him. This witness also denied other suggestions put to him.

20. D.W.3 is the Assistant Commercial Tax Officer at Kakinada who deposed as per the records relating to the assessments of the 1st defendant. D.W.4 is a resident of Ramachandrapuram and he deposed that he knows defendants 6 and 15 and the 15th defendant is the mother of his son-in-law and the 15th defendant gave the diary relating to the 6th defendant to be filed into Court for the year 1970 and he knows the hand-writing of the 6th defendant. Ex.B-19 is the diary in the hand-writing of the 6th defendant. This witness was cross-examined. It is needless to say that the 6th defendant had not preferred any Appeal.

21. D.W.5 is the Assistant Director, Forensic Science Laboratory, Hyderabad. Strong reliance was placed on the evidence of this witness on the ground that the expert expressed some opinion relating to the signatures. This witness deposed that on 24-10-1978 he received requisition from Sub-Court, Rajahmundry enclosing certain documents containing the specimen and disputed signatures. The disputed signatures were marked by him as Q-1 to Q-3 and the specimen signatures were marked as S-1 to S-24. This witness deposed about the signatures relating to the other defendants also in detail and his comparative study in relation thereto. This witness opined that the person who wrote the signatures marked as S-7 to S-12 in Exs.B-24 and B-25 did not write the disputed signatures contained in Exs. A-3, A-57 and A-58 marked by him as Q-3 to Q-7 as per Ex.B-23. This witness also deposed about the subsequent signatures of the 6th defendant. This witness while deposing about the subsequent signatures of the 7th defendant had stated that the subsequent signatures of the 7th defendant were marked by him as S-9 to S-24 as per Exs.B-30 and B-31. The corresponding admitted signatures of the 7th defendant were marked by him as Q-10 and Q-13 contained in Exs.A-24, A-25 and A-58 and he thoroughly compared the disputed signatures with the specimen signatures of the 7th defendant and he is of the opinion that the person who wrote the subsequent signatures marked by him as S-9 to S-24 in Exs.B-30 and B-31 did not write Q-10 to A-13 contained in Exs.A-24, A-25 and A-58. Ex.B-23 is his opinion. This witness also deposed about the reasons how he had given Ex.B-23. This witness was cross-examined at length.

22. D.W.6 is the son of the 5th defendant and he had deposed about certain details. It is needless to say that these parties, the legal representatives of the 5th defendant who is no more, had not preferred any Appeal. Strong reliance was placed by the Counsel for the appellant on the evidence of D.W.5, expert evidence, and the opinion given by him on comparison of signatures and would contend that the 7th defendant had not executed Ex.A-58 at all. Reliance also

was placed on the decisions *Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee* since deceased and after him his legal representatives and Others, and *Smt. Bhagwan Kaur Vs. Shri Maharaj Krishan Sharma and Others*, .

23. It is no doubt true that the expert examined as D.W.5 had given the opinion Ex.B-23 and certain reasons also had been given by him. It is needles to say that it is only opinion evidence. It is pertinent to note that the stand taken by the 7th defendant in the written statement and also while deposing as D.W.2 is that his signatures had been obtained on blank papers by the 2nd defendant on assurance for applying loans. When such papers are available it would be too remote to infer that the 2nd defendant would have fabricated or forged signatures in collusion with the Bank or the Bank would have resorted to forge the signatures. Hence on the strength of such opinion evidence, the expert evidence of D.W.5, when clear evidence of P.W.1, P.W.2 and P.W.6 is available on record in general and P.W.6 in particular and especially in the light of the admissions made by, the 7th defendant as D. W.2, the opinion of the expert D.W.5 cannot be given much weight as against the direct evidence available and hence the trial Court had arrived at the correct conclusion in this regard.

24. Submissions at length were made relating to the aspect that the execution of the document is something different from mere admission of the signatures. Strong reliance was placed in this regard on *Pirbhu Dayal v. Tula Ram*, AIR 1922 All. 401 wherein the Division Bench of Allahabad High Court held that where the plaintiff sued relying on a document which the defendant affirmed to be only a blank piece of paper to which he was asked to affix his signature and thumb impression, the burden of proof of its execution lay on the plaintiff. In *Ch. Birbal Singh Vs. Harphool Khan and Another*, while dealing with execution of document and meaning thereof it was held:

"The point has been argued at great length from both sides. I have given my anxious consideration to the whole matter and have no hesitation to say that in a case based on pronote the initial burden lies on the plaintiff to prove execution of the pronote and when the burden is discharged it is then that the court shall raise a presumption in favour of the plaintiff for holding that the pronote was for consideration and it will be for the defendants to rebut that presumption. The same principle was laid down in the case of *Kundan Lal Ralla Ram v. Custodian Evacuee Property, Bombay* (AIR 1961 SC 1316). Before proceeding further it may be considered as to what the word "execution" signifies. In *Shaikh Edadut Ali v. Muhammad Fareed*, (35 Ind. Cas. 56 = AIR 1916 206) it was held that the word "execution" consists in signing a document written out, read over and understood and does not consist of merely signing a blank paper. The same view was taken in the cases of *Mirza Gorgani v. Bhola Mal Nibalchand* (AIR 1934 Lah. 293(2) and *Pirbhu Dayal Vs. Tula Ram*, (2). Therefore, the first question which arises for consideration is whether the execution of the pronote was proved by the plaintiff or admitted by the defendants. The plaintiff examined himself and one Pheru, the marginal witness of the pronote. Both of them contradicted each

other on material points to the extent that the learned first appellate Court was justified in rejecting their evidence. According to the plaintiff, the said advance was made by him in his Kothri which is north facing. He immediately resiled from this statement and gave out that the money was advanced at the house of Mithan Lal, the scribe of the pronote and the receipt. According to him, Ratna and Pheru were present at that place and the pronote was scribed by Mithan Lal at his house. He had also stated that the necessary stamp and form for executing the pronote and the receipt were brought by Mithan Lal. Pheru on the other hand gave out that the advance was made at the house of the plaintiff and the pronote and the receipt were also executed at that place. According to him, these documents were scribed by one Pirthvi and not by Mithan Lal, as stated by the plaintiff. He also gave out that the stamp and the forms were brought by Harphool. Obviously these contradictions should not have been there if the pronote and the receipt were actually written out in the presence of the defendants and their thumb marks were obtained thereafter. It may further be stated that neither Mithan Lal, the alleged scribe of the documents nor Ratna was produced in this case. In this manner the learned first appellate Court was perfectly justified in holding that the plaintiff had failed to prove execution of the pronote and the receipt. The conclusion is based on sound reasonings. As held in the case of R. Ramachandran Ayyar Vs. Ramalingam Chettiar, . Section 100(1)(c) CPC does not refer to error or defect in the appreciation of evidence adduced by parties on merits. Even if the appreciation of evidence made by the lower appellate Court is patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that cannot be said to introduce a substantial error or defect and the High Court cannot interfere with the conclusions recorded by the lower appellate Court. In the instant case the conclusions cannot be characterized as erroneous or wrong and cannot be disturbed."

The Apex Court while dealing with material alteration without consent of the party liable under it and the effect thereof in Seth Loonkaran Sethiya and Others Vs. Mr. Ivan E. John and Others, observed:

"Question No. 5: Before proceeding to determine this question, it would be well to advert to the legal position bearing on the matter. As aptly stated in paragraph 1378 of Volume 12 of Halsbury's Laws of England (fourth edition) "If an alternation (by erasure, interlineations or otherwise) is made in a material party of a deed, after its execution, by or with the consent of any party to or person entitled under it, but without the consent of the party or parties liable under it, the deed is rendered void from the time of the alteration so as to prevent the person who has made or authorized the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound by it, who did not consent to the alteration, any obligation, covenant or promise thereby undertaken or made.

A material alteration according to this authoritative work, is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its

original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed.

The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed

...

As the above mentioned alternations substantially vary the rights and liabilities as also the legal position of the parties, they cannot be held to be anything but material alternations and since they have been made without the consent of the defendants first set, they have the effect of cancelling the deed. Question No. 5 is therefore, answered in the affirmative."

Relating to the execution of the documents, the evidence of P.W.1, P.W.2 and P.W.6 is clearly available on record and apart from this aspect the admission relating to the signatures by D.W.2 also would assume lot of importance. The 7th defendant pleaded in paras-11 and 12 of the written statement as hereunder:

"As stated supra this defendant affixed his signatures to the letter of guarantee dated 13-4-1970 and on letter of application 31-10-1970 on the assurance that defendants 2 to 4 as also defendants 5 and 6 will be joining the execution of those documents and that defendants 2 to 4 would be the persons that will be primarily, principally and ultimately liable if at all. Since defendants 2 to 4 have not joined the execution of the said documents in their individual capacity and that the signatures purporting to be that of defendant No. 5 is not his signature on the letter of guarantee dated 13-4-1970, this defendant is not liable either under the letter of guarantee dated 13-4-1970 on which this defendant affixed his signatures and other documents on which the signatures purporting to be those of this defendant are not his. This defendant also learns that the signatures of purporting to be those of defendants 4 and 5 on letter of application dated 31-10-1970 are not theirs and so this defendant also cannot be liable. This defendant is not aware of the various resolutions of the Board of Directors of the 1st defendant.

For a guarantee to be valid, it must be tripartite i.e., the creditor, the debtor and the guarantor must be parties to the same. Here none of the concerned documents were tripartite document. The plaintiff Bank is not an executant of any of them. The 1st defendant Company also did not sign. Hence this defendant submits that the letter of guarantee cannot be enforced against this defendant."

25. It is pertinent to note that the stand taken by the 7th defendant is the theory of obtaining signatures on blank papers and utilizing such blank papers by the 2nd defendant. However, a deviated stand is being taken denying the very signatures and denying the very execution taking advantage of the opinion of the expert D.W.5. In the light of the direct evidence available on record this stand

taken by the appellant/7th defendant cannot be accepted.

26. Further, submissions at length were made relating to the Bank's negligence and the discharge of the surety or the guarantor.

The plaintiff Bank no doubt pleaded at para-11 as hereunder:

"While so it came to the notice of the officers of the plaintiff Bank in February 1971 that defendants 2 and 3 and their henchmen tampered with the goods in the key godown and furtively removed the goods in both open loan and key loan godowns. The inspection by the officers of the Bank revealed that the reports and stock statements given on behalf of the 1st defendant were false, misleading and that there were severe shortages both in the open loan goods and the key godown goods and that goods of different description from that of those mentioned in the lodgment and of value far less than declared were kept in the key godowns and that the Directors and their henchmen were responsible for the mess. The plaintiff Bank demanded payment of all amounts due and sealed the premises of the factory on 1-3-1971 by locking the outer door of the building housing machinery by virtue of the provisions in the letter of hypothecation empowering plaintiff to take possession at his option. Confronted with such a situation and for some time avoiding being present in the factory premises even after receipt of the telegraphic notice, the 2nd and 3rd defendants having been detected by the external auditors in the inspection and inventory made by them in the presence of the 2nd defendant on 10th and 11th March 1971 while admitting by letter dated 16-3-1971 that shortages and irregularities occurred in the stocks and owning the liability to make good for the loss without reference to the reasons for the said shortages, offered additional securities by making 8th defendant and late A.B.T. Sundaram, his mother stand guarantee for payment of maximum principal sums of Rs. 60,000/- and Rs. 1,25,000/- respectively as per letters of guarantee dated 25-3-1971 and 26-3-1971 respectively executed by them. Defendants 2 and 3 passed a letter to the plaintiff requesting time for payment and release of factory for working the same. A letter of hypothecation creating charge over the machinery to secure an amount of Rs. 60,500/- was also executed by 1st defendant on 26-3-1971 which charge was also registered on 6-5-1971 with the Registrar of Companies. The 2nd defendant also deposited his title deed dated 18-9-1969 pertaining to his individual immovable property with the plaintiff on 26-3-1971 at Rajahmundry as further security for all the amounts due. As the plaintiff did not agree to release the factory for fear of losing its security, the 2nd defendant confirming the misgivings of the plaintiff, actually trespassed into the factory breaking open the seals of the plaintiff Bank and committed theft of contents therein on 1-4-1971 and again on 27-9-1971 for which criminal cases are now pending."

It is true that a memo also was filed by the plaintiff in the suit which reads as hereunder:

Memo filed by the plaintiff

"Plaintiff begs to state that there are no stocks in either key godowns or the open loan premises."

In the written statement filed by the 7th defendant at para-13, specific stand was taken that the plaintiff has been grossly negligent and further pleaded as hereunder:

"...The plaintiff and the plaintiff Bank is bound to check the open loan and key loan stocks periodically and also has to keep watch over the open loan account till they are in tact put in the godowns. They have to keep track of the honouring or dishonouring the documentary demand bills and take immediate and necessary action. They have also to get insured all the insurable goods and the company's movable and Immovable properties. They obviously failed awfully in discharging their duties and they are grossly negligent. But for their gross negligence the shortage and irregularities referred to in para (11) of the plaint would not have occurred. Even after the discovery that the goods in key godown were tampered with as alleged by the plaintiff Bank and those in open loan and key loan godowns were removed, the plaintiff Bank did not take any immediate action. It should have taken immediate precautions to safeguard Company's premises, machines and other property by employing additional watchmen and should have also alerted defendants 5 to 7 to enable them to safeguard their interest and mitigated their alleged liability as far as possible. The goods are of a perishable nature and steps should have been taken immediately to sell the available stock by exercising the right of sale. This would have mitigated the alleged liability of defendants 5 to 7. Nothing is known about the fate of those goods till now. The plaintiff Bank is guilty of gross negligence and on that account this defendant discharged of his liability, even if any. In any view not taking immediate action against the 1st defendant amounts to gross negligence and on that account also this defendant stands discharged of the alleged liability. The plaintiff Bank gave time by extending to the 2nd defendant some respite in return for the security of his mother and brother. In the said circumstances the plaintiff Bank must be deemed to have waived its claims on defendants 5 to 7."

As D.W.2, the 7th defendant had taken the stand that there was negligence on the part of the Bank and hence automatically his liability as guarantor would come to an end. On the aspect of deed of guarantee and the variance operating as discharge, strong reliance was placed on *S. Perumal Reddiar v. Bank of Baroda* wherein it was observed at paras 44 and 46 as hereunder:

"The surety, it is often said, is a favoured debtor. An unauthorized material alteration by the promisee whether that is by adding anything to or by striking out any of a written contract, avoids the contract against the person otherwise liable upon it. In a printed form of guarantee, if the signature of the guarantor is obtained prior to the filling up of the blanks relating to material particulars of the contract, the said filling up of the blank spaces in the printed form of guarantee amounts to material alteration especially when the said deed relating to the contract of guarantee is in the possession of the promisee or his agent, and

discharges the contract of guarantee. In the instant case, the alterations have been made by the agent of the Mangadu Branch of the plaintiff bank while the document was in its custody and so, the said alteration amounts to material alteration and the appellant, who is the promisor, is thereby discharged. In a document of guarantee, if the blank spaces relating to the amount for which the person stands as a guarantor, the date of the instrument, the amount for which the person stands as a surety and the rate of interest for which the amount had been advanced, are filled up, such filling up would amount to substantial alteration, which are to the detriment of the surety and the said material alteration discharged the surety from liability. The said alterations are certainly to the disadvantage of the surety. They cannot be held as alterations of unsubstantial nature and that the surety cannot claim to be discharged. The conduct of P.W.2 in this case in bringing the deed of guarantee from the bank to his house and asking the appellant to put his signature in it is certainly an act which is not in accordance with the normal procedure. Equally, the act of P.W.1 in filling up the blank spaces in Ex.A-3, without the knowledge of the appellant long after the signature of the appellant was obtained in it is really very strange.

...

The true rule, in my opinion, applicable by the contract of guarantee is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted. If the alteration is to the disadvantage of the surety, or its unsubstantial nature is not self-evident, the surety can claim to be discharged. The contract of the surety should not be altered without his consent and the creditor should not undertake to alter the contract and they say, that though the contract had been altered, it was not done to the disadvantage of the surety, especially when such alterations were made with respect to material particulars regarding the contract of guarantee affecting the surety."

Reliance also was placed on *State Bank of Saurashtra v. Chitranjan Rangnath and the Apex Court* at paras 10 and 16 held:

"If the two promissory notes Exts.81 and 30 coupled with the letter of guarantee Ext.31 executed by the surety and the bound Ext.83 executed by the principal debtor at one sitting on September 16, 1957, evidence one composite transaction, it is an inescapable conclusion that the principal debtor offered two securities one the pledge of goods and the other the personal guarantee of the surety. The surety in good faith contracted to offer personal guarantee on the clear understanding that the principal debtor has offered security by way of pledge of goods and the goods were to be in the custody of the creditor Bank. On this conclusion Section 139 of the Act will be indubitably attracted. Section 141 comprehends a situation where the debtor has offered more than one security, one of which is the personal guarantee of the surety. Even if the surety of personal guarantee is not aware of any other security offered by the principal debtor yet once the right of the surety against the principal debtor is impaired by

any action or inaction, which implies negligence appearing from lack of supervision undertaken in the contract, the surety would be discharged under the combined operation of Sections 139 and 141 of the Act. In any event, if the creditor loses or without the consent of the surety parts with the security, the surety is discharged to the extent of the security lost as provided by Section 141."

Further strong reliance was placed on the decision of a Division Bench of this Court in *State Bank of India v. Praveen Tanneries* wherein it was held at paras 9,11,12,14 and 24 as hereunder:

"Under the first scheme viz., cash credit (Mandi type) monies were advanced to the 1st defendant on pledge of the stock kept in the godowns indicated by the Bank the 1st defendant holding with him the lock and key of the same. The Bank maintains stock register for the same. The limits of advance allowed by the bank are at 30% on raw material, 40% on wool and 50% on the value of 8. *State Bank of India Vs. Praveen Tanneries and Another*, . the stock in the process thus at an average of 40%. The 1st defendant has to submit periodical statements of stock maintained under this scheme. The evidence of P.W.1 and Ex.A-6 the statement of account concerned show that the plaintiff stopped lending amounts to the 1st defendant after 18-9-1960. It is also admitted by P.W.1 that D-1 stopped manufacturing goods by December 1969. Ex.B-1 is the stock statement showing the value of the goods on 16-1-1970 at Rs. 60,735/-. Ex.B-2 is another statement of stock as on 29-5-1970 at Rs. 60,788-13 paise. The plaintiff has not produced any register or stock statements submitted by the 1st defendant from time to time nor the register maintained by the Bank in regard to the goods pledged nor the Drawing Power Ledger though the 2nd defendant called upon it to produce the same in his written statement as well as in his notice Ex.B-9 in 1970 the amount due to the Bank under this scheme is about Rs. 61,000/- apart from Rs. 10,000/- and odd towards interest. From out of this amount Rs. 39,974-24 was already excluded as noted supra on the ground that the same was arrears outstanding and brought forward after execution of the agreements and guarantee bonds. The balance therefore remains is only about Rs. 21,000/-. The plea of the 2nd defendant is that had the plaintiff sold the pledged goods in time the plaintiff could have realized the balance amount. The plaintiff sold the goods only after filing the suit in 1972. The goods by their nature decayed and therefore the total goods of the value of Rs. 2,60,000/- had only fetched an amount of Rs. 10,000/- in auction. That apart as contended for the 2nd defendant the plaintiff also violated the terms and conditions in the agreement. The bank did not issue notice to the 2nd defendant bringing forth all these facts to his notice except informing him of this only after the suit is filed. Thus the plaintiff has impaired the rights of the 2nd defendant who is a surety and has the right to enter into the shoes of the creditor to realize the amount from the debtor after paying the amount to the creditor. Thus the plaintiff has violated the terms of the agreement and advanced amounts equal to the value of the pledged goods and also did not take steps at the proper time to realize the amounts by putting

the goods to sale more so when the plaintiff came to know that the 1st defendant stopped business in December 1969 and allowed the goods to decay and perish. This is also admitted by P.W.1 in his evidence.

...

Under the 5th scheme, the plaintiff is claiming an amount of Rs. 1,15,000/-and odd as per Ex.A-31 statement of account. As per the evidence of P.W.1 under this scheme the stocks are pledged to the bank and the plaintiff advanced money upto 18% of the firm orders for contract. Irrevocable letters of credit would be given by the foreign buyers in favour of the 1st defendant and deposited with the bank. The stocks of the 1st defendant were also deposited with the bank. The bank maintained an account of stocks pledged and the stock so pledged was also subject to periodical inspection by the officers of the bank. The 1st defendant was to submit the periodical statements of his stock and the bank staff would verify the valuation given. Here also the advances are at 40% on an average of the value of the goods pledged. The bank advanced money to the 1st defendant under this head between 7-6-68 and 24-7-68. On 24-7-68 the bank advanced a sum of Rs. 50,000/-. In all the bank has advanced a sum of Rs. 99,500/- under this scheme to the 1st defendant. The case of the 2nd defendant is that under this scheme the 1st defendant. The case of the 2nd defendant is that under this scheme the 1st defendant pledged goods of the value of 1,68,200/- and the plaintiff allowed the stock to deteriorate and perish without putting the same to sale and adjusting with the proceeds thereof the amount that was due from the 1st defendant. In view of this the contention advanced on behalf of the 2nd defendant is that the rights of the 2nd defendant guarantor are impaired as against the security available with the plaintiff bank. P.W.1 admitted that Exs.B-3 and B-4 stock statements sent between 26-1-70 and 29-5-70 show the value of the stock under pledge in this respect at Rs. 1,00,920/-. The bank did not sell the stock till 25-11-72 though the 1st defendant did not pay the amount due from him. As per the evidence of P.W.1 the bank came to know that the 1st defendant stopped the business in December 1969. Still the bank did not take any steps to sell the stocks pledged. It was only after filing of the suit and after the 1st defendant pleaded that the plaintiff failed to bring the stocks to sale the auction was conducted and in that goods put at the value of Rs. 2,60,000/-had fetched an amount of Rs. 10,000/-and odd. Apart from this the plaintiff did not file the record to show the actual quantity of stocks available on 25-11 -72 the date of auction the rate at which the goods were sold or the list of goods sold. Further there were certain deletions for which there was no explanation forthcoming. It is also in the evidence of P.W.1 that the bank gave a notice Ex.A-32 dated 8-5-70 to the 1st defendant pointing out certain irregularities in the accounts. P.W.1 was put present at the time of sale of the goods. He could not say whether the articles were taken from the godown and sold or any articles were left out in the go-down. He could not also say whether the goods were in a highly decomposed state at the time of sale though he denied the situation that the bank was careless in not realizing the amounts from pledged goods in proper

time and allowing the security to be impaired by deterioration and pilferage etc. The plaintiff further failed to show the goods that were sold in the auction except filing the bid list which simply shows that a particular variety of skin was sold at such and such a rate per K.G. Though the plaintiff is bound to account for the goods under pledge, it failed to do the same. Thus due to the conduct of the plaintiff the goods under pledge were perished and decayed and became worthless. It is amazing to note that goods valued at Rs. 2,60,000/- and were under pledge with the bank fetched an amount of Rs. 10,000/- when put to auction. This conduct of the plaintiff therefore as found by the Court below has impaired the right of the surety-2nd defendant, who is entitled to enter into the shoes of the creditor to realize the amount from the debtor after paying back the amount due from the debtor.

...

Under the 3rd scheme, Outward Bill Overdraft the plaintiff agreed to advance a maximum amount of Rs. 25,000/-. Ex.A-14 is the agreement executed by D-1, Ex.A-15 is the transferred pronote while Ex.A-16 is the guarantee-bond executed by D-2 in this behalf. An amount of Rs. 22,233-13 paise is claimed by the plaintiff on this account. Ex.A-19 is the statement of account in relation to this scheme. It is in the evidence of P.W.1 that under this scheme D-1 sells goods to another, dispatches the goods either by railway or road-way and produces before the plaintiff bank. The plaintiff bank would negotiate the same with another bank and recover the money. As soon as the R.R. or lorry way bill is produced the bank advances 75 to 90% of the value of the goods. After recovering the full amount from the consignee bank the plaintiff bank would first adjust the advance made to the 1st defendant and then pay D-1 the balance amount. In these transactions, the goods under transit covered by the R.R. or lorry way bill would be the security to recover the money advanced. In case the consignee bank does not pay the amount and returns it for any reason the bank will demand the 1st defendant to pay back the amount advanced and it is only on such repayment the R.R. or the lorry way bill would be handed over to the 1st defendant. All this procedure is spoken to by P.W.1. The contention of the learned Counsel for the 2nd defendant is that contrary to the terms and conditions of the agreement, the plaintiff in cases where the consignee-bank returned the R.R. or the lorry way bill to the plaintiff bank, the plaintiff did not demand for repayment of the advance made to the 1st defendant and on the other hand gave back the R.R. or the lorry way bill soon after its return and thus it resulted in impairment of the security that would have been available to D-2 the surety. The last transaction in this loan is on 12-9-69. The debit entry made on that day is for Rs. 16,500/-. As against this transaction the contention of the 2nd defendant is that the plaintiff having received the R.R. returned by the consignee-bank did not demand D-1 for repayment of the advance made and on the other hand handed over the bill to D-1. the explanation of P.W.1 is that it was so handed over to enable D-1 to find out another purchaser. It is also admitted by P.W.1 that the bank was handing over returned R.R. or lorry way bill to D-1 without demanding repayment of the

advance given. This is exactly contrary to Clause (xiv) of Ex.A-14. On account of this return of the R.R. or lorry way bill the amount advanced of Rs. 16,500/- remained unpaid. Had the plaintiff brought the goods covered by the R.R. to sale without returning the same to D-1 the amount would have been cleared of. On account of the negligence of the plaintiff bank in this behalf the amount could not be realized. In view of this irregular action and violation of terms and conditions of Ex.A-14 the Court below has rightly excluded the amount of Rs. 6,500/- along with interest calculated thereon (viz., Rs. 233-13 paise) and granted decree only for the balance of Rs. 5,500/-.

...

Thus the second defendant has amply proved that the bank acted irregularly and in violation of terms and conditions of the agreements entered into and advanced loans beyond the scope of the agreements and behind the back of the 2nd defendant-surety, resulting in impairment of the security against which the surety 2nd defendant could have proceeded by entering into the shoes of the creditor-plaintiff.

The last decision of the Supreme Court that has bearing on the present facts in the matter of discharge of the surety from the liability is the one in *State Bank of Saurashtra Vs. Chitranjan Rangnath Raja and Another*, . There "A" bank has given Cash Credit facility to a businessman to the tune of Rs. 75,000/- as against two securities offered by him, namely (1) the pledge of goods to be kept under lock and key under supervision of the Bank and (2) personal guarantee of the surety. The pledge and the personal guarantee were not two independent transactions but they formed part and parcel of one composite transaction. The surety himself agreed to give personal guarantee on the specific understanding and with the full Knowledge of the Bank that the principal debtor was offering another security, namely, pledge of goods. The surety in good faith contracted to offer personal guarantee on the clear understanding that the principal debtor has offered security by way of pledge of goods and the goods were to be in the custody of the creditor bank. It was concurrently found that the bank was utterly negligent with regard to the safe keeping and handling of pledged goods and the security of pledged goods was lost on account of the negligence of the Bank. In those circumstances, the Supreme Court after referring to the decision in *Wulff v. Jay* (1872 (7) QB 756) wherein reliance was placed upon the decision in *Rees v. Barrington* (1 supra) as noted above, held:

"Section 141 comprehends a situation where the debtor has offered more than one security one of which is the personal guarantee of the surety. Even if the surety of personal guarantee is not aware of any other security offered by the principal debtor yet once the right of the surety against the principal debtor is impaired by any action or inaction which implies negligence appearing from lack of supervision undertake in the contract, the surety would be discharged under the combined operation of Sections 139 and 141 of the Act. In any event of the creditor loses or without the consent of the surety parts with the security, the

surety is discharged to the extent of the surety lost as provided by Section 141."

Apart from these decisions the notes by the renowned author Frederick Thomas White and Owen Dacies Tudor in their Eighth Edition on "Leading Cases in Equity" while referring to the decision in *Rees v. Berrington* (30 Eng. Reports 765) refers to the different situations wherein the surety stands discharged of his liability. They are (i) giving farther time to the principal debtor without notice to or consent of the surety, (ii) misrepresentation of the material fact or fraudulent concealment of the existing material fact from the surety by the creditor would invalidate the contract, (iii) where there is a departure from the terms of the contract, (iv) where the creditor without the assent of the surety gives time to the principal debtor, (v) where the creditor takes another surety or additional security in satisfaction of the first surety, the first surety will stand discharged. The following passage with reference to the discharge of the surety on the creditor's farthinger the time to repay the debt without notice to the surety has a material bearing on the present facts. It runs:

"This produces no inconvenience to any one; for it only amounts to this that there shall be no transaction with the principal debtor without acquainting the person who has a great interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry on any transaction without the privity of him (the surety) who must necessarily have a concern in every transaction with the principal debtor you cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." (at page 575)

Referring to the impairment of the security which also results in discharge of the surety, the learned authors at page 601 stated:

"So a surety will be released if the creditor cannot on payment by his surety, give him the securities, in exactly the same condition as they formerly stood in his hands, and this may, of course extend even to discharging the surety entirely from his liability...."

From the above decisions and provisions of law referred to, it is clear that not only the variance in the terms and conditions of the contract by the creditor without notice to or consent of the surety would discharge the surety of the liability, but it would equally discharge him if the creditor cannot on payment by his surety, give him the securities in the same condition as they formerly stood in his hands, thereby rendering impairment. This doctrine enunciated in *Rees. v. Berrington* (30 Eng. Reports 765) has been approved by the Supreme Court and thus continues to be good law even after two hundred years. The facts in the case on hand as held *supra* reveal that not only the creditor-bank had varied the terms of the contract but had also rendered the securities not available to the surety for being proceeded against as he is entitled to, after making the payment to the Bank and thereby caused the impairment."

27. There cannot be any quarrel or controversy relating to this proposition of law. On a careful scrutiny of the decisions referred to supra in this regard, the decisions are distinguishable on facts. As per the evidence of P.W.1, P.W.2 and P.W.6 and also the other witnesses who were examined on behalf of the plaintiff Bank they have been taking all the steps and it cannot be said that the Bank officials have been negligent in any way and merely because the Directors had resorted to certain unlawful criminal acts as can be seen from the records available, it cannot be said that it was due to the negligence on the part of the Bank officials and that cannot be taken advantage of by this guarantor so as to contend that the liability of the guarantor automatically would come to an end because of such negligence. When the evidence is clear and categorical in this regard the decisions and the propositions of law which had been laid down by the Courts while deciding such matters in the factual backdrop cannot be made applicable in the present case. Hence, this Court is not inclined to accept the stand taken by the appellant/ 7th defendant that in view of the negligence on the part of the Bank, his liability as guarantor automatically came to an end. Suffice to state that the evidence adduced in this regard by the Bank is clear and categorical and no other opinion is possible in this regard.

28. Point No. 4: Submissions at length were made relating to the aspect of interest and reliance was placed on *Radha Agencies and Ors. v. Vijaya Bank, Bhimavaram Branch*, . 2002 (1) An.W.R. 117 = 2002 (2) ALD 857 . *Sri Panduranga Traders and others Vs. State Bank of India, Vatluru Branch, W.G. Dist., and Central Bank of India Vs. Ravindra and Others*, . This is a commercial transaction. It is no doubt true that the granting of interest may be discretionary but however reasons had been recorded by the trial Court. While granting 9% interest. In the decision referred (11) supra, it was observed at para-55 as hereunder:

"During the course of hearing it was brought to our notice that in view of several Usury Laws and Debt Relief Laws in force in several States private money-lending has almost come to an end and needy borrowers by and large depend on banking institutions for financial facilities. Several unhealthy practices having slowly penetrated into prevalence were pointed out. Banking is an organised institution and most of the banks press into service long running documents wherein the borrowers fill in the blanks, at times without caring to read what has been provided therein, and bind themselves by the stipulations articulated by best of legal brains. Borrowers other than those belonging to corporate sector, find themselves having unwittingly fallen into a trap and rendered themselves liable and obliged to pay interest and quantum whereof may at the end prove to be ruinous. At times the interest charged and capitalised is manifold than the amount actually advanced. Rule of *damdupat* does not apply. Penal interest, service charges and other over-heads are debited in the account of the borrower and capitalised of which debits the borrower may not even be aware. If the practice of charging interest on quarterly rests is upheld and given a judicial recognition, unscrupulous banks may resort to charging interest even on monthly

rests and capitalising the same Statements of Accounts supplied by banks to borrowers many a times do not contain particulars or details of debit entries and when written in hand are worse than medical prescriptions putting to test the eyes and wits of the borrowers. Instances of unscrupulous, unfair and unhealthy dealings can be multiplied though they cannot be generalised. Suffice it to observe that such issues shall have to be left open to be adjudicated upon in appropriate cases as and when actually arising for decision and we cannot venture into laying down law on such issues as do not arise for determination before us. However, we propose to place on record a few incidental observations, without which, we feel, our answer will not be complete and that we do as under:

(1) Though interest can be capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date, yet penal interest, which is charged by way of penalty for nonpayment, cannot be capitalised. Further interest, i.e. interest on interest, whether simple, compound or penal, cannot be claimed on the amount of penal interest. Penal interest cannot be capitalised. It will be opposed to public policy.

(2) Novation, that is, a debtor entering into a fresh agreement with creditor undertaking payment of previously borrowed principal amount coupled with interest by treating the sum total as principal, any contract express or implied and an express acknowledgment of accounts are best evidence of capitalisation. Acquiescence in the method of accounting adopted by the creditor and brought to the knowledge of the debtor may also enable interest being converted into principal. A mere failure to protest is not acquiescence.

(3) The prevalence of banking practice legitimatises stipulations as to interest on periodical rests and their capitalisation being incorporated in contracts. Such stipulations incorporated in contracts voluntarily entered into and binding on the parties shall govern the substantive rights and obligations of the parties as to recovery and payment of interest.

(4) Capitalisation method is founded on the principle that the borrower failed to make payment though he could have made and thereby rendered himself a defaulter. To hold an amount debited to the account of the borrower capitalised it should appear that the borrower had an opportunity of making the payment on the date of entry or within a reasonable time or period of grace from the date of debit entry or the amount falling due and thereby avoiding capitalisation. Any debit entry in the account of the borrower and claimed to have been capitalised so as to form an amalgam of the principal sum may be excluded on being shown to the satisfaction of the Court that such debit entry was not brought to the notice of the borrower and/or he did not have the opportunity of making payment before capitalisation and thereby excluding its capitalisation.

(5) The power conferred by Sections 21 and 35A of the Banking Regulation Act, 1935 is coupled with duty, to act. Reserve Bank of India is prime banking institution of the country entrusted with a supervisory role over banking and

conferred with the authority of issuing binding directions, having statutory force, in the interest of public in general and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally. Reserve Bank of India is one of the watchdogs of finance and economy of the nation. It is, and it ought to be, aware of all relevant factors, including credit conditions as prevailing, which would invite its policy decisions. RBI has been issuing directions/circulars from time to time which, inter alia, deal with rate of interest which can be charged and the periods at the end of which rests can be struck down, interest calculated thereon and charged and capitalised. It should continue to issue such directives. Its circulars shall bind those who fall within the net of such directives. For such transaction which are not squarely governed by such circulars, the RBI directives may be treated as standards for the purpose of deciding whether the interest charged is excessive, usurious or opposed to public policy.

(6) Agricultural borrowing are to be treated on a pedestal different from others. Charging and capitalisation of interest on agricultural loans cannot be permitted in India except on annual or six monthly rests depending on the rotation of crops in the area to which the agriculturist borrowers belong.

(7) Any interest charged and/or capitalised in violation of RBI directives, as to rate of interest, or as to periods at which rests can be arrived at, shall be disallowed and/ or excluded from capital sum and be treated only as interest and dealt with accordingly.

(8) Award of interest pendente lite and post-decree is discretionary with the Court as it is essentially governed by Section 34 of the CPC de hors the contract between the parties. In a given case if the Court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced the Court may exercise its discretion in awarding interest pendente lite and post-decree interest at a lower rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner.

In the decision referred (10) supra, where a suit was filed by bank for recovery of loan granted on an equitable mortgage and interest was granted from the date of filing the suit till realization, this Court held that the Court has discretion to reduce the rate of interest. The Division Bench while deciding the said matter preferred to follow the decision of the Apex Court in N.M. Veerappa v. Canara Bank, AIR 1988 SC 1101 in preference to the decision in State Bank of India Vs. Yasangi Venkateswara Rao, In the decision referred (9) supra while dealing with Order 34 Rule 11 of the CPC it was held that in mortgage suits for recovery of bank loan grant of interest at the rate of 6% from the date of suit being proper the interest was reduced from 12% to 6%.

29. Be that as it may, in view of the fact that this is a commercial transaction and

reasons had been recorded by the trial Court in this regard this Court is not inclined to disturb the rate of interest which was granted by the trial Court especially in the light of the fact that except the 7th defendant no other defendant had preferred the Appeal and in view of the said fact also it would not be just and equitable to modify the decree so far as it relates to the appellant/7th defendant only and hence this submission made by the Counsel for the appellant also cannot be accepted.

30. Point No. 5: In the light of the findings recorded above, the Appeal is devoid of merit and accordingly the same shall stand dismissed. It is true that the other defendants had not preferred any Appeal and the appellant/7th defendant alone had preferred the Appeal. But however in the light of the peculiar facts and circumstances of the case, parties to this litigation to bear their own costs.