
(1992) 10 MAD CK 0034
In the Madras High Court

C. Amarendran and Others

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 20-10-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 6A

Citation : (1993) 2 MLJ 500

Hon'ble Judges : Mishra, J

Bench : Division Bench

Judgement

Mishra, J.—The respondent-State Bank of India, Kancheepuram branch, filed a suit, C.S. No. 171 of 1975, for recovery of a sum of Rs. 14,93,615.35 with interest at 14% per annum till date of payment alleging inter alia that defendants 1 to 3 started a partnership firm under the name and style of National Engineering Works which firm approached it in 1967 for financial accommodation. The Bank sanctioned instalment credit loan of Rs. 67,994 on 19.8.1968, accepted a cash credit lock and key pledge agreement executed by the firm on 11.2.1970 for Rs. 45,000 and a cash credit Mundy type pledge agreement for Rs. 2,75,000 on the same date, viz., 12.2.1970. According to the bank the firm pledged the machinery as security for all types of advances sanctioned by the bank by their letter dated 12.1.1970. and executed a promissory note for Rs. 1,50,000 towards cash credit bills along with an agreement for accommodation against bills tendered for collection, on 16.3.1970. The firm, according to the bank, executed a trust letter on 6.3.1972 authorising it to hold all the goods pledged to it as trustees and renewed the promissory note by a renewal letter dated 17.1.1973.

2. The fourth defendant, according to the bank, who is the wife of the first defendant is the proprietrix of a firm Ashok Industries. This firm also approached the plaintiff-bank for financial accommodation in 1969, All other defendants (defendants 1 to 3) executed guarantee documents on 10.3.1971. The bank granted cash-credit lock and key loan of Rs. 3,00,000 to Ashok Industries on the

execution of a demand promissory note on 10.3.1971 on which date the goods mentioned in the agreement were pledged as security, for the repayment of the advance amount. This firm Ashok Industries also executed a promissory note and a cash-credit Mundy type pledge agreement "or Rs. 2,75,000 along with a pledge letter. Subsequently, according to the bank, the unit was sanctioned cash credit bill limit of Rs. 3.5 lakhs for collection of bills on the execution of an agreement, defendants 1 to 3 standing as guarantors for all the advances sanctioned to Ashok Industries by a guarantee agreement dated 10.3.1971 which guarantee was revived by a letter dated 17.1.1974

3. On 10.6.1971 the title deeds of the house properties No. 29 and 29-A in Veeraswami Pillai Street, Egmore, Madras (more particularly described as item No. 1 in Schedule I of the plaint) belonging to, defendants 1 and 2 were deposited with the bank at Madras with intention to create an equitable mortgage in order to avert legal proceedings. On 11.11.1971 the first defendant deposited at Kan-cheepuram branch of the bank the title deeds of his property at No. 24-B, Vaikunda Perumal North Mada Street, Kancheepuram (more particularly described in item 2 of Schedule 1 of the plaint), with intention to create an equitable mortgage as additional security for the amounts due from all the defendants under the various accounts. The bank's claim further is as follows:

The plaintiff-bank submits that when the title deeds mentioned above were deposited as security, they were meant to cover the total sum of Rs. 12,87,994 then agreed and undertaken by the defendant to pay jointly and severally of which a sum of Rs. 9,26,000 represented the amount due by the proprietary concern and the balance of Rs. 3,62,994 represented the amount due by the Firm.

"The plaintiff-bank submits that the accounts of the firm and the accounts of the proprietary concern were thus integrated as one and all the defendants have become joint debtors in respect of the said integrated sum with the result that all the defendants herein became jointly and severally liable to pay the plaintiff-bank the said sum of Rs. 12,87,994 on 10.6.1971".

"The plaintiff-bank submits that since then the accounts became stagnated and have not been running at all or only running on a slipshod manner. So, the plaintiff bank railed upon the defendants to regularise the account that is to repay the amount due on advances, as stated above. But, the defendants failed to comply with plaintiffs demand and have assumed "a precariously non-possums attitude necessitating this legal action. Legal notices calling upon all the defendants to repay the advances were also issued to them on 10.6.1975 on behalf of the plaintiff-bank by their legal advisers".

"The plaintiff-bank submits that there is now due from the defendants to the plaintiff bank a sum of Rs, 14,93,615.25 as per the statement of accounts filed herewith".

"The plaintiff-bank submits that it is entitled to a personal decree for the entire amount due from all the defendants in addition to a mortgage decree in respect of the equitable mortgages mentioned above. The details of the said mortgages are as follows:

- (a) Dates of mortgage: 10.6.1971 and 11.11.1971;
- (b) Mortgagors defendants 1 and 2 and the mortgagee; the plaintiff-bank;
- (c) The sum of Rs. 12,87,994 due as on 10.6.1971.
- (d) The properties are not subject to any other mortgage;
- (f) The amount now due is Rs. 14,93,615.35.

4. The defendants responded to the suit by filing written statements, a common written statement by defendants 1, 2 and 4 and a separate written statement by the third defendant and two separate suits one by the first defendant (in C.S. No. 171 of 1975) on the file of the Subordinate Judge's Court, Kancheepuram, claiming accounting from the Bank and payment of such amount as may be found due on taking of accounts (later transferred to the file of this Court and numbered as CS. No. 588 of 1979 for being tried with the bank's suit, C.S. No. 171 of 1975) and the other (by the fourth defendant in C.S. No. 171 of 1975) on the file of the Subordinate Judge's Court, Kancheepuram, claiming accounting from the bank and payment of such amount as may be found due on the taking of accounts (later transferred to the file of this Court and numbered as C.S. No. 589 of 1979 for being tried along with C.S. No. 171 of 1975).

5. The return of defendants 1,2 and 4 along with the contents of the plaint in the suits discloses as follows:

The fourth defendant Saroja started Ashok Industries for the first time in 1969 and she had account dealing with the bank from 1969. Defendants 1 to 3 started the partnership firm in 1967 under the style of National Engineering Works. Defendants 1 to 3 have been signing blank forms and papers of the plaintiff bank from 1967 to 1969. Some of such papers were converted by the bank as documents as if executed in the year 1970. Similarly, blank, papers signed during 1969-1970 were converted into documents as if executed in the year 1972 by Ashok Industries. National Engineering Works and Ashok Industries are distinct and separate entities doing independent business, to the knowledge of the plaintiff-bank. In 1974 the National Engineering Works sent a bill to the plaintiff for a sum of Rs. 6,786 and requested the bank to appropriate Rs. 6,000 towards the agreed instalments for National Engineering Works and Ashok Industries and to adjust the balance towards the instalment credit loan. The bank promptly replied by letter dated 31.12.1974 that the bill in question was from National Engineering Works and hence the amount was credited in respect of National Engineering Works and not in respect of Ashok Industries.

6. The first written statement of defendants 1, 2 and 4 has thus stated as follows:

The National Engineering Works and Ashok Industries are different and distinct entities " doing independent business and carried on by different individuals. Ashok Industries has no manner of right, title or interest in relation to the business carried on by the National Engineering Works and vice versa. Thus so far as these defendants are concerned, both the aforesaid businesses, namely, National Engineering Works and Ashok Industries are quite distinct and separate. As a matter of fact, National Engineering Works and Ashok Industries have been assessed to Income Tax individually to the knowledge of the plaintiff

"The borrowing from the plaintiff-bank by the said National Engineering Works and Ashok Industries are in pursuance of different and distinct documents. Even, according to the plaintiff, there should not be any mix-up of both the entities even in respect of material used by them though both of them are carrying on similar businesses. As early as 1.11.1971 the plaintiff itself has written a letter wherein it is stated as follows:

"It was noticed and brought to your notice during our inspection of your factory that some raw materials belonging to the National Engineering Works were placed in the yard of Ashok Industries and vice versa. It is not proper and please ensure that only stocks belonging to the respective units are stored in their factories". "Similarly, as late as in 1974, when repayments were being made in pursuance of understanding arrived at between the plaintiff and defendants, which understanding had been violated by the plaintiff, the National Engineering Works sent a Bill to the plaintiff for a sum of Rs. 6,786 and requested the plaintiff to appropriate Rs. 6,000 towards the agreed instalments for National Engineering Works and Ashok Industries and also requested the plaintiff to adjust the balance towards the instalment credit loan, the plaintiff had promptly and categorically stated, in and by its letter dated 31.12.1974, that since the bill in question is from the National Engineering Works, they could credit the amount only to National Engineering Works and no amount could be credited or transferred for the amount that had been promised to be paid in respect of Ashok Industries". "In any event and on the plaintiffs own showing, 4th defendant cannot in any manner be made liable for the alleged dues of the National Engineering Works. So far as the liability of Ashok Industries is concerned, there has been a personal guarantee by the partners of the National Engineering Works and it has been agreed that the security given for the indebtedness of the National Engineering Works will enure to the benefit of the plaintiff in respect of the advances made to Ashok Industries assuming, but without admitting, that the said guarantee is valid. Consequently, if there was really any liability in respect of Ashok Industries, the 4th defendant as the principal debtor and defendants 1 to 3 as guarantors will be liable for the same, assuming, but without admitting, that the guarantee in question is valid. But, in any view of the matter, for the indebtedness, if any of the National Engineering Works, the 4th defendant would not be liable"

"Thus, the plaintiff, by its own conduct and on facts stated, is precluded and

estopped from contending that both units are one and the same and filing a suit consolidating the transactions in respect of both National Engineering Works and Ashok Industries. Further there is no communication whatsoever to either National Engineering Works or Ashok Industries to the effect that the amounts due in respect of both have been consolidated by the plaintiff.

7. They (defendants 1,2 and 4) have also described the transactions stated as follows:

It may not be out of place to point out at this, juncture that notwithstanding the fact that under the arrangement between the parties the margin has been given in the document that have been executed even on 12.2.1970, instead of giving the agreed margin, the plaintiff has stated that the margin was fifty percent which was never the agreed margin. The forms in question had been got signed blank at separate points of time and consequently, the same had been filled up as if the margin is 50 per cent. In accordance with the agreement for cash credit executed on 12.2.1970, the amount in question had not been advanced at all and consequently the defendants charge that the plaintiff" had committed the fundamental breach of the contract even at the time the contract in question had been entered into

and

The true facts are as under, Defendants 1 to 3 had been carrying on business under the name and style of National Engineering Works at Kancheepuram. The said National Engineering Works had banking transactions with the plaintiff Bank. The said National Engineering Works applied for a loan to the plaintiff and the plaintiff, in pursuance of its letter dated 30th April, 1967 had granted unsecured overdraft against bills drawn on Madras Electricity Board, Simpson & Co. and Ashok Leyland-margin 20 percent cover period 2 months upto a limit of Rs. 15,000. This limit was to be additionally secured by the pledge of the said firm"s unencumbered machinery valued at Rs. 20,000." "The said National Engineering Works had requested for cash credit Mundy type loan facility for which details were called for in the said letter of the plaintiff to the National Engineering Works. Gradually the limit of the loan facilities had been increased".

"Similarly, the Ashok Industries which is the proprietary concern of the 4th defendant had an account with the plaintiff-bank from 1969 and there were some facilities extended by the plaintiff-bank. Gradually the limit of loan facilities in respect of the Ashok Industries had also been increased".

"In the meantime, in or about 1969, the tenders given by the National Engineering Works and Ashok Industries to the Electricity Boards of Tamil Nadu and Andhra Pradesh had been accepted and a large number of purchase orders were given by the said Electricity Board to the National Engineering Works and Ashok Industries for the manufacture and supply of a lot of electrical line items. In fact, the materials for which orders had been placed by the said Electricity Board we"re worth several lakhs of rupees".

"As stated earlier, the National Engineering Works and Ashok Industries had banking transactions with the plaintiff. In view of the satisfactory operation of the said account by the National Engineering Works and Ashok Industries from the Electricity Boards, the Officials of the plaintiff-Bank at Kancheepuram as well as officials from the Madras office of the plaintiff had been watching the rapid progress of National Engineering Works and Ashok Industries and also their capacity to procure large number of orders worth lakhs of rupees. As a matter of fact, during and from the said period till about 1973, the plaintiffs officials were the advisers of the said National Engineering Works and Ashok Industries in respect of all transactions. They had advised the said National Engineering Works and Ashok Industries about the method in which accounts will have to be kept by the said National Engineering Works and Ashok Industries, how the machineries could be utilised, and how the applications to the plaintiff had to be made and in effect in respect of the entire business carried by the said National Engineering Works and Ashok Industries".

"The officials of the plaintiff had inspected the business premises of National Engineering Works and Ashok Industries and after inspecting the several purchase orders given to the said National Engineering Works and Ashok Industries, they had offered to increase the limits and consequently the National Engineering Works and Ashok Industries were advised by them as to the manner in which necessary applications to the bank will have to be preferred and in fact some of the officials had dictated and corrected the drafts of the letter to be written by the said Ashok Industries and National Engineering Works to the plaintiff.

"In 1970, the limit was thus increased in respect of National Engineering Works in pursuance of the letter of the plaintiff dated 3.1.1990 and the terms of the Overdraft sanctioned were as under:

"In respect of cash credit (Mundy Type) against pledge of raw materials viz., M.S. Flats rounds, angle sheets, iron rods etc. semifinished goods and finished goods, the earlier limit of Rs. 25,000 was raised to Rs. 2,75,000 In respect of Cash Credit (lock and key) against stocks as mentioned above, the now limit was Rs. 45,000 The margins were stipulated as 10 per cent for M.S. Flats, 25 percent for other raw materials, and 33-1/3 per cent for semifinished goods/finished goods. In respect unsecured overdraft against supply bills, drawn on Government Departments, other bills, drawn on Simpson & Co., and others accompanied by lorry receipts, railway receipts/invoices accompanied by acknowledged delivery notices, the limit was raised from Rs. 1,00,000 to Rs. 1,50,000. The margin was 10 per cent and cover period was 3 months. Further, all the limits sanctioned are to be collaterally secured by (1) pledge of entire machinery valued at Rs. 98,000 subject to period charge in respect of instalment credit loan, (2) equitable mortgage over the property valued at Rs. 50,000 belonging to Smt. Chandrammal, one of the partners, (3) Equitable mortgage over the properties valued Rs. 33,000 belonging to the managing partner Sri C. Amarendran."

"In accordance with the above enhancement of limits, the properties bearing Door No. 29, Veerasami Pillai Street, Madras and No. 24, Vaikuntaperumal Mada Street, Kancheepuram, belonging to the first defendant were given by way of equitable mortgage as collateral securities for the overdrafts sanctioned by the plaintiff.

"In respect of property bearing No. 29, Veerasami Pillai Street, Madras, the document which was demanded to be deposited with the plaintiff-bank and which was in fact deposited with (he plaintiff-bank for creating an equitable mortgage was a partition document and in the said document it is specifically stated that the property in question was allotted to the branch of Ggopalakrishnan and his minor son, the first defendant. The first defendant was then a minor and consequently the house tax receipt were in the name of his guardian Chandrammal. It was stated that the title deeds in respect of that property were to be handed over by Chandrammal, notwithstanding the fact that the property belonged only to the first defendant herein. As on date the first defendant is the owner of the said property and he is the person affected in relation to the transaction. Since there was no conflict of interest between the said Chandrammal and the first defendant, there was no objection on the part of the first defendant when Chandrammal handed over the documents at Madras to the plaintiff-Bank". "Similarly the limit was increased in respect of Ashok Industries in pursuance of the letter of the plaintiff dated 9th March, 1971 and the terms of the overdrafts sanctioned were as under:

In respect of Cash Credit (Lock & Key) against pledge of stocks of raw materials viz. M.S. Sheets, rods, etc. and finished goods viz., electrical line equipment, the limit was enhanced from Rs. 30,000 to Rs. 3,00,000 In respect of cash credit (Factory Type) against pledge of stocks of raw materials viz., M.L. Sheets, rods, etc. and finished goods, viz., electrical line equipment, the existing cash Credit (Mundy Type) was converted into Cash credit Factory Type the limit was enhanced from Rs. 30,000 to Rs. 2,75,000. The margin fixed were 10 per cent for raw materials, 25 per cent for semi-finished goods and finished goods. A sub limit was fixed at Rs. 1,75,000 for drawings against semifinished goods and finished goods. In respect of unsecured overdraft Bills accompanied by railway/ lorry receipts in the course of collection, the limit was Rs. 3,50,000 The margin was 10 per cent and the cover period was 3 months for 90 per cent bills and 4 months for 10 per cent bills. The advances sanctioned were to be collaterally secured by pledge of the Unit's machinery valued at Rs. 45,000 by equitable mortgage of house property at Madras and Kancheepuram of the 1st defendant, and personal guarantee of the partners of National Engineering Works".

"In view of the order obtained to the tune of about several lakhs of rupees by the National Engineering Works and Ashok Industries and since the orders have to be executed within a very short period of time and delivery has to be made in accordance with the delivery schedule given along with the purchase orders, the personnel of the Electricity Boards advised the National Engineering Works and

Ashok Industries to get the raw materials required for the manufacture and supply of items covered by the purchase orders in the open market and said that if subsequently quote is allotted the same could be utilised by the defendants". "It may be pertinent to point out at this juncture that atleast in regard to one item of the materials, namely, cold rolled sheets, the open market price was more than double the price in the controlled market, The concerned Electricity Board also promised to give allotment from J.P.C. as soon as they received the allotment orders. The J.P.C. allotment given to Ashok Industries had been utilised and the sheets had been purchased and they were also included in the lock and key loan given by the plaintiff.

"The National Engineering Works also approached the Tamil Nadu Small Industries Development Corporation for the allotment of necessary raw materials at the controlled price but the said Corporation refused to supply them at the controlled price".

"In view of the aforesaid circumstances, the National Engineering Works and Ashok Industries had to purchase M.S. Flats in the open market even though as already stated, the open market price was price was about twice the controlled price. The National Engineering Works purchased iron flats from Sri Ram Machinery Corporation through the plaintiff and the entire purchase price for the said flats had been paid by the plaintiff.

"Since the said M.S. Flats purchased from the said Rama Machinery Corporation were found not suitable for the job in question, they being brittle, they could not be utilised for the purpose for which they were brought. The National Engineering Works found it difficult to return the materials to the said Rama Machinery Corporation and get back the money paid. The National Engineering Works approached the plaintiff and appraised them of the position in which they had been pleased on account of the above situation. For the purpose of salvaging the materials that had been purchased, the said National Engineering Works suggested that if permitted, the flats could be exchanged for sheets in the open market, since the said sheets could be used for the manufacture of B type boxes to be supplied to the Electricity Boards, Tamil Nadu and Andhra Pradesh".

"The plaintiff also agreed with the suggestion and consequently the National Engineering Works exchanged the flats for cold rolled sheets in the open market. At that stage, the plaintiff, on verification, was satisfied about the price at which the materials were valued and exchanged at the rate of Rs. 100 per sheet, the same being the market value thereof. On that basis, the National Engineering Works were called upon to provide the necessary margin valuing the same as aforesaid at the rate of Rs. 100 per sheet. All the sheets that were obtained in exchange for the flats were taken by the plaintiff into lock and key godown at the time the limit was increased by the plaintiff. As a matter of fact, for the purpose of verification the plaintiff wanted a letter from the person from whom sheets were obtained in exchange for flats, viz., Messrs. P. Raghavalu Chetty, Narayanasami Chetty and such a letter was obtained by the first defendant and

handed over to the plaintiff. The first defendant had also given a letter stating that for such exchange of materials, cash bills could not be obtained".

"As stated earlier, even while the purchase orders were placed, the Electricity Board had stated that they would make arrangements for J.P.C. allotment to the defendants and in fact J.P.C. allotment was given. In view of the fact that the raw materials required had already been purchased by the National Engineering Works and also in view of the fact that the National Engineering Works did not have sufficient funds to pay the E. M. Deposit for indent, and since there were materials already in stock, the materials were not indented from the J.P.C. allotment by the National Engineering Works".

"The Ashok Industries which had also been given J.P.C. allotment utilised the same, purchased the same with the help of the funds provided by the plaintiff and brought in the stocks of J.P.C. allotment into the lock and key loan with the plaintiff.

"Till about the early part of 1971, the Electricity Boards of Tamil Nadu and Andhra Pradesh had placed purchase orders with the National Engineering Works and Ashok Industries respectively for the manufacture and sale of Electrical line materials worth about Rs. 12,68,820 and about Rs. 14,87,000."

"As ill-luck would have it, some time in 1971, due to power out and stringent monetary position and local policies, the purchase orders which had been placed by the Electricity Boards with the National Engineering Works and Ashok Industries were suspended, with the result the Sheets that had been stocked by the National Engineering Works and Ashok Industries which "could be used only for the materials to be manufactured and supplied to the "Electricity Boards were of no immediate use. The materials were lying idle and getting rusted, while interest on the advances made by the plaintiff was mounting up. In the said circumstances, the plaintiff was approached and on the advice of the then local Agent of Kancheepuram Branch, one Mr. Kalyanasundaram and the Development Officer, One Mr. Sridharan, a letter dated 28th December, 1971 was given to the plaintiff giving the entire details in relation to the circumstances in which the defendants were placed. The plaintiff was asked to look into the case and advise as to whether the materials could be disposed of. As a matter of fact, the abovementioned letter was written in the manner suggested by the said officials themselves since it was stated that unless the letter was written in such a manner, it would be very difficult to get necessary permission from the Head office. In the said letter, a complete resume of all events that had happened had been given and it had been specifically stated that if alternative orders were not procured, the entire materials will have to be sold and the plaintiff was requested for grant of permission to sell the materials".

"It may not be out of place to point out at this juncture that permission was necessary to sell the materials since they were under the lock and key of the plaintiff.

"Further, at the time when permission was sought for sale of the materials in the open market, the price of those materials in the open market was higher than even the purchase prices of those materials in the open market".

It may also be pointed out at this juncture that even earlier there had been a number of discussions with the plaintiffs then agent at Kancheepuram, Mr. Kalyanasundaram, the Field Officer, Mr. Sundaram, the Development Officer, Mr. Sridhran, and Technical Officer, Mr. Balasubramaniam and others and during such discussions, it was specifically pointed out that in view of the fact that orders had been suspended by the Electricity Boards, no useful purpose would be served by retaining the sheets and incurring interest charges on the amounts advanced by the plaintiff. It was also made clear that certain materials which had been kept under lock and key store of such nature that they would become damaged if kept in stock for a long time and that there was no possibility of using those materials in the near future and therefore, it was better that the goods were "disposed of. In fact the defendants only wanted permission to sell the materials so that the sale proceeds could be appropriated towards the dues of the defendants to the plaintiff-bank. The defendants impressed upon them that if the goods are sold the liabilities of these defendants would be wiped off.

"The then local agent of the plaintiff had on several occasions written to the Head Office seeking directions as to whether permission could be given for the sale of the materials ultimately, the plaintiffs Madras office had turned down the said proposal for sale of the materials. Thus the plaintiff had prevented the defendants from selling the materials that were in stock with the plaintiff under lock and key loan"

"It may be pertinent to point out that as a matter of fact, in March, 1972, the defendants got a ready purchaser for the entire materials with a cheque for Rs. 55,000 as advance payment. But alleging that there had been instructions from the higher authorities not to give permission for sale the local agent of the plaintiff Mr. Kalyanasundaram refused to permit the defendants to sell the goods".

"The plaintiff has thus prevented the defendants from carrying on the business in the best "possible interests of the business in the circumstances that prevailed then and hence-there is no jurisdiction whatsoever for the plaintiff to charge any interest on the amount due from the defendants. The plaintiff is not only not entitled to charge any interest but the plaintiff must also reimburse the defendants in respect of all losses sustained by them by reason of the plaintiffs acts. The plaintiff is estopped from claiming any amount in view of the act of plaintiff itself.

"As on 31.12.1971, for the purpose of fulfilment of various orders the National Engineering had stocked raw materials worth Rs. 5,34,664.20, The stock under the lock and key of the plaintiff comprised of 31 axles, 1355 G.P. Sheets, 1730 B.P. Sheets, 863 Kg. E.M. Steel rods and 1390 C.R. Sheets and were of the value of Rs. 4,65,541 Raw materials worth Rs. 69,123.20 were secured to the plaintiff

under the Open Mundy Type Loan. The value of the entire stock as on 31.12.1971 in respect of National Engineering Works, as stated earlier was Rs. 5,34,664.20".

"Similarly, as on 31.12.1971 the Ashok Industries had stocked raw materials worth Rs. 5,44,980.90. The stock under lock and key of the plaintiff comprised of 618 B.P. Sheets, 2175 G.P. Sheets, 500 G.P. Sheets, 2800 H.R. Sheets of the value of Rs. 4,36,000. The other materials worth Rs. 1,09,980.90 were under the open Mundy Type loan. Besides the above, the said Ashok Industries had also with them finished and semi-finished goods of the value of Rs. 88,713.60. As stated earlier, in view of the suspension of the purchase orders by the Electricity Board, the materials stocked by the defendants became not useful for any immediate manufacture. That was why permission was applied for to sell the materials and to appropriate the sale proceeds towards the amount due from the defendants to the plaintiff on various accounts. As stated earlier, permission for sale was not given. Subsequently, it was suggested by the plaintiffs officers, Messrs-Sridharan, Kalyanasundaram, Venkataraman, after discussion at Madras that if the goods in stock were revalued, it would be possible for the plaintiff to give permission for the sale of the materials. On such revaluation of the goods with the National Engineering Works, the goods of the value of Rs. 4,65,541 and 39,800 were valued at Rs. 2,12,711 and Rs. 26,220. In the same way, the goods that were lying with Ashok Industries were revalued. The goods worth Rs. 4,36,000 and Rs. 15,776 were revalued "at Rs. 2,53,428 and Rs. 8,208. On account of the revaluation, the value of the goods with the defendants was brought by Rs. 2,66,41.0 in the case of National Engineering Works and Rs. 1,91,140 in the case of Ashok Industries totalling to an under-Valuation of Rs. 4,57,550 "It may be pertinent to point out at this juncture that when an account of the revaluation the value of the goods with the defendants had come down and the stipulated margin had not been maintained the plaintiff did not call upon the defendants to bring in additional amount in accordance with the agreement between the parties. Nor did the plaintiff take any fresh document in view of the circumstances that prevailed after re-valuation".

"Even in spite of the revaluation of the stocks, which was said to be for the purpose of granting permission to sell the materials, the plaintiff, as stated earlier, did not give permission to sell the goods at that point of time."

"But, ultimately, in June, 1973, when the market was very dull and when the power cut was in full force, the sale of the materials was compelled by the plaintiff. At that time, the defendants have stated that the market value was very low and that they would be put to serious "loss if the goods were sold at that time. The plaintiffs Regional Manager Mr. Vaidhyanathan, in the presence of Messrs. Venkataraman and Rengarajan, said that the goods should be immediately sold and he assured that for some period a moratorium would be given to the defendants in respect of the existing liability after adjustment of the sale proceeds of the goods towards the amount due to the plaintiff and that the

defendants could commence the business afresh and that fresh advances would be given thereafter. Accordingly, the defendants bonafide believing the assurances of the above-mentioned officers of the plaintiff including the Regional Manager Mr. Vaidhyanathan and for the purpose of avoding unpleasantness, agreed to sell practically all the raw materials including C. R. Sheets, notwithstanding the fact that the defendants had been put to serious losses for which the defendants could even then have claimed damages from the plaintiff.

"All the sheets were sold and the entire sale proceeds had been paid to the credits of the defendants" various accounts with the plaintiff-Bank. In fact, the purchasers themselves had paid the amount straight into the plaintiff-bank and no portion of the sale consideration of the materials was utilised otherwise. There were some materials which could not be sold and they are even now lying at the premises". "In October, 1973, the plaintiff suddenly stopped the overdraft facilities and the discounting of Bills without any notice to the defendants. The defendants gave a telegram to the regional report of the plaintiff Mr. Vaidhynathan who sent the Administrative Officer one Mr. Pillix to Kancheepuram and there was a discussion between the defendants and the said officer alongwith the agent of Kancheepuram branch Mr. Kalyanasundaram and it was agreed by the plaintiff that they would give overdraft upto 90 per cent of Labour bills and 10 per cent of sales bills. Even this facility was suddenly stopped in March, 1974 without prior notice to the defendants. After March 1974, the defendants have written a letter dated 22.4.1974 to the plaintiff agreeing to pay Rs. 1,000 per month. The National Engineering Works have paid the said monthly instalments upto March, 1975 and the Ashok Industries had also paid for about six months".

"The loss that had been caused to the defendants on account of the acts of the plaintiff should be reimbursed by the plaintiff. While so, the plaintiff had suddenly on 24.3.1975 locked up even the remaining materials though the plaintiff is not entitled to do so. All the said materials are now under the lock and key of the plaintiff. The plaintiffs action in locking up the materials is high handed illegal and serious damage had been caused to the defendants by reason of the conduct of the plaintiff and such damages also should be borne by the plaintiff. Subsequently the partnership had been dissolved and all the assets and liabilities were taken over by the first defendant and the first defendant is entitled to realise all the assets and liabilities of the said dissolved firm of National Engineering Works".

"After the sale of the said goods, systematically the plaintiff had been squeezing credit; neither the moratorium promised was given nor any fresh advances as promised was given; This would abundantly prove that the intention of the plaintiff was merely to throttle the defendants".

"The defendants state that both the National Engineering Works and Ashok Industries are entitled to recover the losses from plaintiff and for that purpose, a true an correct account in respect of all the dealings will have to be taken. The

plaintiff has not given a true and correct account in respect of all transactions. The correct position of the account can be arrived at only after a true and correct account is taken. Even in the accounts given, excess interest had been charged and unless copies of statements of accounts are given, the defendants will not be in a position to controvert the same.

8. The plaintiff-bank has filed no reply to the said written statement.

9. The first defendant in C.S. No. 171 of 1975 as plaintiff in C.S. No. 588 of 1979 mainly proceeded on the ground that it was the bank that advised the partnership firm in all its transactions and when it came to adjustments of the amounts advanced to it and a clear offer to purchase the entire materials in the stock belonging to both the National Engineering Works and Ashok Industries came with an advance cheque of Rs. 55,000 the bank which, in the normal business and banking practice, is obliged to give permission for sale of the materials on condition that the sale proceeds of the said materials were deposited in discharge "of the advances sanctioned, declined to do so and refused permission to sell the goods but sold it when the market price of the goods had gone down and in the process of collection of amounts of the bills the bank had not given a true and correct account showing the persons from whom the moneys had been collected and the amounts that had been collected and the dates when the amounts had been collected and whether in respect of any bills the amount had not been collected and had not returned the bills which were not collected so that the firm itself could collect the bills.

10. The fourth defendant in C.S. No. 171 of 1975, in her suit, C.S. No. 589 of 1979, maintained almost a similar stand and alleged,

If the goods had been sold at the time when permission was requested by the plaintiff, they would have fetched at least Rs. 6,57,280 even if the sheets alone had been sold. As on that date, the liability of the plaintiff to the defendant under all the accounts was only Rs. 6,36,212 and adjusting sale proceeds towards the amount due to the defendant, the plaintiff would still be entitled to a surplus besides, the encumbrance- over the other materials "including finished and semi-finished goods would have been removed by reason of the discharge of the entire indebtedness and the plaintiff would have had the beneficial use of such materials also.

11. In the written statements filed on behalf of the bank there has been a general denial of the allegations somewhat specifically on the question of sale of goods but no specific denial with regard to the allegation that proper accounts of the bills were not furnished by the bank and bills which were not collected had not been returned to the plaintiffs (in CS. Nos. 588 and 589 of 1979) has been made.

12. A learned single Judge of this Court has, however, found as follows:

(1) The defendants' signatures were not obtained on blank promissory notes.

The suit documents were executed by the defendants. They are not post-dated as pleaded by the defendants. (This finding has been recorded primarily for the reason that the onus is upon the defendants to show that the plaintiff-bank obtained any signatures of the defendants on blank forms and blank papers and thus fabricated the said documents)". This onus has not been discharged by the defendants".

"(2) The defendants were entitled to claim release of the goods whether raw materials or finished goods, placed as security in favour of the plaintiff-bank on deposit of the proportionate value of the goods as per the terms and conditions of the agreement. It was not open to the plaintiff-bank to refuse permission to release the pledged goods when the defendants tendered the value of such goods at any given time. But there is no explanation as to why the defendants did not proceed to sell the stock of the entire raw materials to the Bombay purchaser if really the sale would have benefited them in wiping out the entire principal and interest amount due to the plaintiff-bank."

"(3) There is no evidence to show that there was any diminution in the sale price when the goods were actually sold from the date when the alleged purchaser had come with cheque for Rs. 55,000 and the defendants had sought permission to release the stock of the raw-materials."

"(4) The National Engineering Works and Ashok Industries are distinct entities in the eye of law for accounting purposes. The advances and repayments made by each unit must be dealt with separately. So far as the persons who are liable for the balance amounts due by separate units are concerned only such of the persons, who have signed for the respective unit would be liable for that amount, due by that particular unit. Since the advance have been made by the plaintiff on the strength of the assurances and responsibility of the .first defendant, the plaintiff-bank is entitled to combined both the causes of action and file a single suit. The first defendant's properties are offered as security for the advances made in the name of Ashok Industries also. The fourth defendant cannot be made liable for the advances due by the National Engineering Works. Defendants 2 and 3 are liable only as guarantors for the amounts due by both the industries, but a single suit can be filed in the peculiar circumstances of the case. Otherwise, it will cause injustice and be detrimental to the plaintiff-bank who have come forward to make advances in order to promote the small sale industries started by the first defendant in two distinct names, namely, National Engineering Works and Ashok Industries, and"

"(5) D.W. 1 has admitted the receipt of several statements of accounts of the Bank both for National Engineering Works and for Ashok Industries in respect of several facilities and has not raised any objection. It will be seen from Exs. D-8 and D-9 letters that the defendants have not moved their little finger against the correctness of the statements. Even in Ex.D-26 dated 22.4.1974, the defendants, have not disputed the correctness of the statements of account sent by the plaintiff-bank with regard to bills facility or any other facility. D.W. 1 has admitted

in cross-examination (vide pages 107 and 108) that in Ex.D-13 he had been asked to take speedy steps to realise the over due bills. Then he was confronted with the question that he had been informed of the nonpayment of such of those bills and that the bank wanted to go to the drawees to see that payments are made. But he has chosen to depose (vide page 108) that the plaintiff did not give the list of the bills, which were not honoured and had not given the statement showing the amounts "received and not received. Still further D. W. 1 has added that he asked the plaintiff-bank to furnish the statement and list several times. He further added that he had the statement of accounts given to him every month in respect of the facilities with an advice that if there was any error or omission or mistake D.W. 1 was free to point out the same to the plaintiff-bank and that he did not give any notice to the plaintiff calling upon particulars. Evidently, the defendants have become desperate after the filing of the suit and that they have through of raising all sorts of defence with a view to escape the liability without any basis, when D.W. 1 admits that the plaintiff-bank informed the non payment of some of the bills and D. W. 1 undertook to see to the payment of the same by the drawees, he would have been posted with full particulars of the bills that were not honoured by the drawees. Therefore, the defence raised cannot be believed.

13. Accordingly, the learned single Judge has held that the defendants are not entitled to a true and proper account from the plaintiff as claimed in the written statement and that the bank had furnished true and proper account with reference to the Bills Discounting facility.

Learned Counsel for the appellants has attached the judgment on three counts: (1) The bank's suit has suffered a serious defect as loans given to two separate legal entities have been clubbed together and there is such a mixing up of the claims of the bank against the firm with the claims of the bank against the firm with the claim of the bank against the fourth-defendant that the suit has precisely become an amalgam of the two proceedings, ingredients of which proceedings are not identifiable; (2) appellants' misfortune has been a direct result of the biddings of the officers of the bank, who initially encouraged them to go for expanded business activities, but later suggested them by not agreeing to the sale of the stock in December, 1971 and thereafter, when the selling rate of the goods in the market was much higher and later sold the stock in the market at a price that fetched much less than the price at which the goods had been valued; (3) In their written statement, filed in the bank's suit, they fully indicated how the bank failed to account for the bills that had collected and in handing over or sending the bills, which were not honoured to them and reserved their right to sue for accounts. Accordingly, the two suits aforementioned were filed for accounts and damages. In the absence of the accounts of the bills fully furnished to the defendants, the bank can neither move for foreclosure nor for any money claims against the defendants. According to the learned Counsel for the appellants, the trial court has erred in not dismissing the suit for the reason of the mis joinder of parties and in not decreeing the claims of the appellants in

their suits for the reason of the damage that the defendants suffered on account of the bank initially encouraging them to expand their business and later not permitting them to sell their stock, which would have liquidated all bank's claims and selling the goods at a lower rate in the market as well as for accounts of the bills already collected or bills that were not collected.

14. It is correct when it is said that partnership firm and the firm of the fourth defendant functioned as separate legal entities, in the sense that they were granted various credit facilities separately by the bank. They continued as separate entities in such loan transactions that the partnership firm or the fourth defendant contracted with the bank. It appears, however, that the title deeds, which created mortgage, brought into a common credit facility, these two separate legal entities, with respect to which there is a clear mention in the plaint in these words:

The plaintiff-bank submits that on 10.6.1971, the title deeds of the house properties, Nos. 29 and 29-A, Veeraswami Pillai Street, Egmore, more particularly described as item 1 in Schedule 1 hereunder, belonging to the defendants 1 and 2 were deposited with the plaintiff-bank at Madras with intention to create an equitable mortgage in order to avert imminent legal proceedings.

Again on 11.11.1971 to first defendant also deposited at Kancheepuram with intention to create an equitable mortgage the title deeds of his property at No. 24-B, Vaikunda Perumal North Mada Street, Kancheepuram, more particularly described as Item 2 in Schedule 1 hereon, as additional security for the amounts due from all the defendants under the various accounts in consideration of the bank forbearing to sue.

The plaintiff-bank submits that when the title deeds mentioned above were deposited as security, they were meant to cover the total sum of Rs. 12,87,994 then agreed and undertaken by the defendants to pay jointly and severally of which a sum of Rs. 9,20,000 represented the amount due by the proprietary concern and the balance of Rs. 3,82,994 represented the amount due by the firm.

Asserting that the National Engineering Works and Ashok Industries, the partnership firm and the business of the fourth defendant, were different and distinct entities doing independent business and alleging that a mix up was created by the bank in their written statement, the defendants, however, conveniently omitted to answer the specific allegation of the mortgage and the loans thus brought in a common pool in such a way that as for accounts one was required to see the separate loans to the partnership firm and the proprietary firm, but for satisfaction of such loans to the common resources of the defendants. The answer in this behalf, in the judgment of the learned single Judge, is clear and unambiguous in the sense that the learned single Judge has taken notice of the evidence of P. W. 1, who deposed that so far as the bank was concerned, they had acted one set of account for Ashok Industries and another

set of account of National Engineering Works and that they were distinct units, but has said,

Thus, it is clear that the two units are distinct units so far as the plaintiffs advances are concerned. *Amarendran v. State Bank of India* (Mishra, J.) earned, though defendants 1 and 4, who are husband and wife, have received advances on the security of the same properties with a view to take the maximum advantage of receiving loans from the bank by creating two different units...D.W.1 is the first defendant and the fourth defendant has not been examined, D.W. 1 has deposed that, the expansion and growth of National Engineering Works necessitated his asking the plaintiff-bank for the enhancement of existing facility and sanction of additional facility after getting orders and succeeding in tenders and accordingly he approached the plaintiff for enhancing the existing facility and for sanctioning additional facility, that solely in 1969 he started another industry, which was under his supervision, that is Ashok Industries started in the name of his wife Saroja...that the fourth defendant has given power of attorney to D. W. 1 to look after the said Ashok Industries, that in all matters and discussion with the plaintiff-bank on financial aspect, D.W. 1 represented the Ashok Industries and that the plaintiff-Bank heard D.W.1's representation in relation to Ashok Industries also...that he had always been discussing the financial questions for both National Engineering Works and Ashok Industries with the plaintiff-bank, that at one time D.W. 1 sold some materials of National Engineering Works to Ashok Industries, which were pledged to the plaintiff-bank, that the plaintiff-bank accordingly confirmed such transaction and debited in his account, that the plaintiff-bank has made adjustments accordingly in the respective accounts and that D.W. 1 did not object to such transfer of amount from factory type account to mundry type account.

D.W.1 has deposed that himself and the other partners stood as guarantors for the outstanding of Ashok Industries, that two properties, one at Kancheepuram and another at Madras, were offered as securities for both the units, that he had written to the plaintiff offering the two properties as security for both the accounts in Ex.P-18 letter and that the fourth defendant did not stand as guarantor for National Engineering Works.

learned counsel for the appellant has, in his own persuasive way, taken us through the evidence of this witness and other evidence on the record and has tried to persuade us to accept the contention with respect to the misjoinder of parties and amalgamation of claims of two distinct and separate legal entities into one. Having once done so, as noticed in the evidence, as above, in our opinion, defendants cannot be heard to say that the bank must ask them to account for the claims of the two units separately as if the bank could not sue for a common mortgage with respect to the claims of the two separate units in the hands of the defendants.

15. In the case of fiduciary relationship, courts" sometime take notice of undue influence of the creditor and hold, in case it is found that the debtor acted in

deference to the advice of the creditor to his prejudice, that any damage caused should be compensated by the creditor. A case of this kind has been cited at the bar by the learned Counsel for the appellants in the case of *Lloyds Bank Ltd. v. Bundy* (1974)3 W.L.R. 501. The rule in this behalf has been stated in *Tato v. Williams* (1866)2 Ch. 55. In *Tufts v. Spier* ILR (1952)2 ILR 516 and *Williams v. Bayley* (1866) L.R. 1 H.L. 200. Some such principles are stated, which are followed by Lord Denning, M.R. in his judgment in the words:

The first category is that of "dureas of goods". A typical case is when a man is in a strong bargaining position by being in possession of goods of another by virtue of a legal right, such as by way of pawn or pledge or taken in distress. The owner is in a weak position because he is in urgent need of the goods. The stronger demands of the weaker more than is justly due and he pays it in order to get the goods. Such a transaction is voidable. He can recover the excess see *Astley v. Reynolds* (1731)2 Stra. 915 and *Green v. Duckett* (1883)11 Q.B.D, 275. To which may be added the cases of "colore officit, where a man is in a strong bargaining position by virtue of his official position or public profession. He relies upon it so as to gain from the weaker-who is urgently in need more than is justly due; see *Piggott's case*, cited by Lord Kenyon, C. J., in *Catwright v. Bowler* (1799)2 Rep. 723, *Parker v. Bristol & Exeter Railway Company* (1851)6 Exch. 702 and *Steele v. William* (1853)8 Exch. 625. In such cases the stronger may make his claim in good faith honestly believing that he is entitled to make his demand. He may not be guilty of any fraud or misrepresentation. The inequality of bargaining power the strength of the one versus the urgent need of the other renders the transaction voidable and the money paid to be recovered back; see *Miskell v. Harper* (1915)3 KB. 106.

The second category is that of "misconscionable transaction". A man is so placed as to be in need of special care and protection and yet his weakness is exploited by another far stronger than himself so as to get his property at a gross undervalue. The typical case is that of the "expectant heir". But it applies to all cases where a man comes into property, or is expected to come into it-and then being in urgent need another gives him ready cash for it, greatly below its true worth, and so gets the property transferred to him; see *Evans v. Llewellyn* (1787)1 Cox. 333. Even though there be no evidence of fraud or misrepresentation nevertheless the transaction will be set aside: see *Fry v. Lane* (1988)40 Ch.D. 312 where Kay, J., said "The result of the decisions is that where a purchaser is made from a poor and ignorant man at a considerable undervalue the vendor having no independent advice, a court of equity will set aside the transaction". This second category is said to extend to all cases where an unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker, see the cases cited in *Halsbury's Laws of England*, 3rd ed. Vol.17 (1956), page 682 and in *Canada Morrison v. Great Finance Ltd* (1966)55 D.L.R.710 and *Knupp v. Bell* (1968)67 D.L.R.256. The third category is that of "undue influence" usually so called. These are divided into two classes as stated by Cotton, L.J. in *Ali Card v. Skinner* (1887)36 Ch.D. 145. The first are those

where the stronger has been guilty of some fraud or wrongful act-expressly so as to gain some gift or advantage from the weaker. The second are those where the stronger has not been guilty of any wrongful act, but has through the relationship which existed between him and the weaker, gained some gift or advantage for himself. Sometimes the relationship is such as to raise a presumption of undue influence, such as parent over child, solicitor over client, doctor over patient, spiritual adviser over follower. At other times a relationship of confidence must be proved to exist. But to call of them the general principle obtains which was stated by Lord Chelmsford L.C. in *Tato v. Williamson* (1866)2 Ch.App. 55: "Wherever two person stand in such a relationship that while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other and this confidence is abused or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed." Such a case was *Tufton v. Sporni* (1952)2 T.L.R. 516.

The fourth category is that of "undue pressure". The most apposite of that is *Williams v. Bayley* (1866) L.R. 1 H.L. 200,, where a son forged his father's name to a promissory note, and by means of it, raised money from the bank of which they were both customers. The bank said to the father, in effect: Take your choice-give us security for your son's debt. If you do take that on yourself, then it will all go smoothly, if you do not, we shall be bound to exercise pressure". Thereupon, the father charged his property to the bank with payment of the note. The House of Lords held that the charge was invalid because of undue pressure exerted by the bank. Lord Westbury said, at pages 218-219:

"A contract to give security for the debt of another, which is a contract without consideration, is above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it." Other instances of undue pressure are where one party stipulates for an unfair advantage to which the other has no option but to submit. As where an employer the stronger party-has employed a builder-the weaker party to do work for him. When the builder asked for payment of sums properly due (so as to pay his workmen) the employer refused to pay unless he was given some added advantage. *Stuart V.C.* said: "Where an agreement, hard and inequitable in itself, has been exacted under circumstances of pressure on the part of the person who exacts it, this Court will set it aside". See *Ormes v. Beadel* (1860)2 Giff. 166 (reversed on another ground. In *D.&C. Builders Ltd. v. Rose* (1966)2 Q.B. 617, 625.

The fifth category is that of salvage agreements. When a vessel is in danger of sinking and seeks help, the rescuer is in a strong bargaining position. The vessel in distress is in urgent need. The parties cannot be truly said to be on equal terms. The court of Admiralty have always recognised that fact. The "fundamental rule" is

"if the parties have made an agreement, the court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the court will disregard it and decree what is fair and just.

We need not exercise ourselves, however, with this aspect of the law and the principles that are applied in such cases for, at the first instance, we noticed that there has been no such case made out in the written statement, except vague pledgings in this behalf and assuming that there has been absolutely no evidence whatsoever for such an inference, that the transactions between the parties were affected by inequality of bargaining power. A case has been made out that in March, 1972, a certain prospective Bombay purchaser; with a draft for Rs. 55,000 appeared on the scene for the goods belonging to the defendants, but in the custody of the bank, and the bank refused permission to sell the goods. It is on this basis that a suggestion has been made that at that time the sale price Of the goods was higher than the price these goods fetched when sold. Defendants have, however, conveniently omitted to quote the rate at which the alleged prospective Bombay purchaser had agreed to purchase the goods. It is not possible, on such facts, as we have noticed, to concede to the contention of the learned Counsel for the appellant in this behalf that any transaction between the bank and the defendants was inflicted by the vice of inequalities of bargaining power or that the bank sold the goods at a price, which was lower than the price that the goods would have fetched when sold to the allotted prospective Bombay purchaser.

16. When we advert to the third question mooted at the bar on behalf of the appellants, and see the discussions in the judgment of the trial court, we find ourselves in a fix, that has been created by complete absence of any pleading by the bank answering the charge that the bills were not accounted for or have been accounted for, but not returned, except a vague denial and although it is urged on behalf of the bank that there is evidence of substance on the record, which would show that bank had given full statement of accounts of the bills, collected by it and returned unpaid bills to the defendants, there has been no discussion in this regard in the judgment of the trial court. In fiduciary transaction of this kind accounts fluctuate. It is indeed essential that specific pleadings are advanced. Appellants reserved their right in this behalf to sue separately in the written statement when they filed in the bank's suit. It appears that when they filed their suits, the new provision, as found in Rule 6-A of Order 8 of the Code of Civil Procedure, was not there. This Rule 6-A in Order 8 of the Code has brought in a new provision, besides the provision with respect to the set off, as found in Rule 6 thereof, saying:

(1) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filling of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has

expired, whether such counter-claim is in the nature of a claim for damages or not; Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counterclaim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counterclaim of the defendant within such period as may be fixed by the court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

Full opportunity thus was available to the bank to file a written statement and contest the issue of accounting with respect to the bills collected or not collected. In the suits that the defendants had filed, the bank, it appears, did not release that its claim needed necessary backing of evidence and that when a suit raising a counter-Claim had been filed, it was required to rebut the allegations specifically. One thing is clear. If full credit of the bills collected has not been given by the bank and bills which have not been collected have not been returned to the defendants, defendants are entitled to a decree to the extent of the credit covered by the bills. If accounts in this behalf are available and these accounts explain fully the demands of the bank, the bank's suit has to be decreed for the full amount. This cannot be achieved without adverting to the accounts and the evidence showing how many bills were collected by the bank and from whom and how such collected money was accounted for by the bank and if bills were not collected, whether the bank returned the bills to the defendants and if it did not return, whether by not returning the bills, which were not collected by the bank, it caused loss to the defendants. Learned Counsel for the respondent-bank endeavoured to persuade us to see the evidence on the record in this behalf for, as he said, he felt convinced that there has been no mistake in the bank in fully accounting for the bills collected and returning the bills to the defendants, which were not collected and according to him, there is sufficient evidence on the record to the said effect. We have, however, not yielded to his persuasion. The Appellate Court can enter into the evidence and record its own findings on facts, if it is found that some relevant material and material evidence has not been considered by the court below. There is no want of jurisdiction in this behalf. But besides oral evidence, it appears, quite a few documents marked without objection are on the record and the bank intends to rely upon the contents of such documents. We are aware that in *P.C. Purushothama Reddiar Vs. S. Perumal*, , the Supreme Court has said that when a particular document is admitted in evidence without objection by the opposite party, the contents of such documents are also admitted in evidence. Courts in India have not hesitated in taking contents of such documents into consideration, but two exceptions have always been noticed, namely, when genuineness of the contents or correctness of the contents as controverted, proof of contents, as

required by Section 67 of the Evidence Act, is insisted upon and such evidence is never taken as conclusive evidence. It is used for the purpose of corroboration or contradiction only. This Court has dealt with this aspect of the law in some details in a recent judgment in the case of K. Kuppuswami Pillai v. E. Natarajan and another, L.P.A. No. 167 of 1988, judgment dated 16.7.1992, and stated the law in these words:

It is well settled that the proof of the genuineness of a document as proof of the authorship of the document is the proof of a fact like that of any other fact. Courts in India have, for the said reason, allowed evidence relating to the proof of the genuineness of a document to be either direct or circumstantial. Such evidence, may consist of direct evidence of a person who saw the document being written or the signature being affixed or may be proof of the handwriting of the contents or of the signature by one of the modes provided in Sections 45 and 47 of the Indian Evidence Act. Such evidence may also be internal evidence, afforded by the contents of the document.

In Mobarik Ali Ahmed Vs. The State of Bombay, , the Supreme Court considered the issue whether the internal evidence afforded by the contents of the document amounted to the proof of the authorship of the document and the Supreme Court held that the evidence of the recipient of the document would be material to establish the authorship of the document. In the light of the above, a Division Bench of the Bombay High Court in Mohammed Yusuf and Another Vs. D. and Another, , has fully analysed the law and stated as follows:

The reason on which the decision of Bhagwati,],, is based is not far to seek. The evidence of the contents contained in the document is hearsay evidence unless the writer thereof is examined before the court We, therefore, hold that the attempt to prove the contents of the document by proving the signature or the handwriting of the author thereof is to set at nought the well recognised rule that hearsay evidence cannot be admitted. This question has been discussed by Halsbury at paragraph 533 at page 293 (Halsbury's Laws of England, 3rd Edition, Volume 15), under the heading "Hearsay" says Halsbury:

...Statements in documents may also be hear-say. So, if had taken counsel's opinion before acting, the contents of the opinion would be admissible for the same purpose, but not to prove the truth of any statement of fact herein." The paragraph (534) Halsbury has discussed the reasons for rejection of hearsay evidence and says:

The reasons advanced for the rejection of hearsay are numerous, among them being the irresponsibility of the original declarant, the depreciation of truth in the process of repetition, the opportunities for fraud which its admission would offer, and the waste of time involved in listening to ideal rumour. The two principal objections, however, appear to be the lack of an oath administered to the originator of the statement and the absence of opportunity to cross-examine him". The Advocate General drew our attention to a decision of House of Lords in

Maria Sturla v. Filipoo Freceie (1979)2 AC. 623. In that case, the report of a committee appointed by a public department in a foreign state was admitted in evidence as a public document. It was, however, held that it was not admissible as evidence of all the facts stated therein. In that case, the facts were, the document in question, a report of certain persons called the *Ginute di Marina* at Genoa, was sought to be put in evidence for the purpose of proving that person who was formerly consul for the Genoese Republic in London, and the succession to whose daughter, Mrs. Brown was in question was a native of Quarto near Genoa and at the time that report was made, aged about forty-five years. The document was tendered for that purpose and for that purpose only. It was concerned that the report was an authentic public document of the Genocese Government. The statements, however, contained in the report were not based on the evidence of any of the relatives of the Consul at Genoa. The information contained therein did not appear to have been received from any member of Mangini's family. One of the well recognised exceptions under the English Law of Evidence to the reception of hearsay evidence is the evidence relating to pedigree. The only question which their Lordships of the House of Lords were considering was, whether the contents of the report fell within the purview of the above exception and their Lordships held that it did not, because the statements contained in the report were not based on the evidence given before the dispute started by any of the members of the deceased's family. We are not concerned with that part of the decision of the House of Lords in the present case. The point to be noted is that the statements contained in the report were treated as hearsay and since they did not fall within the well recognised exceptions, they were excluded from evidence. To conclude this part of the discussion, we hold, in the first place, that what has been formally proved is the signature of Abreo and not the writing of the body of the document at Ex.28 and secondly, that even if the entire document is held formally proved, that does not amount to a proof of the truth of the contents of the document. The only person competent to give evidence on the truthfulness of the contents of the document was abreo". A glance to the language used in Section 67 of the Indian Evidence Act also supports the view that we take that the proof of the document by proving the signature of the first defendant herein cannot extend to the proof of the genuineness of the contents thereof, for the contents of Ex.A-4 are in the handwriting of somebody else. Section 67 reads as follows:

67. Proof of signature and handwriting of person alleged to have signed or written document produced: If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting." If a document is alleged to be signed by any person, the signature is proved by examining that person. If a document is alleged to have been written wholly or in part by a person, such handwriting of so much of the document, as is alleged to be in that person's handwriting, is proved by examining that person.

We are however, not saying anything finally in this behalf for we intend to remit the case for a reconsideration of the evidence on the record on the question of issue No. 4 in C.S. No. 171 of 1975 and issue No. 5 in C.S. Nos. 588 and 589 of 1979, the only issue relating to the accounts based on the bills, with respect to which the respondent-bank has acted as the agent of the defendants. We are conscious, however, that the suits of the year 1975, decreed in the year 1982, are going to be revived for the limited purpose of the accounts covered by the bills aforementioned and a public undertaking is involved in the proceedings. We cannot, however, find any *via media*, except the setting aside of the judgment and decree and remand, as indicated above. There has been a long protracted litigation and substantial delay caused in the Court. In the circumstances, it is desirable, after remand, the cases are heard expeditiously and disposed of as quickly as possible. In the result, the appeals are allowed to the extent indicated above, the impugned judgment and decrees are set aside; the case is remitted to the trial court for further hearing on the issue indicated above. In the circumstances of the case, there shall be no order as to costs.