
(1988) 04 DEL CK 0011
In the Delhi High Court
Case No : Suit No. 815 of 1983

Canara Bank, R.K. Puram

APPELLANT

Vs

Sanjeev Enterprises and Others

RESPONDENT

Date of Decision : 25-04-1988

Acts Referred:

Citation : AIR 1988 Delhi 372 : (1991) 71 CompCas 181

Hon'ble Judges : A.B. Saharya, J

Bench : Single Bench

Advocate : Atul Kumar, C.S. Patney and V.B. Andley, for the Appellant;

Judgement

Arun B. Saharya, J.

(1) In this suit, the plaintiff has prayed for a decree for a sum of Rs. 13,13,622.34 jointly and severally against defendants I to 4, and to the extent of the sum of Rs. 16,843.90 p. against defendant No. 5, with interest thereon at the rate of 21.5 per cent per annum from the date of the suit till payment and with costs.

(2) The plaintiff is a banking company, a body corporate and a nationalised Bank, constituted under the Banking Companies (Transfer and Acquisition) Undertakings Act, 1970, hereinafter referred to as the Bank. It has its head office at Bangalore and its branches are spread throughout India. The suit relates to its branch at Sector Xii, R.K. Puram, New Delhi. The plaint is signed and verified by Mr. M. N. Prabhu. It is alleged that he was the Senior Manager of the said branch and that he was duly authorised by a power of attorney to institute the suit and to sign and verify the plaint on behalf of the Bank.

(3) It is alleged in the plaint that Kuldip Singh Sawhney, defendant No. 2, is the sole proprietor of the business carried on in the name and style of M/s Sanjeev Enterprises, defendant No. 1, hereinafter referred to as the Firm; that he authorised his son Sanjeev Sawhney, defendant No. 3, to carry on and look after the entire business, and to deal with Bank and all other parties in connection

with the business; that the said defendants had business dealings with the Bank since 1976 when a current account was opened under which they enjoyed open cash credit (hereinafter called OCC) facilities up to a limit of Rs. 5 lakhs; that payments due to the Bank were guaranteed personally by defendants No. 2 and 3 as well as by Reema Sawhney, defendant No. 4, and by Baljit Kaur, daughter and wife respectively of defendant No. 1. It is alleged that after the death of Baljit Kaur, defendants No. 2 to 4 are liable in their capacity as her legal representatives. It is further alleged that after the death of Baljit Kaur, defendants No. 2, 3 and 4 executed a fresh deed dated 18th March 1981, by which they independently undertook/ guaranteed to repay liability of the Firm to the extent of Rs. 15 lakhs, and, at the same time, defendants No. 3 and 4 acknowledged liability, up to that time, for Rs. 8,07,375.91 under Occ Account No. 1, for Rs. 36,731.71 under Occ Account No. 2, for Rs. 56,945.15 p. on account of supply bills, and for Rs. 5,010.50 on guarantees. It is also alleged that later, on 22nd April 1981, defendants No. 1 and 2 acknowledged their liability under the said four heads for a sum of Rs. 8,41,527.96, Rs. 38,235.81, Rs. 59,366.75 and Rs. 5,010.50 respectively. It is clarified in the plaint that no claim has been made in the suit for payment on account of supply bills and guarantee as the liability in respect of supply bills has been debited to the Occ Account, as agreed" by the defendants, and the preexisting liability on account of guarantees was extinguished.

(4) It is further alleged by the Bank that the defendants No. 1, 2 and 3 were unable to conduct their business properly and they needed more financial assistance to improve its working, Therefore, they approached the Bank to give them overdrafts, open cash credit and bills discounting facility and, for that purpose, defendants No. 1 to 4 executed various documents dated 7th September 1981, which included three separate requests for overdraft facilities, each up to a limit of Rs. 5 lakhs, Rs. 2,52,256.75 and Rs. 2.18,500, three promissory notes of corresponding value, and other documents for hypothecation of goods, machinery tools, and book-debts etc., by way of security, and an agreement for opening Cash Credit Account. It is alleged that on the basis of these documents, the Bank granted to the Firm bills of exchange discounting facility, under account known as Bills of Exchange Discounting Account (BE Account for short), to the extent of Rs. 3,00,000, as a clean advance, subject to payment of interest at 19.5 per cent per annum plus 2 per cent penal interest, that the other facilities sought by the said defendants were also granted, that the then existing liability of the Firm in its" Occ Account was over Rs. 10,00,000 which was bifurcated into three accounts for administrative convenience as per request of the defendants; that a limit up to Rs, 5 lakhs was allowed under Occ Account No. 1 while Accounts No. 2 and 3 were blocked; and that the defendants acknowledged their liability and undertook to clear the blocked accounts first by making payment at the rate of Rs. 25,000 per month.

(5) Further, it is alleged that during the course of business, the defendants discounted various Hundies drawn on .approved parties like M/s Le Mount

Garments Private Ltd., defendant No. 5, that two of the Hundies dated 15th October 1981 and 28th November 1981 for Rs. 21,000 and Rs. 15,035 respectively, drawn on and accepted by defendant No. 5 were dishonoured, and that a sum of Rs. 36,035, thus, remained outstanding in the Be Account. It is alleged that as those Hundies were dishonoured by defendant No. 5, they were protested before a Notary Public on 14th April 1982, the said defendant is liable, jointly and severally, with the other defendants on the basis of the said two Hundies. The Bank has claimed from defendant No. 5 payment of Rs. 46,843.90 p. which includes the outstanding amount of Rs. 36,035 and a sum of Rs. 10,808.90 p. as interest at the rate of 21.5 per cent per annum on the principal sum from the due date up to the date of the suit.

(6) It is also alleged by the Bank that defendants No. 1, 2 and . 3 had undertaken to regularise their accounts and to pay at least Rs. 25,000 per month to liquidate their liability, but they failed to do so inspire of demand for payment; that they admitted their failure by a letter dated 4th April 1982: that they promised to maintain stock atleast of the value of Rs. 6 lakhs under the Occ account, and not to divert their fund; that they acknowledged their liability to the Bank by letters dated 16th April 1982. 21st April 1982 and 1st March 1983, but they kept on putting off the Bank instead of paying the money due to it.

(7) It is alleged that on 13th January 1983 payment of Rs. 6,61,935.31 p. was due on Occ Account No. 1, Rs. 2,03,579.07 on Occ Account No. 2, and Rs. 3,06,122.65 on Occ Account No. 3, aggregating to a total of Rs. 11,71,637.03, and that a further sum of Rs. 36,035 was due on the Be Account; that all these outstanding amounts were transferred to the Loan Past Due Account (LPD Account for short); that the said amounts unclouded interest up to 31st December 1982; and that interest due thereafter on the total liability on the three Occ Accounts has been claimed at the rate of 18.5 per cent per annum up to the date of suit, amounting to Rs.80,087.09p. Besides this, a sum of Rs. 4,518.77 is claimed towards premium and a sum of Rs. 8,088.55 and Rs. 1640 has been claimed on account of interest previously short charged. Interest at the rate of 21.5 per cent per annum from the due date up to the date of filing of the suit is claimed on the Be Account, amounting to Rs. 10,808.90. Thus, the Bank has claimed payment of total sum of Rs. 13,13,622.34 from defendants No. 1 to 4 and a sum Rs. 46,843.90 from defendant No. 5 up to the date of institution of suit.

(8) To oppose the suit, defendants No. 1 to 4 have pleaded that the claim pertains to the year 1976, so the suit filed on 26th May 1983 is barred by limitation. They have disputed the authority of M. N. Prabhu to sign and verify the plaint and to institute the suit on behalf of the Bank, en merits, it is alleged that the amounts claimed by the "Bank are inflated, excessive and that the Bank has not correctly accounted for various payments received by it. It is alleged that the defendants were entitled to concessional rate of interest as per the rules and instructions of the Reserve Bank of India but the Bank has claimed it at an

excessive rate as also against the terms of agreement between the parties. It is further alleged that the Bank obtained signatures of the defendants on various blank forms. They have denied that they acknowledged any liability at any time. Regarding the dishonour of Hundies, it is alleged that the Bank was responsible for it, as it did not honour its financial commitment to the defendants which led to cancellation of their contracts with their customers. The said defendants have denied their liability under the Be Account as also to "pay the amount claimed in the suit or any other amount to the Bank.

(9) In the written statement of defendant No. 5 it is denied that Mr. M. N. Prabhu has any authority to sign and verify the plaint and to institute the suit on behalf of the Bank. It is admitted that the two Hundies were drawn on it by the Firm and that it did not pay the amount claimed on the said Hundies, but liability to pay the amount claimed in the suit is denied. It is denied that any Notary Public ever presented the Hundies for payment on 14th April 1982 or on any other date. It is alleged that Anil Sabharwal, on behalf of defendant No. 5, accepted the Hundies, on the pretext of having purchased certain goods vide bills of the Firm dated 15th October 1981 and 28th November 1981 for Rs. 21,000 and Rs. 15,035 respectively, but no goods whatsoever were purchased by it and that the "Hundies were accepted merely by way of financial help to the Firm. On these allegations, it is pleaded that the Hundies were without consideration. Further, it is alleged that defendant No. 3, who is also known as Pixi, wrote a letter dated 27th March 1982 to the Managing Director of defendant No. 5 that neither the Firm nor the Bank shall approach it for payment on the said Hundies and that defendants 1 to 3 promised to return those Hundies to defendant No. 5. Liability to pay interest at the rate of 21.05 per cent per annum or at any other rate to the Bank is also denied.

(10) The Bank has controverted the allegations made by the defendants and has reiterated its own case in the replication. With reference to defense set up by defendant No. 5, it is denied that the Hundies were not presented to defendant No. 5 for payment on 14th April 1982; or that no goods were purchased by defendant No. 5 from the Firm, or that the Hundies were drawn on and were accepted by defendant No. 5 merely by way of financial help to the Firm. The Bank has pleaded that defendant No. 5 is liable as it had accepted the Hundies, and that the bank is not concerned with any financial arrangement or understanding between the defendants. The allegation that the Hundies were without consideration has also been denied.

(11) On these pleadings, the following issues were framed :- 1. Whether the suit is within time ? 2. Whether the plaint has been signed, .verified, and instituted by a duly authorised and competent person ? 3. What amount is due to the plaintiff and against whom? 4. Whether the signatures of the defendants were obtained on blank forms and papers ? If so, to what effect? 5. Whether the plaintiff is entitled to interest ? If so, at what rate and to what amount ? 6. Whether the Hundies for Rs. 21,000 and Rs. 15.035 are without consideration ?

If so, to what effect ? 7. Relief.

(12) The Bank has examined Public Witness 1 U.B. Holla alone and gave up the other witnesses named in the list. D1W1 Sanjeev Sawhney (defendant No. 3) has appeared as the sole witness on behalf of defendants 1 to 4. while defendant No. 5 has produced D5W1 Sudhir Chopra as the only witness on its behalf. Issue No. 1

(13) The Bank filed the suit on 26th May 1983 for recovery of money from defendants No. 1 to 4 primarily on the basis of accounts of the Firm maintained by it, and on various other documents executed by the said defendants, during the period from March, 1981 to the date of the suit. After indicating background of the dealings between the parties, which started in 1976; the Bank has set up its case" that in March 1981 the said defendants acknowledged their liability then due to the Bank, that defendants No. 2, 3 and 4 personally guaranteed repayment of money due from the Firm, that the Firm sought further credit facilities for which various documents Exhibit P9 to Exhibit P21 were executed on its behalf on 7th .September 1981, and the pre-existing facilities were converted into three Occ Accounts and the Be Account. The Bank has proved these accounts by producing only certified copies Exhibit Public Witness ", Public Witness 1/3, Public Witness ? and Exhibit Public Witness 1/5 respectively. These four accounts were then merged into one Lpd Account Exhibit Public Witness 1/6. The balance due in the Lpd Account has been claimed in the suit.

(14) Plea of limitation has been raised on behalf of the said defendants on the ground that the Bank is enforcing claims against the Firm based upon accounts in respect of transactions of 1976. At the time of hearing, their learned counsel has contended that in 1981 the Bank merely brought forward a debit entry of Rs. 8,76,009.56 in the accounts; that liability of the defendants to pay that amount has not been proved; that the accounts between the parties cannot be said to be open and current as the entries therein are only of interest debited by the Bank and that there was no further transaction between the parties within a period of 3 years from the date of institution of the suit. In support of his contention, he has relied upon Chandradhar Goswami and Others Vs. The Gauhati Bank Ltd., .

(15) The defendants' plea is misconceived and the decision cited by the learned counsel is inapplicable to the facts of the present case It is no doubt true that the Bank has referred to commencement of dealings with the Firm in 1976 and has given the background of grant of facilities and of the dealings between the parties to explain the circumstances in which defendants No. 2. 3 and 4. on the death of Baljeet Sawhney in February 1981, acknowledged and confirmed their liability to the Bank as on 18th March 1981, by a letter Exhibit P3 and also executed on the same date an agreement Exhibit P8 to personally guarantee payment of money due from the Firm up to the limit of Rs. 15 lakhs. The Bank has proved on record a letter Exhibit P-6 dated 22nd April 1981 by which defendant No. 2, as proprietor of the Firm specifically admitted liability as on that date to the extent of Rs. 8,41,527.96 on Occ No. 1, Rs. 38,235.81 on Occ No. 2,

and Rs. 59,364.75 on the supply bills accounts which were then in operation. It has also been proved on record that, on the request of the said defendants, the Bank granted further facilities to the Firm on the basis of a series of documents Exhibit P-9 to Exhibit P-21 all dated 7th January 1981. These documents relate request for three overdraft facilities and Open Cash Credit facilities, and include three separate promissory notes for amounts tallying with the limit of each of the overdraft facilities, and deeds of hypothecation of machinery, tools, etc. and book debts to secure those facilities. Claim of the Bank on the basis of the three Occ Accounts, Exhibit Public Witness ", Pw 1/3 and Public Witness ?, and the Be Accounts Exhibit Public Witness 1/5 has to be appreciated in the context of the various documents on record. The outstanding balance of each of these accounts is reflected in the Lpd Accounts Exhibit Public Witness 1/6. It is pertinent to point out that Occ Account No. I Exhibit Public Witness I /2. shows cash and self withdrawals frequently every month in 1981 and even in 1982. Just to mention a few of them, there are such entries in 1981, on 9th September, on 8th, 23rd, 26th and 29th October, and then in November and December also. which follow through 19th and 22nd February in the year 1982. The two Hundies Exhibit P24 and Exhibit P23 are dated 15th October 1981 and 28th November 1981 respectively, on the basis of which claim is raised in the Be Account Exhibit Public Witness 1/5. On these facts, it cannot be said that there were no transactions within three years of institution of the suit and that the account between the parties was not open as argued by learned counsel for the defendants. Apart from this, there are on record letters dated 4th April 1982, 16th April 1982. 21st April 1982 and 1st March 1983. Exhibits P-22, P-25, P-26 and P-27 respectively. by which the said defendants repeatedly promised to pay to the Bank amount outstanding against them. It is found, Therefore, that the suit is within time. Issue No. 2 :

(16) The "plaint is signed and verified by M. N. Prabhu. The defendants have disputed his. authority to do so. Public Witness 1. Manager of the concerned branch of the Bank, has stated that M. N. Prabhu was Senior Manager of the said branch at the relevant time. He has identified signatures of M. N. Prabhu on the plaint. He has produced and proved the original Power of Attorney executed by the Bank in favor of M. N. Prabhu, Exhibit Public Witness 1/1 is its photo copy. Paras 9 and 10 of the document authorise M. N. Prabhu in the following terms :-

"9.To demand, collect, receive and give effectual bona-fide discharges of in the name and on behalf of the Bank all debts, advances, and claims due to the BANK; further to take and use all lawful proceedings and means for recovering and Realizing the said debts and advances and also to commence, prosecute and to defend at law all action, suits claims, demands and disputes."

"20.To appoint and employ agents, including Advocates, Vakils, Pleaders or other Legal Practitioners, Overseers, Receivers or other persons at such remuneration by way of fees, salary, commission or otherwise as the above named attorney may think proper and to dismiss and discharge the same from time to time and

to employ or appoint any other person in their stead".

(17) In view of the power of attorney in favor of M. N. Prabhu, learned counsel for the defendants did not press this issue at the time of hearing. Even otherwise, the Bank has proved on record that M. N. Prabhu, who signed and verified the plaint, was duly authorised and that he was competent to institute the suit on behalf of the Bank. It is, Therefore, found that the plaint has been signed, verified and instituted by a duly authorised and competent person on behalf of the Bank. Issue No. 4 :

(18) It is appropriate to take up issue No. 4 prior to issue No. 3 which can be effectively considered together with issues No. 5 and 6). Defendants No. 1 to 4 have merely alleged in their written statement, without giving any particulars, that the Bank has taken their signatures on various blank papers and blank forms. DlwI Sanjeev Sawhney, defendant No. 3. claims to be fully conversant with the dealings between the parties. He has also proved on record Exhibit P2, power of attorney executed by defendant No. 2, authorising him to carry on business of the Firm and to deal with the Bank and others in respect of the business. As a witness, he has restricted the controversy to only 328 six of the documents on record Exhibit P-14 to P-17, Exhibit P20 and P21. According to him, these documents had "unfilled up blanks in them when they were signed by defendants and/or by Shrimati Baljeet Sawhney." At the time of hearing, learned counsel for the said defendants, further confined their case to just an inference against the Bank that he wants the court to draw, from a look at the face of each of these documents, that there is a difference, according to him, in the ink and the instrument used to fill up the blanks as against those used by the various defendants for signing these documents. This is a baseless plea. Defendants I to 4 do not dispute that they had commercial dealings with the Bank. The disputed documents are only six out of the various documents, Exhibit P-9 to Exhibit P-21, all dated 7th September 1981. Each of these documents is admittedly signed by the defendants, and is part of the same transactions. This apart, the defendants admittedly wrote several letters to the Bank after September 1981. Some of them are Exhibits P22.P25, P26 and P27 dated 4th April 1982, 16th April 1982, 21st April 1982, and 1st March 1983 respectively. They never raised this dispute in any of their letters to the Bank. In answer to a court question DlwI has conceded:

"WE never protested to the plaintiff bank about getting blank documents signed by me, my father and my sister."

Further, none of the other defendants has appeared as witness to even corroborate the vague statement of DlwI or the modified plea of their counsel advanced at the time of hearing of the case. On the other hand, Public Witness 1 has categorically deposed that it is the normal practice of the Bank not to accept any document unless it is filled up and is complete in all respects. In cross-examination he refuted the suggestion that the Bank used to obtain signatures of the parties on blank forms of documents. Not even a single instance was put to

the witness to support the bald suggestion made to him.

(19) In view of these circumstances, it cannot be said that signatures of the defendants were obtained by the Bank on any blank forms or papers. Defendants No. 1 to 4 are bound by the documents signed by them. Issues No. 3, 5 and 6 :

(20) The Bank has claimed payment of a sum of Rs. 15,13,622.34 jointly and/or severally from defendants 1 to 4 and to the extent of Rs. 46,843.90 p. from defendant No. 5 also.

(21) The claim against defendants 1 to 4 is primarily based upon Occ Account No. 1, Occ Account No. 2, Occ Account No. 3, the Be Account and the Lpd Account of the Firm maintained by the Bank, and on various letters and documents admittedly signed and executed by the said defendants during the period from March 1981 till institution of the suit in May 1983.

(22) The said defendants have contested the claim on the pleas that the amounts stated in the accounts are wrong, inflated and excessive, that the Bank has not correctly accounted for various payments made to it; that the Bank did not furnish the statement of dues periodically to them; that they were entitled to concessional rate of interest but the Bank has charged them at an excessive rate; and that they never acknowledged any liability to pay any amount to the Bank.

(23) The nature of dealings between the Bank and defendants 1 to 4, the growing need of the Firm for financial assistance, t

(24) PW1 has stated the background and has explained the facts with reference to various documents. He has also explained the usual practice and procedure followed by the Bank as also the various accounts on which the suit is based. He has stated, that initially a Key shut Cash Credit facility was extended to the Firm, that, later, Open Cash Credit (OCC) facility was sanctioned up to a limit of Rs. 50,000 only which was extended from time to time, that the credit facility granted to the Firm was guaranteed personally by defendant No. 2, his wife Baljeet Kaur, and by defendant No. 3 by an agreement dated 4th July 1979 Exhibit P-8. He has further stated that on the death of Baljeet Kaur in February 1981, defendants No. 2, 3 and 4, confirmed and acknowledged their liability as her heirs by a letter dated 13th March 1981 Exhibit P-3, and also executed an agreement of guarantee and gave it along with a covering letter of the same date, Exhibit P-5 and Exhibit P-4 respectively, and that defendant No. 2 acknowledged liability of the Firm in different accounts as on 22nd April 1981 by a letter of that date. Exhibit P-6. He has explained that the Firm sought enhancement of credit limits, as it reached the extent of liability of approximately Rs. 10,00,000 in April 1981. For that purpose, he has stated that three Occ Accounts were started, Occ Account No. 1 for Rs. 5,00,000 Occ Account No. 2 for Rs. 2,18,500 and Occ Account NO. 3 for Rs. 2,52,256.75. With reference to a series of documents, all dated 7th September 1981, he has explained that those documents were executed on behalf of the Firm to back up each of the said Occ

Accounts. Exhibit P-13 is a request for overdraft facilities up to a limit of Rs. 5,00,000. Exhibit P-16 is a Promissory Note for that sum, and Exhibit P-21 is the agreement for opening cash credit account with a limit of Rs. 5,00,000, which rate to Occ Account No. 1. Likewise, Exhibit P-11 is the request for grant of overdraft facility up to a limit of Rs. 2,18,500 and Exhibit P-12 is the Promissory Note for the same value, relatable to Occ Account No. 2, and Exhibit P-9 and Exhibit P-10, request for overdraft facility and a Promissory Note respectively for Rs. 2,52,256.75, are relatable to Occ Account No. 3. By a letter Exhibit P-15, it was confirmed that the Firm was not enjoying open cash credit facilities elsewhere and undertook not to avail similar facilities in future also except with consent of the Bank in writing. Further, a deed of hypothecation of machinery, accessories and tools Exhibit P-17, with a list of tools, dies, fixtures and implements etc. Exhibit P-18, and a list of machinery Exhibit F-19; another agreement of hypothecation of books debts Exhibit P-20, and a letter Exhibit P-14 assuring the Bank and undertaking that the Firm shall hold itself fully responsible for seeing that the locks and seals on the godowns are kept in tact and always to give free access to authorised officer of the Bank to verify the goods hypothecated. etc. were also executed on behalf of the Firm on 7th September 1981 itself. He has further stated that only Occ Account No. 1 for Rs. 5,00,000 was operatable while the other two Occ Accounts were blocked accounts. In answer to a court question he has explained that the significance of blocked accounts is that withdrawals are not permitted and only outstanding liability can be cleared. In his examination in chief he has further stated that the outstanding amounts in Occ No. 2 and 3 were payable by Installments; that there is no cash credit entry at all in Occ No. 2. that the various credit entries in it were brought forward from other accounts of the Firm on discounted bills of exchange etc. and that in Occ No. 3 the only deposit on 19th February 1982 of Rs. 2,323 is from the proceeds of one of the discounted bills of exchange, and that all repayments arranged for by the Firm are entered in its accounts. With regard to Occ Account No. 1 also, Public Witness 1 has stated that all deposits made on behalf of the Firm were entered and are shown in that account. The Be Account has also been explained by PW-1. He has stated that the Firm got various Hundies discounted through the Bank, that two of the Hundies, for Rs. 15,035 and Rs. 21,000" Exhibit P-23 and Exhibit P-24 respectively were dishonoured, and that the debit balance of Rs. 36,035 in that account is the aggregate value of the said two dishonoured Hundies.

(25) PW-L has further explained that Occ No. 1 (Exhibit Pw 1), Occ No. 2 (Exhibit Public Witness 1/3) and Occ No. 3 (Exhibit PW-?) had a debit balance of Rs. 6,61,935.31. Rs. 2,03,579.07 and Rs. 3,06,122.65 respectively as on 13th January 1983 which were transferred to the Lpd Account Exhibit Pw 1/6, and that the debit balance of Rs. 36,035 as on 24th May 1983 in the Be Account was also transferred to the Lpd Account. He has also explained each of the entries in the Lpd Account Exhibit Public Witness 1/6. He has stated that the first entry of Rs. 11,71,637.03 is the aggregate of the debit balance of Occ Account Nos. 1, 2 and

3 as on 13th January 1983, the next entry of Rs. 4528.77 represents the mandatory premium paid to Deposit Insurance Credit Guarantee Corporation of India (CGC). The third and the fourth entries of Rs. 8,885.55 and Rs. 1640 represent the amount of interest which was short collected. The fifth entry of Rs. 80,087.09 is for interest up to 26th May 1983, the next entry of Rs. 36,035 is the amount of debit balance in the Be Account on 24th May 1983, and the last entry of Rs. 10,808.90 is of interest on the Be Account, thus making an aggregate of Rs. 13,13,622.34 as the balance due from the Firm as on the date of filing of the suit.

(26) In cross-examination on behalf of defendants 1 to 4, Pw 1 has admitted that his entire statement is based upon records of the case. According to him, the three Occ Accounts were opened on the basis of separate letters received from defendant No. 1 in respect of each account. He denied the suggestion that all the three Occ Accounts were operational or that cheques were being issued from each of those accounts. In answer to a specific question, he has stated "Deposit in different accounts were made as per requests of the defendants." He has further stated that the Bank received letters from the defendants instructing it to deposit specified percentage of proceeds realised in its separate accounts. On being cross-examined with regard to proceeds amounting to Rs. 15,035 on discounting one Hundi and proceeds amounting to Rs. 21,000 for discounting another one, he has explained that a sum of Rs. 11,270 has been credited on 1st of December 1981 in Occ Account No. 1, and a sum of Rs. 3,765 has been credited on the same date in Occ Account No. 2, making an aggregate sum of Rs. 15,035 towards proceeds of the first Hundi; and, similarly, he has traced an entry of Rs. 21,000 in Occ Account No. 1 on 18th October 1981 and of Rs. 5,250 in Occ Account No. 2 on the same date to explain the amount of Rs. 15,750 for the second Hundi. Apart from these test questions, Public Witness 1 has not been cross-examined on the aspect of the accounts by defendants 1 to 4. Regarding statement of accounts, he has asserted that they were being regularly sent to the defendants. He has expressed his inability to produce any document to substantiate this but he has explained that operation of these accounts is a continuous process, that statement of accounts are issued from time to time, that no acknowledgement is taken for it, and that the Bank does not charge any party for preparation of these statements. He has denied a suggestion that the plaintiff Bank never sent any statement of accounts to the defendants.

(27) It is pertinent to point out that Public Witness 1 brought into court all the original account books of the Bank but no effort was made on behalf of defendants 1 to 4. to cross-examine him to even suggest that the amounts stated in the accounts are wrong, inflated or excessive, or that the Bank has not correctly accounted for payments, if any, made to it. On the other hand, Public Witness 1 has fully and specifically explained entries made in the accounts with regard to the sale proceeds of two of the Bills of Exchange on which he was cross-examined. He has categorically denied the suggestion that statements of accounts were not furnished to the defendants. The defendants have failed to

shake the position taken by him that statement of accounts are issued by the Bank from time to time and that no acknowledgement in writing is taken for it. That itself is a good reason to explain his inability to produce any document to substantiate the statement made by him in court.

(28) Apart from half-hearted cross-examination of Public Witness 1, defendants 1 to 4 have failed to establish their defense even through Sanjeev Sawhney, defendant No. 3, who was examined as D1W1. He is the constituted attorney of his father who is the sole proprietor of the Firm. He claims to be fully familiar with the dealings of the Firm with the Bank. In his examination-in-chief, he has stated the background, which is to the same effect as that stated by PW1, that initially Key shut Cash Credit facility was extended to the Firm for a specific purpose, that the Bank later extended Open Cash Credit facility to the extent of Rs. 50,000. He has stated, however, that whatever advance was availed of by the Firm was repaid with interest. Thereafter, according to him, the Bank advanced facilities on the basis of Cash Credit which were payable on execution of each contract. He has proceeded further to state that the Bank did not take the Firm's permission for opening different Occ accounts Nos. 1, 2 and 3, and that the Bank opened these accounts on its own and merely informed the Firm about it. It is pertinent to set out his entire statement regarding Occ Accounts No. 1, 2 and 3:

"THE Bank did not take our permission for opening the different OCC. Account No. 1, No. 2 and No. 3. They opened these accounts and informed us about it. Initially, credit facility under the Occ account continued up to an extent of Rs. 4 lakhs. Thereafter, when we wanted extension of the facility for purposes of a particular contract, the bank opened up the Occ Account No. 2, credited that account with the amounts sanctioned to us and issued us the cheque book in respect of Occ Account No. 2. Occ Account No. 3 was opened up by the bank on its own. We were merely informed of opening of this account and were told by the bank that the debit balance in this account constituted the liabilities which were over due towards interest etc. Occ Account No. 1 and Account No. 2 were operational. Occ Account No. 2 was being operated regularly by us. We used to deposit money and draw cheques on that account regularly till about six months before the bank filed the suit in the court. During the "said period of last six months before filing the suit, the bank received only deposits in this account and did not permit us any withdrawal out of it."

His statement is completely belied by the various entries in the Occ Accounts as well as by the various documents which are admittedly signed on behalf of the Firm. Indeed, being conscious of the two contents and the tenor of those documents, particularly the series of documents dated 7th September 1981, a convenient plea was taken that the Bank got signed from the said defendants blank documents at the time when overdraft facilities were sanctioned. This flimsy defense has already been rejected while dealing with issue No. 4 earlier. Apart from this, D1W1 has no Explanation whatsoever to give regarding the entries in the accounts, the correctness thereof or of the documents on records.

In his cross-examination on behalf of defendant No. 5 (for the purposes of the case of defendant No. 5 with regard to the Hundies in dispute) D1W1 has categorically stated "we keep regular accounts" yet, accounts of the Firm were never produced to substantiate the plea that any payments were made by it which were not entered in the accounts of the Bank. In cross-examination on behalf of the Bank, D1W1 has admitted:

"I am unable to comment upon the suggestion that our liability to the bank in 1981 was over about Rs. 10 lakhs."

He has tried to explain his inability for the reason "..... the statement of accounts were never made available to us". Significantly, in answer to a court question he has clearly admitted: "I am unable to say whether there were any payments made by us to the Bank which are not reflected in the accounts produced in court."

(29) On the other hand, the Bank has proved a letter. Exhibit P-3 dated 18th March 1981, by which defendants No. 2,3 and 4 confirmed their liability as heirs of Baljeet Sawhney specifically stating the amounts due with reference to each of the Firm's accounts as on 18th March 1981, and another letter Exhibit P-6, dated 22nd April 1981 signed by defendant No. 2 as sole proprietor of the Firm, acknowledging liability for specific amounts against each of the accounts as on 22nd April 1981, The Bank has also placed on record letters Exhibit P-25, P-26 and P-27 written by defendant No. 3 on behalf of the Firm in April 1982 and March 1983 proposing to clear liability to the Bank in Installments. In none of these letters did the defendants question the correctness of the accounts generally or by specific reference to any of the entries made in them, nor did they even allege that any payments were made, but had not been shown in the accounts.

(30) Plea raised by the defendants No. 1 to 4 that they were not supplied copies of statements of accounts by the Bank has not been substantiated on record. As against the straight forward position of the Bank explained by Public Witness 1, D1W1 Sanjeev Sawhney wants the court to believe that the Bank never supplied statements. of accounts inspire of repeated requests to do so. He has stated, in answer to court questions that the Bank was requested in writing many times to furnish the statements of accounts but he could not produce proof of any of these written requests. If at all the defendants ever made any such written request, they ought to have required the Bank to produce it, or if they had any particulars thereof, they ought to have confronted Public Witness 1 with it, but they have not done so. 31 In these circumstances, the accounts produced by the Bank are found to be correct. The Lpd Account, Exhibit Pw 1/6, reflects the aggregate amount of Rs. 11,71,637.03 due and transferred from the three Occ Accounts on 13th January 1983, and, it brings forward a sum of Rs. 36,035 as the balance due on 24th April 1983 in the Be Account. Defendants No. 1 to 4 have not even disputed their liability to pay Rs. 4,528.73 Charged as Cgc premium in the Lpd Account, or the correctness of any of the other amounts

stated in the Occ Accounts, the Be Account, or in the Lpd Account. Thus, on the basis of the accounts, Exhibit Public Witness ", Exhibit Public Witness 1/3, Exhibit Public Witness ?, Exhibit Public Witness 1/5 and Exhibit Public Witness 1/6, it is found that on the date of the suit, an amount of Rs. 13,13,622,34 was due to the Bank from the Firm. Defendant No. 2 is the sole proprietor of the Firm. In that capacity he is personally liable to pay the said amount to the Bank. Further, each of the defendant Nos. 2, 3 and 4 is also personally liable to pay the said amount to the Bank by virtue of the Agreement dated 18th March 1981 Exhibit P-5, by which each of them guaranteed payment of the general balance due from the Firm to the extent of Rs. 15 lakhs.

(32) Joint and several liability of defendant No. 5 has been claimed up to the extent of Rs. 46,843.90 being the value of two dishonoured Hundies, one for Rs. 21,000 and the other for Rs. 15,035, which were drawn on and accepted by it, and for interest thereon at the rate of 21.5 per cent per annum up to the date of the suit.

(33) Despite defendant No. 5 pleading in its written statement that no goods were purchased from the Firm, that the Hundies were without consideration, that it accepted them merely by way of financial help to the Firm, and that Defendants 1, 2 and 3 had represented to it that neither they nor the Bank shall approach it for payment on the basis of the said Hundies; and despite its denial that the Hundies were presented to it for payment, or that they were protested, or, that the protest was noted; no issue was claimed for trial on any of these matters except issue No. 6 on the limited question whether the Hundies are without consideration. At the trial, however, this Defendant has tried to make out a case that the goods supplied by the Firm were returned to it.

(34) Pw 1, who has deposed generally about the case of the Bank, has stated in his examination-in-chief that the two Hundies were presented to defendant No. 5 through Bank and thereafter through Notary Public in April 1982 and that Om Prakash Jain, Notary Public, submitted his reports dated 14th April 1982, which have been marked for purposes of identification as "X" and "Y" on the record. On cross-examination on behalf of defendant No. 5, he has explained that the Bank did not consult defendant No. 5 before discounting the Hundies, that the Bank did not ascertain from defendant No. 5, at the time of discounting the Hundies, whether it had received the goods covered by the Hundies or not. Learned counsel for defendant No. 5 has put to the witness specific portions of two letters, Exhibit P22 dated 4th April 1982 and Exhibit P25 dated 16th April 1982, sent by the Firm to the Bank indicating, inter alia, that defendant No. 5 was not satisfied with the goods related to the dishonoured Hundies, that the said defendant had returned those goods and it did not owe to the Firm any permit as of the date of Exhibit P25, that the amount drawn by the Firm against the discounted bills would be paid back by it. and that the Firm had requested the Bank to return those bills to defendant No. 5 through the Firm. With reference to the said specific portions of the two letters, the witness has been asked a

question if records of the Bank show any action taken on the basis of those letters. He has answered that the records do not show any action on them. He has further explained that the Hundies were not returned to the Firm as was requested by it, and that, as a practice, the Bank returns only those Hundies of which liability is cleared. Another letter Exhibit P-26 dated 21st April 1982, from the Firm to the Bank, was shown to Public Witness 1. The relevant portion of para 3 of that letter reads as follows :- "Further we have your assurance that no legal action shall be taken against M/s. Le Mount Garments Pvt. Ltd.. with regard to their two overdue hundies o" Rs. 21,000 and Rs. 15,035 respectively, and neither will be the branch be harassing the party for the payment of these bills, until and unless we are informed about the same well in advance. We in the meanwhile will try and persuade the party into taking delivery of the material against which the hundies had been drawn, this material now being in our custody as material rejected by the party." After reading it, the witness lies maintained the position that no assurance was given to defendants No. 1 to 4 on the basis of their request, and that the matter was not followed up with defendant No. 5 after the Bank received the letters Exhibit P-22, P25 and P26 from the Firm. He has rejected the suggestions that the goods in respect of which the Hundies were drawn were never sold by the Firm to defendant No. 5 or that the two Hundies were drawn on defendant No. 5 only as a friendly gesture to help the Firm or that there were in fact no commercial transactions in respect of the Hundies. He was also cross-examined regarding presentment of the Hundies. He admitted that his statement that the Hundies were dishonoured is based on the Bank's record and that he did not go himself to present those Hundies.

(35) D1W1 has said nothing in his examination-in-chief on issue No. 6. In b-is cross-examination on behalf of defendant No. 5, however, he has refuted the suggestion that he represented to Anil Sabharwal that he or the Firm were in difficulty and needed financial assistance, or that the Firm did not sell any goods to defendant No. 5. He has asserted that goods were, in fact, sold to defendant No. 5. He has admitted, however, that the goods were rejected by defendant No. 5 and were returned to the Firm. In cross-examination of this witness, defendant No. 5 has also brought on record a letter from the Firm Exhibit Dw 1/1-B dated 27th March 1982 and an undated Note written in hand Exhibit Dw 1/1-A, both addressed to defendant No. 5. By the letter, it was confirmed that the material described in it was received back by the Firm, that the Hundies were due back and would be returned to defendant No. 5, and that, in the meanwhile, the Firm did not have any claim on defendant No. 5 on account of the returned material. Further, defendant No. 5 was assured that neither the Firm nor the Bank shall bs approaching it for payment on the basis of the Hundies. The undated Note Exhibit Dw 1/1-A is addressed to Anil Sabharwal, Managing Director of defendant No. 5 and is signed by "Pixie", pet name of Sanjeev Sawhney. By this Note, it was represented that one Hundi was left. behind and that two other Hundies (which are subject matter of the suit) had also been discharged but were lying

with Prabhu of the Bank who was out of station and that they will be returned when he came back. At the end, the Note stated : "Thanks a lot for everything and sorry once again".

(36) D5W1 Sudhir Chopra is one of the Directors of defendant No. 5. He has stated that defendant No. 5 never purchased any goods from the Firm, that the Hundies were drawn on and accepted by it to provide financial assistance to D1 W1 v Sawhney (defendant No. 3), who was a personal friend of his and of Anil Sabharwal, the Managing Director of the company, that the story suggesting purchase of goods was made up to enable defendant No. 3 to get financial assistance from the Bank, that no money was payable to the Firm, and that there was no consideration for the two Hundies. Regarding presentment and dishonour of the Hundies, he has said nothing in the examination-in-chief. On cross-examination on behalf of the Bank, he has stated that he did not remember if Om Prakash, Public Notary, visited the office of defendant No. 5 and presented the two Hundies on 14th April 1982.

(37) At the time of hearing, learned counsel for defendant No. 5 has raised the plea of failure of consideration. He has also contended that the Bank is not entitled to claim any payment from defendant No. 5 as it has failed to prove presentment of the Hundies, that defendant No. 5 is not liable to pay any amount at all as interest, or, in the alternative, to pay interest calculated at a rate more than six per; cent per annum, on the basis of the two Hundies. Against this, learned counsel for the Bank has contended that it cannot be said that either of the Hundies was drawn without consideration as each of them expressly recites the consideration, that the question of consideration is irrelevant and it cannot be raised by defendant No. 5 as each of the Hundies bears endorsement of unqualified acceptance by it; that each Hundi is enforceable according to its apparent tenor against defendant No. 5 in absolute terms, notwithstanding failure of consideration, even if it be assumed to be so, and without proof of noting or protest on dishonour, even if defendant No. 5 be allowed to urge all these aspects, which is, of course, contested for want of any issue or proper opportunity to the Bank to meet these aspects; and that interest calculated at the rate of atleast six per cent per annum is payable on the principal sum from the due date on the basis of the Hundies.

(38) Issue No. 6 is restricted to the question whether the Hundies are without consideration, and, if so, to what effect. To consider this issue, as also the rival contentions of the parties, it is necessary to appreciate tenor of the instruments in question. The Hundies Exhibit P24 and Exhibit P23 are dated 15th October 1981 and 28th January 1982 for a sum of Rs. 21,000 and Rs. 15,035 respectively. Each of them was admittedly drawn by the Firm on Defendant No. 5 who accepted the first one (Exhibit P24) on the date of the instrument itself while the second one (Exhibit P-32) was accepted on 30th November 1981. Each of them bears an endorsement "accepted" without any qualification. The Hundies expressly recite consideration and also stipulate the value thereof "inclusive of

interest at nil".

(39) The text of each of the Hundies is reproduced below : Exhibit P24 Rs. 21,000 Hundi No. SE/P4/81 Date. 15th October '81 Place; Faridabad. "Sixty (60) days after date (inclusive of days of grace) pay to Canara Bank or order at their R. K.. Puram Branch, New Delhi, the sum of Rs. 21,000 (Rupees twenty one thousand only) inclusive of interest at nil. This Bill represents sale of goods as per our Invoice No. SEB/35/81-82 dated 15th October '81 for Rs. 21,000. This Bill form a part of our Bill No. SE/ /81-82 dated, 15th October 1981 for Rs. 21,000 (Rupees twenty one thousand only) and due on 15th December 1981. To M/s. Lemount Garments Pvt. Ltd. Gurukul Estate, P.O. Amar Nagar, 12/6, Mathura Road, Faridabad. Exhibit P-23 Rs. 15,035 Hundi No. SE/17/81-82 Date. 28th Nov. '81 Due date. 28-1-82 Place : Faridabad. 60 (Sixty) days after date inclusive of days of grace, pay to Canara Bank or order at their R. K. Puram Branch, New Delhi the sum of Rs. 15,035 (Rupees fifteen thousand and thirty five only) inclusive of interest at nil. This Bill forms part of our Hundi No. SE/17/81-82 dated 28th November 1981 for Rs. 15,035 drawn on M/s. Le Mount Garments (Private) Limited, Faridabad and due on 28th January 1982. To M/s. Le Mount Garments (P) Ltd. Gurukul Estate, P.O. Amar Nagar, 12/6, Mathura Road, Faridabad."

(40) On the pleadings of defendant No. 5 and in view of the documents produced by the parties, issue No. 6 was restricted to the question whether Hundies Exhibit P 24 and P 23 are without consideration, and if so, to what effect. At the trial, however, defendant No. 5 tried to shift its defense on the ground of failure of consideration on the plea that goods supplied by the Firm rejected and returned to it. On this ground, learned counsel for defendant No. 5 has contended that his client was under no obligation to pay to the Bank any amount claimed on the basis of the two Hundies. He has relied upon section 43 of the Negotiable Instruments Act, 1881, hereinafter referred to as the Act. and on Hari Charan Banerjee and Another Vs. Emperor, and K.K. Koran Vs. T. Tara Bai, (3). It is pertinent to note that the case pleaded by defendant No. 5 in its written statement is that no goods were purchased by it from the Firm, that the Hundies were drawn on and accepted by it altogether without consideration and merely to provide financial assistance to the Firm. In other words, defendant No. 5 has denied the initial conclusion, and even the ab initio existence, of any contract with the Firm. Indeed, it has been pleaded in clear terms that there was no commercial transaction between the parties. This plea is obviously false. The plea of failure of consideration, which has been raised at the hearing, presupposes the existence of a duly concluded contract with consideration, and subsequent failure of consideration vitiating the contract. Although, section 43 of the Act provides for a common consequence of a negotiable instrument made, drawn and accepted etc. if it is without consideration, or for a consideration which fails, yet the two causes envisaged therein are different, each arises in different circumstances, and really contradicts the other. It cannot be said in respect of any transaction for a consideration, which fails later, that it was without

consideration. Likewise, in a transaction without consideration, there can never be failure of consideration. Therefore, the plea of failure of consideration contradicts the defense pleaded by defendant No. 5 that the transaction was without consideration. Such a contradictory plea cannot be raised. It has to be rejected.

(41) Even otherwise, Exhibit Dw 1/1-B, letters Exhibit P-22, P-25 and P-26 and the trend of cross-examination on behalf of defendant No. 5 of Public Witness 1 and D1W1, particularly suggestions made to them in their cross-examination, establish beyond doubt that goods were, in fact, supplied by the Firm to defendant No. 5. This was the consideration for the Firm to draw the two Hundies on defendant No. 5, and, before maturity, each of them was unconditionally "accepted" by defendant No. 5. Defendant No. 5 has failed to rebut the presumption of consideration under clause (e.) of section 118 of the Act. Indeed, particulars of the invoice under which the goods were supplied are expressly stated in each of the Hundies. The first part of issue No. 6, Therefore, stands disproved and it is found that there v/as lawful consideration for the two Hundies.

(42) Even if defendant No. 5 be allowed to raise the plea of failure of consideration, and it be assumed to have been established, yet, it will not free defendant No. 5 from the obligation to pay to the Bank money due on the two Hundies as each of them was "accepted" by it without any qualification. The Bank is not concerned with the ultimate facts of the transaction between the Firm and defendant No. 5. As between the Bank and defendant No. 5, the only contracts expressed are the bills of exchange, Exhibit P-23 and P-24, and these bills do not, on the face of them, show that payment was to be made on the goods being accepted by defendant No. 5. In taking this view. I am supported by Jacob v. Sohan Lal. (1933) 34 Plr 645 . The immediate parties to the transaction, on the Hundies in question, are (1) the Firm being the Drawer and defendant No. 5, the acceptor, and, (2) the Firm as the Drawer and the Bank as the payee. The Bank and defendant No. 5 are not the immediate parties to the transaction. If at all there was failure of consideration on the transaction between the Firm and defendant No. 5, this plea cannot be set up by defendant No. 5 against the Bank. The Bank is not concerned with failure of consideration, if any, on the transaction between the Firm and defendant No. 5. and its right to recover money due on the Hundies cannot be affected by any assurance, Exhibit P-26, D1W1/1-A or D1W1/1-B. by one to the other, or by understanding between them. So far as the Bank is concerned, consideration for the Hundies is expressly stated therein. Defendant No. 5 accepted them without any qualification before maturity of each of the Hundies. Defendant No. 5 is bound to pay the amount to the Bank: according to the apparent tenor of the Hundies by virtue of section 32 of the Act. It cannot escape liability to pay the amount claimed by the Bank on the basis of the two Hundies, Exhibit P-23 and P-24.

(43) To avoid liability, learned counsel for defendant No. 5 has contended that presentment of Hundies has not been proved on record.

(44) The Bank has specifically pleaded in para 18 of the plaint : "Cause of action against Defendant No. 5 arose on the two Hundies which were dishonoured on presentation." In its written statement, defendant No. 5 merely pleaded that there was no cause of action against it. On such a vague denial, no specific issue was framed for trial on this question. It appears from the record that the Bank had produced original report dated 14th April 1982 of a Notary Public in respect of each of the two Hundies. In the absence of any issue, the Bank did not summon the Notary Public and took no other steps also to formally prove presentment of the Hundies for payment. D5W1, the only witness examined on behalf of defendant No. 5, did not even dispute the due presentment and noting of protest in respect of the two Hundies. In cross-examination on behalf of the Bank, he remained evasive on this question. He has merely stated that he did not remember if Om Prakash .Tain, Notary Public, visited the office of defendant No. 5 on 14th April 1982, and, presented the two Hundies for payment. In these circumstances, I am not inclined to allow defendant No. 5 to raise this plea at the final stage of the case. The Bank cannot be harmed for failure of defendant No. 5 to claim and properly raise this issue for trial if it was really serious about it.

(45) However, since learned counsel for defendant No. 3 has argued the point, I will now proceed to deal with it. To show that even an acceptor of a Hundi will be freed from liability if due presentment of a Hundi is not proved, he has relied upon Nanhey Mal Vs. Chait Ram and Another, , Oudh Commercial Bank v. Gur Din, Air 1920 Oudh 191 , and Sher Mohd. Khan v. Haji Ahmad, Air 1935 Pesh 132. The first two cases are on a promissory note. on which liability to pay arises on demand and is governed by principles different from those applicable to an "acceptor" of a Bill of Exchange. The third case of Oudh Commercial Bank v. Gur Din, no doubt, supports him. In that case, the learned Judicial Commissioner held that in view of exception to section 64 of the Act, every party to the instrument was discharged except the holder himself. A question of non-presentment of Hundies for payment to the acceptor came up for consideration before the Allahabad High Court in the case of Benares Bank Limited Vs. Hormusji Pestonji and Others . After review of various cases on this question, on the interpretation of section 64, the Allahabad High Court held that the word "other" has been used to show that there is a difference between section 64 and sections 61 and 62, where the words used are "no party" and came to a conclusion that u/s 64 the result of non-presentment of Hundies for payment is not exemption of the acceptor of the liability but exemption of other parties to Hundies only. The Allahabad High Court then proceeded to notice the view of the Judicial Commissioner and observed as under :- "In this case the learned Judicial Commissioner sitting singly held that in view of the exception to S. 64 the meaning of that section was that every party to the instrument was discharged except the holder himself. This reading of S. 64 reduces it to an absurdity. I fail to see how a holder can be liable to himself. The holder cannot sue himself for the amount of the negotiable instrument. For this reason and for the reasons given above, I find myself entire disagreement with this case." The Calcutta High

Court also considered this question in the case of Manik Ratan Guin and Another Vs. Prakash Chandra and Others, (9). The Calcutta High Court also dissented from the view of the Judicial Commissioner of Oudh and accepted the Allahabad view. For the reasons stated in the Allahabad and the Calcutta judgments. I also disagree with the Oudh view. Even if defendant No. 5 be allowed to raise the plea regarding presentment of the Hundies. want of proof of presentment cannot exempt the acceptor from liability on the Hundi.

(46) It is found, for the aforesaid reasons, that the principal sum of Rs. 36.035 is due to the Bank from defendant No. 5 on the basis of the two Hundies Exhibit P24 and P23 for Rs. 21,000 and Rs. 15,035 respectively.

(47) Interest has been charged from the Firm in the Occ Accounts at the rate of 18.5 per cent per annum and at the rate of 21.5 per cent on the balance of the Be Account transferred to the Lpd Account. Interest at the rate of 21.5 per cent has also been claimed from defendant No. 5 on the two Hundies in question. Pendente lite and future interest is claimed from all the defendants at the rate of 21.5 per cent per annum.

(48) The question of liability of defendants No. 1 to 4 to pay interest to the Bank and that of defendant No. 5 has to be dealt with separately as the case against defendants 1 to 4 arises out of transactions between the Bank and the Firm, while the claim against defendant No. 5 is based only on the two Hundies Exhibit P23 and P24.

(49) With regard to defendants 1 to 4. it has been pleaded by the Bank that on the dealings between the parties since 1976, when current account was opened in the name of the Firm, the rate of 16" per cent per annum plus 2 per cent per annum penal interest was payable by them; that interest on the total liability in the three Occ account has been charged at the rate of 18.5 per cent after various documents were executed on 7th September, 1981; that the facility for discounting Bills of Exchange under a separate Be Account was a clean advance and was subject to payment of interest calculated at the rate of 19.5 per cent per annum plus 2 per cent per annum penal rate; and, that interest on the balance of the Be account shown in the Lpd account has been calculated at the rate of 21.5 per cent per annum from the due date till the date of the suit. The said defendants have not specifically denied averments in the plaint regarding the rate of interest. They have denied, however, that the Bank is entitled to charge interest at the rates mentioned by it. and have pleaded that the rate of interest charged by the Bank is excessive, that it is against the terms of agreement between the parties, and that the Firm. being a sick unit, is liable to pay interest, if any, only at a concessional rate as per the rules and instructions of the Reserve Bank of India.

(50) Pw 1 has stated in his examination-in-chief that the statement of accounts Exhibit Public Witness ", Public Witness 1/3. Public Witness ?, Public Witness 1/5 and Public Witness 1/6, annexed to the plaint, reflect interest in the Occ account

calculated at the rate of 16.5 per cent per annum plus 2 per cent penal interest, which is the rate of interest stipulated in the Promissory Notes, Exhibits P-16, P-12 and P-10, letters of requests for overdraft facilities, in the Deeds of Hypothecation of machinery etc., Exhibits P-17, P-18, P-19 and P-20, as also in the original agreement for opening cash credit accounts facility Exhibit P-21, which were signed on behalf of the Firm on 7th September 1981. He has further stated that the rate of 19.5 per cent per annum, which is the commercial rate, plus two per cent per annum penal interest, is reflected in the Lpd account Exhibit Public Witness 1/6 on the balance due and transferred to that account from the Be account. Exhibit Public Witness 1/5. In his cross-examination on behalf of defendants No. 1 to 4, he has stated specifically that the Bank "has not received any instructions from Reserve Bank of India to give concessional rate of interest to sick units in general." Further, in the course of his cross-examination, he has produced a letter dated 14th of November, 1979 Exhibit Public Witness 1/7 received by the concerned branch from the head office of the Bank directing interest to be charged from the Firm at a revised rate, on the basis of which, he has stated that a letter dated 27th of November 1979 Exhibit Pw 1/8 was sent to the Firm. Apart from the said questions, Pw 1 has not been cross-examined on behalf of defendants 1 to 4 regarding the admissible rate of interest. On this aspect, the entire statement made by D1W1 in his examination-in-chief reads as follows :-

"WE had an agreement with the bank to charge interest @ 12" % for the overdraft facility as well as for discounting bills of exchange."

In his cross-examination on behalf of the plaintiff, he has clarified that his statement "is evidenced by letter dated 3-7-79 written to us by the bank". That letter is Exhibit D1W1/D. He has further stated that the Firm did not receive any intimation regarding the change in the rate of interest by Exhibit Public Witness 1/8 dated 27th November, 1979. On being confronted with the various documents Exhibit P-9 to P-21, all dated 7th September, 1981, he has admitted that they are signed by his father but he has qualified it by saying "they were signed by him when the documents were blank." (The allegation that the Bank obtained signatures on blank forms has already been considered and rejected for the reasons stated earlier while dealing with issue No. 2).

(51) The Bank's case has been proved by various documents executed on 7th September, 1981. Three separate requests Exhibits P-13, P11 and P9, were made by the Firm for overdraft facilities in respect of Occ accounts 1, 2 and 3 respectively. Express provision is made for payment of interest "at 2% over the agreed rate for the advance with a minimum of 18.50% from the date of such default" in Exhibit P-13, identical words are used in Exhibit P-11 and Exhibit P-9, but 19.50 per cent is the minimum rate stipulated therein. The agreement regarding opening of cash credit (open loan) Exhibit P-21, envisages interest at 6 per cent per annum above the Reserve Bank of India rate with a minimum of 16.5 per cent per annum in clause 3 while clause 5 recites that the Firm agreed

to "hypothecate/agree to hypothecate and charges to the Bank all the goods and commodities" and clause 13 authorises the Bank to "dispose of the goods hypothecated and charged and to apply the net proceeds at such sale towards the liquidation of the principal and interest moneys due to the Bank on the said cash credit account with further interest thereon at 18.50 per cent per annum." Further, three promissory notes, Exhibits P-16, P-12 and P-10 executed as security in respect of Occ account Nos. 1, 2 and 3 respectively, expressly stipulate payment of interest. While Exhibit P-16 provides for "interest at 6.50 per cent per annum above the Reserve Bank of India rate with a minimum of 16.5 per cent per annum compounded quarterly. Exhibits P12 and P10 provide for a minimum of 16.5 per cent per annum also compounded quarterly. Public Witness 1 has categorically stated in his cross-examination that 21.5 per cent per annum is the commercial rate prescribed by the Reserve Bank of India. Apart from the inference drawn from the stipulation of the rate of interest in the Promissory Notes Exhibits P-16, P-12 and P-10, it is pertinent to point out that Exhibit P-21, the agreement regarding opening cash credit (open loan), specifies in clause 3 the agreed rate at 6.5 per cent per annum above the Reserve Bank of India rate with a minimum of 16.5 per cent per annum, and clause 13 authorises the Bank to charge 18.5 per cent per annum towards the liquidation of principal and interest moneys due on cash credit accounts. Exhibit P-13, the request of the Firm for overdraft facilities, envisages interest at 2 per cent over the agreed rate for the advance (which makes it 18.50 per cent when read with a minimum rate of 16.50 per cent stipulated in clause 3 of the agreement, Exhibit P-21), and, the other two requests. Exhibits P-11 and P-9, specify even a higher rate with a minimum of 19.50 per cent per annum. Thus, the Bank has justified the amount of interest charged by it at the rate of 18.50 per cent per annum in the Occ accounts and at the rate of 21.50 per cent per annum on the balance of the Be account.

(52) On the other hand, defendants 1 to 4 have failed to demolish the case made out by the Bank on the basis of documentary evidence on record. In their written statement, they have raised a vague plea to question entitlement of the Bank to charge interest mentioned in the plaint. The allegation that the rate of interest charged by the Bank is excessive, without themselves specifying the rate of interest in the written statement, cannot be entertained. Further, they have claimed that being a sick unit they are liable to pay interest at a concessional rate as per the rules and instructions of the Reserve Bank of India. The so called concessional rate has not been specified by them. No rules or instructions of the Reserve Bank of India have been filed or proved on record. In cross-examination on behalf of these defendants, Public Witness 1 has stated that the Bank has not received any instructions from the Reserve Bank of India to give concessional rate of interest to sick units in general. No further questions were put to him in this behalf. D1W1 Sanjeev Sawhney mentioned the rate of twelve and a half per cent for the first time in his examination-in-chief on the basis of the letter Exhibit D1W1/D dated/3rd July 1979. The relevant portion of that letter is reproduced

below : "Sub : Renewal of limits : tenable till 22-6-80 : sick unit. We wish to inform you that our Special Review Section, Delhi Circle Office has renewed the following limits "tenable till 2-6-80 with following terms and Conditions. Occ : 5.00 lacs : Margin 20% @ 12"% p.a. against raw material such as steel. Stock statement to be submitted once in a month. Sub limit for goods in process and finished goods Rs. 3.00 lakhs. Be : (NEMS-DA Basis) Rs. 3.00 lakhs @ 12"% issuance not to exceed 90 days Bills drawn on reputed parties only." At the top. the letter prominently states the subject to be "tenable till 22-6-80", The defendants have not explained the events after 22nd June 1980. The position taken up by D1W1 breaks down the subsequent events on which the suit is really based. By the letter Exhibit Public Witness 1/7 dated 14th November 1979 the head office of the Bank informed the concerned branch of the decision to revise the rate of interest on Occ accounts to 14 per cent and on Be account to 14" per cent per annum with effect from 1st October 1979. Public Witness 1 has stated that the Firm was informed about it by a letter dated 27th November 1979 a copy of which is Exhibit Public Witness 1/8. When Exhibit Public Witness 1/8 was put D1W1 in his cross-examination, he found it convenient to say : "We did not receive any intimation regarding the change in the rate of interest by Exh. Public Witness 1/8. In any event, this controversy is immaterial as all earlier communications between the parties stand superceded by a series of documents executed on behalf of the firm on 7th September, 1981, on which the suit is really based.

(53) At the time of hearing, defendants 1 to 4 invoked discretion of the court under order Xx rule Ii CPC ., by an application registered as I.A. 4139 of 86, to waive the interest payable by them, apart from allowing them to deposit the amount of decree, if passed, in Installments. This application is based on the statement made in para 2 which reads a, follows :- "2. That as stated in the written statement, the repayment of loan to the plaintiff could not be effected by the applicant/defendants on account of prolonged power cut, labour trouble and also on account of the fact that the plaintiff did not advance further amounts to the Defendants, inspire of various promises and assurances made by the plaintiff to the defendants to this effect. Thus the defendants could not complete and execute various orders received by them from such reputed companies like M/s. Escorts Ltd., K. G. Khosla & Co. Ltd., Delhi Transport Corporation etc. In that process the defendant lost good money unvested by them for The purchase of raw material and for the unfinished goods etc"

(54) The defendants waited for three years after the institution of the suit to make this application after full trial of the case. There is nothing on the record to substantiate the reasons stated in para 2 of the application. On the other hand, the documents proved on record show that the defendants promised several times to liquidate their liability be installments but they did nothing about it. In these circumstances, I find that the application is far from bona fide. The defendants are not entitled to the exercise of direction of direction in their favor Order Xx rule 11 CPC. On the contrary, I am satisfied that this application is an

abuse of the process of the Court. It is, Therefore, rejected.

(55) Consequently, it is found that the Bank is entitled to interest at the rate of 18.50 per cent per annum on account of the cash credit facilities extended to the Firm, and at the rate of 21.50 per cent per annum on the Be account as brought forward and finally reflected in the Lpd account, Exhibit Pw 1/6. Interest on these accounts, up to the date of the suit, has already been debited to the account of defendants No. 1 to 4, and the Bank has established its right to do so.

(56) From defendant No. 5 the Bank has claimed payment of an amount of Rs. 10,808.90 p. as interest at the rate of 21.5 per cent per annum on the principal sum of Rs. 36,035 due on the two Hundies from the due date till the date of the suit. Defendant No. 5 has denied its liability to pay any interest calculated at the rate of 21.05 per cent per annum or at any other rate. Learned counsel for defendant No. 5 has contended : (1) that the claim of the Bank is based only on the two Hundies and not on any commercial transaction; (2) that there was no agreement between the parties relating to interest; (3) that no interest at all is payable on the two Hundies, in view of section 79 of the Act, as "interest at nil rate" is expressly specified in each of the instruments; and, in the alternative, (4) that interest can be claimed, if at all, only at the rate of 6 per cent per annum. On behalf of the Bank, it has been contended that the words "inclusive of interest at nil" used in the Instruments do not exclude admissibility of interest altogether, but merely clarify that the value stated in the instrument is not inclusive of any interest; and, that the Bank is, in any event, entitled to payment of interest at the rate of 6 per cent per annum by virtue of section 80 of the Act.

(57) The first proposition advanced by the learned counsel for defendant No. 5 is correct and it needs no discussion. The second proposition has been urged in view of the statement made by Public Witness 1 in his cross-examination that there was no specific agreement between the Bank and defendant No. 5 regarding payment of interest on dishonoured Hundies. This statement of the witness and the proposition advanced on the basis of that statement, are of no use as the obligation to pay interest on a Hundi depends on the terms expressly made in it notwithstanding any agreement relating to interest between the parties. The other two proposition, and the rival contentions have to be decided on the apparent tenor of the instrument and of the acceptance thereof, in view of sections 5, 32, 79 and 80 of the Act. Text of each of the Hundies has been set out earlier. The said statutory provisions "are reproduced below :- "5. A "bill of exchange" is an instrument in writing. containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. A promise or order to pay is not "conditional", within the meaning of this section and section 4, by reason of the time for payment of the amount or any Installment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be

uncertain. The sum payable may be "certain", within the meaning of this section and section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an Installment, the balance unpaid shall become due. The person to whom it is clear that the direction is given or that payment is to be made may be a "certain person", within the meaning of this section and section 4. although he is misnamed or designated by description only." "32. In the absence of a contract to the contrary, the maker of a promissory note and "the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respective, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand. In default of such payment as aforesaid, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default." "79. When interest at a specified rate is expressly made payable on a promissory note or bill of exchange, interest shall be calculated at the rate specified, on the amount of the principal money due thereon, from the date of the instrument, until tender or realisation of such amount, or until such date after the institution of a suit to recover such amount as the Court directs." "80. When no rate of interest is specified in the instrument, interest on the amount due thereon shall, notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of six per cent per annum, from the date at which the same ought to have been paid by the party charged, until tender or realisation of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs." Explanation.-When the party charged is the endorser of an instrument dishonoured by non-payment, he is liable to pay interest only from the time that he receives notice of the dishonor."

(58) The apparent tenor of each of the Hundies directs defendant No. 5 to pay a specified sum of money to the Bank. The pertinent words following the specified amount are "inclusive of interest at nil". The word "inclusive" is an adjective. It has been used to limit and restrict the specified amount payable on the instrument. "Nil" is, obviously, the "rate" of interest. These words indicate expressly that the specified amount "includes future interest", and, that the specified amount, (which is thus ascertained) is the "certain sum of money" which "only" is payable on the instrument, as postulated by section 5 of the Act. Since defendant No. 5 "accepted" each of the Hundies before maturity, section 32 binds him to pay the amount thereof according to the apparent tenor of the acceptance. By the unqualified acceptance, defendant No. 5 is bound to pay the specified amount "only", which is a certain sum and it "includes future interest" as envisaged by section 5. The obligation of defendant No. 5 to pay on the instrument cannot be extended any further.

(59) Section 79 directs that interest on the amount due shall be calculated at the specified rate. when interest at a specified rate is expressly made payable; while

section 80 provides for it to be calculated at the rate of six per cent per annum, when no rate is specified in the instrument. As already found, on apparent tenor or each of the Hundies and the acceptance thereof, the words "inclusive of interest at nil" following the amount specified in each of the instruments restricts the amount payable thereon and it includes future interest. This is, no doubt, a peculiar stipulation to exclude liability to pay future interest, which could also be done by use of the words "without interest", but that makes no difference at all. Value of or liability on an instrument consists of two parts. First, the principal sum due, and, second, the interest thereon. The aggregate thereof constitutes the value of or the liability on it. Section 79 and section 80 regulates calculation of interest when it is payable the former at the specified rate, and the latter at six per cent when the rate is not specified. Neither section 79 nor section 80 of the Act can be invoked when no interest is payable on the specified amount or when the specified amount includes future interest, as in the present case. In such a case as this, the specified sum of money only is payable on the instrument.

(60) It is, Therefore, found: (1) that the amount specified in each of the Hundies includes future interest; (2) that the amount specified in each of them is the only amount payable on them; (3) that interest at the rate of 21 per cent per annum or at any other rate is not payable on the specified amount from the due date to the date of the suit; and (5) that claim of the Bank against defendant No. 5 for payment of the amount of Rs. 10,808.90 p. as interest is not justified. However, since defendant No. 5 failed to pay the amount due on the Hundies, it is liable to pay interest thereon from the date of the suit and future interest at the rate of six per cent per annum u/s 34 of the Cods of Civil Procedure.

(61) Finally, in view of the foregoing discussion on issues No. 3, 5 and 7. it is found that the aggregate amount of Rs. 13,13,622.34 p. (which consists of Rs. 11,77,885.80 as the principal sum due on account of cash credit facilities, the principal sum of Rs. 36,035 due on the Be account carried forward in the Lpd, and the interest charged, thereon unto the date of the suit) is due to the Bank jointly and severally from defendants No. 1 to 4, that defendant No. 5 has failed to prove that the Hundies Exhibit P23 and Exhibit P24 are without consideration, and that the said defendant is liable to pay the aggregate sum of Rs. 36.035 only to the Bank on the basis of those Hundies; and that the Bank is entitled to claim interest from the Firm on the Occ accounts at the rate of 18.50 per cent per annum and on the Be account at the rate of 21.50 per cent per annum (already charged by it up to the date of the suit), while it is not entitled to claim payment of the amount of Rs. 10,808.90 p. as interest from defendant No. 5.

(62) Since the defendants have failed to pay the amounts due from them, defendants 1 to 4 are liable to pay interest at the rate of 18.50 per cent, which is the contractual rate for payment of interest on the cash credit facilities, and is considered to be reasonable to be paid on the principal sums adjudged, from the date of the suit to the date of payment, while defendant No. 5 will pay interest at

the rate of 6 per cent per annum on the sum of Rs. 36,035 from the date of the suit till the date of payment.

(63) Therefore, a decree is hereby passed in favor of the plaintiff Bank and against defendants No. 1 to 4 jointly and severally for a sum of Rs. 13,13,622.34 p., with interest at the rate of 18.5 per cent per annum on the amount of Rs. 12.13.840.80 p. being the aggregate of the principal sum due on the cash credit and the Be accounts, from the date of the suit to the date of payment, and jointly and severally against defendant No. 5 to the extent of Rs. 36,035 only with interest at the rate of six per cent per annum on that amount from the date of the suit to the date of payment; and with costs.