

(1981) 01 KL CK 0016
In the High Court Of Kerala
Case No : A.S. No's. 179 and 187 of 1975

K.A. Lona etc.

APPELLANT

Vs

Dada Haji Ibrahim Hilari and Co. and Others

RESPONDENT

Date of Decision : 20-01-1981

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 13, 13(1), 26, 27, 4
Partnership Act, 1932 — Section 18, 19, 22
Stamp Act, 1899 — Section 12(3)

Citation : AIR 1981 Ker 86 : (1982) 1 ILR (Ker) 749

Hon'ble Judges : U.L. Bhat, J;G. Viswanatha Iyer, J

Bench : Division Bench

Advocate : V.S. Moothathu, N.R.K. Nair, K.J. Joseph, T.K.M. Unnithan, S. Narayanan Potti, S. Sankara Subban and George Mathew, for the Appellant; P.V. Aiyappan, Mathews Mathew, S.A. Nagendran, N.N. Divakaran Pillai, N.K. Sreedharan, N.P. Samuel, M.A.T. Pai, T.K. Chinnan, S.A. Nagendran and K.K. Subhagamani, for the Respondent

Final Decision : Allowed

Judgement

Bhat, J.—These two appeals have been filed by the plaintiffs in O. S. No. 252/72 and O. S. No. 159/71 respectively on the file of the Sub Court, Trichur.

2. A. S. No. 187/75 is filed by the plaintiff in O. S. No. 159/71. The suit is for recovery of monies due under two promissory notes dated 11-11-1967 for Rs. 10,000 (Ext. A1) and dated 17-12-1969 for Rs. 28,500/- (Ext. A2) said to have been executed by the 3rd defendant, managing partner of the first defendant firm, for and on behalf of the firm, the second defendant being the other partner. The amounts remained unpaid in spite of demands and a notice. The second defendant filed written statement contending that the firm has been dissolved, that the third defendant had no authority to borrow money so as to bind the firm, that the business was stopped on account of the unlawful acts of the third defendant, that documents in the suit are brought about by collusion of the plaintiff and the third defendant who are friends, that loan could not be

contracted without the junction of the second defendant, that in any event the alleged promissory notes are not supported by consideration and are vitiated by collusion, that they did not find a place in the accounts maintained by the third defendant, that there was no necessity for borrowing on behalf of the firm, that in any event plaintiff is not entitled to interest or a decree against the firm or the second defendant, that the promissory notes do not appear to have been duly stamped at the time of execution and therefore are not admissible in evidence. The third defendant filed written statement admitting execution of the documents but denying that they were duly stamped or that they were executed as promissory notes. According to him, on behalf of the firm he was having dealings with the plaintiff by way of purchase of areca-nuts, that normally payments would be made in cash, but on certain occasions when he was short of cash he used to make the payments at night or on the next day and on such occasions he used to give letters to the plaintiff on the plaintiff's request as security and the two documents relied on the plaint are two such letters. They are not supported by consideration and they were not stamped and they did not purport to be promissory notes. The second letter was issued later on in supersession of the first letter. There were no loan transactions at all. The stamps must have been affixed subsequently and therefore there is material alteration.

3. The appellant in A. S. No. 179/75 filed the suit O. S. 252/72 against the very same partnership and partners impleading his own son-in-law as the 4th defendant. The 4th defendant in this suit is none other than the brother of the plaintiff in O. S. 159/71. It was alleged in O. S. 252/72 that the third defendant, for and on behalf of the firm, borrowed a sum of Rs. 27,000/- from the 4th defendant on 21-12-1979 as Managing Partner of the firm and executed Ext. A37 promissory note, that the promissory note was duly endorsed in favour of the plaintiff for consideration and the amount remained unpaid in spite of the demands, letter and notice. The second defendant sent a false reply in collusion with the third defendant. Defendants 2 and 3 filed separate written statements raising contentions similar to those raised by them respectively in the other suit. The 4th defendant did not file a written statement.

4. The two suits were consolidated and tried together. The plaintiffs in the two suits were examined as P. Ws. 1 and 2 respectively. The 4th defendant in O. S. 252/72 was examined as P. W. 4. The common defendants 2 and 3 were examined as D. Ws. 1 and 2 respectively. P. Ws. 3, 5 and D. W. 3 are other witnesses examined. The trial court held that Exts. A1, A2 and A37 are really promissory notes and not merely letters, that they have been materially altered by affixing and cancelling stamps subsequently, that the promissory notes were executed by third defendant for and on behalf of the firm and he has power to contract debts so as to bind the firm, that the promissory notes are not true, but are collusive and without consideration, that no interest can be claimed, and that the plaintiffs are not entitled to decrees either on the promissory notes or on the basis of the debts. Accordingly, both the suits were dismissed with costs of

defendants 1 to 3. The respective plaintiffs now seek redress at the hands of this Court.

5. Exts. A1 and A2 purport to be the two promissory notes which are subject matter of the suit O. S. 157/71. Ext. A37 is the alleged promissory note being the subject-matter of O. S. 252/72. A contention was raised by the defendant in the trial court that the documents are not promissory notes. This contention was overruled by the trial court. Learned counsel for the respondents have urged this contention before us also. They argued that Exts. A1, A2 and A37 cannot be treated as promissory notes for two reasons, viz., that they do not mention the "promisee" and they are not executed to the "order" of the payee. Section 4 of the Negotiable Instruments Act defines promissory note as an instrument in writing (not being a banknote or a currency note) containing an unconditional undertaking signed by the maker to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument, Exts. A1, A2 and A37 are practically in the same form. It is true that the documents do not say that the payment will be made to any promisee named in the body of the documents or to his order. Going by the definition in Section 4 of the Negotiable Instruments Act, it is not necessary that the promise should be to pay the money to the "order" of a certain person. Even without such a clause a document could be a promissory note. Section 13 of the Negotiable instruments Act defines a negotiable instrument as a promissory note, bill of exchange or cheque payable either to order or to bearer. Explan. 1 states that such a documentation is payable to order if it is expressed to be so payable to a particular person and does not contain words, prohibiting transfer or indicating an intention that it shall not be transferable. A reading of Sections 4 and 13 of the Negotiable Instruments Act makes it clear that a document, if it otherwise satisfies the definition of promissory note, will not cease to be so merely because the words "to order" are absent in the document. Even without such an expression, the document could be a promissory note. It is also negotiable in case the document does not contain words or expressions prohibiting negotiation. The other ground urged that the documents do not show the name of the payee and therefore cannot be treated as promissory notes does not appear to be correct. Section 4 of the Negotiable Instruments Act only requires that the document must show that the amount is to be paid to or to the order of "a certain person". If a document clearly states that it is so payable to a certain person specifically described therein as such in the body of the document, the matter is clearly beyond controversy. The question of interpretation arises only where a document is not so clearly expressed. It is true that Exts. A1, A2 and A37, the body of the documents do not specifically say that the amount is payable to a particular person. But in these documents the recitals start after mentioning the name of plaintiff (in O. S. No. 159/71 i.e. P. W. 1 in the case of A1 and A2) and the name of 4th defendant (in O. S. No. 252/72 in the case of Ext. A37). In other words, the documents are, so to say, addressed to the respective promisees that is followed by a promise to pay though the word "you" is not present. A reading of each of the documents as

a whole would show that the person whose name is written at the top was intended to be indicated as the payee under the docu-1 ment. In each of the documents, the payee is ascertained by name and the name is given at the top. The instruments definitely and with certainty point out the persons who are to receive the money. As pointed out by Bhagwati, J. (as he then was) in *Jagjivandas Bhikhabhai Vs. Gumanbhai Narattamdas*, that -

"Section 4 does not say that the name of the payee must appear in the words of the promise nor does it say that the payee must be specified in any particular part of the instrument. The name of the payee may be set out in any part of the instrument and so long as it appears clearly on a reading of the instrument taken as a whole that the instrument specifies the payee with certainty, the instrument must be held to be a promissory note if the other ingredients of the definitions are satisfied."

We have no hesitation to agree with the trial court that Exts. A1, A2 and A37 clearly spell out and specify the payee with certainty and therefore the documents have to be treated as promissory notes.

6. The next question which arises for consideration is whether these promissory notes are genuine or collusive and whether they are supported by consideration in the former case. The finding entered by the trial court on these questions is seriously challenged by the appellants in the two appeals.

7. We will first deal with Exts. A1 and A2 which are the subject-matter of O. S. No. 159/71. Admittedly the first defendant was constituted partnership to trade in arecanuts and other agricultural produce (sic) (and?) had depots or shops at Chaliserry and Kunnamkulam and the third defendant was, as a matter of fact, managing the same in his capacity as a Managing Partner. Ext. EI is the original partnership deed dated 29-9-1901 where he is shown to be a Managing Partner, though he had not contributed any capital. There is no dispute that the plaintiff in O. S. No. 159/71 (P. W. 1) is a trader in Chaliserry dealing with arecanuts and other commodities. There is also no dispute that he has a textile shop at Chaliserry. P. W. 1 has deposed that on 11-11-1969 and 17-12-1969 the third defendant on behalf of the firm borrowed Rs. 10,000/- and Rs. 28,500/- respectively and executed Exts. A1 and A2 promissory notes. According to him the borrowing under Ext. A1 was made in his textile shop in the presence of P.W. 5 and the transaction has been entered in Ext. A5 ledger at page 116 and Ext. A6 day book at page 41. He has spoken to the relevant entries. Similarly, according to him, Ext. A2 transaction was entered into in his arecanut shop and the transaction has been entered in the Ext. A3 ledger at page 33 and Ext. A4 day book at page 31. He has spoken to the entries. The entries fully corroborate the evidence of P. W. 1 and the recitals in Exts. A1 and A2. There is no other corroborative evidence regarding Ext. A2 transaction. But Ext. A1 transaction was sought to be corroborated by the evidence of P. W. 5. He has deposed that in November 1969 he was waiting in P. W. 1's shop to get a bus to go home after seeing a doctor to get medicine for the witness's wife and he saw P. W. 1 paying

bundles of currency notes to a neighbour-trader who executed a promissory note in his letter head and gave it to P.W. 1 after signing and affixing stamps etc. As against this evidence adduced on behalf of P. W. 1, is the evidence of defendants 2 and 3 examined as D. Ws. 1 and 2 and Ext. B3 day book relating to the first defendant's firm. Ext. B3 day book does not make any reference to the amounts covered by Exts. A1 and A2. D. W. 1 has no personal knowledge about any transaction. He is not in a position to speak about Ext. B3 or any of the entries therein. He only states that Ext. B3 was given to him when the partnership business was closed in April, 1971. Though it is admitted that the business was stopped in 1971, no document was produced to show in which month the business was stopped or the firm was dissolved. D.W.I also stated that third defendant had no authority to borrow without his junction. Ext. B3 refers to other loans and repayments regarding which D W 1 has no knowledge, DW 2 clearly admitted that he executed Exts. A1 and A2 though he would say they were not stamped. According to him he had not borrowed any monies thereunder. He was making purchase of arecanuts from P. W. 1; sometimes he used to pay the money or portion of the money only in the evening or the next day and whenever he had to postpone the payment till the evening or the next day, he used to give letters like Exts. A1 and A2 at the request of the plaintiff and in the evening or the next day the amounts used to be repaid and Exts. A1 and A2 are two such letters. His case is that the letters were issued only for the purpose of security and did not evidence any loan transaction. In cross-examination he definitely stated that when he gave these documents he had purchased arecanuts from P. W. 1 and he had no cash with him. But Ext. B3 will show that he had sufficient cash with him; but he had not paid money to P. W. 1 on the dates of Exts. A1 and A2 or the next day. Then D. W. 2 stated "I should have paid, if I borrowed I should have paid. I have paid it. I don't remember if I asked for return of the documents when I paid. We were friends. So I did not ask for return of Exts. A1, A2 and A37". The trial court on the basis of the above evidence arrived at conclusions against the plaintiff. The transactions covered by Exts. A1 and A2 have been spoken to by P. W. 1, who must necessarily have personal knowledge regarding the same. It is true that the person who wrote the account books Exts. A3 to A6 has not been examined. It has to be remembered that this is not a suit on accounts. Actually the suit is for recovery of amount borrowed by the third defendant and in respect of which promissory notes have been executed. The primary evidence is the evidence of P. W. 1. The entries in the accounts spoken to by P. W. 1 are sought to be used only to corroborate his evidence. He has deposed that the accounts are maintained correctly and truly. In other words, he takes responsibility for the correctness of the accounts. Regarding this aspect of the evidence there has not been any cross-examination. At one stage he stated that one Kango wrote the accounts. Later he stated Kango is an alias name for C. T. Verghese, who was his writer during the relevant period. The non-examination of the writer, who of course wrote the accounts only at the night or the next day is not sufficient to hold that the accounts have no value at all, particularly when they are used only to corroborate P. W. 1 and not

as primary evidence of any transaction. The trial court declined to accept the accounts for another reason, namely, that the Sales Tax Officers, who are alleged to have inspected the shop in 1970 did not initial (or put) their signature in these accounts and they were actually submitted before the concerned officials only in 1971, that is, after defendants 2 & 3 fell out. It is true that P. W. 1 admits that in 1970 there was an inspection by the Sales Tax Intelligence officials. But it was not elicited from him as to which shop was inspected. It may be that the mention of the year 1970 is a mistake for 1971. Of course no initials are seen in the account books as having been put in 1970. But the account books show initials by the concerned officials as having been put on 20-1-1971. There is nothing to show that the officials who inspected the shop actually looked into the account books or put any initials. It is seen from the evidence that the date of inspection as suggested in cross-examination was a Sunday. As we have already pointed out there could be a mistake about the year of the inspection also. P. W. 1 is certain that the inspection was in January. We have pointed out that the initials are seen put in January, 1971. We take note of the fact that Ext. B3 also bears the initials of concerned officials only on 21-2-1971, though it is a book relating to the year 1969. Under these circumstances, we are unable to agree with the view taken by the trial court that Exts. A3 to A6 have no value.

8. The trial court placed very strong reliance on the circumstance that Exts. A1 and A2 transactions do not find a place in Ext. B3 said to have been maintained by third defendant in regard to the firm trade. The document was produced in the court by the second defendant, who claimed to have got it from the third defendant at the time of the dissolution of the firm. D. W. 1 has no personal knowledge regarding Ext. B3 or its entries and was unable to speak with reference to the same. It was marked at the instance of the second defendant's counsel during the cross-examination of D. W. 3. Yet not a single question was asked by the second defendant's counsel to bring out that Ext. B3 was truly and regularly maintained in the ordinary course of business. D.W. 2 has not given any such evidence with reference to Ext. B3. It is brought out from D. W. 2 that according to Ext. B3 on the dates of Exts. A1 and A2 he had huge cash balances of about a lakh of rupees. This is relied on as an argument to show that such being the case, the third defendant would not have borrowed monies on those dates. But it has to be seen that the case propounded by the third defendant is that he gave Exts. A1 and A2 by way of security, because he had no money to make immediate payments. This case cannot co-exist with the entries in Ext. B3 to the effect that there were huge cash balances. The evidence of D. W. 2 shows that he was maintaining ledgers, purchase books and other records and all the records have been handed over to D. W. 2. It is in evidence that the firm had accounts in several banks. None of these records are forthcoming. It is clear that Ext. B3 does not reflect correct and full state of affairs with reference to the firm and no reliance can be placed on the same in the absence of other connected books relating to the firm. D. W. 2 was cross-examined with reference to several entries of Ext. B3 by the plaintiff's counsel. It has been elicited from him that

according to Ext. B3 on 22-3-1969, there was an opening cash balance of Rupees 98,000/- and the closing balance was over Rs. 1,14,000/- and purchases were to the order of less than Rs. 39,000/- but on that day he had taken a loan of Rupees 20,000/-. No explanation has been attempted either by D. W. 1 or D. W. 2 regarding those and other similar entries. The entry referred to by us just now will show that according, to Ext. B3, on a day when there was cash balance of nearly a lakh of rupees and the purchases were of a very little amount compared with the cash balances, a loan of a huge amount of Rs. 20,000/- was taken. In the absence of any explanation, we are unable to hold that any implicit reliance can be placed on the entries in Ext. B3, particularly when D. W. 3 (D. W. 2?) himself has not deposed that the entries were made truly and in the ordinary course of business. Hence we find that the trial court erred in drawing any inference from the fact that Ext. B3 makes no reference to Exts. A1 and A2 transactions. We cannot also accept the entries in Ext. B3 to hold that on the concerned days, there were huge cash surplus available with the third defendant, particularly in the absence of production of purchase register, bank account books etc.

9. The trial court has also proceeded on the basis that the plaintiff admitted that there were no other borrowings by the third defendant earlier. This does not appear to be correct. The lower court does not appear to have carefully studied the oral evidence in the case. Even in chief examination P. W. 1 has stated that third defendant used to borrow money to the extent of Rs. 5,000/- and Rs. 10,000/- from him and repay the same night or the next day, but such transactions are not shown in the regular account books though entered in daily sheets which are not preserved. P. W. 4, the other creditor, has also deposed that he used to make advances of amounts of Rs. 5,000/- to DW3 whenever he required the same and all amounts not repaid within a day find a place in his account books. Therefore the trial court was not right in proceeding on the basis that the plaintiff admitted that there are no other borrowings by the third defendant from him. From the mere fact that the plaintiff and the third defendant have been friendly an inference of collusion cannot be drawn.

The trial court also commented on the fact that the registered notice was issued by P. W. 1 only on 25-9-1971 after the dissolution of the firm. We have already seen that there is no evidence placed before the court to show when exactly the firm was dissolved. It is accepted that the business was stopped in 1971, but there is no documentary evidence to show in which month it happened. We may take notice of the evidence of P. Ws. 1 and 2 that the business was stopped only to dupe persons from whom borrowings have been made. Considering the fact that plaintiff and the third defendant have been neighbouring traders for a long time, no adverse inference can be drawn from the circumstance that the notice was issued only on 25-9-1971. It cannot be taken as an indication against the genuineness of Exts. A1 and A2. The trial court also commented on the fact that according to the plaintiff's account books he had sufficient cash balances to make the advance. According to the lower court, Since the plaintiff had bank

account it is unlikely that he would have retained the monies with him. We do not think that the trial court was justified in drawing such an inference. The trade of the plaintiff and other areca traders is such that they have to pay large amounts at any given time or day when arecanuts are brought to them for sale. There is nothing surprising if they keep cash amounts to the tune of Rs. 20,000/- or 30,000/- with them without keeping the same in bank. We also notice that means of P. W. 1 to pay these amounts has never been challenged either in the reply notice or in the written statement or at the stage of evidence.

10. The trial court also suspected the passing of consideration on the ground that P. W. 1 did not directly speak regarding the payment of money, but only stated (matter in Malayalam omitted. --Ed.) This view of the evidence also does not appear to be correct. In chief examination P.W. 1 has definitely stated that the consideration of Exts. A1 and A2 has been paid to D. W. 3, that is (matter in Malayalam omitted. -- Ed.). The matter was pursued in cross-examination where he definitely stated that under Exts. A1 and A2 he paid cash amounts to third defendant. The lower court was in error in holding that PW 1 did not directly state that he paid the cash amounts. P. W. 5 has been dismissed as an unreliable witness. This also appears to be a hasty conclusion. It is true that he is a casual witness. But his name has been elicited in cross-examination of P. W. 1 as one of the persons present. He has given an explanation for his presence at the shop. There is nothing inherently improbable in the explanation. He appears to be a respectable witness. A reading of his evidence sounds as if he is speaking the truth. He has not definitely identified the borrower as the defendant. If he is a hired witness, he could have been easily persuaded to identify the borrower. He has only deposed that he saw P. W. 1 paying large amount of money to the adjoining trader, who executed promissory note. The way in which he has given evidence shows that he is only speaking the truth and has not been hired for the occasion. Of course his evidence is not sufficient to corroborate the plaintiff's case, but it is a circumstance which goes in favour of the plaintiff's case.

11. We have already referred to the evidence relied on by the plaintiff. It consists of the evidence of P. W. 1 who speaks regarding the transaction and the corroborative entries in the account books. We have noticed that the means of P. W. 1 to make payments has not been challenged. There is nothing improbable in fellow-traders in arecanuts running business in the same neighbourhood helping each other in cases of need. The evidence of D. W. 1 is of no assistance since he pleads ignorance and alleges only the absence of need and authority in the third defendant to contract loans. Absence of need has not been established since we have found that the entries in Ext. B3 by themselves are not reliable. We will separately deal with the question of authority of the third defendant to contract loans. We have referred to the fact that even Ext. B3 contains entries to the effect that loans have been taken for the purpose of partnership business. It is not as if taking loans does not fall within the purview of managing a business like this. In fact, Ext. X1 itself contemplates the firm raising loans. The third defendant came up with a specific case that he executed Exts. A1 and A2 only as

separate security for price of arecanuts purchased. There is not a shred of evidence to show that the documents were executed only by way of security and not as urged by P. W. 1. There is nothing suspicious regarding the entries in the account books relied on by P. W. 1. It may be that D. Ws. 2 and 3 fell out sometime in 1971. There is nothing to show that they had fallen out in 1969 or 1970, though Ext. B1 would show that they had some difference in 1968. In the nature and circumstances of the case it is difficult to accept that third defendant would have helped in concocting Exts. A1 and A2. It is in evidence that second defendant is a rich trader in Mangalore. There is no suggestion in the evidence or pleadings that the third defendant is not a man of substance or is a man of straw from whom no recovery could be made. It is difficult to believe in the circumstances of the case that the third defendant would have been a party to concoct documents which would create liability for huge amounts in third defendant himself. Learned trial Judge did not properly appreciate the evidence, oral and documentary, and the circumstances and probabilities. The evidence adduced is quite sufficient to establish a preponderance of probability in favour of the truth of P. W. 1's case. The material before the court is not sufficient to show that the documents were brought about in collusion. If Exts. A1 and A2 are genuine transactions there is a presumption in support of consideration, though such a presumption may not be drawn against the second defendant. But the evidence of P. W. 1 supported by the entries in the account books and the admitted means of P. W. 1 to pay amounts and the attendant circumstances already discussed above are sufficient to establish passing of consideration under Exts. A1 and A2 also.

12. We may now consider Ext. A37. The promisee under Ext. A37 is the 4th defendant in O. S. No. 252/72 examined as P. W. 4. He endorsed the promissory note in favour of his father-in-law-plaintiff examined as P. W. 2. P. W. 4 is also a trader in arecanuts and other commodities at Chalisserry. P. W. 1 is an agriculturist who also lends money. P.W. 4 has deposed that on a very large number of occasions he has advanced small amounts up to Rs. 5,000/- to the third defendant for urgent purposes on occasions when the third defendant required money on account of the closure of banks etc., and whenever repayment was not to be made within 24 hours the transactions were entered into the account books of P.W. 4's shop. On the date of Ext. A37, the third defendant approached him for a loan of Rs. 50,000/- to pay people who supplied arecanuts to the firm. P. W. 4 had no money. He went in his car to the house of his father-in-law P. W. 2 and took from him Rs. 27,000/- which he advanced to the third defendant for which Ext. A37 promissory note was executed. The 3rd defendant had undertaken to pay it within 8 days without interest. Since money advanced was not his own and taken from the father-in-law, it does not find a place in his accounts. Ext. A37 was not given as a security for price of arecanuts purchased. The promissory note was not taken in the name of PW2 because PW2 did not know the third defendant. The witness actually saw the third defendant disbursing the money to arecanut vendors in the shop. No interest was stipulated

at the time of execution of Ext. A37 because it was a loan for 8 days. Subsequently his father-in-law and wife began to press him to return the money to the father-in-law and then he made an endorsement of the promissory note in favour of the father-in-law.

13. P. W. 2 has also supported the evidence of P. W. 4. He has cash amount of about Rs. 30,000/- which he used to advance to needy persons. A week or 10 days prior to the date of Ext. A37, four persons (whose names are given by him) returned the amounts borrowed by them and this amount was kept in his house. On the date of Ext. A37, his son-in-law came and asked for some money to help a fellow trader for a short while and accordingly he paid him Rs. 27,000/-. Ten days later P. W. 2 began to press his son-in-law for return of the money. His son-in-law agreed to repay and made over the promissory note to him saying that he will pay the amount later. There were other occasions when son-in-law had borrowed from him and returned the money. The witness has no accounts or bank accounts.

14. We have already adverted to the nature of the evidence given by D.Ws. 1 and 2. D. W. 1 has no personal knowledge about any of the transactions of the firm at Chalisserry and he is not in a position to affirm or deny anything. The stand taken by him is that this transaction does not find a place in account book Ext. B3 maintained by the third defendant on behalf of the firm. We have already noticed that no reliance could be placed on the entries in Ext. B3; therefore Ext. B3 cannot be accepted as sufficient rebuttal of the evidence of P. Ws. 2 and 4. That leaves us only with the testimony of D. W. 2. In his written statement, the stand taken is that Ext. A37 was executed as a security for price of arecanuts purchased and subsequently payments have been made. He repeated the stand in chief examination, but under stress of cross-examination he had to admit, as we have already noticed that Ext. A37 is practically a transaction of borrowing. He says; "I should have paid. If I borrowed I should have paid. I have paid it. I don't remember if I asked for return of the documents when I paid". His failure to take back Ext. A37 is sufficient to show that the theory of security propounded by him cannot be true. It may also be noticed that there was no effective cross-examination of D. W. 2 on behalf of the second defendant. We have also noticed that it is improbable that the third defendant who would also be liable under Ext. A37 transaction would have colluded with P. W. 2 or 4 to concoct documents like Ext. A3 or execute it without consideration or failed to take it back if the loan or transaction had been discharged. The mere fact that till the filing of the suit these persons have been friendly with each other would not lead to any inference of collusion.

15. The trial court however did not properly consider the evidence and circumstances. The trial court drew an adverse inference from the circumstance that this loan is not mentioned in the account books of P. W. 4's shop. The reason is obvious, namely, that the amount was not taken from his business. This explanation was not adverted to by the trial court. Trial court also

commented on the mention of interest in the endorsement made by P. W. 4 to P. W. 2. This is not material as the consideration for the endorsement was the original borrowing made by P. W. 4 from P. W. 2 and they are close relations. The trial court also thought that 21-12-1969 the date of Ext. A37 was Sunday on which none of the parties admittedly did any business. We have carefully gone through the oral evidence in the case. We are unable to find any such admission as is referred to by the trial Court. The evidence of P. W. 4 would suggest that Ext. A37 was written in his shop. Even assuming that none of these persons conduct any business on a Sunday, that by itself is not a factor to impro-babilise the truth or genuineness of Ext. A37 transaction, considering the nature of the business transacted by these traders. Their business consists in making bulk purchase of arecanuts and other commodities from agriculturists and selling them to persons at Manga-lore, Bombay and other places. We have already noticed that Ext. B1 contemplates that the firm may have to borrow monies for the purpose of the business. Such traders have to find cash amounts to pay agriculturists intending to sell their commodities. Turning away such intending sellers on account of lack of cash amount at hand would seriously affect business. We may also notice that all these transactions took place in a small bazar in a rural area where the idea of Sunday as a holiday may not have taken deep roots. It cannot be said that agriculturists intending to sell arecanuts or other commodities would avoid coming on Sundays. We find that not even a suggestion on this aspect has been put on behalf of the second defendant to D. W. 2. The reasons which weighed with the trial court to hold against Ext. A37 transaction do not appear to be sound. We are unable to find any proper or sufficient reason to disbelieve the evidence of P. Ws. 2 and 4 in the light of Ext. A37 and admissions made by DW2 in cross-examination. If their evidence is accepted it must follow that Ext. A37 is also true and genuine supported by consideration and is not collusive document.

16. The trial court has found that Exts. A1, A2 and A37 have been materially altered and therefore can have no legal effect. The third defendant took the stand that when he signed and gave these documents, no stamps had been affixed and they must have been clandestinely affixed subsequently and purported to be cancelled by drawing two lines. In each of these documents the stamps are seen affixed on the face of the documents by the side of the signature. Prima facie there are no suspicious circumstances on the face of these documents. In the case of a negotiable instrument, the court is entitled to draw an initial presumption that it is properly stamped, though where the instrument itself appears suspicious or bears marks of alteration on the face of it, the plaintiff will have to be required to make out that there was no alteration after its execution. With respect, we agree with the observations to this effect made by K. K. Mathew, J. (as he then was) in *Sankara Pillai v. Usman Settu* 1963 KLT 241. The trial court did not advert to this initial presumption nor draw any proper conclusion therefrom. Having carefully examined these three documents we are unable to find anything suspicious on their faces; nor are there any overt

indications of alterations or tampering. Therefore the burden of establishing material alterations rests squarely on the defendants.

17. It is seen that in each of these instruments the stamps are cancelled not by the third defendant putting his signature on them, but by drawing two parallel lines across the stamps. The lower court thought that this method of cancelling stamps is quite contrary to the common course of transactions and therefore it creates suspicion regarding this aspect of the case. Though the trial court did not find any difference in ink used in drawing the lines in regard to Exts. A1 and A2, the lower court found such a difference in regard to Ext. A37. Having carefully examined all the three documents, we are unable to find any difference in the ink used to draw the lines and the ink used to affix the signature or make the other writings in any of the documents, There is also no material before the Court to show that normally the only way of cancelling stamps is by writing signature on them. Much less is there anything to suggest that no other way is lawful or that this way is the normal way adopted by all parties. The evidence of PW 1 in the case of Exts. A1 and A2 and the evidence of PW 4 in the case of A 37 is that the third defendant himself affixed the stamps and cancelled them, though this is denied by DW 2. We have also seen from the manner in which these documents are written and the transactions themselves show that the documents are intended to be promissory notes. We have also seen that there is nothing to probabalise the contention of the third defendant that the documents are executed only as security. Our conclusion is that the documents are intended to be promissory notes. If so, in the normal course of events, the parties would have taken care to see that they were stamped and the stamps cancelled. The 3rd defendant has no case that he was not aware that the documents are required to be stamped or that the stamps required to be cancelled and therefore it was not so done.

18. The learned counsel for the 2nd respondent strenuously contended that drawing two lines across the stamps is not sufficient cancellation according to law. Section 12 of the Stamp Act deals with cancellation. Section 12(3) of the Stamp Act reads thus:

"(3) The person required by Sub-section (1) to cancel an adhesive stamp may cancel it by writing on or across the stamp his name or initials or the name or initials of his firm with the true date of his so writing or in any other effectual manner."

Even according to this provision cancellation by writing the signature or initials is not the only way of cancelling the stamp. Cancellation must be done in an effectual manner. Writing the name or initials is one such effectual manner indicated in Section 12(3) of the Act. There could be other effectual ways in which stamps could be cancelled. The purpose of cancellation is to see that the stamps are not used again as is mentioned in Section 12 clause (1) (a) and (b) of the Stamp Act, where it is stated "cancel the same so that it cannot be used again". Learned counsel for the second respondent pointed out that where one or

two parallel lines are drawn across the stamps, it is still possible for somebody to put his signature above the line to make it appear that the stamp was being cancelled for the first time and in such case it cannot be said to be an effectual cancellation and therefore drawing a line or two in that fashion cannot be said to be effective cancellation. We are unable to agree with this submission. The expression "so that it cannot be used again" only means that it cannot be used again in the normal course without realising that the stamp has already been cancelled. The expression does not imply that the cancellation must be made in such a way as to make it impossible for any dishonest person to use the same once again fraudulently. The test to see if a stamp has been effectually cancelled is to see whether an ordinary, honest, law-abiding citizen would on seeing the stamp believe that it is already cancelled and therefore refrain from using it or would believe that it has not already been used and therefore would proceed to use it once again. We are fortified in this view by the authorities collected at pages 196 and 197 of the Indian Stamp Act by K. Krishnamurthy and R. Mathrubutham 1980, Edn. The learned authors refer to various decisions in the following manner:

"On the other hand, it has been held that the words "so that it cannot be used again" do not imply such a degree of cancellation as would make it impossible for any dishonest person to make thereafter a fraudulent use of stamp. The criterion for determining whether a stamp has been effectually cancelled is whether the ordinary conscientious man would, on seeing the stamp come to the conclusion that it has been already used. The question is one that depends on the facts of each case. Thus cancellation of the stamp by drawing diagonal lines across it, their ends extending to the paper, would be sufficient. Drawing lines across an adhesive stamp is a good cancellation provided an intention to cancel is clear from what has been done. So also the drawing of two lines crossing each other across the face of the stamp. Also the drawing of two parallel lines on the three stamps affixed to a promissory note where a perusal of the note showed that the intention to cancel was clear...."

19. A scrutiny of Exts. A1, A 2 and A37 shows that across each of the stamps affixed in these documents two parallel lines have been drawn. These lines indicate the intention to cancel the stamps. The lines have been drawn in such manner that it would be evident to any ordinary person that the stamp had already been used. The cancellation in the instant case is therefore effective and lawful. When cancellation has been made in a lawful manner we do not think any suspicion could be attached to it by stating that cancellation has not been done by writing the signature over the stamps or that it has not been done in the proper manner or normal way. On the other hand, we are of opinion that since the documents purport to be promissory notes, in the normal course stamps could have been affixed and" they would have been cancelled. This is what is spoken to by P. Ws. 1 and 4 also. We find no reason to reject their testimony. The lower Court did not care to consider their testimony at all.

20. The learned counsel for the second respondent further contended that if stamps were affixed and cancellation was subsequent to the execution of the promissory note, it would amount to material alteration and that is what happened in the case of the instruments involved in this case. PW1 has deposed that the 3rd defendant affixed the stamp and cancelled the same. In cross-examination he stated that when third defendant put his signature in Exts. A1 and A 2, stamps have been affixed and after putting his signature he cancelled the stamps. He denied that stamps have been affixed just before the suit. We have already noticed the evidence of PW 5 that he had seen promissory notes being executed and stamps being affixed. PW4 who gave evidence with reference to Ext. A 37, stated in chief examination that stamps had been affixed at the time of writing and cancelled by 3rd defendant at the time of signing and before delivery of the promissory note.

21. Section 2(12) of the Stamps Act states that unless there is something repugnant in the subject or context, the expression "executed" means "signed". We have already adverted to Section 12 of the Stamp Act. Clauses (1) and (2) of Section 12 which have a bearing on this question read as follows:

"12. Cancellation of adhesive stamps:--(1) (a) Whoever affixed any adhesive stamp to any instrument chargeable with duty which has been executed by any person shall, when affixing such stamp, cancel the same so that it cannot be used again; and

(b) whoever executes any instrument on any paper bearing an adhesive stamp shall, at the time of execution unless such stamp has been already cancelled in manner aforesaid, cancel the same so that it cannot be used again.

(2) Any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again shall, so far as such stamp is concerned, be deemed to be unstamped."

Section 12 makes it clear that either the stamp must be cancelled when it is affixed or if it is not so cancelled it must be cancelled at the time of execution, which is, as per the definition of the word "execution" means at the time of signing. This provision however should not be interpreted in a mechanical way so as to defeat justice or prevent people from following rules of law in a reasonable way. We are concerned with several acts required to be done in connection with the promissory note, namely, writing, signing, affixing stamps, cancelling it and delivering the same to the promisee. Cancellation is expected to be done according to Section 12 of the Stamp Act, either when stamps are affixed or when it is executed, that is, when it is signed. If we look at the section in a mechanical way, it means either affixing and cancellation must be done simultaneously or at the same time, that is, at the identical moment or signing and cancellation must be done at the identical moment. In practical terms, this is an impossibility. This provision must be understood in a reasonable and intelligible way. Viewed in this light, the provision could only mean that the

stamps must be cancelled either immediately they are affixed or immediately after the maker puts his signature. In other words, the entire process must take place in such a manner that one must be able to say that it has been done simultaneously as part of the same transaction. T. C. Raghavan, J. (as he then was) took the same view in *Kuruvila Markose Vs. Varkey Varkey*, , relying on the ruling of the Division Bench of Madras High Court in *Surij Mull v. Hudson* ILR (1901) Mad 259. We are in respectful agreement with the view taken by the earlier Kerala decision, as that is the only practical and reasonable way of interpreting Section 12 of the Stamp Act.

22. There is the evidence of PWs 1 and 4 relating to affixing and cancellation of the stamps. The trial Court did not go into this evidence. The evidence is consistent with the normal course of conduct and is in accordance with the initial presumption that an instrument is properly stamped. The expression "properly stamped" means not only that stamps of the requisite money value are affixed, but that they are lawfully cancelled. The reasons urged by the trial Court to hold that there is something suspicious in the cancellation do not appear to be sound. Further, mere suspicion in the matter is not sufficient to come to a conclusion that there has been material alteration in the document. A finding that an instrument is materially altered, as in the case of any finding by a Civil Court, must be the result of a preponderance of probability established on the basis of evidence and circumstances. There is no such preponderance of probability established in case in regard to allegation of material alteration in the promissory notes. We, therefore, hold that defendants 2 and 3 have failed to prove that the documents are materially altered.

23. The trial Court has also held that the promissory notes were executed by the 3rd defendant for and on behalf of the firm and the third defendant was competent to execute the promissory notes so as to bind defendants 1 and 2. This finding is challenged by the learned counsel for the 2nd respondent. The learned counsel, Shri P. V. Ayyappan, for the 2nd respondent strenuously contended that Ext. B1, which is the original partnership agreement, did not confer any right on the 3rd defendant to contract debts without the junction of the second defendant, that even the limited right conferred under Ext. B1 has been further restricted in 1968 by Ext. XI, that on the face of Exts. A1, A2 and A37 it is not apparent that the third defendant executed them for and on behalf of the firm, and therefore even if the other findings of the trial Court are to be reversed, no decree can be passed against defendants 1 and 2.

24. Ext. B1 partnership deed constitutes the third defendant as the Managing Partner of the firm and directs that he shall be in charge of the day to day business of the partnership firm. It requires that bank accounts in the name of the firm shall be opened by the partners, though the accounts shall be operated by the third defendant. Clause 10 of Ext. XI states that the partnership may raise or borrow loans, or overdrafts, cash credit etc., from banks or other parties on the securities of the assets of the firm or without any security at such rate of

interest etc. This clause makes it clear that the agreement contemplated raising of loans as part of the process by which business activity of the firm is to be carried out. Ext. XI of course does not confer any specific power on the third defendant to contract loans by himself, nor does it create any restriction on his power. A specific conferment of power to contract debt on a partner in a trading firm is unnecessary since every partner is an agent of the firm for the purpose of business of the firm. This follows from Section 18 of the Indian Partnership Act which reads: "Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm" and Section 19(1) of the Act which reads thus: Subject to the provisions of Section 22, the act of a partner which is done, to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. The authority of the partner to bind the firm conferred by this section is called his "implied authority".

25. A reading of Sections 18 and 19 of the Partnership Act makes it clear that every partner is an agent of the firm for the purpose of carrying on business and the act of the partner which is done to carry on only in the usual way, business of the kind carried on by the firm binds the firm subject of course to the provision of Section 22 of the Act. We have already noticed that Ext. X1 contemplates the firm raising loans for the purpose of business. There can therefore be no doubt that by virtue of Ext X1 and Sections 18 and 19 of the Partnership Act, the Managing Partner of the 3rd defendant had every right to borrow monies for the purpose of the firm.

26. According to the second defendant, the third defendant was misusing his power and this was objected to by the second defendant and subsequently in 1968, the parties entered into Ext. B1 agreement restricting the power of the third defendant to contract debts. Under Ext. B1, the third defendant agreed not to make private dealings or private borrowings or to lend the name of the firm for his private dealings and private borrowings without the consent of the second defendant. He further undertook to enter in the account books of the firm all dealings of borrowings, purchase or sales made by him. He also undertook not to borrow money from any parties clandestinely or privately in the name of the firm without the consent of the second defendant, Ext. B1 does not show that the right of the Managing Partner to raise loans on behalf of the firm has in any way been restricted. He only undertook not to make private dealings or borrowings in the name of the firm and to maintain proper accounts and not to borrow monies clandestinely and privately in the name of the firm without the consent of the second defendant. We are unable to read into these provisions any substantial restriction of his right to borrow monies on behalf of the firm, which is recognised under Sections 18 and 19 of the Partnership Act. It may be noted that Sections 18 and 19 clause (1) of the Act do not contain a non obstante clause.

27. PWs 1 and 4 have deposed that the third defendant represented to them that he had the power to borrow monies on behalf of the firm. They have also deposed that they were not informed about the so-called restrictions created in

Ext. B1 document. The firm had bank accounts in several banks. The evidence of the Manager of one of the banks, PW3 would show that even though a copy of Ext. X1 has been submitted to the bank, a copy of Ext. B1 has not been so submitted. DWs 1 and 2 also have no case that these persons were aware of the terms, of Ext. B1. It cannot therefore be said that PWs 1 and 4 were aware of the so-called restrictions in Ext. B1. Thus, the implied power of the 3rd defendant to borrow money on behalf of the firm from third parties remained unimpaired, so far as third parties were concerned.

28. Section 20 of the Indian Partnership Act contemplates contract between the partners to extend or restrict the implied authority of a partner. Such a restriction shall not affect an act done by a partner on behalf of the firm falling within his implied authority unless the person with whom he has dealings knows of the restriction or does not know or believe that partner to be a partner. Defendants 2 and 3 have no case in the written statement or in their evidence that PWs 1 and 4 did not know or believe the third defendant to be a partner or knew about any of the terms and conditions of Ext. B1. It cannot, therefore, be said that borrowing by third defendant on behalf of the firm will not bind the firm by virtue of the terms of Ext. X1.

29. It is next contended by the learned counsel for the second respondent that the borrowings under Exts. A1, A2 and A37 were really not made on behalf of the firm and were not expressed to be so made and therefore the firm and the second defendant are not liable. He placed reliance on Section 22 of the Indian Partnership Act and Section 27 of the Negotiable Instruments Act. Section 22 of the Indian Partnership Act says:

"22. In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm".

Relevant portion of Section 27 of Negotiable Instruments Act reads thus:

"27 Every person capable of binding himself or of being bound as mentioned in Section 26, may so bind himself or be bound by a duly authorized agent acting in his name".

30. According to Sri. P. V. Ayyappan, counsel for the second respondent, an instrument can be treated as executed in the firm name for the purpose of Section 22 of the Indian Partnership Act only where the partner signs for and on behalf of the firm. He also contended that in order that an act may be treated as an act of an agent, the agent must act in the name of the principal as per Section 27 of the Negotiable Instruments Act and this also would mean that the act must be specifically expressed to be done for and on behalf of the partnership or the other partner. We shall presently consider the decisions relied on in this connection.

31. In the decision reported in *Johnstone v. Mt. Jan Bibi*, (AIR 1928 Lah 722)

the existence of a partnership itself had been denied. The promissory note was written and signed by one of the alleged partners, who made the promise to pay in the words "I promise to pay". It was written in the letter-head of the printing press alleged to have been run by the partnership. It was held that the promissory note was not executed by the alleged partner on behalf of the firm and the use of the letter-head of the printing press was only to indicate his address. The Court relying on an earlier decision of the Privy Council in *Sadasuk Janki Das v. Kishan Pershad* AIR 1918 PC 146, observed that the real point for decision is whether the promissory -note has been so drawn that in form it binds the firm. In other words, importance was attached to the form of the document also.

32. In the decision reported in *Pat-tabhirami Reddi v. Balliah* AIR 1928 Mad 1196 the promissory note was signed by two persons, who happened to be partners in a firm along with a third person. But the document recited that the borrowing was made for the necessity of the partnership firm. It was held that on a fair interpretation of the instrument the name of the firm as the party liable is sufficiently disclosed and all the partners are liable. It was argued before the Court that the firm will be liable only if the partners signed in their capacity as partners or specifically in the name of the firm. This argument was rebutted by relying on Section 27 of the Negotiable Instruments Act which provides that a person may be bound by a duly authorised agent "acting" in his name and distinguishing the expression "acting" from the expression "signing". Reilly, J., also relied on the decision in *Sadasuk Janki Das v. Kishan Pershad* AIR 1918 PC 146 to hold that principal will be bound by agent's signature to a promissory note if his name is disclosed in such a way that on a fair interpretation of the instrument his name is the real name of the person liable. It was held that it is unnecessary that there must be anything in the signature to show that signatory signs for the principal.

33. In the decision reported in *Sagar-mal v. Bhikusa Tuljiram* AIR 1936 Nag 252, a promissory note was signed by one of the partners of the firm, who did not describe himself to be a partner and he made a promise to pay using the words "I promise to pay". He gave his own individual address and not the firm address in the instrument. The body of the document also referred to the personal name and not the firm. Relying on the decision in AIR 1918 PC 146, the Court came to the conclusion that unless the responsibility of the firm is made plain and can be instantly recognised since the instrument passes from hand to hand, the person signing alone is liable.

34. In *Penumatsa Rangaraju Vs. Sait Devichand Bhootaji Firm partner Sait Seshmull Kasturji and Another*,) the court had to consider a promissory note signed by a person, who happened to be one of the partners of the firm, and the promissory note did not in any way disclose either the name of the firm or the connection of the signatory with the firm, but it mentioned that the money was borrowed for the purpose of partnership business. It was held that the firm was

not liable. It was argued that the firm is liable in view of the implied authority of a partner contemplated in Section 22 of the Partnership Act. This argument was overruled by Patanjali Sastri, J., (as he then was) as follows:

".....the suit having been based solely on the note, the question arises as to whether the note has been executed in such a form as to make the petitioner also liable on the note as a partner. Section 27, Negotiable Instruments Act, enacts that every person capable of binding himself or of being bound as mentioned in Section 26 may also bind himself or be bound by a duly authorised agent acting in his name. This involves the consequence that, so far as the making..... of a promissory note, are concerned, these acts must, in order to bind the firm, be done by a partner in the name of the firm, and it is not sufficient that they are done in any other manner expressing or implying an intention to bind the firm, which u/s 22, Partnership Act, would otherwise be sufficient to bind the firm, for the latter section must yield to the special provisions of the Negotiable Instruments Act. It is not, however, necessary that the note should be signed by the partner in the name of the firm but the name of the firm as the party liable on the note must be sufficiently disclosed".

(emphasis ours)

35. The decision reported in N.S.M. Adaikappa Chettiar Vs. The Official Assignee, High Court, dealt with a promissory note signed by an individual who happened to be a partner in a firm of which she and her husband were partners. The promissory note did not disclose in any manner the name of the firm or the firm liability, though evidence was adduced to show that money was actually utilised for the benefit of the firm. It was held that only the signatory was liable since on the face of the promissory note she alone was the debtor and not the firm.

36. Reliance is also placed on the decision reported in Devji @ Deviji Shivji Vs. Maganlal R. Athrana and Others, which related to a case of sub-lease taken by a person who happened to be one of the partners. But the case put forward consistently was that the lease was taken benami on behalf of all the respondents and the case was not proved. When the appeal was argued in the Supreme Court, it was contended that the signatory being a partner, the firm is liable u/s 22 of the Indian Partnership Act. Since sub-lease was not executed in the name of the firm and the signatory did not obtain the lease acting on behalf of the firm it was held that the partner did not bind the firm by the transaction. As to under what circumstance a transaction could be said to have been executed in the name of the firm was not considered by the Court.

37. On a close consideration of the provisions of the Negotiable Instruments Act in the light of the decisions referred to above, in our opinion, the correct position appears to be as follows, in so far as a negotiable instrument is concerned. In the normal course a signatory of a negotiable instrument alone is liable thereunder. Even if he happens to sign an instrument only as an agent, he alone will be liable if he signs it without indicating thereon that he signed only as an

agent or that he does not thereby intend to incur personal responsibility. At the same time, a principal may be bound by a duly authorised agent executing a negotiable instrument, provided the agent "acts in the name of the principal". The special provisions (namely Sections 26 and 27) of the Negotiable Instruments Act override the provisions of Section 22 of the Partnership Act, in so far as negotiable instruments are concerned. In other words, a firm or the principal will be bound under a negotiable instrument only if the agent, that is the partner, "acts" in the name of the firm. It is not sufficient that the partner in some other manner implies an intention to bind the firm. It is necessary that the making of a negotiable instrument must, in order to bind the firm, be done by a partner in the name of the firm. The name of the firm must be clearly and sufficiently disclosed on the face of the instrument. The firm will be bound by the partner's signature if the name of the firm is disclosed in such a way that on a fair interpretation of the instrument, the firm name is the real name of the person liable on the instrument. The real question is whether the instrument is so drawn that in form it binds the firm. It is not sufficient that the firm name is mentioned only as an address of the signatory-partner. The responsibility of the firm must be made plain and must be instantly recognised from the form in which the instrument is made, since the instrument may pass from hand to hand. The true meaning of the instrument must be evident at the first glance. This, however, does not mean that the firm will be liable only if the signatory signs specifically on behalf of the firm. It is sufficient if the form in which the instrument is drawn up or made is such that it may be said reasonably that the instrument has been made by a duly authorised agent acting in the name of the principal, that is, by a partner acting in the name of the firm.

38. The matter has to be decided in the light of the above principles. Each of the three promissory notes in the case has been written on a letter-head which contains the full name, description and address of the partnership firm. It is no doubt true that the promissory notes are seen signed only by third defendant, who did not put the name of the firm or put his description as Managing partner under the signature. If this had been done, the matter would have been beyond all controversy. In the body of the note the promise is not that "I promise to pay", but that "we promise to pay". The expression ""we", it appears to us has been deliberately used for the purpose of disclosing the liability of the firm. This view gains strength when we also consider the fact that the promissory notes have been executed on the letterheads which contain the full name, description of the firm. It cannot be said that the letter-heads have been used only to indicate the address of the third defendant. On the face of these documents it is clear beyond any doubt that the third defendant was clearly acting and purporting to act in the name of the firm. We agree with the view taken by the trial Court that by virtue of Section 27 of the Negotiable Instruments Act the firm is liable under the three instruments. We have already indicated that there is absolutely no evidence before the Court to show that the promisees were aware of any restrictions on the power of the third defendant to contract debts or raise

loans. On the other hand, the evidence would suggest that the promisees were informed that he had full authority to do so. We agree with the view taken by the trial Court that under the promissory notes, the firm and other partner are liable.

39. Under these circumstances the liability of the defendants under Exts. A1 and A2 is clearly established. The promisee under Ext. A37 is the 4th defendant in O. S. 252/72, who endorsed the promissory note in favour of his father-in-law, namely, the plaintiff thereunder. The endorsement has been spoken to by PWs. 2 and 4 and there does not appear to be any ground not to accept their testimony. If we go by their evidence and there is no reason why their evidence should not be accepted, it is clear that the endorsement also is supported by consideration, since the funds for the loan were advanced by the plaintiff to the 4th defendant, and this was adjusted towards the consideration of the endorsement. The fact that the endorsement mentioned interest is of no moment in weighing the evidence as a whole.

40. It is argued by the learned counsel for the respondents that Ext. A37 is not negotiable because it does not contain the words "or order". We have already seen that an instrument can be promissory note even if it does not contain the expression "to the order of". The same is the position with reference to negotiable instrument, as defined in Section 13(1) of Negotiable Instruments Act. Explanation 1 to Section 13 of the Act says inter alia that a promissory note is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words, prohibiting transfer or indicating an intention that it shall not be transferable. In other words, a promissory note is payable to order in two cases, namely, where it is expressed to be so payable to order or where even if it is not expressed to be so payable to order, if it is expressed to be payable to a particular person and does not prohibit expressly or by implication transfer of the note. Viewed in this light, it can be seen that Ext. A37, is a promissory note expressed to be payable to a particular person and does not contain any express or implied prohibition against a transfer and therefore it must be treated as payable to order. We, therefore, hold that Ext. A37 is negotiable and the endorsee is entitled to claim the money due thereunder. This view is supported by the decisions in Jagjivandas Bhikhabhai Vs. Gumanbhai Narattamdas,) and Parshottam v. Ishwarbhai (AIR 1971 Guj 252).

41. The last point urged before us relates to the finding regarding interest claimed by the plaintiff. The trial Court did not believe the version of the respective plaintiffs that there was agreement to pay interest and therefore held the issue regarding interest against the plaintiffs. Even if the parties did not agree to pay interest, the plaintiffs would be entitled to claim interest u/s 80 of the Negotiable Instruments Act. u/s 80 of the Act, where no rate of interest is specified in an instrument, interest shall be calculated at the rate of 6% per annum from the date on which the money should have been paid by the party concerned until realisation of the amount due or until such date as the Court

directs. Where the instrument is silent regarding interest, it is a case where no rate of interest is specified in the instrument. Hence interest could be ordered at the rate provided u/s 80 of the Negotiable Instruments Act. We direct that in the two suits, the respective plaintiffs will be entitled to interest from the dates of promissory notes till recovery.

In the result, the two decrees and the common judgment of the trial Court are set aside. The two suits are decreed as prayed for with costs. The appeals are accordingly allowed with costs.