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(2001) 12 AP CK 0094

In the Andhra Pradesh High Court

Case No : C.C.C. Appeal No. 69 of 1985

Salauddin and Co. — APPELLANT

Vs

State Bank of India and Others — RESPONDENT

Date of Decision : 18-12-2001

Acts Referred:
Contract Act, 1872 — Section 70, 72

Citation : (2001) 12 AP CK 0094

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

Bench : Single Bench

Advocate : Rasheeda Thabassum, for C. Bala Gopal, for the Appellant; M. Narender Reddy, for Respondent No. 2, P.R. Prasad, for Respondent Nos. 4 and 5 and M.L. Ramakrishna Rao, for the Respondent

Final Decision : Allowed

Judgement

P.S. Narayana, J.—The unsuccessful 5th defendant in O.S. No. 661/76 on the file of III Additional Judge, City Civil Court, Secunderabad is the appellant. The plaintiff in the suit is the 1st respondent and defendants 1, 2, 3, 4 and 6 are respondents 2 to 6 in the appeal. The 1st respondent-plaintiff filed a suit against defendants 1 to 6 praying for a judgment and decree jointly and severally against, all the defendants for a sum of Rs. 2,96,271.30 ps., together with interest and also the other incidental reliefs. The Court below by the judgment and decree dated 12.11.1984 had decreed the suit with costs for an amount of Rs. 2,96,271.30 ps., as against defendants 1 to 4 with costs and future interest at 6% per annum from the date of suit till realisation and had also decreed the suit against defendants 5 and 6 only for an amount of Rs. 2,71,643.40, without interest and costs. The 5th defendant, aggrieved by the same, had preferred the present appeal. Defendants 1, 2 and 4 were set ex parte. The 3rd defendant filed a formal written statement and defendants 5 and 6 had filed their respective written statements and had contested the matter.

2. For the purpose of better appreciation and also convenience the parties will be

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referred to as arrayed in the suit.

3. It was pleaded by the 1st respondent-plaintiff that the 2nd respondent in the appeal the 1st defendant in the suit, is a partnership firm consisting of defendants 2 to 4 i.e., respondents 3 to 5 in the appeal, as its partners. The 5th defendant i.e., the appellant in the appeal has been dealing in purchase and sale of eggs and the 6th defendant-6th respondent in the appeal is a transport company. It was also pleaded that the plaintiff-Bank is not aware whether defendants 5 and 6 are the proprietary concerns or partnership firms. It was also pleaded that the 1st defendant has been carrying on trade in eggs, which was granted a D.D. purchase limit of Rs. 2 lakhs initially in the month of May, 1974 which was enhanced subsequent thereto to Rs. 3.50 lakhs. The 1st defendant used to dispatch the eggs to outstations like Bombay etc., through lorries and the documentary bills namely, bills accompanied by lorry receipts, used to be presented by the 1st defendant to the plaintiff-Bank, who used to discount the same and send the documentary bills to their respective destination branches to enable to drawees to retire the bills and take delivery of the goods from the transport company. Likewise, the 1st defendant presented for discounting the following six bills together with the relative lorry receipts against which the sums mentioned herein were paid by the plaintiff to the I st defendant:

S.No Consignment No. and date Truck No. Purchase price

1. No. 5D/20.2.1976 MET 9354 Rs. 45,599.40

2. No. 6D/26.2.1976 ADT 630 Rs. 49,119.00

3. No. 7D/4.3.1976 MBT 7059 Rs. 5.3,802.00

4. No. 8D/10.3.1976 AAT 1983 Rs. 47,132.40

5. No. 9D/20.3.1976 MHD .3943 Rs. 44,578.00

6. No. 10D/27.2.1976 APB 706 Rs. 31,411.80

It was also pleaded that all the aforesaid bills were drawn by the 1st defendant on the 5th defendant and each of the above bills was accompanied by a lorry receipt of the 6th defendant and none of the said documentary bills were retired by the drawee-5th defendant in spite of considerable lapse of time and the lorry receipts and the bills were returned by the plaintiff''s Branch at Mandvi, Bombay. It was also further pleaded that suspecting that the 5th defendant in collusion with the 6th defendant might have taken delivery of all the goods covered by the lorry receipts without retiring the bills, the plaintiff-Bank had sent letters dated 21.6.1996 to defendants 1 to 6 and the 1st defendant had sent a reply dated 25.6.1976 and the 6th defendant had sent a reply dated 5.7.1976. Subsequent thereto, the plaintiff had sent a legal notice daied 8.7.1976 and the 5th defendant had sent a reply dated 13.7.1976 and the 6th defendant had

6. The 3rd defendant filed a written statement to the effect that the 2nd defendant was the Managing Partner of the 1st defendant-firm and he was doing

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business in his own way without consulting the other partners and however though written statement was filed by the 3rd defendant, for reasons best known, the 3rd defendant had not chosen to contest the matter either entering into the witness box or otherwise.

7. The 5th defendant i.e., the appellant in the present appeal, had filed a detailed written statement. No doubt, the 6th defendant also had filed a written statement and made an attempt to throw the blame on the 5th defendant. It is brought to my notice that the 6th defendant also had filed an appeal C.C.C.A. No. 49/85, which was dismissed for default. In the written statement filed by the 5th defendant, the 5th defendant had taken a stand that he had no knowledge of the alleged transactions between the plaintiff and the 1st defendant or defendants 1 to 4 and 6th defendant till the receipt of the first letter from the 6th defendant. It was also further pleaded that in the light of the subsequent correspondence with the 6th defendant, it was established beyond doubt that fraud was played on the plaintiff by defendants 1 to 4 on one part and the 6th defendant on the other and the then Manager or agent of the plaintiff-Bank at Amberpet, Hyderabad. The 5th defendant had taken a specific stand that there is no cause of action against him and the suit is bad for misjoinder of parties. The 5th defendant also had further pleaded in detail as follows:

8. That this defendant has been acting as Commission Agent for the defendant No. 1 for the sale of the eggs dispatched by the defendant No. 1 to this defendant at Bombay since last more than 3 years for the sale thereof by the defendant at Bombay as its Commission Agent. The said eggs were from time to time directly dispatched by the defendant No. 1 to this defendant at Bombay and the same were immediately sold by this defendant as its commission agent at Bombay and after deducting the commission the remaining amounts were credited in the commission agency account of defendant No. 1 maintained by this defendant in the name of the defendant No. 1 and from the very beginning the goods were directly sent by the defendant No. 1 and at no time this defendant had received any documents from plaintiff-Bank or any other Bank for the delivery of the goods sent by the defendant No. 1. That the said six consignments were sent by the defendant No. 1 to this defendant directly through the defendant No. 6 and as goods thereof viz., eggs, were perishable, had been sold away immediately in due and ordinary course as the Commission Agent of the defendant No. 1 and after deducting the commission thereon the net sale proceeds were credited in the said commission agency account of defendant No. 1 in the books of account of this defendant and that this defendant from time to lime made payments of diverse amounts to the defendant No. 1 and the said amounts have been debited in the said account. The defendant No. 5 know nothing and was not concerned with the alleged transactions and/or facilities having been discontinued by the plaintiff-Bank. It is ridiculous and false even to suggest that the highly perishable commodity like eggs can be discounted with any Bank and that any Bank would even take risk of discounting of such highly perishable commodity. The very fact that such

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perishable goods were discounted by the plaintiff-Bank by itself goes to prove beyond doubt that the officer and/or officers concerned of the plaintiff-Bank were a party to the fraud played on the plaintiff-Bank. That this defendant was not a party to the alleged letter dated 12.2.1976 addressed to the defendant No. 6 by the defendant No. 1. The defendant denies the contents thereof and says that it seems that the said letter must have been got prepared in collusion of the defendant No. 1 and the defendant No. 6. It is not binding on this defendant. This defendant says that the alleged letter must have been got prepared as an afterthought inasmuch as neither any copy of the alleged letter was furnished to this defendant nor any reference thereof was at any time made even in the correspondence exchanged between the defendant No. 6 and this defendant. That this defendant had never been the bailee or trustee of the defendant No. 6 for storage of any goods. The said eggs were directly sent to this defendant to sell the same as usual on commission agency basis at Bombay and accordingly the same had been sold by this defendant. The entire story in this behalf put up is fabricated and concocted by the defendant No. 1 and defendant No. 6. This defendant denies that the defendant No. 6 entrusted the said eggs to this defendant for storage at Bombay and that this defendant advised the defendant No. 6 for disposing off the said eggs as early as possible as the same being the perishable goods. The said allegations are false and baseless. There was no occasion or necessity for his defendant for giving any advice or direction for selling the eggs of the defendant No. 1 as Commission Agent since the very beginning for the last more than 3 years and had been selling the same as such at Bombay. This defendant says that this defendant had not been doing and had never done the business of warehousing as alleged. This defendant says that in any event, if this defendant had been doing the business of warehousing it was not within the power of the defendant No. 6 to store the said eggs with this defendant inasmuch as the defendant No. 6 was merely a carrier. The duty of defendant No. 6 was to have contacted the Branch Office concerned of the plaintiff-Bank at Bombay and should have acted according to the instructions received. This defendant says that this defendant ha; proved the defendant No. 6 as an absolute liar in the correspondence, That this defendant is not aware of any letter addressed by the defendant No. 1 to the plaintiff and this defendant is not responsible for it nor is this defendant in any way concerned with anything which the defendant No. 1 and/or defendants 1 to 4 and 6 might have done in collusion. That the plaintiff has no right to involve this defendant in this suit inasmuch as for no reasons this defendant was responsible for payment of the suit claim. It seems that the fraud has been played on the plaintiff-Bank by the subordinates of the plaintiff''s Bank, the defendant Nos. 1 to 4 and defendant No. 6. This defendant says that if the defendant No. 6 was aware of the facts that the plaintiff s Bank at Bombay was the consignee the defendant No. 6 ought to have retained the said goods with it or would have contacted the plaintiff-Bank at Bombay and should have obtained instructions from the said branch and followed the same. This defendant says that if this defendant had been doing the business of warehousing as alleged the defendant No. 6 should have obtained from this

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defendant at the last any receipt or receipts for storage of the said eggs. That this defendant does not owe any amount to the plaintiff nor is this defendant in any way, responsible for any liability. This defendant acted as commission agent as per the directions of the defendant No. 1 and sold the goods sent to this defendant directly and after deducting the amount of the commission the remaining amount were credited in the said commission agency account of the defendant No. 1. This defendant says that the defendant No. 1 has from time to time withdrawn amounts from this defendant from the said commission agency account. This defendant craves leave to refer to and rely upon the said commission agency account, the forwarding letters of the defendant No. 1, the books of accounts of this defendant and the correspondence prior to suit. That the defendant''s representative had been to Hyderabad with this defendant''s Advocate from Bombay when they satisfied the officers of the plaintiff that this defendant had nothing to do with the fraud played on the plaintiff-Bank. This defendant further says that thereafter the office bearer of the C.I.D. Police had been to Bombay from Hyderabad to whom the full inspection of all the documents of this defendant was given whereby they were satisfied that this defendant was not a party to the fraud played upon the plaintiff. That this defendant is not the drawee and did not accept the bills of the plaintiff as buyers. This defendant has received the goods directly from the defendant No. 1 through defendant No. 6 who is a public carrier as the commission agent of the defendant No. 1. The defendant No. 6 never revealed that the plaintiff-Bank was the consignee. The defendant received the goods sent by the defendant No. 1 to this defendant as commission agent only and hence, this defendant cannot in any way be liable or responsible or accountable for the same. This defendant says that this defendant was not in any way concerned with the alleged documents inasmuch as the letters of dispatch were directly addressed and sent to this defendant by the defendant No. 1, through the defendant No. 6, That this defendant has already made payment of the sale proceeds of the goods after deducting the commission, to the defendant No. 1 as such, if the plaintiff has advanced any amount to the defendant No. 1 or its partners, the plaintiff can proceed against them and the defendant No. 6 who was their carrier. This defendant has unnecessarily been involved in this false litigation.

9. As already stated supra, the 6th defendant also had filed a written statement in a way throwing the burden and the blame on the 5th defendant. The 6th defendant had taken a stand that the defendants 1 to 4 are liable to the plaintiff, but however denied the joint and several liability. The 6th defendant also had explained the practice in relation to the goods consigned and the procedure. It was also pleaded that defendants 1 to 4 had given to the plaintiff-Bank title deeds relating to the lands, house plot, L.I.C. policies and a house and other properties for the purpose of securing the services from the plaintiff-Bank. It was also pleaded that the plaintiff-Bank as Bankers were never interested in the delivery of eggs consignment and the 6th defendant shall refer to and rely upon the 6th defendant''s Goods Consignment Notes 1 to 4 dated 30.1.1976,

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5.2.1976, 10.2.1976 and 16.2.1976 respectively in regard to consignments of loose eggs dispatched to consignee as plaintiff by the 1st defendant and its partners, defendants 2 to 4 and one more, i.e., Sri P. Ranga Rao, 22, Rakanolla village, Atchampet Taluq, Mahaboobnagar District, whose name is shown as a partner of the firm M/s. Balaji Agencies, should have been impleaded as a defendant. It was also further pleaded that the subject matter of the suit is covered by G.C. Note Nos. 5 to 10. The plaintiff never cleared the consignments but recovered the monies advanced by it from the 1st defendant and its partners. The plaintiff have suppressed the facts from this Court that against their advances to the 1st defendant and its partners, it has taken from them sufficient security to realise the amount from the defendant and its partner. From the previous dishonoured goods consignment Note Nos. 1,2,3 and 4 which were ultimately honoured by the first defendant and its partners and by taking securities from the charging the properties of the first defendant and its partners against the advances of Rs. 2,71,643.40 ps., it isevident that the plaintiff accepted the performance of the promise to repay the advances from the first defendant and its partners, and therefore, the plaintiff cannot take recourse to the 6th defendant to whom the plaintiff has advanced no monies and from whom the plaintiff never cared to take delivery of the consignment of the perishable eggs on arrival at Bombay for more than three months. The plaintiff has no cause of action against the 6th defendant and the decree may be passed only against the first defendant and its partners, vide Order 1 Rule 4(b) of the Code of Civil Procedure, 1908. Moreover, the decree has to be passed only against the first defendant and its partners by virtue of the document dated 12.2.1976 passed by the first defendant addressed to the 6th defendant, the original whereof is filed herewith, of which the plaintiff had and must be deemed to have the knowledge thereof. In case, the 5th defendants were the drawees and accepted the bills of the plaintiff as buyers the plaintiffs remedy shall be against the 5th defendants who were required by the plaintiff to retire the documents by paying the value of the eggs consignments dispatched under the documents. Section 41 of the Contract Act and Order 1 Rule 4(b) of the CPC would therefore, apply to the 5th defendants. The suit lorry receipts are not documents title and do not represent the goods alleged as pledged to the plaintiff. Therefore, the plaintiff could not have discounted those bills or advanced any monies, on those bills, under law. If he has done so it is sheerly against statute and illegal. The alleged lorry receipts are only nominal or accommodation papers resorted to by the plaintiffs Bank to advance loans to defendant No. 1 as a scheme as set out above under a credit facility arrangement extended to defendant No. 1 under a separate or different contract. The contention of the plaintiff that there is pledge in the advances made by the plaintiff to defendant No. 1 is untenable. The suit claim against this defendant on the alleged breach of the illegal contract is not maintainable and is liable to be dismissed with costs. Without prejudice to the above contentions and one from the other the 6th defendants say that they are the transport contractors. The consignors informed the 6th defendant that since they were booking for transport perishable consignments of eggs through the 6th

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defendants and that the first defendants discounted with and took advances against the goods consignment notes covering such egg consignments from their Bankers, State Bank of India, Amberpet. Hyderabad and that the consignments in ordinary course of transit reached Bombay earlier than G.C. Notes negotiated through the Bank, the first defendants directed the 6th defendants the name of M/s. Salahuddin & Co., 19, Crawford Market, Bombay (5th defendants) who could and would retain and store the eggs consignments as the 6th defendants property, and as the 6th defendants bailees and trustees. The 6th defendants were further assured that the said M/s. Salahuddin & Co., shall not use, deal with or dispose off the consignments until their relative goods consignments notes were surrendered to the 6th defendants by the parly interested in the same, duly discharged or retired from the Bank on their presentation. The 6th defendants were to have the carriers lien over such eggs consignments and were at perfect liberty collect and remove these consignments from the storage premises of M/s. Salahuddin & Company prior to the surrender of the relative G.C. Notes/lorry receipts to the 6th defendants and the payment of the 6th defendants freight, octroi, truck detention and other incidental charges and expenses incurred in respect of these eggs consignments and finally undertook and agreed to indemnify the 6th defendant of all costs and consequences arising from storing the consignments in this manner with the 5th defendants. The 6th defendants are producing herewith the original writing passed by the first defendants to the 6th defendants dated 12.2.1976 recording this agreement, holding themselves now solely and exclusively liable for a decree against themselves under Order 1 Rule 4(b) of the Code of Civil Procedure. The plaintiff is the member of the Indian Bankers Association, Stadium House Block No. 3, 6th floor, Veer Nariman Road, Churchgate, Bombay. The 6th defendants have been recommended by the said Indian Banks Association to all its member Banks, including the plaintiff to place the 6th defendants on their approved list and to accept the goods consignment notes/lorry receipts of the 6th defendants for the purpose of discounting or negotiation. As per the Clause 7 of the Circular of the Indian Banks Association bearing No. LT/70-41/4649, dated 29.8.1976 the plaintiff, as its member Bank, was and is prohibited from accepting lorry receipts covering consignments of perishable goods unless adequate arrangements for cold storage and refrigeration during transit and before delivery are made. The plaintiff and the 6th defendants, through the Indian Banks Association are bound by this clause. On account of this condition the plaintiff should not have advanced any monies against the said six goods consignment notes. By doing so, they did it at their own risk and responsibility and the 6th defendants cannot concerned with the advance made by the Rank to the first defendants and its partners in respect of these perishable consignments without adequate arrangements for cold storage in transit. In respect of the first four consignments, vide G.C. Note Nos. 1 to 4 which were dishonoured at Bombay, the plaintiff recovered the amount from the first defendants and its partners. Similarly, the plaintiff should recover the advances given by them in respect of the latter six goods consignment notes from the first defendants and its partners only. The 6th defendants booked the

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following six full truck load consignments of loose eggs ex-Secunderabad for carriage and delivery to the plaintiff as the consignee on the assumption of the previous compliance of the mandatory direction in Clause 7 of the Circular No. LT/70-41/4649 dated 29.8.1976 from the Indian Banks Association regarding the plaintiff being prohibited from advancing monies against the perishable commodities unless cold storage facilities exists during transit and at the destination.

G.C. Note/ Lorry Reel. No. Booking Despatch Date Truck No. Trip sheet manifest No. Unloaded for storage at Thana

5. 20.2.76 MHT-9354 7750 22.2.1976

6. 26.2.76 MHT-7404 7751 29.2.1976

7. 4.3.76 MHT-7059 7756 6.3.1976

8. 10.3.76 A AT-1983 7757 13.3.1976

9. 20.3.76 MHD-3943 7758 23.3.1976

10. 27.2.76 APB-706 7761 29.3.1976

The above six consignments, on arrival at the destination (Thana) remained in the custody of the 6th defendants said bailees or trustees for storage pending delivery to the consignee producing the original consignees copies of the relative Goods Consignment Notes to the 6th defendants. The above six perishable consignments of eggs remained with the 6th defendants bailees or trustees for storage, unclaimed or uncleared for a long time. As per Clause-5 of the terms and conditions of the contract of carriage incorporated in the relative Goods Consignment Notes/lorry receipts, the 6th defendants had the rights to dispose off perishable lying undelivered after 48 hours of arrival without notice. These terms and conditions arc prescribed by the Indian Banks Association of which the plaintiff is a member. In any case, the conduct of the 6th defendants was the conduct of a reasonable and prudent man The 5th defendants, the 6th defendants bailees and trustees for storage advised the 6th defendants that the eggs, being perishable were likely to gel rotten if not disposed of within a week of arrival. The 6th defendants, therefore, advised the 5th defendants to sell and dispose of these perishable eggs before they got completely rotten or spoiled. By prolonging the sale of the eggs in the hope that the plaintiffs Bombay office will call and take delivery of the consignments the eggs deteriorated to such an extent that according to the 6th defendants said bailees and trustees, Bombay only a sum of Rs. 57,033.86 was realised in respect of these six consignments of loose eggs. The 5th defendants informed the 6th defendants Bombay Manager on July 5, 1976 that on finalising the accounts, a sum of Rs. 57,083.86 was lying with them by way of realisation of the spoiled eggs which remained unclared and unclaimed for unnecessarily long time. On receiving the letter dated 21st June, 1976 the 6th defendants by their Counsels letter dated July 5, 1976 recorded the above facts and called upon the plaintiff to surrender the said six original goods

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consignment notes so that they could direct their said bailees or trustees for storage to remit the sale proceeds of Rs. 57,083.86 directly to the plaintiff. The 6th defendants expressed surprise that when the plaintiff, having its Head Office and 70 Branch Offices in Bombay have purchased/discounted the six G.C. Notes/ Lorry Receipt for Rs. 2,71,643.40 ps. in the months of February and March, 1976 in respect of the consignments, which comprised of to the plaintiffs knowledge, perishable eggs should enquire about the same after more than 3 months through their first letter dated 21.6.1976. The 6th defendants are transport contractors engaged in transportation of goods by road. They are neither egg merchants nor do they have any facilities for cold storage and refrigeration during transit and pending delivery. The 6th defendants deny that they delivered the consignments to the 5th defendants. The consignments were off-loaded in the 5th defendants premises as the 5th defendants, being egg merchants, had the storage arrangements for eggs consignments and the 6th defendants were directed to the 5th defendants by the first defendants and its partners vide their writing dated 12.2.1976 and further the plaintiff were aware that the prior four consignments of eggs comprising of four full truck loads were in similar manner off-loaded in the premises of the consignee the payment of which after the 5th defendants dishonoured the documents, were recovered by the plaintiff from the first defendants and its partners. The plaintiff never cared to send any reply to the 6th defendants letter dated 5th July, 1976. There was some correspondence between the 5th defendants and the 6th defendants. The 6th defendants clarified to the 5th defendant that they were not concerned with the confidential internal business relation, arrangement or transactions between the 5th defendants and the first defendants and its partners. The 6th defendants reiterated that they unloaded the consignments for storage with the 5th defendants on the basis of the written document dated 12.2.1976 passed by the first defendants to the 6th defendants and thus treated the 5th defendants as the 6th defendants bailees and trustees for storage. The 6th defendants however, called upon the 5th defendants to render an up-to-date statement of account of any monies remitted by them directly to the first defendants and its partner. The 5th defendants did not give any such accounts. The 5th defendants informed the Bombay Manager of the 6th defendants that on finalizing the accounts, a sum of Rs. 57,083.86 was lying with them by way of sale proceeds of the spolied aggs which had remained uncleared and unclaimed by the consignees for unnecessarily long time. The plaintff is alleged to have advanced Rs. 2,71,643.40 to the first defendants and its partners. If there is any truth in what the 5th defendants say the first defendants and its partners have again received Rs. 2,71,643.40 less commission, from the 5th defendants. The 6th defendants deny that they have done anything wrong. They have, as directed, stored the goods with the 5th defendants, eggs merchants, pending clearance by the plaintiff, but since eggs being perishable commodity, they got the same sold and disposed of through the 5th defendants, who have informed the 6th defendants that they realised Rs. 57,083.86. Subsequently the 5th defendants took up a false stand that they had acted as commission agents for the first defendants. As between the 5th

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defendants and the 6th defendants, this could not be true. The 5th defendants off-loaded all the six consignments and passed the acknowledgements and confirmation to the effect that the consignments were received by them as per the relative goods consignments notes/lorry receipts, which show that the 5th defendants had the full knowledge that the consignments belonged to State Bank of India whose name was mentioned as consignee on all the six relative goods consignment notes under which the eggs consignment, were carried and off-loaded at Thana/Bombay for storage pending delivery to the party producing the original G.C. Notes/Receipts. It, therefore, confirms that the 5th defendants acted as bailees, trustees and agents for the 6th defendants and the plaintiff for the storage of the eggs consignments. This is further supported by the writing of the first defendant, dated 12.2.1976 directing the 5th defendants to act as the 6th defendants bailees or trustees for storage of the eggs consignments. The 6th defendants note from the earlier goods consignment note Nos. 1 to 4 that the 5th defendants must have been the drawees and accepted the bills in respect of the eggs consignments, accepting liability as buyers directly to the plaintiff and not as commission agents for the first defendants, apart from the position that insofar as the 6th defendant was concerned the 5th defendants acted as bailees and trustees for storage of the six eggs consignments till the original copies were surrendered to the 6th defendants and further acted as agents for sale on behalf of the 6th defendants when the eggs consignments were sold under Clause 5 on the relative goods consignment notes. In case the 5th defendants were the drawees and accepted the plaintiffs bills as mentioned in para 16 of the plaint, they would then become liable for the price of the six consignments of eggs directly to the plaintiff. The 6th defendants say that as per the registration of the firm No. 1410/74 one Sri P. Sree Ranga Rao is also a partner of M/s. Balaji Agencies and the plaintiff should have added him as the defendants. The correct name of the 6th defendants is Messrs M. Nusserwanji & Co. The 6th defendants are a registered partnership concern. The 6th defendants are not aware of and do not admit that the plaintiff granted to the first defendants a D.D. purchase limit of Rs. 3.5 lakhs. The plaintiff is hereby called upon to produce its record to show on what basis and security the plaintiff granted a D.D, purchase limit of Rs, 3.5 lakhs to the first defendants. The 6th defendants say that it is customary for the Banks to secure themselves by creating a charge on or hypothecation of the properties of the party to whom it granted a D.D. purchase limit and in the event of non-payment, take recourse to the securities for realisation of the amount. The 6th defendants hereby call upon the plaintiff to disclose what action it has taken to recover the alleged amount of Rs. 2,71,643.40 advance to the first defendants and its partners when the documents were returned dishonoured from Bombay in February, March, April, 1976. The 6th defendants say that the plaintiff are prohibited by the Indian Banks Association vide Clause 7 of the IBA''s Circular dated 29.8-1975 to accept and advance monies against lorry receipts covering consignments of perishable goods unless adequate arrangements for cold storage and refrigeration during transit and before delivery were made. Secondly it is against the directive of the Reserve Bank of India to advance

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monies to the extent of full value of the consignments, especially when the consignment is fragile and perishable like eggs. Thirdly, the original G.C. Notes from Hyderabad to Bombay if negotiated by a Bank by registered post and presented to the ultimate consignee, lakes at least a week, whereas the life span of eggs, without cold storage facilities may be hardly a few days. The 6th defendants hereby call upon the plaintiff to produce the documentary bills presented by the first defendants to the plaintiff tor discounting, since according to the 5th defendants the first defendants had been sending eggs consignments on commission basis, that is there could not be any firm sale bills and invoices of the first defendants. It appears that the first defendants has perpetrated a fraud on the plaintiff by presenting bogus sales bills in view of the submission by the 5th defendants that they never purchased the consignments and they remitted the sale proceeds, after deducting their commission, to the first defendants. The first defendants and its partners should account for such amounts if any received from the 5th defendants and pay over the same to the plaintiff. The 6th defendants hereby call upon the plaintiff to name the drawees of such bills and whether the drawees had accepted such bill/bills or Exchange/hundies for payment. If the drawees have accepted the bills as mentioned in para 16 of the plaint, the plaintiff''s remedy lies only against such drawees of the bills. The 6th defendants are not aware of and also do not admit that the first defendants presented for discounting six bills nor do they admit that the plaintiff paid amounts mentioned against each bill. The 6th defendants hereby call upon the plaintiff to produce the bills drawn by the first defendants on the 5th defendants. The 6th defendants deny that such bills were dispatched along with the trucks. The plaintiff must prove that the documentary bills were to be retired by the drawees/5th defendants. The plaintiff must show that the 5th defendants were the drawees and accepted the bills and became themselves liable to pay to the plaintiff by non-retirement of the bills. The 6th defendants deny that they delivered the consignments to the 5th defendants or colluded with the 5th defendants. The consignments were off-loaded by the 6th defendants with the 5lh defendants as the 6th defendants'' bailees and trustees for storage pending their delivery to the party producing the relative G.C. Notes and ultimately the eggs consignments, being of perishable nature, had to be and were sold and disposed of by virtue of Clause No. 5 on the relative goods consignment notes. The 6th defendants have not seen the replies of the first defendants dated 4.5.1976 and 25.6.1976 giving the alleged reasons for the drawees not having retired the bills. The 6th defendants reserve the right to deal with them and to amend the written statement on inspection of the same. The 6th defendants deny that they delivered the consignments of eggs to the 5th defendants. The 6th defendants say that as per the instructions they kept the consignments with the 5th defendants as the 6th defendants bailees and trustees for storage till any party or the plaintiff, not necessarily the 5th defendants, surrendered the original goods consignment notes. The 6th defendants were merely carriers and not eggs merchants having premises and cold storage facilities to store the eggs consignments on arrival at Bombay. The 6th defendants deny that they delivered

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the consignment to the 5th defendants as alleged or otherwise. The 6th defendants deny that they have committed any breach of contract as alleged. The 6th defendants deny that they are setting up the writing dated 12.2.1976 executed by the first defendants and to plead the same as an excuse to commit breach of the terms and conditions of the lorry receipts/Goods Consignment Notes. The plaintiff wrongly presumed that the 6th defendants effected delivery of the eggs consignments to the 5th defendants in violation of the conditions of the relative lorry receipts/G.C. Notes. The document dated. 12.2.1976 executed by the first defendants addressed to the 6th defendants in fact clearly says that the 5th defendants shall not use deal with or dispose of the consignments until the relative G.C. Notes were surrendered to the 6th defendants. It further says that the 6th defendants were at perfect liberty to collect and remove the same from the 5th defendants custody or premises prior to the surrender of the relative G.C. Notes. Thus, there was no delivery of the eggs consignments by the 6th defendants to the 5th defendants. The 6th defendants would have off-loaded the consignments in the plaintiffs premises in Bombay if the plaintiff had the cold storage arrangements and at the time of booking of the consignments at Secunderabad the plaintiff had informed the 6th defendants where such place was at the destination. The fact that the plaintiff''s branch office al Bombay returned the documents to its Hyderabad office goes to show that the plaintiff never intended to take delivery of the eggs consignments nor it had any premises at Bombay available with cold storage facilities to keep the eggs consignments. The 6th defendants say that it was neither obligatory nor necessary for them to bring to the notice of the plaintiff the recommendation made by the first defendants in their writing dated 12.2.1976 since the same pertained to storage of the eggs consignments on arrival and not the delivery of the same. The plaintiff is a member of the Indian Banks Association and under the scheme under which the 6th dei''endants are granted approval the 6th defendants are to print the terms and conditions of the contract of carriages exactly in the same manner as prescribed by the Indian Banks Association representing the plaintiff as its member. Clause 5 of the relative lorry receipt/ G.C. Note Nos. 5 to 10 held by the plaintiff provide that the 6th defendants shall have the right todispose of perishable articles lying unclaimed or undelivered after 48 hours of arrival without notice. The 6th defendants, therefore, deny that any notice to the plaintiff, having over 70 branch offices in Bombay was necessary before sale of the perishable consignments of eggs, which at least fetched Rs. 57,083.86 as otherwise the same would have become rotten and rendered a total loss. The 6th defendants deny that the sale of the six consignments of perishable eggs was illegal and not binding on the plaintiff. The plaintiff''s Bombay office simply sent back the G.C. Notes/lorry receipt to the plaintiff at Hyderabad, instead of coming forward to take delivery of the six consignments or issuing directions for their storage immediately on arrival at Bombay. The plaintiff wrote to the 6th defendants for the first time on 21.6.1976, after a lapse of more than three months in regard to perishable consignments of eggs arrived in Bombay in February, March, 1976. The 6th

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defendants agree that since the 5th defendants have acknowledged receipts on the six eggs, consignments on the lorry receipts/Goods Consignment Notes, the 5th defendants cannot plead ignorance of the consignments having been dispatched under the documentary bills negotiated through the plaintiff-Bank. The 5th defendants were aware that the consignee of these eggs consignments were the plaintiff. The 5th defendants would be liable to the plaintiff if the 5th defendants wrongly or falsely claim that they sold off the consignments on commission basis and remitted the proceeds to the first defendants and its partners. The 6th defendants also had pleaded several other aspects.

10. On the strength of the pleadings of the parties, as many as 13 issues were settled by the trial Court, which are as follows :

1. Whether the plaintiff-Bank was prohibited from discounting the bills accompanied with L.R. covering perishable goods? If so, whether the plaintiffs suit is liable to be dismissed against any of the defendants?

2. Whether any officer of the plaintiff-Bank colluded with any of the defendants for committing fraud against plaintiff-Bank? If so, whether the plaintiff''s suit is liable to be dismissed against any of the defendants?

3. Whether under the D.D. purchase facility extended by the plaintiff to the D1 to D4 on the strength of the securities furnished by D1 to D4 the plaintiff is bound to claim the suit amount only from D1 to D4 and whether D1 to D4 alone are liable to the suit claim?

4. Whether D5 is liable to pay to the plaintiff the suit amount representing the purchase price of the bills and the amounts covered by the bills or any part of it?

5. Whether D5 at the instance of D6 sold any of the consigned goods and realised any amount? If so, whether D5 is liable to account for that amount to plaintiff?

6. What is the effect of the letter indemnity bond executed by D1 to D6 dated 12.2.1976?

7. Whether D6 is liable to pay to the plaintiff the suit amount representing the purchase price of the bills and the amounts covered by the bills or any part of it?

8. Whether the suit is bad and liable to be dismissed for misjoinder of causes of action?

9. Whether the suit is bad and liable to be dismissed for non-joinder and misjoinder of parties?

10. Whether the plaintiff''s claim for interest against D5 and D6 in a suit of damages or compensation is maintainable?

11. Whether this Court has no jurisdiction to try this suit?

12. Whether the Court-fee paid is sufficient?

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13. Whether the suit claim is barred by limitation against any of the defendants?

As already stated supra, the defendants 5 and 6 alone had contested the matter and though the 3rd defendant had filed the written statement, he had not participated in the trial. On behalf of the plaintiff, the Manager of the Bank was examined as PW-1 and Exs. A-1 to A-46 were marked. On behalf of appellant-5th defendant, a representative of the 5th defendant was examined as DW-1 and on behalf of the 6th defendant, a representative of the 6th defendant was examined as DW-2 and Exs. B-1 to B-58 were marked. The Court below had discussed Issue No. 1 at paragraph-8, Issue No. 2 at paragraph-9, Issue No. 3 at paragraph-10, Issue Nos. 4 and 5 at paragraph-11, Issue No. 6 at paragraph-12, Issue No. 7 at paragraph-13, Issue Nos. 8 and 9 at paragraph-14, Issue No. 10 at paragraph-15, Issue No. 11 at paragraph-16 and Issue Nos. 12 and 13 at paragraph-17 of the judgment and had ultimately decreed the suit as already stated supra and aggrieved by the said judgment and decree, the 5th defendant had filed the present appeal.

11. Heard both the Counsel on record and also perused the material available on record.

12. Mrs. Rasheeda Thabassum, the learned Counsel representing Mr. Bala Gopal, the learned Counsel appearing on behalf of the appellant-5th defendant, had made the following submissions. The learned Counsel while making elaborate submission had taken me through the pleadings of the respective parties and also the evidence available on record. The learned Counsel also had brought to my notice that C.C.C.A. No. 49/85 filed by the 6th defendant was dismissed for default and even the application to restore the same was again dismissed for default. The learned Counsel had further submitted that though the 3rd defendant had filed a formal written statement, defendants 1 to 4 had not contested the matter at all and the 5th and the 6th defendants had contested the matter. The learned Counsel also had submitted that it is not in dispute that defendants 5 and 6 are not partners in the 1st defendant-firm. The 6th defendant is only a transport Company and the 5 defendant is impleaded as a party only as one who had received the goods and sold the said goods. The learned Counsel also had submitted that there is no cause of action for the 1st respondent-plaintiff to proceed against the appellant-5th defendant and the suit is bad even for misjoinder of parties. The learned Counsel also had taken me through the evidence of PW-1, DW-1, DW-2 and also had pointed out several improbabilities and also the conduct of the Branch Manager PW-1, who was in fact prosecuted and no doubt which had ended in acquittal. The learned Counsel also had strenuously contended that there is no privity of contract at all between the plaintiff and the 5th defendant at any point of time and the burden of establishing how the 5th defendant also is liable, is heavy on the plaintiff and except the vague evidence of PW-1, there is no other evidence available on record and unless the acceptance of the bill by the drawee is established, the plaintiff cannot fasten the 5th defendant with any liability at all and the learned

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Counsel also had placed reliance on Seth Jagjivan Mavji Vithlani Vs. Ranchhoddas Meghji, , and Benares Bank, Limited Vs. Priya Das Pitam Chand and Others, The learned Counsel also had contended that even the aspect of authorised agent had not been established at all and in such a case there is no question of invoking the doctrine of unjust enrichment. The learned Counsel also had pointed out in view of the inconsistent and contradictory stand taken by the defendants.5 and 6, no collusion between them can be inferred, but on the contrary in the light of the facts and circumstances collusion between defendants 1 to4 and PW-1 can be definitely inferred. The learned Counsel had drawn my attention to Ex. A-31, the deposition of the 5th defendant as PW-14 for prosecution in C.C. No. 17/78 and also Ex. B-12, the statement u/s 313, Cr.P.C. and Exs. B-9 and B-11. The learned Counsel also had stressed on Ex. B-1 and had contended that the plaintiff cannot act contrary to the provisions or guidelines specified in Ex. B-1. The learned Counsel had drawn my attention to Exs. A-1 to A-6 and also Ex. A (sic) A-46 and also Sections 7, 33 and 61 of Negotiable Instruments Act and Section 70 of the Indian Contract Act. The learned Counsel also had further contended that in fact the facts reveal that there is sufficient security available for the plaintiff-Bank to proceed against the 1st defendant and its partners only and in fact a demand was made for additional collateral security also and hence the plaintiff-Bank is entitled to the relief, if any as against defendants 1 to 4 and not against 5th defendant as such: If at all there is any liability on the part of the 5th defendant, it is between defendants 1 to 4 and 5th defendant and on the strength of it, unless otherwise acceptance is established, the 5th defendant as such cannot be fastened with any liability whatsoever. The learned Counsel also had drawn my attention to Ex. A-13 in this regard. The learned Counsel also had contended that the mere knowledge of the transactions in any way will not bind the 5th defendant. The learned Counsel also had elaborately argued on the ingredients of the doctrine of unjust enrichment and had placed strong reliance on Union of India (UOI) Vs. Sita Ram Jaiswal, .

13. Mr. Narender Reddy, the learned Counsel representing the 1st respondent-plaintiff Bank had narrated in detail the practice and the procedure and had contended that the suit was instituted as against the 5th defendant also by the plaintiff-Bank not only as drawer and drawee, but also in view of the facts and circumstances explained in paragraph-10 of the plaint. The learned Counsel also had drawn my attention to paragraphs 5 and 6 of the written statement of the 5th defendant where there is total denial of the knowledge, but however there are admissions made by DW-1 which go to show that he has ample knowledge about the transactions and thus the pleading in fact is at variance from proof. The learned Counsel had contended that this conduct of DW-1 clearly goes to show that though the goods were delivered by the 6th defendant to 5th defendant and the 5th defendant received goods and sold the goods and realised the amount, the 5th defendant intends to retain the amount which he is bound to pay to the plaintiff-Bank in view of the facility extended by the plaintiff-Bank to the 1st defendant firm. The learned Counsel also had taken me through both the

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oral and documentary evidence and how the 1st defendant has been utilising the facility and under what circumstances, the 5th defendant also is liable to pay the amount. The learned Counsel also had pointed out that the violation to the contravention of the instructions or the guidelines under Ex. B-1 at the best can be an irregularity and Ex. B-1 cannot be taken as an advantage by the 5th defendant to escape from the liability itself. The learned Counsel also had drawn my attention to Exs. A-33 to A-46. The learned Counsel also had pointed out that the 6th defendant parted the goods to the 5th defendant without permission and the 6th defendant is one of the recognised transport carriers maintained by the plaintiff-Bank. The learned Counsel also had contended that in the light of the fact that the 5th defendant had derived the benefit and had been retaining the amount, the plaintiff is entitled to maintain action as against the 5th defendant also even in view of Section 72 of the Indian Contract Act. The learned Counsel also had brought to my notice that the very fact that PW-1 was prosecuted, is of no consequence and however it is afact that PW-1 also was acquitted. The learned Counsel had taken me through the judgment of the Court below and had contended that proper and convincing reasons had been recorded by the Court of first instance and hence the Appellate Court should be slow in disturbing such findings. The learned Counsel also had contended that at any rate, the technicalities and objections relating thereto which are being raised by the appellant-5th defendant should not come in the way of doing substantial justice since the 1st respondent-plaintiff is a Bank and public money is involved. The learned Counsel had placed strong reliance on United Bank of India v. Naresh Kumar and Ors. AIR 1997 SC 3.

14. On the strength of the elaborate submissions made by both the Counsel and also in the light of the evidence of PW-1, DW-1 and DW-2 and Exs. A-1 to A-46 and Exs. B-1 to B--58, the following points arise for consideration in this appeal.

1. Whether there is any privity of contract in between the appellant-5th defendant and the 1st respondent-plaintiff Bank?

2. Whether the appellant-5th defendant is a drawee to the bills or only a commission agent?

3. Whether the 1st respondent-plaintiff Bank had discharged the burden relating to the drawer and drawee relationship so as to fasten the liability on the strength of the bills, on the appellant-5th defendant?

4. Whether any representative of the appellant-5th defendant had signed in the bills either as agents or authorised persons of the appellant-5th defendant?

5. Whether the appellanl-5th defendant is liable to any portion of the suit amount to the 1st respondent-plaintiff Bank?

6. Whether the appellant-5th defendant also is liable to pay the suit amount in view of the provisions of the Negotiable Instruments Act and also the Indian Contract Act?

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7. To what relief?

15. It is pertinent to note that though the questions relating to jurisdiction, limitation and Court-fee had been raised, both before the Court of first instance and also before this Court, both the Counsel had not advanced any arguments relating to those aspects. Now, coming to the Points which fall for consideration in this appeal, for the purpose of convenience, Points 1 to 6, in view of the fact that they are so closely interrelated, can be discussed together.

The pleadings of the respective parties had been already narrated in detail above and they need not be repeated again. The principal question that was elaborately argued by both the parties is, whether there is any privity of contract at all as between the appellant-5th defendant and the 1st respondent-plaintiff Bank. No doubt, for the purpose of establishing this fundamental aspect of privity of contract the other contentions relating to the drawer and drawee relationship and also the procedure followed by the 1st respondent-plaintiff Bank and also the 1st defendant had been argued at length by both the Counsel. On behalf of the 1st respondent-plaintiff Bank, PW-1 was examined. PW-1 had deposed about the seriesof events and how the " st defendant firm was granted Demand Draft purchase facility initially for Rs. 2 lakhs and enhanced to Rs. 3.50 lakhs subsequent thereto and the procedure followed while the 1st defendant had been sending eggs to Bombay through the lorries. PW-1 deposed that the 1st defendant used to give lorry receipts and invoices for discounting and used to draw money immediately handing over the invoices and lorry receipts to the Bank and the Bank used to send such bills to Bombay to the 1st respondent-plaintiff''s Branch at Bombay and the consignees used to pay the amount to the plaintiff-Bank and lift the consignment after retirement of the bills. PW-1 also deposed that the 1st defendant had discounted six bills with lorry receipts with the Bank in February and March, 1976, marked as Exs. A-1 to A-6 and the 2nd defendant signed Exs. A-1 to A-6 on behalf of the 1st defendant and Exs. A-7 to A-12 are the corresponding lorry receipts which were issued by the 6th defendant and Exs. A-7 to A-12 bear numbers of lorries in which the goods were transported and Exs. A-1 to A-6 were endorsed in favour of the plaintiff-Bank. The bills, Exs. A-1 to A-6 were entered into register and together with Exs. A-7 to A-12, they were sent to the plaintiffs Branch at Bombay for collection and those bills were presented to the appellant-5th defendant for payment and retirement of the bills and signatures of the 5th defendant had been obtained on Exs. A-1 to A-6. PW-1 also deposed that Exs. A-7 to A-12 were not endorsed by the Bank since no payment was made and hence Exs. A-1 to A-6 were returned by the Bombay Branch since amounts were not paid and subsequent thereto a letter dated 21.6.1976 was sent to the 1st defendant and Ex, A-13 is its copy. Earlier, the Bank had sent another letter dated 24.4.1976 to the 1st defendant which was also referred to in Ex. A-13 and Ex. A-14 is the reply dated 21.1.1976 and the 1st defendant sent a reply on 25.6.1976 which is marked as Ex. A-15 and PW-1 also deposed that the 6th defendant delivered the consignments in Exs. A-7 to A-12 to the 5th defendant and the lorry receipts were not delivered

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to the 6th defendant by the 5th defendant by then and the plaintiff-Bank issued a notice to the defendants 1 to 3, 5 and 6 and called upon them to pay back the amount due to the Bank under Exs. A-1 to A-6, which is marked as Ex. A-18. Exs. A-19 to A-21 are the postal acknowledgements and Ex. A-22 is the reply by the 5th defendant. Ex. A-23 is the reply by the 6th defendant. The 5th defendant sent his further reply on 13.6.1976, Ex. A-24 and another reply by the 6th defendant dated 16.7.1976 is Ex. A-25 and Ex. A-26 is the reply from the 6th defendant on 20.7.1976 and Ex. A-27 is the reply from the 5th defendant. Ex. A-28 is another reply from the 5th defendant and the statement of account is marked as Ex. A-29. PW-1, on recall and also in further chief-examination had stated that prior to the suit transaction, the 5th defendant had retired as many as 28 bills through S.B.I. Mandvi Branch, Bombay and those 28 bills emanated from S.B.I. Amberpet Branch. Ex. A-32 is the voucher retired by the Mandvi Branch for Rs. 55,100/-, dated 24.1.1976 for the amount paid covered by Bill No. 19 and Exs. A-33 to A-46 are the payment vouchers in respect of the bills retired by the 5th defendant and Exs. A-33 to A-46 show the name of the 5th defendant as the payee. However, in cross-examination PW-1 had stated that on behalf of the 5th defendant, someone had signed on Exs. A-33 to A-46 and he cannot say whether the person who had signed is an authorised person of the 5th defendant. PW-1 in cross-examination had also admitted that at the time of sanctioning the facility, landed properties were taken as security and the said security continued for all the transactions and in all the transactions including the suit transaction, the relationship of the Bank and the defendants 1 to 4 is that of lender and borrower. PW-1 deposed that the 5th defendant also can be treated as a party to the credit facility since he is adrawee of the suit bills. PW-1 also deposed that the drawee of bill will have an option either to accept or not to accept and even after acceptance, either to pay or not to pay and he cannot identify the signature in Exs. A-1 to A-6 and there is signature of someone on the bills Exs. A-1 to A-6, but he cannot say whether the signatures are that of the 5th defendant or on behalf of the 5th defendant and there are no seals of the 5th defendant Company on the bills. PW-1 also deposed that he cannot say when they were informed by the Bombay Office regarding non-acceptance of the bills, Exs. A-1 to A-6. But however, he had deposed that as soon as the intimation was received regarding non-payment of bills, notice was issued to defendants 1 to 4 for payment of money covered by the bills.

16. PW-1 also was cross-examined at length by the 6th defendant. In the cross-examination of the 6th defendant, PW-1 deposed as follows:--

The agreement was signed by the 1st defendant Company wherein D.D. purchase facility has been extended or granted. The agreement contains various terms and conditions. The said agreement is not filed in this Court. It is not true to suggest that the agreement is not filed deliberately because our case will be weakened. It is true that as per that agreement if bills are not retired by the drawee and if they are returned to us we have to claim the amount of the bills only from the 1st defendant. At the time of the agreement the 1st defendant had

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given security of some land, house plot at Guntur, house at Nadivelli at Guntur District. PW-1 also admitted that the Indian Bankers Association had issued a Circular dated 29.8.1975 to the effect that the Banks should not accept lorry receipts covering consignments of perishable goods unless adequate arrangements for cold storage and refrigeration during transit and before delivery are made and it was marked as Ex. B-1 and PW-1 also had admitted that the amount was lent to the 1st defendant mainly on the security furnished by the 1st defendant and the partners. PW-1 in fact was cross-examined at length and was confronted relating to several facts. Ex. B-11 is the certified copy of the F.I.R. issued by the D.S.P., C.B.I. SPE cases. PW-1 was prosecuted along with defendants 2 and 3 and Ex. B-12 is the certified copy of Section 313, Cr.P.C. statement. PW-1 also admitted that the security papers were not filed into Court. However PW-1stated that even prior to the suit transaction, the 5th defendant had retired as many as 28 bills through S.B.I. Mandvi Branch, Bombay and all these bills had emanated from the S.B.I., Amberpet Branch. Much stress had been placed on these documents only to show that DW-1 is not a trustworthy witness since in the pleading, the 5th defendant had taken a stand, which is one of totai denial.

17. Apart from the evidence of PW-1, DW-1 and DW-2 also were examined. DW-1 is the Proprietor of the 5th defendant concern and DW-2 is the Manager of Bombay Branch of the 6th defendant in the suit and also the G.P.A. holder of the partners of the 6th defendant-firm. DW- 1 had in fact deposed that Exs. B-3 to B-8 are the original letters of the 1st defendant addressed to the 5th defendant, dated 26.2.1976, 4.3.1976, 10.3.1976, 20.3.1976 and 21.3.1976, which pertain to the suit consignment. PW-1 deposed that the consignment was sent in a lorry directly to the 5th defendant which was received at the shop and as they were perishable the eggs were sold under six bills, Exs. B-9 to B-14 and the amount realised had been sent to the 1st defendant partly through telegraphic transfer through Banks and partly in cash and the receipts relating to payment of cash to the 1st defendant were marked as Exs. B-15 to B-19. DW-1 also deposed that after adjustment of the entire amount, they have to pay a sum of Rs. 34,509.52 ps., to the 1st defendant and DW-1 had specifically deposed that Exs. A-1 to A-6 do not contain his signatures and no one.on his behalf atleast had signed on any one of them and he had no knowledge about the terms between the 1st defendant and the 6th defendant relating to the transport of eggs. No doubt, in the cross-examination of the 6th defendant, an attempt was made to show about the knowledge of the 5th defendant about the suit consignment vis-a-vis the plaintiff-Bank, DW-1 when cross-examined by the plaintiff had admitted that they maintained regular account books which are available with them and his father was doing eggs business and had denied the suggestion that in 1996 his father was the proprietor of the 5th defendant and that to avoid presence of his father in Court he was slating that he was the proprietor. DW-1 also had denied the suggestion that earlier the 1st defendant had sent 28 bills through the Bank accompanied by lorry receipts for retirement by them. DW-1 also had denied the

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suggestion that he had deposed in the criminal case that the signatures in Exs. A-1 to A-6 i.e., Exs. P-1 to P-6 therein, bear the signatures of his father and servant. He had specifically deposed that he cannot say whether they are the drawees in respect of Exs. A-1 to A-6 transactions. DW-1 also deposed that the bill book containing Exs. B-1 to B-26 and the receipt book, Exs. B-27 to B-31, do not bear the seal or the endorsement of the Income Tax Authorities and there are no audit entries also on them. It was suggested to him that Exs. B-21 to B-31 were fabricated for the purpose of suit, which was specifically denied. Ex. A-31 is the certified copy of the deposition of DW-1 himself in C.C. No. 17/78. The day book, Ex. B-43 and also relevant entries, Exs. B-43(a) for the year 1975-76 with translated copies, had been filed into Court.

18. Apart from the evidence of DW-1, the evidence of DW-2 also is available on record. As already stated supra, DW-2 is the Manager of Bombay Branch of the 6th defendant and also the G.P.A. holder of the partners of the 6th defendant-firm. DW-2 had deposed that only three partners of the 1st defendant firm are impleaded in the suit and Ex. B-44, registration extract, shows four partners and Sri Ranga Rao, one of the partners, had not been impleaded as a party to the suit at all. DW-2 also had deposed about Exs. A-7 to A-12 and also Exs. B-45 to B-48, the consignees copies of the G.C. Notes and all these consignments were sent on owners risk and the same is indicated even in the G.C. Notes. DW-2 also had stated that since the eggs are perishable, they had delivered them to the 5th defendant in accordance with the request of the 2nd defendant. DW-2 also had deposed that after Ex. B-2 indemnity bond, consignments 3 to 10 were entrusted to them under Exs. B-47 and B-48 and Exs. A-7 to A-12. DW-2 also had stated that along with the carriers copy they had also filed check post slips of sales lax and Exs. B-49 to B-52 are the carrier copies of the G.C. Notes and Exs. B-54 to B-57 are sales-tax check post slips. DW-2 had specifically stated that he did not act in collusion with the 1st defendant or the 5th defendant. DW-2 also had stated that the endorsements of the 1st defendant appearing on the reverse of Exs. A-7 to A-12 only show that the plaintiff is a collection agent of the 1st defendant. DW-2 also deposed that on enquiry in the middle of June 1976, the 1st defendant informed him that most of the eggs had perished and the sale proceeds were to an extent of Rs. 57,000/- and odd only DW-2 further deposed that according to his information, PW-1 colluded with the 1st defendant and may be also with the 5th defendant and in the event of the 5th defendant not paying the amount of Rs. 57,0007-and odd, the 6th defendant is liable to pay. DW-2 was cross-examined at length relating to several aspects and also the procedure. DW-2 no doubt admitted that he is aware of the bills discounting facility and he had admitted that in bill discounting facility, the bills which accompany the lorry receipts are discounted by the Bank and in turn the Bank intimates the drawee about the receipt of the bill for enabling the drawee to retire the bill by paying the amount. DW-2 also admitted that the Bank is not a party to the indemnity bond. DW-2 had further deposed that after C.B.I, enquiry against PW-1, they came to know that there was collusion between PW-1 and the 1st defendant-firm

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for the following reasons : (1) without cold storage facility PW-1 should not have discounted the bills of perishable Articles; (2) even if discounted he should not have paid more than 50% of the face value of the goods; (3) the report of Solman Raj as Enquiry Officer in Departmental Enquiry against PW-1; (4) in case of perishable articles, PW-1 should not have given retention period of 15 days; and (5) calling back the consignees copy back to Hyderabad.

19. On the strength of this evidence, the Court below had decreed the suit partly as against the appellant-5th defendant also.

20. Section 7 of the Negotiable Instruments Acl, 1882, dealing with drawer and drawee reads as follows:--

"The maker of a bill of exchange or cheque is called the ''drawer''; the person thereby directed to pay is called the ''drawee''."

In the law of Negotiable Instruments and Dishonour of Cheques, 2nd Edition, by me, at page 37, while dealing with acceptance, I had stated :--

"For a valid acceptance, the following essentials are required-

(1) It should be in writing;

(2) It must be signed by drawee or his agent;

(3) It should be on the bill;

(4) It must be completed by delivery.

In the decision referred (1) supra, it was held that the drawee of a Negotiable Instrument is not liable on it to the payee unless he has accepted it. In Jagannath v. Heap & Co., 1909 Indian Cases 804, while dealing with the aspect of bills of exchange and drawee, it was held that the person named as drawee cannot substitute third person as drawee and acceptance by substituted person is not binding. In the decision referred (2) supra, it was held that the burden of proof to show that there was acceptance lies on the holder.

21. In the light of the above legal position, now the evidence available on record has to be appreciated. It is the principal contention of the appellant-5th defendant that there is no privity of contract at all in between the 5th defendant and the plaintiff-Bank. In fact, it cannot be even in any dispute at all since but for the credit facility arrangement in between the 1st defendant and the plaintiff, the 5th defendant is nowhere in the picture. Hence, I have no hesitation to arrive at the conclusion that there is no privity of contract in between the plaintiff and the 5th defendant.

22. Then the next question will be whether by virtue of Exs. A-1 to A-6 transactions and also in the light of the pleading as specified in paragraph-10 of the plaint, can the plaintiff-Bank fasten the 5th defendant with liability. The 5th defendant no doubt had denied knowledge of all the transactions. But a serious attempt was made to show that the stand of denial taken by the 5th defendant

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cannot be believed and the said pleading is in variance to the proof i.e., the evidence of DW-1. In Allam Gangadhara Rao Vs. Gollapalli Gangarao, , it was held that it is trite to say that a party is expected and is bound to prove the case as alleged by him and as covered by the issues framed and this is in accordance with the main principle of practice that a party can only succeed according to what was alleged and proved secundum allegate et probata. But however, the mere fact that Exs. A-33 to A-46 had been pressed into service cannot improve the case of the plaintiff-Bank in any way unless it is established and proved that the 5th defendant as a drawee is liable to pay the amount. As far as this aspect is concerned, it is no doubt true that PW-1 had stated in the chief-examination that the 5th defendant had signed in Exs. A-1 to A-6. It is pertinent to note that initially notice was not issued to the 5th defendant at all. But in the cross-examination of the 5th defendant, PW-1 had specifically stated :

"I cannot identify the signature on Exs. A-1 to A-6. There is signature of someone on the bills Exs. A-1 to A-6. But I cannot say whether the signatures are mat of the 5th defendant or on behalf of 5th defendant. There are no seals of 5th defendant-Company on the bills."

PW-1 also had admitted that as per the agreement if bills are not retired by the drawee and if they are returned to the Bank, the Bank has to claim the amount of bills only from the 1st defendant. However, DW-1 had taken a specific stand specifically denying having signed the said documents. Hence, in the light of the nature of evidence let in by the plaintiff-Rank, it cannot be said that the signatures of the 5th defendant or any alleged agent of the 5th defendant on Exs. A-1 to A-5, are proved. It is needless to mention that the 1st respondent-plaintiff had miserably failed in discharging the burden cast upon it. Even in relation to Exs. A-33 to A-46 in the further cross-examination of the 5th defendant, PW-1 had stated as follows:

"Exs. A-33 to A-46 are prepared by Amberpet Branch of S.B.I, They are sent along with bills and they arejust like a covering letter. D5 is the drawee in all the documents. On behalf of D5 someone has signed on Exs. A-33 to A-46.I cannot say whether the person who signed is an authorised person of D5."

Hence in the light of the nature of evidence let in by the 1st respondent-plaintiff Bank, the evidence is highly insufficient to prove any kind of acceptance on the part of either the appellant-5th defendant or any authorised agent of the appellant-5th defendant in this regard. The evidence of DW-1 is in fact clear and categorical on all aspects. Apart from all these, the specific stand taken by the 5th defendant is that if at all there is any liability, the liability of the 5th defendant will be to that of the Ist defendant only and in the light of some erect it facility in between the plaintiff and the 1st defendant, the liability cannot be fastened on the 5th defendant. As already observed by me supra, the evidence lei in by the 1st respondent-plaintiff Bank is highly insufficient to establish all the connecting links so as to prove acceptance in order to fasten any liability on the appellant-5th defendant relating to the suit transaction. As already observed by

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me, even the attempt made on behalf of the 1st respondent-plaintiff Bank is to impute knowledge of certain prior transactions to the 5th defendant, may not help the 1st respondent-plaintiff Bank in any way and it will not improve the case of the 1st respondent-plaintiff Bank any further in the absence of evidence to establish the necessary essential ingredients of acceptance for fastening liability in a case of this nature. It is made clear that in the present dispute, the Court is not concerned with the inter-se problems of the 1st defendant vis-a-vis the 5th and the 6th defendants. The evidence of DW-2 also is to the effect trying to throw the blame both on the 1st and the 5th defendants and also to some extent on PW-1, raising a plea of collusion. In the light of the failure on the pan of the 1st respondent-plaintiff Bank in establishing the case, this aspect need not be gone into in detail.

23. The next question which falls for consideration is whether on the principle of doctrine of unjust enrichment, can the 5th defendant be fastened with liability. Both the Counsel had advanced elaborate arguments placing reliance on Sections 70 and 72 of the Indian Contract Act. Section 70 of the Indian Contract Act, dealing with Obligation of person enjoying benefit of non-gratuitous act, reads as follows :--

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

In the decision referred (3) supra, the Apex Court held as follows:--

"The three ingredients to support the cause of action u/s 70 are these: First, the goods are to be delivered lawfully or anything has to be done for another person lawfully. Second, the thing done or the goods delivered is so done or delivered "not intending to do so gratuitously". Third, the person to whom the goods are delivered "enjoys the benefit thereof."

24. Reliance also was placed on K.S. Satyanarayana Vs. V.R. Narayana Rao, , in this regard. The learned Counsel for the 1st respondent-plaintiff Bank had made a serious attempt to show that though the present dispute may not fall u/s 70 of the Indian Contract Act, it definitely falls u/s 72, which deals with liability of person to whom money is paid, or thing delivered, by mistake or under coercion, and which reads as follows:

"A person to whom money has been paid or anything delivered, by mistake or under coercion, must repay or return it."

It is not the case of the 1st respondent-plaintiff Bank that the amount was paid either by mistake or under coercion, so as to attract Section 72 of the Indian Contract Act, 1872. In the Law of Contract, by me, at page 329,1 had stated :

"In Forlrosa v. Fairbairn, 1943 A.C. 32, Lord Wright has stated the legal position as follows:

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''.... any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution,''

In Nelson v. Larholt (1948) 1 KB 339, Lord Denning has observed as follows:

''It is no longer appropriate to draw distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the Court orders restitution if the justice of the case so requires''."

From the evidence available on record, it is not clear what amount in fact had been fetched by the 5th defendant and upto what extent the 5th defendant had paid the amount to the 1st defendant. It is also pertinent to note that the security given by the 1st defendant is available with the plaintiff-Bank. In the absence of dear evidence, the plaintiff-Bank cannot try to derive advantage of the inter-se dispute, if any in between the defendants 1 and 5, in this regard. It also appears that as against PW-1 and certain others, there is a criminal case and the acquittal in a criminal case may not be of any importance in the facts and circumstances of the present case. Even if Sections 70 and 72 of the Indian .Contract Act, 1872 are read together and also the illustrations specified under the said provisions are taken into consideration, in the light of the evidence of PW-1, DW-1, DW-2 and also the documentary evidence, it cannot be said that the ingredients under the aforesaid provisions of the Indian Contract Act, 1872 are established so as to fasten liability on the 5th defendant in any way whatsoever in an action brought against the 5th defendant by the 1st respondent-plaintiff Bank. Hence, viewed from any angle, the judgment and decree as against the appellant-5th defendant cannot be sustained at all.

Point 7:

It is no doubt true that the plaintiff in the present suit is a Bank. In the decision referred (4)-supra, it was held as follows:

"Where the Courts came to a conclusion that money had been taken by certain parties from Bank and certain persons had stood as guarantors and that the claim of the Bank was justified it will be a travesty of justice if the Bank is to be non-suited for a technical reason such as plaint was not signed by competent person which does not go to the root of the matter and the only defect which was alleged on behalf of the parties was one whic.h was curable."

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However, when there is no privity of contract at all and when the Bank had miserably failed to establish the acceptance as a drawee and in the light of the admissions made by even PW-1 and the specific stand taken by the 5th defendant and the evidence of DW-1, it cannot be said that the defects in the present suit are of such a curable technical nature and hence at any stretch of imagination in the light of the evidence available on record, the appellant-5th defendant cannot be fastened with any liability in the present suit. I have perused the judgment of the Court below and also the findings recorded on different issues and I am satisfied that the Court below had misdirected itself in appreciating the evidence and recording findings thereon. Hence for the reasons recorded above in detail, the appeal filed by the 5th defendant is bound to succeed and accordingly the appeal, so far as it relates to the appellant-5th defendant is concerned, is allowed and the judgment and decree made against the appellant-5th defendant, are hereby set-aside. However, in the peculiar facts and circumstances of the case, the parties are directed to bear their own costs.

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