

(1995) 10 GUJ CK 0015
In the Gujarat High Court
Case No : First Appeal No. 1423 of 1995

Shivam Construction Co. and Others	Vs	APPELLANT
Vijaya Bank, Ahmedabad and Others		RESPONDENT

Date of Decision : 11-10-1995

Acts Referred:

Bankers Books Evidence Act, 1891 — Section 4
Banking Regulation Act, 1949 — Section 21, 21(2), 22, 35A
Civil Procedure Code, 1908 (CPC) — Section 96
Contract Act, 1872 — Section 171
Evidence Act, 1872 — Section 114
Limitation Act, 1963 — Article 1 , 18
Partnership Act, 1932 — Section 18, 19, 19(2), 26

Citation : AIR 1997 Guj 24 : (1997) 1 GLR 774

Hon'ble Judges : R.M. Doshit, J;J.N. Bhatt, J

Bench : Division Bench

Advocate : R.N. Shah, for the Appellant; U.D. Shukla, for the Respondent

Final Decision : Dismissed

Judgement

J.N. Bhatt, J.—The appellants have questioned the legality and validity of the judgment and decree recorded in Summary Civil Suit No. 712 of 1984 by the City Civil Court Judge, at Ahmedabad on 29th April, 1994, decreeing the suit of the respondent No. 1 Vijaya Bank for a sum of Rupees 5,66,368/- with interest at the rate of 18% per annum on Rs. 3,76,000/- from the date of the suit till, realisation, by invoking the aid of the provisions of Section 96 of the Code of Civil Procedure, 1908 (the "Code").

2. At the admission stage we found that there was no any illegality in passing the impugned judgment and decree. However, we had called for the record and proceedings after issuing notice to the contesting respondent No. 1 Vijaya Bank. After having heard the learned Advocates appearing for the appellats and the respondent Vijaya Bank and considering the testimonial and documentary collections emerging from the record of the present case, we are of the opinion

that the appeal is required to be dismissed at the threshold being meritless as the impugned" judgment and decree are quite weighty, legal and sustainable.

3. Since this Court is addressed at a marathon length at the threshold, we would like to highlight the serious contentions advanced on behalf of the appellants in the backdrop of the aforesaid facts.

4. Present respondent No. 1 Vijaya Bank instituted the aforesaid suit against the defendants in respect of the outstanding dues of the Bank in the current account No. 1446 of the appellant No. 1 original defendant No. 1 firm. The appellant No. 1 is the original defendant No. 1; appellant No. 2 is the original defendant No. 2; appellant No. 7 is the original defendant No. 7, and appellant No. 4 is the original defendant No. 8; whereas, respondent Nos. 2 to 5 are the original defendants Nos. 3, 4 & 5. The Parties are, hereinafter, addressed as shown in the cause title of the original suit for the sake of convenience.

5. Defendant No. 1 firm had a current account No. 1446 with the plaintiff Bank. The Bank had sanctioned over-draft facility to the defendants on the security of fixed deposit receipt. Initially the temporary over-draft facility was upto the limit of Rs. 5,25,000/- and then on 21-1-1979 against the security of fixed deposit receipts (FDRs) was raised to the tune of Rs. 7,73,968/- as desired by the defendants. In security of repayment of the outstanding dues, the defendants had also executed a promissory note and other documents in favour of the plaintiff Bank. Since the said current account was operated irregularly, the plaintiff Bank had requested the defendants to square up the account by transferring the fixed deposit receipt amounts. The request was not attended to, nor responded. Therefore, the plaintiff Bank after giving a credit of the amount of Rs. 9,42,092.82 P. from FDRs was constrained to file a suit for the balance amount of Rs. 3,65,201-10 which remained outstanding to be paid by the defendants to the plaintiff Bank in the said current account.

6. There were overdrawings in the current account. According to the case of the Plaintiff Bank there were overdrawings in the current account to the tune of Rs. 5,94,537.75 P. as on 9-12-1982. Since the dues of the Bank were not paid by the defendants despite repeated demands and requests by the Bank, the suit came to be filed.

7. The defendant resisted the suit. An application for leave to defend was granted to the original defendants Nos. 1 to 4. Original defendants Nos. 5 & 6 did not appear and contest, defendant No. 8 had filed leave to defend and the same course was adopted by defendant No. 7 also.

8. It transpires that the defendants Nos. 1 & 2 had filed common written statement at Exh. 65. Defendant No. 4 filed pursis to --treat his leave to defend application as his written statement. Defendants Nos. 3, 5 & 6 did not file written statement Defendants Nos. 7 & 8 filed composites written statement at Exh. 60. The contesting defendants combated the claim of the Bank on various grounds.

9. In the light of the pleadings of the parties the trial Court raised issues at Exh. 67A. The plaintiff relied on the oral evidence of two witnesses namely, one D.P. Shah, at Exh. 70 and on another Mr. V.S. Shetti at Exh. 106. The defendants relied on the evidence of three witnesses, namely, (1) Defendant No. 7 Mr. B.C. Shah; (2) Defendant No. 8 Miss Damini Dinesh Shah, Exh. 144 and (3) Mr. Deepak Shah, Chartered Accountant at Exh. 145. The parties also placed reliance on the documentary evidence to which a recourse and reference will be made by us at the appropriate stage hereinafter.

10. Upon appreciation and assessment on the evidence on record, the trial Court decreed the suit for an amount of Rupees 5,66,368/- with running interest at the rate of 18% per annum on an amount of Rupees 3,76,000/- from the date of the suit till realisation, with costs by the judgment recorded on 29th April, 1994.

11. The learned Advocate appearing for the appellants raised multi-prolonged attack on the validity and legality of the judgment and decree under challenge. It was seriously criticised that the trial Court has committed serious illegality in passing the impugned decree in a suit which was incompetent and time barred. The contention is also raised that the plaintiff Bank is not entitled to interest as considered and awarded by the trial Court. The contentions raised on behalf of the appellants are countenanced with equal vehemence on behalf of the respondent No. 1 original plaintiff Bank.

12. Since the points raised on behalf of the appellants are inter-connected, it would be expedient to deal with them and dispose of them simultaneously.

13. In order to appreciate the contentions raised before this Court, it would be necessary and advisable to set out the following aspects which have remained uncontrovertible in the light of the record of the present case :

(1) That the defendant No. 1 firm had obtained temporary over-draft facility on the security of the fixed deposit receipt initially for a sum of Rs. 5,25,000/- which was raised to Rs.5,80,000/-, and finally to Rupees 6,85,000/-.

(2) That the F.D.Rs. which were pledged with the plaintiff Bank as security were originally in the name of one firm named Shreeji Corporation.

(3) The said F.D.Rs. originally in the name of Shreeji Corporation came to be transferred in the name of defendant No. 1 firm M/s. Shivam Construction Co.

(4) That Shreeji Corporation, a partnership firm, has two partners, one of them is Mr. D.K. Patel, H.U.F., Karta Dhirubhai K. Patel who is the original defendant No. 2 and who appears to be the main Managing Partner of defendant No. 1 firm; that it may also be noted that the plaintiff Bank was given a mandate by the defendants to the effect that the current account shall be operated jointly by the signature of defendant No. 2 Mr. D.K. Patel on one hand, and any one of the rest of the seven partners, on the other.

(5) That the four chaques each of Rupees 95,000/- drawn on Ahmedabad District

Cooperative Bank Ltd., Ahmedabad, issued by Ashoknagar Co-operative Housing Society Ltd. and produced at Exhs. 113 to 116, came to be presented on 29th December, 1979 in the current account of the defendant No. 1 firm.

(6) That the said Co-operative Bank returned the cheques with Memorandum produced at Exhs. 117 to 120 with a common endorsement of "refer to drawer", thus the aforesaid four cheques totalling to Rupees 3,80,000 / - came to be bounced and as per the date mentioned in the memorandum, on the same date i.e. 29th December, 1979, and that the plaintiff Bank made credit entry of an amount of Rs. 3,80,000/- in the said current account No. 1446 of defendant No. 1 firm on 29th December, 1979 which came to be reversed on 1st January, 1980 in view of the return of the aforesaid four cheques.

(7) That the plaintiff Bank debited the said current account of the defendant No. 1 firm by crediting an amount of Rs. 3,56,000/- in the account of Shreeji Corporation, a partnership firm having account with the same Bank and an amount of Rs. 20,000/- in the account of D. Sushil & Co. The aforesaid two debit entries came to be by the plaintiff Bank in the current account No. 1446 on 29th December, 1979.

(8) The question whether the action of the Bank was legal and valid or the plaintiff Bank was authorised will be a question to be examined and adjudicated later on by us.

(9) The defendant No. 2, D.K. Patel, is the karta of D.K. Patel, H.U.F. who is one of the two partners of Shreeji Corporation in whose account the amount of Rs. 3,56,000/- came to be transferred, and he is not examined as a witness.

(10) The second partner of Shreeji Corporation is one Mr. R.C. Joshi, who is the father of defendants Nos. 5 & 6. None of them is examined.

(11) The transfer of amounts of Rupees 3,56,000/- and Rs. 20,000/- in the account of Shreeji Corporation and D. Sushil & Co. respectively on 29-12-1979 is made by the plaintiff Bank on oral authority.

(12) The defendants have never objected the transfer of the aforesaid amounts from the current account No. 1446 of the defendant No. 1 firm to (i) Shreeji Corporation; and (2) D. Sushil and Co. on 29-12-1979, till filing of the suit.

(13) The plaintiff Bank had served the defendants with two notices Exh. 91 dated 25-8-1980 and Exh. 90 dated 7-10-1980 requesting the defendants to square up the dues of the Bank in current account No. 1446. The said notices were not replied nor complied with.

(14) Thereafter the Bank had liquidated and appropriated the fixed deposit receipt amount towards the Bank's dues on 21-10-1980. The total proceeds of the F.D.Rs. with interest of an amount of Rs. 9,42,092.82 P. came to be transferred for the appropriation of the Bank's dues in the over-draft account.

(15) The balance amount of Rupees 3,65,201.10 P. remained to be paid by the

defendants to the plaintiff Bank in the said current account.

(16) The defendants had acknowledged the debt of the plaintiff Bank. They had also confirmed the balance in their accounts by a letter.

(17) The plaintiff had filed the suit for the recovery of the amount of Rs. 7,56,892/-

14. It was vehemently submitted that the basis of the suit as acknowledgement, is not proved. It is also submitted that the suit is barred by limitation. It is true that the suit is founded upon the acknowledgment made by the defendants. The Trial Court has considered these aspects and has found that the suit is not barred by limitation. This contention is reiterated before us.

15. The suit came to be filed on 17-2-1984, the case of the Bank is that the suit is filed within the period of limitation of three years. Article 1 in the Schedule under the Limitation Act, 1963, is the relevant provision for filing a suit for recovery of a running account. According to the provision of Article 1 in the Schedule under the Limitation Act, 1963, three years" period is prescribed for filing a suit relating to accounts. Article 1 in Part I in the Schedule under the Limitation Act, 1963 reads as under:

Part I -- Suits Relating to Accounts.

Description of Suit

Period of Limitation

Time from which period begins to run

1,

For the balance due on a mutual, open and current account, where there! have been reciprocal demands between the parties.

ThreeYears.

The close of the year on which the last item admitted or proved is entered in the account; such year to be computed as in the account.

16. It could very well be seen from the aforesaid provision that for running account the period of limitation is prescribed. According to Article 1 the Limitation Act, the period of limitation is three years which starts from the close of the year in which the last item admitted or proved is entered in the account. Such year is to be computed as in the account meaning thereby that in the year in which last entry is made would be excluded in computing the period of limitation and thereafter like that from the following month the limitation of three years would start. It is true that one sided payment is not sufficient. Mutual account involves a reciprocal demand, and payment or promise.

17. The fixed deposit receipt came to be liquidated and the proceeds along with

the interest came to be appropriated towards the dues of the Bank in the current account on 21st October, 1980, and according to the provisions of Article 1, the close of the year in which the last item admitted or proved is entered in the account. Such year is to be computed as in the account from which the time would begin to run. The contention raised on behalf of the Bank is that the financial year at the relevant time was, April to March. The suit came to be filed on 17-2-1984. Therefore, the period of limitation would begin to run from 1st April, 1981 and the suit is, therefore, filed within three years.

18. Against, the basis of suit is acknowledgment of dues of the Bank made by the defendants. It is, therefore, submitted that alternatively the suit is within the limitation on the basis of the acknowledgment. The Bank has placed reliance on three written acknowledgments produced at Exhs. 74, 75 and 103. Defendant No. 1, partnership firm, has acknowledged the dues of the Bank. One partner D.K. Patel (who appears to be the Managing Partner) has signed for and on behalf of defendant No. 1 firm three acknowledgments. The first one is at Exh. 74, It is dated 20-12-1981. The acknowledgment is below the intimation sent by the plaintiff Bank dated 30th September, 1981. Thus there is a written acknowledgment confirming and acknowledging the dues of the bank as on 30th September, 1981. Again the same partner Mr. D.K. Patel has also acknowledged the dues of the Bank by writing a letter dated 20-12-1981. It is very clear from the said letter that there is an acknowledgment by the defendant No. 1 firm for the purpose of Section 18 of the Indian Limitation Act. The third acknowledgment in favour of the plaintiff Bank by the defendant No. 1 firm is dated 24-8-1982. Thus the balance in the current account of the defendant No. 1 firm with the Plaintiff Bank as on June 1982 came to the tune of Rs. 5,40,495.40 P. which came to be confirmed and acknowledged. Thus, three acknowledgments in writing confirming the balance in the current account and acknowledging the dues for an on behalf of the defendant No. 1 firm, are successfully established by the plaintiff Bank against which there is no evidence of the defendants. Therefore, the trial Court has rightly placed reliance on this documentary evidence of acknowledgments.

19. Section 18 of the Limitation Act makes a provision about the effect of acknowledgment in writing. It would be, therefore, necessary to refer to the provision of Section 18 which reads as under:

"18. Effect of acknowledgment in writing. (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was no signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the

Indian Evidence Act, 1872 (I of 1872), oral evidence of its contents shall not be received."

20. The jural relationship of debtor and creditor must be admitted; administration may be implied, but surrounding circumstances may be considered to construe the documents. Even a mere look at the three documentary evidence Exhs. 74, 75 and 103 unequivocally goes to show that for and on behalf of the defendant No. 1 firm, acknowledgment of the dues of the plaintiff Bank is made by the partner Mr. D.K. Patel. An acknowledgment u/s 18 of the Limitation Act must be of a liability. Thus, the liability must be alive or in existence on the date of the acknowledgment. It must be in writing and signed by the person against whom such writing is claimed. The acknowledgment, therefore, must be before the expiry of the period prescribed for suit or application in respect of such property or right.

21. Multifarious objections are raised against the legality and validity of the aforesaid acknowledgment on which the suit is founded upon. The first is that the acknowledgments are not made within the period of limitation of three years. This submission is absolutely meritless. Even if we take the first transaction or entry in the account which occurred in January 1979, then also, the acknowledgments are within the period of limitation. Therefore, the contention that the acknowledgment is made of time barred date is as such out of date and obsolete which cannot be subscribed, to.

22. The second contention against the acknowledgment is that the partners of the defendant No. 1 firm cannot be bound by the acknowledgment made by partner Mr. D.K. Patel, original defendant No. 2. The attention of this Court is invited to a mandate given by the defendant No. 1 firm to the plaintiff Bank with regard to the operation of the current account. It is true that as per the mandate the current account was required to be operated jointly by one partner Mr. D.K. Patel on one hand, and any one of the rest of the seven partners on the other hand. There is a specific provision in Clause (11) of the Partnership deed Exh. 105. Thus the account of the Bank in the name of the firm was required to be operated by its partner one Mr. D.K. Patel jointly in with any one of the remaining seven partners.

23. Relying on the aforesaid Clause (11) of the Partnership deed it has been contended that the acknowledgment made by defendant No. 2 one of the partners of the firm is not binding on the firm and other partners. Thus, the submission prima facie may appear to be captivating, but not convincing; subtle, but not legally sustainable. What is provided in Clause 11 of the partnership deed is the operational instructions to the plaintiff Bank. It does not contain that the general authority or implied authority of the partner to act as an agent of the firm is circumscribed. A partner undertaking to allow the bank in getting the acknowledgment executed could not be said to be unauthorised or illegal action of the partner rendering the firm and other partners immune from the said liability. On the contrary, a partner is an agent of the firm for the purpose of

business of the firm. There is an implied authority of the partner to act as an agent of the firm,

24. Section 18 of the Indian Partnership Act, 1932, in Chapter IV makes it clear that subject to the provisions of the Partnership Act a partner is an agent of the firm for the purpose of business of the firm. In Chapter IV, various provisions are enumerated and prescribed with regard to the relations of partners to the third parties. A conspectus of Sections 18 19 and 26 of the Partnership Act would go to show that unless contrary provision is made in the partnership deed a partner of the firm is an agent of the firm for the purpose of business of the firm and he has an implied authority.

25. Section 19 of the Partnership Act provides an implied authority of the partner as an agent of the firm. It is very clear from the aforesaid provision of Section 19 that 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 a partner to bind the firm conferred by this section is called his "implied authority". The Sub-section (2) of Section 19 provides eight circumstances wherein the implied authority of the partner cannot be exercised. In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to do as many as following eight actions. The acknowledgment for and on behalf of the firm is not covered in any one of the Clauses (a) to (h) under Sub-section (2) of Section 19. Therefore, the contention that Clause (11) of the Partnership deed related to the operational instructions prohibits one of the partners to acknowledge a debt is meritless and is rightly not accepted by the trial Court.

26. In a Division Bench decision of this Court in Firm of Sarabhai Hathising and Another Vs. Ratilal Nathalal and Others, this Court has held that the partner is an agent of the firm and has an authority to do all things necessary for the benefit of the firm. Acknowledgment of liability in respect of subsisting debt by a partner is binding on the firm as the same is not falling within the exception of Section 19(2) of the Partnership Act. Therefore, the view which we are inclined to take is also very much reinforced by the aforesaid Division Bench decision of this Court. It may also be mentioned that in that decision it was further held that the partner's signing the statement of accounts on behalf of the firm would amount to valid and subsisting acknowledgment under Sections 18 and 19 of the Limitation Act. On the aforesaid premise, the contention that the defendant No. 2 Mr. D.K. Patel was not authorised to bind the firm and other partners by making of acknowledgments Exhs. 74, 75 and 103 is nothing but an after thought to thwart legal liability for the payment of Bank's dues. We, therefore, reject this contention.

27. It is also seriously submitted that the plaintiff Bank had no right to liquidate or prematurely encash the fixed deposit receipts for the purpose of appropriation towards the dues of the Bank in the current account of the defendant No. 1 firm. As enumerated hereinbefore, the F.D.Rs. were pledged with the Bank as security

for temporary over-draft facility to the defendant No. 1 firm. The plaintiff bank found that there was overdrawn by the defendants in the over-draft account in the current account. Therefore, after giving notices as aforesaid, and requesting the defendants to pay up or square up the dues the plaintiff-Bank was constrained to liquidate the Fixed Deposit Receipts (F.D.Rs.) as there were over drawings in the current account more than the sanctioned ceiling under the temporary over-draft facility. There is no dispute about the fact that the Bank has appropriated the proceeds of fixed deposit receipts along with interest towards dues of the Bank. The outstanding amount in the current account came to be Rupees 13,07,293.92 P. The defendants failed to accede to the request of the plaintiff Bank to pay up the said dues by transferring the fixed deposit receipts, with interest. Therefore, the plaintiff Bank had liquidated the fixed deposit receipts along with interest on 21st October, 1980, the total amount of which came to Rs. 9,42,092.80 P. Therefore, giving the credit for the said amount the balance amount of Rupees 3,65,201.10 P. remained to be paid by the defendants to the plaintiff Bank in the said over-draft current account. It is this action of the plaintiff-Bank which is questioned in the course of the marathan submission before this Court.

28. The very purpose of taking securities by the Bank is obvious. Temporary over-draft facility was sanctioned on the security of the fixed deposit receipts. Despits requests and demands, and notices to the defendants to square up over-drawings, the defendants failed to square up or pay up the dues of the plaintiff Bank rendering the Bank and lacing it on a point where the Bank had no option but to appropriate the dues of the overdraft account by liquidating the fixed deposit receipts. Accordingly the Bank did it. Could this be said to be an illegal action on the part of the bank ? The obvious answer would be in the negative. Apart from that, there is a provision under the law with regard to the Banker's lien under which it is open for the Bank to appropriate or recover or transfer amounts from other accounts for the dues of the Bank in one account. It would be at this stage appropriate to have a close look into the provisions of Section 171 of the Indian Contract Act, 1872. Section 171 of the said Act reads as under:

"171. General lien of bankers, factors wharfingers, attorneys and policy-brokers. --Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

It could very well be seen from the aforesaid provision that Bankers have general lien in the absence of contract to the contrary to retain security for general balance of accounts or any goods bailed to the Bank. Apart from that, there is also evolution of doctrine of "set off" under which the Bank has a right of "set off". Therefore, action of the plaintiff Bank in transferring the fixed deposit receipt amounts by liquidating for appropriation of the Bank's dues in the

current account of the defendants would not be said to be unauthorised, unjustified or illegal. In a Division Bench decision rendered in Punjab National Bank Ltd. v. Satyapal Virmani, AIR 1956 Punjab 118 the principles of Banker's lien u/s 171 of the Contract Act are very well highlighted. It is held that on the facts and circumstances of the case the Bank could claim a general lien on the surplus amount left with it and could retain it for payment of other debts due from the same party in the absence of any contract to the contrary. Section 171 of the Contract Act provides for a general banker's lien. According to the law merchant, the banker can look to his general lien as a protection against loss on account, or loss on loan or verdraft. And money has been held to be a species of goods over which lien may be exercised. Where a banker has advance money to another, he has, obviously a lien on all securities which come into his hands for the amount of his general balance, unless there is an express contract or circumstances to the contrary, which is not the factual scenario in the present case.

29. There is a very interesting judgment of the Calcutta High Court in the case of Krishna Kishore Kar Vs. United Commercial Bank and Another, wherein, it is held that in the absence of contract to the contrary, banker's lien u/s 171 could be exercised. In case of separate accounts in the Bank, adjustment can be made by the Bank under Banker's lien. The plaintiff having cash credit account and other account all proceeds of fixed deposits duly credited in cash credit account, it was held that relying on the provisions of Section 171 of the Contract Act the balance can be adjusted by appropriating the amount lying in the separate account in exercise of general lien by the Bank.

30. In Canara Bank and others Vs. M/s. Taraka Prabhu Publishers Pvt. Ltd., and others, the Division Bench has upheld the doctrine of "set off" over and above the general right of Banker's lien. In that case, the suit was filed for the recovery of loan by the Bank and the Bank had transferred the amount deposited in the current account to its lona account for set-off. It was found that the Bank has right of set-off in terms of contract to recover the debt due to it. It was further observed in the said case that enforcement of doctrine of set-off for the amounts to be realised by the Bank could not be said to be in the ultimate analysis, in public interest an action which is arbitrary or exercise in a malafide manner.

31. The doctrine of "set-off" by the bank has been evolved since long. There is a definite purpose and philosophy behind it. It has long roots.

32. In Roxburghe v. Cox (1881) 17 Ch D 520, the Court of Appeal had taken the view that even if it is taken for granted that bank's lien applied money paid to the account of the creditor still the proper doctrine of set off under which the bank is authorised to claim an amount for set off of the debts owed by the customers.

33. The aforesaid decision was again affirmed in another case reference Re-Moris Conveys v. Moris (1922) 1 IR 81, where a similar view has been taken with

regard to set-off for the money which is owed to them by retaining the money belonging to the debtor in a particular account.

34. The above view has also been affirmed in *National Westminster Bank Ltd. v. Halesowen Presswork & Assemblies Ltd.* (1972) 1 All ER 641, by the House of Lords in which the principle of set-off has been expounded and upheld in connection with the bank's right to realise their debts from a particular debtor whose money was received by the banker in the course of business as such.

35. In the present case, it is beyond any doubt that the appellants who had enjoyed over draft facilities on the securities of the FDRs, failed to discharge their duties and committed defaults, went on for overdrawals. Therefore, under the terms of loan as well as under the right of "set-off" and also under the general banker's lien, the plaintiff bank was empowered and entitled to transfer and appropriate even by liquidation the FDs towards their over-draft account of the defendants. On all counts it cannot be said even for a moment that the action of the plaintiff-bank in liquidating the FDRs for purpose of appropriation towards bank's dues was, in, any way, unjust, improper or illegal.

36. Next it was contended that the plaintiff-Bank has failed to prove its suit dues. It is also contended that the Bank is not entitled to interest as claimed by the plaintiff-Bank. After having examined the facts and circumstances and the evidence on record, we have no hesitation in finding that the plaintiff-Bank has, successfully, established the suit dues. The bank has placed reliance on the certified true copy of the current account of defendant No. 1 firm u/s 4 of the Bankers' Books Evidence Act 1891. The certified true copy from the current account is produced and relied on. It is contended from the certified true copy that u/s 4 Bankers Books Evidence Act 1891, does not prove the dues of the Bank. It is true that under the provisions of Section 4 of the Bankers Books Evidence Act, subject to the other provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence. Section 4 of the Banker's Books Evidence Act, 1891, reads as under:

"4. Mode of proof of entries in bankers' books:-- Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts, therein, recorded in every case where, and to the same extent as, the original entry itself is, now, by law admissible, but not further or otherwise."

37. The submission raised on behalf of the appellants that reliance is placed only on the certified entries in the Bankers' Books, is also not correct. The plaintiff-Bank has relied on the evidence of two witnesses. The plaintiffs witness Mr. D.P. Shah who was the concerned junior clerk at the relevant time is examined, at Exh. 70, and the Manager Mr. Shetty (as he then was) in the said Branch, is examined at Exh. 106. Taking into account the documentary evidence or certified

entries u/s 4, coupled with the oral evidence of the two witnesses of the bank, the Bank has, successfully, shown the dues of the bank. There is no reason to discard the evidence of the two witnesses of the plaintiff-Bank supported by certified copy of accounts in Bankers' Book. The trial court has, rightly, relied on the evidence of the plaintiff-bank while passing the impugned decree.

38. As against that, apart from halfhearted plea of the defendants in written statement; apart from a weak hearted testimony of two witnesses; suppressing the evidence of material witnesses and not producing the most important documentary evidence of the books of account of the defendant firm, how could the defendants be allowed to contain that the evidence relied on by the trial Court is unjust or illegal or perverse. The star witnesses of the defendants who is one Mr. D.K. Patel, has not stepped into the witness-box for the reasons best known, to him. It was he along with three other partners and persons had authorised the plaintiff-bank to transfer an amount of Rs: 3,56,000/- in the account of Shriji Corporation and an amount of Rs. 20,000/- in D. Sushil & Co. on 29-12-1979 has been kept away. Adverse inference has to be drawn for such non-examination of material witnesses as well as material documentary evidence of books of accounts. Non-production of books of accounts some stray letters and documents would undoubtedly cause serious doubt about the credibility and the veracity of the defendants. Not only that, according to the settled proposition of law, an inference can be drawn for non-production of important documents in the form of books of accounts. It is settled proposition of law that that a party who is in possession of these documents which can throw light upon the issues in controversy withholds the same from the scrutiny of the Court, could be visited with an adverse inference. This proposition is very well expounded by the Apex Court in the case of Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, . Again non-production of material documentary evidence like books of accounts of the defendants also would be sufficient to raise an adverse inference.

39. Again, a serious criticism was levelled with full vehemence by the learned Advocate for the appellants for charging of the rate of interest for a long spell of time. Despite repeated submission the learned Advocate for the appellants has not been able to convince us from the record that the plaintiff Bank has over-charged the amount of interest. On the contrary the record indicates that the Bank has charged interests as per the contract and the directions of the Reserve Bank of India. Needless to mention that u/s 35-A of the Banking Regulation Act, 1949, the Reserve Bank of India is empowered to issue appropriate directions to the Banks for effective and efficient control and management. Our attention is also invited to the provisions of Section 21 of the Banking Regulation Act, 1949. Section 21, Sub-section (2)(e) is relevant for the purpose which is providing for the rate of interest and other terms and conditions on which advance or other financial accommodation may be made or guarantees may be given, is also within the domain of the Reserve Bank of India. In other words, the Reserve Bank of India can give directions to the Banking Company or generally or to any group of Banking Company including on the question of rate of interest and other

terms and conditions for the advances. The trial Court has considered the circulars of the Reserve Bank of India relating to the rate of interest and after considering the facts and circumstances the relevant provisions of law and the relevant circulars has found that the rate of interest recovered by the plaintiff-Bank is just and reasonable and legal.

40. It may be noted at this stage that on account of initial mis-interpretation and misunderstanding on the part of the officers of the plaintiff-Bank there was charging of interest more than the entitlements and the directions under the circulars of the Reserve Bank of India. Therefore, the plaintiff-Bank had given a pursis, at Exh. 150, whereby, the interest is reduced and it is charged as per the contract until the over-draft facility account became clean over-draft. Thereafter the interest is charged as per the circulars of the Reserve Bank of India. Again it may be noted that the promissory note executed by the defendants and produced, at Exh.71 also, shows the rate of interest to be charged with quarterly rest. Exh. 72 is a letter by all the partners in favour of the Bank about the rate of interest agreeing to pay at the rate to be prescribed or prevalent as per the circulars, and instructions of the Reserve Bank of India. The trial Court has also, rightly, not placed reliance on Exh. 146 which is a statement prepared by one witness of the defendants, Mr. D.D. Shah. The trial Court has placed reliance on the evidence of certified copies of the Bankers' Books coupled with the evidence of the witness Mr. D.P. Shah, at Exh. 30, and the evidence of the Manager Mr. Shetty, at Exh. 106.

41. Having regard to the documentary evidence discussed hereinabove, and particularly the rate of interest mentioned in the promissory note at Exh. 71, and the letter dated 22-1-71 at Exh. 72, in relation to the rate of interest, while viewed in the light of the provisions of Sections 22 and 35-A of the Banking Regulation Act, 1949, and the evidence on record, the rate of interest awarded by the trial Court, before and after the suit, is contractual rate and it is quite just and reasonable and justified.

42. Having regard to the aforesaid facts and circumstances narrated hereinbefore, and the entire relevant proposition of law set out above, this Court has no hesitation in finding that the present appeal by the original defendants Nos. 1, 2, 7 and 8 is, totally, meritless and is required to be dismissed with full costs at the threshold. Since we found no merits in the present appeal it was not thought expedient to issue notices to respondents Nos. 2 to 5.

43. However, a parting thought may be necessary. Though the appeal is found merit-less, there are certain objectionable irregularities on the part of the concerned officers of the plaintiff Bank. Confirmation and affirmation of the impugned judgment and appeal in this Court, this appeal should not be construed a hinderance or hurdle in taking appropriate departmental action against the erring officers of the bank if so desired by the Management of the Bank. We think that it is necessary to place it on record.

44. With these observations the appeal is dismissed at the admission stage with full costs.