IN THE COURT OF THE DISTRICT JUDGE, KHURDA AT BHUBANESWAR.

Present:

Dr. D.P. Choudhury,
District Judge, Khurda
at Bhubaneswar.

Dated, Bhubaneswar the 21st July'14.

R.F.A. No. 121 of 2005.

[Arising out of the judgment dated 04.08.2005 & decree dated 25.08.2005 passed by the learned 2nd Addl. Civil Judge (Sr. Division), Bhubaneswar in Money Suit No. 714/39 of 2004/1991.]

Indian Bank, a body corporate constituted under the Banking Companies (Acquisition & Transfer of Undertakings) Act V of 1970 carrying on business of Banking and having its Head Office at 31, Rajaji Road, Madras-1, with one of its Branch Office amongst other places at 32, Ashoknagar, Bhubaneswar, P.S. - Capital, District – Puri.

... **Appellant / Plaintiff.**

-***V e r s u s***-

1. Sri Laxminarayan Malla, aged 49 years, S/o. Late Seerilal Malla, Proprietor, M/s. Laxmi Cloth, Plot No.50F, Ashoknagar, Unit-II, Bhubaneswar, District – Puri.
2. Sri Bishunu Narayan Malla, aged 47 years, S/o. Late Seerilal Malla, Capital Hata, Bhubaneswar, District – Puri.

... **Respondents / Defendants.**

Counsel :

For Appellant -- Shri N.K. Pattnaik & Associates.
For Respondents -- Shri A.K. Ray & Associates.

Date of conclusion of argument : 04.07.2014.
Date of judgment : 21.07.2014.

J U D G M E N T

Plaintiff in the Court below has preferred this appeal challenging the judgment dated 04.08.2005 & decree dated 25.08.2005 passed by the learned 2nd Addl. Civil Judge (Sr. Division), Bhubaneswar in Money Suit No. 714/39 of 2004/1991, dismissing the suit.

2. The parties hereinafter have been referred to as they have been arrayed in the trial Court for the sake of convenience and proper appreciation.

3. The factual matrix of the case of the plaintiff is that plaintiff is a Banker duly constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act V of 1970. Defendant No.1 being borrower enjoyed different credit facility from the plaintiff for opening of a cloth shop and defendant No.2 is the co-obligant / guarantor for due repayment of the loan. This credit facility was being enjoyed by defendant No.1 since 1976. It is further averred, inter alia, that on 04.09.1982, a fresh limit of Rs.15,000/- was made in favour of M/s. Laxmi Cloth, wherein defendant No.1 was the sole proprietor and defendant No.2 was the guarantor for due repayment of loan and this limit was made in continuation to the earlier limits availed by defendant No.1 from the plaintiff with effect from 24.11.1976. When the limit of Rs.15,000/- was made, on 04.09.1982, defendant Nos.1 and 2 executed joint and several Demand Promissory Note for Rs.15,000/- to secure outstanding advance of the said amount with interest @ 5% per annum over

the Reserve Bank of India rate with a minimum of 15% per annum with quarterly rests. They also executed letter of continuity on 04.09.1982 for the security held on 06.07.1981 and also declared in letter dated 04.09.1982 that he is the sole proprietor of the firm M/s. Laxmi Cloth. Not only this, but also, the defendants executed an agreement for demand cash credit on the hypothecation of movable property to secure the aforesaid advance of Rs.15,000/- on the ground that the security obtained out of the finance shall stand hypothecated to the Bank. Defendant No.1 executed a letter of continuing security, stating that the pronote of 04.09.1982 would operate as continuing security for the said amount. Defendant No.2 executed a letter of guarantee for the said loan amount availed by defendant No.1. On 02.07.1984, 22.03.1985 and on 08.03.1988, defendants executed letter of acknowledgement of debt. Thereafter, defendant No.1 did not repay the loan amount regularly in spite of notice by the plaintiff. As on 06.03.1991, there was an outstanding amount of loan of Rs.29,592/- against the defendants. Since the defendants did not repay such amount, suit was filed in the Court below for recovery of such amount with pendente lite and future interest thereon from the defendants.

4. Defendant No.1 filed written statement, admitting about availing of the cash credit facility from the plaintiff-Bank since the year, 1976; but he has not filed any document pertaining to security. Defendant No.1 has further averred in the written statement that the daily ledger maintained by the plaintiff

does not disclose that on 04.09.1982 a fresh credit limit for an amount of Rs.15,000/- has been made. Defendant No.1 has also challenged the deed of hypothecation of movable property dated 04.09.1982, as the conditions therein have not been scribed by himself by his own hand and the interest column has not been filled in. Although there is signature of guarantor Bishnu Mal in para-8 of the deed of hypothecation, but no date has been mentioned. He has also challenged the letter of continuity being not filled up properly; but admitted the signature of one Bishnu Narayan Mall executing that document. He has not admitted to have received letters of debt balance on 02.07.1984, 22.03.1985 & 08.03.1988. He has admitted to have paid Rs.15,000/- towards loan amount in the Current Account ledger folio in May, 1986, but challenged the outstanding balance stating that on different dates different accounts have been maintained wrongly by the plaintiff-Bank. Defendant No.1 has further stated that there is no agreement between himself and plaintiff-Bank by 07.03.1991 to pay back the total amount of Rs.29,592.15 paise with interest. Further, he stated that since he has paid the last instalment of Rs.300/- on 06.04.1987 and the suit was filed in the year, 1991, the suit is barred by law of limitation. According to him, there is no cause of action to file the suit and the suit is not maintainable in the eye of law. Hence, he prayed to dismiss the suit.

5. Although defendant No.2 did not file written statement, but he was permitted to participate in the suit.

6. Basing on the pleadings of both the parties, the

following issues were framed by the learned trial Court.

i) Whether the suit is maintainable ?
ii) Whether the suit is barred by limitation ?
iii) Whether the plaintiff is entitled for realization of a sum of Rs.29,592.15p. from the defendants ?
iv) To what other relief, the plaintiff is entitled ?

7. The learned 2nd Addl. Civil Judge (Sr. Division) has answered issue No.(iii) holding that the plaintiff is not entitled to realise a sum of Rs.29,592.15 paise from the defendants and, consequently, answered all other issues in the negative dismissing the suit of the plaintiff.

CONTENTIONS :

8. Learned counsel appearing for the appellant challenged the findings arrived at by the learned trial Court on the grounds that the learned trial Court has failed to appreciate the facts of the case and the evidence on record. He further submitted that the learned trial Court has committed error by not placing reliance on Exts.11 to 17 when they have been admitted by the defendants. He further submitted that the learned trial Court has also failed to appreciate the question of law, as the onus lies on the defendants to prove their plea particularly when the executed documents have been admitted by the defendants. According to him, due to non-application of mind and non-appreciation of the evidence on record, the learned trial Court has committed error in dismissing the suit. So, he prayed to allow the appeal.

9. On the other hand, learned counsel appearing for the

respondents submitted that the evidence led by the plaintiff is not sufficient to prove their claim. He also submitted that plaintiff has brought some evidence beyond pleadings which is not permissible under Order 6, Rule 2 of the C.P.C. According to him, the learned trial Court has gone through the entire materials on record and properly appreciated the facts of the case and the evidence as well. He supported the judgment of the learned trial Court and prayed to dismiss the appeal.

DISCUSSION :

10. It is well settled law that the first Appellate Court being the Court of finding of facts and law has to answer in every issue decided by the learned trial Court. It is also well settled law that the evidence adduced in the lower Court has to be reappreciated by the first Appellate Court while deciding the appeal. Bearing in mind the settled principles, let me find out if the finding of the learned trial Court is liable to be interfered with.

11. Let me first of all find out whether the finding of the learned trial Court on issue No.(iii) is correct or not. It is revealed from the plaint of the plaintiff that defendant No.1 was availing cash credit facility since 1976 and such fact has been admitted by defendant No.1. Now, again the plaintiff has submitted supporting the plaint averments that on 04.09.1982 a fresh limit of Rs.15,000/- was made in favour of M/s. Laxmi Cloth wherein defendant No.1 is the sole proprietor and defendant No.2 became the guarantor. It is stated in the plaint

that on 04.09.1982, defendant Nos.1 & 2 executed joint and several Demand Promissory Note for Rs.15,000/- to secure the outstanding advance with interest @ 5% per annum with a minimum of 15% per annum with quarterly rests. In his written statement, defendant No.1 does not admit the contents of the documents; but admits his signatures in the agreement for Demand Cash Credit on hypothecation of movables dated 04.09.1982. Not only this, but also defendant No.1 being examined as D.W.1 has admitted in para-8 of his cross-examination that he was the proprietor of (D.C.M.) N.R.S. Firm in the year, 1976 and also the proprietor of M/s. Laxmi Cloth in the year, 1982. He has also admitted that in the year, 1976, Rs.10,000/- was credited in the account of (D.C.M.) N.R.S. He has also admitted that he has applied for a loan of Rs.15,000/- and that application has been admitted into evidence and marked as Ext.11. He has also admitted in cross-examination that the old firm (D.C.M.) N.R.S. has been converted to M/s. Laxmi Cloth store. Of course, this fact has not been pleaded in plaint; but there is no bar to bring any new fact in cross-examination if admitted by defendants. So, the contention advanced by learned counsel for the respondents is jettisoned. He has admitted that in business transaction, he used to deposit and draw cash from the above account. He has admitted his signature in the Demand Promissory Note dated 24.11.1976 vide Ext.13/a. Moreover, in para-10 of his cross-examination, he has admitted that he has not specifically mentioned in the written statement that he has not

executed Exts.1 to 4. It may be mentioned that Ext.1 is the Demand Promissory Note dated 04.09.1982, Ext.2 is the declaration of sole proprietor, Ext.3 is the letter of continuity dated 04.09.1982, and Ext.4 is the deed of agreement of hypothecation dated 04.09.1982. So, in such situation, the facts specifically not denied must be deemed to have been admitted. Besides, in the written statement, defendant No.1 has admitted to have signed the papers of the Bank; but they were left blank. In that view of the matter, the position of law is required to be deliberated. Since the Banking institution deals with negotiable instruments, we may refer to section 118 of the Negotiable Instruments Act, 1881 (in short, "the Act"). It is reported in the case of ***Raja Kishore Chhapolia*** Vs. ***Lakshman Rout*** **(1990 CLT 548),** wherein our own Hon'ble High Court has been pleased to observe in para-6 of the judgment that :

> "From all these decisions and the reading of the sections, the law is well settled that once the execution of the pronote is admitted the presumption under Section 118(a) arises. However, this presumption is a rebuttable one. This presumption is to the effect that until contrary is proved a presumption shall be drawn that the instrument was for consideration. The presumption under Section 118 of the Act can be rebutted by circumstantial evidence or by presumption of fact drawn under Section 114 Illustration (g) of the Evidence Act".

12. With due respect to the above decision, I find in the instant case that since the defendants have admitted their signatures on Exts.1 to 4 and other documents, presumption under section 118 of the Act goes in favour of plaintiff to effect

that defendants have executed the same after entries therein have been duly filled in. Onus lies on defendants under section 102 of the Evidence Act to rebut the same by proving that the contents were filled in after their signatures were obtained. But, no evidence has been led by defendant No.1. At the same time, he can discharge his onus by cross-examining P.W.1. It is revealed from the cross-examination of P.W.1 that during 1976, he has seen the signature of defendant No.1; but in para-23 of his cross-examination, he has stated that in the year, 1982, he was not serving under the plaintiff-Bank. Thereafter, there was vivid cross-examination; but it has been brought out that the documents were filled in by the Bank. Even if P.W.1 being the employee of plaintiff-Bank was not there at the time of execution of Exts.1 to 4 or Exts.5 to 8, nevertheless these documents being printed one and duly maintained during course of business by the plaintiff-Bank cannot be said to have been subsequently filled in after the signatures of defendant Nos.1 and 2 were obtained. On the other hand, defendant No.1 has failed to elicit any evidence during cross-examination of P.W.1 to discharge his onus. So, the presumption about execution of the documents filed by the plaintiff towards open cash credit and subsequent thereto the increase of such limit with loan amount of Rs.15,000/- on 04.09.1982, the deed of hypothecation of the movable goods, the deed of guarantee by defendant No.2 and other documents go to prove that the same have been executed after being duly filled in.

13. Now, the dispute arises about Ext.9. It was the contention of learned counsel for the appellant that Ext.9 has not been properly appreciated by the learned Court below. On the contrary, learned counsel for the respondents submitted that Ext.9 does not disclose about increasing of cash credit limit of Rs.15,000/- by way of obtaining a Demand Promissory Note from defendant No.1 on 04.09.1982 being not reflected in the said exhibit and other materials for which the same cannot be taken as a proper statement of accounts to show the outstanding balance against the defendants. I went through Ext.9. It appears that this is a Current Account ledger maintained against M/s. Laxmi Cloth having proprietorship of defendant No.1. It is maintained since 1976. If one goes through the same, the same, in fact, would not disclose that on 04.09.1982 cash credit of Rs.15,000/- was deposited in his account. Also it does not disclose that on 24.11.1976, Rs.10,000/- as cash credit limit was raised and defendant No.1 has executed D.P. Note to this effect as admitted by him in his cross-examination. As a matter of fact, on 14.01.1982, there was outstanding balance of Rs.25,830.71 paise against defendant No.1. Thus, it is found that before beginning of 1982, there was already outstanding against the said defendant. Now, it appears that from time to time there is withdrawal and deposit of money and finally in March, 1991 there was balance of Rs.29,592.15 paise against the defendants. Now, it is to be seen whether this Demand Promissory Note of Rs.15,000/- has been adjusted against the balance amount

because it is a cash credit limit account. It is revealed from para-30 of the cross-examination of P.W.1 that on 17.05.1986, defendant No.1 has paid Rs.15,000/- vide Ext.9 and he has also paid Rs.300/- on 06.04.1987 under the said exhibit and, finally, in March, 1991 there was outstanding of Rs.29,592.15 paise. Since it is a cash credit facility account, even if the Demand Promissory Note of Rs.10,000/- and Rs.15,000/- being not mentioned on the same must have been taken into consideration to up-date the accounts from time to time.

14. It appears that in every month till March, 1991, cash has been withdrawn by defendant No.1. So, Ext.9 cannot be appreciated in the manner as is done by the learned Court below. On the other hand, this account being maintained in a Current Account with cash credit limit facility, it cannot be construed like normal loan account ledger. Moreover, these documents are maintained in due course of business and is admissible under section 34 of the Evidence Act. Every page has been certified by the concerned Banker and the Manager has certified that it is maintained in the Branch in regular course of business and the original ledger has been kept by them. Under Section 4 of the Banker's Books Evidence Act, 1891, the 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. Certified copy

has also been defined under the said Act vide section 2(8) that “certified copy” means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business. Now, adverting to the “banker's books”, which is defined under section 2(3) of the above Act, the same depicts that banker's books include ledgers, day-books, cash-books, account books and all other books used in the ordinary business of a bank. So, in view of the above character of Ext.9, as discussed, the same can be relied upon to prove that there was outstanding of Rs.29,592.15 paise against the defendants and defendant No.2 is a guarantor, as the documents have already been proved by the plaintiff. Apart from this, the defendants have not adduced any evidence to prove that Ext.9 is not a correct ledger maintained in course of business by the Bank. Hence, it is found that there is outstanding amount of Rs.29,592.15 paise against the defendants. That apart, D.P. Note dated 04.09.1982 vide Ext.1 and agreement vide Ext.4 show that they have agreed to pay the principal with interest @ 15% per annum. So, it is found that the defendants are liable to pay a sum of Rs.29,592.15 paise with interest @ 15% per annum thereon to the plaintiff. In this regard, the finding arrived at by the learned Court below on issue No.(iii) is not agreed with and, as such, the said issue is answered in favour of the plaintiff.

15. So far as issue No.(ii) is concerned, the defendants

have taken a plea that the suit is barred by limitation. On going through Exts.6, 7 & 8, it appears that the signatures therein have been admitted by defendant No.1; but he has not admitted the contents thereof in the written statement. During his examination, he has denied to have lent his signatures on blank documents. At the same time, he has admitted that he has put his signature in Ext.7 on 21.07.1984. So, the plea of the defendants that they have signed the blank papers has not been well proved by defendant No.1. On the other hand, it is proved by P.W.1 that three documents under Exts.6, 7 & 8 are balance confirmation letters of the plaintiff duly executed on 02.07.1984, 22.03.1985 & 08.03.1988. All the documents have proved that the defendants have acknowledged the balance debt against them. Not only this, but also in Ext.9, it appears that on 04.03.1991, he has withdrawn Rs.843.55 paise and the suit was filed on 07.03.1991. So, at any rate, the suit is not barred by limitation.

16. In view of the findings on issue Nos.(iii) & (ii), there lies cause of action for which the suit is maintainable. In the facts and circumstances of the case, the plaintiff is entitled to recover Rs.29,592.15 paise with pendente lite and future interest @ 15% per annum, as prayed for. I do not agree with the findings of the learned trial Court on these issues for the reasons stated above. Hence ordered :

O R D E R

The appeal is allowed on contest with cost and the judgment dated 04.08.2005 & decree dated 25.08.2005 passed

by the learned 2nd Addl. Civil Judge (Sr. Division), Bhubaneswar in Money Suit No. 714/39 of 2004/1991 are hereby set aside. The respondent-defendants being jointly and severally liable to pay a sum of Rs.29,592.15 paise with pendente lite and future interest @ 15% per annum are directed to pay the same to the appellant-plaintiff within a period of two months hence, failing which the appellant is at liberty to recover the same by following due process of law.

District Judge, Khurda
at Bhubaneswar.
21.07.2014.

Dictated, corrected by me and pronounced in the open Court this day the 21st July, 2014.

District Judge, Khurda
at Bhubaneswar.
21.07.2014.