
Indian Bank, Sec"bad Vs Boorugu Nagaiah Rajanna and others

CCCA No. 142 of 1988

Court: Andhra Pradesh High Court

Date of Decision: Oct. 29, 1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€” Order 41 Rule 22, Order 41 Rule 27, Order 41 Rule 33#Negotiable Instruments Act, 1881 (NI) â€” Section 30, 31, 73, 90, 92#Railways Act, 1980 â€” Section 78

Citation: AIR 2000 AP 289 : (2000) 2 ALD 548 : (2000) 2 ALT 490

Hon'ble Judges: S.V. Maruthi, J; D.S.R. Varma, J

Bench: Division Bench

Advocate: Mr. Y. Vasudev Rao, for the Appellant; Mr. M. Krishna Mohan Rao and Mr. R.V. Subba Rao, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

S.V. Maruthi, J

1. The appeal arises out of the suit in OS No.322 of 1983 on the file of the Additional Chief Judge, City Civil Court, Hyderabad. The plaintiff is

the appellant. The suit was filed for recovery of Rs.3,00,067-40 Ps.

2. The averments of the plaint in brief are as follows :

The defendant No. 1 is a partnership firm and defendants 2 to 11 are the partners. The first defendant obtained Documentary Bills purchase facility

for the business up to a limit of Rs.2,50,000/- in the year 1971 and executed promissory notes, a letter of continuity and an agreement for bills

purchase facility as collateral security for the repayment of amounts due to the plaintiff bank. The bills purchase facility was renewed from time to

time. In the course of transactions between the plaintiff and the defendants, the branch office at Madras of the plaintiff bank returned six sets

of documents to the plaintiff bank reporting that they were dishonoured by the drawees (purchasers) when presented for payment. After the six bills

were returned dishonoured, the plaintiff bank addressed a letter dated 25th October, 1980 to the defendants by registered post informing them that

the above mentioned bills totalling to Rs.2,02,000/- with interest thereon were returned unpaid and outstanding in the bank books and requesting

the defendants to adjust the amounts due. However, the defendants have not discharged the liability. Therefore, on 1st March, 1982, a lawyer's

notice was issued demanding a sum of Rs.2,91,463-25 ps., as on 28-2-1982 from the defendants in spite of receipt of the notice, the defendants

have not paid the amounts. The total amount thus, due from the defendants is Rs.3,00,067-40 Ps., and the defendants are liable to pay the said

amount with interest at the rate of 12 1/2% p.a. from the date of filing of the suit till the date of realisation.

3. The defence set up by the defendants is one of denial. In addition, it is stated that the plaintiff bank granted bills discounting facility to M/s.

Lokula Kusumaiah and Brothers up to the tune of Rs. 1,50,000/-. The said firm, as and when exceeded their limits, had obtained the additional

signature of the first defendant firm as a co-obligant and discounted with the plaintiff bank. Therefore, all the bills of exchange filed by the plaintiff

bank contain the co-obligant's signature of the firm of M/s. Lokula Kusumaiah and Brothers. The drawee, drawer the purchasers at Madras and

the co-obligants M/s. Lokula Kusumaiah are necessary and proper parties to the suit. In the absence of necessary parties, the defendants are

exonerated.

4. The hundies referred to in the plaint dated 9-2-1980, 15-2-1980 and 23-2-1980 for an aggregate value of Rs.2,02,000/- were drawn by

Ghulam Hussain of Bakaram, Hyderabad in favour of Hafizur Rehman and Hafiz Ahmed, Periamet, Madras. The said drawer endorsed the

aforesaid six hundies in favour of M/s. Lokula Kusumaiah and Brothers. The said M/s. Lokula Kusumaiah and Brothers and the first defendant

firm endorsed the same in favour of the plaintiff. The said negotiable instruments were dated between 9-2-1980 to 23-2-1980 and the plaintiff has

failed to give notice of dishonour immediately on their dishonour. Hence, they are not liable in respect of the suit hundies for want of notice as

prescribed under the Negotiable Instruments Act. The plaintiff neither has given notice of dishonour nor did he return the Railway receipts on

account of which, the defendants have sustained loss as the consideration for the suit hundies are with the plaintiff. Therefore, the plaintiff cannot

claim any amount on account of the said negotiable instruments. The plaintiff intimated the dishonour of hundies only on 25-10-1980 by which

time, all recoveries of the goods under the Railway receipts dated 9-2-1980 to 23-2-1980 have become stale and not recoverable from the

Railways. When the defendants explained on receipt of the suit notice, the plaintiff promised to look into the matter and made necessary

amendments. Therefore, the defendants executed a renewal document in August, 1982 and also deposited an amount of Rs.50,000/- in suspense

account. Hence, the suit is liable to be dismissed.

5. On the basis of the pleadings, the trial Court framed as many as seven issues and two additional issues. The plaintiff examined PWs.1 to 3, while

the defendant examined DWs.1 and 2. On behalf of the plaintiff Ex.A1 to Ex.A48 were marked. On behalf of the defendants, no documents were

marked.

6. During the pendency of the suit defendant No. 12 viz., M/s. Lokula Kusumaiah and Brothers were impleaded as a party.

7. On the basis of the documentary and oral evidence, the trial Court decreed the suit against the defendants 1 to 11 and dismissed the suit against

defendant No.12. The trial Court granted interest at the rate of 6% p.a. from the respective dates of the bills to the date of realisation of the

principal amount with proportionate costs. Aggrieved by the same, the plaintiff filed the appeal claiming interest at the rate of 16 1/2% p.a. from the

respective dates of bills till the date of realisation.

8. The main argument of the learned Counsel for the appellant bank is that in view of the judgment of the Supreme Court in Corporation Bank Vs.

D.S. Gowda and Another, , transaction in the present case, relating to the facility of discounting of bills is a commercial transaction and therefore,

they are entitled for interest at the rate of 16 1/2% per annum.

9. While the learned Counsel for the respondents Sri M. Ramachandra Rao contended that the bills of exchange are dated 9-2-1980, 15-2-1980

and 23-2-1980. Ghulam Hussain the original owner of goods, sold the goods to Hafizur Rahman and Hafiz Ahmed at Madras, discounted the

Railway receipts and bills of exchange in favour of defendant No.12 M/s. Lokula Kusumaiah and Brothers. Since M/s. Lokula Kusumaiah had the

bill discounting facility only up to Rs. 1,50,000/- they have obtained the additional signature of the first defendant firm and discounted with the

plaintiff bank. Therefore, the plaintiff bank is in possession of the Railway receipts. When the drawees dishonoured the bills, when presented by its

branch office in Madras, the fact of dishonour was intimated to the first defendant on 25-10-1980 nearly after a period of eight months. u/s 106 of

the Negotiable Instruments Act, 1881, the notice of dishonour should be given within a reasonable time i.e., by the next post or on the day next

after the dishonour of bills. Since there is a non-compliance with the requirement of Section 106 of the Negotiable Instruments Act, 1881, as there

is an enormous delay in giving notice of dishonour, the suit is liable to be dismissed. However, though the defendant No.12 has paid the decretal

amount and no appeal has been filed by the defendants 1 to 12, still it is open to the defendants, who have not filed any cross-objections to urge in

opposition to the appeal of the plaintiff, a contention which if accepted by the trial Court, would have necessitated the total dismissal of the suit. In

support of his contention he relied on a Full Bench judgment of the Madras High Court in Gaddam Chinna Venkata Rao and Others Vs. Koralla

Satyanarayanamurthy and Another, , Sri Chandre Prabhuji Jain Temple and Others Vs. Harikrishna and Another, and Shri Ravinder Kumar

Sharma Vs. The State of Assam and Others, . Therefore, the plaintiff is not entitled for interest @ 16 1/2% per annum and the appeal is liable to

be dismissed.

10. The learned Counsel also brought to our notice the following passage from Tannan's Banking Law and Practice in India, Nineteenth Edition

1997, Page 492 and Para 424 of the Halsbury's Laws of England, 4th Edition.

Rule governing the sending of notice of dishonour :--When the person giving notice and the one to receive it reside in the same town, the notice

must be sent to reach the other party on the day after the dishonour when they reside in two different places the notice must be despatched at the

latest on the working day after the day of dishonour. It must be remembered that the holder of a bill loses his right to claim the amount from the

previous endorser if he fails to inform them without undue delay of the fact of dishonour and all other parties against whom he wished to press his

claim. This duty on the part of banker is some times neglected with the result that he loses his right against endorser. Such negligence results

particularly in cases of documentary bills.

Para 424:

As in the case of dishonour by non-acceptance. So also in that of dishonour by non-payment, notice of dishonour must be given to the drawer

and each indorser; otherwise the drawer or any indorser to whom such notice is not given is discharged.

Time is an element of the utmost importance in regard to the due sending of notice of dishonour.

Notice may be given as soon as the instrument is dishonoured and it must at all events be given within a reasonable time thereafter. What is a

"reasonable time" must, as in the case of presentment for payment be to some extent a matter of fact dependent upon the circumstances of the

case; but in respect of notices of dishonour the rules laid down by law for its determination are much more precise;

In the absence of special circumstances, notice is not deemed to have been given within a reasonable time unless, (1) where the party giving and

the party to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the

instrument or (2) where the party giving and the party to receive notice reside in different places, the notice is sent off on the day after the

dishonour of the instrument, if there is a post at a convenient hour on that day, or, if there is no such post on that day, then by the next post

thereafter.

As notice of dishonour is one of the things required by the statute to be done in less than three days, non-business days are excluded in reckoning

time (Para 431).

11. He also brought to our notice Sections, 30, 31, 90, 93, 94, 95, 105 and 106 of the Negotiable Instruments Act (hereinafter called as "the

Act"), which casts an obligation on the holder of the instrument to issue a notice of dishonour within a reasonable period or within the time

stipulated u/s 106 of the Act. He also contended that the goods i.e., hides and skins are perishable goods and they were sent between 9-2-1980

and 23-2-1980 from Hyderabad to Madras by train. The Railway receipts and bills bear the signature of Ghulam Hussain and defendant No.2.

Since they endorsed it, the plaintiff became the owner of the Railway receipts as goods were sent by Railway consignment. The plaintiff bank had

the custody of Railway receipts Ex.A1? to Ex.A22 as security for the transactions. Therefore, the plaintiff should have taken delivery of the goods

at Madras and sold them and mitigated the loss caused by dishonour of bills, as the Supreme Court in The Morvi Mercantile Bank Ltd. and

Another Vs. Union of India (UOI), , held that the "Railway receipts are the documents of title". However, the plaintiff neither sold the goods and

mitigated the loss caused by the dishonour of bills nor, did he inform the first defendant immediately of the fact of dishonour. Had the plaintiff

informed the first defendant about the dishonour of bills immediately, the first defendant would have paid back the amount of Rs.2,02,000/- given

by the bank and taken the Railway receipts from the bank and also would have taken the delivery of goods at Madras and would have sold them

and made the claim against the drawer Ghulam Hussain for the loss if any, if suffered. Under Ex.A9 dated 25-10-1980, eight months later, the

plaintiff informed the first defendant about the dishonour of the bills. u/s 78-B of the Railways Act, 1980, any claim for loss in respect of goods

against the Railways for compensation, has to be within six months from the date of delivery of goods. In view of the conduct of the plaintiff in

failing to mitigate the loss arising out of breach of contract, the suit was liable to be dismissed. The Counsel also submitted that there is no evidence

to establish the correct rate of interest on the bills of exchange and relying on the rate of interest mentioned in the promissory notes, the plaintiff is

claiming interest @ 16 1/2% p.a., to which he is not entitled, as the suit is not filed on the basis of a pronote, as they were executed as a collateral

security.

12. In reply the Counsel for the appellant contended that there was an oral notice of dishonour of the bills and at any rate the notice of dishonour

was issued in June, 1980 and thereafter reminder was issued in October, 1980. Therefore, notice of dishonour was given within a reasonable time.

At any rate the defendants have given an unconditional undertaking, undertaking to see that the defendant No. 12 pays the amount. Therefore,

there is a waiver of notice of dishonour u/s 98-G of the Act. Further there is no plea that the defendants have suffered any damage for want of

notice of dishonour. In view of clause 7 of the agreement, Ex.A8, the notice of dishonour is waived. At any rate, by their conduct, the defendants

have waived the notice of dishonour of the bills. The defendants have even not asked for the return of the Railway receipts by tendering the amount

covered by the pronotes. Therefore, there is no liability on the part of the plaintiff to return the Railway receipts. It is only, when the defendants

tendered the amounts covered by the pronotes and the bills, the obligation on the part of the plaintiff arises to return the Railway receipts.

13. The Counsel also submitted that the defendants have deposited Rs.50,000/- and till the notice was issued, they have not raised the issue of

notice of dishonour, though they have acknowledged all the letters.

14. As regards the rate of interest he submitted that all the documents must be taken together viz., Exs.A5 to A8 and the rate of interest mentioned

in Ex.A6 is the relevant rate.

15. Relying on the decision of the Supreme Court reported in Tummalla Atchaiah Vs. Venka Narasingarao, and Choudhary Sahu (Dead) by Lrs

Vs. State of Bihar, he contended that the defendants have not filed cross-appeal or cross-objections. Therefore, they are not entitled to seek any

relief in the appeal as this Court in exercise of the powers under Order 41, Rule 33 CPC cannot reopen the decree which had already become

final.

16. While the learned Counsel for the defendant No. 12 contended that the suit is barred by limitation as defendant No.12 was impleaded on 16-

12-1985 in IANo.350 of 1985. The cause of action arose on 25-10-1980 and hence the suit is barred by limitation.

17. The questions that arise for consideration on the respective arguments are as follows :

1. Whether the plaintiff is entitled for 16 1/2% per annum interest;

2. Whether the plaintiff issued the notice of dishonour in accordance with the provisions of Negotiable Instruments Act;

3. Whether the defendants can oppose the claim of the plaintiff for interest @ 16 1/2% p.a. on the ground that on merits the suit is liable to be

dismissed without filing the cross-appeal or cross-objections;

4. Whether there is a waiver of notice of dishonour.

Point No. 1:

The undisputed fact is that the transaction is a commercial transaction, as Ghulam Hussain sold hides and skins to one Hafizur Rahman, the drawee

at Madras and Ghulam Hussain endorsed the bill of exchange in favour of the defendant No. 12, who obtained the signature of the first defendant

on the negotiable instrument, as he had bills discounting facility only upto Rs. 1,50,000/-. Since it is a commercial transaction in view of the

judgment of the Supreme Court in Corporation Bank v. D.S. Gowda's case referred (supra), the interest rate will be at the contract rate.

However, there is no evidence as to what is the contract rate. The Counsel for the appellant contends relying on the documents executed viz.,

Ex.A5 to Ex.A7 that the contract rate of interest is at 16 1/2% p.a. His further contention is that Ex.A5 to Ex.A8 viz., pronotes, renewal letter,

letter of continuity and bills discount agreement should be read together and if so read, 16 1/2% p.a., would be the rate of interest. Therefore, the

plaintiff is entitled for the interest at that rate.

18. While the Counsel for the respondents contends that in none of the documents, except in the pronotes, the rate of interest is mentioned. The

pronote is executed as a collateral security only and since the suit is not based on the pronote, the plaintiff is not entitled for recovery of interest @

16 1/2% p.a.

19. Coming to the oral evidence, PW1 admitted that they have not debited interest to the suit amount and he does not know whether the interest

chargeable on the amounts of bills dishonoured is always simple interest, and that he does not remember the rate of interest charged on the account

and it may be varying from time to time and depends on the prevailing lending rates of interest in the quarter and he does not remember as to what

are the varying rates applicable during the period from 3-8-1980 to the date of suit. He further says that the RBI rates varies from time to time and

under Banking Regulations, they have to intimate each party the charge of interest and he does not remember whether any intimation was sent to

the defendants and that they have to intimate the party and take acknowledgment.

20. PW3 says that he does not know the rate of interest between 9-2-1980 and 13-8-1982. The interest is charged as per RBI Regulations and

he does not know if between that period interest rate was revised several times. The interest at 19.5% was debited as per instructions from the

loan sanctioning authority and he does not know, if there was any agreement between the bank and the defendant regarding interest.

21. DW1 in his evidence stated that the plaintiff never intimated them that they would charge the panel interest on the said amount. Thus the oral

evidence does not establish as to the rate of interest to be charged from the defendants. However, the defendants executed pronotes in favour of

the bank agreeing to pay interest @ 16 1/2% p.a. Therefore, the rate of interest mentioned in the pronote shall be treated as the contract rate of

interest and in view of the judgment of the Supreme Court in D.S. Gowda's case referred (supra), the rate of interest is 16 1/2% p.a.

Point No.2:

Section 30 of the Negotiable Instruments Act, 1881, provides that in case of dishonour by the drawee, the drawer of bill of exchange is entitled for

compensation provided due notice of dishonour has been given to the drawer.

22. Section 92 of the Act says that a bill of exchange is dishonoured by nonpayment when the acceptor of the bill makes default in payment upon

being duly required to pay the same.

23. Section 73 provides that the holder of the bills of exchange has to give notice that the instrument has been dishonoured to all the parties to

whom the holder seeks to make severally or jointly liable.

24. Section 105 of the Negotiable Instruments Act provides for the reasonable time for giving notice of dishonour.

25. Section 106 determined as to what is the reasonable time for giving the notice of dishonour. According to Section 106 of the Act, notice of

dishonour should be given within a reasonable time and that it should be sent by post on the next day after the holder or any other party who was

bound to give notice. Hence, the notice should be despatched by post immediately on the day of dishonour or the day next after the dishonour.

26. Notice of dishonour is a must. Otherwise, the drawer or the indorser to whom such notice is not given is discharged.

27. It is pointed out that notice of dishonour must be given as soon as the instrument is dishonoured and it must be in all events within a reasonable

time thereafter and what is a reasonable time depends on the facts and circumstances of each case. In other words, the holder of a bills of

exchange comes to know of the dishonour of the bills of exchange presented to the drawee, the moment he comes to know of that, he has to issue

a notice of dishonour and despatch it by the next post or on the day next after the day of dishonour or within a reasonable time. On the facts of the

present case, the bills are dated 9-2-1980, 15-2-1980 and 23-2-1980 and they were despatched to Madras for collection along with the Railway

receipts to the plaintiff bank. There is no evidence when the drawee in Madras refused to honour the bills. The only evidence on record is Ex.A9,

which is a office copy of the letter written by the plaintiff to the first defendant dated 5-10-1980. It refers to their letter dated 26-6-1980. In this

letter, they point out that the six bills totalling to Rs.2,02,000/- plus interest remained unpaid and still outstanding in their books of account and

requesting the defendants to clear the amounts, otherwise they will be compelled to take the recourse of law. It is no doubt true that this letter

refers to the letter dated 26-6-1980. However, the said letter was not filed during the course of trial and the plaintiff filed a petition to adduce

additional evidence. We will refer to the said application at a latter stage. From the evidence, except the letter dated 25th October, 1980, and the

reference to the letter dated 26-6-1980, there is no other evidence that the notice of dishonour was issued to the defendants earlier to 26-6-1980.

28. Coming to the oral evidence, PW1 in his chief-examination says that they gave notice to the defendants on 25-6-1980 by registered post,

when the bills were dishonoured and sent back by the Madras branch to them and Ex.A9 is the office copy of the said notice. He further says that

the bank gave a notice of dishonour to the defendants and the defendants promised to pay the amounts in a reasonable time, but they did not. In

the cross-examination, he says that they have issued notice to the defendants within six months i.e., on 26-6-1980. He admits that the Railway

receipts show that the goods can be claimed within six months. He also admits that they have not filed the office copy of the notice dated 26-6-

1980 and that they have not mentioned it in the plaint. He also admits that he cannot say when Ex.A36 to Ex.A41 were returned to them.

29. PW2 denies that Ex.A9 was the first letter by the bank issued to the defendants in respect of demands for the bills returned.

30. PW3 says that when bills caused by a Railway receipt is dishonoured, the duty of the bank is to inform the party about it and he does not

know if the bank has not informed in writing about the dishonour of the above bills and there is no intimation in writing to defendant No.1 about the

dishonour as oral information might have been given, and he is not personally aware of the oral information.

31. DW1 in the chief-examination says that the plaintiff bank did not intimate them as to when the bills of exchange Ex.A36 to Ex.A41 were

dishonoured by the consignee on presentation.

32. DW2 defendant No. 12 stated that about two or three months after the dishonour of the Railway receipts by the consignee, the plaintiff bank

informed defendant No. 12, firm about their dishonour.

33. From the oral evidence, it appears that the first notice of dishonour was issued on 26-6-1980. Though DW2 says that two or three months

after the dishonour of the Railway receipts by the consignee, the plaintiff informed defendant No.12, firm about their dishonour.

34. A reading of the evidence of DW2 shows that defendant No.12 was informed about the dishonour of two or three months after the dishonour

of Railway receipts by the drawee. There is no evidence as to when the drawee refused to honour the bills. In the absence of evidence as to when

the drawee refused to honour the bills, the evidence of DW2 is of not much assistance to the Court in arriving at the conclusion as to the date on

which, the notice of dishonour was given. However, from the documentary evidence, read with the oral evidence, it is clear that the first notice of

dishonour was issued on 26-6-1980. The next question is whether the notice of dishonour dated 26-6-1980 is within a reasonable time. When the

defendant raised in his written statement a plea that there was no notice of dishonour issued to them, the burden of proof is on the plaintiff to

establish that the notice of dishonour was issued within the reasonable time. From the evidence, we find that the first notice of dishonour was issued

on 26-6-1980. To hold that the notice of dishonour dated 26-6-1980 is within a reasonable period, or that it is in compliance with the provisions

of the Act, there should be evidence, as to the date and time at which the drawee refused to honour the bills. The plaintiff alone is posted with the

knowledge of the date and time at which the drawee dishonoured the bills. Therefore, the plaintiff should have adduced evidence by producing

relevant documents under which the bills were dishonoured. The plaintiff is in possession of those documents and that is the best evidence to

determine whether the notice of dishonour is within a reasonable time or not. The plaintiff suppressed the best evidence which is in their possession.

Therefore, it is open to this Court to draw an inference, that had the documents under which the bills were dishonoured by the drawee were

produced, it would establish that the notice of dishonour dated 26-6-1980 was not only beyond the period prescribed u/s 106 of the Act, but also

beyond the reasonable period. Therefore, we are of the view that the notice of dishonour dated 26-6-1980 is beyond the reasonable period, and

also violates the stipulations prescribed u/s 106 of the Act.

Point No. 3 :

It is a plaintiffs appeal claiming interest @ 16 1/2% p.a., while the trial Court granted interest only @ 6%. The defendants have not filed any cross-

appeal or cross-objections. The contention of the Counsel for the respondents is that in view of non-compliance with the statutory requirement of

issuing the notice of dishonour, the suit is liable to be dismissed and therefore, the respondents without even filing the cross-appeal, can oppose the

appeal filed by the plaintiff.

35. In Gaddem Chinna Venkata Rao and another's case (supra), the facts in brief are as follows:--Koralla Satyanarayanamurthy filed a suit for

recovery of a sum of Rs.1,450/- due on a promissory note executed by the appellant on 27-1-1937, on the ground that the defendant No.1

(appellant No.1) borrowed Rs.3,000/- on a promissory note dated 12th December, 1934. On 27th January, 1937, there was due on this

instrument Rs.4,359/-. On that date defendant No.1 repaid in cash Rs.3,059/- and in respect of the balance of Rs. 1,300/- he executed the

promissory note in suit. The defence was that the note of 12th December, 1934 really represented what was due in respect of a loan of Rs.2,000/-

advanced in 1925. On 23rd October, 1929, defendant No.1 repaid a sum of Rs.1,900/-. By this payment and the payment of Rs.3,059/- on 27th

January, 1937, he had repaid altogether more than double the amount borrowed in 1925 and he is entitled for the relief under the Madras

Agriculturists Act. The District Munsif, decreed the suit for Rs.300/- on the ground that the defendant is entitled for the relief under the

Agriculturist's Act and that the promissory note of 12th December, 1934 is a new cash transaction. On appeal, the Subordinate Judge reversed

the said decision and decreed the suit in its entirety. He held the defendants are not entitled to challenge the District Munsif's finding that the

promissory note of 12th December, 1934 represented a new cash transaction, because they had neither appealed nor had they filed a

memorandum of cross-objections. On further appeal to the High Court, the matter was referred to a Full Bench, as the contention of the

defendants was that they are entitled to raise the objections by reasons of the provisions of Order 41, Rule 22. In that context, the Full Bench held

that:

Let us take a case where a plaintiff sues for a debt of, say Rs. 1,000/- and the suit is contended by the defendant on two grounds (i) discharge,

and (ii) limitation. Let us assume that the trial Court dismisses the suit on the ground of limitation, while negating the plea of discharge. The plaintiff

in an appeal from that decree may be able to satisfy the appellate Court that the decision on the point of limitation is incorrect. In such an

eventuality Order 41, Rule 22 enables the defendant to sustain the decree by making good the plea of discharge found against by the Court below.

Let us, however, take a more complex case where the claim and defence are of the same character as in the last illustration, but the trial Court

gives a decree to the plaintiff for Rs.600/- only disallowing the claim for the balance on the ground of limitation. In essence the decree, as already

explained, bears a double character. There is a decree for the plaintiff for Rs.600/- and a decree for the defendant in respect of the sum of

Rs.400/- disallowed by the Court, because to that extent the decision was in his favour. When the matter is taken before the appellate Court by an

appeal by the plaintiff in which, let us say, he asks for a decree for the balance of Rs.400/-disallowed by the Court below, it is open to the

defendant respondent - that is that it seems to me the rule says - to support the disallowance of the claim to the extent of Rs.400/- by making good

his plea of discharge which will avail him to that extent and no more. In doing so, he is only relying on a ground decided against him the Court

below, and this is precisely what the rule permits. In other words, where there is a decree for a part only of a claim, it means that it is partly in

favour of the plaintiff and partly in favour of the defendant and when the respondent, is given liberty by the rule to support the decree, it is to enable

him to support that part of the decree which is really in his favour. In doing so, he is not attacking the decree insofar as it is in favour of the plaintiff

nor is he supporting it; for, obviously, he is not interested in supporting it at all. In fact he is only attempting to prevent the plaintiff from increasing

the burden of the liability beyond the limit fixed by the decree appealed against.

36. In *Sri Chandra Prabhuji Jain Temple's* case referred (supra), the Supreme Court referred to the judgment of the Madras High Court in *Chinna*

Venkata Rao 's case (supra) with approval.

37. The Supreme Court again in *Shri Ravinder Kumar Sharma's* case (supra), reiterated the view in *Chandra Prabhuji's* case. It was held that:

Though in certain earlier cases in Madras High Court, a view was taken that the defendant-respondent in such situations could not attack such a

finding, a Full Bench of the Madras High Court in *Venkata Rao and others v. Satyanarayana Murthy* and another AIR 1943 Mad. 698 : 1LR

1944 Mad. 147, set the controversy at rest by holding that the respondent could attack a finding upon which, part of the decree against him was

based, for the purpose of supporting the other part of the decree which was not against him. In that case, Leach, C.J., accepted the view of the

referring Judges Wadsoworth, J. and Patanjali Sastri, J., (as he then was) to the following effect:

Under Order 41, Rule 22, it is open to a defendant-respondent who has not taken any cross-objection to the partial decree passed against him, to

urge in opposition to the appeal of the plaintiff, a contention which if accepted by the trial Court, would have necessitated the total dismissal of the

suit.

The above judgment of the Full Bench was approved by this Court in Sri Chandre Prabhuji Jain Temple and Others Vs. Harikrishna and Another,

. by Mathew, J., speaking on behalf of the Bench.

That means that under Order 41, Rule 22 CPC before the 1976 Amendment, it was open to the defendant-respondent who had not taken any

cross-objection to the partial decree passed against him, to urge, in opposition to the appeal of the plaintiff, a contention which if accepted by the

trial Court would have resulted in the total dismissal of the suit. This was the legal position under the unamended Order 41, Rule 22 as accepted by

the Madras Full Bench in Venkata Rao's case and as accepted by this Court in Chandra Prabhuji's case.

38. Therefore, from the judgments referred to above, it follows that under Order 41, Rule 22 CPC it is open to the defendant who had not filed

any cross-objections to the decree passed against him to urge in opposition to the appeal of the plaintiff, a contention which if accepted by the trial

Court, would have resulted in the total dismissal of the suit and prevented the plaintiff from increasing the burden of the liability beyond the limit fixed

by the decree appealed against.

Point No.4:

As regards waiver, the only evidence is the oral evidence and there is no documentary evidence. PW3 in his evidence says that on the date on

which the suit was filed, they paid Rs.50,000/- in miscellaneous account. He further says that the defendants represented that they would pay

Rs.50,000/- in part payment and wanted extension of time. On 13-8-1982, the defendants paid the amount. They kept the amount in suspense

account on the same day on which the suit was filed in the Court. Later, the defendants wanted the amount to be repaid to them in view of filing of

the suit and he obtained permission from the Head Office and returned the amount and it was on the basis of their recommendation, the Head

Office permitted them to refund Rs.50,000/- to the first defendant. DW1 in his evidence stated that they had deposited Rs.50,000/- with the plaintiff

bank with the request to keep the same in sundry account with the assurance that the defendant No-12 would make payment and requested not to

file the suit and along with Ex.A44, they had also executed fresh documents, because the plaintiff bank informed them that the documents already

executed were getting time-barred. After the institution of the suit, they have withdrawn the said amount. In other words, from the oral evidence, it

appears that the defendants have deposited an amount of Rs.50,000/- and DW1 gave assurance that defendant No.12 would make the payment

and requested them not to file the suit. However, the amount was deposited under Ex.A44 on 27-8-1982. u/s 98-G of the Negotiable Instruments

Act, when a party entitled to notice, knowing the facts, promises unconditionally to pay the amount, due on the instrument, the notice of dishonour

is not necessary. In other words, if a party knowing fully well the facts and circumstances of the case unconditionally promises to pay the amount

under the instrument, then it is not necessary to issue notice of dishonour. As pointed out in the earlier paragraphs, the goods were despatched in

the month of February, 1980. Had the defendants gave an unconditional undertaking before (the expiry of a reasonable period for issuing notice of

dishonour, the plaintiff is entitled to contend that there is a waiver of notice of dishonour. From Ex.A44, it is clear that the defendants have

deposited the amount of Rs.50,000/- under Ex.A44 only in the month of March, 1982 i.e., one day prior to the filing of the suit, not before the

expiry of the reasonable period of notice of dishonour to be issued under the Act. Therefore, there is no question of waiver. Further there is no

plea in the plaint and no issue was framed nor evidence was adduced. In the absence of a plea and evidence and issue framed, the plaintiff is not

entitled to raise the plea of waiver.

39. Therefore, from the above it follows that the defendant is entitled to urge that the plaintiff is not entitled for interest @ 16 1/2% per annum on

account of the failure to issue notice of dishonour, which would have resulted in the total dismissal of the suit by the trial Court. Therefore, we are

of the view (that though the rate of interest is 16 1/2% per annum, and the plaintiff in the normal course would have been entitled to the same, but

having regard to the fact that (there was a failure on the part of the plaintiff in issuing the notice of dishonour within a reasonable period, we dismiss

the appeal. At this stage, we also point out that, had the plaintiff issued the notice of dishonour within a reasonable period, the defendant would

have paid the amount and collected (the Railway receipts and proceeded against the drawee for whatever relief to which (they are entitled. By virtue

of inaction within a reasonable period, the plaintiff disabled the defendant for recovering the costs of the goods. Secondly, the plaintiff herself

could have filed a suit against the drawee for wrongful dishonour of the bills and even the costs, or sold the goods and mitigate the loss. In view of

the inaction and lapse on the part of the plaintiff, they are liable to pay costs. The appeal is dismissed. It is also dismissed against defendant No.12

along with costs.

40. The CMP filed for receiving additional evidence is also dismissed as the ingredients of Order 41, Rule 27 are not satisfied.