(2015) 1 LW 312

Madras High Court

Case No: Second Appeal No. 163 of 2008

Madras Cements Limited		APPELLANT
	Vs	
T.M.T. Kannammal Educational Trust		RESPONDENT

Date of Decision: Nov. 27, 2014

Acts Referred:

- Arbitration Act, 1940 - Section 8
- Civil Procedure Code, 1908 (CPC) - Order 12 Rule 2, Order 6 Rule 4, Order 8 Rule 3, Order 8 Rule 4, Order 8 Rule 5
- Evidence Act, 1872 - Section 101, 102, 103, 115, 34
- Sales of Goods Act, 1930 - Section 55
- Transfer of Property Act, 1882 - Section 7, 8

Citation: (2015) 1 LW 312

Hon'ble Judges: R. Mahadevan, J

Bench: Single Bench

Judgement

R. Mahadevan, J.
This second appeal is directed against the judgment and decree dated 27.07.2007 and made in A.S.No. 248 of 2006 on the file of the III Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 07.07.2005 and made in O.S.No. 3105 of 2002 on the file of the VII Assistant City Civil Court, Chennai.

2. Plaintiff, who lost its case before both the courts below is the appellant in the second appeal.

3. The case of the plaintiff before the Trial Court was that the plaintiff is carrying on the business of Manufacture and distribution of cement and its allied products and is in the business for several decades in the brand name of ""Ramco Cement"". The first

defendant is the Trust running various institutions and is having running account with the plaintiff in respect of the supply of cement from the year 1997. The plaintiff supplied cement on credit basis to the second defendant college, which is run by the first defendant Trust, and there is outstanding dues of Rs.1,76,640/- on the running account as on April 1999, payable by the defendants to the plaintiff, as per the statement of accounts. The defendants never disputed the supply of cements and acknowledged their liability. The plaintiff supplied the goods for construction at the second defendant college only upon the assurance given by the first defendant to clear the dues. The defendants continuously defaulted in payment of the outstanding dues. Hence, notices dated 08.06.2001 and 11.12.2001 were sent to the first defendant and the same were received by the defendants on 11.06.2001 and 14.12.2001 respectively. After the receipt of notices, the defendants paid a sum of Rs.4,000/- (Rs.2,000/- each on two occasions), which were adjusted towards interest. Thereafter, they failed and neglected to clear the outstanding dues. Hence, the present suit had been filed. Since the transaction between the plaintiff and the defendants is a commercial transaction, the plaintiff is entitled to interest at the rate of 24% per annum.

4. The suit was resisted by the defendants denying the running account from the year 1997 for the purchase of cements from the plaintiff and contended that the defendants have made payments to the plaintiff as and when they received the materials from them. The defendants verified their accounts and found that there was no balance outstanding towards the plaintiff''s account and they did not owe any money to the plaintiff, that too with 24% usurious interest and therefore, the suit is not maintainable, since it is barred by limitation. At no point of time, the defendants have acknowledged any alleged liability with the plaintiff. Hence, they prayed for dismissal of the suit with costs.

5. The Trial Judge framed the following issues:-

i) Whether the plaintiff is entitled to receive the outstanding dues from the defendants for the supply of cements?

ii) Whether the suit is barred by limitation?

iii) To what relief, the plaintiff is entitled?

6. Before the Trial Court, Mr.T.Mathivanan, Assistant Manager (Legal) of the plaintiff company examined himself as PW1 and marked nine documents as Exs.A1 to A9. No oral and documentary evidence was adduced on the side of the defendants. The Trial Court, on analysis of oral and documentary evidence on the side of the plaintiff, dismissed the suit with costs. On appeal, the appellate court, confirmed the finding of the Trial Court and dismissed the appeal. Aggrieved against the concurrent judgment and decree of both the courts below, the present second appeal has been filed.

7. The second appeal has been admitted identifying the following questions to be the substantial questions of law involved in the second appeal:

i) When the defendant admitted that he had received the materials from the plaintiff, is not the onus on the defendant to prove that he had not received the materials as per the invoice filed by the plaintiff?

ii) When the defendant had stated that he has made the payment to the plaintiff in respect of the materials received by him, is not the onus on the defendant to prove the details of the payments made by him?

8. The arguments advanced by Mr.V.V.Giridharan, learned counsel for the appellant and by Mr.Karunakaran, learned counsel appearing on behalf of the respondents are heard in detail. The materials available on record are also perused.

9. The learned counsel for the appellant/plaintiff would submit that since the defendants having a running account, arrears relating to the same is claimed and such arrears were demanded by issuing notices but no reply was given by the defendants denying the same, which will amount to acceptance of the liability.

10. According to the learned counsel for the appellant/plaintiff, the respondents/defendants, even in their written statement had not specifically denied the arrears and hence, the claim of arrears shall be taken to be admitted.

11. In support of his contention, the learned counsel relied on paragraphs 7 and 8 of the Judgment of the Orissa High Court reported in Chairman-cum-Managing Director, New India Assurance Company Ltd. and Another Vs. Rabi Narayan Chhotrai, , which reads as follows:-

"7. At this juncture it would be profitable to take note of provisions of Order 8 of the Code of Civil Procedure, 1908 (in short, "CPC"). Rules 3, 4 and 5 of the said Order threw beacon light on the controversy. Rule 3 provides that the denial has to be specific and it shall not be sufficient for a defendant, in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth except damages. Rule 4 deals with evasive denial. It is provided that where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Rule 5 speaks of specific denial. When the denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. The gist and meaning of the allegation traversed, as distinct from details which are comparatively immaterial must exist. The purport and effect of denial must be clear and distinct. Mere denial is not sufficient, but a specific denial which must be in express terms and definite and unambiguous is necessary. The principle underlying Rule 4 lays down that where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance, and the pleadings should be specific. Rule 5 further lays down that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleadings of the defendant, shall be deemed to be admitted. All these lead to non-traverse of allegations.

If the interpretation put by the learned counsel for the insurer is accepted, it would include a vague, routine denial, a camouflage for avoiding reference to arbitration. In such a case, inclusion of the arbitration clause in the policy would be rendered meaningless, purposeless and redundant. There must be basis for denial. In order to take the claim out of purview of the arbitration clause, the insurance company is required to establish prima facie acceptable ground for denial of the liability. Court has to be satisfied about the dispute raised is covered by the arbitration clause in order to invoke jurisdiction under Section 8 of the Act. The Court at the threshold is competent to decide whether the fact upon which exercise of jurisdiction is dependant is in existence or not. It is not to mechanically accept or refuse the prayer for reference. It has to apply its judicial mind to cull out whether the foundational facts necessary for exercise of its jurisdiction exist or not.

8. Our answer to the questions raised by the learned single Judge are as follows :(i) A bald, mechanical, routine denial of the liability is not sufficient to oust jurisdiction of the Court under Section 8 of the Arbitration Act. Some material or basis has to be indicated when denial is made or dispute is raised.(ii) The Court exercising jurisdiction under Section 8 of the Act can at the threshold examine the question whether the denial of liability has any basis or not. The matter now be placed before the learned single Judge. Reference is accepted and disposed of."

12. The learned counsel for the appellant/plaintiff would further submit that for proving the claim, invoices have been produced by the appellant/plaintiff, which were sufficient enough for proving the claim and Ex.A7 series Delivery Challan cum Invoices, Ex.A8 invoice/despatch advance and Ex.A9-copy of Delivery Challan cum Invoices, were reflected in the statement of accounts filed and those documents were not denied by the respondents. Contrarily, settlement of entire arrears had not been proved by the respondents. Relying upon Sections 34, 101, 102 and 103 of the Indian Evidence Act, it is argued that the onus lies on the respondents, since the plaintiff raised specific claim of arrears and in support of his above contentions, he relied on the following judgments and prayed that the appeal may be allowed.

(i) State Bank of India Vs. Yumnam Gouramani Singh, , which reads as follows:-

"Evidence Act (1 of 1872), Ss. 34, 115 - Bank Loan ï¿½ Proof ï¿½ Bank producing books of account ï¿½ Entries therein corroborated by Branch Manager and other bank officials ï¿½ sufficient proof of loan transaction ï¿½ moreso, when loonee has admitted loan.""

(ii) Narain Das and Others Vs. Firm Ghasi Ram Gojar Mal and Others,

"(b) Evidence Act (1872), S. 34 - Plaintiff producing account books ï¿½ His witness giving evidence in support of entries ï¿½ defendant not deeming it necessary to cross-examine witness with respect to his personal knowledge of facts he was stating ï¿½ Evidence of witness is sufficient corroboration of entries."

(iii) Kulamani Mohanty Vs. Industrial Development Corporation of Orissa Ltd., , and the relevant portions are extracted hereunder:-

"(a) Evidence Act (1 of 1872), S. 34 - Books of accounts ï¿½ entries in ï¿½ proved by official staff ï¿½ neither objection nor evidence produced to doubt correctness of those entries ï¿½ said entries would be admissible in evidence.

(b) Civil P.C (5 of 1908), S. 152 ï¿½ Money decree ï¿½ inaccuracy in calculation and accounting made by trial Court ï¿½ mistake noticed in appeal ï¿½ mistake should be corrected by appellate Court notwithstanding no cross objection filed by other party.

13. Keeping in view the aforesaid settled position of law, it has to be seen whether the books of accounts have been properly proved. It is the case of the plaintiff that the books of account exhibited in this case are kept in the office of the plaintiff, a public limited company, in regular course of business. Not only in that respect account books were produced and each of the relevant entries were proved, but also there was no challenge to that evidence of the plaintiff. As has been stated by the Apex Court and also the different High Courts including this Court (in the above noted decisions), there is no specific method of proving the books of account. If the books of account produced as the primary evidence and oral evidence is led as corroborative evidence relating to the entries in the books of accounts maintained in the regular course of business, unless the contrary is proved or any doubt is raised through evidence regarding genuineness of such books of account or any of the entries, then such books of account should be regarded as proved. The thrust of the argument of the appellant is that many of the entries were not made by P.W. No. 1. That does not make any difference inas- much as P.W. No. 2 is the other witness who has stated about making most of the entries. Be that as it may, when the entries were proved by the official staff from the books of account and when those entries were proved not only without objection but also no evidence was brought on record worth the name to doubt correctness of those entries, hence this Court finds no reason to reject such evidence or to hold contrary view than the findings recorded by learned sub-ordinate Judge. As it appears, the appellant having failed to rebut and to discharge his onus, has tried to escape by resorting to unavailable technical pleas on the basis of some citations which on principle, as noted above, also do not support his stand."

(iv) Arakkan Narayanan Vs. Indian Handloom Traders and Others, and the relevant portion in paragraph -6 of the said judgment is extracted below:-

"6. Ext.B1 is a stamped receipt executed by the plaintiff in favour of the defendants for Rs. 16,040/-. In Ext. B1 it is stated that there was no balance. The plaintiff contended that the last portion in Ext. B1 was a subsequent addition. Excepting for the testimony of PW 1, there was nothing to show what was the addition in Ext. B1. A plain reading of Ext. B1 does not show that the last line was written later. Burden was on the plaintiff to show that this was wrong. Learned counsel for the appellant relied on Ext. A6 to show that the balance as on 3-3-1988 was Rs. 16,239.50. Section 34 of the Indian Evidence Act states

that entries in the books of account regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements should not alone be sufficient evidence to charge any person with liability. This section makes it clear that all entries in the books of account regularly kept in the course of business are relevant. But it must be shown that the accounts are in the books, the book must be book of accounts and the accounts must be regularly kept in the course of business. The entries are, however, not by themselves sufficient to charge any person with liability. It is a piece of evidence which the Court may take into consideration for determining whether the amount referred to therein was in fact paid by the plaintiff to the defendant. The regular proof of books and accounts requires that the clerks who have kept those accounts, or some person competent to speak to the facts, should be called to prove that they have been regularly kept and to prove their general accuracy. The quantum of evidence required for corroboration would vary in each case. "

(v) AIR 1957 TRAV-CO. 184 (V 44 C 61 June) (K.Gopala Pillai .v. N.Gopala Pillai) and the relevant portion is extracted as follows:-

"The effect of S. 34 is that a mere entry in an account book by itself is not evidence of any liability. It cannot be held that under S. 34 plaintiff alone is not competent to prove the accounts when the account, on the face of it, does not create any suspicion and is seen to be regularly kept. In such a case merely because the writer of the account is not examined, the plaintiff cannot be non-suited. When most of the items claimed by the plaintiff are shown to be real by other independent evidence, there is no meaning in saying that each entry should be further corroborated apart from the evidence of the plaintiff himself."

(vi) Balmukand and Another Vs. Jagan Nath, and the relevant portions are as follows:-

(b) Evidence Act (1872), S. 34 ï¿½ Account books ï¿½ Regularly kept in the course of business ï¿½ What are ï¿½ "Regularly" meaning of.

Account books maintained according to a particular system from day of day and balances struck at the end of each day, should be held to have been regularly kept in the usual course of business. The phrase "regularly" means that the accounts must be kept according to a system, though that system need not be elaborate. Again, it is a mistake to think that the expression "regularly kept" is synonymous with "correctly kept", though if they are not correctly kept, that would affect the weight to be attached to the entries made therein but not their admissibility.

(c) Evidence Act (1872), S. 34 - Entries in Account books corroborative evidence.

Section 34 of the Evidence Act does not require any particular form of corroborative evidence, and where in a suit the plaintiff produces books of accounts and a witness on his behalf gives evidence in support of the entries and there is no cross-examination of the witness with respect to his personal knowledge of the facts stated, that is sufficient

corroboration."

(vii) Vol.79 1994 Company Cases 389 (State Bank of India .v. Yumnam Gouramani Singh) and the relevant portion reads as under:-

"Bank ï¿½ recovery of loan ï¿½ suit ï¿½ evidence ï¿½ officers of bank proving advance of loans and execution of documents ï¿½ borrower not disputing loans ï¿½ entries in bank"s books proved by corroborating evidence ï¿½ High Court not right in dismissing suit ï¿½ bank entitled to decree ï¿½ Evidence Act, 1872, S. 34."

(viii) Canara Bank Vs. Eastern Mechanical Works and Another, and the relevant portion is as follows:-

"(f) Civil Procedure Code, O.12, R. 2 ï¿½ Suit for recovery of loan ï¿½ Service of notice to admit documents on defendant ï¿½ defendant denied the loan documents executed by him, which were proved by the plaintiff ï¿½ defendant is liable to pay costs quantified in sum of Rs.10,000/-."

(ix) Phul Singh Vs. State of Haryana, and the relevant portion reads as under:-

"Sale of Goods Act, 1930 - Sections 55 and 4 ï¿½ Suit for recovery of price ï¿½ defendant vendee denying supplies ï¿½ initial onus on plaintiff supplier to prove privity of contract between the parties ï¿½ Admission by defendant of supply of goods and its receipt would raise a presumption, till contrary is proved, that a supply order had been placed on the plaintiff by the defendant ï¿½ Whether the person actually placing the order was a partner of the defendant firm or a person authorised by it, immaterial ï¿½ onus then shifts on the defendant to rebut the presumption ï¿½ non-production of books of account and production of stray letters and bills, held, would raise a presumption against the defendant ï¿½ Evidence Act, 1872, Sections 102 and 103.

13. Per contra, learned counsel for the respondents/defendants would submit that according to Section 34 of the Evidence Act, the plaintiff should have produced the account books so as to substantiate its claim on the basis of the statement of accounts. The statement of accounts produced by the plaintiff is nothing but a computerised sheet. In the absence of a particular document, viz., account books/ledger for proving the claim, there need not be any specific denial, except reputing the claim. All the judgments cited by the appellant are not related to the case on hand and they are all related to bank loans and settlement related issues. In support of his contention, learned counsel for the respondents/defendants relied upon Mettur Beardsell Limited Vs. M/s. Salem Textiles Limited and 2 others, , wherein the Hon"ble Mr. Justice P.Sathasivam, (as he then was), has made reference to the decision in Deluxe Road Lines Vs. P.K. Palani Chetty, , wherein Srinivasan, J., has held that it is well settled proposition of law that mere production of account books will not be sufficient to charge a person with any liability.

14. His Lordship has further held that the requirements of Section 34 of the Evidence Act will not be satisfied by the production of accounts simpliciter. Further, the person who wrote the accounts has not been examined. Likewise, the person who is said to have made the payments mentioned in the accounts has not been examined. It is only the Secretary who had nothing to do with either the payment or the writing of the accounts, has been examined. There is no explanation for not examining the others.

15. Under these circumstances, His Lordship has further held that mere production of accounts will not be sufficient to charge any person with any liability and the requirement of Section 34 of the Indian Evidence Act will not be satisfied by the production of accounts simpliciter.

16. In Central Bureau of Investigation Vs. v.C. Shukla and Others, , while speaking on behalf of the Full Bench, Hon''ble Mr. Justice M.K. Mukherjee, has referred to the decision in M.S. Yesuvadiyan Vs. P.S.A. Subba Naicker, , wherein, it has been held as under:-

S. 34, Evidence Act, lays down that the entries in books of account, regularly kept in the course of business are relevant, but such a statement will not alone be sufficient to charge any person with liability. That merely means that the plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account even though those books are shown to be kept in the regular course of business, he will have to show further by some independent evidence that the entries represent real and honest transactions and that the moneys were paid in accordance with those entries. The legislature however does not require any particular form or kind of evidence in addition to entries in books of account, and I take it that any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished by entries in books of account if true." While concurring with the above observations the other learned Judge stated as under:

" If no other evidence besides the accounts were given, however strongly those accounts may be supported by the probabilities, and however strong may be the evidence as to the honesty of those who kept them, such consideration could not alone with reference to s. 34, Evidence Act, be the basis of a decree."

17. It is vehemently contended by the learned counsel for the respondents that a person who wrote the entries or a person who has knowledge of them, should appear and depose before the Court, then only, it could be held to have been proved, but in the case on hand, it was not done so.

18. In support his contention, he has relied upon the following decisions:

(i) 2008-3-L.W.609 (S.Babu .v. M/s.J.K.Industries Ltd., Madurai) and the relevant portion is as follows:-

"(Indian) Evidence Act, Section 34/Entries in Account books, Admissibility in evidence - Contention raised in the appeal by defendant that the trial Court erred in relying upon Ex.A1, which is nothing but a copy of the accounts and as per Section 34 of the Indian Evidence Act, it was inadmissible in evidence and also PW.1 was not the competent person to speak about such accounts as admittedly he was a new entrant under the plaintiff"s service - Held: perusal of the decisions would leave no doubt in the mind of the Court that even if the original account books are produced, it would not constitute reliable evidence within the meaning of Section 34 - in support of the statement of accounts, there should be some evidence to prove that the entries are reflecting the genuineness and honesty of the transactions concerned - A person who wrote the entries or a person who has knowledge of them, should appear and depose before the Court - Then only, it could be held to have been proved. But in this case, it was not done so."

(ii) Rangammal Vs. Kuppuswami and Another, and the relevant portion reads as follows:-

"C. Evidence Act, 1872 - S. 101 ï¿½ Burden of proof ï¿½ genuineness of a document ï¿½ burden lies on the party who relies on validity of a document to prove its genuineness ï¿½ only then onus will shift on the opposite party to dislodge such proof and establish that the document is sham or bogus ï¿½ fraud/forgery/malafides ï¿½ Civil Procedure Code, 1908 - Or. 6 R. 4 - Transfer of Property Act, 1882, Ss. 7 and 8."

(iii) S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, and the relevant portion runs as follows:-

"(g) A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another"s loss. It is a cheating intended to get an advantage. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document, in order to gain advantage on the other side, then he would be guilty of playing fraud on the court as well as on the opposite party."

19. In the decision reported in S. Babu Vs. M/s. J.K. Industries Ltd. , the learned Single Judge of this Court has held that a perusal of the decisions would leave no doubt in the mind of the Court that even if the original account books are produced, it would not constitute reliable evidence within the meaning of Section 34 of the Indian Evidence Act. In support of the statement of accounts, there should be some evidence to prove that the entries are reflecting the genuineness and honesty of the transactions concerned.

20. Further, the learned Single Judge has held that a person who wrote the entries or a person who has knowledge of them, should appear and depose before the Court and then only, it could be held to have been proved.

21. The witness, viz., PW.1 examined on the side of the plaintiff did not give any reason for not producing the original account books/ledgers before the Court. Moreover, the appellant did not try to produce the account books/ledgers before this Court. Similarly, in

Ex.A7 (2 Nos.), there is no signature found against the column ""'Dealer''s signature with Seal"" for receiving 400 bags RAMCO Cement and 300 bags RAMCO Cement. PW.1 in his evidence had admitted that they did not produce the ""running account"" relating to defendants. Moreover, PW.1 is not a competent person to depose in this case, since he is not a person dealing with accounts, but he is a person working under legal section of plaintiff company. As rightly argued by the learned counsel for the respondents/defendants, the initial burden lies only on the plaintiff to prove the claim by leading sufficient and cogent evidence, if there exists any. Till contrary is proved, onus then shifts on the defendant to rebut the presumption. The plaintiff cannot gain advantage on the mistakes done by the defendants and he has to prove his case by producing the relevant materials. It is a settled law that the plaintiff has to stand on his case and he cannot abandon his case and to rely upon the weakness of the defendant to succeed his case. The said principle has been laid down by the Honourable Apex Court in the judgment reported in Sri Chand Vs. Inder and Others, wherein it has been held as follows:

"4.....It is not necessary to investigate as to whether or not the defendants had lawfully acquired any sub-tenancy right under Bhagwani because even if it is held that the defendants had not acquired such subtenancy right, the weakness of the defendants " case, cannot strengthen the case of the plaintiff who must succeed by establishing his own case. "

22. The same principle is also upheld by the Honourable Apex Court in the judgment reported in Punjab Urban Planning and Dev. Authority Vs. M/s. Shiv Saraswati Iron and Steel Re-Rolling Mills, . The relevant paragraph would run as follows:

"10. ..... The plaintiff/appellant must succeed or fail on his own case and cannot take advantage of weakness in the defendant/ respondent''s case to get a decree."

23. Section 34 of the Evidence Act will not be satisfied by the production of accounts simpliciter. Such statements shall not alone be sufficient evidence to charge any person with liability. In the absence of production of original account book, this Court need not look into the dispute.

24. Similarly, in the Written Statement the defendants stated that they had made the payments to the plaintiff as and when they received the materials from them and that the defendants verified their accounts and found that there is no balance outstanding towards the plaintiff''s account and they did not owe any money to the plaintiff, that too with 24% usurious interest. The above statements, in the considered opinion of this Court, would amount to denial of the arrears claimed by the plaintiff.

25. In the decision Balmukand and Another Vs. Jagan Nath, , relied on by the learned counsel for the appellant, it has been held as under:-

"Section 34 of the Evidence Act does not require any particular form of corroborative evidence, and where in a suit the plaintiff produces books of accounts and a witness on his behalf gives evidence in support of the entries and there is no cross-examination of the witness with respect to his personal knowledge of the facts stated, that is sufficient corroboration."

26. Section 34 of the Evidence Act does not require any particular form of corroborative evidence means, it requires corroborative evidence.

27. In the instant case on hand as already discussed above, neither account books nor ledgers are produced and a person who wrote the accounts was not examined. There is nothing on the side of the plaintiff except the statement of the accounts. Therefore, even as per the decision relied on by the learned counsel for the appellant, there is absolutely no evidence and no corroboration.

28. In Arakkan Narayanan Vs. Indian Handloom Traders and Others, , the learned Single Judge of Kerala High Court has observed as under:-

"Section 34 of the Indian Evidence Act states that entries in the books of account regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements should not alone be sufficient evidence to charge any person with liability. This section makes it clear that all entries in the books of account regularly kept in the course of business are relevant. But it must be shown that the accounts are in the books, the book must be book of accounts and the accounts must be regularly kept in the course of business. The entries are, however, not by themselves sufficient to charge any person with liability. It is a piece of evidence which the Court may take into consideration for determining whether the amount referred to therein was in fact paid by the plaintiff to the defendant. The regular proof of books and accounts requires that the clerks who have kept those accounts, or some person competent to speak to the facts, should be called to prove that they have been regularly kept and to prove their general accuracy. The quantum of evidence required for corroboration would vary in each case. "

29. As per the above decision, the plaintiff never produced the books of accounts and its author was not examined and the statement of accounts are, however, not sufficient to charge the defendants with liability and therefore, this decision is not applicable to the case of the appellant.

30. In K.Gopala Pillai .v. N.Gopala Pillai (AIR 1957 TRAV-CO. 184 (V 44 C 61 June), it has been held as under:-

"The effect of S. 34 is that a mere entry in an account book by itself is not evidence of any liability. It cannot be held that under S. 34 plaintiff alone is not competent to prove the accounts when the account, on the face of it, does not create any suspicion and is seen to be regularly kept. In such a case merely because the writer of the account is not

examined, the plaintiff cannot be non-suited. When most of the items claimed by the plaintiff are shown to be real by other independent evidence, there is no meaning in saying that each entry should be further corroborated apart from the evidence of the plaintiff himself."

31. This decision also would not lend any support to the case of the plaintiff for the reasons stated above as absolutely there is no evidence, except the statement of accounts.

32. It is well settled that a person who wrote the entries or a person who has knowledge of them did not appear and depose before the Court and in such circumstances, it cannot be held that the case of the plaintiff has been proved. When the plaintiff has not proved its case by examining the person, who wrote the accounts and received the payments from the defendants, the mere production of statement of accounts will not be sufficient to charge the defendants with any liability.

33. In the case on hand, one Mathivanan has been examined as P.W.1, who has nothing to do with the accounts and the payments received and there is also no explanation for not examining the person, who wrote the accounts and received the payments and therefore, it could not be held that the requirements of Section 34 of the Evidence Act have been satisfied.

34. At this juncture, it is pertinent to note here that Section 101 of the Evidence Act, 1872 defines "burden of proof" which clearly lays down that:

"101. Burden of Proof :- Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case.

35. As discussed above in the light of the decisions cited, which are relied upon by the defendants, when the plaintiff themselves have miserably failed to prove their case by examining the person, who wrote the accounts and the received the payments in support of their statement of accounts and unless such burden is discharged on their part, the defendants cannot be expected to prove the case of the plaintiff, which is the settled position of law and therefore, the inevitable answer to the substantial questions of law is to be in favour of the respondents/defendants.

36. Further, in the second appeal, normally, as against the concurrent findings of the courts below, this Court would not interfere under Section 100 of C.P.C., unless the findings of the courts below are perverse and any failure to consider the evidences both oral and documentary, which will pave the way for miscarriage of justice.

37. For the foregoing reasons, this Court does not find any reasons to interfere with the concurrent findings of the Courts below.

38. In the result, the Second Appeal is dismissed confirming the judgment and decree of both the Courts below. No costs.