HIGH COURT OF GUJARAT

SAJJANARAJ SWARUPCHAND
V/S
MEHTA COMMERCIAL CO

Date of Decision: 28 April 1972

Citation: 1972 LawSuit(Guj) 130

Hon'ble Judges: A A Dave

Eq. Citations: 1973 AIR(Guj) 57

Case Type: Second Appeal

Case No: 722 of 1966

Subject: Civil, Commercial

Acts Referred:
Code Of Civil Procedure, 1908 Or 30R 1

Final Decision: Appeal allowed

Advocates: K S Nanavaty, N R Oza

Reference Cases:
Cases Cited in (+): **1**
Cases Referred in (+): **8**

Judgement Text:-

A A Dave, J

[1] This is an appeal against the judgment and decree of the learned District Judge Bulsar at Navsari confirming the judgment and decree of the learned Civil Judge. Junior Division, Umbergaon in civil suit No. 47 of 1962 with certain modification as per the particulars mentioned in the judgment.

[2] The facts gives rise to this appeal in a nut-shell are as under:--

> The present respondent Mehta Commercial Company a firm registered under the India Partnership Act having its principal officer of business at Umbergaon, and six partners in all. One of them was one Madanchand Kishanchand. The present appellant who was the defendant tin the trial Court is also a partnership firm which started its business at Bhilad from Samvat Year 2021, having two partner's Sajjanraj and Swarupchand. This Swarupchand is the son of the plaintiff's partner Madanchand. It has come out in evidence that the mother of Sajjanraj and the mother of Madanchand are sisters. Thus. the partners of the plaintiff firm and those of the defendant-firm. Were inter-related. According to the plaintiff both the plaintiff and defendant firm had mutual dealings. The plaintiff firm had sold to the defendant firm from time to various quantities of grass and both these firms had paid and received various items from each other. It was alleged by the plaintiff that for all these transactions, an account was opened in the books of account was opened in the books of account in the plaintiff-firm in the name of defendant in Samvat Year 2012 and all the amounts paid on behalf of defendant firm were debited in their account and the amount received form the defendant firm were credited from time to time. The accounts between them were often settled. These dealings were upto Sambat year 2016. According to the plaintiff at the end of Samvat year 2016 on Aso Vad Amas an amount of Rupees 9146-70 paise remained due from the defendant firm as principal including the interest. As the defendant failed to pay the said amount the plaintiff served him with a notice and in spite of the demand. when the defendant failed to pay the said amount the suit was filed to recover Rs. 10,000/- consisting of Rs. 9, 146-70 paise as principal and Rs. 853-30 paise as interest. According to the plaintiff, as there was mutual open and current account between the parties, the suit was in time.

[3] On behalf of the defendant Sajjanraj Mukundchand who was served with the

summons as partner of the defendant firm contested the suit and filed his written statement at Ex. 25. He contended that the firm of the defendant was dissolved on Fagan Vad Amas of Samvat year 2016 and the second partner Swarupchand who is the son of the plaintiff partner Madanchand has taken away all the books of account of the firm and hence he was not in a position on challenge any specific items out of the items detailed in the plaintiff books of account. while therefore not admitting any of the items either on the credit or debit side. the defendant put the plaintiff to the strict proof of its case. Sajjanraj denied that the plaintiff had purchased any grass form the defendant firm. According to him the plaintiff firm had contracts with Aarey colony Bombay fro the supply of the grass. As the grass could not be sent from Umbergaon the plaintiff firm has contracted with the defendant firm under which the defendant firm had to send grass to Aarey Colony Bombay According to the defendant the Bombay Grass Selling company were the against to of the plaintiff firm at Bombay any they received the cheque form Aarey colony which was credited in the plaintiff account. According to the defendant the accounts between them were never settled in his presence and were not binding on him. He alleged that the second partner and Swarupchand may have been present and in present and in collusion with the plaintiff settlement may have been made but the said settlement cannot be binding on him. He also alleged that the account books of the plaintiff firm are not reliable and they are not properly maintained. He then specifically mentioned that the was no given credit for several items as per particular mentioned in the written statement. From the pleading of the parties the learned trail Judge framed issues the Ex. 28. From the evidence that was before whim the learned trial judge held that the plaintiff had proved that Rs. 9146-70 paise towards the principal and Rs. 853-30 paise towards interest had remained due from the defendant . He therefore passed a decree against the defendant for the said amount. Against the said judgment and decree of the learned trial Judge, an appeal was preferred in the district Court of Bulsar at Navasari. The learned District Judge while confirming the judgment and decree of the trial court. Modified it and held that Rs. 8344-70 paise toward principal and Rs. 665-30/- paise towards interest, in all Rs. 9,000/- were due by the defendant to the plaintiff. He therefore, passed a decree accordingly Against the said decree of the learned District Judge, Bulsar at Navsari the original defendant has preferred the present appeal to this Court.

[4] Mr. K. S. Nanavaty learned Advocate for the maintainable inasmuch as it was dissolved prior to the institution of the suit;

1. The suit against the defendant firm was not maintainable inasmuch as it

was dissolved prior to the institution of the suit;

2. The plaintiff should have filed the suit against the erstwhile partners of the dissolved firm and not against the firm;

3. That no decree could be passed against the defendant from mere entries in the books of account maintained by the plaintiff;

4. That the plaintiff had failed to prove various items from his books of account and therefore, the decree passed by the learned Judge cannot be sustained.

[5] Mr. N. R. Oza, learned Advocate for the plaintiff-respondents on the other hand urged that the defendant in his written statement filed that before the trial Court had not specifically pleaded that the suit was not maintainable. He urged that such a technical plea should not be permitted to the taken in a second appeal. He urged that after all, it was a technical defence and nothing turned on the merits of the case. He urged that even assuming for the sake of argument that the defendant firm was dissolved on the date of the institution of the suit aummons against the defendant was served on Sajjanraj who admittedly was a partner of the defendant firm an the therefore, whatever decree is passed would be binding on Sajjanraj. On merits he urged that even though the defendant was given inspection of the books of account of the plaintiff. he did not specifically challenged several times from the books of account and vaguely asserted that the books of account were not properly maintained by the plaintiff. He should be have specifically shown as to which times were wrong and were not supported by the evidence on record. He urged that even though the defendant had maintained books of account intentional the said books were suppressed because if they were produced the plaintiff would have been able to show form the corresponding entries in the books of account of the defendant that his case was correct. Under the circumstances he submitted that the when both the courts have recorded finding that the defendant owned Rs. 9000/- and odd to the plaintiff this finding should not be disturbed in the second appeal.

[6] It may be noted at the outset that the defendant has not taken a plea in his written statement that the suit was not maintainable as the firm was dissolved on the date of the

suit and that the case of action of the suit had arisen after the dissolution of the firm. In this connection. It will be worthwhile to refer to Order 30. Rule 1. C. P. C. It says:--

> Any two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm if any of which such person were partners at the time of the accruing of the cause of action and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were at the time of the accruing of the cause of action partners in such firm to be furnished and verified in such manner as the court may direct".

Therefore Rule 1 Order 30 clearly envisages that the suit could be instituted by or against a firm doing business in India. The only qualification is that the firm must consist of two or more persons as partners at the time of the accruing of the cause of action . there is nothing in the rule is to show that a suit could not lie against a dissolved firm in the firm's names if the cause of action had accrued prior to the institution of the suit. In the instant case no doubt the defendant in his written statement has stated that the firm was dissolved on Fagan Vad Amas of Samvat year 2016 which is equivalent to 27th March 1960. The plaintiff in the plaint has stated that the cause of faction had arisen on 18th November 1961. Relving on the averment made in the plaintiff that the cause of action had arisen on 18th November 1961. It was urged by Mr. Nanavaty that as the cause of action had accrued after the partnership firm was dissolved on 27th March 1960. the suit against the firm is firm's name was not maintainable and the plaintiff should have brought a suit against the partners of the dissolved firm. He submitted that not only the defendant at the earliest possible opportunity in his written statement had come out that the firm was dissolved on 27th March 1960 but even Sajjanraj in the deposition Ex. 81 has also stated about the dissolution of the firm on that day. Sajjanraj was not challenged on this point by the plaintiff that the firm it was not the say of the plaintiff that the firm was not dissolved on the date alleged by Sajjanraj. Mr. Nanavaty therefore, urged that in the absence of the any denial on behalf of the plaintiff the defendant should be believed that the firm was dissolved on the day the suit was instituted against it. He therefore, urged that it the firm was dissolved prior to the institution of the suit. and if the cause of action as stated in the plaintiff arose after the

dissolution of the firm. apparently the suit was not maintainable.

[7] Mr. Oza, referred to the case of Bhagatsingh v. Jaswant Singh, 1966 AIR(SC) 1861. where in was observed that;

"Where a claim has been never mad in the defence presented on amount of evidence can be

looked into upon a plea which was never put forward".

Relving on these observation Mr. Oza urged that when the defendant has not specifically put a claim in the written statement that the suit was not maintainable in was not suit open to him now to contend in a second plea that the suit was not maintainable and he should not be permitted to take such a plea as it involved a question of fact. It is true that the defendant in his written statement has not taken a specific plea that the suit was not maintainable because the firm was dissolved prior to the institution of the suit and that the cause of the action had accrued to the plaintiff after it dissolution. But the defendant has stated that the firm was dissolved on a particular day that is 27th March 1960. It is also clear from the averment made in the suit plaint that the cause of action on 30th November 1961 that is after the alleged date of dissolution of the firm. Apparently, therefore in view of the words used in rule 1. order 30. C. P . C. the suit against the defendant tin the firm's name would not be maintainable. Mr. Oza. however urged that this point was merely of academic interest. Once was notice of the suit was served on one of the partner of the firm. it was immaterial whether at the time of the institution of the suit the firm was dissolved. He urged that the whatever decree obtained would be binding on all the partners. In support of his say. he referenced to the case of Gordhandas Kalvanji Bhat v. Gautamchand Rupchand, 1925 AIR(Bom) 331 where in it was observed that:--

"Where a suit is under Order XXX. rule 1 of the civil Procedure Code. properly filed against a partnership firm in the firm's name service on any one or more of the partners or on the managers shall be deemed good

service upon the firm. There is no difference as to the mode of effecting the service whether the firm is going on or has been dissolved at the date of the institution of the suit. If the service is effected as provided by rule. 3. the suit can be proceeded with against the firm and the plaintiff is entitled to obtain a decree against the firm. In the case of partnership which are going concerns at the date of the institution of the suit the decree which is obtained against the firm is binding on the all partners in the firm whether they have been served individual or not. In the case of a firm which has been dissolved to the knowledge of the plaintiff before the institution of the suit the plaintiff must serve each and every partner whom he seeks to make personally liable for the decree. The right to execute the decree as against the firm is in no way affected by the proviso".

Mr. Oza, therefore, urged that even assuming for the sake of argument that the firm was dissolved at the date of the institution of the suit. the decree could not bind the other partner who were not served with the notice and who were not impleaded as partners. the decree obtained against the firm would not be invalid. In my opinion the ruling referred to by the learned Advocate for the respondent plaintiff has not considered the question whether a suit against a dissolved firm could lie on a cause of action which had accrued after the dissolution of the firm. In my opinion therefore the is ruling cannot help us in order to find out whether such was tenable or not. In the instant case from the pleadings apparently. it transpires the that case of action arose on 13th November 1961 that is after the date of the dissolution of the firm prima facie, therefore such a suit against the firm in the firm's name would not be tenable.

[8] Mr. Oza, next referred to the case of K. P. Muhammed v. Parakkat Nayer Vettil Thevazhi Tarwad, 1971 AIR(Ker) 290 wherein it was observed by full bench of the Kerela High Court as under:--

"A plea that Section 77 T. P. Act operates as a bar to accounting under Section 76(h) of that Act cannot be allowed to be raised for the first time in second appeal".

Mr. Oza, relying on these observations urged that even if the suit was not

maintainable such a plea should not be permitted to the taken in a second appeal by the defendant. He urged that the defendant should have taken a specific plea in the trial court that the suit was not maintainable. In such a case. it would have been open to the plaintiff to amend the plaint impleading the partners of the dissolved firm as defendant. He urged that such a technical defect should not be allowed to come in the way of the interest of justice and the suit should not be thrown off merely on such a technical ground. Mr. Oza also urged that in case this court was of the view that the suit against the defendant was not enable on the cause of action which accrued after the dissolution of the firm the plaintiff should be given and opportunity to amend the plaint so that the plaintiff may not be prejudiced on account of this technical defect. He urged that such amendment should be permitted even in a second appeal. In support of his say he referred to the case of Jai Jai Ram Manohar Lal v. National Building Material Supply Gurgaon, 1970 1 SCR 22 . wherein it was held that:--

"Application for amendment of the plaint could not be granted because there was no averment therein that the mis-description was on account the suit must fail, cannot be accepted. In our view, there is no rule that unless in an application for amendment of the plaint it is expressly averred that the error omission or misdescription is due to a bona fide mistake. the court has no power to grant leave to amend the plaint. The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any narrow or technical limitations".

With respect I am in entire agreement with the observation made therein. In the instant case. the question about the maintainability of the suit was for the first time raised in this court by the learned Advocate of the defendant. It is interesting to note that not only this point was not taken in the trail court but it was not argued even before the first appellate court. Under the circumstances in the interest of justice the plaintiff must be given an opportunity to amend the plaint and implead the partners of the dissolved firm as defendant. firstly because as on issue was farmed by the court no specific evidence had been led on behalf of the parties to show that the firm in fact was dissolved on 27th March 1960 as alleged by the defendant in his

written statement and in his evidence before the court. Similarly. there is no clear cut evidence that the whole cause of action accrued to the plaintiff on 13th November 1961 after the dissolution of the firm. The plaintiff had averred in the plaint that there was mutual. current and open account between the parties and therefore the suit and in time. No doubt that plaintiff had averred that there was settlement of account and defendant would be liable to the tune of Rs. 1000/- including interest at the end of samvat year 2015. But form the averment. it cannot necessarily be inferred that the while cause of action accrued on 13th November 1961'. In any case when there were hundreds of dealings between the parties and if most of these dealings had taken place prior to the alleged date of dissolution of the partnership. it cannot be said that the suit with regard to these items would not be maintainable even against the firm in its firm's name. In the absence of any specific evidence on this point it is difficult for me sitting in second appeal to find out as to which times were prior to the dissolution of the firm and which items were after the dissolutions of the firm. Under the circumstances. it would not be open to me to dismiss the suit merely on a technical ground that the plaintiff had filed the suit against dissolved firm on a cause of action which was stated to have accrued on 13th November 1961 that is after the date of the dissolution of the firm. I would have permitted the plaintiff to amend the plaint in this court if for reasons which I am stating below. I would not have remanded the suit to the trail court of proceeding further on merits.

[9] The pertinent question which arises before me is whether the plaintiff has proved his case against the defendant on merits. According to the plaintiff there were several dealings between the parties and accounts were maintained in which amount received from the defendant were credited and the good sold to the defendant were debited. According to the plaintiff . after taking account the defendant was liable to the tune of Rs. 9400/- and odd and with interest it came to Rs.10000/-. The defendant in his written statement did not deny that there were dealings between them. The say of the defendant however. is that as his books of account were taken away by his partner Swarupchand who is the son of one Madanchand who was a partner in the plaintiff-firm. he was not in a position to specifically state as to which items were correct and which items were not true. He. therefore. has stated that the plaintiffs should be put to the strict proof of his case. It seems that the defendant had taken several adjournments from the court for filing written statement in order to have inspection of the books of

account of the plaintiff. Thereafter. the defendant filed his written statement. But in the written statement. the defendant came out with a case that he was not given inspection of all the books of account by the plaintiff. In his written statement. the defendant clearly has stated that his books of account were lying with Swarupchand. The defendant in his evidence before the court had come out with a case that his books of account were taken away by Swarupchand. The plaintiff in his evidence did not state anything about the books of account of the defendant firm being taken away by Swarupchand. No doubt. the defendant has not examined Swarupchand in order to show that his books of account were lying with him. But one may not expect the defendant to examine Swarupchand for the simple reason that Swarupchand is the son of Madanchand who is a partner in the plaintiff-firm. It is just possible that Swarupchand may not support the defendant's case because of his relationship with the plaintiff-firm. But in the absence of any evidence showing that the defendant was in fact in possession of the books of account at the relevant time and that he was suppressing the same with the intention that the plaintiff's case may no find corroboration from the corresponding entries in his books of account. no adverse inference could be drawn against the defendant. Mr. Oza. learned Advocate for the respondent submitted that it was brought out form the evidence of Sajjanraj that the suit for dissolution and account was filed in the court wherein Khatavahi for the samvat year 2014 was produced in Court. This shows that the defendant either was in possession of the books of account or the defendant had knowledge that books of account were produced that books of account were produced in court by Swarupchand and were in the custody of the court. He therefore urged that nothing prevented the defendant from getting the said books of account produced from the court. It is true that form the evidence of the defendant it has come out that Khatavahi for the samvat year 2014 was produced in the court and the said Khatavahi was lying in the high Court at the relevant time. But the evidence does not show that books of account for the previous year 2012, 2013 or for samvat year 2015 were in possession of the defendant. The plaintiff has not denied the defendant's say that the books of account were taken away by Swarupchand. Under the circumstances unless it was established that in spite of the defendant being in custody of the books of account had deliberately omitted to produce the same of some ulterior motive. on adverse inference can be drawn against the defendant. Thus the principle laid down in the case of Gopal Krishnaji Kethkar v. Mohd. Haji Latif., 1968 3 SCR 862 relied upon by the learned Advocate for the respondent plaintiff cannot help him.

[10] Both the courts below have recorded a finding that books of account were maintained by the plaintiff in the regular course of business and that they were correct.

That relving on the entries in these books of account as corroborative piece of evidence to the deposit of the plaintiff. both the courts below accepted the plaintiff's version and passed a decree in its favour. With respect of the learned Judge their whole approach while appreciating the evidence is not correct. The courts below seems to have been prejudicial against the defendant because he had failed to produce his books of account. According to the learned Judges the defendant had deliberately suppressed his books of account. According to the, even though the defendant had taken inspection of the books of the account of the plaintiff he had not at the proper stage denied the genuiness of the several entries on which reliance was placed by the plaintiff and therefore they came to the conclusion that when the plaintiff's books of account were properly kept and entries made their were correct the plaintiff was sufficiently corroborated by the entries in the books of account and therefore, the plaintiff's case was duly proved. With respect of the learned Judges the finding recorded by them is not correct. It may re remembered that mere entries in one' own books of account would not be conclusive and binding on the other side. Under Section 34 of the Evidence Act, such entries in the boos of account kept in the regular course of business would be relevant and could be used be corroborative piece of evidence. But they themselves cannot be a basis for foundation of decree.

I am supported in my view of by the case of Chandradhar Goswami v. Gauhati Bank Ltd., 1967 1 SCR 898 wherein it was observed that:--

"It is clear from a bare perusal of the section that no person can be charged with liability under merely on the basis of entries in books of account even where such books of account are kept in the regular course of business. There has to be further evidence to prove payment of the money which may appear in the books of account in order that a person may be charged with liability there under. except where the person to be charged accepts the correctness of the books of account and does not challenge them. In the present case however the appellants did not accept the correctness of the books of account. We have already indicated that they went to the length of saying that the accounts were not correctly kept and were fraudulent. They also said that no money had been taken by them after March 1 1947. This being their pleading. the trail court rightly farmed the third issue relating to the total amount due from the appellants to the Bank. But unfortunately it overlooked to go into the issue specifically and we have already indicated

how it made a mistake in arriving at the amount due when considering the issue relating to relief. In any case as the appellant had not admitted the correctness of the accounts filed by the bank particularly after March 1. 1947 the bank had to prove payment of Rs. 10,000/- on March 19, 1947 if it wanted to charge the appellant with liability for that amount". From the observations of the Supreme Court therefore it would be clear that ton decree can be a passed merely on the basis of entries found in the books of account which may have been maintained in ordinary course of business unless the correctness of the books of account are admitted by the other side. In the instant cased the defendant from the beginning has denied the correctness of the entries in the books of account of the plaintiff. According to the defendant. he was not in a position to specifically deny several items from the books of account as his won books of account were taken away by his partner Swarupchand who was the son of Madanchand who was a partner of the plaintiff-firm. I therefore do not agree with Mr. Oza that as the defendant has not specifically disputed several entries in the books of account he is deemed to have admitted the correctness thereof. In support of his case Mr. Oza referred to the case A. I. R. 1966 S. C. 1861. wherein it was observed that:--

"Under S. 6 it is necessary, that a person objection to the validity of the appointment of an heir to the property on the ground of custom must plead and prove that the land in suit is ancestral and that the comes within five degrees of the common ancestor. The mere fact that the defendant contended in the written statement that the plaintiff could not be adopted according to the custom does not tantamount to making the requisite pleas.

Similarly the mere fact that the issues as framed did involve the consideration of the validity of the adoption and the ancestral nature of the land in suit will not cloth the vague allegation in the written statement with the definiteness of the requisite pleadings.

Where a claim has been never mad in the defence presented on amount of evidence can be looked into upon a plea which was never put forward."

There can be no quarrel with the principle enunciated therein and with respect. I am in entire agreement therewith. But the ratio of that the case cannot apply to the facts of the instant case. In the instant case when the plaintiff had specifically come out with a case that Rs. 10,000/- were due by the defendant to the plaintiff as per the statement of account mad eat the end of samvat year 2015 onus lay on the plaintiff to prove his case. That onus cannot be discharged by mere productions of his account books which were not admitted by the defendant. The plaintiff along with his plaint had appended copies of entries from his books of account. From a perusal of the mere entries appended by the plaintiff one cannot bet any idea about the nature of transaction entered into between the parties. Unless therefore the full inspection was given to the defendant he would not be in a position to dispute several times. The learned Judges below have assumed that the defendant had taken inspection of all the books of account and in spite of the inspection being taken he had not specifically denied the items and therefore he should be presumed to have admitted the correctness of the entries. With respect to the learned Judges. I am unable to agree with them that the defendant has taken inspection of all the books of account of the plaintiff. there is no evidence on record showing that the defendant was given inspection of all the books of account. The learned Judges seem to have been under this impression because the defendant had taken several adjournments in order to file his written statement. But merely because the defendant may have taken adjournments giving reasons that he wanted to have an inspection of the books of the account one cannot necessarily come to the conclusion that the inspection must have been given to the defendant or that he had taken inspection of all the books of account. Assuming for the sake of argument that the defendant was given inspection of the books of account. the defendant has stated that in the absence of the corresponding entries form this books of account he was not in a position to challenge the correctness of the entries found in the books of account of the plaintiff. In my opinion the defendant is right in saying so. The defendant also had denied that the books of account maintained by the plaintiff were genuine or that the entries were correct. Under the circumstances. it was in could not he plaintiff to prove it case by leading no the cogent evidence. The plaintiff could have produced the correspondence vouchers bills. etc. in support to f its case. There were several mutual dealings between the parties during the last four years. I am therefore not prepared to belief that except the books of account

the plaintiff had not maintained any vouchers. correspondence bills etc. showing the existence of the transaction entered in to by the plaintiff firm with the defendant. One therefore fails to under stand why the plaintiff did not produce and such paper sin support of its case. the learned Advocate for the appellant invited my attention to several entries in the books of account maintained by the plaintiff. The plaintiff in his evidence in paras 372 and 374 has been cross-examined about the genuineness of these entries. The entry for Rs. 135/- dated 28-8-1956 is with regard to cash payment. Even though this entry is found in the leader. there is corresponding entry in the Rojmel Similarly the entry for Rs. 2000/- dated 9-2-1867 alleged to be cash payment to the defendant is not fund in the Rojmel Similarly the entry for Rs. 2000/- dated 3-8-1957 which is alleged to be cash payment to the defendant it not found in Rojmel. It is found that the entry for Rs. 2000/- is debited against the khata of defendant being adjustment entry for the excess credit given to the defendant in respect of the transaction with Sajjanraj. It may be noted that the firm Sajjanraj Bhikahalal did not exist at the relevant time. No corresponding entries from the books of account of Sajjanraj Bhikhalal were produced by the plaintiff to show that any excess amount was paid to Sajjanraj Bhikhalal and that the said amount was adjusted in the Khata of the defendant which his consent. Even though Kastruchand in his evidence in general has stated that the books of account of Sajjanraj Bhikhalal were with him. these books were not produced in court. The defendant has denied this entry. Thus. if the plaintiff wanted to rely on any adjustment entry on account of excess credit give to the defendant tin respect of the transaction with Sajjanraj Bhikhalal he has got to prove it by production of the account of Sajjanraj Bhikhalal. Merely because this entry is shown in the Khata of the defendant. it cannot be accepted as gospel truth. The plaintiff also had relied on the Hayala entries fro Rs. 2000/- dated 22-11-1957, Rs. 284-12-0 of the year 2013 and Rs. 532-12-6 with regard to the transaction of the with Vrailal Devidas. The plaintiff had not examined Vrailal Devidas in order to prove the Havala of Rs. 532-12-6. The plaintiff also did not lead any evidence to show how the amount of Rs. 284012-0 was posted as Havala for the samvat year 2013 in the Khata of the defendant. The evidence shows that various times of cash amounts which have been debited in the Khata of the defendant as cash payment are not found in the Rojmel. The explanation give by the plaintiff is that cheques were received which were credited in his account in

the bank. Thereafter bearer cheques were drawn in this name and after withdrawing the said amounts the amounts were paid to the defendant and hence. no corresponding entry were made in the Rojmel in may opinion the explanation given by the plaintiff is not convincing. Even if the plaintiff had withdrawn the said amount by drawing cheques in his own name when the said amount is ultimately given to the defendant in cash. corresponding entry had got to be shown in the Rojmel in order to prove the correctness thereof Absence of cash entry in the Rojmel would create a reasonable suspicion in one's mind about the genuineness of the entries which are found in the Khatavahi. It is not difficult to manipulate the Khatavahi in any way on may like. Unless the khatavahi was supported by day to day entries in the Rojmel one cannot place implicit reliance on the entries in the khatavahi only in order to pass a decree on such entries.

In the case of the Chandi Ram Deka v, Jamini Kanta Deka AIR 1952 Gau 92, it was observed that:--

"In order to be relevant under Section 34. the books of the account just be kept regularly in the courts of business. They must be in accounting with some known system of accounting. Where the books produced are merely the leaders not supported by any day books or rorznamcha containing no entries of transaction as they taken place and there is no daily opening or closing balance in the leader accounts but what was shown from those books was that the was plaintiff' account and in that account entries were made and those entries could all have been made on any one day these books do not fulfill the requirements of Section 34 and be regarded as relevant under that Section".

Mr. Oza learned Advocate for the plaintiff referred to the decision of the High Court in the case of Alumal Tahelram v. Mehthram Basarmal, 1968 GLR 1078. where in it was observed by my learned bother N. G. Shelat. J. that:--

"Under Section 24 of the Evidence Act. the entries for the books of account regularly kept in the course for the business before they can be acted upon for holding a person liable thereunder. must get some corroborative

evidence form other sources. It may be either oral evidence of the plaintiff or of the person who wrote accounts. It may again also be from other documents such as vouchers receipts etc. in respect of the transaction that took place between the parties. But more determining factor should be the circumstances surrounding the account maintained by the plaintiff if they satisfy the court about the correctness of those entries and statement made in such books of account and they can well serve as a corroborative piece of evidence required under Sec 34. of the Act as it may happen that evidence by way of vouchers. receipts etc. may not be there and the oral evidence may not be available of the person who actually entered into that transaction".

Relying on these observation Mr. Oza urged that in the instant case the plaintiff was examined on oath. the plaintiff had disposed about the several transaction an explained each and every entry in his books of account. From his evidence it transpires that the books of account were regularly maintain by him. Both the court have recorded finding that the account books were properly and correctly maintained. Under the circumstance when the defendant did not produce wad his own books of the account the plaintiff could be said to be sufficiently corroborated by the entries made in the account the plaintiff could be as to be sufficiently corroborated by the entered madden the account books an there was not reason why the plaintiff's evidence should not be believed whit regard to the correctness of the entries found in the books of accounts. The circumstances of this case wen to support the plaintiff say. Several entries pertaining to the truncation with Aarev colony Bombay of the supply of grass were duly proved by the employee of Aarev could no producing relevant entries from the books of account maintained by Aarev colony . This shows that the entries made in the books of account by the plaintiff were correct. Thus. it was urged by Mr. Oza that even from the circumstances of this case one can drawn a legitimate inference that the plaintiff books of account were correct and therefore there was nothing wrong if the court reliving on the oral evidence of the plaintiff corroborated by the entries made in the account books passed a decree in his favour. It is true that in certain circumstance one may rely on the deposition of the plaintiff corroborated by his books of account but when the correctness of the entries in the books of account are denied by the other

said mere word of the plaintiff supported by the entries in his books of account would not be sufficient to pass a decree in his favour. This is exactly what has been held by the supreme court in the case of Chandradhar Goswami. It has been clearly laid down by the Supreme Court that.

"No person can be changed with liability merely on the basis of entries in books of account event where such books of account are kept in the regular course of business. There has to be further evidence to prove payment of the money which may appear in the books of account in order that a person may be charged with the liability thereunder except where the person to be charged accepts the correctness of the books of account and does not challenge them".

Naturally, the enter made in the books of account have to be proved by examining the person who has written the books of account. From the deposition of the plaintiff the books of account may therefore be said to have been proved. But that would not in any way fasten the liability on the defendant if the defendant did not admit the correctness of the entries made therein . with respect therefore the observations made in Alumal Tahemram. (1968) 9 GLR 1078 or beyond the principle laid down by the supreme Court. This High Court in a later case in the case of Shubhkaron Rameshwarlal Aggarwal v. The Durgaprasad Pvt. Ltd, 1972 AIR(Guj) 208 has made the following observations:

"The provisions of Sec 4 of the Evidence Act lays done a rules of evidence at the entries in the books of account would not be sufficient for purposes of finding the liability against a person. There should be additional evidence independent of those entries which would prove the from of payment in respect of which the entries are made in books of account. Where the entries are not admitted. it is the duty of a party seeking to enforce the liability of such entries to produce evidence in support thereof to show that the money was advanced as indicated them therein and thereafter the entries would be of use a corroborative evidence".

The same view was taken by me in first appeal No. 870 of 1965 decided on

1-3-1972 (Guj) where in it was observed that

"Where the defendant in the written statement categorically denied the statement made in the plaint that they were the servants of the plaintiff of that the suits hope was sub-let to the a plaintiff at the monthly rent of Rs. 100/- and that they had overdrawn several amounts as alleged by the plaintiff it was not necessary for them to dispute each and every item shown in the extracts of the books of account. Defendant No. 1 in the evidence before the court had categories denied all these items. As observed earlier it is for the plaintiff to prove his case and he cannot succeed merely because the defendant were unable to prove any partnership between them ..... In order to bind the defendant the accounts should have been made up and signature obtained No. such signature is taken of the defendant on the khata baki for the amount which feel due by the defendant to the plaintiff as alleged by him. Under the circumstance mere entries in the books of the account of the plaintiff cannot be bindings on the defendants".

It is thus clear that in order to fasten liability on the defendant with regard to the transactions mere would of the plaintiff supported by the entries in his won books of account would not be sufficient when the defendant has not admitted the correctness of the said entries I have already referred to several items which are not found in the day book maintained by the plaintiff. It way be noted that the plaintiff in paras 338, 339, 340 and 341 of his deposition has admitted that all the transactions are not written done in the books of the account He particularly stated that uplak amounts which would be returned immediately or a day after. would not be mentioned in the books of the account. In paras 443 and 445. he admitted that his Nodh books does not bear any date. His Mehtaji would not therein any transaction which may be brought to his knowledge it was also brought out from the cross-examination in para 486 that expenses for going in his native place were not debited. This shows that the Uplak amount and some sundry expenses incurred by the plaintiff were not noted even in the Rojmel. Under the circumstances there is not grantee that the entries made in the khatavahi were genuine. In any case when the defendant has controverted the correctness of the said entries it was for the plaintiff to establish the same by leading independent evidence in support thereof. He could have been able

to prove the same by production of vouchers, bills correspondent etc,. I am not prepared to believe that when several transaction had taken place between the parties other evidence was not available to the plaintiff. Thus even though the books of account may have been maintained by the plaintiff in the regular course of business. mere entries made therein would not be sufficient to pass a decree in his further particularly when the defendant has not admitted the same as laid done by the Supreme court. Mr. Oza next urged that this court while hearing the second appeal should not disturb the finding of fact recorded by both the court below. He urged that both the court below had believed that the plaintiff books of account were correctly maintained in the ordinarily course of business. he therefore urged that the decree passed by the lower courts should not be disputed. It is true that normally the finding of that record by the first appeal court which is the final court of fact should be accepted by this court while hearing a second appeal. But if is found that both the course below that appreciated the evidence on a wrong angle or under the mistaken belief of the law that the entries made in the books of account regularly kept would be sufficient to pass decree in favour of the plaintiff. it would be open to this court to set aside the said finding which was contrary to law. In the instant case both the courts below have drawn an inference on assumption of the certain facts. Both the courts below have drawn an adverse inference against the defendant of non-production of the books of the account. Both the courts below have believed the books of the plaintiff on the ground that some of the entries made therein were support by the entries made in the books of account of Aarey colony. Bombay. In my opinion merely because some entries have been duly proved it cannot necessarily be inferred that all the entries relied upon by there plaintiff were correct. Both the courts below have not paid sufficient attention to the facts that payment of cash to the defendant regarding items of Rs. 2000/- dated 9-2-1957. Rs. 2000/- dated 3-8-1957 and Rs. 135/- dated 28-8-1956 were not found in the Rojmel at all both the court also implicitly relied on the Havala entries made by the plaintiff in his books of account. The defendant has challenged the correctness of the entries. The Havala entries if they are not admitted by the defendant have got to be duly proved by calling the person concerned. The amount of Rs,. 532-12-6 was a transaction with regard to Vrajalal Devidas. This transaction could have been proved by examining Vrajlal Devidas Similarly adjustment entry of Rs. 2000/-

in respect of the transaction with the Sajjanraj Bhakhalal could have been proved by examining the partner of Sajjanraj Bhaikhalal support by an entry in their books of the account. However the plaintiff had not taken the trouble to the examined the persons in order to prove the entries which were disputed by the defendant . Both the court below have not sufficiently appreciated this aspect of the case. The seemed to be of the view that the plaintiff' deposition supported by the entries made in his books of account would be sufficient for passing a decree in his favour. with respect of the learned Judge below they were not right in their view. As held by the Supreme Court as well as by this court in the cases referred to earlier mere entries in the books of account will not be sufficient to fasten the liability to the defendant particularly when the defendant has not admitted the said entries. The entries in the books of account the merely corroborative piece of evidence. Naturally the said entries have got to the proved entire by examining the plaintiff or some person who has written the books of account. But merely because the plaintiff who is an interested person given evidence no the and seeks corporation from his own books of account in my opinion that would not be sufficient a pass decree in the favour when all the entries have been controverted by the defendant. As both the courts below has appreciated the evidence though a wrong angle relying on misconceived notions of law it is open to this court to disturb the finding of fact recorded by both the courts below.

[11] Mr. Oza invited my attention to the letter Ex. 107 wherein the defendant and acknowledge his liability to the tune of Rs. 10,000/- Mr. Oza therefore urged that when the defendant had previously admitted his liability. it was not necessary for the plaintiff to lead any further evidence and the defendant should not be permitted to resile from his previous statement. In support of his case he referred to the judgment of the Divisions Bench of this court in first appeal No. 1009 of 1960 decided on 5-2-1963 (Guj)wherein it was observed:--

"The party who has made the admission must know that the statement can be undo against him and it he had any expiation to offer, it is for him to enter into the witnesses boss of the offer expansion as he can. In our judgment it a document containing an admission is bough on the record, it means that the opportunity is given to the party concerned to pain the admission and if he

fails to avail himself of that opportunity the effect thereof cannot be that the admission cannot be sued as evidence in the case. In the case in the party it is entirely his chose whether the should go in the witness box or no and in or judgment. Section 145 cannot be have been intended by the Legislature to lead to such a position that valuable evidence furnished by an admission made by a party against himself can be practically nullified by a reseal on the part of that very party of enter into the witness box".

There can be no quarrel with the principle enacted therein and with respect. I am in agreement there with. The question however is -- whether the latter Ex. 107 relied upon the plaintiff amounts to and mission with regard to the suit transaction . It was be noted that this letter was not produced by the noted that plaintiff along with other documents produced by him at the relevant time. The plaintiff did not refer to this letter in the own examination-in-chief. The plaintiff did not rely on this letter as an admission on the part of the defendant support of his case. Only in cross-examination the plaintiff confronted the defendant with the letter. The defendant admitted to have writhed this letter but the defendant did not say this letter was writ ten with regard to the particular suits transaction. In this letter the defendant has made that it was difficulty for him to make payment. He was named certain other creditor to whom he was liable to the turn of Rs. 60,500/- Taking all these circumstances it to consideration,. he has mentioned that he was making all efforts to make payment of not only Rs. 10,000/- but whether amount which would ultimately be found due on taking accounts. This letter does not bear any date. The plaintiff has not stated in his disposition on the when this letter was received by him. The plaintiff and defendant and mutual dealing for the last four years which run to several thousand or rupees. It is not improbable that his letter may have been written by the defendant in the beginning of their mutual dealing. Therefore merely because the defendant had promised to pay Rs. 1000/- or any amount that may be found due to the defendant on taking account one cannot drawn in fence that this letter pertained to the last settlement of account alleged to have been made between them as stated by the plaintiff. There is nothing in this letter to suggest so. In my opinion therefore in the absence of any explanation offered by the plaintiff this letter does not help him at all. This letter cannot be sued as an admission in support of the plaintiff cause of action in the

present suit. In my opinion therefore this letter will not be helpful to the plaintiff in support of his case.

[12] Mr. Oza lastly urged that in case this court came to the conclusion that mere entries in the books of account were to sufficient of fastening liability on the defendant in the interest of justice. the suit should be remanded to the trial Court in order to give the plaintiff an opportunity to lead necessary evidence in support of his case. Mr. Nanauaty who appeared on behalf of the defendant fairly conceded this position. In my opinion there is great force in the submission made by Mr. Oza. As already observed both the court below have gone on the assumption that mere entries in the book of account supported by the sworn testimony of the plaintiff will be sufficient to pass a decree in his favour. Under the circumstances it would not be proper to dismiss the suit in toto. In my opinion it would be just and proper if the judgment and decrees of both the court are a set aside and the suit of remanded to the trial Court for proceeding further in the light of the observations made above.

[13] In the result the appeal succeed. The judgment and decree passed by both the court below are her by and aside and the suit is remanded to the trial court with a direction to proceed further according to law. It will be open to the plaintiff to amend the plaintiff and to being the partners of the dissolved firm on record if deemed proper. It will be open to both the parties to lead additional evidence in support of their respective case. In view of the facts of this case costs of this appeal will abide the final result.

[14] Appeal allowed.