Received on	29.11.2004
Registered on	29.11.2004
Decided on	23.04.2025
Duration	
	YY MM DD

IN THE COURT OF JUDGE, COMMERCIAL AND 2nd ADDITIONAL SR. CIVIL JUDGE , AT AHMEDABAD (RURAL)

SPECIAL CIVIL SUIT NO.320 OF 2004
EXH.__

Plaintiff : **State Bank of India**
A body corporate Constituted under the provisions of State Bank of India Act, 1955having its Central office at 239, Mumbai, Local Head Office at Lal Darwaja, Ahmedabad and one of its Branch/Office amongst other places at Lal Darwaja, Ahmedabad, known as “Ahmedabad Main Branch”, Ahmedabad.

Versus

Defendants :

1. **Dhirajlal Ghusabhai Hirpara**
   Adult, Occupation: Business,
   Residing at: A/10, Dhiren Park Society,
   Ambawadi Char Rasta, Ahmedabad
2. **Chinubhai Gandubhai Patel**
   Adult, Occupation: Business,

Residing at: A/34, Harikrupa Tower,
Nr Bapunagar Bus Stand,
Ahmedabad.

3. **Shreeji Construction Co.,**
C/o. Lakshmanbhai Jivrajbhai Patel (Partner),
Siddhi Sarjan Apts., Near Rahul Tower,
Satellite, Ahmedabad.

4. **The Siddhi Sarjan Co-op. Hsg. Soc. Ltd.,**
Siddhi Sarjan Apts.,
Opp. Kanak Kala Apts.,
Near Rahul Tower, on 100 Ft. Road,
Saellite, Ahmedabad.

5. **Mahila Vikas Co-op. Bank Ltd.,**
Vasna Branch,
Vasna, Ahmedabad.

Subject : Suit for recovery of amount Rs.6,27,212/-

APPEARANCE :

For Plaintiff : Ld. Adv. Mr. Lalit V. Mansinghani
For Defendant Nos.1 & 2: Ex-parte
For Defendant Nos.3 & 4: Ld. Adv. Mr. Vinod M. Patel
For Defendant No.5 : Ld. Adv. Mr. M. R. Lakhia

J U D G M E N T

- **Facts of the Suit :**

1. The present suit has been filed by the plaintiff bank against the defendant for recovery of Rs.6,27,212/- (Rupees Six Lacs Twenty Seven Thousand Two Hundred Twelve only) along with accrued interest of 9.25% p.a. with monthly rests thereon from the date of the suit till payment. It is submitted that the plaintiff is a body corporate constituted under the provisions of The State Bank of India Act, 1955 having its Central Office at Mumbai, Local Head Office at Lal Darwaja, Ahmedabad and one of its branch office amongst other places at Lal Darwaja, Ahmedabad known as Ahmedabad main branch, Ahmedabad. The plaintiff is doing business of banking.

1.1 It is further submitted that the defendant No.1 is the principal borrower residing at Ahmedabad. Defendant No.2 is a guarantor for the Housing Term Loan advanced to defendant No.1 by plaintiff bank. Defendant No.3 is developer of the scheme organized by defendant No.4 – Co-Operative Housing Society for its members. The defendant No.5 is a Co-Operative Bank, joined in this suit as collecting Banker.

1.2 It is further submitted that defendant No.1 approached plaintiff bank in or about December 2002 and requested to grant financial assistance to purchase a flat under Public Housing Loan Scheme of plaintiff bank. Defendant No.1 submitted all personal details as well as copies of the papers/documents obtained by

Defendant No. 1 from Defendant Nos. 3 & 4. Plaintiff bank acceded to Defendant's request and granted to Defendant No. 1 a Term Loan of Rs.5,00,000/- on or about 02.12.2002 for purchase of the flat. The said Term Loan carried interest @ 10.35% p.a. with quarterly rests and was made repayable by 180 equated monthly instalments of Rs.5700/- commencing from March 2003. Defendant No. 1 agreed to such repayment by monthly instalments.

1.3 It is further submitted that as security for due repayment of the said loan of Rs.5,00,000/- with interest, costs, charges and expenses, Defendant No. I have executed and delivered to plaintiff bank the following documents/agreements:

a) Memorandum of Term Loan Agreement for Housing Loan of Rs.5,00,000/-
b) Agreement to Mortgage along with other documents
c) Declaration

By executing the aforesaid security documents/agreements, Defendant No. 1 has created first charge by way of Equitable Mortgage in favour of plaintiff bank by deposit of the title deeds and documents of Defendant No. 1's immovable property bearing Flat No.C/2, First Floor, "Siddhi Sarjan Apartments" of Siddhi Sarjan Co-op. Housing Soc. Ltd. registered under the Co-operative Societies Act bearing Registration No. GH-19213 dtd. 26-10-1999 situated at Near Rahul Tower on 100 ft. Road, Satellite, Ahmedabad, admeasuring about 150 Sq. Yds. constructed on and bearing (Survey No. 32/1) Final Plot No. 36 of T.P. Scheme No. 3, Mouje Vejalpur, Taluka City, Registration District Sub-District Ahmedabad. Defendant No. 3&4 Defendant No. necessary Undertaking Allotment Letter, Possession Letters, Money Receipts and other related papers pertaining to allotment of Flat No. C/2 on First Floor in "Siddhi Sarjan Apts." Defendant No. 1 is, therefore, liable for due repayment of such loan along with interest, costs, charges and expenses.

1.4 It is further submitted that defendant No.2 is a guarantor and had agreed to give personal guarantee for the loan granted by plaintiff bank to Defendant No. 1 and has executed Letter of Guarantee for Rs.5,00,000/- in plaintiff bank's favour. The said guarantee is continuing guarantee and Defendant No. 2 is liable for due repayment of the amount outstanding, in the said loan account of Defendant No. 1 in Defendant No.2's personal capacity as guarantor jointly with Defendant No. I along with costs, charges and expenses. It is further submitted that the defendant No.1 has availed the said Term Loan of Rs.5,00,000/- for purchase of flat and accordingly the plaintiff bank has issued Banker's cheque for the value of flat in the name of defendant No.3 being Developer and/or organizer of a scheme of defendant No.4 Co-op. Housing Society. Therefore, the defendant Nos.1 to 4 become liable, jointly and severally, to the plaintiff Bank for due repayment of the said Term Loan.

1.5 It is further submitted that defendant Nos.3 and 4 have issued undertakings, documents, receipts, agreements and other related papers through which specific charge over the portion of land along with the super structure thereon has been created in favour of plaintiff Bank, qua allotment of Flat No. C/2 on 1" Floor in "Siddhi Sarjan Apts." of Siddhi Sarjan Co-op. Housing Soc. Ltd. It is further submitted that the defendant No.4 has also given No Objection, No Due, No Charge Certificate, Possession Letter, Money Receipts, Original Share Certificate, etc. After completion of all procedural aspects and formality, the plaintiff bank issued banker's cheque for Rs.5,00,000/- in favour of defendant No.3 towards consideration of said Flat No. C/2 in First Floor in “Siddhi Sarjan Apts.” on which the Hosting Term Loan has been sanctioned to defendant No.1 guaranteed by defendant No.2. Thereafter, the defendant Nos.1 and 2 became irregular in making repayment of monthly installments. Upon inquiry and inspection it is found by the plaintiff bank that all the defendants have colluded with each other along with concerned officer of the plaintiff bank by taking undue advantage of position of officer of the plaintiff bank and committed fraud with the plaintiff bank. It is to be submitted that the investigation and other departmental proceedings are pending against the said officer of the plaintiff bank.

1.6 It is further submitted that defendant No.5 is a cooperative bank through which the proceeds of the cheque of above-mentioned loan transaction are collected for and on behalf of Defendant No. 1. Defendant No.5 has not taken proper care and have also not taken proper identification and other details of the account holder before opening the account. defendant No. 5 has grossly violated banking norms due to which defendant No. 5 cannot get protection under Section 131 of the Negotiable Instruments Act. Defendant No.5 has failed to act as prudent banker. Defendant No.5 is, therefore, liable to make payment to plaintiff bank.

1.7 It is further submitted that the defendant No. 1 is not paying monthly installments regularly and punctually as agreed and stipulated. Defendant No. 1 has thus committed breach of the terms and conditions of the documents/agreements executed by him and committed gross financial indiscipline. Plaintiff bank time and again requested and reminded Defendant No. 1 to regularize Defendant No. I's loan account by paying the amount of overdue installments and interest. But Defendant No. 1 has not acceded to plaintiff bank's request. Hence, Defendant No. 1 is a willful defaulter. Thereafter upon inquiry the plaintiff bank came to know that the defendant Nos. 1 to 4 have colluded with each other for obtaining finance from the plaintiff bank. Thus the defendants are willful defaulters and it appears that they are purposely avoiding the repayment. The defendants have committed breach of the terms and conditions of the documents/agreements executed by them from time to time.

1.8 It is further submitted that on account of willful default and non-cooperative attitude of the defendants, the plaintiff bank through its Advocate issued legal notice to all the defendants on 10.07.2004 calling upon them to repay the amount outstanding in compliance with said notice. However, the defendants have not complied with the demand contained in the said notice. The plaintiff bank is, therefore, constrained file the present suit against the defendants for recovery of the dues of the plaintiff. It is further submitted that the outstanding in term loan account of defendant No.1 as on 30.04.2003 is Rs.5,21,633/-and interest accrued but not charged from 01.05.2003 till the date of filing of the suit is Rs.1,05,579/-. Thus, total amount is Rs.6,27,212/- including interest. It is further submitted that as per the guidelines issued by the Reserve Bank of India, interest is not charged from 01.05.2003 though the same has accrued in the Term Loan Account of defendant No.1 and the same is not shown in the Statement of Account. The plaintiff submits that the Statement of Account with interest charged/applied will be produced before this Hon'ble Court as and when required.

1.9 It is further submitted that the aforesaid Term Loan was granted to defendant No.1 at Ahmedabad and is repayable to the plaintiff bank at Ahmedabad. The mortgaged property is also situated at Ahmedabad. Therefore, this Hon'ble Court has jurisdiction to try, entertain and dispose of the present suit.

1.10 It is further submitted that the cause of action for the suit has arisen when defendant No. 1 applied for Term Loan and the plaintiff bank sanctioned Term Loan of Rs.5,00,000/- on 2/12/2002 and when defendant No. 1 executed documents/agreements in favour of the plaintiff bank and when defendant No. 1 created equitable mortgage by depositing the title deeds and documents through Memorandum of Entry and when defendant No. 2 has executed Letter of Guarantee and when defendants Nos. 3 & 4 have issued Allotment Letter, Possession Letter, etc. to defendant No. 1 and when the plaintiff bank issued cheque for the amount of loan in favour of defendant No.3 and when the said cheque has been credited by defendant No. 5 in the account of defendant No. 3 and when the plaintiff bank, through its Advocate, issued legal notice to the defendants on 10/7/2004 and when the defendants failed to repay the outstanding amount due in Term Loan Account in compliance with the said notice. Thus, the plaintiff's claim is within the period of limitation.

1.11 The plaintiff therefore prays that:

> **A.** This Hon'ble Court may be pleased to pass a decree ordering the defendant Nos. 1 to 4 jointly and severally, to pay Rs.6,27,212/- (Rupees Six Lacs Twenty Seven Thousand Two Hundred Tweleve only) with further interest at the rate of 9.25% p.a. with monthly

rests therein from the date of the suit till payment.

B. This Hon'ble Court may be pleased to order and decree for sale of the mortgaged immovable property of defendant No.1 being Flat No.C/2, First Floor, “Siddhi Sarjan Apartments” of Siddhi Sarjan Co-op. Housing Soc. Ltd. registered under the Co-operative Societies Act bearing Registration No. GH-19213 dated 26.10.1999 situated near Rahul Tower on 100 ft. Road, Satellite, Ahmedabad, admeasuring about 150 Sq. Yds. Constructed on land bearing (Survey No.32/1) Final Plot No.36 of T.P. Scheme No.3, Mouje Vejalpur, Taluka City, Registration District Sub-District Ahmedabad, under the direction of this Hon'ble Court and appropriate the net sale proceeds towards the amount outstanding / due in Term Loan Account to the plaintiff as mentioned in prayer (A) hereinabove.

C. That in the event of net sale proceeds realized from the sale of the aforesaid mortgaged property be insufficient to cover the amount mentioned in prayer (A) hereinabove, defendant Nos. 1 to 4 may be ordered and decreed to pay, jointly and severally to the plaintiff bank the amount of such deficiency from their personal property/ies with further interest.

D. The defendant No.5 may be ordered and decreed to pay the amount of Rs.5,00,000/- to the plaintiff bank with interest from 03.12.2002 to the date of payment. It is to be clarified that the amount claimed from defendant No.5 is a part of the total claim.

E. The costs of the suit may please be awarded in favour of plaintiff.

F. Any other and further relief which the Hon'ble Court deems fit and proper may kindly be granted.

<u>Defendant Nos.1 & 2:</u>

2. Summons of the defendant Nos. **1 & 2** were issued but could not be served in the usual model and hence, public summons issued by the plaintiff bank in the news paper 'Divya Bhaskar' dated 07.03.2025, which is produced vide Exh.73/1 and the copy of the bill is produced along with the lists vide Exh.73/2. As per 'Rojnama' of the case, plaintiff has produced pursis vide Exh.73 declaring publication of the public summons but the defendant Nos. 1 and 2 have not chosen to appear before the Court and the suit against them is proceeded **Ex-parte.**

<u>Defence of Defendant Nos.3 & 4:</u>

2.1 Upon service of summons, defendant Nos. **3 and 4** have appeared through their Ld. Advocate and have filed written statement vide Exh.13 wherein they have denied the maternal allegations made in the plaint and have submitted that the defendant No.1 has not made any application to them and mo such person was member of their scheme and they are not knowing such person. Defendants have also pleaded that, Flat No. C-2 was **3 and 4** not in existence in the scheme and they have not allowed such flat to the defendant No.1. It is also pleaded that, if any fraud is committed by the defendant Nos. 1 and 2 in connivance with the bank officials. Defendant Nos. 3 and 4 are not liable. It is also pleaded that, present suit against defendant Nos. 3 and 4 is without any authority and they are not involved in the alleged transaction and hence, the suit against them is liable to be dismissed.

<u>Defence of Defendant No.5:</u>

2.2 Upon presentation of the present suit, summons was issued to the defendants and defendant **No.5** has filed written statement vide **Exh.9** and has contested the present suit. Defendant No.5 has taken the plea that they are not a party to the Loan Agreement and they have nothing to do with the grant of the loan in favour of the defendant No.1 and thereby contended that, such suit against them be dismissed.

3. On the basis of the pleading of the case and documents on record, this Court were framed the following issues vide Exh. **72** on dated 17.03.2025 for adjudication of this suit as under:

:ISSUES:

1. Whether the plaintiff proves that he is entitled for recovery of an amount of Rs.6,27,212/- with interest 9.25% from the defendants till the realization of the suit amount ?

2. Whether the plaintiff proves that he is entitled for relief as para **b** and **c** ?

3. Whether the plaintiff proves that he is entitled for recovery of an amount from the defendant No.5 Rs.5,00,000/- with interest from 03.12.2002 till the date of payment ?

4. What order and decree ?

4. My findings on the above referred issues are as under:

1. In the Affirmative
2. In the Negative
3. In the Negative
4. As per final order

5. Here, in this case, the plaintiff in order to prove his case has produced following oral and documentary evidences which are as follows:

:ORAL EVIDENCE:

Sr. No.	Particulars	Exh.
1	Chief-Examination Affidavit of Manishkumar Jha, Bank Manager of the plaintiff bank	77

:DOCUMENTARY EVIDENCE:

Sr No.	Particulars	Date	Exh./ Mark
1	Defendant's Loan Application Form	02.12.2002	78
2	Loan Sanction Letter	02.12.2002	79
3	Memorandum of Term Loan Agreement	-	80
4	Declaration of Defendant No.1	-	81
5	Agreement to Mortgage along with other documents	08.12.2002	82
6	Defendant No.2's Letter of Guarantee	-	83
7	Notice issued by plaintiff to defendants	10.07.2004	84
8	Statement of Account	-	85
9	Receipt Memo by main Branch SBI		76

- **Arguments on behalf of the Plaintiff:**

6. The Ld. Advocate Mr. Lalit V. Mansinghani on behalf of the plaintiff has argued in consonance with the averments of the plaint and submitted that it is on record that the defendants had been availed the loan of Rs.5,00,00/- for purpose of financial assistance to purchase a flat under Public Housing Loan Scheme from the plaintiff bank, as per the terms and conditions of the agreement, hence, the defendants are liable to pay the dues. It is further argued that all the documents produced by the plaintiff bank before the Hon'ble court are maintained as per rules and regulations of the said bank. Narration of so called transactions and documents are duly proved by the deposition of authorized representative of plaintiff bank in the evidence at Exh.77. (examination-in-chief). No rebuttal evidence is led by defendants side to challenge the case of the plaintiff. Also there is no reasons for plaintiff to create such fake evidence against the defendants. Hence, urged before the Court to allow the suit amount Rs.6,27,212/- (Rupees Six Lacs Twenty Sevenn Thousand Two Hundred Twelve only) with further interest @ 9.25% p.a. with monthly rests thereon from the date of the suit till payment. The right of evidence and right of arguments of the defendants have been closed.

:REASONS:

ISSUE NO. 1: Whether the plaintiff proves that he is entitled for recovery of an amount of Rs.6,27,212/- with interest 9.25% from the defendants till the realization of the suit amount ?

7. In this case, it is pertinent to note that despite service of summons, the defendants had not appeared before this Court and as such there is no any written statement and thus, there is no contest from the defendants side. Therefore, before appreciating the evidence on record, it would be appropriate to refer the recent judgment of Hon'ble Gujarat High Court of Pineshbhai Mangabhai Patel Vs. Hemanthbhai Mangabhai Patel, which is circulated to all Civil Judges, in R/Second Appeal No.76 of 2025, the Hon'ble High Court of Gujarat has discussed the CPC order regarding (i) Meaning of Material Pleadings (ii) Order XII Admissions (iii) Material Proposition of fact or law (iv) Order XV Disposal of the suit at the first hearing (v) Prolonging of litigation by unscrupulous & role of Courts in curbing the same.

8. Further, it would be appropriate to refer the **provisions of Order 8 Rule 5 of the Civil procedure Code and amendments to it and its applicative to commercial i.e. as under:**

> **"Order 8 Rule 5: Specific denial.**
> 1) 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 taken to be admitted.** Except as against a person under disability.
> Provided that the Court may in it discretion gain any fact so admitted to be proved otherwise there by such admission.
> Provided further that every allegation of fact in the plaint, if not denied in the manner provided under Rule 3 of this Order, shall be taken to be admitted except as against a person under disability.
> 2) **Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the fac**
> 3/1 **ts contained in the plaint,** except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.
> 3) In exercising its discretion under the proviso to Sub-Rule (1) or under Sub-Rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.
> 4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment the date on which the judgment was pronounced."

Therefore, considering the purpose of providing of Order 8 Rule 5, it is clear that when the defendants have not filed the written statement, the Court has ample powers to pass the decree on basis of the evidence produced by the plaintiff.

9. So far as **issue No.1** is concerned, to prove this issue, the plaintiff has produced affidavit for examination-in-chief of the plaintiff Sh.Manishkumar Jha, Bank Manager of the plaintiff bank, under the provision of order 18 rule 4 of the Code of Civil Procedure, 1908, in his evidence at Exh.77, reiterated the facts of the plaint and fully supported the case of the Plaintiff bank. It is also submitted that he has referred the documents produced by the plaintiff side, which are exhibited at 76 to 85 were produced on record. It is also deposed that the defendants have committed forgery with the plaintiff bank and as such a complaint is also filed with the CBI and they have produced all the original documents to the CBI.

10. It is also deposed in his chief-examination that the present defendant No.1 had requested the plaintiff bank for loan and the plaintiff bank sanctioned a loan of Rs.5,00,000/- in the year 2002. The defendants have executed necessary documents in the favour of the plaintiff bank as per the agreement. The defendants have not paid the amount as per the terms and conditions of the loan document and as per the loan account of the defendant, an amount of Rs.6,23,212/- is due. The plaintiff bank intimated the defendants to pay the due amount, but defendants did not comply the same.

11. Now, before appreciating the documentary evidence produced by the plaintiff Bank, we have looked at the Section 61 of Indian Evidence Act. As per the section the contents of document may be proved either by primary evidence or secondary evidence. Looking to the documents at Exh.76 to 85, those documents are referred and its contents are proved in the Chief-Examination affidavit of Sh.Manishkumar Jha, Bank Manager of the plaintiff bank at Exh.77. Further, its veracity are not challenged, moreover, it transpires that the documents are maintained and prepared as part of official act of plaintiff bank, hence, Presumption by virtue of evidence act Sec.114 (f) would definitely squarely applies to the suit. Hence, those documents are believed to be true and genuine and are admissible in evidence and can be considered for appreciation.

12. Now, considering the facts that the version made on oath by the witness in the capacity of Authorized representative of the plaintiff bank at Exh.77, has not been challenged by the defendants. Hence, there is no reason to disbelieve the oral as well as documentary evidence of the plaintiff. At this stage, when the defendants have not appeared and challenged the documents produced by the plaintiff, recent judgment of the Hon'ble Gujarat High Court, ***Jay Ambe Industries Proprietor Shri Dineshkumar bajranglal Somani Versus Garnet Specialty Paper Ltd. 200(0) AIJEL-HC 243577 decided on 07.01.2022 is required to be considered in the judgment of Hon'ble High Court of Gujarat has discussed the Evidence Act Section 34,59, 61 & 62 and at Para 11, Para 14 and Para 28 has held as under:***

> ***11.*** *"The short question that falls for our consideration is, whether the trial court was justified in dismissing the suit instituted by the plaintiff,* ***despite there being no denial and/or no rebuttal evidence led by the respondent-original defendant."***
>
> ***14. .*** *"At the outset* ***we may take notice of the fact that the respondent-original defendant had not appeared before the trial court as well as before this Court so as to put-forth his***

defense. *In other words, t**he pleadings of the plaint and evidence so adduced remained un-controverted all throughout.** Thus, the **suit for recovery of dues based on documentary evidence such as invoices, duly signed and acknowledged delivery challan and ledger account has not been disputed by the respondent-defendant".***

28."*To hold that a particular document is not ence. It is submitted in this application that, plaintiff bank has filed criminal complaint and as per the Receipt Memo, CBI, Mumbai has collected theadmissible for proof of its contents unless the writer is called, is to denude the documentary evidence of all its value and is clearly contrary to certain express statutory provisions to be found in the Evidence Act, more particularly,* ***Section 59*** *of the Evidence Act. In our opinion, the documentary evidence becomes meaningless if to prove it in every case by way of oral evidence of its contents. If that is the position, it would mean that, in the ultimate, the analysis of the evidence must be oral and that the oral evidence would virtually be the only kind of evidence recognized by law, however, that is not the position under the*

Evidence Act. ***The definition of the term evidence in Section 3 of the Evidence Act lays down that evidence means and includes statements made by the witnesses, which are called oral*** *evidence, and documents produced before the court, which are called documentary evidence.*

A bare perusal of Section 59 of the Evidence Act states that all facts, except the contents of documents, may be proved by oral evidence. Needless to say, that once the documents is proved in the manner provided under the provisions of the Evidence Act, the contents of that documents are also proved. It is for that reason that the Evidence Act adviseldy lays down that the contents of a document can be proved by proving the document in the usual manner, a proposition that emerges unquivocally from a combined reading of Sections 59,61 and 62 of that Act. *Thus, according to us, the trial court should have believed the documents of invoices, such as invoices of the delivery chalan and ledger account,* ***in absence of any dispute or rebuttal evidence submitted by the respondent-original defendant.*** *Once the document has been exhibited, the initial burden of proof could be*

> *said to have been discharged by the original plaintiff.* ***<u>The original defendant was expected to deny the same with cogent rebuttal evidence, but having failed in submitting the rebuttal evidence, the trial court could not have ignored the exhibited evidence/undisputed evidence merely because there was no oral evidence in the form of examination of any evidence</u>*** *by the witness in support of the documentary evidence."*

13. It is also well settled by the Hon'ble Supreme Court in the case of **"Vidhyadhar V. Manikrao" reported in AIR 1999** S.C. 1441, that where the party is not came into the witness box and not denied the averments of the plaint, Court can draw adverse inference against him under S.114(g) of Indian Evidence Act. Also in the case of **"Adivekka & ors. V/s. Hanamavva Korm Venkatesh and ors., reported in AIR 2007 SC 2025"**, The Hon'ble Apex court in head note-A held that, S.114 of evidence act. Adverse inference. Non examination of party to suit. Adverse inference can be drawn against that party.

So, as per the above referred judgments of Hon'ble Supreme Court, an adverse inference can also be drawn against the present defendants. Hence, in absence of cogent evidence challenging the procedure of plaintiff, this Court firmly believes that the defendants have not paid the due amount of term loan granted in favour of defendants by the plaintiff bank. Thus, on the basis of oral evidence and the documentary evidence, the plaintiff succeeded to prove that the defendant No.1 had approached to the plaintiff bank for availing the loan. Further, it is also proved that plaintiff-bank has sanctioned loan facility to the defendant No.1. Defendant No.1 is the borrower, who has taken the loan from the plaintiff bank and defendant No.2 is the guarantor. It is also proved that the defendants were executed in respect of the aforesaid commercial transaction defendants were executed the documents as alleged in the plaint. Furthermore, the plaintiff-bank proved that Rs.6,23,212/- is due and payable by the defendants towards the transaction as alleged in the plaint from the defendants on the date of filing of the suit.

DISCUSSION ON THE POINT OF INTEREST:

14. Herein present case, the plaintiff has claimed the running interest at the rate of 9.25% p.a. with monthly rests thereon from the date of the suit till payment. In this regard, on perusal of the documents and the plaint, it is clear that there is condition that the buyers will take the interest 9.25% p.a. with monthly rests. Further, in this regard, if we consider Section 34 of Civil Procedure Code, it transpires that when decree is for the payment of money, the Court may order interest at such rate as the Court deems reasonable to be paid on the principal sum adjourned from the date of the suit to the date of the decree. Further, it is also provided that when the liability in relations to the sum so adjudged and arisen out of a commercial transaction, the rate of such further interest may exceed 6% per annum but shall not exceed the contractual rate of interest or where there is no contract to rate, the rate at which money are lent or advanced by nationalized bank in relation to commercial transactions. Therefore, as per the Section 34 of CPC, it is clear that where the liability in relations to the sum so adjudged had arisen out of a commercial transaction the Court can order interest as per **contractual rate**. In the instant case it transpires from the documents produced at Exh. 76 to 85, that the transaction between parties to the suit is for the **purchase a flat under Public Housing Loan scheme**. So the transaction in the instant case is purely a commercial one. Herein, this case the plaintiff is entitled to get the interest at the commercial rate i.e. 9.25% p.a. for the period of filing of the suit till realization per Section 34 of the Code of Civil Procedure. Further, in this regard it is at to refer principle laid down by our Hon'ble High Court in **"Central Bank v/s P.R.Germents"** reported in AIR 1986 Gujarat 113 and by Hon'ble High Court of Karnatak in case of "Central bank V/s.

P.R.Germents" reported in AIR 1986 Gujarat 113 and by Hon'ble HIgh Court of Karnataka in case of **"Vijaya bank V/s. S.Bhathija" reported in AIR 1994 Kant 123** is required to see, as per the above judgment,

> "in commercial transaction by **PUBLIC FINANCIAL INSTITUTION** the contractual rate of interest should be rule and departure rare exception and in such case granting of lesser rate of interest is "**ORDINARILY"** ruled out. If the rate of future interest is granted at lesser rate than that of contractual rate that will amount to giving "**PREMIUM"** to those who trade upon the money of others. To reduce or deny interest would amount to penalising the "**creditor"** for approaching the court and encouraging the debtor to deliberately and unjustly prolong the litigation."

15. Therefore, as discussed above, it is fair enough and proper case to order rate of interest at **contractual rate** i.e. 9.25% on the outstanding principle amount from the date of filing of the suit till the date of decree. However, on the facts and circumstances of the case and as discussed as and this Court has decided to allow 9.25% p.a. interest with monthly rests thereon from the date of the suit till payment. Hence, **I answer Issue No. 1 as AFFIRMATIVE.**

<u>ISSUE NO.2:</u> Whether the plaintiff proves that he is entitled for relief as para b and c ?

16. So far as above issue is concerned, the burden lies on the plaintiff. But, the plaintiff is failed to prove the fact that possession of the disputed flat is with the defendant No.1. Therefore, **I answer Issue No. 2 as NEGATIVE.**

<u>ISSUE NO.3:</u> Whether the plaintiff proves that he is entitled for recovery of an amount from the defendant No.5 Rs.5,00,000/- with interest from 03.12.2002 till the date of payment ?

17. As discussed above the plaintiff has proved the issue No.1 as affirmative. Now, so far as above issue is concerned, the burden lies upon the plaintiff to prove the issue according to Evidence Act Section 101 and 102. If we read the evidence, produced by the plaintiff, especially Exh.80 i.e. Memorandum of Term Loan Agreement between the plaintiff and defendant No.1 and 2. Defendant No.1 is borrower, whereas defendant No.2 is guarantor of the defendant No.1. Therefore, the agreement is between plaintiff and defendant No.1 & 2. Further, the plaintiff has not lead evidence how defendant No.5 is liable to pay the said amount. In other words, the plaintiff is not able to prove the issue according to law. Therefore, this Court answer the **issue No.3 in Negative.**

<u>ISSUE NO.4:</u> What order and decree ?

18. In view of the foregoing discussion and finding, following final order is passed in the interest of justice:-

:: <u>F I N A L O R D E R</u> ::

1. The suit of the plaintiff-bank is HEREBY **PARTLY ALLOWED.**
2. The plaintiff is entitled to recover an amount of **Rs.6,27,212/-** (Rupees Six Lacs Twenty Seven Thousand Two Hundred Twelve only) from the defendant Nos. 1 and 2, along with interest @ **9.25%** p.a. from the date of institution of the suit till its actual realization.
3. The suit against rest of the defendants is hereby dismissed.
4. The defendant Nos. 1 and 2 shall pay cost of this suit to the plaintiff and shall bear his own costs.
5. Decree to be drawn accordingly.

Signed and pronounced in the open Court on
this **<u>23rd day of April, 2025.</u>**

Place: Ahmedabad
Date: 23.04.2025

J. A. BAXI
Comm. Judge,
2nd Addl. Sr. Civil Judge & A.C.J.M.,
Ahmedabad (Rural)
Code No.GJ00903

N.B.Bhavsar