

(1998) 03 DEL CK 0021

In the Delhi High Court

Case No : S.No. 81/76

Allora Electric and Cable Co.

APPELLANT

Vs

M/s. Shiv Charan and Bros. and Others

RESPONDENT

Date of Decision : 10-03-1998

Acts Referred:

Citation : (1998) 3 AD 487 : (1998) 72 DLT 761 : (1998) 45 DRJ 403

Hon'ble Judges : J.B. Goel, J

Bench : Single Bench

Advocate : Mr. G.N. Aggarwal, for the Appellant; Mr. A.S. Chandiok and Ms. Neelam Rathore, for the Respondent

Judgement

J.B. Goel, J.—plaintiff, a partnership firm has filed the present suit against the defendants for recovery of Rs. 6,33,210.95, comprising of balance price of the goods, interest @ 12% per annum and amount on account of sales-tax in lieu of sales tax forms not issued. Defendant No. 1 is partnership firm and defendants 2 and 3 are its partners.

2. The case of the plaintiff is that the plaintiff is carrying on business of manufacturing and sale of plastic pipes; formerly under partnership deed dated 7.6.1961 by two persons, namely, Shri Yoginder Nath and his brother Shri Mahinder Nath. Subsequently, with effect from 1.4.1965, two more partners, namely, Narinder Nath and Virendra Nath and Shri Vijesh Kumar, then the minor was admitted to the benefits of the partnership; Vijesh Kumar attained majority in the year 1973 and then partnership deed dated 10.5.1973 was executed amongst the aforesaid five partners. The partnership firm is duly registered under the Partnership Act. Defendants have been purchasing plastic pipes from the plaintiff on credit since 1963. Against the purchases payments on account were being made and after adjusting the payments, balance amount remaining due was carried over at the close of each financial year. Details of the purchases and the payments made year wise from 1963-64 (23.11.1963) to the year 1974-75 have been given in the plaint. Purchases had started on 23.11.63 and

continued up to 4.7.74. After adjusting the payments received, each year a balance of Rs.5,53,835.22 remained due on 1.4.1974. And during the period 1.4.1974 to 4.7.1974 further purchases of the value of Rs.3,12,442.03 were made and during this period Rs. 2,81,000 were paid up to 2.7.1974, then a balance of Rs.5,85,277.25 P. remained due. A sum of Rs.32,140/- each were outstanding to the credit of defendants 2 and 3 with the plaintiff. These amounts of Rs.64,280/- were adjusted against these dues and then a sum of Rs. 5,20,997.25/- remained due from the defendants to the plaintiff. This amount has not been paid by the defendants in spite of various demands and legal notice dated 20.8.1974. plaintiff has also claimed Rs.15,622.09 as sales tax @ 5% on the purchases of Rs.3,12,642.03 made during 1.4.1974 to 4.7.1974 in lieu of sales tax declarations not given. Rs. 96,591.60 as interest @ 12% per annum as per agreement and custom in the trade is also claimed. Thus the plaintiff claims a decree for a total amount of Rs. 6,33,210.94 besides further interest etc.

3. Defendant No. 3 remained ex parte. Written statement has been filed by defendants No. 1 and 2 contesting the suit on various grounds. It is alleged that the plaintiff firm was constituted under a Partnership deed dated 20.4.1974, comprising of S/Shri Prem Chand, Devi Charan, Shiv Charan, Yoginder Nath, Virender Nath and Vijesh Kumar as partners; the partnership constituted on 20.4.1974 is not registered under the Partnership Act and thus is not competent to institute this suit. It is admitted that there were dealing between the earlier partnership and defendants; but it is alleged that the account books have been fabricated in collusion with defendant No. 3. Purchases and payments as claimed by the plaintiff have been denied. It is alleged that in view of the partnership constituted on 20.4.1974, the defendants are not liable and the suit is not maintainable. Various legal pleas have been taken against maintainability of the suit and the suit is without any cause of action.

4. Replication has been filed by the plaintiff denying the various pleas taken by the defendants and reiterating the averments made in the plaint. It is alleged that partnership deed dated 20.4.74 is a sham document and was not acted upon nor affects the partners of the firm under partnership deed dated 10.5.73. It is alleged that no business was transacted by that partnership; though Bank account was opened but it was operated only once, when a sum of Rs. 70,000/- was paid from the funds of partnership of 10.5.73, and a sum of Rs. 66,500/- was paid to M/s. Shriram Vinyl and Chemicals Ltd. who had supplied resins to the plaintiff.

5. On the pleadings of the parties, the following issues were framed on July 15, 1977:..ls1

1. Whether the plaintiff firm is duly registered and the suit instituted by a duly authorised person? O.P.P.

2. Whether the plaintiff firm was reconstituted vide partnership deed dated 20th April, 1974? If so, to what effect? O.P.D.

3. Whether the present suit is liable to be stayed? O.P.D.

4. Whether the suit for specific amount is not maintainable? O.P.D.

5. Whether a sum of Rs. 5,20,997.25 was payable as on 31st March, 1975 to the plaintiff by the defendants as price of the goods? O.P.P.

(Onus objected to. Heard. Objection over-ruled)

6. Whether defendant No. 3 fabricated the accounts and books of defendant No. 1? If so, to what effect? O.P.D.

7. Whether the defendants are liable to pay Rs. 15,622.09 or any other amount representing the amount of Sales Tax payable on the bills mentioned in para 22 of the plaint? O.P.P.

8. Whether the defendants are liable to pay interest? If so, at what rate and to what amount? O.P.P.

9. Relief.

6. Both the parties have produced oral and documentary evidence, examined two witnesses each. PW-1 Budh Singh, Inspector from the Income Tax department has produced copies of Income Tax return, profit & loss account and balance sheet in respect of the defendant firm as mark "A", "B" and "C". PW:2 Shri Yoginder Nath is a partner of the plaintiff firm and besides oral testimony has proved a large number of documents including sale vouchers etc. in respect of supplies made to defendants and also copies of account books. On behalf of the defendants, DW-1, Shri D. Bhaskar, Officer of Oriental Bank of Commerce has deposed that M/s. Allora Electric and Cables Company had opened a current account with them on 25th April, 1974 and produced from their record copy of partnership deed mark "X", account opening form "Y", specimen signature form is mark "Z" and copy of the statement of account is Ex.D-8. DW-2, Shri Shiv Charan is defendant No. 2 and partner of defendant No.1.

7. I have heard learned counsel for the parties, perused the material on record and my findings issue wise are as under :-

The case of the plaintiff is that a partnership firm was initially formed in 1961 of two partners, namely, Yoginder Nath and Mahinder Nath. Subsequently, two partners, Shri Narinder Nath and Varinder Nath and Shri Vijesh Kumar, then a minor, were admitted to this partnership on 1.4.1965; and on attaining majority of the minor, all these five persons constituted a partnership firm for which partnership deed dated 10.5.1973 was entered into; the firm was duly registered under Partnership Act. PW-2, Shri Yoginder Nath has deposed to this effect. He has proved Exh. P-1, certified copy of form "A". He has also deposed about the details of the sales made to the defendants and the payments received.

8. Exh. P-1 is form "A" of the partnership formed in the name of M/s. Allora Electric & Cable Company which was registered on 11.12.1964, comprising of

Mohinder Nath and Yoginder Nath which as its partners formed on 31.5.1961. Subsequently, Narender Nath, Virender Nath and Vijesh Kumar(minor) were admitted as partners and later Vijesh Kumar attained majority w.e.f. 7.5.1973, intimation of these changes has been recorded. Correctness of the testimony of PW-2 on this aspect and also, correctness of Ex.P-1, form "A" have not been disputed in cross-examination in any way, nor any evidence in rebuttal to the contrary has been produced except the plea of new partnership constituted on 20.4.1974, which will be considered hereafter under separate issue.

9. It is thus proved that the plaintiff is a partnership firm, duly registered under the Partnership Act and Shri Yoginder Nath is one of the registered partner. Shri Yoginder Nath who has signed and verified the plaint and instituted the suit was competent to do so. This issue is accordingly decided in favor of the plaintiff and against the defendants.

10. plaintiff in paragraph 7 of the plaint has stated that the defendants started purchasing the goods from them on credit in the year 1963 and they used to make part-payments from time to time; the amounts so paid by them were credited to their account maintained by the plaintiff and at the close of the year on 31st March each year the balance outstanding was carried forward to the next year and in paragraphs 8 to 19, the figures of the total purchases made and the total payments made by the defendants during each year have been specifically mentioned. It is also mentioned in paragraph 19 that on 1.4.1974 a balance of Rs. 5,53,835.22 was brought forward from the previous year and during the period 1.4.74 to 4.7.74 goods worth Rs. 3,12,442.03 were further purchased, thus making a total of Rs. 8,66,277.25 P. Out of this a sum of Rs. 2,81,000 was paid during 1.4.74 to 2.7.74. The defendants in corresponding para 7 of the written statement have admitted that plaintiff had been supplying goods to them from time to time and accounts used to be settled at the end of each year. The total purchases made and the total payments made by defendants as pleaded in paras 8 to 19 of the plaint have been denied but not specifically. Only vague denial has been made stating that the contents of such paras are either incorrect or wrong and denied. Learned counsel for the plaintiff has strongly contended that in the absence of specific denial the above said averments made in these paras of the plaint should be deemed to have been admitted as provided under Order 8 Rule 5 CPC. Order 8 Rule 5 CPC reads as under :-

R.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 pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

11. The object of this provision is to narrow the issues to be tried in the case and to enable either party to know what the real point is to be discussed and

decided. The word "specifically" qualifies not only the word "deny" but also the words "stated to be not admitted" and Therefore a refusal to admit must also be specifically stated. A defendant can admit or deny the several allegations made in the plaint and if he decides to deny any such allegations, he must do so clearly and explicitly. A vague or evasive reply by the defendant cannot be considered to be a denial of fact alleged by the plaintiff. A party is expected to expressly deny the fact which is within its knowledge and a general denial is not a specific denial by "necessary implication". In other words, the denial should be definite and unambiguous. The scope of this provision has been considered in *Badat and Co. Vs. East India Trading Co.*, , where His Lordship Subba Rao, J. after referring to Rules 3, 4 and 5 of Order 8 of the Code has observed as under :-

"These three rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written-statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. The first paragraph of R. 5 is a re-production of O. XIX, R. 13 of the English rules made under the Judicature Acts. But in mofussil Courts in India, where pleadings were not precisely drawn, it was found in practice that if they were strictly construed in terms of the said provisions, grave injustice would be done to parties with genuine claims. To do justice between those parties, for which Courts are intended, the rigor of R. 5 has been modified by the introduction of the proviso thereto. Under that proviso the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. In the matter of mofussil pleadings, Court, presumably relying upon the said proviso, tolerated more laxity in the pleadings in the interest of justice. But on the Original side of the Bombay High Court, we are told, the pleadings are drafted by trained lawyers bestowing serious thought and with precision. In construing such pleadings the proviso can be invoked only in exceptional circumstances to prevent obvious injustice to a party or to relieve him from the results of an accidental slip or omission, but not to help a party who designedly made vague denials and thereafter sought to rely upon them for non-suiting the plaintiff. The discretion under the proviso must be exercised by a Court having regard to the justice of a cause with particular reference to the nature of the parties, the standard of drafting obtaining in a locality, and the traditions and conventions of a Court wherein such pleadings are filed. "

12. The present suit has also been filed in the High Court. The pleadings in the High Court are drafted by trained lawyers and need to be strictly construed. Evasive or vague denial of fact in the written statement of such facts should be taken to be no denials and so deemed to be admitted. On that principle in the absence of specific and unambiguous denial and the denial here being vague, the averments made in paras 8 to 19 should be deemed to have been admitted by

the defendants.

13. Even otherwise, PW-2, Shri Yogendra Nath has deposed that the plaintiff is a partnership firm doing business of manufacture of plastic pipes; defendants 2 and 3 his brothers carry on their business in the name of defendant No. 1; they had business dealings with them from the year 1963 and till 1974; goods were supplied; bills were prepared in respect of sales made to the latter in duplicate; the carbon copies of bills are Ex. P-14 to P-2293; those bills are either signed by Shri Devi Charan or by Shri Shiv Charan (defendants 2 and 3 herein); he is acquainted with their signatures and has identified the same. There is no cross-examination of PW-2 on the correctness of his statement about the purchases, the number of bills, quantities, amounts of the goods sold or delivered to the defendants and the signature as in acknowledgement of the bills. In cross-examination it was suggested that defective goods used to be returned to the plaintiff, which he denied. This plea apart from being vague has not been taken in the written statement by the defendants.

14. Defendant No. 2 appeared as DW-2; he admitted that he and defendant No. 3 are the two partners of defendant No.1; its sales and purchases used to be looked after by him and supplies were being made to them by plaintiff. He has also not denied or disputed the correctness of the bills, the number of bills, quantities and value of the goods purchased from the plaintiff as deposed by PW-2. However, he has stated that some of the goods were returned but he has not given details thereof regarding bill, item returned and the value of the each items of goods which may have been returned except saying vaguely that it might be about Rs. 1,50,000/-, he has not produced any written proof in respect of return of those goods. It is admitted that account books used to be maintained by defendants but those have not been produced and without any valid or tenable grounds. Such plea of return of goods, has not been taken in the written statement and obviously it is malafide and an afterthought and cannot be believed.

15. No objection was raised at the time of exhibiting these bills in the statement of PW-2. But during arguments learned counsel for the defendants has contended that the original bills had not been summoned/called for from the defendants and the copies produced are not primary evidence; those bills could not be exhibited and that mere marking an exhibit does not prove the document and its contents. He has also contended that mere copies of entries in account books are not sufficient to charge a person. He has relied on Chandradhar Goswami and Others Vs. The Gauhati Bank Ltd., and P.G. D'Ombraim and Others VS. Collector of Kamrup and another AIR 1980 Gauhati 55 ; and Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Satteyya and Others, .

16. The purchases against the aforesaid bills have not been denied or disputed specifically. No objection was raised at the time these bills were exhibited. Receipt of these bills is also not disputed/denied. The original bills are in possession of defendants. Section 65 of the Evidence Act, so far as is relevant

reads :-

"Secondary evidence may be given of the existence, condition, or contents of a document - (a) when the original is shown or appears to be in the possession of power - of the persons against whom the document is sought to be proved; or of any person legally bound to produce it;

17. Though a notice to produce the original document has to be given u/s 66 of that case, but such a notice is not necessary in every case and Court can dispense with it in an appropriate case. In this case, the defendants have not objected at the time of marking exhibits on these documents. This will mean that the defendant dispensed with such notice. Original having been issued to and being in possession of defendants is not denied or disputed and is proved otherwise. If the defendants wanted to show that goods of any particular bill or bills were not received or returned by them, they were required to plead specifically and sought production of those bills for proof specifically. In the facts and circumstances, such notice was not necessary u/s 66 of that Act. No objection having been taken about mode of proof when those documents were admitted in evidence, defendants cannot be allowed to raise objection later on. *Brij Mohan Arora Vs. Bank of Baroda and Others, and M/s. Modi Sugar Mills Ltd. Vs. Union of India*, (1972) 2 Del 554. Defendant had notice that these bills will have to be relied and should have been produced. He cannot take benefits of his own acts of withholding the original bills. Carbon copy of a document prepared simultaneously with its original carbon impression ensures its accuracy. PW-2 has deposed that bills Ex. P-14 to P-2293 are signed by defendant No. 2 or 3. The bills containing the acknowledgements signed by defendants are primary evidence of the proof of their having been delivered to the defendant.

18. It is not that merely these bills have been given exhibit marks but PW-2 has deposed that goods against these bills were supplied to the defendants which the latter have not denied. The two authorities cited thus have no relevance.

19. PW-2 has also deposed that they maintain regular books of accounts comprising of ledger, cash books, Nam Bahi, Jama Bahi and Sales Tax Registers which are written by his Munim under his supervision. He has proved translation copies from 1963-64 to 1974-75; of the cash books Ex. P-6/1, Ex. P-6/2; and Ex. P-7/1 to Ex. P-7/11; entries in ledger books are Ex. P- 8/1 to Ex. P-8/12; copies of entries in Naam bahi Ex. P-9/1 to Ex. P-9/10; entries in Jama bahi Ex. P-10/1 to Ex. P-10/7; balance sheets Ex. P-11/1 to Ex. P-11/13; list of sundry debtors Ex. P-12/1 to Ex. P-12/9 and sundry creditors Ex. P-13/1 to Ex. P-13/4 for the years 1963-64 to 1974-75. He has also deposed that Sales Tax Registers are also maintained. He had brought the original account books. PW-2 has not been cross-examined about the correctness of the purchases made or about any of the entries contained in these books of account. Normally where the transactions are numerous, pertaining to more than 10 years, it would be hardly reasonable to expect to explain and prove each and every item and in such a case the genuineness of the books of account is to be presumed to be correct

when the defendants have not cared to deny any particular entries in such account books. Learned counsel for defendant relying on Chandradhar Goswami and Others Vs. The Gauhati Bank Ltd., has contended that mere proof of entries in account books are not sufficient to charge a person with a liability when correctness thereof is not admitted. Books of accounts are relevant as corroborative evidence u/s 34 of the Indian Evidence Act. In this case, liability has not been fastened on mere entries in account books. The case is proved by the testimony of PW-2, corroborated by bills besides copies of statements of accounts proved on record. The purchases and the payments made by defendants and the balance due as stated in the plaint have thus been abundantly proved.

20. Learned counsel for the defendants has also contended that the Munims who have written these account books have not been examined and hence these are not proved. Entries need not be proved by persons who made them. Where a witness is speaking from personal knowledge that accounts relating to suit transactions have been written by his clerk under his supervision as is in this case, the accounts must be taken as duly proved. Moreover, no objection was taken at the time these were given exhibit numbers. As already observed objections regarding mode of their proof cannot be taken at this stage.

21. Shri Shiv Charan, DW-2 deposed that on behalf of defendant No.1, the sale and purchases used to be looked-after by him; that defendant No. 1 used to maintain regular books of account, defendant No. 1 was having dealings with the plaintiff and the plaintiff used to supply goods to them on credit basis and the bills thereof used to be issued to them. These have not been produced. It is well established principle that a party should produce the best evidence available with him and withholding of evidence in their possession will give rise to an adverse inference being raised against him. In Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, , it was held as under :-

"Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof."

22. DW-2 in his cross-examination has admitted that the defendants used to maintain account books; a Local Commissioner appointed by this Court had prepared an inventory of the account books which were found in the premises and had also signed on those account books in his presence. He had brought a ledger book of the year 1974-75 which contains account of plaintiff at page 65 and in that account a sum of Rs.5,05,684.42 is shown due to the plaintiff. He has also admitted that in the balance sheet for the year ending 31.3.1975 filed by them, this account is shown due to the plaintiff and copy of it is Ex. DW-2/2. Defendant should have produced all the relevant material/documents how this

figure has been arrived at and explained the discrepancy appearing in their account from those of the plaintiff.

23. In any view of the case, i.e., pleadings, evidence led by the plaintiff and the circumstances noticed about it has been proved that the defendants had been making purchases from the plaintiff, payments on account were being made and the plaintiff has given credit of these payments, a balance of Rs.5,53,835.22 was due on 1.4.1974; further purchases of the value of Rs.3,12,442.03 were made during 1.4.1974 to 4.7.1974; during the year 1974-75, in all Rs.2,81,000/- was paid against these outstanding. Thus leaving an amount of Rs.5,85,277.25 due from them to the plaintiff. Further credit of Rs.30,000/- as principal and Rs.2,140/- as interest up to 31.3.1975 thereon which were lying to the credit of each defendants No.2 and 3 (i.e., in all Rs.64,280/-) were adjusted towards this liability under their instructions/advice which is also not disputed/disproved. Thus a balance of Rs. 5,20,997.25 is due from the defendants to the plaintiff.

24. Issue No.5 is accordingly decided in the affirmative in favor of the plaintiff and against the defendants.

25. plaintiff in para No. 22 of the plaint has pleaded that they are registered for local Sales Tax, that the defendant did not furnish Sales Tax declaration and as such is liable to pay Sales Tax @ 5% on the purchases made during 1.4.74 to 4.7.74 on the total purchases of Rs. 3,12,422.05P. made during this period and Sales Tax amounting to Rs. 15,622.09 P. is payable. Details of the bills and value of such goods have been given in this paragraph.

26. Para 22 has been replied in the written statement as under:

"That para No. 22 of the plaint is wrong hence denied. The account is fabricated and false. The defendants are not liable to pay the amounts."

This, again is vague, ambiguous and evasive denial. It is not specifically denied that these goods as mentioned were not purchased or their value is not correctly shown. It is not the case that the Sales Tax declaration had been supplied by the defendants against these bills. It is also not disputed that in lieu of such declaration Sales Tax is payable @ 5% on the value of the goods.

27. PW-2 has deposed about the liability and the relevant records including Sales Tax register maintained by the plaintiff and the procedure followed about obtaining such declarations in the past. As already held in Issue No. 5, goods were sold to the defendants on credit and goods sold during 1.4.74 to 4.7.74 as mentioned in para 22 amounting to Rs. 3,12,442.50 are also proved which are included in the balance of Rs. 5,20,970.25P. due from them. It is not necessary to repeat this evidence again. Against these value of the goods worth Rs. 3,12,442.50 neither Sales Tax declaration nor Sales Tax amount has been paid. It is thus also proved that Sales Tax amounting to Rs. 15,622.10 is also payable by the defendants to the plaintiff. Issue No. 7 is decided in the affirmative and against the defendants.

28. plaintiff in para 24 of the plaint has claimed interest @ 12% per annum "under the law and as per agreement and custom in the trade". The amount claimed is Rs. 96,591.60.

29. In reply to this claim agreement and custom, is denied. The market rate of interest of 12% p.a. is not specifically denied. PW-2 has deposed that rate of interest is chargeable @ 12% per annum which is so mentioned in the bill and also according to the practice and custom prevailing in this market. In cross-examination though he has admitted that no interest was charged earlier from the defendant and also from two other family concerns. But he has stated that the payments must be made within a reasonable time and not after years. Liability to pay interest as written on the bills is payable if bill is not paid on presentation of the same. No further cross-examination is carried on this aspect. DW-2 has admitted that condition to pay interest @ 12% p.a. is mentioned in the bills supplied to them. This condition in the bill was never disputed by the defendants. Thus, in the absence of agreement to the contrary this clause amounts to an agreement between the parties to pay interest @ 12% per annum if payment is not made when the bill was given or within a reasonable time. The fact that the plaintiff did not charge interest earlier does not disentitle them to claim interest. The defendants have been making regular payments earlier and that explains that interest was not charged earlier but since the balance dues have not been paid for such a long period the plaintiff is entitled to interest as agreed. It is common knowledge that there is a market custom and trade usage to charge interest on credit sales if payments are not made within reasonable time. Interest is also payable u/s 61 of the Sale of Goods Act. Rate of interest is neither excessive nor unreasonable nor is so alleged. The plaintiff has proved rate of interest as well as entitlement for it and is thus entitled to interest @ 12% per annum on the balance amount due as found in Issue NO. 5. It is thus proved that interest amounting to Rs. 96,591.60 is payable by the defendant to the plaintiff. Issue No. 8 is decided accordingly in the affirmative and against the defendants.

30. The defendant in the written statement has pleaded that the partnership firm M/s. Allora Electric and Cable Company was constituted under partnership deed dated 20.4.74 and its partners are S/Shri Prem Chand, Devi Charan, Shiv Charan, Yogendra Nath, Virendar Nath and Vijesh Kumar; and the old partnership is not in existence and it is denied that the business presently run is of the partnership dated 10.5.1973 and this new partnership had supplied goods for two months and then disputes arose and supplies were stopped and suits for injunction and rendition of account has been filed by defendant No. 2. It is not pleaded that partnership constituted under the partnership deed dated 10.5.73 was dissolved. The plaintiff in the replication has pleaded that the alleged partnership deed dated 20th April, 1974 is a sham document and was never acted upon or intended to be acted upon and the partnership constituted on 10.5.73 between Mohinder Nath, Yoginder Nath, Narinder Nath, Vijendar Nath and Vijesh Kumar which is registered with the Registrar of Firms is doing

business in the name of plaintiff.

31. There is no averment in the written statement as to what happened to the former partnership constituted on 10.5.1973, whether it was dissolved and its accounts were gone into and settled. Two of the partners of the former firm, namely, Mohinder Nath and Narinder Nath are not alleged to be partners in the alleged new firm.

32. DW-2 has deposed that the firm, Allora Electric and Cable Company was constituted on 20th April, 1974 by Prem Chand, Devi Charan, Yoginder Nath, nijendar Nath, Vijesh Kumar and Shiv Charan (DW-2). He has also deposed that the previous partnership comprised of S/Sh. Mohinder Nath, Yoginder Nath, Narinder Nath, Vijendar Nath and Vijesh Kumar and out of them Mohinder Nath and Narinder Nath had retired and a retirement deed was executed. This is a new plea. That dissolution deed has not been proved or produced. Even the original partnership deed dated 20.4.1974 has not been produced. The original partnership and dissolution deed according to him were with Prem Chand. But Prem Chand was not summoned and examined. During his state- ment a copy of the partnership deed dated 20.4.74 mark "X" produced by DW-1 from bank was sought to be exhibited but that was not allowed and an objection against its exhibition was upheld as under :

"In view of Section 60 of the Indian Evidence Act only direct oral evidence is admissible and hence it could be the statement of Shri Prem Chand alone which could prove that loss. In these circumstances this secondary evidence is not admissible u/s 65 of the Evidence Act hence at this stage the said document is not exhibited."

33. Still no evidence was led that the original was in the possession and custody of Prem Chand or was lost. In view of this order the copy placed on record cannot be looked into to prove the factum of the partnership deed dated 20.4.74. Also as noticed earlier, no plea was taken in the written statement that the earlier partnership carrying on business under the partnership deed dated 10.5.73 was dissolved and its accounts were gone into and if any dissolution deed was duly executed by these partners. No such dissolution deed has also been proved. In the written statement the defendant has not pleaded that new partnership that is alleged to have been constituted on 20.4.74 had taken over the assets, debts and liabilities of the former partnership firm or had succeeded to its assets. As such the statement of DW-2 that the earlier partnership was dissolved is obviously not reliable and is an after-thought. A suggestion has been specifically put to him that the partnership constituted under partnership deed dated 10.5.73 was never dissolved and that firm has been carrying on the business. This witness has also not stated anything if the partnership constituted on 20.4.74 had maintained any account books and if so those account books have not been produced. He had no knowledge as to how many transactions were entered into by the partnership of 1974 or how much amount was invested in it and what is the contribution of the partners. Though DW-2 has led evidence

that after this partnership was constituted on 20.4.74 an account was opened with Oriental Bank of Commerce, Chawri Bazar, Delhi, but he has not proved that that account was operated for the business of this new firm. In that account one deposit of Rs. 75,000/- was made out of which a sum of Rs. 66,584/- was paid to M/s. Sri Ram Vinyl & Chemical Industry as liability of the former firm. He denied knowledge if that account has since been closed and when his attention was drawn to statement of account Ex. DW-2/5, he admitted that the account may have been closed on the instructions of one of the partners, but he was not aware. He denied the knowledge if the partnership constituted on 10.5.73 was registered with Registrar of Firms or that was still having account with Allahabad Bank, Hauz Qazi, Delhi. First he stated that intimation regarding the former dissolution of firm was sent by his father to Income Tax department, banks and Registrar of Firms, but again when specifically confronted that such intimation was not given, he gave evasive reply that he could not say. In any case, he has not proved that the intimation of the dissolution was given either to the Registrar of Firms, Income Tax authorities, Sales Tax authorities etc.

34. On the other hand on behalf of the plaintiff PW-2 has deposed that they have been carrying on business under partnership deed dated 10.5.73 comprising of five partners, namely, Shri Mohinder Nath, Yoginder Nath, Narinder Nath, Varinder Nath and Vijesh Kumar, they maintained account books of this firm had brought those books and proved the copies of the account books right up to the year 1974-75, as noticed earlier. In cross examination, he admitted that the partnership deed dated 20.4.1974 was entered into but he stated that that partnership deed was never acted upon and was a sham one. He has further deposed that a bank account was opened and a sum of Rs. 75,000/- was deposited out of the partnership of 10th May, 1973 and out of that account only one withdrawal was made on account of payments to M/s. Shriram Vinyl and Chemicals Industries by means of a cheque for goods received by the partnership of May 10, 1973 and that account is no longer operative and stands closed as per Ex. DW-2/5.

35. Chapter VI of the Partnership Act (for short the Act) prescribes the modes and procedure for dissolution of a firm. It was neither pleaded in the written statement nor proved on the record that the partnership working under the partnership deed dated 10.5.73 had been dissolved, when and what happened to its assets and liabilities. No documentary evidence has been produced. u/s 40 dissolution requires consent of all the partners which has not been proved. u/s 31 a new partner can be introduced only with the consent of the existing partners and u/s 32 a partner similarly can be retired with the consent of all the partners. u/s 33 of the Act, a partner cannot be expelled from the firm. Mohinder Nath and Yoginder Nath were two of the five partners of the partnership constituted on 10.5.73. They are not alleged to be partners in the new partnership. Any dissolution is not binding on them. They could not be expelled or removed from the partnership firm nor new partners admitted to the firm without their consent. Chapter-VII provides for registration of firms. Earlier,

partnership was duly registered as proved by PW-2 and Ex. P-1 Form "A" according to which the partnership comprised of five partners. u/s 63 of the Act intimation of any change occurring in the constitution of the registered partnership firm either on account of ingoing or out-going partners or dissolution of a registered partnership, has to be sent to the Registrar of Firms. Such intimation is also not proved to have been given by the alleged new partnership constituted on 20.4.74. Public notice of retirement, expulsion or dissolution of a registered partnership in the prescribed manner required u/s 72 of the Act has also not been given. It is thus not proved that the partnership which was constituted and registered and which carried on business under partnership deed dated 10.5.73 was dissolved or alleged new partnership constituted on 20.4.74 had taken over its assets and liabilities. As held in Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Satteyya and Others, mere marking of partnership deed dated 20.4.1974, as mark "X", which is also otherwise not proved, does not dispense with its proof and does not prove its contents.

36. Ex. DW-2/3 and Ex. DW-2/4 are the certified copies of the judgment and decree passed by the Civil Court in Suit No. 272/78 filed by Mohinder Nath and Yoginder Nath, two partners of partnership deed dated 10.5.73 against six persons who are alleged to have constituted the partnership deed dated 20.4.74 disputing and denying the legality and validity of any such partnership and seeking permanent injunction against the defendants. Issue Nos. 2 and 3 were as under :-

2. Whether there was any dissolution of partnership firm M/s. Allora Electric & Cable Company? If so, to what effect?

3. Whether defendant Nos. 1, 2 and 6 are partners of M/s. Allora Electric & Cable Company. If so, to what effect?

Defendants 1, 2 and 6 are Devi Charan, Shiv Charan and Prem Chand and whereas defendants 3, 4 and 5 are Yoginder Nath, Vijendar Nath and Vijesh Kumar. On contest and after trial both these issues were decided in favor of the two plaintiffs and holding that the firm M/s. Allora Electric & Cable Company was never dissolved. It was further held that defendants No. 1, 2 and 6 are not the partners of M/s. Allora Electric & Cable Company. It was admitted at the bar that an appeal filed against that judgment and decree has also since been dismissed by the appellate court. However, it was stated during arguments that second appeal has been filed in this Court, but that appeal has not been admitted so far. This decree will operate as res-judicata against defendants. In any case, apart from this verdict by the civil court even otherwise it is not proved that the partnership formerly constituted under partnership deed dated 10.5.73 was dissolved or new partnership had taken over its assets and liabilities and had carried on any business. This issue is thus decided against the defendants.

37. This issue has lost its significance as the trial of the suit had continued and both the parties have led evidence. The other suit and appeal have also been

since decided. This issue has become infructuous. This issue was also not pressed during arguments and is thus decided against the defendants.

38. The burden of this issue was on the defendants and the defendants have failed to prove this issue. In view of findings on Issue Nos. 1, 2 and 5, this issue is decided against the defendants.

39. The burden of this issue was on the defendants who have not produced any reliable evidence. In any case, this issue is not necessary for deciding the suit claim of the plaintiff. This issue is also decided against the defendants.

40. In view of my above findings, the plaintiff has been found entitled to the following amounts :-

(1) Balance price of the goods Rs.5,20,997.25 (2) Amount of Sales Tax in lieu of Sales Tax declaration Rs. 15,622.10 (3) Interest up to the date of institution of the suit Rs. 96,591.60 ----- Total Rs.6,33,210.95 I accordingly, pass a decree for recovery of Rs. 6,33,210.95 with costs of the suit in favor of the plaintiff and against the defendants. The plaintiff is also awarded interest @ 12% per annum on the amounts of Rs. 5,20,997.25 + Rs. 15,622.10 = Rs. 5,36,619.35 from the date of institution of the suit till the decree and further interest @ 12% per annum from the date of decree till realisation.