(2010) 03 DEL CK 0123

In the Delhi High Court

Case No : CS (OS) No. 986 of 1995

Shri Dharampal Arora APPELLANT

Vs

Share Tips, Shri Ashok Mehta and Shrimati Ashok Mehta RESPONDENT

Date of Decision : 22-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10
Evidence Act, 1872 — Section 101, 114
General Clauses Act, 1897 — Section 27
Securities Contracts (Regulation) Act, 1956 — Regulation 15, 17, 18, 9(3)

Citation : (2010) 03 DEL CK 0123

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Amarjit Singh, for the Appellant; Sangram Patnaik, Shanta Pandey and Ashwini Kumar, for the Respondent

Judgement

Indermeet Kaur, J.—plaintiff Dharampal Arora has filed the present suit for recovery of Rs. 50,00,000/. Defendant No. 2 Ashok Mehta and defendant No. 3 wife of Ashok Mehta are both partners of defendant No. 1 M/s Share Tips, a partnership firm comprising of defendants No. 2 and 3.

2. Defendants were dealing in sale purchase of shares from 1989 till 1992. Deliveries were being made through the plaintiff after settling the money transactions with him. Defendants were also dealing in forward trading. Business with the plaintiff was either through oral communication on telephone and sometimes by meetings in the office of the plaintiff.

3. plaintiff is a member of the Delhi Stock Exchange since 1964. He was helping the defendants in their share business. Parties had opened mutual current account in view of the reciprocal dealings and transactions between them. They had good business relations. On 23.8.1991 accounts between the parties finally stood settled and a cheque for Rs. 1,03,188/- was given by the plaintiff to the defendant which was duly encashed by the defendant.

4. As per the accounts of the plaintiff, in the course of their business a sum of Rs. 33,59,809.70 is still due and payable from the defendant i.e. from the period commencing 23.8.1991 to 27.11.1991. In spite of demand the said amount has not been paid to the plaintiff. Defendants are also liable to pay interest @ 18% per annum on this outstanding as per the custom in the market. Interest amount is calculated to Rs. 16,40,190.30; total amount outstanding against defendant is Rs. 50,00,000/-. Pendentelite and future interest has also been claimed.

5. Common written statement has been filed by the defendants. A preliminary objection has been taken that the suit has not been properly valued for the purpose of court fee and jurisdiction; it has not been filed by an authorized person; it is barred by time.

6. On merits, it is reiterated that no amount is due from the defendants. plaintiff was acting as an agent/broker of the defendants for the sale and purchase of shares. It is denied that the plaintiff was ''helping'' the defendants in any way; the ''huge amount'' claimed by the plaintiff has not been specified. It is not in dispute that the cheque dated 23.8.1991 was paid by the plaintiff to the defendant. Thereafter six other cheques were transacted between the parties, details of which have been mentioned in para No. 5 of the written statement. They are transactions dated 16.1.1992 for Rs. 45,739/-, dated 3.2.1992 for Rs. 1,50,724/-, dated 4.2.1992 for Rs. 37,282.50, dated 12.2.1992 for Rs. 3,00,375/-, dated 13.2.1992 for Rs. 1,03,666/- and lastly transaction was dated 31.3.1992 for Rs. 2,00,000/-. It is stated that 13 contract notes relied upon by the plaintiff to substantiate his claim show that it is in fact the plaintiff who owes a sum of Rs. 25,320/- to the defendants ; no bills, credit memos of the alleged transaction has been proved by the plaintiff. No amount is due from the defendants either in the principal account or by way of interest.

7. Replication has been filed reiterating the averments contained in the plaint while denying the defence as set up by the defendants.

8. On 11.5.2001, on the pleadings of the parties, the following issues were framed:

1. Whether the suit is properly valued for the purposes of Court fees and jurisdiction?

2. Whether the suit is liable to be rejected for want of material particulars?

3. Whether the suit is barred by limitation.

4. Whether the plaintiff is entitled to recover from the defendant a sum of Rs. 33,59,809.70 for the transactions effected from 23rd August 1991 to 27th November?

5. Whether the plaintiff is entitled to interest @ 18% on the above amount?

6. Relief.

9. plaintiff in support of his case has examined one witness i.e. Manish Arora. The defendant in support of his case has also examined one witness i.e. defendant No. 2, Ashok Mehta.

10. Arguments have been heard. Record has been perused. Issue wise findings are as follows:

11. Issue No. 1

On 24.4.1995 plaintiff had been permitted to file requisite court fee. On the deposit of the same plaint had been registered as a suit. There is no dispute on this fact.

12. Issue No. 1 no longer survives as the proper court fee has admittedly since been paid.

13. Issue No. 2

Defendant has asserted that the plaint is liable to be dismissed as no details or material particulars about the transactions or the basis on which the amount are claimed by the plaintiff have been given in his plaint. Averments made in the plaint have been perused. plaintiff has drawn attention of this Court to para No. 5 to 8 of the plaint wherein the details of the amounts claimed and the basis of the same have been averred. The supporting documents have to be read along with the plaint. There is no force in this objection of the learned Counsel for the defendant.

14. Issue No. 2 is decided in favour of the plaintiff and against the defendant.

15. Issue No. 4:

plaintiff in support of his claim has filed his statement of account Ex.PW-1/2; this document is running into six pages commencing from period 19.8.1991 to 27.11.1992. As per Ex.PW-1/2 a sum of Rs. 33, 59,809/- is the balance outstanding against the defendant. The defendant has produced his statement of account Ex.DW-1/P-1 which is for the period 19.8.1991 to 16.4.1992.

16. Case of the plaintiff is that the plaintiff was in the sale and purchase of shares on behalf of the defendants. He was also doing forward contracts/badla on their behalf. plaintiff was a member of the stock exchange. Defendant was not member. In his cross-examination PW-1 had admitted that a contract note has to be executed within 24 hours of every transaction which is made on the floor house i.e. on the floor of the stock exchange. PW-1 has filed seven contract notes in this case which are Ex. PW-1/59 to Ex. PW-1/66 for transactions dating 5.3.92 to 30.3.1992. A perusal of one such document shows that it is a confirmation slip on the letterhead of the plaintiff addressed to the defendant firm i.e. M/s Share Tips. The left hand column makes a reference to the securities bought from the defendant and the right hand column makes a reference to the securities sold to the defendant. Counsel for the defendant has pointed out that even assuming these documents to be correct if these credit and

debit entries are calculated a sum of Rs. 25,320/- is in fact due from the plaintiff. No amount is outstanding against the defendant.

17. Admittedly these contract notes are only up to 30.3.1992. PW-1 in his cross-examination has admitted that he has no other contract note after the period 30.3.1992. No such document has also been placed on record.

18. Defendant has admitted the receipt of a payment of Rs. 1,03,188/- on 23.8.1991 vide cheque by the plaintiff. His case is that all accounts between the parties stood settled on 31.3.1992 when the entire margin money which was in the nature of a security amount retained by the plaintiff from the defendant in lieu of transactions which the plaintiff was conducting on behalf of the defendant had also been returned back to the defendant. This is reflected in Ex.PW-1/2. Entry dated 31.3.1992 states that a sum of Rs. 2,00,000/- i.e. the margin money has been credited to the account of the defendants. PW-1 has also admitted in his cross-examination that the entire margin money of the defendant stood paid to him on 31.3.1992. It has also come on record that after 31.3.1992 there are no contract notes in favour of the plaintiff evidencing any further transactions made between the parties except the statement of account Ex.PW-1/2 as also certain bills raised by the plaintiff upon the defendant.

19. Defence of the defendant is that after 31.3.1992 there were no transactions between the parties. This defence of the defendant is negatived by his own admission. In his cross- examination DW-1 has admitted that on 16.4.1992 he had made two cheque payments of Rs. 6,00,000/- and Rs. 5,90,000/- i.e. totaling Rs. 11,90,000/- to the plaintiff. His argument that these payments were in lieu of transactions transacted prior to 31.3.1992 is neither borne out from his pleadings nor from any document or from his testimony. In fact, in his cross-examination, he has categorically admitted that these two payments of Rs. 6,00,000/- and Rs. 5,90,000/- had been made to the plaintiff and are reflected in Ex.PW-1/2. This version is not qualified by any further explanation. This is in contradiction to the earlier stand taken by the defendant that he had no dealing with the plaintiff after 31.3.1992. Clearly the defendant is taking shifting stands and is not coming out with the true picture.

20. Further case of the defendant as set up in his arguments is that on 31.3.1992 there was a credit of Rs. 16,71,518.30 in his account as is reflected in Ex.PW-1/2. This entry of Rs. 16,71,518.30 is admitted by him. In addition he had made the aforenoted payments i.e. Rs. 11,70,000/-. Thus a total sum of Rs. 27,61,518,/- was outstanding in favour of the defendant. DW-1 in his cross-examination has further admitted that whatever shares the plaintiff had delivered to the defendant after 16.4.1992 they were entered in the document Ex.PW-1/2.

21. These admissions of the defendant clearly establish that there were business transactions and dealing between the parties after 31.3.1992. Defendant has also nowhere disputed any specific entry in Ex.PW-1/2. PW-1 has proved this document. No suggestion has been given to PW-1 by the learned defence counsel

that this document is false, fabricated, manipulated or not a true statement of account. This document, in fact, stood admitted by the defendant and he has relied upon the aforenoted entries himself.

22. The statement of account filed by the defendant Ex.DW-1/P-1 is only for the period 19.8.1991 to 16.4.1992. There is no explanation as to why after 16.4.1992 the statement of account maintained (if any) by the defendant was not placed on record. The plaintiff has filed his statement of account which is up to 27.11.1992 and in these circumstances if the defendant wanted to counter the statement of account of the plaintiff it was incumbent upon him to place his own statement of account for the corresponding period. He has deliberately withheld his statement of account for this seven month intervening period i.e. from 17.4.1992 to 27.11.1992 for which an adverse inference against him has to be drawn u/s 114(g) of the Indian Evidence Act for withholding the best evidence. The corollary presumption which arises is that if this evidence would have been produced it would have gone against the interest of the defendant.

23. DW-1 in his cross-examination has admitted that on 23.8.1991 the plaintiff had given him a cheque of Rs. 1,03,188/-and this cheque was honoured; he has further admitted that he does not have the account of transactions which took place between 23.8.1991 up to 31.3.1992; he used to enter the transactions with the plaintiff in Ex.DW-1/P-1; in Ex.DW-1/P-1 the entry of the cheque of Rs. 1,03,188/- is not reflected. This is otherwise an admitted payment but is not mentioned in his statement of account. These admissions of DW-1 falsify his own document i.e. Ex.DW-1/P-1; Ex.DW-1/P-1 is not a true reflection of the accounts maintained between the parties; it is false and fabricated.

24. Per contra the statement of account Ex.PW-1/2 produced by the plaintiff has been proved. DW-1 in his cross-examination has admitted that the delivery of shares of different companies from 10.4.1992 to 23.4.1992 are reflected in Ex.PW-1/2 though not shown in his own statement of account Ex.DW-1/P-1.

25. From this evidence gathered it is clear that the parties were transacting with each other after 31.3.1992. On page 31 of Ex.PW-1/2 the entries from 10.4.1992 to 23.4.1992 stand admitted by the defendant. DW-1 in his cross-examination has also admitted the delivery of 1000 TISCO shares on 24.4.1992 in the sum of Rs. 6,81,750/-. The 200 shares of Shipping Credit Corporation on 3.9.1992 reflects a credit entry of the 30,000 and correspondingly shown as debited in the entry dated 7.4.1992 in the sum of Rs. 12,280/-. DW-1 had denied that these shares were received by him on 7.4.1992 at a value of Rs. 12,280/- and then sold by him to the plaintiff on 3.9.1992 for a value of Rs. 30,000/-. In view of this denial, it was all the more incumbent upon the defendant to have filed his statement of account for 3.9.1992 to give the true picture but he has deliberately chosen not to do so for reasons best known to him.

26. DW-1 in his further cross-examination has given evasive reply to the specific queries on the entry dated 18.9.1992. This was a bad delivery of 25 shares

which had been debited in his account for Rs. 3072.50/-. He has qualified this statement by stating that he has not been maintaining any account regarding these transactions. This is in contradiction to his earlier version wherein he has stated that he has been maintaining a statement of account of all transactions between himself and the defendant and which were reflected in Ex.DW-1/P-1.

27. In the course of the arguments defendant has again taken shifting stands. He has admitted that on 1.4.1992 he had a credit of Rs. 16,71,518.30 as also another sum of Rs. 11,90,000/-i.e. a total amount of Rs. 28,61,518/- was lying in favour of the defendant up to 16.4.1992. He has also submitted that the transactions from 10.4.1992 up to 24.4.1992 are correct. Perusal of Ex.PW-1/2 shows that these are debit entries of Rs. 3,06,500/- for purchase of 2000 Essar Shipping shares, Rs. 58,900/- for 1000 Khaitan Hosiery shares, Rs. 14,05,450/- for 500 Hero Honda shares, Rs. 90,900/- for 500 GNFC shares, Rs. 4,14,000/- for 1000 Reliance shares, Rs. 53,000/- for Indo Gulf shares, Rs. 89,55,000/- for 45000 JCT shares and Rs. 5,81,750/-for 1000 TISCI shares. If a total figure of these amounts is calculated it works out to Rs. 26,46,000/- A hand written chart has been placed on record. It is submitted that even assuming that the statement of account filed by the plaintiff Ex.PW-1/2 is correct; if this debit amount of Rs. 26,46,000/- is deducted from his credit of Rs. 28,61,518/-; a balance of Rs. 2,15,518/- is still due and payable to the defendant.

28. These submissions of the defendant again reflect his shifting and contrary stands. Whereas in the first instance i.e. in his written statement he has submitted that a sum of Rs. 25,320/- is due from the plaintiff; in the course of the arguments, this figure has been enhanced to Rs. 2,15,518/-. Whereas the initial stand of the defendant was that there was no transaction between the parties after 1.4.1992; he has controverted it and has made various admissions as aforenoted and admitted all transactions as reflected in Ex.PW-1/2 up to 24.4.1992. His case being that these transactions were delivery of the shares by the plaintiff to the defendant and adjusted against the amount of Rs. 28,61,518/- which the plaintiff owed to the defendant. This is a piecemeal admission of a document. Part of Ex. PW-1/2 is admitted; rest of it i.e. the entries after 24.4.1992 have been denied by the defendant. Submission of defendant is that all these subsequent transactions relate to forward trading and forward trading was not permissible under the bye-laws of Delhi Stock Exchange after 1.4.1992; further that the plaintiff has not given any particulars or details of these transactions.

29. Attention has been drawn to the order dated 21.4.1998 passed in I.A. No. 135/95 in the present suit. Vide this order the Court had directed the plaintiff to place on record certain documents which inter alia include (i) Trading Hall Diary also known as ''chopri'' (ii) Register of Transaction, (iii) Contract Notes in respect of transactions with the defendants, (iv) Details of ''Badla'' transactions and Margin deposits and (v) Bills other than those already filed by the plaintiff along with his plaint.

30. Affidavit of compliance had been filed by the plaintiff. Defendant has, however, pointed out that in his cross-examination PW-1 has admitted that this was not a compliance in true letter and spirit. Attention has been drawn to his cross-examination, wherein PW-1 had admitted that two accounts were maintained by the plaintiff of the defendant i.e. his client account and his margin account. The original margin account has been misplaced. PW-1 has further admitted that he has not placed on record the entire contract notes/transaction slips except Ex.PW-1/59 to Ex.PW-1/66; he had not filed any other contract notes. PW-1 has further admitted that the chopri which has been filed by him is not in conformity with the prescribed rules of the Delhi Stock Exchange.

31. Counsel for the defendant has contended that these are serious lacunae which the plaintiff had himself admitted and he not having followed the mandate of Section 9(3)(b) of the Securities Contracts (Regulation) Act 1956 (hereinafter referred to as the Act of 1956) and the subsequent rules and regulation notified thereunder as also the bye-laws which have a statutory character, it has been established that the accounts which were maintained by the plaintiff are bogus and manipulated upon which no reliance can be placed. Learned Counsel for the defendant has placed reliance upon Bombay Stock Exchange Vs. Jaya I. Shah and Another, Bombay Stock Exchange v. Jaya I. Shah to substantiate his submission that the bye-laws and the regulations of the Stock Exchange have a statutory and binding force. Attention has been drawn to bye-laws No. 62, 69, 219, 221 and 228. Attention has also been drawn to Regulation No. 15, 17 and 18 of the said Act of 1956. It is submitted that in terms of the circular No. 11/92 dated 10.3.1992 and circular No. 1/92 dated 18.9.1992 forward trading has been banned by the Delhi Stock Exchange and all entries after of 1.4.1992 as recorded in Ex.PW-1/2 are illegal and void transactions.

32. Counsel for the defendant has also placed reliance upon a host of judgments to substantiate his submission that u/s 101 of the Indian Evidence Act the burden of proof is always on the plaintiff; it is for him to establish his case; this burden cannot shift; defendant is under no obligation to produce any document to substantiate the case set up by the plaintiff who has to stand on his own legs. Reliance has been placed upon:

1. Narcinva V. Kamat and Another Vs. Alfredo Antonio Doe Martins and Others,

2. R.K. Madhuryyajit and Another Vs. Takhellambam Abung Singh and Another,

3. Usha Beltron Ltd. v. Nand Kishore Parashamka and Anr. AIR 2001 Cal 137,

4. Bilcare Limited v. The Supreme Industries Ltd. 2007 IV AD (Delhi) 105,

5. Indian Performing Right Society Ltd. v. Debashis Patnaik and Ors. 2007 (2) R.A.J. 293 (Delhi),

6. Anil Rishi v. Gurgakshi Singh 2006(5) Scale,

7 Ramchandra Sakharam Mahajan Vs. Damodar Trimbak Tanksale (D) and Others,

8. Yamuna Nagar Improvement Trust Vs. Khariati Lal,

33. The aforestated enunciations clearly state that it is for the plaintiff to affirmatively and substantially assert and prove the case which he has set up. There is no dispute to this proposition. That the plaintiff must prove his own case and merely because the defendant is not able to prove his defence does not make out a case where the suit of the plaintiff must automatically be decreed.

34. In the instant case, Ex.PW-1/2 has been proved by PW-1. This is the statement of account maintained by the plaintiff of the various transactions which he had with defendant and ranging from 19.8.1991 to 27.11.1992. There is also no dispute between the parties for the transactions inter se between them up to 23.4.1992. Thereafter as per the case of the defendant all the other transactions related to a forward trading which is a banned and illegal transaction after 1.4.1992. There is no such document filed by the defendant. The circulars relied upon by him do not substantiate this. Further Ex.PW-1/2 has been admitted in piecemeal; although initially the defendant had denied it in toto. The transaction of 200 Shipping Credit Corporation shares as reflected as debited on 7.4.1992 are for Rs. 12,280/- and the corresponding credit entry of the same shares on 3.9.1992 of Rs. 30,000/- has not been specifically denied by the defendant. In his cross-examination DW-1 has stated that he is not sure as to how there has been such a variance and how the same shares have been reflected at two points in Ex.PW-1/2. DW-1 has also not denied the bad delivery of 25 shares debited to his account on 18.9.1992. PW-1 has not been given any suggestion by the learned defence counsel at any point of time on the various dates when his cross-examination has been effected that this document is manipulated or fabricated. In fact, more than a partial reliance of the same has been placed upon it by the defendant. The statement of account filed by the defendant Ex.DW-1/P-1 as already noted is only up to 16.4.1992; if the defendant was also maintaining his accounts there was no reason as to why he was withholding it and shying from its production after 17.4.1992 to 27.11.1992 which are the corresponding entries in Ex.PW-1/2. Ex.DW-1/P-1 is even otherwise suspect. DW-1 has admitted in his cross-examination that the transaction on 23.8.1991 of Rs. 1,03,188/- (which was an admitted payment) has not been reflected in his statement of account. This admission completely throws out the veracity of Ex.DW-1/P-1.

35. The bills in this transaction had been proved by PW-1 as Ex.PW-1/114 to Ex.PW-1/147. No suggestion has been given to PW-1 on any occasion that these bills are not a true reflection of the transactions between the parties or that they are forged documents. On oath PW-1 has categorically deposed that these bills/ credit memos were usually signed by defendant No. 2, by his son or sometime by his employees. Perusal of these document show that most of them are counter signed on the date on which they had been issued. There is no cross-examination of PW-1 to the effect that that these bills were not countersigned in the manner in which PW-1 had deposed about them.

36. Further contention of the learned defence counsel is that admittedly a contract note had to be executed for every transaction between the parties within 24 hours. After 23.4.1992 there is no written document with the plaintiff whereby the defendant had authorized the plaintiff to transact on his behalf; in the absence of which it is clear that all the transactions after 23.4.1992 as reflected in Ex.PW-1/2 are sham. On this count also this argument of the defendant must fail. Admittedly, defendant was not a member of the Stock Exchange; he could trade in the stock exchange only through PW-1. PW-1 in his cross-examination stated that the defendant being not member of the Stock Exchange and not competent to enter the trading hall, he used to place orders upon him by personal visits or by phone and that is how a transaction used to take place. s DW-1 has also admitted that the transactions used to take place between the parties on such matters on telephone. This argument of the defendant is negatived by his own witness.

37. Statement of account Ex.PW-1/2 stand proved. Defendant has not come to the court with clean hands. He is taking contrary and shifting stands since inception. Till the filing of the written statement his defence was that the parties had settled all accounts and a sum of Rs. 25,530/- was in fact due from the plaintiff. In his evidence he has asserted that all accounts between the parties stood settled on 31.3.1992 and there were no transactions thereafter. In the course of the arguments, the defendant has changed his stand; he has admitted all transactions in Ex. PW-1/2 up to 23.4.1992 and has given a written chart whereby according to him an amount of Rs. 2,15,518/- became due and payable to him. Initially the defendant had completely denied Ex.PW-1/2; gradually he agreed to accept it in bits and pieces. Upto 23.4.1992 he admitted all the entries. These oral submissions are again contrary to the evidence which had been adduced. DW-1 in cross-examination has not made any specific denial of the 200 shares of Shipping Credit Corporation which has two entries i.e. a debit entry recorded on 7.4.1992 and debit entry of 3.9.1992 similarly. He has also not denied the bad delivery effected on him on 18.9.1992. The said transactions thus stand admitted. It has not been suggested that Ex.PW-1/2 is forged or fabricated. Bills Ex.PW-1/114 to Ex.PW-1/147 duly countersigned by the defendant and his son have been proved in the testimony of PW-1 for which again there is no cross-examination that the said bills are forged or false. The statement of account filed by the defendant is falsified by his own admission; the admitted payment of Rs. 1,03,188/- on 23.8.1991 has not been reflected in this statement of account Ex.DW-1/P-1. Non compliance with the regulations or bye-laws of the Stock Exchange even assuming to be correct would not oust the claim of the plaintiff for the recovery of his amount as claimed by him.

38. Legal notice dated 2.2.1995 Ex. PW-1/148 was served upon the defendants at two addresses i.e. at Nehru place as also the address of the defendant at the World Trade Centre. The UPC receipts are Ex. PW-1/149 to Ex. PW-1/150, postal receipts are Ex.PW-1/151 and Ex.PW-1/152. Undelivered envelops with the AD Cards are Ex.PW-1/153 and Ex.PW-1/154. Presumption u/s 27 of the General

Clauses Act 1897 read with Section 114(e) of the Evidence Act is drawn in favour of the plaintiff; that the said notices having been properly addressed on a pre-paid envelope and sent by a registered post had been served upon the opposite party.

39. In Kalu Ram v. Sita Ram 1980 RLR (Note) 44, it has been held that where the plaintiff before filing a suit makes serious assertions in a notice to the defendant, the defendant must not remain silent by ignoring reply; if he does so an adverse inference for the same may be drawn against him. plaintiff is entitled to recover the aforenoted amount as claimed by him in Ex.PW-1/2.

40. Further case of the defendant is that the claim of the plaintiff is at best only against defendant No. 1 and 2 as the plaintiff even at the time of filing of the suit was not sure if the defendant was a partnership or a proprietorship firm. Defendant No. 3 has to be excluded from all liability.

41. In his cross-examination PW-1 has admitted that DW-1 is a proprietorship concern of defendant No. 2. It is thus clear that no liability can be fastened upon defendant No. 3. No specific issue has been framed in this connection. Learned Counsel for the plaintiff has however pointed out that on 22.2.2005 on a application filed by defendant No. 3 under Order 1 Rule 10 CPC seeking deletion of her name, although her application has been dismissed, this question has been left open and it has specifically been reflected in the order that in case it if is found that defendant No. 3 has no connection with defendant No. 1 no decree will be passed against her. On 3.4.2007 the Division Bench had dismissed the appeal preferred by defendant No. 3 but this question nevertheless remained open. This submission of learned defence counsel is borne out from the record. In view of the categorical admission of PW-1 that defendant No. 1 was the sole proprietorship firm of defendant No. 2, it is clear that defendant No. 3 cannot be fastened with any liability as these transactions were between the plaintiff and the proprietorship firm of defendant No. 2 alone. Defendants No. 1 and 2 are liable to the plaintiff.

42. Issue No. 4 is decided in favour of the plaintiff and against the defendant.

43. Issue No. 5

plaintiff has claimed interest @ 18% per annum. Although there is no contractual rate of interest between the parties yet DW-1 in his cross-examination has admitted that in such like commercial transactions the defaulting party is liable to pay interest. It is admittedly a commercial transaction relating to sale/ purchase of shares. Interest claimed @ 18% per annum on the principal amount up to the date of the filing of the suit is the plaintiff''s entitlement.

44. Issue No. 5 is decided in favour of the plaintiff and against the defendant.

45. Issue No. 3:

Defendant has contended that the suit is barred by limitation. Parties have settled their accounts on 23.8.1991 and this is clear from the averments made in the plaint. The margin money had been paid on 31.3.1992. The suit filed on 21.4.1995 is clearly barred by limitation. This defence of the defendant has no force. Parties were admittedly maintaining a running account of the various inter se transactions between them. Defendant in the course of his arguments has admitted the transactions of 23.4.1992; he himself stated that in Ex. PW-1/2 he had lastly transacted with the plaintiff on 24.4.1992 and he had received a delivery of 1000 TISCO shares of an amount of Rs. 6,71,750/- on the said date. Even as per his case the suit filed on 21.4.1995 is within limitation.

46. Issue No. 3 is decided in favour of the plaintiff and against the defendant.

47. Issue No. 6: Relief:

Suit of the plaintiff is decreed against defendants No. 1 and 2 in the sum of Rs. 50,00,000/- with pendentelite and future interest @ 12% per annum from the date of filing of the suit till realization. Cost also be awarded in favour of the plaintiff. Decree sheet be drawn. File be consigned to record room.