

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 28.10.2010
Judgment Pronounced on: 01.11.2010

+ CS(OS) 1833/2000

ASHOK KUMAR KHANNA Plaintiff

- versus -

JOHNSON AND JOHNSON CO. AND ANR. Defendants

Advocates who appeared in this case:

For the Plaintiff : Mr Pawan Bahl, Adv.
For the Defendants : Mr M.S. Vinayak, Mr Rajan
Narain, Ms Rajeshwari Shukla
and Mr Kishan Rawat, Adv.

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

1. Whether Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported
in Digest? Yes

V.K. JAIN, J

1. This is a suit for permanent injunction and recovery of Rs.25,30,000/-. It has been alleged in the plaint that the plaintiff, who had come to know that the defendant wanted to allot distributorship for G.B. Pant Hospital, Delhi for supply of its various products to that hospital, submitted a letter dated 29th June, 1999, seeking right of

distributorship. Defendant No.2 G.B. Pant Hospital issued a tender for supply of various surgical and other items in the month of October, 1999. The tenderer was required to deposit earnest money between Rs 5,000/- to Rs 30,000/-, in different categories. Defendant No.1, which wanted to participate in the tender to supply Group D items of Cardiology Department was required to pay earnest money of Rs 30,000/-. An official of defendant No. 1 approached the plaintiff, asking him to deposit the earnest money. Accepting the request, the plaintiff got prepared an FDR of Rs 30,000/- in favour of defendant No. 2 on 22nd October, 1999 and submitted the same to defendant No.1. The tender submitted by defendant No.1 was accepted by defendant No.2. It has been further alleged that defendant No.1 had also orally entered into an agreement with the plaintiff to supply its goods to G.B. Pant Hospital, for which the plaintiff was to be paid a margin of about 19% of the total sale. The officials of the defendant also requested the plaintiff to fulfil the basic requirement such as obtaining cellular phone, fax machine and computer, etc. Those requirements were also completed and defendant No.1 was intimated. However, defendant No.1 decided to allot the

supply of goods to G.B. Pant Hospital to M/s Cure Aids India. According to the plaintiff, the supply to be made to defendant No.2 was to the tune of Rs 1.5 crore and 19% of margin on that amount comes to Rs 20.25 lakhs. The plaintiff, therefore, has claimed Rs 20 lakhs towards the margin on the sale to G.B. Pant Hospital. He has also claimed the amount of Rs 30,000/- which he had paid as earnest money. He has further claimed a sum of Rs 5 lakhs as damages for the mental torture, alleged to have been caused to him.

2. The suit has been contested by defendants. In its written statement, the defendant No.1 has taken a preliminary objection that the plaintiff was suing for specific performance of a non-executed agreement and since there was no contract, there was no question of any relief to the plaintiff. It has also been submitted that since there was no acceptance of the proposal submitted by defendant No.1 to the plaintiff, no contract came into existence between the parties. On merits, it has been alleged that no proposal for appointment of a dealer was submitted by the plaintiff in writing, though an FDR of Rs 30,000/- was submitted by him for considering his appointment as a dealer. It has

been further alleged that no official of defendant No.1 had approached the plaintiff and it was the plaintiff, who had approached defendant No.1 to be appointed as a dealer and had submitted the FDR of Rs 30,000/- to show his bona fide. It has also been alleged that the plaintiff was required to take back the amount of Rs 30,000/-, but, he failed to do so.

3. Defendant No.2, in its written statement, has taken a preliminary objection that the suit against it did not disclose any cause of action since no transaction was entered into between it and the plaintiff. It has further been admitted that earnest money of Rs 30,000/- was required to be deposited for cardiology items and the tender submitted by defendant No.1 was accepted and supply order was placed on receipt of authorization from defendant No.1 in favour of M/s Cure Aids India.

4. The following issues were framed on the pleadings of the parties:-

1. Whether the suit is not maintainable as pleaded by defendant No.1 in preliminary objection No.1? OPD
2. Whether there is no contract between the plaintiff and defendant as pleaded in para of the preliminary

objection No.2? OPD

3. Whether payment of Rs 30,000/- by bank draft in favour of defendant No.2 by plaintiff does not create any right in favour of the plaintiff to maintain the suit as pleaded in para 5 of the preliminary objections?
4. Whether the plaintiff is entitled to the relief of injunction?
5. Whether the plaintiff is entitled for Rs 25,00,000/- as damages/compensation?
6. Whether the plaintiff is entitled to recovery of Rs 30,000/- being the amount of bank draft annexed with the tender documents by defendant No.1?
7. Whether the plaintiff is entitled to interest and if so at what rate and for what period?

5. **Issue No.2**

Admittedly, there is no privity of contract between plaintiff and defendant No.2. The tender to defendant No.2 was submitted by defendant No.1 and the order by the hospital was also placed on defendant No. 1. No relief against defendant No.1 has been claimed by the plaintiff. The suit against defendant No.2 is, therefore, not maintainable. In any case, defendant No.2 G.B. Pant

Hospital by itself is not a legal entity, this being an institution of Government of NCT of Delhi. If the plaintiff had any grievance against G.B. Pant Hospital, he could have sued Government of NCT of Delhi, but the suit against the hospital is not maintainable. The issue is decided against the plaintiff and in favour of defendant No.2.

6. **Issue No.1 and 3**

These issues are interconnected and can be conveniently decided together.

The plaintiff has examined himself as PW-1 and has produced two more witnesses. In his affidavit by way of evidence, the plaintiff stated that having come to know that defendant No.1 wanted to allot distributorship for G.B. Pant Hospital for supply of various products, he vide letter Ex.PW-1/1 applied to defendant No.1, seeking distributorship. Defendant No.1 directed its main distributor M/s Reliance Surgical Emporium to give the required goods to him, for supply to various customers in G.B. Pant Hospital. He further stated that defendant No.2 invited a tender in the month of October, 1999 for supply of various surgical and other items. Defendant No.1 was required to pay earnest money of Rs 30,000/- to participate

in the tender, terms and conditions of which are Ex.PW-1/17. The officials of defendant No.1 approached him and asked him to deposit the earnest money by way of FDR in the name of defendant No.2. The plaintiff accordingly got the FDR Ex.PW-1/18 prepared and gave it to defendant No.1 which submitted the same to defendant No.2 and participated in the tender. He further stated that defendant No.1 had also orally entered into a contract with him to supply the goods to defendant No.2 and he was to get about 20% profits from the supplies to be made by him to defendant No.2. The officials of defendant No.1 also requested him to arrange cellular phone, fax machine, computer, etc. which were duly arranged by him and the defendant No.1 was intimated in this regard vide letter Ex.PW-1/19 dated 30th January, 2000. However, in March, 2000, the plaintiff came to know that defendant No.1 had decided to allot the supply to M/s Care India. He also stated that defendant No.1 had supplied goods valued at Rs 2.93 crores to defendant No.2 and he is entitled to 20% profit on these sales, as was agreed by defendant No.1 and was also paid by it to other agents.

7. PW-2 Mr Kailash Chand is an official of G.B. Pant

Hospital. He produced the record Ex.Pw-2/A (Colly.). PW-3 Mr Tarun Kapoor, is an ex-employee of M/s Care India. He stated that he used to participate in the tender of M/s Care India, which had supplied cardiology products worth Rs 65 to 75 lakhs to G.B. Pant Hospital in the year 2001-02 on behalf of Johnson & Johnson Company, of which it was a distributor, till the year 2002. He further stated that the company earns gross profit of 13 to 15%.

8. In rebuttal, defendant No.1 has produced its Zonal Manager Shri Harsh Gulati as DW-1. In his affidavit, Mr Harsh Gulati stated that there was no agreement or contract either written or oral, between the parties at any point of time. He further stated that on 29th June, 1999, the plaintiff had given a proposal to defendant No.1 for being appointed as a dealer and in furtherance of that proposal, he had deposited an FDR of Rs 30,000/- with defendant No.2, on behalf of defendant No. 1. This act, however, was not done with the consent or as per the instructions of defendant No.1 and the proposal of the plaintiff was never accepted by defendant No.1. He also stated that defendant No.1 had not supplied any goods to defendant No.2 through its distributor M/s Care India on

the basis of the earnest money of the plaintiff. According to him, defendant No.1 had repeatedly asked the plaintiff to take back the FDR of Rs 30,000/-, which he had given to show his bona fide interest in being appointed a dealer of defendant No.1 and this was done, without prior consent of defendant No.1. He also stated that the request to be appointed as a dealer had to be filed in a prescribed proforma which was to be forwarded to the head office of defendant No.1 and was to be approved by it. The plaintiff, however, merely sent a letter expressing his desire to acquire dealership, without caring about the prescribed procedure and under no circumstances, approval to such a proposal could have been given by the head office of defendant No.1.

9. It is not necessary that a contract between two or more parties need to be in writing. Oral contracts are permissible in law and are duly recognized. However, the onus of proving such an agreement lies upon the person who sets up such an agreement in case it is denied by the other party. The standard of proof required to prove an oral agreement is much stronger when a large company such as defendant No.1 is alleged to be the party to such an

agreement.

10. Admittedly, the plaintiff was never appointed as a distributor or a dealer of defendant No.1. Admittedly, there was no written contract between the plaintiff and defendant No.1 for supply of products of defendant No.1 by the plaintiff to G.B. Pant Hospital. Admittedly, there is no document from defendant No.1 to the plaintiff, asking him to deposit Rs 30,000/- as earnest money with G.B. Pant Hospital on its behalf. Admittedly, there is no document from defendant No.1 to the plaintiff, agreeing to pay about 19% of the value of the goods which were to be supplied to G.B. Pant Hospital or any other amount as his profit/margin. The entire case setup by the plaintiff is based upon an oral agreement, which has been denied by defendant No.1. Nowhere in the plaint, the plaintiff disclosed the name of the official(s) of defendant No.1, who are alleged to have approached him and agreed to make supply to G.B. Pant Hospital through him, and pay him about 19% of the sale value as his profit/margin. Though the plaintiff pleads an oral agreement with a large company, the plaint does not disclose the name of the person who entered into the alleged oral agreement with him, on behalf

of defendant No.1. There is no explanation from the plaintiff for not disclosing such a vital fact in the plaint.

11. The plaintiff file a replication, controverting the averments made in the written statement of defendant No.1. But, even in the replication, he did not come out with the name of the person, who entered into the alleged oral agreement with him on behalf of defendant No.1.

12. The notice dated 31st January, 2000 sent by the plaintiff is addressed to Mr Vishal Gupta, Regional Sales Executive of defendant No.1. It has been stated in this letter that there was some discussion in the office of Mr Vishal Gupta at the time of defendant No.1 submitting the tender with G.B. Pant Hospital, along with the earnest money of the plaintiff and it was assured by him that certain basic requirements like office fax machine, computer, etc. were to be fulfilled by him before the tender enquiry was finalized. It has been further stated that the plaintiff was ready with necessary formalities. He also asked Mr Vishal Gupta to convey the terms and conditions of the company on the subject of distributorship. However, there is absolutely no averment in this letter that there was an oral contract between the plaintiff and defendant No.1 for

supply of products of defendant No.1 by the plaintiff to G.B. Pant Hospital. If there was an oral agreement to this effect, as alleged in the plaint, there was no reason for not claiming such a contract in this letter sent by the plaintiff. Though it has been alleged in the plaint that commission of about 19% of the sale value of the product was agreed to be paid to the plaintiff as his margin/profit, there is absolutely no indication of any such agreement/assurance in this letter. Again, there is no explanation from the plaintiff as to why no such averment was made in the letter sent by him to Mr Vishal Gupta.

13. Ex. P-1/20 is the letter dated 23rd May, 2000 sent by the plaintiff to Mr N.K. Ambawani, Managing Director of defendant No.1, though it has been alleged in this letter that the Delhi office of the company had asked the plaintiff, in case he was interested in supplying goods to G.B. Pant Hospital, to deposit Rs 30,000/- in favour of G.B. Pant Hospital so as to enable it to participate in the tender due on 22nd October, 1999 and he had accordingly given an FDR of Rs 30,000/- to Delhi office in favour of G.B. Pant Hospital. There is no averment even in this letter that the Delhi office or any official of defendant No.1 had agreed to

pay 19% of the value of the goods to be supplied to G.B. Pant Hospital to the plaintiff as his profit/margin. By the time the plaintiff wrote his letter, he had already come to know that M/s Care India had been appointed by Delhi office of defendant No. 1 for direct sale to G.B. Pant Hospital and he also apprehended that the tender of G.B. Pant Hospital would also be diverted to that firm. Still, he chose not to refer to the alleged agreement to pay 19% of the sale value of the goods to him as his margin/profit. Ex.PW-1/21 is the letter dated 08th June, 2000, written by the plaintiff to Mr. R. Dalal, President (Professional Products) of defendant No.1 referring to his earlier letter dated 23rd May, 2000 addressed to its Managing Director. Though he alleged that Mr Vishal Gupta had assured him that the company was looking after his interest in the transaction, he did not plead any oral agreement in this letter. He did not claim that Mr Vishal Gupta had agreed to pay 19% of the sale value of the goods to him as his profit/margin.

14. Ex.PW-1/21 is the legal notice dated 30th June, 2000, sent by the plaintiff to Mr R. Dalal, President (Professional Products) of defendant No.1 through his counsel Mr Pawan K. Bahl. Even in this legal notice, the

plaintiff did not claim that name any official of defendant No.1 who had agreed to pay 19% of the value of the goods to him as his profit/margin. Again, there is no explanation for not making this claim even in the legal notice sent through a counsel.

15. The plaintiff has not produced any official of defendant No.1 to prove the alleged oral agreement for supply of the products of defendant No.1 to G.B. Pant Hospital, pursuant to the tenders invited by the hospital, or to pay about 19% of the value of the goods to him as his margin/profit in the supply. The letter Ex.PW-1/19, addressed to Mr Vishal Gupta, Regional Sales Executive of defendant No.1 refers to some discussion held in his office, at the time tender for the year 2000-01 was submitted by defendant No.1 to G.B. Pant Hospital along with the earnest money belonging to the plaintiff. Mr Vishal Gupta, however, has not been produced by the plaintiff, as a witness. Since the onus of proving the alleged oral agreement lies upon the plaintiff, it was for him to produce Mr Vishal Gupta to prove what transpired between him and the plaintiff during the discussions, alleged to have taken place in his office. Defendant No.1 had filed an affidavit of Mr Vishal Gupta,

controverting the case setup by the plaintiff. He, however, was not produced for cross-examination and, therefore, his affidavit cannot be read in evidence. It appears from the suggestion given to DW-1 Harsh Gulati in his cross-examination that Mr Vishal Gupta had ceased to be an employment of defendant No.1 either because he had resigned or because had been dismissed from the service of defendant No.1. Mr Vishal Gupta having left the employment of defendant No.1, no adverse presumption can be done against it for not producing him in the witness box. This is more so, when the onus of proving the alleged oral agreement lies upon the plaintiff and the onus is rather heavy since defendant No.1 is a large company and normally such companies will not enter into oral agreements of the nature, claimed by the plaintiff.

16. In his cross-examination, the plaintiff stated that it were Mr M.R. Gandhi and Mr Vishal Gupta, who had approached him and asked him to start the work, promising to award the contract to him after 8-10 months. Even Mr M.R. Gandhi was not produced by the plaintiff to prove the alleged assurance.

17. In these circumstances, I have no hesitation in

holding that the plaintiff has failed to prove that defendant No.1 had entered into an oral agreement with him for supply of its products to G.B. Pant Hospital through him. It is difficult to dispute that the FDR of Rs 30,000/- was got prepared by the plaintiff at the suggestion or with the consent of some official of defendant No.1. The case of the plaintiff is that the FDR was delivered by him in the Delhi office of defendant No.1 and was then submitted by that office to G.B. Pant Hospital, whereas the case of defendant No.1 that the FDR was deposited by the plaintiff directly with G.B. Pant Hospital. Even if it is presumed that the plaintiff deposited the FDR of his own and not through the Delhi office of defendant no.1, the use of that FDR by defendant No.1 for securing order from G.B. Pant Hospital, leaves no reasonable doubt that the FDR of Rs 30,000/- was deposited by the plaintiff with the consent of some official of defendant No.1. But, use of the FDR of the plaintiff by defendant No.1 did not, by itself, result into a concluded contract between the plaintiff and defendant No.1 for supply of the products by defendant no.1 to G.B. Pant Hospital through the plaintiff. It is more likely that the FDR was provided by the plaintiff in order to show his bona fides

in the matter of the request made by him on 29th June, 1999 for grant of distributorship to him and in the hope that the distributorship will be granted and the supply to G.B. Pant Hospital will be awarded to him by defendant No.1. It also appears to me that the official of defendant No.1 utilized the FDR provided by the plaintiff in the hope that he may be awarded distributorship of defendant No.1, in pursuance of the request which had already been made by him. Of course, the hope entertained by the plaintiff and the official of defendant No.1 did not materialize since the plaintiff did not submit a request in prescribed form for appointment as a distributor of defendant No.1 and consequently, his request could not be processed further. In any case, even if it is presumed that some official of defendant No.1 had agreed to the plaintiff supplying the tendered goods to G.B. Pant Hospital on behalf of defendant No.1 that by itself does not entitle the plaintiff to 19% of the value of the goods as his margin/profit. The onus was upon the plaintiff to prove that defendant No.1 had agreed to pay 19% of the sale price to him as his margin. He has miserably failed to prove any such agreement. As noted earlier, there is no mention of any such margin in the letters

written and the legal notice sent by the plaintiff to defendant No.1. In his affidavit filed by way of evidence, the plaintiff claimed 20% and not 19% of the total sale value as the profit agreed to be paid to him by defendant No.1. He, however, has not been able to prove that defendant No.1 had agreed to pay 19% or 20% or any other percentage of the sale value to him as his margin. No doubt, had the plaintiff made supply to G.B. Pant Hospital on behalf of defendant No.1, he would have been entitled to some payment from defendant No.1 as his profit/margin. But, in a suit for recovery of money, it is for the plaintiff to prove what exactly was agreed to be paid to him as his profit/margin. It is not for the Court to speculate as to what could be the margin that would have been paid to the plaintiff by defendant No.1, in case of supply to G.B. Pant Hospital being made through him. No decree for recovery of money can be passed unless the liability of the defendant is ascertained and it is not possible for the Court to ascertain liability in such case unless the plaintiff is able to prove the exact margin/profit agreed to be paid to him.

18. The learned counsel for the plaintiff has referred to the following decisions in support of his case **Bharat**

Petroleum Corporation Ltd. vs. Great Eastern Shipping Co. Ltd. (2008) 1 SCC 503; **JS Bhalla vs. G.J. Bhawnani** 23 (1983) DLT 125; **Mahant Mela Ram Chela Mahant Inder Dass vs. Shiromani Gurudwara Parbandhak Committee, Amritsar** AIR 1992 Punjab & Haryana 252; **Birendra Pratap Singh and anr. vs. Gulwant Singh and others** AIR 1968 SC 1068; **Smt. Niranjana Kaur vs. M/S New Delhi Hotels Ltd. and ors.** AIR 1988 Delhi 332; **Mohd. Salamatullah and ors. vs. Government of Andhra Pradesh** AIR 1977 SC 1481; **A.T. Brij Paul Singh and Bros. vs. State of Gujarat** AIR 1984 SC 1703; **Ayub Ali vs. Union of India** 86(2000) DLT 869; **Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.** 2003(2) Raj. 1 (SC); **Bharat Sanchar Nigam Limited vs. BWL Ltd.** 2006(3) R.A.J. 239(Del).

19. In the case of **Bharat Petroleum Corporation Ltd.(Supra)**, there was a time charter party entered into between the appellant and the respondent on 6.05.1997, for letting on hire, vessels for a period of two years. It was later extended till 31.08.1998. There were various offers and counter-offers exchanged between the parties as to the terms on which the charter party was to continue pending

finalization of a new charter party from 1.09.1998. At every stage the respondent made it clear that till the tender was finalized, the existing terms and conditions of the charter party would continue as per usual practice. No firm interim agreement, however, could be reached though the vessels of the respondents continued to be chartered by the appellant till 31.08.1999. The chartered party agreement contained an arbitration clause. The question before the Supreme Court was whether on expiry of the extended period of charter hired on 31.08.1998 the charter party came to end and the arbitration agreement between the parties perished with it. Answering the question in negative, the Supreme Court, Inter alia, observed as under:-

“It is, no doubt, true that the general rule is that an offer is not accepted by mere silence on the part of the offeree, yet it does not mean that an acceptance always has to be given in so many words. Under certain circumstances, offeree’s silence, coupled with his conduct, which takes the form of a positive act, may constitute an acceptance – an agreement *sub silentio*. Therefore, the terms of a contract between the parties can be proved not only by their words but also by their conduct.”

The facts and circumstances of the case before this

Court being absolutely different, this judgment has no applicability. There is no dispute with the proposition of law that under certain circumstances silence on the part of a party coupled with some positive act on his part may constitute his acceptance. But, no such conduct on the part of defendant No.1 stands established in the present case.

20. In the case of **JS Bhalla(supra)** the owner of the property had appeared in the Court and deposed that he was the owner and lease deed was executed in his favour. He, while in the witness box, was not cross examined about the ownership of the property in question. It was observed that in the absence of cross-examination it must be held that the appellant had admitted the facts deposed by the respondent. However, in the present case, there has been no such absence of examination on the part of defendant No.1 and there was a specific suggestion given to the plaintiff that he had given Rs.30,000/- to defendant No.2 merely to induce defendant No.1 to appoint him as a distributor.

21. In the case of **Mahant Mela Ram Chela Mahant Inder Dass(supra)**, it was observed that a party should put

to each of its opponents witnesses so much of his case as concerns that particular witness and if no such questions are put, the court presumes that the witness account has been accepted. This judgment is of no help to the plaintiff in view of extensive cross-examination conducted by defendant No.1.

22. I have also considered the decision of the Supreme Court in the case of **Birendra Pratap Singh and anr.(supra)**, I do not find any such proposition in this case which can be of any help to the plaintiff.

23. In the case of **Smt. Niranjana Kaur(supra)**, there was failure on the part of defendant No.1 to produce the account books despite direction of the court. In these circumstances, the court felt that an adverse inference could be drawn that if the accounts books or the correspondences between the plaintiff and the defendant No.1 had been produced by defendant No.1, the same would have gone against it. Since no document has been withheld by defendant no.1 before this Court and in any case there was no direction to it to produce any particular record/document, there is no occasion to draw an adverse inference against it.

24. I have also considered the decision of the Supreme Court in the case of **Mohd. Salamatullah and ors.(supra)**. Again, I do not find any such proposition in this case which can be of any help to the plaintiff.

25. The case of **A.T. Brij Paul Singh and Bros.(supra)** was a case relating to breach of work contract. The Court took the view that the contractor was entitled to claim the damages on the basis of expected profit on balance of the works contract. This is not a case based upon a works contract and in any case the plaintiff had failed to prove the alleged oral contract. Therefore, this judgment does not help him.

26. In the case of **Ayub Ali(supra)**, the claimant had claimed 10% of balance works not executed due to premature closure of contract as loss of profit. It was held that the claim was not excessive. Again this judgment has no applicability to the facts of the case before this court.

27. In the case of **Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.(supra)**, the Supreme Court held as under:

“(1) Terms of the contract are required to be taken into consideration before

arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”

Since the plaintiff before this Court has failed to establish any concluded contract between him and

defendant No.1, there is no question of awarding any compensation to him under sections 73/74 of the Contract Act.

28. In the case of **Sanchar Nigam Limited(supra)**, the Arbitrator had noted that the Supreme Court had upheld profit at the rate of 15% and, therefore, award of higher rate of profit was devoid of any reason. This judgment also has no applicability to the facts of the case before this Court.

29. In view of the above discussions, both these issues are decided against the plaintiff and in favour of defendant No.1.

30. **Issue No.4**

Since supply of G.B. Pant Hospital has already been made, this issue has become infructuous and is treated as such.

31. **Issue No.5**

In view of my finding on Issues No.2 and 3, the plaintiff is not entitled either to the amount of Rs 20 lakhs, claimed as his margin/profit on the sale made by defendant No.1 to G.B. Pant Hospital or any amount as damages/compensation. The issue is decided against the plaintiff and in favour of defendant No.1.

32. **Issue No.6**

It was not disputed by the learned counsel for the defendant No.1 that the plaintiff is entitled to recovery of Rs 30,000/- from defendant No.1. Even otherwise, the FDR of Rs 30,000/- was provided by the plaintiff as a non-gratuitous act. Section 70 of Contract Act provides where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. Hence, the plaintiff is entitled to recover this amount from defendant No.1.

33. **Issue No.7**

There is no agreement between the parties for payment of interest on the amount of Rs 30,000/-, utilized by defendant No.1. No custom or usage of trade for payment of interest has either been pleaded or proved by the plaintiff. The provisions of Interest Act are also not applicable in the facts of this case. Section 3 of Interest Act, 1978 empowers the Court to grant interest in any proceedings for recovery of any debt or damages or in any

proceeding in which a claim for interest in respect of any debt or damages already paid is made. It further provides that if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then interest can be directed to be paid from the date mentioned in this regard, in a written notice, given by the person claiming interest, to the person liable for payment of interest. In the case before this Court, the amount of Rs 30,000/- is not returnable to the plaintiff by virtue of a written instrument. Hence, clause (a) to sub-section (1) of Section 3 of Interest Act, 1978 does not apply. Since no interest has been claimed even in the written notice sent by the plaintiff to defendant No.1, interest cannot be awarded to him even under clause (b) of sub-section (1) of Section 3 of the aforesaid Act. Section 4(1) of Interest Act, 1978 is also not attracted as the plaintiff is not entitled to interest on the amount of Rs 30,000/- by virtue of any enactment or other rule of law or usage having the force of law. Since the case of the plaintiff is not covered under clauses (a) and (d) of sub-section (2) of Section 4, interest cannot be awarded to him even under Section 4(2) of the Act. The issue is decided against the plaintiff and in favour of defendant No.1.

ORDER

34. In view of my findings on the issues, the plaintiff is entitled to recover Rs 30,000/- with proportionate costs, only from defendant No.1. The plaintiff is not entitled to any relief against defendant No.2. The suit is, therefore, dismissed against defendant No.2 and is decreed only against defendant No.1 for recovery of Rs 30,000/- with pendente lite and future interest at the rate of 9% per annum and proportionate costs of the suit.

Decree Sheet be prepared accordingly.

(V.K. JAIN)
JUDGE

NOVEMBER 01, 2010
BG