

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	30.08.2019
Pronounced on	23.10.2019

Coram

The Honourable Mr.Justice Krishnan Ramasamy

C.S.No.88 of 2006

M/s.Anish Metals Private Ltd.,
rep. by its Managing Director,
Pravin Shah having its
Office at 70, Kansara Chawl
Kalbadevi Road,
Mumbai.

...Plaintiff

Versus

1.M/s.Chitrahar Traders,
a firm represented
by its Partners,
(i) R.Krishnamurthy
(ii) P.K.Ganeshwar
(iii) V.Sivakumar.

2.R.Krishnamurthy

3.P.K.Ganeshwar

4.V.Sivakumar
Partners, Chitrahar Traders

5.Neyveli Lignite Corporation Ltd.,
rep. by its Chairman

...Defendants

Prayer:

This suit is filed under Order VII Rule 1 of C.P.C r/w. Order 3 Rule 1 of O.S.Rules for the following reliefs:

(a) directing the defendants 1 to 4 to pay a sum of Rs.14,20,80,000/- to the plaintiff;

(b) directing the fifth defendant to pay to the plaintiff a sum of Rs.7 Crores paid by the first defendant as E.M.D in part satisfaction of the plaintiff's claim against defendants 1 to 4;

(c) directing the defendants 1 to 4 to pay interest at 24% per annum to the plaintiff on Rs.12 Crores from the date of plaint viz., 30.01.2006 till the date of realization; and

(d) directing the defendants 1 to 4 to pay to the plaintiff the cost of the suit.

For Plaintiff

Mr.T.V.Ramanujam,
Senior Counsel
for Mr.T.V.Krishnamaachari

For Defendants
1 & 2

Mr.ARL.Sundaresan,
Senior Counsel
for Mr.G.Arul Murugan

Defendant – 3

Mr.Adithya Reddy

Defendant – 4

Mr.S.R.Raghunathan

Defendant – 5

Mr.N.Nithandan

J U D G M E N T

The present suit has been filed seeking for a relief, as stated in preamble portion of this Judgment.

2. The case of the plaintiff, as averred in the plaint, is as follows:-

i) The plaintiff is a Private Limited Company, registered under the Indian Companies Act, 1956, and have been carrying on business in Metals (which includes buying/selling metal scraps). During the month of April 2005, the plaintiff got an information through one of its Brokers that the first defendant-Firm has huge quantity of metal scrap, as the first defendant had a contract with the fifth defendant for dismantling and selling certain defunct plants by a tender. The plaintiff contacted the first defendant-Firm and had several rounds of telephonic conversations. During such course of telephonic conversation, it was revealed by the partners of the first defendant-Firm viz., the defendants 2 and 4 that they are the successful bidders in the auction conducted by the fifth defendant Corporation of Ferrous and non-ferrous scraps in B & C (Briquetting and Carbanisation) plant at Neyveli Lignite Corporation Ltd., Neyveli, containing 60,000 Metric Tonnes of scrap.

ii) Further, the plaintiff also came to know through the defendants 2 to 4 that an auction was conducted by MSTC (Metal Scrap Trading Corporation) in which, the first defendant-Firm became the successful bidder for a sum of Rs.70.01 Crores. All these transactions were occurred during the month of April 2005. On such representation made by the defendants 2 to 4, the plaintiff agreed to purchase the scrap in B & C plant at Neyveli as and when the plant is dismantled by the first defendant. In due course of time, payment will be made in part as against the supplies made.

iii) The plaintiff paid a sum of Rs.12 Crores on 21.04.2005 by way of Demand Draft payable at Chennai, bearing No.155034 dated 21.04.2005, drawn on HDFC Bank in favour of the first defendant firm, since the defendants 2 to 4 insisted on an advance for confirmation of the contract of sale. The second defendant as a partner of the first defendant-Firm, has issued a receipt dated 24.04.2005, wherein, he has acknowledged the receipt of the said Demand Draft. He further stated that the payment of Rs.12 Crore is received as advance for the purchase of metal scrap, for which, price shall be fixed at the time of delivery on the market value.

iv) The defendants 2 to 4 represented that the dismantling of the plant has already commenced and that the material would be supplied forthwith. In

spite of receipt of a sum of Rs.12 Crores as aforesaid, there was no supply at all by the defendants 1 to 4. The plaintiff has been contacting the defendants quite often in this regard, and they kept promising performance of the contract. Since there was evasive reply by the defendants 2 to 4, the plaintiff grew suspicious and engaged Mr.C.Ramesh Bindu, a Chartered Consulting Engineer, to visit the site, where, B & C plant are situated with a request to report the state of affairs as regards the dismantling of plant, the availability of scrap and all other admitted facts. Accordingly, the said Mr.C.Ramesh Bindu visited and inspected the site from 28.06.2005 to 01.07.2005 and made a report dated 07.07.2005, stating that 47,600 MT of Ferrous and non-Ferrous, machinery and store materials are available in the site as against the total quantity of 60,000 MT. On receipt of this report, the plaintiff again insisted the defendants 2 to 4 to honour its commitments and contract. But again, there was an evasive reply by the defendants.

v) The defendants have been representing that though they were successful bidders, the dismantling of the plant is yet to commence and the plaintiff understood that the representation of Mr.Ramesh Bindu is quite contradictory to the representation already made by the defendants 2 to 4 and growing suspicious, once again, he requested the Consulting Engineer to make

another visit to verify the state of affairs. Accordingly, the Consulting Engineer visited the plant on 30.09.2005 and he submitted a report dated 02.10.2005, wherein, the summary given by him revealed that approximately 16,500 MT of scrap alone was available out of 47,600 MT of scrap found during July 2005. The plaintiff learnt that only 7000 MT (Approx.) of metal scrap is left unlifted at B & C plant at Neyveli. The defendants 1 to 4 are engaging themselves in removal and sale of the remaining scrap in a hectic pace. The defendants 2 to 4 having received a huge sum of Rs.12 crores from the plaintiff, removed the scrap only with a view to defraud the plaintiff. Thereafter, the plaintiff approached the Neyveli Lignite Corporation Ltd., to note down the particulars of scrap lifted by the defendants 1 to 4 from the site. Accordingly, the plaintiff was permitted to take out the details and it was revealed that the scrap was transported by lorries on several occasions and on several dates by the defendants 2 to 4.

vi) The plaintiff had several rounds of discussion through mediators and tried to persuade the defendants 1 to 4 to at least return the amount paid by him by way of demand draft of Rs.12 Crores with reasonable interest towards the profit, which, the plaintiff would have earned, if the contract had been performed by defendants 1 to 4. Though the defendants 1 to 4 had been

promising to return the money, they have been dragging on the issue with ulterior motive. Hence, the plaintiff lodged a complaint with the Superintendent of Police, Salem on 22.12.2005, due to the reason that the residence of defendants 2 to 4 was with the jurisdiction of the Superintendent of Police, Salem. When the defendants 2 to 4 were summoned by the Police, they immediately filed an Anticipatory Bail Petition before the District and Sessions Court, Salem, which was ultimately dismissed. In the said Anticipatory Bail, the defendants 2 to 4 admitted the receipt of Rs.12 crores by way of Demand Draft from the plaintiff at Chennai. However, the defendants have pleaded in their Bail Petition that the plaintiff has committed breach of contract by not making further payment and that they were forced to pay penalty to NLC. The receipt, dated 24.04.2005, sent by the second defendant would clearly show that the defendants 1 to 4 made a promise that the supply would be made and price would be fixed at the time of delivery on the market value. However, no such delivery was made by the defendants 1 to 4 as they promised. On the other hand, delivery was made to outsiders and huge amounts were earned by the defendants 1 to 4.

vii) Further, the plaintiff learnt that the sale proceeds of the scrap had been utilized for the purchase of properties in the name of the first defendant-

Firm, or in their individual names, and have also been diverted to other business concern of the defendants 2 to 4. The fifth defendant has been impleaded in the suit as a Garnishee, since the fifth defendant is withholding a sum of Rs.7 Crores, which was paid as EMD by defendants 1 to 4. The plaintiff is entitled to reasonable damages in the form of interest at the rate of 24% per annum from 24.04.2005 till the date of payment as the defendants 1 to 4 have committed the breach of contract. Therefore, the plaintiff filed the present suit.

3. The defendants 1 & 2 filed their written statement, wherein, they stated as follows:-

(i) The first defendant is a registered Partnership Firm, having office at Tiruppur. The second defendant is one of the partners of the first defendant-Firm.

(ii) According to the defendants 1 & 2, the first defendant was the successful bidder in the e-auction conducted by the fifth defendant herein on 20.01.2005 for the sale of B & C plant and machineries as a whole lot on “As-is-where-is-basis” for a value of Rs.70,01,00,019/-. The fifth defendant issued a sale order on 16.02.2005 along with the terms and conditions in respect to the completion of the sale. Thereafter, pursuant to the payments made to the fifth

defendant, delivery order was issued on 20.04.2005, by which, the delivery period of 300 days was granted starting from 21.04.2005 and expiring on 14.02.2006. Only after the confirmation and delivery order in favour of the defendants 1 and 2, the plaintiff contacted the defendants 1 and 2 through a broker one Mr.Arvind Jhatakia and expressed his interest for purchasing the entire materials of B & C plant in a whole lot for a sum of Rs.120 Crores plus taxes, which was auctioned by the fifth defendant.

(iii) The defendants 1 & 2 denied the averments made in the plaint that B & C plant was containing 60,000 MT of scrap. The averment that it was mutually agreed that payments would be made against the supply is utterly false and incorrect, and if it is so, the plaintiff would not have made a payment of Rs.12 crores without supply of the materials. The defendants 1 & 2 admitted the fact that the plaintiff issued a Demand Draft for a sum of Rs.12 Crores as an advance for the sale to be completed and the plaintiff promised to pay the balance amount within a short period. As such, a receipt was issued to the plaintiff herein for receiving a Demand Draft mentioning it as advance for the purchase of B & C plant scrap material. It was never agreed that the payment has to be made by the plaintiff as and when supply is made. The plea of the plaintiff in this regard is palpably false.

(iv) The defendants 1 & 2 states that the plaintiff has been dilly dallying and postponing the payment of further sum under one pretext or the other. There was no bonafide intention on the part of the plaintiff to make further payment and complete the sale.

(v) The plaintiff never contacted the defendants 1 & 2 for the purpose of supply of material as alleged by them. Whiles, all of a sudden, the plaintiff contacted them after some time and informed that they were not able to arrange funds and requested that they may be treated as a partner in the B & C plant tender and requested defendants 1 and 2 that the amount of Rs.12 Crores paid by them may be treated as their contribution and the proportionate profit may be shared with them. Even though it was not practical and the plaintiff has to only pay more money apart from the amount of Rs.12 Crores paid by him, to compensate the loss caused by them to the first defendant firm, the defendants 1 & 2 agreed to the proposal. Thereafter, only the plaintiff deputed his people at the work site B & C plant Neyveli and took part in the dismantling operation. The people deputed by the plaintiff's signed at the log book registers maintained by the fifth defendant, which would clearly reveal their presence in the dismantling work at the work site.

(vi) Since the plaintiff did not turn up with the payments as promised, we were forced to execute the dismantling work at the B & C plant, Neyveli, as the delivery order is effective only for 300 days, which expires on 14.02.2006. As the plaintiff did not make payment and complete the sale and delayed the dismantling and removal of the material work, the defendants are put to heavy loss.

(vii) The plaintiff's Consulting Engineer submitted a report on 07.07.2005, stating that only 47,600 MT of scrap alone was available and further report dated 02.10.2005 stating that only 16,500 MT of scrap was alone available were without any basis and utterly false. Since the fifth defendant has to sign for taking every load of material. The register maintained by the fifth defendant would clearly reveal the quantity of the entire material that has been lifted from the B & C plant, Neyveli. As on 14.02.2006, a total quantity of 16,027 MT of scrap alone has been removed, which has been sold to an amount of Rs.33,37,19,471/- for which, the entire bills are available. From 22.02.2006 till the completion of the entire permitted period to take delivery of the materials, only a total quantity of 52,25,061 kgs has been removed, which has been sold to an amount of Rs.6,34,75,518/-. The total value of a sum of Rs.39,71,94,989/-, alone has been removed from the fifth defendant premises

during the entire contract period. Therefore, the defendants suffered a loss of more than Rs.60 Crores.

(viii) The plaintiff, on coming to know that the defendants 1 & 2 have incurred a loss more than Rs.60 crores in the B & C plant tender, has now, in the last minute come up with a totally new stance by stating that he has only paid for the material in order to escape from bearing the loss occurred in the transactions. The plaintiff has filed the suit only to escape from their liability to compensate these defendants.

(ix) The first defendant is situated at Tiruppur and the work site is at Neyveli. The plaintiff has given the address of the first defendant Firm at Chennai, only for the purpose of filing the suit before this Court to have the advantage of lesser Court Fee. The entire transactions took place at Tiruppur and Neyveli. As such, there is no jurisdiction to file the suit before this Court. Therefore, the entire suit itself is liable to be dismissed with costs.

4. The third defendant filed an individual written statement, wherein, it is stated as follows:-

i) The third defendant is neither a necessary nor a proper party to the suit.

On 21.04.2005, when the plaintiff has allegedly paid Rs.12 Crores to the first

defendant, the third defendant was not at all involved in the transaction. The third defendant was not a partner after the sale order was issued by the fifth defendant to the first defendant, and subsequently, the third defendant retired from partnership on 13.04.2005. Hence, the third defendant has been unnecessarily dragged into the litigation only with an intention to harass him and to get some illegal gain out of him. Therefore, the third defendant averred that the plaint itself has to be rejected on the ground of misjoinder of parties.

ii) Further, it is stated that the third defendant was not aware of the transaction set out in paragraph No.3.1 of the plaint. On the other hand, he has stated that it is unbelievable that a big deal involving Rs.100 Crores could be finalized by telephonic conversation. Further, it is denied that the third defendant and defendants 2 and 4 insisted on an advance for confirmation of the contract as stated in paragraph No.3.2 of the plaint. The receipt dated 24.04.2005, is unstamped and cannot be received in evidence under Section 35 of the India Stamp Act. Not a single document is filed to show the nature of the contract entered into between the plaintiff and the first defendant. Further, the receipt issued by the second defendant does not specify the names of the partners. The plaintiff claims to be a reputed Company doing business throughout India. So, without verifying whether the first defendant is a

proprietary concern, the contract alleged to have been entered into by the plaintiff with the first defendant is totally unimaginable.

iii) The third defendant stated that he never met the plaintiff and also he did not seek a return of the EMD from the fifth defendant. According to the third defendant, the plaintiff illegally gave a Police Complaint at Salem against the defendants. The third defendant stated that if at all the plaintiff has anything to do with the advancing of money for the removal of the scraps, that came into existence only on 24.04.2005 and the plaintiff and the defendants 1 & 2 are only aware of the relationship that existed among themselves as the third defendant ceased to be a partner on that day as he retired from partnership on 13.04.2005. The third defendant further contended that there was a joint venture agreement between the plaintiff and defendants 1 & 2. Further, in the arbitration proceedings between third defendant and the second defendant, an award has been passed to the effect that only the second defendant is liable for the debts of the first defendant-Firm. A Memorandum of understanding was also entered between the third defendant and the second defendant, wherein, the second defendant undertook to take care of the claim in the suit. Hence, the present suit is liable to be dismissed.

5. The fourth defendant filed separate written statement, wherein, he denied all the averments in the plaint except those that are specifically referred to and admitted by him hereunder.

i) He denied the allegation that the plaintiff contacted him in respect to the B & C plant Tender granted in favour of the first defendant-Firm herein. The first defendant is a Partnership Firm and at no point of time, the fourth defendant was a partner to the Firm. The perusal of the Form furnished by the Registrar of Firms will clearly establish the above fact that the fourth defendant is no way connected with the first defendant-Firm. The plaintiff has falsely stated that the fourth defendant is one of the partners of the first defendant Firm and has misled this Court and has obtained interim orders as against the fourth defendant also. The defendant is neither a proper nor necessary party in the present suit.

ii) The second defendant approached the fourth defendant, representing that he was the successful bidder in the e-auction conducted by the fifth defendant for the sale of the plant and machinery and sought for a loan of Rs.1,00,00,000/- (Rupees One Crore only) from the fourth defendant. The second defendant, being a known acquaintance, this defendant advanced the sum of Rs.1,00,00,000/- (Rupees One Crore) and at the request of the second

defendant, had lent the same by way of Demand Draft favouring the fifth defendant. The transaction between this defendant and the second defendant was purely a loan and the fourth defendant is not aware or concerned with the auction or of the purchase of plant and machinery from the fifth defendant. The second defendant has also refunded the loan of Rupees One Crore to fourth defendant and as such, presently, there is no transaction or dealing pending or subsisting between the fourth defendant and the defendants 1 to 3.

iii) As stated above, the fourth defendant has nothing to do with the auction conducted by the fifth defendant or the purchase of plant and machinery from them. The fourth defendant is not a partner to the first defendant Firm and he does not have any authority to sell the scrap to the plaintiff as he is not the successful bidder of the tender. Even the entire records produced by the plaintiff only shows that the first defendant is the successful bidder and the second defendant has received the payment from the plaintiff as the partner of the first defendant firm.

iv) Since he is not a partner of the first defendant firm, he denied all the averments made in the plaint. Further, he has stated that he is an unnecessary party in the present suit and therefore, the present suit is liable to be dismissed for misjoinder of all the parties also, and the plaintiff impleaded him only with

a *mala fide* intention to damage his reputation and causing loss to him in his business and personal life. He further stated that the plaintiff also filed a false complaint against the fourth defendant. Therefore, he stated that there is no truth in the plaint and the same is liable to be dismissed.

v) When the matter was listed before the learned Additional Master-I, on behalf of the plaintiff, one witness Mr.Pravin Shah (P.W.1) was examined and 16 documents were marked viz., Exs.P1 to P16 and on the side of the defendants, three witness were examined viz., Mr.R.Krishnamurthy/second defendant (D.W.1), Mr.P.K.Ganeshwar/third defendant (D.W.2) & Mr.V.Sivakumar/fourth defendant (D.W.3) and 12 documents were marked viz., Exs.D1 to D12.

6. Thereafter, when the matter came up before this Court on 29.01.2009, after perusing the pleadings and the materials available on record, this Court framed the following issues:-

Issue No.1 :

Whether the plaintiff offered to purchase the entire 'B' and 'C' Plant for a sum of Rs.120 Crores plus taxes from the first defendant ?

Issue No.2:

Whether the plaintiff became a partner with the first defendant and participated in the dismantling work of 'B' and 'C' Plant and sales as partner?

Issue No.3:

Whether the sum of Rs.12 Crores paid by the plaintiff was directed to be treated as their contribution in regard to the arrangement between the plaintiff and the defendants 1 and 2 as a joint venture?

Issue No.4:

Whether the fourth defendant is a partner of the first defendant-Firm and whether he is liable for the suit claim?

Issue No.5:

Whether the third defendant has retired from the partnership firm as on 13.04.2005 in accordance with law?

Issue No.6:

Whether the third defendant is liable for the suit claim under Sections 28, 32 and 45 of the Partnership Act?

Issue No.7:

Whether the plaintiff is entitled to the suit claim?

Issue No.8:

Whether the plaintiff is entitled to claim interest at the rate of 24% per annum from the date of the suit till the date of realization?

Issue No.9:

To what relief is the plaintiff entitled?

7. Mr.T.V.Ramanujam, the learned Senior Counsel for the plaintiff contended that the written terms of Ex.P2, the receipt, dated 24.04.2005 is admitted, and there cannot be any oral evidence contrary to the written terms of Ex.P2. He would further contend that Sections 91 & 92 of the Indian Evidence Act, 1872 is a bar of it. He would further contend that the affidavit and petition filed by the second defendant seeking Anticipatory Bail before the District and Sessions Court, Salem, have been marked as Exs.P4 & P5 respectively, the relevant portion from the said petition is as follows:-

“ Para No.4

Thereafter, the complainant company represented by Praveen approached M/s.Chitrahar Traders at Chennai and offered to purchase the metal scrap and pay more amount than the actual amount paid by M/s.Chitrahar Traders for the said transaction. In pursuance to the said offer made at Chennai the said Praveen issued a Demand Draft of Rs.12 Crores as advance on 21.04.2005 at Neyveli and agreed to pay the balance amount in installments within a short period.”

7.1 The learned Senior Counsel would submit that the said affidavit is the earliest document filed before the Court after the plaintiff filed the complaint against the defendants 2 to 4 on 22.12.2005. According to him, the plaintiff has paid a sum of Rs.12 Crores as advance and the second defendant has also issued a receipt dated 24.04.2005, which was marked as Ex.P2, wherein, it is stated as follows:-

*“ Received Rs.12,00,00,000/- (Rupees Twelve Crores only)
Demand Draft No.155034 dated 23.04.2005 payable at Chennai
in our favour as advance for purchase of B & C Plant Scrap
material for which price shall be fixed at the time of delivery for
the market sale value.*

***From M/s.Anish Metals Private Ltd., 70, Kansara Chawl
Kalbadevi Road, Mumbai – 400 002.”***

7.2 Further, the learned Senior Counsel contended that during the Cross Examination of D.W.1/second defendant, the second defendant admitted the fact that there is no documentary evidence produced before this Court to show that the plaintiff Company had agreed to purchase the entire lot of scrap materials in B & C Plant at Neyveli Lignite Corporation Limited for Rs.120 Crores. Ex.P2, is the receipt dated 24.04.2005, issued by him on behalf of the first defendant under the Letter pad of the first defendant, under which 12

Crores were received by way of Demand Draft. The said receipt contains the signature of the second defendant.

7.3 The learned Senior Counsel submitted that the second defendant (D.W.2) has sworn to an affidavit, stating that the plaintiff offered to pay more amount and there is no whisper about the alleged offer of the plaintiff for buying B & C Plant for Rs.120 Crores plus taxes. He also submitted that, if really, this version of the second defendant is true, this would have found place in Exs.P4 and P.5 (Anticipatory Bail Petition) filed by the second defendant. He stated that this is document *ante-litem motam*.

7.4 The learned Senior Counsel for plaintiff further contended that except *ipse dixit* of D.W.1, there is absolutely no evidence to fortify the contention of the defendants. He would contend that the second defendant produced Ex.D1 (agreement entered into between the first defendant and Mr.Arvind Jhatakia/Broker) for the first time when he gave evidence as D.W.1. In fact, he attempted to mark Ex.D1 through P.W.1 who is not a party to Ex.D1 and P.W.1 did not admit the document and it was not marked through P.W.1. He objected to the marking of Ex.D1 on the ground that it is an unregistered

document and Ex.D1 has not been proved by further examining the broker. He would contend that the plaintiff is not a party to Ex.D1, which is typed in a non-judicial stamp paper of Rs.20 (two sheets of Rs.10/- each) and the said stamp paper has been purchased at Tirupur on 19.04.2005. He also contended that it is not known as to why the said stamp paper has been purchased on 19.04.2005. He would contend that the said Ex.D1 is created to suit the requirement of the defendants for the purpose of the case and the plaintiff is not a party to it.

7.5 The learned Senior Counsel argued that there was no offer by the plaintiff to purchase the entire lot of scrap materials in B & C Plant at Neyveli Lignite Corporation Limited for Rs.120 Crores plus taxes. He further argued that the first defendant Firm has issued a Stamp Receipt for Rs.12 Crores under Ex.P.2 and it has been signed by the second defendant, however, the said receipt does not speak about the alleged offer of Rs.120 Crores. Apart from filing the Document No.3, Ex.D1, the defendants have not filed any other document mentioning that the plaintiff made an advance payment of Rs.12 Crores for the contract of Rs.120 Crores plus taxes. Therefore, the learned Senior Counsel contended that there is no contract between the plaintiff and the

first defendant either written or oral for the purpose of buying the entire lot of scraps in B & C Plant at Rs.120 Crores as alleged by the defendants 1 & 2. Hence, the learned Senior Counsel prayed for decreeing the suit.

8. On the other hand, Mr.AR.L.Sundaresan, learned Senior Counsel appearing for the defendants 1 & 2 advanced his arguments by stating that the plaintiff had approached the defendants 1 & 2 through a Broker, viz., Mr.Arvind Jhatakia and expressed their interest for purchasing the entire materials of the B & C Plant, as a whole lot, for a total sum of Rs.120 Crores plus taxes. He would submit that the fifth defendant Corporation invited offers for sale of its scrap consisting of both ferrous and non-ferrous metals in B & C Plant at Neyveli and the first defendant was the successful bidder in the e-auction conducted by the fifth defendant on 20.01.2005 for the sale of B & C Plant and machineries as a whole lot on “As-is-where-is-basis” for a value of Rs.70,01,00,019/-. He further submitted that the fifth defendant issued the sale order on 16.02.2005 along with the terms and conditions in respect to the completion of the sale. He would submit that, pursuant to the payments made to the fifth defendant, delivery order was issued on 20.04.2005, by which, the delivery period of 300 days was granted, starting from 21.04.2005 and expiring

on 14.02.2006 for removing the materials.

8.1 The learned Senior Counsel further submitted that since the plaintiff approached the defendants 1 & 2 for purchasing the entire materials of the B & C Plant for a sum of Rs.120 Crores plus taxes, the defendants showed their willingness to the plaintiff to dismantle and remove the entire materials, provided, they made a down payment of Rs.120 crores for the purchase of the materials in a whole lot. The learned Senior Counsel would further submit that, in the said circumstances, only the first defendant had requested the plaintiff to pay the entire amount before the removal of the materials and the plaintiff agreed to pay the sum and also made an initial payment of Rs.12 Crores.

8.2 The learned Senior Counsel would argue that, based on the agreement to buy the entire quantity of the material in a whole lot at Rs.120 Crores, the transaction was finalized by the broker Mr.Arvind Jhatakia. He also argued that on 24.04.2005, the first defendant entered into an Agreement with the said Mr.Arvind Jhatakia, by which, the first defendant agreed to pay 0.25% of the sale value to Mr.Arvind Jhatakia as his brokerage charges. He further argued that the defendants 1 & 2 made initial payment of Rs.3 Lakhs and

agreed to pay the balance amount of Rs.27 Lakhs after the receipt of the sum of Rs.108 Crores from the plaintiff and the said Agreement was marked as Ex.D1.

8.3 The learned Senior Counsel further submitted that the defendants 1 & 2 admitted the fact that they received the Demand Draft for a sum of Rs.12 Crores as an advance for the sale to be completed and the plaintiff promised to pay the balance amount within a short period and as such, Ex.P2/Receipt was issued to the plaintiff for receiving the Demand Draft, mentioning the receipt of said sum as advance for the purchase of B & C Plant scrap material. Even in Ex.P.2 it is specifically stated that the price for such purchase shall be fixed at the time of delivery on the market value. He further submitted that in the said receipt/Ex.P.2, neither any price for the material nor time for delivery was fixed therein. Thereafter, the plaintiff was dilly dallying and postponing the payment of further sum under one pretext or the other.

8.4 The learned Senior Counsel would further contend that P.W.1 has categorically admitted that he was informed about the suit transaction by one Aravind Jhatakia, who is a broker and the document, Ex.D1 which is the agreement signed by the broker, who introduced the plaintiff, clinchingly

establishes the entire sale taken place between the plaintiff and these defendants, and the value, for which, the plaintiff entered into such agreement is for purchase of the entire materials as a whole lot for a sum of Rs.120 crores plus taxes and the Commission paid to the broker towards the sale value arranged by him would prove the same. He, therefore, contended that the plaintiff entered into an arrangement with the first defendant for the purpose of purchasing entire B & C Plant for a sum of Rs.120 Crores and a sum of Rs.12 Crores paid by the plaintiff is only towards the advance for the total sale value of Rs.120 Crores, and thereafter, the plaintiff evinced no interest to pay the further amount. Since the plaintiff did not turn up with the payments as promised, the defendants 1 and 2 were forced to execute the dismantling work at the B & C plant, Neyveli, as the delivery order is effective only for 300 days, which expires on 14.02.2006. As the plaintiff did not make payment and complete the sale and delayed the dismantling and removal of the material work, the defendants are put to heavy loss and only to get himself discharged from the liability, the plaintiff has filed the present suit. Therefore, the learned Senior Counsel submitted that the suit is liable to be dismissed.

9. Mr.Adithya Reddy, the learned counsel appearing for the third

defendant would submit that at the time of making payment, the third defendant retired from the partnership firm on 13.04.2005, and therefore, he is not aware of the transaction alleged to have been entered into between the plaintiff and the first defendant, for the value of Rs 120 Crores. He further contended that the plaintiff never contacted the third defendant and that he is not aware of the nature of the transaction between the plaintiff and the second defendant. Further, the learned counsel contended that if at all the plaintiff has anything to do with the advancing of money for the removal of the scraps, that came into existence only on 24.04.2005 and the plaintiff and the defendants 1 & 2 are only aware of the relationship that existed among themselves as the third defendant ceased to be a partner on that day.

10. Mr.S.R.Ragunathan, the learned counsel appearing for the fourth defendant submitted that, the first defendant is a Partnership Firm and at no point of time, the fourth defendant is a Partner in the Partnership-Firm, whereas, he only assisted for preparing the receipt for a sum of Rs.12 Crores. He further submitted that at the time of making the payment by way of Demand Draft by the plaintiff to the first defendant, except, second first defendant, the fourth defendant is no way connected with the first defendant-Firm and is

aware of the transaction between the plaintiff and the first defendant, but the plaintiff has falsely stated that the fourth defendant is one of the partners of the first defendant Firm. Further, the learned counsel submitted that the fourth defendant is neither a proper nor necessary party in the present suit.

11. Heard the learned counsel appearing for the parties and perused the pleading and documents.

Issue No.1:

Whether the plaintiff offered to purchase the entire 'B' and 'C' Plant for a sum of Rs.120 crores plus taxes from the first defendant?

12. Both the plaintiff and the defendants 1 & 2 categorically admitted the fact that the defendants 1 and 2 received a sum of Rs.12 crores on 24.04.2005, by way of Demand Draft No.155034 payable at Chennai (Ex.P.1) issued in their favour by the plaintiff. Further, in the receipt itself, marked as Ex.P.2, it is clearly mentioned that a sum of Rs.12 crores was paid as advance for purchase of B & C plant scrap material, and the price shall be fixed at the time of delivery on the market value. By referring to this, Mr.AR.L.Sunderesan, learned Senior Counsel for the defendants 1 and 2 contended that, on a perusal

of Ex.P.2, it is clear that the price for the metal scraps will be fixed only after the payment of balance amount of Rs.108 crores plus taxes.

12.1 Further, the learned Senior Counsel for the defendants 1 and 2 referred to Ex.D1 and submitted that though the plaintiff is not a party and signatory to Ex.D.1, the learned Senior Counsel would contend that this is one of the important documents, wherein, the contract for purchase of the metal scrap for a sum of Rs.120 Crores by the first defendant was discussed among the parties to the agreement, more particularly, the broker viz., Mr.Arvind Jhatakia, through whom the defendants came to know about the plaintiff. Therefore, according to the learned Senior Counsel for the defendants 1 and 2, the payment of Rs.12 crores by the plaintiff is only an advance payment made by the plaintiff for the entire contract for the purchase of the B & C Plant of Rs.120 Crores.

12.2 This Court perused the receipt dated 24.04.2005, Ex.P.2, wherein, it is stated that the payment of Rs.12 crore is towards advance for a purchase of B & C Plant scrap material, for which, price will be fixed at the time of delivery on the market sale value, which means the defendants are required to fix the

price for delivery of the material to the plaintiff on the market sale value. This Court also examined Ex.P2 and the witness of D.W.1. On a perusal of Ex.P2, it appears that the receipt was issued by the second defendant on behalf of the first defendant under the Letter pad of the first defendant, for receipt of Rs.12 crores by way of Demand Draft, dated 21.04.2005, marked as Ex.P.1 and the said receipt was issued on 24.04.2005. If that being the case, if it is the intention of the parties that the price for the materials would be fixed by the defendants at the time of delivery to the plaintiff, and this Court looks into such a way that first defendant agreed only to supply B & C Plant scrap material to the plaintiff and price shall be fixed at the time of delivery on the market sale value prevailing at that point of time, it is pertinent to note that, no where, does Ex.P.1 contemplate that the total contract value is for Rs.120 Crore

12.3 Further, this Court would like to point out that, if the intention of the parties is to receive Rs.12 crores towards advance out of the total contract price of Rs.120 crores, then, there is no necessity for the parties to mention in Ex.P.1 that the price for the purchase of metal scrap shall be fixed at the time of delivery. Similarly, if the total contract value is for Rs.120 Crore, then, there is no need for the defendants to make a mention in the receipt that they would fix

the price for the purchase of the materials at the market value at the time of delivering the goods. Since in the receipt/Ex.P.2, it is categorically mentioned that the price shall be fixed at the time of delivery at the market value, this Court could only construe that there is a contract between the plaintiff and the first defendant only for the purpose of supply of scrap material and price shall be fixed at the time of delivery of material at the market value. Beyond that, this Court is not in a position to have any other view as stated by the defendants 1 and 2 that both the plaintiff and the defendants 1 and 2 entered into a contract for 120 Crores. Therefore, this Court holds that, there is no contract between the plaintiff and the first defendant to purchase B & C Plant for a sum of Rs.120 Crores from the first defendant and it can only be held that there is a contract between the plaintiff and the first defendant for a sum of Rs.12 Crores, for which, the price will be fixed at the time of delivery on the market value. Accordingly, Issue No.1 is answered against the defendants.

Issue No.2:

Whether the plaintiff became a partner with the first defendant and participated in the dismantling work of 'B' and 'C' Plant and sales as partner?

13. Mr.T.V.Ramanujam, the learned Senior Counsel for the plaintiff

would contend that there is no pleading in the written statement of the defendants 1 and 2 about the implied contract, acquiescence, waiver, estoppel and also no novation of contract. The learned Senior Counsel submitted that though the defendants have pleaded novation by referring to Section 52 of the Indian Contract Act, unless and until, the defendants prove the alleged contract of the plaintiff offering to purchase B & C Plant for Rs.120 Crores plus taxes and the defendants accepting the said offer, there is no question of novation of a non-existing contract and hence, Section 52 of the Indian Contract Act also will not apply.

13.1 The learned Senior Counsel for the plaintiff further contended that the story of Joint Venture Agreement cannot stand on its own, unless and until, the alleged contract of the plaintiff offering to purchase B & C Plant for Rs.120 crores plus taxes and the defendants accepting the said offer is proved. He would also argue that according to the defendants, the plaintiff represented that the plaintiff could not make further payments and requested the defendants that the plaintiff may be treated as a partner and the sum of Rs.12 Crores may be treated as part contribution made by them and the proportionate profit may be shared. He further submitted that what is the proportionate profit, from which

figure, the profit has to be computed, and on what basis and at what rate the proportion is to be calculated. The learned Senior Counsel for the plaintiff further submitted that even as per the case of the defendants 1 & 2, it is a contingent contract and the contingency is that to dismantle and sell scraps in B & C Plant resulting in profit. Even assuming that the agreement entered into between the plaintiff and the first defendant is a joint venture agreement, it is not known as to what are the terms of the alleged joint venture agreement and it does not speak of any share in case of the losses occurred.

13.2 The learned Senior Counsel for the plaintiff contended that, even if it is the case of the defendants that the plaintiff and the first defendant entered into a joint venture agreement, D.W.1, in his cross examination stated that the profit sharing ratio is 3:1, in which event, there should be four persons, and the learned counsel contended that there were only three partners in the first defendant-Firm, and hence, there could not have been a Partnership with the profit sharing ratio of 3:1 and further, the defendants 3 & 4 are claiming that they are not partners to the first defendant-Firm.

13.3 The learned Senior Counsel argued that there could not have been

any consensus for the alleged joint venture agreement with a profit sharing ratio of 3:1 and the alleged joint venture agreement also does not mention anything by the loss and even assuming without admitting that there existed a joint venture agreement between the parties, the said agreement is void for uncertainty in view of Section 29 of the Indian Contract Act. Therefore, he would submit that since the said joint venture agreement becomes void, Section 65 of the Contract Act will come into play and the sum of Rs.12 Crores together with interest has got to be refunded to the plaintiff. He also argued that simply because, certain men of the plaintiff were available at the site at Neyveli, it cannot be stated that the plaintiff joined in the dismantling process conducted by the first defendant-Firm. In fact, the plaintiff's men have nothing to do with removing of the scrap and they cannot do also. If really, the plaintiff's men joined in the process of dismantling work, and removing scrap with the defendants, the particulars of the plaintiff's workmen should have been maintained in writing and signed by both parties. In this connection, he referred to the deposition of D.W.1, which states as follows:-

“I do not know whether the copy of the letter dated 01.04.2009 referred to in Ex.D2 is produced before this Court. We have not produced any authorization letter given by the plaintiff company authorizing Mr.Ashok and Raju to monitor the dismantling work. Witness volunteers and adds: Gate passes were issued to

them.”

13.4 The learned Senior Counsel would contend that it is alleged in the written statement that the men of the plaintiff signed at the log book registers maintained by the fifth defendant, but, no such document has been produced by the defendants to prove the same. Only the defendants 1 and 2 produced some permanent passes and Ex.D.3 to show that the gate passes were issued to plaintiff's persons, viz., Mr.Ashok and Raju by the fifth defendant, but, those two persons were mentioned only as Supervisor in the said document and since they were aware of the prices of the materials, for providing information to the Managing Director of plaintiff, they were sent as representatives on behalf of the plaintiff, and therefore, it cannot be stated that the plaintiff's men participated and managed the dismantling work. He would further contend that in spite of the representatives of the plaintiff being present at the site, the defendants failed to supply any material for a sum of Rs.12 Crores given as advance by the plaintiff to the first defendant. Since the defendants 1 and 2 failed to supply the materials and return the advance paid to them, without having any other option, the plaintiff filed a Police complaint against the defendants 2 to 4 for failure of returning the money and for breach of contract and cheating. Hence, the learned Senior Counsel for the plaintiff

contended that there is no such contract and the plaintiff have not entered any partnership agreement either orally or implied to become a partner with the first defendant and participated in the dismantling work of 'B' and 'C' Plant at NLC.

14. On the other hand, Mr.AR.L.Sundaresan, learned Senior Counsel appearing for the first defendant submitted that after the payment of advance of Rs.12 crores, since the plaintiff was not in a position to remit the entire payments, they contacted these defendants and requested them to permit the plaintiff to participate as a joint venture partner and the amount of Rs.12 Crores paid by them may be treated as their contribution and the proportionate profit may be shared with them out of the sale of the materials at site. In view of the payment of Rs.12 crores and the plaintiff evincing interest to join in the dismantling and removal of the materials and participate in the entire venture as a joint venture partner, the first defendant agreed to the proposal and permitted the officials of the plaintiff viz., Ashok and Raju to be present at the site in the B & C Plant at Neyveli to enable them to keep the stock of the total materials removed from the plant and the sales effected, so that proper accounts can be worked out at the end of the 300 days period or at the end of the entire materials being removed from the site.

14.1 The learned Senior Counsel for the defendants 1 and 2 further submitted that the plaintiff immediately deputed his people Ashok and Raju at the work site of B & C Plant, Neyveli who took part in the dismantling operation. The people deputed by the plaintiff also signed at the log book registers maintained by the fifth respondent, which clearly reveal their presence in the dismantling work at the work site. To evidence the presence of the plaintiff's officials at the NLC site for the period from 05.05.2015 to 12.11.2005, the defendants produced certain gate passes issued by the fifth defendant to Mr.Ashok and Raju and the same was marked as Ex.D3. Therefore, the learned Senior Counsel contended that the representatives of both the plaintiff and the first defendant were monitoring and managing the dismantling and removal of the materials from the site at B & C Plant at Neyveli. The representatives of the plaintiff had been maintaining the register, showing the quantity of materials removed from the site every day, including the lorry number and the place of dispatch. Depending upon the best offer, the lorries are directed to the respective purchasers places for unloading. The materials are sold then and there immediately after the removal from B & C Plant site and after receiving the entire consideration for the same. Hence, the

learned Senior Counsel contended that the representatives of the plaintiff viz., Ashok and Raju were also present and had participated in the sale of the materials removed from the site and was fully aware of the prices that the materials fetched at all times, and this would per se prove that as per the joint venture agreement, the plaintiff took part in the dismantling and removal work of scrap at B and C plant at NLC.

14.2 The learned Senior Counsel for the defendants 1 and 2 further submitted that, P.W.1 in his evidence categorically admitted the presence of his men and Engineers at the work site of the fifth defendant-NLC and the periodical reports sent to him by his men from the work site. The statement makes it abundantly clear that the plaintiff was all along participating in the dismantling work and sale of scrap during the entire contract period and that he had the complete knowledge of the removal of each and every material from the place of the fifth defendant.

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14.3 P.W.1 further admitted that, Mr.Bhaves Shah and Mr.Umesh Muni were present inside the work site of the fifth defendant as his representatives at the time of dismantling. The plaintiff has received the report

about the dismantling from the aforesaid two representatives and the plaintiff was aware that the materials removed during the dismantling at NLC site were filled in trucks and sent outside and sold to the purchasers. Even when one of their representative was not well, the plaintiff has sent other two of their men Mr.Ashok and Mr.Raju to NLC site, who are employees to monitor the dismantling and sales. P.W.1 has infact, categorically admitted that he was monitoring the dismantling every minute and hour by receiving reports about the quantity of material dispatched, type of material dispatched and truck number and that he was getting the details every day over phone.

14.4 Further, he submitted that P.W.1 has categorically deposed that he will also get reports in writing once in 2 months or 2 ½ months and the document in Ex.P14 filed by the plaintiff is the transport details of the scrap removed by the first defendant from the fifth defendant plant. Ex.P14 contains the details about the Bill date, Truck Number and number of trips of the Truck, which was prepared by Bhavesh Shah and Umesh Muni and sent to the plaintiff. The plaintiff has stated that Ex.P14 is the report prepared in his Bombay office based on the report in writing that was submitted by his representatives every 2 to 2 ½ months. P.W.1 further admitted that he was

aware that the materials dismantled at NLC site have been immediately sold to persons, who are interested and ready with the payment. P.W.1 has further admitted that their representatives at the NLC site were looking into as to how many trucks of material they would get. The following is extracted version of P.W.1 during cross-examination by the counsel for defendants 1 & 2:-

“At the time of dismantling at NLC, Bhavesh Shah and Umesh Muni were present as my representatives. Bhavesh Shah and Umesh Muni were inside the site of NLC at the time of dismantling.

I have received report about the dismantling from the aforesaid two representatives. The reports of Bhavesh Shah and Umesh Muni have already been filed by me before this Hon'ble Court. I do not know as to how the process of dismantling takes place at the side. The materials removed during dismantling at NLC site are filled in trucks and sent outside and sold. Ashok and Raju are my office staff. Ashok is working in my office at Pune and Raju are my office at Mumbai. When Bhavesh Shah was not well, I sent Ashok and Raju to NLC site. I do not know as to when Ashok and Raju left for NLC site and how long they stayed there.

I was receiving reports about quantity of material dispatched, type of material dispatched and truck number. I was getting details every day. I used to get these details over phone daily. I used to get reports in

writing once in two months or 2½ months. The document shown to me is document No.10 filed by me, namely, Xerox copy of transport details of scrap by D1 from D5 plant and it is now marked as Ex.P14, Ex.P14 contains the details about the Bill date, Truck number and Number of

Trips of truck. The details furnished in Ex.P14 have been given by Bhavesh Shah and Umesh Muni.

Q: *Is Ex.P14 the periodical report given by your representatives and as referred by you above?*

A. *Ex.P14 is the report in writing that was submitted by my representatives every 2 months of 2 ½ months as I have deposed earlier.*

I am aware that the material dismantled at the NLC site were immediately sold to the persons who are interested and ready with the payment.

It is correct to state that my employees Ashok and Raju were given passes at NLC site at the time of dismantling.

But I knew the total quantity removed from NLC site, since my staff used to note down the same and informed me.”

14.5 Therefore, he submitted that from the above, it is clear that the representatives of the plaintiff were issued permanent passes and were permitted to be inside the plant of 5th defendant only in the capacity as a partner with the first defendant to participate in the dismantling and sales. Therefore, from the documents, viz., Ex.D3, Ex.P.14 and the evidence of P.W.1, it is evidently clear the plaintiff joined as a partner with the first defendant and participated in the dismantling and sale of the scrap materials from the fifth defendant plant.

14.6 Further, the learned Senior Counsel for the defendants 1 and 2

submitted that there was novation of contract. As the plaintiff was not in a position to pay the balance amount of Rs.108 Crores, they requested the defendants 1 and 2 that they (plaintiff) may be treated as a partner in the B & C plant tender and that the amount of Rs.12 Crores paid by them may be treated as their contribution and the proportionate profit may be shared with them. Even though it was not practical, as the plaintiff has to pay more money apart from the amount of Rs.12 Crores paid by him, to compensate the loss that would caused to the first defendant firm, the defendants 1 & 2 agreed to the proposal for the joint venture partnership. In view of the said oral understanding, the plaintiff also asked the defendant-Firm to arrange to allow his representatives to keep watch on the site of the B & C Plant, and accordingly, the defendants 1 and 2 also organized through the fifth defendant and managed to get two passes so as to enable the plaintiff's representatives to be present in the dismantling place and provide minute to minute information to the plaintiff's Managing Director.

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14.7 Further, the learned Senior Counsel for the defendants 1 and 2 submitted that the plaintiff appointed Mr.C.Ramesh Bindhu as the Chartered Engineer and the said Chartered Engineer also visited and inspected the B & C

Plant from 28.06.2005 to 01.07.2005 and filed a Report to the plaintiff on 07.07.2005. The said Chartered Engineer also once again, inspected the B & C Plant on 30.09.2005 and filed a report to the plaintiff on 02.10.2005. Since the plaintiff was a joint partner, the defendants allowed the Chartered Engineer and the plaintiff's representative, viz., Ashok and Raju to be present at the B & C Plant during the process of dismantling and removal of scrap work. If at all, if the intention, with which, the parties have entered into the contract is only to supply the material for a sum of Rs.120 crores, there is no obligation on the part of the defendants to allow the plaintiff's Chartered Engineer to verify the stocks and also permitted the representatives of the plaintiff to take notes of stocks available from time to time and allow them to provide information to the plaintiff.

14.8 Further, Mr.A.R.L.Sundarasan, the learned Senior Counsel contended that, Ex.P14 clearly shows as to how both the representatives of the plaintiff were allowed to be present in the fifth defendant's site. If at all the plaintiff is not a joint partner, what would have made the defendant-Firm to allow the plaintiff's representatives to the site of the fifth defendant-Firm and allow them to provide information to the plaintiff. Further, the plaintiff was

also permitted to note down the particulars of the scrap removed from the site of the fifth defendant. Since there existed an oral agreement between the parties, the defendants 1 & 2 allowed the plaintiff to perform the aforesaid exercises. Therefore, he submitted that there is a joint venture agreement between the plaintiff and the defendants 1 & 2 and as deposed by D.W.1, the profit sharing would be 3:1.

15. This Court, while answering Issue No.1 held that there was a contract between the plaintiff and the defendant for the supply of scrap material for a sum of Rs.12 Crores. When that being the case, now, the issue to be decided in the present case is whether there is any novation of contract between the parties. In this context, it would be worthwhile to refer to Section 62 of the Contract Act, which reads as follows:-

“Effect of novation, rescission, and alteration of contract.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. —If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.”

15.1 Therefore, the duty of this Court is to decide whether the parties have agreed to substitute the new contract or to rescind or to alter the original contract. The original contract between the parties is for supply of material for Rs.12 crores by the defendants to the plaintiff. Whether this contract has been

substituted by virtue of the conduct of the parties either by way of written or otherwise by orally. In the present case, even for a payment of a sum of Rs.12 crores made by the plaintiff to the first defendant-Firm, the parties have not entered into anything in written except Ex.P2, which is the receipt for payment of a sum of Rs.12 Crores issued by the second defendant on behalf of the first defendant. Though there was no written contract, this Court came to the conclusion by analysing the conduct of the parties and by virtue of Ex.P.2 that there was a contract between the plaintiff and the first defendant for the supply of goods for a sum of Rs.12 crore, for which, the price shall be fixed at the time of delivery on the market value.

15.2 Since this Court already found that there was a contract between the plaintiff and the first defendant for the supply of scrap for a sum of Rs.12 crores, it is now for this Court to decide whether there is a joint venture agreement between the first defendant and the plaintiff either by orally or written, and to answer this issue, this Court examined the following aspects from the conduct of the parties:

(a) The advance amount for supply of material was paid by the plaintiff on 24.04.2005. After that, the first defendant started removing the material

from 07.05.2005 or the 1st week of May. The representatives of the plaintiff were present at the B & C Plant at Neyveli from 07.05.2005 onwards and until the removal of the entire scrap. Subsequently, the plaintiff filed a complaint with the Superintendent of Police, Salem on 22.12.2005, stating that their representatives of the plaintiff were present at the site of the fifth defendant at the time of removal from 24.04.2005 to 22.12.2005. The plaintiff not at all made even a single request to the first defendant for the supply of material and the representatives of the plaintiff were just present at the site. This would per se clearly shows that they were not interested in the material and they are only interested in gathering the information with regard to the removal of material and other activities happening inside the site of the fifth defendant. Thus, the plaintiff simply kept quite, and has not complained of anything about the non-supply of material. Hence, this conduct of plaintiff would go to show that the plaintiff have agreed to contribute Rs.12 Crores, which was already paid for supply of scrap to consider the plaintiff as the joint venture partner with the first defendant in the dismantling work of B & C Plant.

(b) The plaintiff appointed the Chartered Engineer Mr.Ramesh Bindu to evaluate the scrap material at the B and C plant. Initially, the plaintiff appointed the Chartered Engineer and the said Chartered Engineer also visited

and inspected the B and C plant on 28.06.2005 to 01.07.2005 and the said Chartered Engineer filed his first report to the plaintiff on 07.07.2005. Further, once again, the said Chartered Engineer inspected B and C plant on 30.09.2005 at the request of the plaintiff and filed his report to the plaintiff on 02.10.2005. As far as the fifth defendant/NLC is concerned, the Chartered Engineer is a third party, it is not necessary for the NLC to allow the Chartered Engineer to value the scrap available at the B and C plant. The said Chartered Engineer was allowed to enter into the B and C plant to evaluate the scrap only upon the request of the first defendant to the NLC/fifth defendant. Therefore, this would show that the first defendant allowed the Chartered Engineer to enter into the B and C plant to evaluate the scrap due to the joint venture agreement between the plaintiff and the first defendant. Barring from any such joint venture agreement, there is no need for the first defendant to allow the Chartered Engineer to enter into the premises of the B and C plant to evaluate the scraps available there. Merely, for the supply of material to the extent of Rs.12 crore, it is not necessary for the first defendant to allow the Chartered Engineer into the B and C plant. Further, if at all, there is any concern for the plaintiff for the supply of the scrap, it is only the price of the scrap and the said price need not be ascertained by appointing Chartered Engineer and visiting the place,

where, the scrape was available, the said price can be ascertained only in the market, which is outside the B and C plant of the fifth defendant/NLC.

c) Further, the plaintiff also stated in the plaint that they have also approached the NLC to note down the particulars of scrap lifted by the defendant from the B & C Plant, for that also, the defendant made arrangement to approach the fifth defendant to get the information. If the plaintiff is merely a purchaser of the scrap material, there is no need for the fifth defendant to allow him to note down the particulars of the scrap lifted by the first defendant. According to the fifth defendant, the plaintiff is only a stranger, there is no necessity for providing any information regarding the removal of scrap by the first defendant. However, the first defendant made arrangements with the fifth defendant to provide necessary information as demanded by the plaintiff. This would also show that the plaintiff was only involved in the capacity of the joint venture partner and has demanded all these particulars and the first defendant also made arrangements and on the request of the first defendant, the fifth defendant also made arrangements to permit the representatives of the plaintiff at B and C plant throughout the period of removal of entire scrap materials.

(d) Further, as discussed above, the first defendant considered the plaintiff as a joint venture partner, as the first defendant allowed the two

representatives of the plaintiff to be present at the site of B & C Plant to monitor the removal of the scrap. The first defendant also made arrangement to get the gate passes for the two representatives of the plaintiffs to enter into the site of the fifth defendant. If the defendants treated that the plaintiff only as a purchaser, obviously, there is no necessity for the first defendant to arrange two gate passes for the two representatives of the plaintiff, to note down the day to day activities relating to the removal of the scrap from the site. It is because of the understanding between the plaintiff and the first defendant for carrying on the business of removal of scrap of B & C material by way of Joint Venture Agreement, the first defendant has rendered all possible assistance so as to enable both the representative of the plaintiff as well as the Chartered Engineer to verify the stocks available from time to time and allow them to provide information to the plaintiff. Therefore, this would also go to show that there is a joint venture agreement between the plaintiff and first defendant.

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15.3 Hence, this Court has no hesitation to hold that there was a contract for supply of material between the plaintiff and the first defendant for supply of material for a sum of Rs.12 crores. Subsequently, the parties to the

said contract agreed to substitute the new contract by virtue of the Joint Venture Agreement. The said Joint Venture Agreement is validated by the conduct of the parties as discussed in the manner stated above in para No.15 to 15.2 (d). Therefore, this Court holds that the plaintiff became the partner with the first defendant and participated in the dismantling work of B and C plant and sales as partner. Accordingly, Issue No.2 is answered.

Issue No.3:

Whether the sum of Rs.12 crores paid by the plaintiff was directed to be treated as their contribution in regard to the arrangement between the plaintiff and the defendants 1 and 2 as a joint venture?

16. In view of the finding to the Issue Nos.1 & 2, it is held that the sum of Rs.12 Crores paid by the plaintiff should be treated as a contribution towards the Joint Venture Agreement entered into between the plaintiff and the defendants 1 & 2. Hence, this issue is answered accordingly.

Issue No.4:

Whether the fourth defendant is a partner of the first defendant firm and whether he is liable for the suit claim?

17. Mr.T.V.Ramanujam, learned Senior Counsel for the plaintiff

contended that the fourth defendant is a staff of the first defendant-Firm. The fourth defendant has taken part in the negotiations between the plaintiff and the first defendant-Firm. The fourth defendant was very much present, when the plaintiff paid the advance of Rs.12 Crores and the same was recorded in Ex.P2 receipt. The fourth defendant has admittedly written Ex.P2 receipt. Further, the fourth defendant, in his Affidavit filed before the Principal and Sessions Judge, Salem, marked as Ex.P.8, says that he is a very big business man. A big businessman need not be a scribe to the document. It is not necessary for him to come all the way from Coimbatore to Palladam to write Ex.P2 Receipt. It was argued by the defendants that there is no pleading that the fourth defendant held out to be a partner. But, in the plaint, it is stated that defendants 2 to 4 represented to be a partners of the first defendant-Firm and promised to supply scrap in B & C Plant to the plaintiff for Rs.12 Crores. The learned Senior Counsel referred to a decision rendered by the Hon'ble Supreme Court, in the case of ***Ram Sarup Gupta Vs. Bishun Narain Inter College*** reported in (1987) 2 SCC 555, wherein, it is held that, "In the absence of pleadings, evidence, if any, produced by the parties cannot be considered. No party should be permitted to travel beyond its pleadings and all necessary and material facts should be pleaded by the party in support of the case set up by it. The object

and purpose of pleading is to enable the adversary party to know the case it has to meet. In the case on hand, the fourth defendant knows what case he has to meet, and that is why this issue has been framed.

17.1 The learned Senior Counsel for the plaintiff further contended that the fourth defendant has also written Ex.P16, and has paid a sum of Rs.1 Crore to the fifth defendant directly on the letter head of the first defendant Firm. The fourth defendant has held out to be a partner of the first defendant Firm at the time when the plaintiff paid the advance of Rs.12 Crores. In view of that, the fourth defendant will be liable under Section 28 of the Partnership Act, 1932. Therefore, the learned Senior Counsel contended that the fourth defendant represented the first defendant Firm and he is liable for the suit claim. Though the fourth defendant has stated that there is reference to profit and liquidated damages, the plaintiff has only stated that he wants refund of Rs.12 Crores with interest and has further stated that if the defendants 1 & 2 had performed the contract as promised, the plaintiff could have sold and made a profit and has also sought for liquidated damages. It is not known why the fourth defendant is relying on this. The fourth defendant does not say that there is a contract for Rs.120 Crores plus taxes. The fourth defendant was present at the time when Ex.P2 receipt was written and he was the scribe. Hence, the fourth defendant

is a partner of the first defendant-Firm by holding out.

18. On the contrary, Mr.S.R.Raghunathan, learned counsel appearing for the fourth defendant refuted the submission of the plaintiff's counsel by stating that the fourth defendant is not all a partner of the first defendant-Firm. He further submitted that the averments in the plaint are exclusive averments against the fourth defendant, regarding the special transaction. Neither does the plaint averments establish that the fourth defendant is a partner in the first defendant firm, nor, there is any documentary evidence to prove that the fourth defendant was a partner or held out to be a partner of the first defendant. He would further contend that admittedly, the fourth defendant is not a partner of the first defendant firm, he did not receive any monies from the plaintiff and hence, not a necessary party to the suit. Thus, the relief sought for by the plaintiff as against the fourth defendant is unsustainable. He would also submit that the plaintiff also not produced any evidence showing that the fourth defendant to be a partner of the first defendant firm at any point of time. On the contrary, the documents marked as Ex.P10 and Ex.P11 clearly establishes that the fourth defendant was not a partner of the first defendant. The suit has been falsely filed against the fourth defendant.

18.1 The learned counsel for the fourth defendant also submitted that in the Proof Affidavit of P.W.1 dated 08.04.2009, for the first time, the plaintiff contended that the fourth defendant held out to be a partner in the first defendant firm. The said statement has been averred in isolation in paragraph Nos.4 & 6 of the Proof Affidavit. A perusal of the proof affidavit and the context, in which, the statement had been made reveals that the same had been added as an afterthought to falsely implicate the fourth defendant. There is no evidence to substantiate the plea of holding out. The fourth defendant has clearly pleaded that he was not a partner of the first defendant-Firm and had filed the deed of partnership of the first defendant which clearly shows that the fourth defendant was never a partner of the first defendant.

18.2 The learned counsel for the fourth defendant further referred to the judgement of the Honourable Supreme Court, in the case of ***Kattinokkula Murali Krishna Vs. Veeramalla Koteswara Rao and Others*** reported in **2010 1 SCC 466**, wherein, it is held as follows:-

“evidence beyond pleadings can neither be permitted to be adduced nor can such evidence be taken into consideration.”

18.3 The learned counsel further advanced the arguments stating that in order to hold out the person liable under Section 28 of the Indian Partnership Act, 1932, on the basis of holding out as a partner in the Firm, it is not enough to show that he represented himself or permitted himself to be represented as a partner. Holding out requires, to put briefly, a representation and knowledge of representation by the plaintiff and action upon the faith of it. It must be shown that the plaintiff did something, which he would not have done, or omitted to do for such representation. In support of his contention, he referred to the judgment *Tower Cabinet Co. Ltd Vs. Ingram* reported in (1949) Vol 1 ALL ER 1033.

18.4 The learned counsel would argue that in order to fall under the category of holding out, the plaintiff ought to have pleaded so and established the same by adducing evidence. The allegation of the fourth defendant holding out has been averred in isolation in Paragraph Nos.4 & 6 of the proof affidavit of P.W.1. A perusal of the proof affidavit and the context, in which, the statement had been made reveals that the same had been added as an afterthought. The fourth defendant had merely written the text of the receipt (Exhibit P-2) on behalf of the second defendant as requested by him, since the

second defendant could not write in English and the same was duly signed by the second defendant. The fourth defendant had never participated in any tender called for by the fifth defendant, and had at no point of time represented to the plaintiff or anyone that he was a partner of the first defendant firm, and was never a partner of the first defendant, not received any money and had held out to be a partner of the first defendant. Therefore, the learned counsel submitted that the fourth defendant is not at all a partner of the first defendant-Firm and the suit is liable to be dismissed against the fourth defendant.

19. On perusal of the documents and upon hearing both the sides, with regard to the Issue No.4, this Court finds that except Ex.P2, no other document have been filed by the plaintiff to substantiate his contention that the fourth defendant is the partner of the first defendant firm. In Ex.P2, the fourth defendant merely prepared the receipt on behalf of both the plaintiff and the first defendant, and apart from that, he has not done any other work. Further, there is no pleading in the plaint to prove the contention of the plaintiff that the fourth defendant is the partner by way of holding out in the terms of Section 28 of the Indian Partnership Act, 1932. The plaintiff is trying to hold up his case without any pleading in the plaint and claim that fourth defendant as the partner

by way of holding out through the Proof Affidavit and oral evidence of P.W.1. Further, the statement of the P.W.1 is not supported by any document. It is only an oral evidence not supported by any pleading in the plaint. Therefore, the same cannot be accepted. The plaintiff also not filed any document pertaining to the partnership to establish, who are all the partners of the first defendant-firm. Therefore, as stated above, though the plaintiff has taken a stand that the fourth defendant is a partner by virtue of holding out, to appreciate the case of the plaintiff that the fourth defendant is the partner of the first defendant firm, the plaintiff has not filed any documents, except, ipse dixit of P.W.1. Therefore, the fourth defendant successfully confuted the submission made on behalf of the plaintiff. Hence, Issue No.4 is decided in favour of the fourth defendant holding that he is not a partner of the first defendant-Firm. Accordingly, fourth defendant is not liable to pay the suit claim.

Issue Nos.5 and 6:

Whether the third defendant has retired from the partnership firm as on 13.04.2005 in accordance with law?

Whether the third defendant is liable for the suit claim under Sections 28, 32 and 45 of the Indian Partnership Act?

20. The learned Senior counsel for the plaintiff submitted that the third defendant is a partner to the first defendant-Firm. The partnership deed, dated 07.03.2005 marked as Ex.P.10, shows that the third defendant is one of the partners to the first defendant-Firm. Even at the time of receiving Rs.12 crore from the plaintiff, the third defendant is a partner, now, a false evidence is sought to be created as if the third defendant has retired from the Partnership as on 13.04.2005. The date of registration of the first defendant-Firm is 10.03.2005, now the third defendant says that he retired from the partnership within 33 days. The deed of retirement is marked as Ex.D.10, the stamp paper is said to have been purchased in Mimisal, a coastal village, near Aranthangi, Pudukottai District, very far of from Tiruppur and further, there is a whitener applied in the place of the date, which clearly shows that it is an anti-dated and created documents. Further, he submitted that clause 4 of the said Partnership Deed is important, as the said Partnership Deed says that the same shall be effective from 20.01.2005, i.e., the date on which, the first defendant was declared as successful bidder. The second and third defendants agree to contribute 50% each towards capital and after completion of the project, the third defendant has no right.

20.1 The learned Senior Counsel for the plaintiff further submitted that in terms of the Clause 8 of the Partnership Deed, both the partners shall look after and manage the day-to-day affairs of the Firm and in terms of Clause 9, both the partners are empowered to operate banking transaction on behalf of the Firm either individually or jointly. Further, as per Clause 11, any Partner desirous of leaving this Partnership can do so only after giving one month notice in writing in RPAD to the remaining partner and entitled to receive his amount lying in the account. The learned Senior Counsel by referring to the above clauses of the Partnership Deed, submitted that, admittedly, no one month notice by RPAD was given by the third defendant. The plaintiff is a third party. The deed of retirement, dated 13.04.2005 is a collusive affair between the defendants 2 and 3 and it is antedated. In inner para 3 of the Deed of Retirement, marked as Ex.D10, it is stated that the retiring partner have scrutinized and accepted the accounts prepared for the period ending 12.04.2005, which is vague, as no figure is mentioned, no such account has been produced before the Court. Therefore, the learned Senior Counsel submitted that the Ex.D10 is nothing but a fabrication of false evidence. Now, the third defendant has marked Form A of the first defendant Firm issued by the Registrar of Firms, Tiruppur, in the cross-examination of P.W.1, which is

marked as Ex.D-5, and on the face of it, the document cannot be relied upon, as the said document has four sheets, in the first page, there is an entry at the right side, “1.06.06, தீய படிவம் V இன் படி 13.04.2005 முதல் நிறுவண தலைப்பு ”. Some Form A has been filed on 01.06.2006, but the money was received from the plaintiff on 24.04.2005, on which date, the so-called retirement has not been intimated to anyone. Hence, he contended that the Ex.D.10 will not bind the third parties. Therefore, the third defendant cannot escape from the liability.

20.2 The learned Senior Counsel further submitted that the deed of retirement is dated 13.04.2005, it is not known as to why, it was intimated on 12.06.2006 to the Registrar of Firms. So after filing of the suit, the defendants 2 and 3 colluded with each other and created the documents. Probably, these documents would have been created when the defendants moved anticipatory bail and in the anticipatory bail petition moved by the third defendant, it is vaguely stated that he is no way connected with the Firm. Even in this case, there is no reference to the deed of retirement, nor any particulars were given, which clearly shows that the defendants 2 and 3 have planned and schemed things to create the deed of retirement.

20.3 Further, the learned Senior Counsel for the plaintiff submitted that in the application filed by the plaintiff, in A.No.826 of 2008, third defendant has filed a counter affidavit, in which, there is no reference to the deed of retirement. The said counter affidavit was filed in the year 2008 and the first and second defendants filed written statement on 03.05.2006. In the written statement, there is no reference to the deed of retirement, and there is no pleading that the third defendant has retired from the partnership. Further, the first and second defendants in their written statement at Para No.8 have stated they reserve the right to file the counter claim against the plaintiff, but, no counter claim has been filed till today. For the first time, in the written statement filed by the third defendant on 19.12.2008, he has come forward with a plea that he retired from the partnership on 13.04.2005.

21. Reverting to the submission of the learned counsel for the third defendant, the learned counsel for the third defendant submitted that there is no specific allegation against the third defendant, ipse dixit, in para No.3.1 and 3.2 of the plaint. Merely, by referring to the defendants 2 to 4, no other materials have been placed to implicate the third defendant in the first defendant-Firm, in the capacity as partner. The sale letter, Ex.P.13 was issued by the fifth

defendant to the first defendant was on 16.02.2005, whereas, the partnership between the second and third defendant was entered into only on 07.03.2005 (Exs.P.10 and P11) after awarding of bid by the fifth defendant. The fact remains that the plaintiff was not even aware of any role or presence of the third defendant in any of the transactions is obvious from the statements by the plaintiff's Managing Director during the cross examination conducted by the counsel for defendants 1 and 2 on 02.03.2010. The plaintiff's Managing Director makes no reference to either knowing, meeting or interacting with the third defendant at any time in the transactions. The third defendant entered into a partnership with the second defendant only after the first defendant obtained the contract from the fifth defendant. Soon thereafter, differences arose between the second defendant and third defendant and third defendant came out of the partnership on 13.04.2005, itself vide deed of retirement entered into between the second and third respondents. Even the second defendant has not disputed the retirement of the third defendant. Only after the said retirement, the plaintiff entered into a contractual relationship with the first defendant. Hence, the third defendant was not a partner of the first defendant-Firm, either at the time, when the first obtained the tender award from the fifth defendant or when the plaintiff entered into any arrangement with the first defendant for purchase

of scrap materials. The fact that the plaintiff was certainly not aware of any involvement of the third defendant in the first defendant's Firm is clear from the plaintiff's statement during cross-examination by the third defendant counsel on 22.03.2010, that he has not seen the partnership deed of the first defendant till the date of filing of the suit. Further, the preparation, drafting and registration of the retirement deed was undertaken by the second defendant, and the third defendant has only signed the same and that, the retirement deed was duly registered with the Registrar of Firms as can be seen from Ex.D5.

21.1 The learned counsel for the third defendant further submitted that there was only contractual agreement showing the transaction between the plaintiff and the first defendant, which is signed by the plaintiff's broker, and the plaintiff is not a party to the said agreement, and hence, he cannot rely on the same. Further, the agreement states that it is being signed by the third defendant, on behalf of the first defendant, but, the fact remains that it is actually signed by the second defendant, and it is not known as to why the second defendant included the name of the third defendant, even though the third defendant had retired from the first defendant-Firm earlier.

21.2 Therefore, it is submitted that the plaintiff has no locus to question the retirement of the third defendant on the basis of non-fulfilment of clause 11, as it is an internal arrangement between the partners. The second defendant being the only other partner, he himself has not disputed the third defendant's retirement. Even as per the Sections 32 (3) and 72 of the Partnership Act, it is clear that a partner shall continue to be liable to a third party for any act done by him, if done before the retirement. According to the learned counsel for the third defendant, the said provision has no application to the case of the third defendant's retirement, because, the third defendant never did any act either during or post his retirement that can be considered as an act of the firm in relation to the plaintiff. In this context, he referred to proviso to Section 32 (3) of the Partnership Act, which is extracted herein below:-

“provided that a retired partner is not liable to any third party, who deals with the Firm, without knowing that he was a partner”

21.3 The learned counsel for the third defendant by referring to the above provision, submitted that third defendant retired from the partnership firm on 13.04.2005, and therefore, he is not responsible for any act of the plaintiff with the first defendant and he is also unaware of the transaction alleged to have been entered into between the plaintiff and the first defendant,

for the value of Rs 120 Crores and if at all the plaintiff has anything to do with the advancing of money for the removal of the scraps, that came into existence only on 24.04.2005 and the plaintiff and the defendants 1 & 2 only are aware of the relationship that existed among themselves, and therefore, the third defendant is not proper and necessary party and liable for the suit claim.

22. From the averments and submission of the third defendant, and on perusal of the documents, it is admitted by both the parties that the Partnership Agreement was entered into between the second and third defendants on 07.03.2005. According to the third defendant, he resigned from the Firm w.e.f. 13.04.2005, due to misunderstanding between himself and the second defendant. However, there was an agreement between the plaintiff and the first defendant-Firm, which was marked as Ex.D.1, wherein, the name of the third defendant was mentioned as partner of first defendant but it has been signed by the second defendant. Eventhough the third defendant resigned from the first defendant-Firm on 13.04.2005, it is an issue to be decided as to why, his name was shown in Ex.D1, agreement, as if, he is representing the first defendant-Firm.

22.1 Admittedly, there is no document to show that, on the date of making payment by the plaintiff on 24.04.2005, the third defendant retired from the first defendant-Firm. On perusal of Ex.D.10, retirement deed and Form A, issued by the Registrars of Firms, which is marked as Ex.D.5, wherein, there is an entry at the right side, "1.06.06, தீய படிவம் V இன் படி 13.04.2005 முதல் நிறுவன கலைப்பு ". Form A has been filed on 01.06.2006 and the same was intimated to the Registrar of Firms on 12.06.2006. Further, the first and second defendants have not stated anything about the retirement of the third defendant in their written statement. Clause 4 of the Partnership Deed clearly states that the firm shall take effect from 20.01.2005, i.e., the date on which, the first defendant was declared as successful bidder. The second and third defendants agree to contribute 50% each towards capital and after completion of the project, the third defendant has no right. When such be the case, in terms of clause 3 of the deed of retirement, third defendant (retiring partner) stated that he confirms and acknowledged having received all the amounts due to him towards his share in the Firm, in full and final settlement of his share in the Firm and also in full settlement of the balance standing to his credit in the capital and current account of the Firm. This is only a vague reference. What was the share of the retiring partner in the Firm and the details of the amount, to

which, the retiring partner is agreeable for, was not mentioned in the deed of retirement, and in the absence of such details, this Court can only construe that the retirement deed/Ex.D.10 was prepared only to defeat the claim of the plaintiff, as if, third defendant retired from the first defendant-Firm.

22.2 Further, as per Clause 11, any Partner desirous of leaving this Partnership can do so only after giving one month notice in writing in RPAD to the remaining partner and entitled to receive his amount lying in the account. Admittedly, there is no such notice was given by the third defendant to the second defendant and no such proof was filed before this Court to establish the compliance of section 11 to prove the same. The filing of retirement deed with the Registrars of Firm, as if, the third defendant retired with effect from 13.04.2005, on 12.06.2006, in which, Form A was filed by the third defendant for dissolution of the partnership with the Registrar of Firms is only an after thought and creates suspicious about the retirement of the third defendant without any iota of doubt.

22.3 Further, in the written statement filed by the first and second defendants, there is no reference to the deed of retirement of the third

defendant. D.W.2/third defendant admits the fact that he has not referred about the retirement from the partnership or about his retirement deed in the counter statement filed on 19.07.2006, filed in O.A.No.96 of 2003, and A.No.628 of 2006. D.W.2 further admitted that he has adopted the counter affidavit of the first and second defendants, which shows that he has no separate case. All these facts would show that the third defendant has not come with a bona fide case about his retirement and he has not confuted the submission of the plaintiff.

22.4 Further, in the absence of compliance of Section 32 (3) and 72 of the Partnership Act on the part of the third defendant, this Court can construe that the third defendant acted as partner of the first defendant-Firm at the time of receipt of Rs.12 Crore from the plaintiff and the retirement deed/Ex.D.10, and Form A is only an afterthought of the third defendant to defeat the claim of the plaintiff. Hence, this Court is not in a position to accept the contention of the third defendant that he retired from the partnership w.e.f 13.04.2005 and it can only be held that the third defendant is one of the Partners of the first defendant-Firm as on the date of receipt of the advance amount from the plaintiff, viz., Rs.12 crore and therefore, he is liable for the suit claim.

Accordingly, issue Nos.5 and 6 are answered.

Issue Nos.7 to 9:

Whether the plaintiff is entitled to the suit claim?

Whether the plaintiff is entitled to claim interest at the rate of 24% per annum from the date of the suit till the date of realization?

To what relief, the plaintiff is entitled to?

23. In view of the findings of this Court in regard to Issue Nos.1 and 2, this Court is not in a position to treat the payment made by the plaintiff of Rs.12 crore as advance for the supply of material and pass the decree as prayed for. This Court has already held that there is a joint venture agreement entered into between the plaintiff and the first defendant, in the manner answered to the Issue Nos.1 to 3, and the said joint venture agreement between the plaintiff and the first defendant was formed only for the purpose of carrying out the business of removal and sale of scrap materials available at the B and C plant. In the present case, the object of forming such joint venture agreement has been completed and therefore, the parties to the agreement has to necessarily determine the profit and loss account in the business, after ascertaining the profit and loss and by giving appropriate debit or credit to the capital invested

by the plaintiff, the plaintiff is entitled to get back the balance capital, if any available, in his account.

23.1 As far as this issue is concerned, this Court has to decide that what would be a profit sharing. There is no document or oral agreement produced/adduced before this Court to decide the profit sharing ratio. Only, D.W.1 deposed in his evidence that the profit sharing ratio was 3:1. However, the plaintiff has not agreed due to the reason that there are three partners. According to him, 2 other partners categorically stated that they are not at all partners, and therefore, the profit sharing ratio 3:1 is a false and not at all agreed. However, this Court already came to the conclusion that there was a joint venture agreement between the plaintiff and the first defendant. In support of the contentions, D.W.1 deposed that the profit sharing ratio was decided between the plaintiff and the first defendant as 3:1. Having this Court accepted the contention of the defendants 1 and 2 based on the conduct of the parties as decided herein before, this Court is in a position to accept the profit sharing ratio as deposed by D.W.1, in the absence of any documentary proof. The submissions of the plaintiff is not supported by any document and it is merely as assertion, without any proof.

23.2 As this Court has already accepted the profit sharing ratio in the joint venture agreement between the plaintiff and the first defendant as 3:1, now, it is proceeded to determine the profit or loss in the business venture agreement based on the averment made by both the parties.

23.3 As stated above, in order to put quietus to the matter, this Court also verified the documents filed by both the parties. It is also found that the first defendant realized the sale revenue to the extent of Rs.39,71,94,989/-. The first defendant admitted this fact in his written statement. Therefore, this Court rounded off the said figure and the total revenue from the sale of the scrap material is to a sum of Rs.40 Crore. The total amount paid to the fifth defendant to purchase the B & C Plant scrap material by the first defendant is for a sum of Rs.70 Crore. Hence, in the present case, this Court is of the view that there is a loss in the business to an extent of Rs.30 Crore i.e., Rs.70 Crore – Rs.40 Crore in the absence of any other accounts rendered by the first and second defendants before this Court. Accordingly, the said loss of Rs.30 Crore shall be borne by both the parties in the ratio of 3:1. Out of the loss of Rs.30 Crore, the plaintiff is liable to bear $\frac{1}{4}^{\text{th}}$ of the total loss, i.e. $\frac{30}{4} = \text{Rs.7.5 Crore}$. The

total investment made by the plaintiff is Rs.12 Crore, by deducting Rs.7.5 Crore towards the loss in the business, a sum of Rs.4.5 Crore (Rs.12 – Rs.7.5), the defendants 1 to 3 are liable to return along with interest from the date of filing of the plaint till the date of realization. Since the present transaction is a commercial transaction, the plaintiff is entitled to interest at the rate of 12% p.a from the date of filing of the suit till the date of realization.

23.4 In the present case, this Court, in order to put quietus to the issue moulded the relief and has taken the loss in the business as Rs.30 Crore, as stated by the first and second defendant in the written statement and calculated the capital to be returned to the plaintiff, after adjusting the profit and loss. It is made clear that, in case, if the plaintiff has still come to know in future, if there is any discrepancies in the sale of scrap, worth Rs.40 Crore, the plaintiff is at liberty to take action against the defendants 1 to 3, for the illegalities and for the loss of profit. Further, this Court also grants liberty to the plaintiff to ask for the rendition of the account from the defendant Nos. 1 to 3. As stated above, if there is any discrepancies in the loss, the plaintiff is at liberty to take appropriate action for the illegalities/misappropriation, if any found subsequently.

23.5 At the time of argument, the learned Senior Counsel for the plaintiff made a submission that, it was only mentioned as profit sharing ratio in the joint venture agreement. Nowhere, it is mentioned as profit or loss sharing agreement. The said submission does not have any merit, because, in the business World, normally, they used to say profit sharing ratio, which includes profit or loss. Therefore, this Court is of the view that the profit sharing ratio means it is profit as well as loss. Accordingly, issue Nos.7 to 9 are answered.

24. In fine, this Court pass the following judgment and decree:-

i) That there is a contract for supply of material between the plaintiff and the first defendant for a sum of Rs.12 Crore.

ii) That there is a Joint Venture Agreement between the plaintiff and the first defendant for removal and sale of scrap at B & C plant, Neyveli.

iii) That a sum of Rs.12 Crore paid by the plaintiff to the first defendant was treated as contribution of the plaintiff to the joint venture arrangement made between the plaintiff and the first defendant.

iv) That the documents filed by the third defendant with the Registrar

of Firms with regard to his retirement with effect from 13.04.2005, in the year 2006, are only an after thought and therefore, this Court is not in a position to accept the said documents, as proof for the retirement of the third defendant.

v) That the third defendant is partner of the first defendant firm, and accordingly, he is liable for the suit claim, in terms of Section 28 of the Partnership Act.

vi) That the fourth defendant is not a partner of the first defendant firm by holding out and accordingly he is not liable for the suit claim.

vii) That the plaintiff is entitled to a sum of Rs.4.5 Crore along with interest at the rate of 12% p.a. from the date of filing of the suit till the date of realization as the present transaction is a commercial transaction.

viii) That this Court grant liberty to the plaintiff to ask for rendition of accounts from the defendant Nos.1 to 3 and to take appropriate legal action for the illegalities / misappropriation of funds, if any found in future, in the first defendant firm.

ix) Cost of the suit.

25. Accordingly, the suit is partly decreed, as stated above.

23.10.2019

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Index : Yes/No



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KRISHNAN RAMASAMY, J.,

mrr

Pre-Delivery Judgment
in C.S.No.88 of 2006



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