

FAT 473 of 2011

Ct-08

**Vikash Somani
Vs.
Reliance Industries Ltd. & Ors.**

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Mr. Satarup Banerjee
Mr. Sariful Haque
Mr. Rajib Mullick
Ms. Shrayashi Maity
... For the Appellant

Mr. Siddhartha Mitra, Sr. Adv
Mr. U.S Menon
Mr. Domingo Gomes
Mr. Abhirup Chakraborty
... For the Respondent no. 1

The appeal is directed against a judgment and decree dated 13th July, 2011 in a suit for declaration of title in respect of 550 equity shares of the defendant no. 1.

We have heard Mr. Satarup Banerjee, learned counsel representing the appellant and Mr. Siddhartha Mitra, learned senior counsel representing the respondent no. 1

Before the trial court, save and except the defendant no. 1, other defendants did not enter appearance.

The plaintiff claims to be a share broker. He had parted with 550 equity shares of the defendant no. 1 allegedly on the basis of a telephonic instruction received from the defendant no. 2. In its attempt to prove sale of 550 shares to the defendant no. 2, a small chit of paper was produced before the trial court, alleged to be a money receipt, issued by the defendant no. 2. Curiously, the plaintiff did not feel it necessary to issue a summon upon the defendant no. 2 or the defendant no. 3 to prove the transaction. The defendant No.1 is not

answerable for the transaction termed as dubious by the learned Trial Judge.

In **Gurbakhsh Singh v. Gurdial Singh** reported at **AIR 1927 P.C. 230** Lord Shaw after referring to the fact that a material witness who was present in court did not go to the witness box pointed out at page 233 of the report as follows:

“Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manoeuvre under which the counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party’s own witness”. (emphasis supplied)

As a corollary it can be stated that the plaintiff cannot take the advantage of non appearance of the defendants as a tool to persuade the court to decree the suit on the ground of non-traverse. Even if the said defendants do not appear and contest the plaintiff is obliged to prove its case- the onus lies on him to prove the transaction.

The inability to produce any witness to prove the transaction is fatal to the case. The onus is on the plaintiff to show that the shares were sold on the basis of the instruction received by him from the said defendant over telephone. The plaintiff could have summoned the person who alleged to have come from the defendant No.2 to take delivery of the shares. The money receipt is not conclusive of the transaction. The plaintiff has failed to discharge his burden of proving the transaction.

As correctly observed by the trial court there is no documentary evidence suggesting any transaction of purchase or sale of shares between the plaintiff and the defendant no. 2.

We are in agreement with the observation made by the learned Trial Judge that the claim of the plaintiff appears to be of doubtful character.

Under such circumstances, the appeal accordingly fails and is hereby dismissed.

There will be no order as to costs.

(Uday Kumar,J.)

(Soumen Sen, J.)

