

*

IN THE HIGH COURT OF DELHI

Judgment reserved on : September 17, 2008

%

Judgment delivered on : September 24, 2008

+

RFA 545/2005

RAVENDER PAUL

..... Appellant

Through: Ms.Maldeep Sidhu, Advocate

VERSUS

GOETZE INDIA LTD.

..... Respondent

through: Mr.Jasmeet Singh, Advocate

CORAM:

Hon'ble Mr.Justice Pradeep Nandrajog

Hon'ble Mr.Justice J.R. Midha

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

: PRADEEP NANDRAJOG, J.

1. The appellant has failed in his endeavour to obtain a favourable decree in the suit filed by him. The judgment and decree dismissing his suit is dated 3.3.2005.

2. The case of the plaintiff was that he was residing in Germany and was carrying on business under the name and style of M/s. LUBTECH MAILRHOFSTR. He stated that his business was to introduce buyers in Germany to manufacturers of leather products in India and take

commission if the deal materialized and the Indian manufacturer sold goods to the Germany buyer. He stated that the respondent appointed him as an agent in 1994 to interact with a German buyer namely Speitch & Wesrsky GMBH & Co. He stated that as per the agreement he was to receive 5% commission on sales affected by the defendant on said German buyer. It was pleaded that in the season concluding in September, 1995 the defendant made sales to the said German Company in sum of Rs.60 lacs and in the second season affected sales worth Rs.80 lacs. Thus, appellant claimed that he was entitled to commission on said sum @5% of the total sale value i.e. Rs.7 lacs. Stating that no payment was made to him hence he was entitled to interest @ 18% per annum, pre-suit interest was calculated @ Rs.2.31 lacs. Suit was filed seeking a decree in sum of Rs.9.31 lacs with pendente lite and future interest @ 18% per annum.

3. In the written statement filed, respondents stated that in the year 1994 it deputed 2 of its representatives namely, Mr. R. Jayaraman and Mr. Vinod Verma, to visit countries abroad including Germany to obtain business. During the course of visit the plaintiff introduced himself to said persons claiming to be an expert in leather garments and boasted of being in touch with importers of leather garments in Germany. To test the plaintiff it was agreed between the plaintiff and said persons that for the ensuring summer

season plaintiff would demonstrate his skills and would prove his worth of procuring orders by obtaining orders for sale to be affected by defendant. It was pleaded that the ensuing period was akin to the plaintiff being a probationer. It was pleaded that no agreement was arrived that the defendant would get any commission to the plaintiff for the first season much less @ 5% on the sales affected.

4. To put it simply the defendant pleaded that by procuring some orders for the ensuing summer months the plaintiff would prove his worth and only then the parties would enter into a contract.

5. On the pleadings of the parties the issue which required to be adjudicated upon was whether the plaintiff was appointed as an agent by the defendant to introduce importers of leather garments in Germany and if yes whether the defendant had agreed to pay commission being 5% of the value of the exports made.

6. To prove his case, the appellant filed several facsimile messages as also photocopies of some facsimile messages. The contents of the documents purport to be communications received by the appellant from the respondent.

7. The original copies of the facsimile message filed by the appellant are a document marked 'B' at page 329 of the Trial Court record; a document marked 'C' at page 333; a

document marked 'D' at page 335; a document marked 'F' at page 337 and a document marked 'G' at page 341. We note some more original facsimile messages which are not marked at pages 331, 343 and 347 of the Trial Court record.

8. We note that most of the original facsimile messages placed on record are not legible. The reason is that the ink used for taking the print of the facsimile message has sublimed/evaporated gradually resulting in the printed words getting faded. Nonetheless, as of today one can make out some impressions of the words even from the naked eye. But, the document(s) cannot be read fully. It is apparent that the paper carried some inscription which over the period of time gradually faded.

9. The learned Trial Judge has non-suited the appellant by refusing to look into the contents of any document referred to in his testimony by the appellant or any document referred to in the testimony of the witnesses of the respondent.

10. Reason why learned Trial Judge has done so may be noted in the language of the learned Trial Judge. The reasoning is as under:-

“.....The only document which suggest some kind of agreement between the parties are photocopies of the Fax messages mark A to G.

Court can not place any kind of reliance on the said copies. Plaintiff had placed on record only

photocopies of Fax messages which he had allegedly received from the officials of defendant company and also copies of Fax messages which he himself had sent to defendant. The original Fax messages which he had received were never placed on record. What were placed on record were mere photocopies of Fax messages received or sent by him. Whenever a person wants to send a Fax message to another person, then, he puts the paper in the Fax machine in his office and then the message gets transmitted to the receiver. The receiver will receive the message on the Fax machine installed in his office. The marks A to G were not original papers. As per **section 65 of the Indian Evidence Act**, secondary evidence can be given where original is in power and possession of the other party. Towards this end a notice to produce must be given to the said other party. This is requirement of **section 66 of the Indian Evidence Act**. In case, the said other party fails to produce the documents then, court can permit leading of secondary evidence. A notice to produce document can also be given **Under Order 12 Rule 8**. Only thereafter, secondary evidence can be led and court can place reliance on copies of documents so produced. Fax messages mark A to G are not even the original messages received or sent by the plaintiff. They are mere photocopies of the messages received and sent by him."

11. It may be noted that a witness of the respondent DW-1 Mr. R. Jayaraman spoke, as under, in respect of some of the facsimile messages:-

".....It is correct that 91-011-6834594 is the fax number of the defendant/company. I, however, do not remember whether 6843922 is the other number of the defendant/company. This fax number is also on document mark at 'A'....."

".....I do not remember whether on 14th February, 1995 I had sent a fax message to the plaintiff stating that the 5% commission, agreed upon, given to him includes 2% commission of Raja. I have seen the document 'G-I' but the same is not legible, it appears to be a blank paper with faded print. I cannot say whether such a fax was sent by our company"

12. Holding that there was no admissible evidence

learned Trial Judge has concluded as under:-

“Reverting back to the facts of the case, defendant witness denied sending of the Fax messages. Court can not draw any presumption that photocopies of Fax messages mark A to E originated from the defendant. Plaintiff has been negligent to the extent of even he did not file the copy retained by him of the Fax message F and G which he himself had sent. Thus, court can not place any reliance on the said Fax messages. In absence of any substantive evidence, court holds that plaintiff was never appointed as agent by the defendant nor defendant was liable to pay any commission to the plaintiff. Both the issues are decided in favour of defendant and against the plaintiff.....”

13. The testimony of DW-1 itself establishes that the facsimile messages were fading with the passage of time.

14. It is unfortunate that counsel for the appellant did not bring it to the notice of the learned Trial Judge that facsimile messages are transmitted over the telephone and the electronic impulse is reproduced in a print form by the facsimile machine and print out is taken on paper with the help of a cartridge ink which has a high ammonia content. Those with a little knowledge of chemistry know that ammonia is a highly vaporizing chemical and vaporizes very rapidly. A print out taken with the help of a chemical having ammonia base would be a perishable print out because with the passage of time due to vaporization of ammonia the imprint would fade and would become extinct at some point of time.

15. It was a practice followed in the industry to immediately take out photocopies of facsimile messages because of the inherent limitation of preserving the contents

of facsimile messages.

16. In our opinion rules of evidence have to be read in harmony with the progress of science. Thus, where a person claims that he had received a facsimile message from the opposite party and produces the faded facsimile messages which cannot be legibly read but produces photocopies thereof and states that the photocopies are obtained from the original facsimile message, on proof of the facsimile message being transmitted, the contents of the photocopy would be admissible in evidence as secondary evidence because the original facsimile message would presumably be lost due to the imprint fading on the original facsimile message.

17. We may highlight the issue with reference to only one document being the document marked 'B'. The document can be graphically reproduced as under:-

" F A X M E S S A G E

GOETZE (INDIA) LIMITED
(LEATHER DIVISION)

To	<u>Mr. RAVINDER PAUL</u>	From	<u>R. JAYARAMAN/MANOJ VERMA</u>
Fax No.	<u>004989835746</u>	Fax	<u>91-011-6834594, 6843922</u>
Date	<u>July 20, 1995</u>	Page	<u>1 of 1</u>
Our Ref.	_____		

Please refer to your fax No.6027 and 6029 dated 13/7/95.

We have reviewed the role and relation between GIL (not legible) yourself. For any relation to last as well as to grow should be a 'You win I win situation created' and all should benefit. The nature of the leather business (not legible) areas on the quality standards between what is acceptable and (not legible) acceptable, is putting the manufacturer at disadvantageous position. When we are not able to get adequate returns for efforts and risk taken, it is difficult for us to pay commission for each order for just introducing a customer.

It is true that when we first met we were keen to do business using an exclusive middleman who has no interest other than promoting our business. We will complete the first (not legible) S & W in another 30 days

and we will sent your (not legible) thereafter. In our initial experience we feel that our (not legible) will not be protected as a company and we are not gaining (not legible) additional advantage by having a middleman. We would then settle your commission after completing the orders.

Regards
Sd/-
R.JAYARAMAN

237, Okhla Industrial Estate, Phase III, New Delhi(not legible)
Ph.: 91-11-6911468, 0885194, 6848970(not legible)
Telex : 091-76256 GIL (not legible)”

18. The document marked ‘B’ shows that if one was to strain one’s eye it is possible to read more than 99% of the contents of the document and the remaining 1% can be filled up subject to context.

19. Similarly, we find that the document marked ‘C’ can also be fully read by straining the eye. It is a facsimile message sent under the signatures of R. Jayaraman. It has a short content. It reads as under:-

“ F A X M E S S A G E

GOETZE (INDIA) LIMITED
(LEATHER DIVISION)

To	<u>Mr. RAVINDER PAUL</u>	From	<u>R. JAYARAMAN</u>
Fax No.	<u>004989835746</u>	Fax	<u>91-011-6834594, 6843922</u>
Date	<u>July 12, 1995</u>	Page	_____ of _____
Our Ref.	_____		

RE : COMMISSION

A suitable commission for introduction and above mentioned services will be paid after the completion of entire order and payment received by us (which is normally the system with our other agents also who are paid on quarterly basis).

Regards
Sd/-
R.JAYARAMAN

237, Okhla Industrial Estate, Phase III, New Delhi(not legible)
Ph.: 91-11-6911468, 0885194, 6848970(not legible)
Telex : 091-76256 GIL (not legible)”

20. Since the learned Trial Judge has not discussed the evidence which was led, we set aside the impugned judgment and decree dated 3.3.2005 and restore the suit for fresh adjudication. While so doing learned Trial Judge would treat all documents marked during the testimony of the appellant/plaintiff.

21. Needless to state decision would be on merits.

22. Parties are directed to appear before the learned Trial Judge on 21.10.2008, who on restoring the suit would assign it to the successor Judge.

23. No costs.

PRADEEP NANDRAJOG, J.

J.R. MIDHA, J.

September 24, 2008
rk