

REPORTED

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) 408/2000

DATE OF RESERVE: August 12, 2008

DATE OF DECISION: March 04, 2009

M/S. KARAN PROMOTERS (P) LTD. Plaintiff
Through: Mr.Harish Malhotra, Sr. Advocate with
Mr.Rajender Aggarwal, Advocate.
versus

THE GREAT EASTERN SHIPPING CO.LTD. Defendant
Through: Mr.Vikas Dhawan, Advocate

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

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?

JUDGMENT

: **REVA KHETRAPAL, J.**

1. The present suit has been brought by the plaintiff M/s. Karan Promoters Pvt. Ltd. against the defendants for the recovery of Rs.42,66,771/- with pendente lite and future interest.
2. The facts as asserted in the plaint are within a narrow compass. The plaintiff company has been doing the business of liaison and property

consultants. The defendant No.1 company was the owner of the building Great Eastern Plaza at 2A, Bhikaji Cama Place, New Delhi. The plaintiff alleges that the defendant No.1 had engaged its services to find out tenants for the entire building. Accordingly, the plaintiff gave a proposal to one M/s. Ericsson Communications Pvt. Ltd. whereby an area of 70000 sq. ft. was offered by the plaintiff to M/s. Ericsson on a monthly rent of Rs.200/- per sq. ft, which included the maintenance charges of the said building. In response to the said offer, discussions were held between the plaintiff and M/s. Ericsson and ultimately the deal was finalized with the plaintiff. In the first instance, M/s. Ericsson had agreed to take only the first, second and third floors of the building which was owned by the defendant No.1, while other portions were agreed to be taken at some later stage. A Memorandum of Understanding was accordingly executed between M/s. Ericsson and the defendant No.1 on 15.05.1996, whereby and whereunder it was agreed that M/s. Ericsson would in the first instance take the first, second and third floors on a monthly rent of Rs.59,37,447.45, on the terms and conditions incorporated therein. Ultimately, a lease was executed by the defendant No.1 in favour of M/s. Ericsson on 4.9.1996, which was registered on 13.9.1996.

3. The plaintiff further alleges that though the fourth and sixth floors of the said building were owned by M/s. Punj Lloyds Ltd. and M/s. Living Media Ltd. respectively, they having purchased the same from the defendant No.1,

but, for the purpose of dealing with the lease of the 4th and 6th floors, the defendant No.1 was given authority by the said purchasers to lease out the said two floors in favour of M/s. Ericsson. The plaintiff being the property dealer in the said deal, was to get brokerage from both the parties, equivalent to one month's rent from M/s. Ericsson as well as the defendant No.1 herein.

4. It is further asserted in the plaint that after the lease was executed for the first, second and third floors of the building, the defendant No.1 paid a sum of Rs.59,37,447/- to the plaintiff in two equal installments. The first installment was paid in October, 1996 and the second installment in the year 1997. The lease with respect to 4th floor was got executed between M/s. Ericsson and M/s. Punj Lloyds on 10.02.1997 on a monthly rent of Rs.13,38,168/- and the lease with respect to the sixth floor was got executed between M/s. Ericsson and M/s. Living Media Ltd. at a monthly rent of Rs.12,18,521/- on the authority given to the defendant No.1 by the purchasers of the 4th and 6th floors. Accordingly, commission at the rate of 13,83,168/- being one month's rent for the 4th floor and Rs.12,18,521/- being one month's rent for the 6th floor became due and payable to the plaintiff from the defendant No.1, as it was the defendant No.1 alone who had engaged the services of the plaintiff as a broker. The defendant No.1 having refused to pay the aforesaid commission to the plaintiff, various notices were issued to the defendant No.1 by the plaintiff, but the defendant No.1 refuted its liability to pay the aforesaid amount, which,

according to the plaintiff it is liable to pay with interest at the rate of 24% per annum, which is the rate prevalent in the trade. The plaintiff accordingly prays that a decree be passed in its favour for a sum of Rs.26,01,689/- with pendent lite and future interest at the rate of 24% per annum on the said amount, totalling to Rs.42,66,771/-.

5. The defendants No.1 and 2 have filed separate written statements, but both the written statements are on the same lines. In the written statement filed by them, the defendants have specifically and categorically denied and disputed that the defendant No.1 had negotiated the lease of the entire building for and on behalf of the buyers. It is submitted by the defendants that after selling and/or transferring different portions of the building to different buyers, the defendant No.1 had no authority or locus standi to deal with the said portions of the building. It is also submitted that the defendant(s) at no point of time engaged the services of the plaintiff, as alleged or otherwise. The defendants state that even the involvement of Mr.Vinod Gupta (of the plaintiff Company) in relation to the first, second and third floors of the building, which were leased out to M/s. Ericsson Communications Pvt.Ltd., was limited to his introducing the said M/s. Ericsson as a prospective client for the leasing of the first, second and third floors of the building. The entire negotiations were held between the representatives of the defendants and the representatives of the said M/s. Ericsson, and Mr.Vinod Gupta was not even involved in the

aforesaid discussions that led to M/s. Ericsson taking on lease the first, second and third floors. However, at no point of time any negotiations or discussions took place between the defendant No.1 and the said M/s. Ericsson for any portion other than the first, second and third floors of the building. The draft Memorandum of Understanding relied upon by the plaintiff, is alleged to be a totally false and fabricated document. The defendants submit that it was never signed by the parties.

6. It is also denied and disputed by the defendants that during that time any discussions were held or any agreement was concluded with regard to the 4th and 6th floors of the building or any talks took place with regard to the leasing out of the aforesaid floors at a later date as alleged. The defendants contend that the plaintiff cannot possibly be entitled to any brokerage from the defendants. The defendants were admittedly neither the lessors nor the lessees of the said portions of the building. The defendant No.1 was at no point of time involved in the negotiations or deal with regard to the 4th and 6th floors nor any authority was given to the said defendant for the aforesaid purpose by M/s. Punj Lloyds or M/s. Living Media. Though the plaintiff did not render the requisite service as a broker for the lease of the first, second and third floors of the building, yet the defendants on the consistent pleading of the plaintiff, agreed to release the brokerage of Rs.59,37,447/- and the plaintiff is now dishonestly seeking to exploit the generosity of the defendant No.1 by making

a wholly false, frivolous and opportunistic claim in respect of the 4th and 6th floors. Accordingly, the defendant No.1 by its letter dated 19.11.1998 informed the plaintiff through Mr.Vinod Gupta that the claim with regard to the brokerage for the leasing of the 4th and 6th floors of the building was false and baseless. In so far as the 6th floor is concerned, which was owned and possessed at the relevant time by one M/s. Living Media India Ltd., the plaintiff does not even know the date as to when the lease deed was executed, which clearly demonstrates the extent of involvement of the plaintiff. The defendants also aver that subsequently the said Living Media India Ltd. re-sold the 6th floor to the defendants on 11.2.1997, but at the relevant time the defendant No.1 had nothing to do with the 6th floor. It is denied by the defendants that the plaintiff is entitled to a decree in the sum of Rs.42,66,771/- or any other amount whatsoever.

7. It bears mentioning that in the preliminary submissions of their respective written statements, the defendant No.1 as also the defendant No.2 have submitted that pursuant to a Scheme of Arrangement sanctioned by the Hon'ble High Court of Judicature at Bombay on 26th August, 1999 and 10th September, 1999, the defendant No.1, the Great Eastern Shipping Co.Ltd. had demerged a part of its undertaking, which comprised of the business activities of managing, developing and operating all commercial complexes/properties, including owning and/or operating business centres as defined in the said

Scheme, to Gesco Corporation Ltd. (now known as Mahindra Gesco Developers Ltd.), the Defendant No.2 herein. The premises in question were also included in the demerged undertaking and consequent to the sanctioning of the Scheme of Arrangement, all rights, entitlements, liabilities, etc. in relation to the said premises and/or buildings have been taken over by and vest in favour of the Gesco Corporation Ltd. The name of Gesco Corporation Ltd. has since been changed to Mahindra Gesco Developers Ltd. pursuant to a fresh Certificate of Incorporation having been granted by the Registrar of Companies on 24.12.2002.

8. The plaintiff in replication submits that the aforesaid Scheme of Arrangement is entirely an internal matter between the defendants No.1 and 2 because the dealings with the plaintiff and the defendant No.1 were prior to the sanction of the said Scheme and the defendant No.2 cannot come in the way of the plaintiff to seek relief against the defendant No.1.

9. On the pleadings of the parties, the following issues were framed for adjudication on 13th May, 2005.

1) Whether Punj Lloyds and M/s. Living Media India Ltd. had authorized the defendant to negotiate a lease with Ericsson Communication Pvt.Ltd. on their behalf as alleged in the plaint? OPP

2) In case Issue No.1 is proved in the affirmative, whether there existed any agreement between the plaintiff and the defendant under which the former was entitled to payment of brokerage in respect of the lease created in favour of M/s.

*Ericsson Communications Pvt. Ltd. qua the 4th and 6th floor of Great Eastern Plaza, 2 A, Bhikaji Cama Place, New Delhi?
OPP*

3) In case Issue No.2 is found in the affirmative, whether the brokerage payable to the plaintiff was equivalent to one month's rent fixed with the lessee namely M/s. Ericsson Communications Pvt. Ltd.

4) Whether the suit is barred by limitation? OPD

5) Whether the suit is bad for non-joinder of parties. If so, to what effect? OPD.

6) Relief.”

10. In the course of trial of the suit, the plaintiff, Mr.Vinod Gupta tendered in evidence his affidavit by way of evidence, Ex.PW-1/A and was cross-examined at length. Mr.Deepak Nayar, the Senior Manager of the defendant No.2 company also tendered in evidence his affidavit by way of evidence on behalf of the defendants No.1 and 2 and was also cross-examined at some length (Exhibit DW1/A).

11. I have heard Shri Harish Malhotra, the learned senior counsel for the plaintiff and Shri T.K.Ganju, the learned senior counsel for the defendants and gone through the evidence on record. After hearing the learned counsel for the parties, my findings on the issues are rendered as follows:-

Issues No.1, 2 and 3:

12. Issues No.1,2 and 3, being closely inter-linked and inter-connected with each other, are being dealt with together.

13. It is not in dispute that at the relevant time M/s. Punj Lloyd Ltd. and M/s. Living Media India Ltd. were the owners of the 4th and 6th floors respectively, though subsequently the 6th floor has been purchased by the defendant No.2, M/s. Mahindra Gesco Developers Ltd. It is also not in dispute that the 4th and 6th floors were given on lease to M/s. Ericsson Communications Pvt. Ltd. (for short Ericsson), who is not a party to the present suit. The sheet anchor of the case of the plaintiff is that the defendant No.1, the Great Eastern Shipping Co. Ltd. though had sold the 4th and 6th floors to M/s. Punj Lloyd and M/s. Living Media India Ltd., had authorization from the said two concerns to negotiate a lease with M/s. Ericsson.

14. The onus of proving that M/s. Punj Lloyd and M/s. Living Media India Ltd. had authorized the defendant to negotiate a lease with M/s. Ericsson, as alleged in the plaint, is on the plaintiff. The plaintiff has sought to discharge the said onus by tendering in evidence the affidavit by way of evidence of Shri Vinod Kumar Gupta. In his said affidavit by way of evidence, Shri Vinod Kumar Gupta admitted on oath that the defendant had sold certain floors of M/s. Great Eastern Plaza to different parties and it retained with it only the 1st, 2nd and 3rd floors, thereby clearly admitting that the plaintiff was not the owner of the 4th and 6th floors. PW-1, however, further stated that the defendant No.1 company had negotiated the lease of the entire building for and on behalf of the subsequent purchasers, as they had authorized the defendant company to do so

and in this regard the exchange of correspondence is relied upon by the witness, being the letter dated 16th February, 1996 written by M/s. Ericsson to the defendant No.1 with copy to Shri Vinod Gupta, the Managing Director of the plaintiff; the letter dated 20th March, 1996 also sent by M/s. Ericsson to the defendant No.1 with copy to Shri Vinod Gupta, the Managing Director of the plaintiff and the letter dated 10th October, 1996 sent through fax by the defendant No.1 to Shri Vinod Gupta (exhibited as Exts.PW-1/3, PW-1/4 and PW-1/5). Reliance is also placed by the witness upon the unsigned draft of Memorandum of Understanding to which the proposed signatories were the defendant No.1, M/s. Anand Weaving & Spinning Mills Ltd., M/s. Punj Lloyd Ltd. and M/s. Living Media India Ltd. (Ex.PW-1/6).

15. Placing reliance upon the aforesaid letters, the learned senior counsel for the plaintiff, Mr.Malhotra submitted that in respect of the 4th floor, the lease executed between M/s. Ericsson and M/s. Punj Lloyd Ltd. on 10th February, 1997 was on a monthly rent of Rs.13,38,168/-, which had materialized due to the efforts of the plaintiff alone and thereafter, the lease with respect to the 6th floor was got executed between M/s. Ericsson and M/s. Living Media India Ltd. at a monthly rent of Rs.12, 18,521.70 and consequently the defendant No.1 became liable to pay the aforesaid amounts being one month's rent respectively for the 4th and 6th floors, as it was the defendant No.1 who had engaged the services of the plaintiff and as the lease with respect to the first,

second, third, fourth and sixth floors had been struck at one go, though it was decided to be executed in parts. The defendant No.1 though had paid a sum of Rs.59,37,447/- to the plaintiff in two equal installments as brokerage for the lease executed for the first, second and third floors, had illegally refused to pay the commission to the plaintiff for the fourth and sixth floors on the pretext that the plaintiff was not involved in materializing of the said leases.

16. Per contra, the learned senior counsel for the defendant, Mr.T.K.Ganju vehemently contended that the plaintiff had miserably failed to discharge the onus placed upon it of establishing that the defendant No.1 had the authorization from the owners of the fourth and sixth floors to negotiate the lease agreements on their behalf. Insofar as the letter dated 16th February, 1996 (Ex.PW-1/3) is concerned, the said letter was addressed by M/s. Ericsson as proposed lessees to the defendant No.1 as proposed lessor and merely shows that certain negotiations were held between the former and the latter for the lease of the building, the Great Eastern Plaza. The subsequent letter dated 20th March, 1996 (Ex.PW-1/4) is also of no assistance to the plaintiff, inasmuch it shows that M/s. Ericsson made the following request to the defendant No.1:

“Further, you are requested to get us letter from all the lessors to whom part of the building has been sold out by you, stating that, they agree to the terms and conditions that have been agreed to between our Company and the Great Eastern Shipping Co. Ltd. The letter should also state that they authorize the Great Eastern Shipping Ltd. to consolidate the deal and to agree to the construction and leasing terms on

their behalf”

17. Thus, from the contents of the aforesaid letter it is clear that there was no authorization given to the defendant No.1 by the purchasers of the fourth and sixth floors to deal with the leasing out of the said floors.

18. Next, advertng to the letter dated 10th October, 1996 (**Ex.DW-1/P1**), the said document though is a fax sent by the defendant No.1 to M/s. Cat Eye Corporation through Mr.Vinod Gupta (PW-1), the same pertains to brokerage in connection with the leasing of the first, second and third floors to M/s. Ericsson, the relevant portion of which reads as under:

“Notwithstanding the fact that we had no previous agreement on your service charges, in spite of numerous attempts on our part, we have acceded to your request.

Our head office has accorded approval to one month's rental as brokerage to be paid in two equal instalments, the first instalment shall be paid presently and the second in the first half of 1997”.

19. The above letter, Mr.Ganju contended, which is heavily relied upon by the plaintiff, also does not further the plaintiff's case in any manner, as the lessor of first, second and the third floors was admittedly the defendant No.1, while the fourth and the sixth floors had been sold by the defendant No.1 to M/s. Punj Lloyds and M/s. Living Media India Ltd. Thus, none of the aforesaid letters show that any authority was given at any point of time by M/s. Punj Lloyds to the defendant No.1 requiring the defendant No.1 to act as their agent. This, despite the request made by M/s. Ericsson to the defendant No.1 to obtain

such authorization.

20. Likewise, Ex.PW-1/6, which purports to be a Memorandum of Understanding, inter se, the Great Eastern Shipping Company, M/s. Anand Weaving and Spinning Mills Ltd., M/s. Punj Lloyds Ltd. and M/s. Living Media India Ltd. as the lessors and M/s. Ericsson as the lessee, in no manner furthers the case of the plaintiff, as the plaintiff is admittedly not a party to the said draft Memorandum of Understanding. Whether the said draft Memorandum of Understanding was subsequently executed by the parties and acted upon, is also a matter of conjecture, as there are no pleadings on the record in this regard.

21. Mr.T.K.Ganju, the learned senior counsel for the defendant contended that a bare reading of the plaint and the written statements lead to the clear inference that the plaintiff had not been authorized by the defendant No.1 to lease out the fourth and sixth floors. The defendant No.1, in fact, not being the owner of the said property, had no authority to do so. In order to constitute an agency, there must necessarily be an agent and principal relationship, but in the present case, there exists no evidence on record except the self-serving statement of PW-1 Shri Vinod Kumar Gupta. The fourth and sixth floors of the building admittedly did not belong to the defendant and in the absence of any document on record to establish any authority given by the owners of the said property to lease out the fourth and sixth floors, it is evident that no right exists

with the defendant to do so. The defendant company is neither the lessor nor the lessee of the said premises.

22. Mr. Ganju further contended that a perusal of Section 230 of the Contract Act, 1872 shows that unless an agent personally binds himself, he is not liable for contracts entered into by him for and on behalf of his principal. There is no doubt a presumption to the contrary, in case where the contract is made by an agent for the sale or purchase of goods for a merchant residing abroad; where the agent does not disclose the name of his principal and where the principal, though disclosed, cannot be sued. None of these exceptions being applicable to the present case, the defendant cannot be held liable to pay the brokerage, even assuming for the sake of argument that the defendant had entered into a contract on behalf of the owners of the property.

23. Indubitably, in my view, quite apart from the fact that there is nothing on record to show what efforts were put in by the plaintiff in the obtaining of the lease agreements, there is not a single document on record to show that the defendant was authorized by the owners of the fourth and sixth floors of the building, M/s. Punj Lloyd Ltd. and M/s. Living Media India Ltd., to negotiate the lease on their behalf. The best evidence appears to have been suppressed by the plaintiff for reasons best known to it. The basis of the plaint, as emphasized above, are the letters dated 16th February, 1996 and 20th March, 1996. The said letters have not even been proved by the plaintiff in accordance with law. The

letter dated 16th February, 1996 (Ex.PW-1/3) is a photostat copy of the letter addressed by M/s. Ericsson to the defendant No.1 through Col. R.S.Sodhi. The letter dated 20th March, 1996 likewise is a letter from M/s. Ericsson to the defendant No.1 through Col.R.S.Sodhi. The only way of proving the aforesaid documents would have been to summon the author of the said letters, i.e., M/s. Ericsson. No witness from the said concern has been summoned by the plaintiff and the mere fact that the said letters bear exhibit marks (despite opposition raised to the exhibiting of the said documents by the counsel for the defendant at the time of recording of the evidence), is not sufficient to prove the originals thereof. Nor has any foundation been laid for the leading of secondary evidence under Section 65 of the Evidence Act by the plaintiff [*See Sital Das vs. Sant Ram AIR 1954 SC 606*].

24. Even assuming the said documents to be duly proved in evidence, neither of the said documents shows that the defendant was authorized to act on behalf of the owners of the fourth and sixth floors of the building in its capacity of erstwhile owner. Then again, no witness has been summoned from either M/s. Punj Lloyds or M/s. Living Media India Ltd. by the plaintiff to buttress its contention that the said companies had authorized the defendant company to act for and on their behalf. Thus, the plaintiff has not deemed it expedient to call any witness either from the side of the lessor or from the side of the lessee to prove the authorization of the defendant No.1.

25. On the other hand, PW-1 in the course of his cross-examination has admitted that “In the trade commissions are usually taken from the side of the landlord as well as from the side of the tenant”. The defendants are admittedly neither the landlord nor the tenant and as already stated, there is not an iota of evidence on record to establish that the lessors had given any authorization to the defendant No.1 to lease premises sold to them on their behalf. Even assuming the same to be there, the defendant cannot be held liable in view of the provisions of Section 230 of the Contract Act, 1872. Admittedly also, a suit has been filed by the plaintiff to recover its brokerage from M/s. Ericsson – the lessee, and the matter is pending adjudication before this Court.

26. Issues No.1,2 and 3 are accordingly decided against the plaintiff.

27. **Issue No.4:** *Whether the suit is barred by limitation?:*

In the context of the bar of limitation, it is the plaintiff's case that the lease for the fourth floor was executed on 10th February, 1997 and the plaintiff became entitled to commission in the sum of Rs.13,83,168/- on the said date and it again arose when the lease for the sixth floor was executed and the plaintiff became entitled to Rs.12,18,521.70 being one month's rent by way of commission. The date of the second lease has not been mentioned in the plaint, and though a specific question in this regard was put to the sole witness of the plaintiff, PW-1 Shri Vinod Gupta, he stated that he did not remember the date of the lease agreement with M/s. Living Media India Ltd. Thus, the lease was

presumably executed either on the same day or thereabout.

28. The present suit being a suit for recovery of money, for which there is no prescribed period of limitation, falls within the ambit of Part-X of the Schedule to the Limitation Act, 1963, which stipulates that the period of limitation shall be three years from the date when the right to sue accrues, in the case of any suit for which no period of limitation is provided elsewhere in the Schedule. Admittedly, the suit was filed on 22.02.2000 and thus, the suit appears to be barred by limitation.

29. Issue No.4 is accordingly decided in favour of the defendants.

30. **Issues No.5 and 6:**

In view of my findings on issues No.1 to 3 above, it must be held that M/s. Punj Lloyd Ltd. and M/s. Living Media India Ltd. were necessary parties to the suit and it was, therefore, incumbent upon the plaintiff to implead them as such. M/s. Ericsson would also be a proper party to the suit. The suit is, therefore, held to be bad for mis-joinder of parties. Issues No.5 & 6 are decided accordingly.

Look at it from any angle, the plaintiff cannot be held entitled to any relief from the defendants. In view of this conclusion, CS(OS) 408/2000 is dismissed, leaving the parties to bear their own costs.

REVA KHETRAPAL, J

March 04, 2009

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