

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

*Judgment Reserved on: 08.1.2010*  
% *Judgment Delivered on: 15.1.2010*

+ **CS(OS) No.3164/1996**

SH. K.J.ARORA,  
PROPRIETOR M/S ARORA & ASSOCIATES  
.....Plaintiff

Through: Mr. Abhinav Vashisht and  
Mr.Sumit Singh Benipal,  
Advs. for the plaintiff.

Versus

M/S CAMA AUTOMOBILES PVT. LTD.  
.....Defendant  
Through: (Ex parte)

**CS(OS) No. 3165/1996**

SHRI K. J. ARORA  
PROPRIETOR M/S ARORA & ASSOCIATES  
.....Plaintiff

Through: Mr. Abhinav Vashisht and  
Mr.Sumit Singh Benipal,  
Advs. for the plaintiff.

Versus

AMERICAN EXPRESS BANK LTD.  
.....Defendant.  
Through: Mr. Mudit Sharma, Adv.  
for the defendant.

**CORAM:**  
**HON'BLE MS. JUSTICE INDERMEET KAUR**

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

3. Whether the judgment should be reported in the Digest?  
Yes

**INDERMEET KAUR, J.**

1. By this common judgment (i) CS(OS) No.3164/1996 titled as Sh. K.J.Arora proprietor M/s Arora & Associates Vs. M/s Cama Automobiles Pvt. Ltd. and (ii) CS(OS) No.3165/1996 titled Sh.K.J. Arora proprietor M/s Arora & Associates Vs. M/s American Express Bank shall be disposed off. Vide order dated 22.4.2004 passed in Suit no.3164/1996 both the suits had been ordered to be tagged together.

2. Plaintiff K.J.Arora proprietor of M/s Arora & Associates has filed two suits for the recovery of Rs.26,92,924/- from each of the two defendants in the respective suits. This amount includes the outstanding finder's fee in sum of Rs.16,74,000/- and interest @ 22% per annum from 24.2.1994 to 30.11.1996 i.e. in the sum of Rs.10,18,924/-, totalling the aforestated figure.

3. Briefly stated the facts are that the plaintiff was carrying on business under the name and style of Arora & Associates of finding for fee, buyers, prospective sellers and lessors, prospective lessees of immovable property i.e. in his capacity as a broker and charging a brokerage fee.

4. Defendant of Suit No. 3165/96 i.e. the American Express Bank in or around December 1993 approached the plaintiff through its travel related services department to find for them a

suitable premises in New Delhi having a minimum area of 1,30,000 sq. feet for the purpose of shifting its offices.

5. Plaintiff was professionally engaged by the defendant of Suit No. 3164/96 i.e. M/s Cama Automobiles Pvt. Ltd.( hereinafter referred to as CAMA) to introduce a tenant for its property located at A-37, Main Mathura Road, now known as Mohan Cooperative Industrial Area, New Delhi ( hereinafter referred to as the “said property”) which was under construction at the said time.

6. Plaintiff informed the defendant i.e. the American Express Bank that it was in a position to negotiate on their behalf in respect of the said property for the purpose of their tenancy on its usual business terms for such letting namely at a fee equivalent to one month’s rent and if a security deposit is payable in addition to the rental, at a fee equivalent to 1% of such deposit in addition to the fee payable on the rental. On their approval, the plaintiff introduced the representative of CAMA to the representatives of the American Express Bank and negotiations were held between them from time to time.

7. On 15.12.1993 CAMA issued a letter to the plaintiff setting out the terms and conditions on which the CAMA was willing to let out the said property to the American Express Bank. Pursuant thereto on 16.12.1993 a memorandum of understanding was executed between the American Express Bank and CAMA wherein it has been mentioned that this deal had been done through the

efforts of M/s Arora Associates having their office in 429, World Trade Centre, Babar Road, New Delhi i.e. the plaintiff. In terms of this memorandum CAMA agreed to let out this property to the Bank at a rent of Rs.13,50,000/- per month and a security deposit of Rs.3.24 crores. The defendant i.e. the American Express Bank even as on date is occupying the said property.

8. Plaintiff has prayed that the agreed professional/finder's fee of Rs.16,74,000/- detailed above be paid to him from each of the two defendants i.e. CAMA and American Express Bank which compromises of one month rent of Rs.13,50,000/- and Rs.3,24,000/- as 1% of the security deposit as the entire transaction between CAMA and the American Express Bank had matured through the efforts of the plaintiff. Decree for the aforestated amount as also interest @ 22% per annum till the date of the filing of the suit from 24.2.1994 up to 30.11.1996 comprising of Rs.10,18,924/- has been prayed for; pendente lite interest from the date of filing of the suit till the date of decree with future interest @ 22% per annum has also been prayed in each of the two suits.

9. In Suit No. 3164/96 defendant i.e. CAMA was served by publication. Since none had appeared for the defendant he was proceeded ex parte on 11.11.1999. Ex parte evidence was filed by plaintiff in the said suit.

10. Written statement filed by the defendant in Suit No. 3165/96 has denied the liability. It is stated that even as per the case of the plaintiff the memorandum of understanding relied upon by the plaintiff is a document executed between CAMA and the American Express Bank where the plaintiff is not a party; the suit is bad for mis-joinder of parties as CAMA has not been impleaded who is also a necessary party. It is denied that the plaintiff is entitled to any finder's fee; it is stated that there was no such agreement to the said effect; there is no contract between the parties.

11. On merits, it is submitted that the American Expression Bank had sometime in August 1993 through its travel related services advertised in the 'Hindustan Times' inviting offers from landlords for real estate to be used for office purposes. On 3.8.1983 some responses were received by the defendant which included an offer made by the plaintiff who had offered three sites but which did not include the disputed property. It is submitted that the offer letter does not speak of any commission or brokerage in its terms and conditions; defendant had not specifically engaged the plaintiff to locate any space; no finder's fee much less the quantum of the finder's fee had been agreed to between the parties.

12. On 09.11.1993 Rajesh Arora, Chief Executive of M/s Arora & Associates i.e. the plaintiff had sent an unsolicited offer to the defendant offering him an independent building under

construction @ Rs.12 per sq. feet; subsequently a letter dated 14.12.1993 had been written to the answering defendant by CAMA giving details of the disputed property whereby CAMA had expressed its willingness and authorized the plaintiff to negotiate on their behalf to rent out the disputed property @ Rs.12 per sq. feet and negotiate other terms; however, this letter did not speak of any terms between CAMA and the plaintiff and nor any terms with the answering defendant.

13. It is submitted that the memorandum of understanding dated 16.12.1993 was not a memorandum of understanding in any sense of its term; it only stipulated the intention of CAMA to lease out the premises; party no.2 i.e. the defendant had neither accepted the offer nor the terms thereof; this document had only been received on behalf of the defendant; no commitment and acceptance on behalf of the defendant had been created by this document.

14. It is stated that this deal finally did not mature through the plaintiff as the owner of the property i.e CAMA backed out of the same. In spite of efforts of the answering defendant to bring them to the negotiating table the matter was dropped and no further efforts were made to progress the deal; matter was deemed as closed. Subsequently certain other offers were forthcoming. In January 1994 an offer was received from Mr. Surender Arora of 419, Antriksh Bhawan, 22, K.G. Marg, New Delhi offering premises

A-37, Mohan Co-operative Industrial Estate, Mathura Road i.e. the same premises which the plaintiff had offered and in respect of which the negotiations had fallen apart. In this offer of 10.1.1993 Mr.Surender Arora gave details of the premises as also the terms and stated that the charges for their services rendered will be equal to one month's rent. Thereafter a formal lease was executed between CAMA and the defendant i.e. American Express Bank on 28.1.1994 through the efforts of Mr. Surender Arora.

15. It is submitted that on 1.2.1994, the plaintiff had offered another premises i.e. the premises no.A-36, Mathura Road along with a letter from M/s Tirath Ram Ahuja Ltd., the owner of the said property. In this offer also the plaintiff had not mentioned any terms of their brokerage/commission or finder's fee which they had agreed to accept from the answering defendant.

16. It is submitted that from this letter dated 1.2.1994 it was clear that the plaintiff had abandoned efforts to get the deal in respect of A-37, Mathura Road finalized and he had resorted to offering another fresh deal in respect of property A-36, Mathura Road; it is thus clear that there was no concluded contract between the parties.

17. It is further submitted that because of the inability of the plaintiff to progress the deal with regard to this disputed property the defendant had to pay 50% more for taking the same premises on lease through the efforts of another person. The present suit is

misconceived and malafide. Plaintiff is not entitled to any amount, suit be dismissed.

18. Replication had been filed by the plaintiff reiterating the averments made in the plaint and denying the submission and the defence as set up by the defendant.

19. On 13.11.2000 on the pleadings of the parties, the following issues were framed in Suit No. 3165/96:-

1. Whether the plaintiff is entitled for recovery of Rs.26,92,924/- as claimed in the plaint ? OPP
2. Whether the plaintiff is entitled to interest @22% p.a. on Rs.26,92,924/-? OPP
3. Whether the suit is bad for mis-joinder and non-joinder of the parties? OPD
4. Whether the agreement dated 16<sup>th</sup> December, 1993 is a valid document between the parties? OPD
5. Relief.

20. Arguments have been heard and appreciated. Record including the documents of both the suits i.e. Suit No. 3165/1996 and Suit No 3164/1996 have been perused. Ex parte evidence by way of affidavit has been filed in suit no.3164/1996. Issues were framed in Suit No.3165/1996. Findings are as follows:

21. ISSUE NO.3 :-

22. Two independent suits had been filed by the plaintiff against the lessor and the lessee of the property namely CAMA who is the owner of the suit property and American Express Bank who is the lessee in the said property. Plaintiff has set up two independent causes of action against both the respective defendants and had filed two separate suits against the said two defendants. Both the suits have been ordered to be tagged together vide order dated 22.4.2004. The suits being based on two independent causes of action, the absence of either defendant would not preclude the plaintiff from pressing his claim against the other. There is no non-joinder of parties. Issue No.2 is decided in favour of the plaintiff and against the defendant.

23. ISSUE NOS.1 & 4

24. Both the issues are co-related and will be decided by a common discussion.

25. In suit No.3164/1996 the defendant is ex parte. The averments made in the plaint of the suit No.3164/1996 are identical with the averments made in the suit No.3165/96. The amounts claimed are also identical. Defendant in suit No.3164/1996 is the landlord of the said property which was the subject matter of the lease to the American Express Bank i.e. the lessee and the defendant in suit No.3165/1996.

26. Plaintiff in both the suits has filed his affidavit in evidence and has reiterated the averments made in the plaint on oath in Court.

27. In Suit No.3165/1996 on oath the plaintiff has proved the advertisement dated 1.8.1993 which had appeared in the Hindustan Times. Ex.P-1 is the said document; this is an advertisement of the American Express Bank seeking requirement of office space for their organization; in response thereto the plaintiff vide Ex.P-2 i.e. the letter dated 3.8.1993 had responded and offered three different accommodations for the said purpose but which did not include the disputed property. On 09.11.1993 vide Ex.P-3 plaintiff again wrote to the American Express Bank offering an independent building under construction on a corner plot of Main Mathura Road; however, further details of the said building did not find mention in the said letter.

28. It is clear that up to this date i.e. upto 9.11.1993 there is no documentary evidence exchanged between the plaintiff and the American Express Bank or with CAMA whereby the plaintiff had initiated the proposal for leasing out the disputed property owned by CAMA to the Bank as a prospective lessee.

29. On oath, it has been reiterated by the plaintiff that verbally he had been informed by CAMA to introduce a tenant for its property located at A-37, Main Mathura Road, Mohan Co-operative Industrial Area, New Delhi which was under construction at that

time; keeping in mind the requirement of the American Express Bank and the suitability of the location the plaintiff informed the bank that it was in a position to negotiate on their behalf in respect of this property on its usual business terms i.e. at a fee equivalent to one month's rent and if a security deposit is payable in addition to the rental, at a fee equivalent to 1% of such deposit in addition to the fee payable on the rental. This was admittedly a verbal communication.

30. On 15.12.1993 i.e. Ex.P-4 CAMA the owner of the said property issued to the plaintiff a letter setting out the terms and conditions on which the CAMA was willing to let out the said property to the American Express Bank. Ex.P-4 is a letter addressed by Rajan Thakural managing director of Cama Automobiles to the plaintiff setting out the proposal to lease out its property comprising of a total area of 1,35,000 sq. feet on the lower ground floor, ground floor, upper ground floor and first floor at a proposed rental of Rs.12 per sq. feet per month with a security deposit of six month interest free rental. This document is clearly a proposal only.

31. On 16.12.1993 vide Ex.P-5 a memorandum of understanding was purported to have been executed by CAMA through its managing director Rajan Thukral on one hand and American Express Bank Ltd. through Ramit Nagpal on the other hand. This document has been relied upon heavily by the plaintiff to establish

his claim that this was a memorandum of understanding executed between CAMA and American Express Bank mentioning therein that this deal has been done through the efforts of the plaintiff i.e. the M/s Arora & Associates having its office in 429, World Trade Centre, Babar Road, New Delhi. The plaintiff having thus completed his job of having introduced the lessor and the lessee with one another which deal finally came to be finalized in terms of the agreement to lease out this property dated 28.1.1994, it is clear that the plaintiff became entitled for his commission/finder's fee from both the parties i.e. from CAMA as also the American Express Bank.

32. Perusal of Ex.P-5 shows that this is an untitled document; it has been confirmed and accepted for Cama Automobiles by Rajan Thukral but on behalf of the American Express Bank, it has been received by Ramit Nagpal. The very fact that American Express Bank had only received the document clearly shows the intention of the Bank; the intention being that the parties were yet to negotiate a final deal; this document Ex.P-5 was an offer given by CAMA to the American Express Bank wherein party no.1 i.e. CAMA had spelt out the proposal therein. The fact that this is not a memorandum of understanding is clear from the document itself; the second last paragraph of which reads as under :-

“The payment of the 24 months deposit will be done in 2 installments i.e. 4 months deposit will be paid immediately on signing of the MOU and the balance

will be paid on party no.1 on handing over the building complete in all respects i.e. June 1, 1994.”

33. This document recites that the memorandum of understanding was yet to come into effect which would be signed after the requisite amounts were paid; language of this document speaks for itself; Ex.P-5 was only the confirmation of the earlier proposal which CAMA had addressed to the plaintiff vide Ex.P-4 i.e. the communication dated 15.12.1993. Ex.P-5 was not a contract; memorandum of understanding was yet to be executed between the lesser and the lessee; it has also been admitted by PW-1 in his cross examination that in this document there is no mention that it is a memorandum of understanding.

34. In his cross-examination PW-1 had admitted that if a party wants to have office space on lease the same is located by them on a fee which is charged for providing this service which is called a finder's fee; it has been clarified that services are provided for locating of the space till the finalization of the deal; brokerage/commission and finder's fee is the same thing and there is no statutory provision for the same in India; party always pays for services rendered irrespective of the statutory provisions. PW-1 has admitted that finder's fee is a matter of contract which may be either verbal or oral; it is at a pre-settled rate; it is admitted that Ex.P-2 i.e. the letter dated 3.8.1993 written by the plaintiff to the American Express Bank offering proposals for

accommodation for lease for the purposes of office space did not include the disputed property i.e. the property at A-37, Main Mathura Road, Mohan Co-operative Industrial Area, New Delhi.

35. PW-1 in his cross-examination has further admitted that there was no written contract with the American Express Bank for the finder's fee; he has admitted that "it is correct that commission is paid only on the finalization of the deal".

36. No other evidence was adduced by the plaintiff.

37. The defendant has produced one witness in defence. He is C.V.Raghu. He has reiterated the averments made by the defendant in his written statement. The defence of the American Express Bank was that the same property i.e. A-37, Main Mathura Road, Mohan Co-operative Industrial Area, New Delhi had been taken on lease from its owner i.e. M/s CAmA Automobiles through another broker namely Surender Arora who addressed a letter dated 10.1.1994 mark D-1 to American Express Bank offering the said accommodation for lease. On 28.1.1994 mark D-2 was an agreement entered into between the lessor and the lessee of the said property i.e. between CAmA and Americann Express Bank pursuant to which a formal lease deed was drawn up between the parties on 19.10.1995. On oath, it has been stated that the plaintiff was unable to finalize the deal as he had failed to provide the documents concerning the title deed of the premises. Surender Arora had offered the same property at a rental of Rs.15

per sq. feet per month which was the agreed rental between the parties and was more than the rent of Rs.10 per sq. feet per month offered by the plaintiff. On oath DW-1 has stated that the commission equivalent to one month's rent was paid to Surender Arora for getting this deal finalized. In his cross-examination, DW-1 has admitted that normally brokerage paid to a broker by the bank is based upon the negotiation between the bank and the broker; the rate of the commission agreed between Bank and CAMA was to pay one month rental by each to the broker Surender Arora which amount has since been paid by the American Express Bank.

38. From this evidence which has been adduced both oral and documentary; it is amply clear that the plaintiff was not in a position to get the deal finalized between the CAMA and American Express Bank in relation to the disputed property. The bank had taken the same property from CAMA yet this deal was finalized not by the plaintiff but through the services of Surender Arora. Ex. P-5 was a communication exchanged between CAMA and American Express Bank and was only a proposal which had been given by CAMA to the bank offering its premises through the services of the plaintiff to the bank. This deal, however, could not be finalized as the plaintiff could not produce the requisite documents. Plaintiff in his cross-examination has clearly admitted that it is only on the finalization of the deal that the finder's fee

becomes payable. This deal had admittedly not been finalized through him. The fact that it had fallen through is also evident from the subsequent letter dated 31.1.1994 Ex.P-6 which is a letter addressed by the plaintiff to the American Express Travel i.e. the travel services of the bank whereby another adjoining property of the Main Mathura Road had been offered to the bank for consideration of their lease proposal. Along with this letter the authority letter of the owner of the said property had also been enclosed. This document shows that on 31.1.1994 the plaintiff had offered another property on Main Mathura to the American Express Bank; the deal for the earlier property had obviously not come through that is why the second property was being offered. However, on 28.1.1994 mark D-2 had already been endorsed i.e. an agreement between CAMA and the American Express Bank whereby American Express Bank had agreed to take on lease the property owned by CAMA i.s. A-37, Main Mathura Road, Mohan Co-operative Industrial Area, New Delhi and this was through the services of Surender Arora. Letter dated 10.1.1994 mark D-1 was the letter written by Surender Arora to American Express Bank offering his services to get this property leased out in favour of the bank.

39. This was the status in Suit No.3165/1996.

40. In suit No.3164/96 letter dated 15.12.1993 written by CAMA to the plaintiff has been exhibited as P-1; the memorandum of

understanding purported to have been executed between CAMA and American Express Bank has been proved as Ex.P-2. On 22.1.1994, the plaintiff wrote to CAMA pressing for its dues vide its letter Ex.P-3; legal notice dated 22.3.1994 and 9.4.1994 Ex.P-4 & Ex.P-5 were duly received by the defendant namely CAMA; reply to the said legal notice is dated 5.3.1994 Ex.P-6 wherein CAMA denied its liability alleging that no contract had been concluded between the parties and in fact the deal had fallen through as Ramit Nagpal who had received the document dated 16.12.1993 i.e. Ex.P-2 had not authority on behalf of the American Express Bank.

41. In 2004 (113) DLT 161 Association of Property Consultants vs. DDA the job of a proper broker has been described as a “professional activity” being individualised inasmuch as it is based on his personal skill and expertise; he rendering his professional services for which he is remunerated by way of a commission.

42. Counsel for the plaintiff has placed reliance upon AIR 1928 Bombay 270 Vasanji Moolji vs. Karsondas Tejpal, (1922) 24 Bom LR 847 K.C. Mehta vs. Cassumbhai Keshavji, AIR 1930 All 545 Roopji and sons vs. Dyer Meaken and Co. Ltd. to substantiate his argument that once a broker has found a party who was willing to advance the money to the borrower, once he had put it in the borrower’s power to obtain the loan, he had done all that which his appointment necessitated thus entitling him to his commission. On

the same parameters, it is submitted that in the instant case as well the plaintiff had done all that was within his powers and having introduced the lessor and lessee of the property to one another so much so that a written proposal detailing the terms of the proposed lease had been spelt out in the communication dated 15.12.1993 Ex.P-4 which was the letter addressed by CAMA to the plaintiff and the subsequent document dated 16.12.1993 Ex.P-5 had recognised the efforts of the plaintiff in bringing the lessor and lessee together and thereafter the lease having been executed for the same property and between the same parties, it was a clear case where the plaintiff had become entitled to his finder's fee/commission.

43. As already held supra this Court has concluded that there was no contract between the parties and the document dated 16.12.1993 Ex.P-5 was not a memorandum of understanding, memorandum of understanding was yet to be signed between the lessor and the lessee; this document was only at the stage of a proposal. The judgments relied upon by learned counsel for the plaintiff are all distinct on their own facts and do not apply to the factual matrix of this case. All the said three cases related to a loan transaction between a borrower and the lender where in all cases there was a written document/exchange of communication executed between the parties recognising the services of the plaintiff therein i.e. agent/broker who had introduced the borrower and the lender with one another and concluded their transaction.

As rightly pointed by learned counsel for the defendant in a transaction between a borrower and the lender there could be a single/ sole agent; not so in the case where a property has to be leased out and where proposals are offered both to the lessor and to the lessee by several brokers/ commission agents. It is only on the finalisation of the deal with anyone of the said brokers/commission agents that the said person becomes entitled to his finder's fee/commission. There is no doubt to the proposition that the finder's fee/commission becomes payable to the broker once it is recognised that it was through his effective services that the transaction had concluded.

44. This is not so in the instant case, the deal had fallen through in this case primarily for the reason that the plaintiff was unable to supply the requisite documents to the American Express Bank as has been admitted by defendant no.1 in his cross-examination. In K.C. Mehta's case (supra) it has been held that a broker in order to be entitled to his commission must prove either that the transaction has been completed or that the non-completion was not due to default on the part of the principal.

45. In AIR 1950 SCR 30 Abdula Ahmed Vs. Animendra Kissen Mitter, the Supreme Court, on the facts of the said case had held that the plaintiff was entitled to the commission as the sale in that case was in fact concluded by him, entitling him to earn his commission. Relying upon the decision of the House of Lords in

Luxor (East Bourne) Ltd. vs. Cooper, the Supreme Court had with approval noted-

"The ground of decision in the Luzor's case was that where commission was made payable on the completion of the transaction, the agent's right to commission was "a purely contingent right" and arose only when the purchase materialized. As Lord Simon put it" The agent is promised a reward in return for an event and the event and the event has not happened,

46. These observations of the Supreme Court reinforce the finding of this Court that it is only when the transaction materializes or is finally concluded with the efforts and intervention of the commission agent that he becomes entitled to the commission.

47. The judgment relied upon by the learned counsel for the plaintiff reported as AIR 1933 NULL 784 Khurshed Alam vs. Asa Ram is based on the proposition that the plaintiff is entitled to commission if he is proved to have acted as a broker; even in the absence of evidence a reasonable amount ought to be awarded to him as commission; in that case it had been held to be 2% of the sale transaction. This proposition does not come to the aid of the plaintiff as this Court has already concluded that the plaintiff had not transacted the deal between the lessor and the lessee thus disentitling to him for any commission.

48. Issue nos.1 and 4 are decided against the plaintiff and in favour of the defendant.

49. ISSUE NO.2

50. Issue nos.1 and 4 disentitle the plaintiff to recover any amount. This issue is also decided against the plaintiff and in favour of the defendant.

51. ISSUE NO.5 :-

52. Both the suits are dismissed. No orders as to costs. Decree sheet be drawn. File be consigned to record room.

**JANUARY 15, 2010**  
nandan

**(INDERMEET KAUR)**  
**JUDGE**