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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No. 122/2003

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1st December, 2011

M/S AERO CLUB & ANR.

..... Appellants

Through : Mr.V.N. Kaura with Ms. Paramjeet
Benipal and Mr. Sumit S. Benipal,
Advocates.

versus

ONKAR TRAVELS

..... Respondent

Through : Mr. Vineet Dwivedi, Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the Trial Court dated 4.10.2002. By the impugned judgment Trial Court decreed the suit for recovery of ₹2,08,550/- claimed towards commission charges and penalty of ₹2 lacs for premature termination of the agreement dated 6.2.1997 entered into between the parties. By the agreement dated 6.2.1997, appellants / defendants were allowed to sell their “Woodland” products from the premises of the respondent / plaintiff situated at Shop No.3 in Mikha Singh Jawala Singh Building, G.T. Road, Opposite Company Bagh, Jalandhar.

2. The facts of the case are that respondent / plaintiff filed a suit for recovery of ₹ 3,23,500/- inasmuch as the appellants / defendants prematurely terminated the contract dated 6.2.1997 vide letter dated 28.12.2000. The termination was said to be illegal and premature because the agreement dated 6.2.1997 was for a fixed term of 9 years. The claim in the suit was for commission charges from 1.8.2000 to 30.4.2001 at the agreed rate of ₹22,500/- and ₹27,500/- per month. A sum of ₹2 lacs was claimed as penalty as per clause 2(c) of the agreement dated 6.2.1997, which is actually in the nature of liquidated damages provided for premature illegal termination of the contract.

3. The appellants / defendants contested the suit and did not dispute the agreement dated 6.2.1997 but contended that the premises had to be vacated because there was seepage in the premises and the appellants / defendants suffered losses on account of stock that was damaged on account of the seepage. On account of the seepage the appellants/defendants were caused the loss / damage because the damaged stocks had to be sold at a discount. The appellants / defendants also claimed amounts which were spent for renovation of the subject premises and which they had to vacate because of the seepage. The appellants / defendants alleged total loss on account of damage to the stocks at ₹4,24,015/- and amounts incurred towards renovation at ₹ 10,48,505/-. The

appellants / defendants restricted their claim to ₹ 4,99,000/- out of the total claim of renovation, damaged stocks and interest which was otherwise totaling to ₹15,67,488/-.

4. After completion of pleadings, Trial Court framed the following issues:

- “1. Whether the plaintiff is a duly registered partnership firm and Smt. Amarjeet Kaur Bahia one of its partners? OPP
2. Whether the defendants terminated the agreement illegally before the expiry of nine years? OPP
3. Whether the plaintiff is entitled to recover any damages from the defendant? If so how much? OPP
4. Whether the plaintiff is entitled to any commission? If so for what rate and for what period? OPP
5. Whether the plaintiff is entitled to recover electricity dues? If so how much? OPP
6. Whether the plaintiff is entitled to any interest? If so at what rate? OPP
7. Whether the defendant is entitled to recover any renovation charges? If so, how much? OPD
8. Whether the defendant is entitled for the recovery of any loss on account of alleged reduction in sale value of damaged, spoiled stocks? If so how much and on what amount? OPD
9. Whether the defendant is entitled to any interest on its claim? If so how much? OPD
10. Relief.”

5. Issue No.1 which was framed by the Trial Court was with respect to whether the plaintiff is a duly registered partnership firm and whether Smt.Amarjeet Kaur Bahia was one of its partners. This issue was framed because the appellants / defendants in its written statement pleaded that the respondent / plaintiff partnership firm was not registered under the Partnership Act, 1932 and that Smt.Amarjeet Kaur Bahia was said not to be authorized/competent to file the present suit.

6. The Trial Court has decided this issue in favour of the respondent / plaintiff by holding that the partnership firm / plaintiff was registered with the Registrar of Firms vide the certificate of the Registrar of Firms filed and exhibited as Ex.PW-1/1. The argument which was raised on behalf of the appellants / defendants that the suit was liable to be dismissed because Smt. Amarjeet Kaur Bahia was not shown to be a partner in the Register of Firms was rejected on the ground that there was no such pleading in this regard because the only pleading was of the partnership firm not being registered. The Trial Court has given the necessary findings in para 9 of the impugned judgment which reads as under:

“9. Testimony of PW.1 that the plaintiff firm was duly registered under the Indian Partnership Act and the C-form thereof was Ex.PW.1/1, has gone unchallenged and

unrebutted. Ex.PW.1/1 is the acknowledgement of registration of firms dated 20.8.85 issued by the Registrar of Firms, Chandigarh. This acknowledgment of registration of firms Ex. PW.1/1, recording the entry of the statement in its register and filing the statement issued by the Registrar of Firms, proves the fact that the plaintiff – Onkar Travels is a firm duly registered with the Registrar of Firms. But for producing and proving Ex.PW.1/1, plaintiff on its part has not the extract of the register of firm showing Smt. Amarjeet Kaur Bahis as one of its partners. Even no oral evidence has come to be led that Smt. Amarjeet Kaur Bahia is one of the partners of the plaintiff firm. Though, during the cross examination, PW.1 deposed that he had brought the partnership Deed, but turned up, only to show a purported photo copy of the partnership deed which is mark B. This production of the photo copy of the purported partnership deed mark B, produced by the witness PW.1 during his cross examination, by itself does not prove the factum of Smt. Amarjeet Kaur Bahia being a partner of the plaintiff firm. In view of the foregoing, I have no hesitation in holding that though the plaintiff has proved that the plaintiff is registered partnership fir, it has failed to prove that Amarjeet Kaur Bahia is one of its partners. Failure to prove that Smt. Amarjeet Kaur Bahia is one of the partners I, however, do not consider to be fatal to the suit, especially keeping in view that no issue to that effect was framed, while it is held that the plaintiff is a registered partnership firm. Issue No.1 is decided accordingly.”

7. Learned counsel for the appellants / defendants argued that the Trial Court fell into an error because it is very much a requirement of sub-section (2) of Section 69 of Indian Partnership Act, 1932 that besides the partnership firm having to be registered, the person suing has to be shown as a partner in the Register of Firms. Learned counsel for the appellants in this regard has relied

upon *Firm Buta Mal Dev Raj v. Chanan Mal and others*, AIR 1964 Punjab 270, *M/s. Badrimal Ramcharan and Co. v. M/s. Gana Kaul and Sons and others*, AIR 1971 J&K 109 and *Shanker Housing Corporation (Ext.) v. Mohan Devi & Ors.*, AIR 1978 Delhi 255.

8. In my opinion, there is no error in the finding of the Trial Court in deciding issue No.1 inasmuch as there are two parts of sub-section (2) of Section 69 dealing with the bar of the suit. The first requirement is that it is necessary before a partnership firm files a suit to enforce a right arising from a contract that the firm is registered, and the second requirement is with respect to persons suing being shown in the Register of Firms as partners in the firm. It is open to a party to take one or both of the objections / defences of sub-section (2). A person may only take up the objection that the partnership firm is not registered or person may take up two objections that not only the partnership firm was not registered but the partner who has sued on behalf of the firm is not shown as a partner in the Register of Firms. When we referred to para 1 of the reply on merits in the written statement it is found that there is no defence that Smt.Amarjeet Kaur Bahia is not shown as a partner in the Register of Firms. This issue is a factual issue and it was necessary to raise the same specifically so that the respondent / plaintiff was put to notice. If the respondent / plaintiff was

put to notice, the respondent / plaintiff could have, in addition to filing the certificate of the firm being registered as Ex. PW-1/1, also filed the necessary form to show that Smt.Amarjeet Kaur Bahia was shown as a partner in the Register of Firms. This factual objection was not taken in the trial court, and therefore in my opinion the Trial Court rightly decided the issue No.1 in favour of the respondent / plaintiff.

9. The main issue and crux of the matter between the parties was with respect to the entitlement of the appellants / defendants to terminate the contract on account of the alleged damage to the stocks because of seepage in the premises. This issue has various sub issues i.e. whether in fact there was seepage, if there was seepage then were the stocks of the appellants/ defendants damaged, if the stocks of the appellants / defendants were damaged then what is the quantification of the loss and what is monetary value of the damaged stocks. These aspects have been dealt with by the Trial Court while giving findings with respect to issue Nos.2, 3, 4 and 8. A reference to the findings and conclusions of the Trial Court shows that the Trial Court has held that the appellants/defendants were not entitled to the losses as claimed inter alia for the following reasons:

(i) If there was seepage in the premises, then, in terms of clause 17(b) of the agreement dated 6.2.1997, Ex. PW-1/2, a notice of two months was required to

be given to remedy the breach, and since such notice was not given, termination of the contract was illegal.

- (ii) The appellants / defendants failed to prove that the stocks were in fact damaged by the seepage.
- (iii) The appellants / defendants failed to quantify in monetary terms the loss which was caused on account of the damage to the stocks inter alia because appellants / defendants did not produce their books of accounts and or any proof of loss only on account of seepage.

10. Some of the relevant observations in this regard of the Trial Court and which also reproduces the relevant paras of the agreement are as under:

“10. Agreement executed amongst the parties has been proved on record as Ex.PW.1/2. It is dated 6.2.1997. Paras 1, 2 & 3 of the said agreement undisputedly signed and executed amongst the parties, are as follows:

“1. M/s Aero Club shall utilize the said show room, exclusively for storage, display and marketing of the footwear and other products consigned to and displayed in the said Show Room for sale and Aero shall have exclusive use of the said Show Room for the purpose.

2. That M/s Onkar Travels shall be entitled to a minimum guaranteed commission which will be paid monthly and at the end of the year, the difference of minimum guaranteed commission and additional

commission above sixty lakhs of turnover @ 3% per lakh shall be paid within one month after closing of the Financial year in question. If the turnover in total 60 lakh per annum or ₹five lakh per month, comes less than that the minimum guaranteed commission shall be paid as per table below:-

- A. First 3 years or 36 months – ₹17,500/- p.m.
Second 3 years or 36 months – ₹22,500/- p.m.
Third 3 years or 36 months – ₹27,500/- p.m.
 - B. If the retail turnover (Maximum retail price-sales tax = retail turnover) Exceeds ₹5 lakhs per month or ₹60,00,000/- per annum, additional commission @3% payable on such extra turnover at the end of financial year as per details above.
 - C. The agreement is for nine years and no party will resile from this agreement. If any party resile ₹2,00,000/- to be paid as penalty for early cessation.
 - D. The payment of commission will be paid within 15th of every following month.
3. (a) That the commission will be paid from Ist July, 1995.
- (b) That if the commission is paid after 45 days, 2% interest will be borne by M/s Aero Club.

Para 17 of the said agreement is as follows:-

- 17 (a) This agreement shall operate for the period of 9 years from the date of handing over the premises. Where after the continuation of this arrangements shall be on such terms and conditions as per agreed terms.

(b) Either party can terminate this agreement if any of the aforesaid terms are violated by giving the other party a time of two months to rectify the violation. If the rectification is not carried out within the stipulated period of two months then the agreement can be terminated by giving three months notice.

The foregoing terms of the said agreement provide that the plaintiff is entitled to commission from 1.7.95 and the tenure of the said agreement is for 9 years from the date of handing over the premises, of course by the plaintiff to the defendant firm, while para 2C provides that no party will resile from the agreement and if any party does so, ₹2 lakhs is to be paid as penalty for early cessation, para 17(b) provides that either party can terminate the agreement if any of the terms of the agreement are violated by giving the other party, the time of two months to rectify the violation and if the rectification is not carried out within the stipulated period of two months, the agreement can be terminated by giving three months notice.

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Secondly for the reason that in the event of termination of the agreement, even if it is assumed that the plaintiff on his part violated any term of the agreement, the defendant on its part was required to give notice of two months to the plaintiff to rectify the violation and since after the notice having been so given and the rectification having been not carried out, the defendant on his part was required to give three months' notice thereafter for terminating the agreement as stipulated under clause 17(b) of the said agreement. To my mind, it is therefore, cannot be said that the defendant was either within its rights to terminate the agreement as pleaded by it and even if it is assumed it did so rightly, it was not in consonance with clause 17(b) of the said agreement. I, therefore, hold that the defendant did not terminate the agreement legally before the expiry of nine years.

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16. Defendants in the counter claim made their claim that they were entitled to recovery in all a sum of ₹15,04,321/- from the plaintiff comprising of ₹10,48,505/- towards the renovation charges, ₹4,24,015/- for loss on account of reduction in the sale value of damaged / spoiled stocks; and ₹94,968/- towards interest on the amount for the loss on account of reduction in the sale value of damaged / spoiled goods from March 5, 2000 to August 31, 2001 @ 15% p.a., but confined his counter claim to ₹4,99,000/- only. While confining its counter claim to ₹4,99,000/- as against the total claim of ₹15,67,488/-, the defendants on their part have not specified as to what specific amount of the alleged loss on account of reduction in sale value of damaged / spoiled stocks, it confined its counter claim. In the absence of the specific pleadings to such an effect, to my mind the purported claim of the defendants for the alleged loss on account of reduction in the sale value of damaged / spoiled goods does not proceed on specific pleadings and specific claim made. Even otherwise, I do not find any stipulation in the agreement Ex. PW.1/2 that for reduction in sale value of any damaged or spoiled stocks, for any reason whatsoever, the plaintiff on its part undertook any liability, I also do not find any worthwhile evidence on record to show but for the mere testimonies of DW.1 & DW.2 that certain stocks of its footwear were damaged on account of seepage in the suit premises and it was only on that account, it had to sell its stocks at lessor value. Needless to say, it is not the case of the defendants that they on their part, on account of any such alleged damage, ever even informed the plaintiff before clearing its stocks allegedly spoiled, and sold for a lessor value. Defendants on their part have not even produced any of their accounts books to prove its claim for the alleged loss on account of the alleged reduction in the sale value of damaged / spoiled stocks. DW.1 in his testimony on this account has only deposed that due to seepage, their stocks worth about ₹ 3 to 4 lakhs were damaged and that stock, they were forced to clear at 50% of his costs. This testimony of DW.1 does not lead us anywhere to the exact loss suffered due to the alleged

damage due to seepage in as much as his testimony only refers for the damage to the stocks worth about (emphasis supplied) ₹3 to 4 lakhs and then it talks on its clearing at 50% of its costs but then the costs is not disclosed. Even if it is assumed, that it was the stock worth ₹4 lakhs of costs, the loss suffered by the defendant then only comes to ₹2 lakhs. Defendants on their part in the suit and the DW.2 in his testimony, however, claimed that they suffered the loss to the extent of ₹4,24,015/-. When that is so, either DW.1 or DW.2 are lying. In totality of the facts and circumstances, I have no hesitation in holding that the defendants on their part have failed to prove the issue in its favour to any extent. Issue No.8 is accordingly decided against the defendants and in favour of the Plaintiff.”

11. Learned counsel for the appellants firstly argued with respect to these issues that there is no clause in the agreement dated 6.2.1997, Ex. PW-1/2 requiring giving of notice of two months to rectify the seepage. It is also argued that the appellants had filed various invoices which ran into hundreds, marked collectively as Ex. DW-2/2 that the appellants / defendants had to sell the stocks at a discount. Attention of this Court was also invited to the affidavits by way of evidence filed of DW-2 and DW-3 to show that losses were in fact caused and amounts were spent towards renovation of the premises.

12. I have already reproduced hereinabove in detail the relevant findings and conclusions of the Trial Court. Though I may not agree to some of the conclusions of the Trial Court such as the finding that the agreement Ex.PW-1/2 did not provide for termination of agreement on account of seepage and also that

there is no specific evidence with respect to the amounts spent towards renovation, over all however, the findings and conclusions of the Trial Court are correct that the agreement Ex.PW-1/2 was not validly terminated and that the appellants / defendants failed to prove losses caused to them on account of damage to the stocks by the seepage. My reasons for agreeing with the Trial Court are as under:

- (i) A reference to the agreement shows that the same contains a clause 9, and as per which clause the respondent / plaintiff was to indemnify the appellants / defendants with respect to any damages caused to the appellants / defendants on different counts including for any levy imposed by the Government or local authorities or by customer complaints etc. The expression 'etc' appearing at the end of clause 9 is relevant inasmuch as this shows that the clause is extremely wide and is intended to indemnify the appellants against any losses caused to them. If that be so, clause 17(b) of the agreement will immediately come into play whereby for violation of any term of the contract it was required that a two months notice be given to rectify the violation and it admittedly has not been given in the present case. I, therefore, hold that the agreement was not validly terminated.

- (ii) If really, losses running into lacs and lacs of rupees were caused to the appellants / defendants, then there would have been a spate of correspondence on this aspect, however, there is not even a single letter written by the appellants / defendants to the respondent / plaintiff of the losses caused to them by damage of stocks on account of the seepage in the building. The argument of the counsel for the appellants / defendants that both the parties were situated in close proximity to each other and, therefore, everything was said orally is an argument which I refuse to accept in view of the issue involving monetary liability of lacs and lacs of rupees. Surely, it cannot be said that when huge losses are caused, the appellants / defendants would not have written even a single letter to put this aspect of the huge losses caused to them on record. While making observations on this aspect, I may note that it is not as if the alleged loss was caused only on one day or two days or three days or a few days, but, the losses are said to have caused over many weeks, many months, and in fact for about two years. Therefore, I hold that there is an inherent lack of substance in the defence that losses were caused on account of the damage to the stocks.

(iii) When we refer to the documents which have been filed collectively as Ex.DW-2/2, being the various vouchers which show that the appellants / defendants have given discount for the goods sold at the premises, nothing turns on the same inasmuch as not a single document out of these hundred of vouchers at all refer to discounts being given because the stocks are damaged stocks. I may state that it is not unknown that companies such as “Woodland” and their stockists / dealers have many discount sales, whether it be a Diwali sale, whether it be a New Year sale or whether it be end of the season sale and so on. Therefore, once discount can be given in the commercial world because of various reasons, I hold that merely by filing vouchers showing discounts have been given for goods sold cannot mean that discounts were given because the stocks which were sold were damaged stocks.

(iv) Once there is an illegal termination there does not arise any issue of claiming the alleged renovation costs.

13. A resume of the above facts shows that the agreement in question was for a period of 9 years and in case the same was illegally terminated before the expiry of 9 years, a penalty of ₹2 lacs was provided; the appellants / defendants admittedly failed to comply with the giving of a notice under clause 17(b) to

rectify the alleged defect of seepage, and, there is not a single letter on record with respect to damages caused to the stocks over many weeks and many months running into approximately two years on account of the seepage. A civil case is decided on balance of probabilities. The balance of probabilities shows that the appellants / defendants had prematurely terminated the contract and had refused not only to pay the commission for the period for which the premises were occupied by them, but also they failed to pay the penalty of ₹2 lacs which was provided for premature termination of the contract without valid reason before the expiry of 9 years. I, therefore, hold that the Trial Court was justified in awarding the admitted rate of commission for the period in question and also for giving the penalty of ₹2 lacs. The reason of alleged damage to the stocks by the seepage was quite clearly only a false stand taken up for vacating a premises and terminating the agreement which the appellants wanted, I think, to otherwise terminate for commercial reasons.

14. No other points or issues were urged before this Court.

15. In view of the above, the appeal, being without any merit, is accordingly dismissed, leaving the parties to bear their own costs. The security given by the respondent / plaintiff for withdrawing the amount deposited by the appellants in

this Court will stand discharged. The appeal is disposed of accordingly. Trial court record be sent back.

VALMIKI J. MEHTA, J.

DECEMBER 1, 2011

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