

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

Judgment reserved on : 8th December, 2011
% Judgment delivered on : 14th December, 2011

+ **RFA (OS)37/2003**

COAL INDIA LTD. & ANR. Appellants.
Through: Mr.Anip Sachthey with Mr.Mohit
Paul & Ms.Shagun Matta, Advocates

versus

CONTINENTAL & EASTERN AGENCIES Respondents
Through: Mr.A.B.Dial,Sr.Adv. with Ms.Ananya
Datta, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Appellants have filed the present appeal against the Judgment and decree dated 20.5.2003 passed by learned Single Judge whereby suit for recovery of ₹5,89,434/- filed by the respondent was decreed for a sum of ₹2,92,977.46 paisa only.

2. The respondent filed the suit for recovery of ₹5,89,434/- towards agent commission against the appellants claiming himself to be an agency of defendant No.3 (in the suit) an Italian Company, in India. Appellants floated a global tender for purchase of two hydraulic Crankshaft Grinding Machines on 24.09.1986. Respondent gave an offer dated 22.09.1986 for two machines. Earlier the respondent had

supplied four similar machines to the appellants vide their order dated 05.02.1985. Later on the appellants sought some clarifications and amendment in terms if four machines were purchased instead of two.

3. The respondent had offered in the original offer that Agency commission would be 15% of FOB value of order. By letter dated 07.03.1987, respondent offered discount of 5% on commission if entire order was placed on him and 100% commission was paid on receipt of shipping documents.

4. Appellants wrote letter dated 10.08.1987 to the respondent that the requirement was raised to four Grinder Machines and the respondent should submit reduced price bid accordingly.

5. Respondent vide letter dated 14.08/1987 did the needful and informed the appellants that the price of machine would be the same and be multiplied by four in place of two and discount of 5% on agency commission of 15% would be valid if (i) entire order is placed on the respondent and (ii) 100% agency commission released on presentation of shipping documents. Vide letter dated 09.11.1987, defendant No.3 in the suit, informed the appellants that respondent would not accept any amount less than already offered by them as their work involved lot of expenditure.

6. Further case of the respondent before the learned Single Judge was that the appellants thereupon placed order dated 25.04.1988 addressed to defendant No.3 on the respondent at Delhi who in turn forwarded it to defendant No.3 in Italy only for two machines. An amendment dated 06.0.1985

was issued by appellants to this letter. In the order placed, appellants unilaterally reduced the commission payable to the respondent from 15% to 10% of FOB value, even though discount of 5% was offered only as to quantity discount on four machines and was not applicable to two machines only. Respondent protested against this unilateral action of the appellants as the appellants never consented to 5% discount for only two machines. By letter dated 17.05.1988 the respondent accepted the order at Delhi with the exception of the discount clause.

7. The appellants did not issue any amendment but acted on the respondent's letter allowing 5% discount and established Letter of Credit in favour of defendant No.3 in the suit. Two machines were shipped on 09.01.1989 by the foreign seller. The complete machinery was received by the appellants at site on or before 30.08.1989. The respondent repeatedly wrote to the appellants asking for readiness of site to enable him to commission the machine. Since there was no response, he served legal notice dated 08.04.1989 on the appellants demanding 15% commission.

8. The appellants contested the suit and pleaded that the respondent vide letter dated 22.09.1986 had offered to allow discount of 5% on the FOB price on placement of order for two machines. The appellants had specifically stated in the order dated 25.04.1988 the terms of the discount. There was no such condition that the said discount would be payable only if four machines were purchased. It was specifically mentioned to the respondent that agency commission would be payable

after commissioning was completed by the respondent. Since the respondent had failed to commission the machines in time there was no occasion for the appellants to release 100% agency commission to him. In fact the appellants have been put to heavy losses because of the non-commissioning of the machines. The respondent was not entitled to any commission because he failed to perform his part of the contract.

9. Following issues were framed by the learned Trial Court on the basis of the pleadings of the parties:

(1) Whether this Court has the territorial jurisdiction to try and entertain the suit? OPP

(2) Whether the plaint has been instituted, signed and verified by a duly authorized person? OPP

(3) Whether the plaintiff is entitled to receive ₹4,39,466.20 being 15% agency commission or any lesser amount? OPP

(4) Whether the plaintiff is entitled to interest on ₹4,39,466.20 or any lesser amount and if so at what rate and period thereof? OPP

(5) Whether the plaintiff agreed to give discount of 5% and charge 10% commission payable after commissioning of machine? OPP

(6) Whether the discount of 5% was available only on conditions set out in the plaintiff's letter 07.03.1987 and 14.08.1987 being fulfilled? OPP

(7) Whether the plaintiff is not entitled to any commission due to its breaches and failure to perform its obligations as set out in para 3(c) of the preliminary objection and 23 and 24 of the written statement on merits? OPP

(8) Whether the defendant Nos. 1 and 2 had the site ready for installation of the equipment/machinery in terms of amendment to the contract dated 06.05.1988? OPP

(9) Relief.

10. On recording evidence of the parties and considering the rival contentions, the learned Single Judge passed the impugned judgment and decree dated 20.05.2003. The learned Single Judge while deciding issue No.2 regarding maintainability of the suit filed by the respondent returned the findings that Mr.V.P.Verma had the authority to sign, verify and institute the suit.

11. Aggrieved by the said orders the appellants have come up in the present appeal.

12. Relevant issue for disposal of appeal before us is issue No.2 as during the course of arguments, the learned counsel for the appellants restricted his arguments only on two aspects i.e. the suit filed by the respondent was barred under Section 69(2) of Partnership Act alleging that the respondent was not a registered partnership firm on the date of filing of the suit. Secondly Mr.V.P.Verma who had instituted the suit on behalf of the respondent was not a partner in the said firm on the date of institution of the suit and also was not authorised to institute, sign and verify the plaint.

13. Contention of the learned counsel for the appellants is that the respondent failed to adduce any evidence on record before the court that the respondent-firm was a registered

partnership firm on the date of institution of the suit and thus under Section 69(2) of the Partnership Act, it had no authority to institute the suit. The respondent did not file on record any document to show if Mr.V.P.Verma was a partner in the respondent-firm on the date of institution of the suit or that he was duly authorised to file the suit on behalf of the respondent firm. It was further urged that Ex.P-6, certificate of registration, filed on record by the respondent before the learned Single Judge did not depict Mr.V.P.Verma as a partner in the respondent-firm in his individual capacity. He has been shown as a partner only as 'karta' of Hindu Undivided Family (HUF). Under Hindu Law a karta of HUF cannot enter into a partnership with any other association of persons.

14. Learned counsel for the appellants further pleaded that adverse inference is to be drawn against the respondent for not filing Form 'A' along with plaint to show that Mr.V.P.Verma was a partner in the respondent-firm on the date of institution of the suit.

15. Learned counsel for the respondent has controverted all these arguments and has vehemently put reliance on Ex.P-6 whereof there is specific mention that Mr.V.P.Verma was a partner in the respondent-firm.

16. In the plaint filed in Court on 26.5.1993 the respondent-firm specifically pleaded that respondent-M/s Continental Eastern Agencies was a registered partnership firm and Mr.V.P.Verma was duly authorised and competent to file and prosecute the suit for and on behalf of the respondent-firm and to sign and verify the pleadings, swear affidavits, engage

counsel and to do acts necessary and incidental to the filing of the suit. In the written statement the respondent merely denied this assertion of the appellants and simply pleaded that the plaint has not been instituted, signed and verified by an authorised person and the respondent-firm was not registered partnership firm. It also denied that Mr.V.P.Verma was authorised and competent to file and prosecute the suit. No reasons were disclosed by the appellants as to how Mr.V.P.Verma was not authorised or competent to file and prosecute the suit. Respondent did not specifically plead that Mr.V.P.Verma was not a partner in the respondent-firm and had no authority to file the suit.

17. The burden to prove issue No.2 was upon the respondent and the respondent examined Mr.Ved Prakash Verma to prove its case. In his evidence filed by way of affidavit Mr.Ved Prakash Verma testified on oath that respondent was a registered partnership firm and he was duly authorised and competent to file the suit for and on behalf of the respondent and to sign and verify the pleadings and to do all acts necessary and incidental thereto. He further testified that the form-A of certificate of registration (Ex.P-6) showed that the respondent was duly registered under the Indian Partnership Act and that he was a partner therein. Thus Mr.Ved Prakash Verma categorically claimed the respondent-firm to be a registered partnership firm and he being one of its partners. In the cross-examination, the witness reiterated that he was partner in the respondent-firm from 1973 till 30.11.1999. He further stated that it was not true that he was not a partner in

the respondent-firm on the date of institution of the suit. He admitted that he was partner in the respondent- firm as the karta of HUF. He admitted it to be true that on the date of institution of the suit in his personal capacity, he was not a partner in the respondent-firm. He denied that he was not authorised to sign and verify the plaint and institute the suit on behalf of the respondent-firm.

18. Overall testimony of this evidence read as a whole shows that the witness categorically claimed himself to be a partner as karta of HUF in the respondent-firm. The appellants merely put suggestion to the witness in the cross-examination controverting these assertions. Nothing was suggested to this witness in the cross-examination if respondent-firm was not a registered partnership firm or that it had not continued its existence since the date of registration till the date of issuance of certificate of registration Ex.P-6. This witness specifically pleaded that he remained a partner in the respondent-firm till 30.11.1999. Nothing was suggested to this witness if he had ceased to be a partner on any specific date in the respondent-firm prior to the registration of the present suit.

19. Appellants examined one witness Mr.G.Chaudhary who also filed his evidence by way of affidavit. On perusal of affidavit filed on record by the sole witness of the appellants, it reveals that at nowhere he testified that the respondent was not a registered partnership firm or that Mr.V.P.Verma was not a partner in the said firm on the date of filing of the suit. This witness did not utter a word if Mr.V.P.Verma was not authorised to file the suit or to sign and verify the pleadings on behalf of

the respondent-firm. Virtually there is no counter evidence adduced on record by the appellants to falsify the claim of Mr.V.P.Verma recording his status in the respondent-firm.

20. We have gone through Ex.P-6 (form-A) issued by Registrar of Firms under Section 69 of the Indian Partnership Act.

21. This document Ex.P-6 shows the date of registration of the respondent firm on 08.12.1986. Among others Mr.Ved Prakash Verma has been shown a partner as Karta (HUF). This document Ex.P-6 is a certified copy issued by the Registrar of Firms, Delhi on 18.06.1993. It does not contain if after registration of the firm on 08.12.1986 Mr.Ved Prakash Verma has ceased to be a partner in the respondent-firm at any time. There is mention of one Mr.Ashok Verma who was admitted as partner in the respondent-firm on 08.04.1991 vide notice dated 30.04.1991. It shows that whenever there was a change in the constitution of the respondent-firm, the said change was duly recorded with the Registrar of firms and the Registrar in turn carried out the changes in the form-A (Ex.P-6). No contrary evidence has been filed on record by the respondent to show that Mr.V.P.Verma had ceased to be a partner at any stage in the respondent-firm.

22. The present suit was filed on 26.5.1993. The certified copy Ex.P-6 showing the names of the partners has been issued on 18.06.1993. There is no substance in the plea of the learned counsel for the appellants that on the date of institution of the present suit Mr.V.P.Verma was not a partner in the respondent-firm. Under Section 69(2) of the Partnership

Act there is no condition precedent where the respondent firm was under legal obligation to file on record the certified copy of Form-A along with plaint. The only requirement under the partnership Act is that the person filing the suit must be a partner as shown in Form-A of the Registrar of firm on the date of institution of the suit. Merely because Ex.P-6 was obtained after the filing of the suit, it did not affect the status of respondent-firm as on 26.5.1993. There is nothing unusual to get certified copy after some days of its applying for the same. Since the name of Mr.V.P.Verma finds mention as partner in the Form-A the certified copy of which has been issued on 18.06.1993, in the absence of any evidence to the contrary, it can safely be held that Mr.V.P.Verma was a partner in the respondent firm on the date of filing of the present suit and had continued to be a partner.

23. We do not subscribe to the argument of the learned counsel for the appellants that Mr.V.P.Verma was not authorised to file the present suit. Admittedly number of letters on record were exchanged between the parties during negotiation of contract. In all these documents Mr.V.P.Verma had correspondence with the appellants claiming himself to be a partner of the respondent-firm. At no stage the appellants challenged the authority of Mr.V.P.Verma to act on behalf of respondent-firm as its partner.

24. There is no substance in the plea of learned counsel for the appellants that Mr.V.P.Verma as karta of HUF could not have entered into any partnership with the respondent firm.

25. In the case of Commissioner of Income Tax, MP v. Sir Hukamchand Mannalal & Co. 1970 (2) SCC 352, which contains observation in Mayne's Hindu Law (9th Edition) at P.398 to the following effect:

“Where a managing member of a joint family enters into a partnership with a stranger the other members of the family do not ipso facto become partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Contract Act, in such a case the family as a unit does not become partner but only such of its members has in fact enter into a contractual relation with the strangers, the partnership will be governed by the Act.”

26. In the case reported as (1967) 66 ITR 613 (SC) Ram Laxman Sugar Mills v. Commissioner of Income-Tax, U.P. & Ors. the Hon'ble Supreme Court has categorically held that it is open to the manager of a joint Hindu Family as representing the family to agree to become a partner with another person. The partnership agreement in that case is between the manager and the other person and by the partnership agreement no members of family, except the manager acquires a right or interest in the partnership. The junior members of the family may make a claim against the manager for treating the income or profits received from the partnership as a joint family asset, but they cannot claim to exercise the rights of partners nor be liable as partners.

27. The authority relied upon by the learned counsel for the appellants in the case reported as (1998) 2 SCC 49 Rashiklal & Co. V. Commissioner of Income Tax is not helpful to

him. In this case R, the karta of a HUF, was a partner in a firm which was carrying on, inter alia, the business of mining. The Hon'ble Supreme Court observed that a firm is a compendious way of describing the individuals constituting the firm. An HUF directly or indirectly cannot become a partner of a firm because the firm is an association of individuals. Even if a person nominated by the HUF joins a partnership, the partnership will be between the nominated person and the other partners of the firm. It further observed that if a karta or any other member of the HUF joins a partnership, he can do so only as an individual. His rights and obligations vis-à-vis other partners are determined by the Partnership Act and not by Hindu Law. Whatever may be the relationship between an HUF and its nominee partner, in a partnership, neither the HUF nor any member of the HUF can claim to be a partner or connected with the partnership through a nominee.

28. From the judgments cited above it stands established that an HUF as such cannot be a partner in a firm but it is competent to the manager or karta acting on behalf of the HUF to enter into a valid partnership with a stranger or with the karta of another family.

29. In the present case Mr.V.P.Verma had joined partnership with the respondent-firm as karta of HUF and there was no bar on him to join the partnership as karta of HUF.

30. Thus there is no substance in the arguments of the appellants that the suit filed by the respondent-firm is barred under Section 69(2) of Partnership Act or that Mr.V.P.Verma was not duly authorized to file, sign and verify the pleadings.

31. As observed above, that learned counsel for the appellants did not opt to challenge the findings of the learned trial court on other issues.
32. We find no merit in the appeal filed by the appellants and the same is dismissed.
33. No order as to costs.

(S.P.GARG)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

December 14, 2011
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