

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

% Judgment reserved on : 20th December, 2011
Judgment delivered on : 22nd December, 2011

+ **RFA (OS) 32/2011**

ASHOK KUMAR KHANNA Appellant
Through : Mr.Pawan Kr.Bahl, Advocate.

versus

JOHNSON & JOHNSON CO. & ANR. Respondents
Through : None.

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

S.P.GARG, J.

1. Present appeal has been preferred by the appellant against the judgment and decree dated 01.11.2010 passed by learned Single Judge whereby the suit filed by the appellant for permanent injunction, recovery and damages, was dismissed except decreeing the suit for a sum of ₹30,000/- with interest @ 9% per annum.

2. The appellant is the sole proprietor of M/s.N.S.K. Enterprises. He came to know that respondent No.1 wanted to allot the distributorship for G.B.Pant Hospital, Delhi. Vide letter dated 29.06.1999, he submitted a detailed letter seeking the right of distributorship.

3. G.B.Pant Hospital, Delhi, respondent No.2 issued a tender for the supply of various surgical and other items in

October, 1999. The persons who wanted to participate in the tender were required to deposit earnest money. Respondent No.1 wanted to participate in the tender and was required to pay earnest money of ₹30,000/- for supply of Group 'D' items of Cardiology Department.

4. Case of the appellant before the learned Single Judge was that respondent No.1 approached him if he was interested in the dealership of the Company, he should pay/deposit the earnest money. Accordingly, he accepted the request and got prepared an FDR No.282266 dated 22.10.1999 in favour of respondent No.2. On that, respondent No.1 participated in the tender issued by respondent No.2. The tender submitted by respondent No.1 was accepted by respondent No.2.

5. Grievance of the appellant is that the respondent No.1 had orally entered into a contract with him for supply of goods to respondent No.2 and he was to be paid a margin of about 19% of the total sales. However, contrary to the agreement, the respondent No.1 decided to allot the supply of the goods to M/s.Cure Aids India in March, 2000. The appellant wrote number of letters, including legal notice, on various dates to the respondent No.1 and requested that the supply to respondent No.2 should be routed only through him but to no effect.

6. Plea of the appellant is that he suffered loss of above ₹20 lakhs as the total supply to be made under the contract to respondent No.2 was about ₹1.5 crore. He further claimed ₹5 lakhs as damages towards mental torture and

₹30,000/- given by him as earnest money to the respondent No.1.

7. The suit was contested by the respondents. In the written statement the respondents controverted the allegations of the appellant. Respondent No.1 pleaded that there was no oral or written contract between the parties to appoint appellant as distributor/dealer. The appellant had given a proposal for appointment as a distributor/dealer and had deposited with respondent No.2 an FDR of ₹30,000/- on behalf of the respondent No.1. The appellant was requested time and again to take back ₹30,000/- given by him in the form of FDR to respondent No.2. However, the respondent failed to do so. It was further pleaded that the respondent No.1 had a prescribed performa to be filled which was to be subsequently sent to the Head Office for approval. The proposal was never submitted in any prescribed format to appoint the appellant as distributor/dealer. The appellant was never asked by the respondent to create any infrastructure.

8. After the settlement of issues, the parties examined their witnesses to prove their respective cases. On appraisal of the evidence adduced on record, the learned Single Judge decreed the suit of the appellant only to the extent of payment of ₹30,000/- with interest @ 9% from the date of institution of the suit till the date of realization of the amount observing that the appellant had failed to prove existence of any valid contract to appoint him as distributor/dealer. The appellant also failed to prove the extent of loss suffered due to alleged breach of contract by the respondent No.1.

9. Learned counsel for the appellant has urged that the respondent No.1 had accepted his offer to appoint him as distributor/dealer for supply of goods to respondent No.2 and had induced him to get prepare an FDR of ₹30,000/- in the name of respondent No.2 which was a condition precedent to participate in the tender process. Respondent No.1 had participated in the tender process on the strength of FDR of ₹30,000/- prepared by him and was successful in getting the tender. The respondent No.1 was under legal obligation to fulfill his promise to appoint him as distributor/dealer. However, for ulterior motive, the respondent No.1 appointed one M/s. Cure Aids India as a distributor/dealer. The appellant even retained the amount of ₹30,000/- and did not bother to return it to the appellant. The appellant suffered huge losses due to denial of distributorship/dealership as promised by the respondent No.1.

10. None appeared on behalf of the respondent No.2 to assist the Court.

11. We have scanned the documents on record and have scrutinized the evidence lead by the parties. It reveals that the appellant was interested in getting the distributorship/dealership from respondent No.1 for supply of goods to respondent No.2 and for that purpose, it had written a letter dated 29.06.1999 Ex.PW1/1 to Mr.Vishal Gupta, Regional Sales Executive, respondent No.1. In this letter, the appellant had offered his services for the distributorship/dealership for the products of respondent No.1 for G.B.Pand Hospital. The appellant in this letter requested to Mr.Vishal Gupta to let him know in detail the terms and conditions of the

distributorship/dealership for the products of respondent No.1. The appellant again wrote another letter dated 31.01.2000 Ex.PW1/19 to Mr.Vishal Gupta and informed him that he was assured of distributorship/dealership if few basic requirements of the company like office, fax machine and computer etc. were fulfilled before the finalization of the tender enquiry. In this letter, the appellant conveyed that he was having all the necessary facilities and he be informed about the terms and conditions of the company in detail on the subject. While appearing as PW1, the appellant proved these letters and also testified that there was an oral contract between the parties whereby the distributorship/dealership was to be given to him.

12. It is not in controversy that the respondent No.1 had participated in the tender on 22.10.1999. As per Ex.PW1/7, the tender form was required to be submitted along with an FDR in the name of respondent No.2 of the amount of ₹30,000/-. Admittedly the appellant had got prepared in FDR No.282266 which was utilized by respondent No.1 at the time of participation in the tender process. It is also not in dispute that the tender was awarded to the respondent No.1 and subsequently, the respondent No.1 appointed M/s. Cure Aids India as its distributor/dealer for supply of goods to respondent No.2.

13. On scrutinizing the documents on record, it can well be inferred that at no stage a concluded contract between the appellant and respondent No.1 had come into existence for appointment of the appellant as distributor/dealer for supply of the goods to respondent No.2. Contents of the letters Ex.PW1/1

and Ex.Pw1/19 written by appellant to the representative of the respondent No.1 reveal that the appellant had expressed his intention to respondent No.1 to get its distributorship/dealership and had got prepared an FDR in the sum of ₹30,000/- as earnest money. The appellant failed to produce any written response of respondent No.1 to his offer to get the distributorship/dealership of the respondent No.1. There is nothing on record to show if the unilateral offer made by the appellant was ever accepted by the respondent No.1. The appellant failed to produce any evidence oral or documentary to prove if he was ever asked to prepare FDR in the sum of ₹30,000/- as a condition precedent to get distributorship/dealership. These two letters produced on record do not create any jural relationship between the appellant and respondent No.1 as the appellant was making enquiries from the respondent No.1 about the terms and conditions of the Company for appointment of distributor/dealer.

14. A mere statement of intention made in the course of conversation does not constitute a binding promise, though acted upon by a party to whom it is made. Mere expression of intention of general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer. Contents of these letters reveal that the parties were at the stage of negotiations and there were some correspondences between them to consider the appellant for distributorship/dealership of the products to G.B.Pant Hospital.

15. There was no definite acceptance of the offer made by the appellant to respondent No.1 and it had not gone beyond preliminary negotiations. Acceptance must be definite, positive, unambiguous and unequivocal. When there is no definite acceptance but some preliminary statement as to something relating to the proposed transaction, there is no acceptance.

16. In the present case, the subject matter of the alleged contract was not in existence at the time of negotiations between the parties. The respondent No.1 had merely participated in the tender process and at the time of getting the FDR in the sum of ₹30,000/- from the respondent No.1, the tender process had not been completed. The respondent No.1 had not been awarded the contract. There was no guarantee that on mere participation in the tender process, the respondent No.1 would get the tender accepted. Since subject matter was not in existence at the time of offer made by the appellant, there was no question of coming into existence of any concluded contract between the parties whereby the respondent No.1 could have promised to appoint appellant as distributor/dealer of the goods to be supplied to the respondent No.2. There was even possibility of rejection of the tender of respondent No.1.

17. Admittedly after the contract was awarded to the respondent No.1 by respondent No.2, no formal agreement was reduced into writing between the appellant and the respondent No.1 to appoint the appellant as distributor/dealer for this contract. It has come on record that the respondent No.1 was

having a prescribed performa to apply for distributorship/dealership. Undoubtedly, no such prescribed performa was filled up by the appellant to abide by the terms and conditions of the respondent No.1 for appointment as distributor/dealer. The appellant himself was insisting to make available him the terms and conditions on which the distributorship/dealership was to be given.

18. Utilization of ₹30,000/- in the form of FDR by respondent No.1 for participation in the tender process can't be termed as valid consideration for the alleged contract. Nothing has come on record to show as to how and under what circumstances, the appellant happened to submit his FDR along with the tender form as no evidence has come on record if on any particular date that the respondent No.1 had requested the appellant to furnish the FDR to enable it to participate in the tender process. There is nothing to show if on the strength of this FDR alone, the respondent No.1 was able to get the contract awarded. Undoubtedly the respondent No.1 is a big concern and there was no dearth of ₹30,000/- to enable it to participate in the tender process only on getting the FDR of ₹30,000/- from the appellant. This FDR was meant as an earnest money and was liable to be refunded immediately if the tender was not accepted. This amount of ₹30,000/- can't be taken as a consideration by the appellant to respondent No.1 in procuring the distributorship/dealership.

19. In these letters as Ex.PW1/1 and Ex.Pw1/19 at no where the appellant pleaded that a concluded contract had come into existence between the parties. Just on submitting an

FDR of ₹30,000/- to enable the respondent not to participate in the tender process, it did not confer a vested right on the appellant to get the distributorship/dealership of respondent No.1. The appellant was required to perform other conditions to the satisfaction of respondent No.1 to enable him to get the distributorship/dealership. In the cross-examination, the appellant admitted that in the year 1999 he did not have a satisfactory performance certificate from any government hospital. He did not have a cellular phone, fax machine, computer etc. He further submitted that he was operating from his residence and did not have any commercial premises in New Delhi. He was not even having sales tax number. Nothing has come on record to show if the appellant was having requisite infrastructure to fulfill the requirements of respondent No.1 to be appointed as distributor/dealer. So mere production of FDR without any request from the respondent No.1 did not bind respondent No.1 to award the distributorship/dealership to the appellant.

20. Besides above, the appellant even failed to prove as to what was the loss suffered by him due to denial of distributorship/dealership by respondent No.1. Under Section 73 of the Contract Act, when a contract has been broken the party who suffers by such breach is entitled to claim compensation for any such loss which naturally arises in the usual course of things from such breach. Section 73 further provides that the compensation is not to be given for any remote and indirect loss or damage sustained by a party to the contract by reason of the breach. Basic principle for award of

compensation is that a party injured by a breach of contract should be placed in the same position in terms of money as far as possible had the contract been performed by the party in default. Law also imposes a duty that the party entitled to damages must take reasonable steps for mitigation of damages.

21. In the present case, the appellant has failed to plead and prove actual loss suffered by him because of denial of the distributorship/dealership by the respondent No.1. Firstly, the appellant failed to establish if there was any concluded contract between him and the respondent No.1 to award him the dealership and that he was having all the necessary infrastructure and financial capacity to be appointed as distributor/dealer as per the terms and conditions of the respondent No.1. Secondly, the appellant was required to prove the actual loss suffered by him on account of denial of the distributorship/dealership. The appellant failed to produce any evidence to show if during that period, he had received some offer to be appointed as distributor/dealer from any other concern and because of the assurance/promise of the respondent No.1 in the present transaction, he had refused to accept the said distributorship/dealership. Appellant did not produce any books of accounts to show transactions carried out by him during that period.

22. The learned Single Judge has rightly concluded that there was no promise to pay 19% commission of the total sale of goods to respondent No.2. The appellant has failed to show as to wherefrom he had taken this figure of 19% as his loss of

profits. The appellant failed to prove as to how much quantity for any particular amount was supplied by M/s.Cure Aids India to respondent No.2. The loss of profit claimed by the appellant is imaginary, vague and uncertain. He also did not show as to what steps were taken by him to mitigate the alleged loss of profits.

23. Undoubtedly the respondent No.1 enjoyed the amount ₹30,000/- given by the appellant in the form of FDR and used the same along with tender form to participate in the tender process. The said amount remained with the respondents. Since negotiations to award distributorship to appellant failed, the respondent No.1 was under legal obligation to refund amount of ₹30,000/- to the appellant. In fact it has come on record that the respondent No.1 had asked the appellant to take back the amount of ₹30,000/- but appellant failed to do so.

24. Under Section 70 of the Contract Act, the appellant is entitled for a refund of ₹30,000/- utilized by respondent No.2. In our view, the appellant is entitled for interest as well on the amount of ₹30,000/- paid by him to the respondent No.1 from the date of deposit of the FDR with the respondents. The respondent No.1 can't derive undue benefit of ₹30,000/- paid by appellant with the hope to get distributorship and in fact was utilized by it for participation in the tender process. The learned Trial Court has awarded interest to the appellant @ 9% per annum from the date of institution till realization which to our mind is insufficient. Interest of justice would be served if the respondent No.1 is ordered to pay interest of @ 15% per

annum from the date of deposit of the amount of ₹30,000/-. Real basis for a claim under Section 70 of the Contract Act is not the terms of contract but the quantum of benefit actually derived. In the present case, the respondent No.1 derived the benefit of the FDR in the sum of ₹30,000/- supplied by the appellant.

25. The appeal filed by the appellant is partly allowed and the judgment and decree dated 01.11.2010 passed by learned Single Judge is modified and the appellant shall be entitled to ₹30,000/- with the interest @ 15% per annum from the date of deposit of the amount i.e. 22.10.1999 till realization.

(S.P.GARG)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

December 22 , 2011
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