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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : January 23, 2012*
Judgment Pronounced on: January 30, 2012

+ **CM No.2816/2011 in RFA(OS) No.18/2011**

KARAN PROMOTERS PVT. LTD. & ANR. Appellants
Through: Mr.Prabhjit Jauhar, Advocate.

versus

ERICSSON COMMUNICATIONS PVT. LTD. Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

CM No.2816/2011

1. Appellants had filed a suit against the respondent praying that a decree in sum of ₹1,13,95,591.90 (Rupees One crore thirteen lakhs ninety five thousand five hundred ninety one and paise ninety only) be passed in favour of the appellants and against the defendant together with interest @24% per annum. It was pleaded in the plaint that vide letter dated 02.01.1996 the plaintiff No.2 gave a proposal to the defendant to let out 70,000 sq.ft. area in a building at a rent of ₹200/- per sq.ft. which was accepted and thus was the foundation of the contract.

2. Relevant for the purposes of adjudicating the present application is to note that after so pleading it was further pleaded, in para 5 of the plaint: *'It would be pertinent*

to note that the plaintiff No.2 at the time of giving said proposal made it clear that commission chargeable would be equal to one month's rent.'

3. It was pleaded in the plaint that for the property let out by the plaintiff No.2, commission chargeable was the one month rent and the figure was the suit amount.

4. Highlighting that as pleaded in the plaint, plaintiff No.2 was the property broker to facilitate the letting between the landlord and the respondent and was claiming one month's rent as the brokerage. He pleaded that after the transaction was completed he had incorporated plaintiff No.1 as a company.

5. Defence taken in the written statement was that the agreement was an oral agreement to pay commission being 1% of the annual rent and not as claimed in the plaint.

6. Ignoring other disputes pertaining to the areas which were let out by the landlord to the respondent, relevant for the present application is to note that the plaintiffs never filed, much less proved any letter dated 02.01.1996.

7. When the witness of the plaintiffs i.e. plaintiff No.2 appeared as the witness of the plaintiffs, he stated during his deposition that on 02.01.1996 a letter was submitted containing the terms of the offer. On being cross examined he admitted that the letter was not filed, but stated that he had a copy of the letter. On being further cross-examined as to the amount payable towards commission, he stated during cross-examination: *'It is correct that there was no agreement whereby the defendant had agreed to pay any amount as*

claimed by me in para No.12 of the affidavit (Volunteer- the agreement was only verbal)'.

8. Now, the plaintiffs i.e. the appellants seek to file and thereafter lead evidence to prove the documents annexed with the instant application, which documents are: (i) photocopy of a hand-written stated fax message purportedly sent by fax to the defendant on 03.01.1996 and certificates issued by Vasant Kunj Estate Agents Association that its members would charge one month rent from the tenant and the landlord upon facilitating letting of the premises.

9. Suffice would it be to state that the documents are private documents and can be contrived at any stage.

10. The certificates issued by the Association have little evidentiary value, and whatever be their evidentiary worth, the appellants have given no reason as to why the appellants did not file and prove the same during trial.

11. As regards the photocopy of the handwritten fax message, the original office copy has not been filed, and obviously cannot be filed because in the year 1996 facsimile were generated, through machines attached to the telephone, on paper with ammonia and with passage of time the print faded and got destroyed in three to four years.

12. But, the question would be, should the document be permitted to be proved at this stage after permitting the same to be filed, keeping in view the document is a private document and can be self created at any time.

13. We had asked learned counsel for the appellants whether at this late stage, through MTNL, the appellants can prove, with reference to the record of MTNL that from the

telephone number of the appellants a fax message was sent at the telephone number of the defendant; for the reason only authentic proof of having sent the fax message as claimed would be the record of MTNL. Learned counsel for the appellants fairly conceded that due to long interval of time spanning 16 years, MTNL would not be having the relevant record.

14. Now, the very foundation of the claim is a stated letter of offer dated 02.01.1996, which is now claimed to be a handwritten message sent by fax on 03.01.1996. A document which is the foundation of the claim, if not available with a party is required to be proved through secondary evidence. The appellant No.1 is a company engaged in sale and purchase of properties and renders services to carry out title search and draw up documents pertaining to sale and letting of properties. It is apparent that appellant No.1 has legal advice available.

15. So fundamental is the document to the claim of the appellants that we see no escape from the conclusion that the handwritten note statedly sent by fax has strong suspicions of being a created document. The suit was filed on 28.05.1998, and surely plaintiff No.2, the stated scribe of the fax message, would have certainly remembered that he never sent any letter but a hand-scribed fax message and would have thus so pleaded.

16. Prima facie, authenticity of a document sought to be filed at a belated stage has to appraised by the Court before permitting the same to be filed and proved. Finding none in the handwritten document now claimed to be sent by

fax on 03.01.1996, as against the pleading in the suit that the proposal was sent by means of a letter on 03.01.1996, we decline the prayer made to permit the appellants to firstly file and then prove the document. Similarly, the certificates obtained from the association of which the plaintiffs claim to be members of are possibly self created documents got generated through the association. Additionally, qua said documents no reason has been pleaded as to why they could not be filed and proved at the trial to support a market practice. We further find that the plaintiffs have not led any evidence of other transactions transacted through the plaintiffs where one month's rent has been charged towards commission, an evidence which was available with the appellants.

17. We dismiss CM No.2816/2011 but refrain from imposing costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

JANUARY 30, 2012
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