

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

+ **CS(OS) No.1923/2012**

% **17th July, 2012**

VR WONDER ELECTRICALS AND ELECTRONICS Plaintiff

Through: **Mr. Arvind K. Nigam, Sr. Adv. with Mr.
Jagdish Safar, Mr. Praveen Kr. Jain and Mr.
Malay Dwivedi, Advocates.**

versus

C -QUEST CAPITAL GREEN VENTURES PVT LTD & ORS Defendants

Through

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This suit came up for admission on 6.7.2012. On that date, after hearing the senior counsel for the plaintiff at length, two issues were put to him. First was that the suit, in substance, whatever be the form, is a suit seeking to enforce contractual rights, and since the plaintiff-partnership firm is not registered, the suit would be barred by Section 69 (2) of the Partnership Act, 1932. The second issue raised was that the contract in question between the plaintiff and the defendant no.2 dated 10.2.2011 contains Clause-11, and which is a clause which requires parties to settle their disputes by arbitration in Washington D.C under the

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aegis of the International Chambers of Commerce with its applicable rules of arbitration. On 6.7.2012, on instructions, the learned senior counsel for the plaintiff stated that plaintiff-partnership firm is registered under Section 69 of the Partnership Act, 1908, the certificate of registration under Section 69 has already been couriered to the counsel by the plaintiff, and, that the certificate will be filed. The suit was therefore adjourned to 26th July, 2012.

2. A fresh application filed by the plaintiff under Order 6 Rule 17 is listed today before the next date of 26.7.2012 to which the suit was adjourned. The main matter is therefore taken up today for hearing. By this application, the plaintiff takes up a stand that on 6.7.2012 by error it was said that the partnership firm was registered, actually however the plaintiff partnership firm is not registered, yet it is contended that the suit still lies as what is being enforced through the suit are not contractual rights but rights under law of torts. Reliance is placed upon eleven judgments, and to which judgments I need not refer to, because, the proposition of law cannot be disputed that Section 69 (2) of the Partnership Act does not bar the suit where the rights are claimed de-hors the contract, the suit being barred only where a plaintiff-partnership firm sues to enforce rights under a contract.

3. In order to understand as to whether the suit really seeks enforcement of contractual rights, or rights under law of torts, it will have to be seen as to whether during trial of the case, the plaintiff will have to rely upon the contract dated 10.2.2011 which is entered into between the parties so as to prove its causes of action and the reliefs claimed. We will have to examine the plaint to find out that whether in the plaint for the foundation of the case , relevant averments qua the causes of action are or are not based on the contractual document dated 10.2.2011 titled as “*Habsiguda CPA Financing Agreement*”. This agreement is an agreement between the plaintiff and the defendant no.2, plaintiff in effect being the seller and defendant no.2 in effect the buyer. As will be dilated on hereinafter, these two parties are really the only two necessary parties to the suit.

4. I will also in the present judgment, by which I am essentially dismissing the suit under Section 69(2) of the Partnership Act,1932 will refer to the fact that really there is no cause of action against the defendant no.1 which is only a group company of the defendant no.2 and to whom goods were to be delivered for the defendant no.2 only with which there is a contract, and admittedly, there is no contract entered into between the plaintiff and the defendant no.1 and thus no privity of contract between the plaintiff and the defendant no.1. Also, the defendant no.3 authority is really in the position of a garnishee only i.e. if the

plaintiff succeeds in the suit, possibly, the plaintiff may seek to get its rights enforced by execution thereafter against defendant no.3, inasmuch as, the defendant no.3 would have with it or is capable of controlling the assets/monies of the defendant no.2, and to which, monies or 'carbon credits' the plaintiff would have legal rights. Learned senior counsel for the plaintiff on 6.7.2012 had extensively referred to various clauses of this agreement dated 10.2.2011, and some of which clauses I will refer to hereinafter.

5. The facts of the case are that the plaintiff claims to have entered into the subject agreement dated 10.2.2011 with the defendant no.2 by which the plaintiff agreed to supply Compact Fluorescent Lamps (CFLs), for a project undertaken by defendant no.1 in Andhra Pradesh for substituting normal lights with CFLs. The contract was with defendant no.2, and delivery was to be made to the defendant no.1. Though the contract is called 'a financing contract', yet, there can be no manner of doubt that plaintiff is a seller, defendant no.2 is a buyer and the point of delivery is the defendant no.1. There is a Kyoto Protocol as per which by use of CFLs, under a detailed procedure which is in place being followed, 'carbon credits' are earned. These carbon credits are tradable and have monetary value. Under the Agreement dated 10.2.2011, the plaintiff agreed to supply and finance CFLs numbering 526500. There are various clauses in the contract which

pertain to how the 'carbon credits' will be allocated to the plaintiff and the defendant no.2 respectively i.e 78% to the plaintiff and 22% to the defendant no.2. Clause 5 of the contract also contains the expected prices or the transaction prices with respect to the "carbon credits". Learned senior counsel for the plaintiff has also taken me through appendices 'C' and 'D' to the contract dated 10.2.2011 which give percentages of distribution of the "carbon credits" from the year 2011 till the year 2019.

6. A reading of the plaint makes it more than abundantly clear, and it being settled law that what has to be looked into is the substance and not merely the language or form which is employed, that really the plaintiff in fact claims monetary reliefs and other consequential reliefs like injunctions etc being its share of 'carbon credits' which it would have earned by supply of the CFLs. Such causes of action and reliefs can never be established without relying upon the contract dated 10.2.2011. To understand this further, it is necessary to reproduce the prayer clauses of the plaint and which read as under:-

“PRAYER

28. It is respectfully prayed that the Hon'ble Court be pleased to grant the following reliefs to the Plaintiff:

(a) A decree of permanent injunction restraining Defendants Nos.1 and 2 from diverting any remaining CFLs supplied by the Plaintiff to the said Defendants to any place outside the

Habsiguda CPA Project or for any purpose other than the purposes of the said project;

(b) A decree of permanent injunction against Defendant No.3 restraining the said Defendant from approving the issue of any CERs to Defendants Nos. 1 and 2 or any other person for the 95,253 CFLs, diverted by Defendants Nos. 1 and 2 and for any other CFLs supplied to Defendants Nos. 1 and 2 for the Habsiguda Project but used elsewhere, or the approval of issue of CERs in respect of any project other than the Habsiguda Project where any CFLs supplied by the Plaintiff have been utilized;

(c) A decree of ₹2,61,13,308 in favour of the Plaintiff and against Defendants Nos. 1 and 2 as damages including punitive damages equal to the value of loss of CERs caused by them to the Plaintiff;

(d) an order requiring Defendants Nos. 1 and 2 to render up this Hon'ble Court their Accounts of profits attributable to the use of all CFLs supplied by Plaintiff to Defendants Nos. 1 & 2 and diverted to other use, and awarding the same to the Plaintiff

(e) An order directing Defendants Nos. 1 and 2 to deliver up all records, papers and accounts whether in physical or in digital format and including all recording formats including but not limited to hard disks, pen drives, Compact Disks and the like, pertaining to the diversion of the Plaintiff's CFLs from the Habsiguda project, and all unused CFLs with all labels and containers, to the Plaintiff.

(f) Grant leave to Plaintiff under Order 2 Rule 2(3) CPC to sue for contractual relief if and when any cause of action arises in respect of the same;

(g) Award the costs of the present suit and legal expenses including counsel's fee in favour of the Plaintiff and against Defendants Nos. 1 and 2;

AND

That this Hon'ble Court may be pleased to pass such further orders, if any, as it may deem fit and proper in the facts and circumstances of the present case.”

7. Surely none of the reliefs claimed above and the causes of action on the basis of which they are claimed can at all be established except through the contract dated 10.2.2011. The case of the plaintiff in the plaint is that the defendant no.1 has wrongly transferred some of the CFLs which were to be used in Habsiguda in Andhra Pradesh to its other projects and consequently, there would be loss of carbon credits for the plaintiff. Though there are prayer clauses claiming injunctions etc against defendant no.1 and 2 from diverting the remaining CFLs with them i.e. 95253 in number to any other person or any other project, in my opinion, the primary relief and the real entitlement of the plaintiff (who euphemistically is called as financier in the contract dated 10.2.2011) is to monies as a seller who has sold CFLs to the defendant no.2. If a person to whom goods are transferred, fails to pay consideration for the same, then, the right of a person such as the plaintiff in this case is to basically recover either the price of the goods or the consequential monetary amounts being the carbon credits in this case and for which Clause 5 of the Agreement in fact specifies the expected transaction prices of the different years from 2011 to 2017. The prayer Clause(C) also shows that decree is sought for a sum of ₹2,61,13,308/- with respect to the value of such CERs i.e “carbon credits”. The further prayers with respect to injunction,

rendering of accounts and delivery of records etc are all those which arise pursuant to breach of the contract dated 10.2.2011. In my opinion, shorn of the frills, the plaint really seeks enforcement of contractual rights arising from the contract dated 10.2.2011 entered into between the plaintiff and the defendant no.2. Surely, and it cannot be doubted, that, at every step, plaintiff will have to rely upon and prove the terms of the contract dated 10.2.2011 with respect to claiming of the reliefs prayed in the present suit.

8. Learned senior counsel for the plaintiff sought to rely upon various judgments to argue that a suit which is filed claiming infringement of tortious rights, cannot be barred under Section 69 of the Partnership Act, 1932. As already stated above, there can be no quibble to this legal proposition, but here in reality the suit is based on the contract dated 10.2.2011 and no law of torts. The suit cannot be said to be enforcing rights under law of torts merely because cosmetic averments to that effect have been made in the plaint. There has to be a meaningful, and not a cursory, reading of the plaint. However so the plaintiff may want to disguise the plaint, a thorough reading of the same shows that the suit seeks enforcement of contractual rights. Though, para 22 of the plaint make averments with respect to the rights/remedy arising in tort, but, there can be no manner of doubt that all the rights arise from the contractual relationship viz under

the Agreement dated 10.2.2011. If a person to whom CFLs are given wrongly 'converts' the same, and though in a way it may be argued that there is a tort of 'conversion', really and actually what the plaintiff will be entitled to is the price of CFLs which are said to be 95253 in number as also the other CFLs which the defendant nos. 1 and 2 may have converted for use through other projects, besides the price/value of the carbon credits which the plaintiff alleges it has lost and the related reliefs of injunctions etc, and all of which spring from the contract dated 10.2.2011. The tortious actions which do not fall under Section 69 of the Partnership Act, 1932 are really those actions which have absolutely no co-relation to any contractual matter i.e they spring totally independent of contractual terms. Once the main and almost the entire basis of the plaint is a contract, averments made merely to camouflage the real nature of the suit by pleading that there is a tort of conversion with regard to CFLs, cannot take away from the fact that really and undoubtedly contractual rights are sought to be enforced, and I hold accordingly.

9. I for one, with all humility, have failed to understand the attitude of the plaintiff, as I have repeatedly put to its counsels that there should hardly be difficulty in getting the partnership firm registered under Section 69 of the Partnership Act, 1932 , and then filing the suit, and in fact from 6.7.2012 till today,

the partnership firm may even have been got registered under Section 69 of the Partnership Act, 1932, yet, learned senior counsel for the plaintiff on instructions states that the present suit is being pressed.

10. So far as the defendant no.1 is concerned, merely because at the instance of the contracting party; being the defendant no.2-company and only with whom the plaintiff has a contract with respect to CFLs; the deliveries have to be made to it, there is no right of the plaintiff which will arise against the said defendant no.1 with whom there is no privity of contract. Obviously, any relief which may be granted in favour of the plaintiff will be binding not only against the defendant no.2 but also its agents, servants, employees etc. i.e. including the defendant no.1. Also, under Section 2(d) of the Contract Act, 1872 since consideration to a contract need not flow only to a party to a contract, therefore merely the delivery point person (assuming for arguments sake that delivery is consideration under the contract and which it is not) is a person different from the contracting party cannot /will not mean that such a person who takes delivery will become a party to the contract. Therefore, really the defendant no.1 was not a necessary party at all to this suit. I have a doubt that the object of adding the defendant no.1 (as also the defendant no.3) really is to avoid the arbitration clause in the contract dated 10.2.2011, for contending that the suit disputes cannot/ought

not to be referred to arbitration as the defendant nos. 1 and 3 are not parties to the contract containing the arbitration clause.

11. So far as the defendant no.3 is concerned, the defendant no.3 authority has been made a party to the suit so that injunction as prayed can be claimed against it from not releasing the carbon credits to the defendant no.2. Really therefore, the defendant no.3 authority is sued only as a garnishee i.e. a person who would have control of the monies and assets of a debtor. The debtor in this case would be the defendant no.2. A garnishee comes into play ordinarily only after a decree is passed against the debtor, or if at all so during the pendency of the suit, only limited to the aspect of interim proceedings whether under Order 38 or under Order 39 CPC. Such a garnishee has no part in the cause of action to the suit and a party to an interim proceedings cannot be a necessary party to the suit. In fact such garnishee need not even be made a party to the suit and all that is required is that it would be heard on the direction qua interim orders. I have already stated that the object of adding the defendant no.3 (as also defendant no.1) is to get out of the arbitration clause which requires the parties to settle their disputes by arbitration in Washington D.C under the aegis of the International Chambers of Commerce. I need not say anything further on the aspect of arbitration because I am dismissing the suit on account of bar of Section 69(2) of the Partnership Act, 1932 and

defendants no. 1 & 3 not being required as parties to the suit. Of course, learned senior counsel for the plaintiff is right in theoretically contending that defendant no.2 may waive the arbitration clause, but, all I can say is that that would only be known in due course of time. I must also note that prior to the filing of suit there have been no attempt with respect to settlement of the disputes between the parties by negotiations, and which is one of the requirement of Clause 11 of the contract dated 10.2.2011.

12. In view of the above, I have no option but to dismiss the suit on account of bar of Section 69 (2) of the Partnership Act, 1932. Defendant nos. 1 and 3 are unnecessary parties to the suit and the suit against them does not lie. The suit is accordingly dismissed.

13. Since the suit is dismissed, all pending applications are also dismissed accordingly.

14. The date fixed i.e. 26.7.2012 stands cancelled.

JULY 17, 2012
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VALMIKI J. MEHTA, J.