* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **CS(OS) No. 226/2006**

% **7th July, 2015**

M/S KASHMIRI LAL SURINDER KUMAR ..... Plaintiff

Through: Mr. Madhur Sapra, Adv.

versus

M/S VEER BHAN RAMESH KUMAR & ORS ..... Defendants

Through: Mr. Vivekananda, Adv. for D-2 and D-3

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. Plaintiff/M/s Kashmiri Lal Surinder Kumar has filed the suit for recovery of Rs.20,55,000/- against three defendants. Defendant no. 1 as per the plaint is a partnership firm called as M/s Veer Bhan Ramesh Kumar . Defendant no.2 Sh. Ramesh Kumar Sachdeva and defendant no.3 Sh. Jitender Kumar Sachdeva are stated to be partners of the defendant no.1/Firm.

2. As per the plaint the plaintiff firm is carrying on the business of selling of fruits and vegetables, including, as an agent thereof. It is stated in the plaint that defendant no.1 through defendant nos.2 and 3 had been purchasing fruits and vegetables from the plaintiff firm at Delhi and for such transaction

defendants were paying commission to the plaintiff over and above the quoted price. Plaintiff states that invoices were issued from time to time and a total sum of Rs.75,25,268.72/- was due from the defendants for the period from 2.4.2001 till 3.3.2004 and against which defendants are stated to have made payments totaling to Rs.54,71,278.97/- thus leaving a balance of Rs.20,53,989.75/- and for recovery of which amount the subject suit has been filed alongwith the claim thereon of interest.

3. Defendants no.2 and 3 have appeared and contested the suit. As per the defendant nos. 2 and 3 there is no firm by the name of defendant no.1. It is stated that defendant nos. 2 and 3 have no connection or co-relation with any firm in the name of defendant no.1. The defendants deny that they ever did any business on credit/loan or commission basis with the plaintiff even at Delhi or Narwana. Territorial jurisdiction of this Court was also denied. Defendants have prayed for dismissal of the suit on the ground that no amount is due from the defendant nos. 2 and 3 to the plaintiff much less any amount towards commission payment.

4. The following issues were framed in the suit on 16.7.2010:

> "(i) Whether the suit is liable to be rejected on the ground of non-joinder and mis-joinder of necessary parties? OPD

(ii) Whether this Court has the territorial jurisdiction to entertain the suit? OPD

(iii) Whether the plaintiff is entitled to recover Rs.20,53,989.75/- from the defendant? OPP

(iv) Whether the plaintiff is entitled to interest @ 24%, if so, on what amount and for what period? OPP

(v) Relief"

5. In support of its case, plaintiff has filed affidavit of evidence of Sh. Surinder Kumar as PW-1 and Sh. Jagdish Lal Dua as PW-2. Through these affidavits, the plaintiff firm being registered as a partnership firm under Section 59 of the Partnership Act,1932 has been proved by filing form issued by the Registrar of Firms exhibited as Ex.PW1/1. Through the affidavit of PW-1, it is also sought to be proved that signatures of the defendant no.2 appear on the back of the freight challan numbers 5124, 10060, 2554 and 2588 dated 22.6.2001, 3.7.2001, 30.9.2003 and 8.10.2003 respectively. These challans have hence been exhibited as Ex.PW1/2 to Ex. PW1/5. The statement of account maintained by the plaintiff has been filed, proved and exhibited as Ex.PW1/6. Legal notice dated 31.3.2005 served by the plaintiff upon the defendants has been proved and exhibited as Ex.PW1/7 and the reply dated 19.4.2005 given by the defendants no.2 and 3 has been proved and exhibited as Ex.PW1/8.

6. On behalf of the defendants evidence has been led by filing affidavits of evidence of defendant nos. 2 and 3. In the affidavit of defendant no.2, defendant no.2 has denied his signatures which as per the plaintiff existed on freight challans Ex.PW1/2 to Ex.PW1/5. Defendant nos. 2 and 3 have also in their affidavits denied the statement of account filed by the plaintiff and have denied any liability on the basis of the said statement of account Ex.PW1/6. Defendant nos. 2 and 3 have denied that there existed defendant no.1 firm or that the defendant nos. 2 and 3 ever did any business on credit/loan or commission basis with the plaintiff. In the affidavits it is also stated that when the purchasing was made from the plaintiff it was in cash and payment was made then and there with respect to cash transactions ie there was no selling of fruits and vegetables by the plaintiff as an agent to the defendant no.2.

7. Issue no.2 with respect to territorial jurisdiction is not pressed on behalf of defendant nos. 2 and 3.

<u>Issue nos. 1, 3 & 4</u>

8. That leaves with issue nos. 1, 3 and 4 as to entitlement of the plaintiff to claim the suit amount from the defendants including interest. Also,

relevant would be whether defendant no.1 is liable. All these three issues no. 1, 3 and 4 are now therefore taken up together for disposal.

9. At the outset, it is necessary at this stage to refer to and reproduce Section 34 of the Evidence Act,1872 and which provision reads as under:-

> "**34. Entries in books of account, including those maintained in an electronic form when relevant**.- Entries in books of account, including those maintained in an electronic form, regularly kept in course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability."

10. A reading of the aforesaid provision shows that merely by filing and proving a statement of account, liability cannot be fastened upon a defendant, and it is necessary that entries in the statement of account have to be proved by the documents of the transactions/entries. It is seen in the present case that except a self-serving statement of account no documents have been filed by the plaintiff with respect to the transactions comprised in the entries. Plaintiff has only filed a total of four freight challans exhibited as Ex.PW1/2 to Ex.PW1/5 but the defendant no.2 has denied his signatures and no evidence has been led on behalf of the plaintiff, including that of an expert, to show that the signatures on Ex.PW1/2 to Ex.PW1/5 are same as the admitted signatures of the defendant no.2. The four challans are not challans pertaining to any specific invoices of the goods raised by plaintiff, but they are challans only with

respect to freight payment and total of which four challans come to approximately Rs.5,500/-.

11. On such fragile evidence as led by the plaintiff this Court cannot fasten a huge liability as claimed in the suit upon the defendants more particularly because the plaint is totally silent as to when and what was any written agreement for payment of commission, what is the rate of commission which was agreed to be payable by the defendants to the plaintiff with respect to each alleged invoice which is the subject matter of the statement of account (in any case not proved), what would be the amount of commission payment qua each invoice. Also, plaintiff as per the statement of account claims that various payments were received by the plaintiff from the defendants, but, once again except the entries of the alleged payments, no documentary proof is filed that these payments were made by the defendants on the plaintiff. In the statement of account it is reflected that payments have been made by cash but no documents or receipts of the transactions of these alleged cash payments have been filed and proved on behalf of the plaintiff. No income tax returns have been filed by the plaintiff to show that any sales were made by the plaintiff to the defendants including defendant nos. 2 and 3 or that in such income tax returns plaintiff has shown that dues are payable by the defendants being those dues as stated in the suit plaint.

12. The conclusion of the above is that plaintiff has not proved any commission agreement, rates of commission, sale of goods by means of invoices to the defendants, whether the goods have been received by the defendants, whether the defendants ever made payments to the plaintiff etc etc. In sum and substance, in support of the suit plaint the supporting evidence is only a statement of account and four challans showing freight payment but no documents of the transactions of sales by means of invoices of a particular amount of the sale of fruits and vegetables or challans of delivery or of any debit and credit notes raised with respect to commission payment have been filed and proved. As already stated above, on mere statement of account a suit claim cannot be said to be proved in view of Section 34 of the Evidence Act.

13. Learned counsel for the plaintiff has argued that defendant no.2 in his cross-examination on 25.4.2014 has admitted that this defendant sometimes purchased fruits from the plaintiff and which is in contradiction from the stand in the written statement that the defendants never had any transaction with the plaintiff, however, this argument is misconceived because in the relevant portion of the cross-examination defendant no.2 has stated that he sometimes purchased fruits and vegetables from the plaintiff and made cash payment then and there, and in the written statement, defendant nos.2 and 3 have only stated that they have never had any credit/loan commission with the plaintiff with

respect to purchase of fruits and vegetables or there was any commission payable with respect to this transaction. Putting it in other words, defendant nos. 2 and 3 in the written statement have taken up a stand that they never had any credit dealing with the plaintiff and hence of commission payable with respect to the credit system in which fruits and vegetables were purchased by the defendants, and therefore, in the cross-examination when it is stated that sometimes transactions were entered into by payment in cash cannot said to be in any manner a contradiction with the stand in the written statement.

14. In the opinion of this Court, plaintiff has therefore miserably failed to prove that defendants are liable to pay the suit amount. Once the suit amount or the principal amount is not payable, there does not arise any issue of payment of interest to the plaintiff.

15. So far as the defendant no.1 is concerned, though the said defendant is *ex parte*, defendant nos. 2 and 3 have however stated that they have no connection with the defendant no.1 and it is noted in terms of the evidence which is discussed above that plaintiff has failed to prove that it had any transaction of any dues payable even by the defendant no.1. Also, it is not proved that what is the constitution of defendant no.1 ie who are the alleged partners of defendant no.1, whether defendant nos.2 and 3 or anyone else. This has not been proved before this Court by filing any documentary evidence

much less clinching evidence. Plaintiff has therefore failed to prove that it had any transaction for payment of commission even by the defendant no.1 to the plaintiff.

16. In view of the above, the suit is without any merit. Suit is accordingly dismissed, leaving the parties to bear their own costs. Decree sheet be prepared.

JULY 07, 2015 **VALMIKI J. MEHTA, J.**
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