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

\+ **RFA No.1069/2017**

% **Reserved on: 22nd December, 2017**
Pronounced on: 3rd January, 2018

VIJAY PAL SINGH ..... Appellant
Through: Mr. L.C. Rajput, Advocate with Mr. S.K. Verma, Advocate.

versus

USMAN GANI ANSARI ..... Respondent

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

C.M. No.47291/2017 (exemption)

1. Exemption allowed subject to just exceptions.

C.M. stands disposed of.

RFA No.1069/2017 and C.M. No.47290/2017 (stay)

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant in the suit impugning the judgment of the Trial Court dated 18.11.2017 by which trial court has decreed the suit for recovery of moneys filed by the respondent/plaintiff for an amount of Rs.3,50,000/- along with interest at 9% per annum simple. The amount which is decreed in favour of

the respondent/plaintiff against the appellant/defendant is on account of the liability of the appellant/defendant to pay commission to the respondent/plaintiff as carrying and forwarding agent duties performed by the respondent/plaintiff for the appellant/defendant.

3. The facts of the case are that the respondent/plaintiff filed the subject suit for recovery of Rs.3,50,000/- pleading that he was running the business of medicines under the name and style of M/s Hadis Pharma as its sole proprietor. The appellant/defendant approached the respondent/plaintiff for their medicine products being carried and forwarded in Delhi and therefore an agreement dated 31.3.2011 was executed between the respondent/plaintiff and M/s Adonis Pharmaceuticals Pvt. Ltd. of which the appellant/defendant was one of the Directors. An amount of security deposit of Rs.5 lacs was deposited by the respondent/plaintiff with M/s Adonis Pharmaceuticals Pvt. Ltd. It was pleaded in the plaint that the respondent/plaintiff was to get 2% commission and 1% of the amount was to be paid as expenses to the respondent/plaintiff incurred as C&F agent. It is further pleaded in the plaint that the appellant/defendant did not pay the settled amount of commission and expenses till

January, 2013 which came to Rs.1,05,000/- and consequently the agreement dated 31.3.2011 was terminated. Since the agreement was terminated, the security deposit of Rs.5 lacs paid by the respondent/plaintiff to M/s Adonis Pharmaceuticals Pvt. Ltd became repayable and therefore an agreement dated 23.7.2013 was entered into between the respondent/plaintiff and the appellant/defendant along with another Director of M/s Adonis Pharmaceuticals Pvt. Ltd, one Mr. Nazar Ahmad whereby an amount of Rs.4 lacs was payable under this agreement dated 23.7.2013 by the appellant/defendant and a sum of Rs.2,05,000/- was to be paid by the other Director Mr. Nazar Ahmad. Since the amount of Rs.4 lacs which was payable by the appellant/defendant to the respondent/plaintiff in terms of the agreement dated 23.7.2013 was not paid, hence the respondent/plaintiff filed the subject suit.

4. The appellant/defendant contested the suit and pleaded that the plaint is without any cause of action. It was also pleaded by the appellant/defendant that the suit is bad for non-joinder of necessary party as the third party to the MoU/agreement dated 23.7.2013 namely Mr. Nazar Ahmad has not been made party

defendant to the suit. Execution of the first agreement dated 31.3.2011 was not disputed and nor was it disputed that M/s Adonis Pharmaceuticals Pvt. Ltd had received a sum of Rs.5 lacs as security from the respondent/plaintiff. It was pleaded in the written statement that the respondent/plaintiff was to be refunded the amount of Rs.6 lacs in interest free instalments of Rs.20,000/- per month and that the appellant/defendant had already paid a sum of Rs.3,88,840/- to the respondent/plaintiff and details of which are contained in para 6 of the impugned judgment. It was also pleaded that the respondent/plaintiff had agreed to receive only a sum of Rs.50,000/- from the appellant/defendant after receiving an amount of Rs.2,05,000/- from Mr. Nazar Ahmad, and that the appellant/defendant has already paid a sum of Rs.50,000/- to the respondent/plaintiff on 30.9.2013 in full and final settlement and therefore the suit had to be dismissed.

5. Issues were framed and parties led evidence and these aspects are recorded in paras 10 to 14 of the impugned judgment as under:-

> "10. On the basis of pleadings of the parties, vide orders dated 19.05.2015, following issues were framed by Ld. Predecessor of this court:
>
> ***Issues***

(1) Whether the suit is bad for non joinder of the parties in view of preliminary objection no.1 of the written statement? O.P.D.
(2) Whether there is no cause of action for filing the present petition, in view of preliminary objection no.2 of the written statement? O.P.D.
(3) Whether the plaintiff is entitled to recover sum of Rs.3,50,000/-? O.P.P.
(4) If the answer to issue no.3 is in affirmative, whether the plaintiff is entitled to interest thereupon, if so, at what rate and for which period? O.P.P.
(5) Relief.

11. Parties to the suit were thereafter called upon to substantiate their case by leading evidence.

12. Availing the given opportunity, plaintiff appeared in the witness box as PW-1. He filed his examination in chief by way of affidavit Ex.PW.1/1. During the course of his deposition, plaintiff had relied upon following documents:

i) *Declaration of the plaintiff in his working as Proprietor of M/s Hadis Pharma dated 28.03.2011 is Ex.PW1/A,*
ii) *Agreement dated 31.03.2011 is Ex.PW1/B;*
iii) *Cheque of Security Amount dated 05.04.2011 is Ex.PW1/C,*
iv) *Agreement/Memorandum of Understanding dated 23.07.2013 is Ex.PW1/D,*
v) *Legal Notice dated 26.08.2014 is Ex.PW1/E,*
vi) *Postal receipts are Ex.PW1/F,*
vii) *Acknowledgment Card is Ex.PW1/G,*
viii) *Reply to legal notice dated 10.09.2014 is Ex.PW1/H.*

13. PW-1 was cross examined in detail on behalf of defendant. The same is not mentioned here, for the sake of brevity and the material portion thereof, shall be referred and adverted to, while appreciating the evidence, vis-à-vis the arguments on behalf of the parties while giving findings on the issues so framed.

14. Defendant Vijay Pal Singh, to defend the claim raised by plaintiff appeared in the witness box as DW-1. He too filed his examination in chief by way of affidavit Ex.DW.1/A. DW-1 was cross examined in detail on behalf of plaintiff. The same is not mentioned here, for the sake of brevity and the material portion thereof, shall be referred and adverted to, while appreciating the evidence, vis-à-vis the arguments on behalf of the parties while giving finding on the issues so framed."

6. The main issues are as to whether the MoU/agreement dated 23.7.2013 was entered into between the parties and whether the

appellant/defendant had paid an amount of Rs.6 lacs under this agreement to the respondent/plaintiff. In this regard, trial court has rightly observed that the MoU/agreement dated 23.7.2013 has been proved and exhibited as Ex.PW1/D and as per which the appellant/defendant admitted his liability to the respondent/plaintiff for a sum of Rs.4 lacs. Trial court also has rightly held that the alleged payments totaling to Rs.3,88,840/- made by the appellant/defendant to the respondent/plaintiff as stated in para 6 of the impugned judgment are between 6.5.2011 and 25.3.2013 i.e prior to the execution of the agreement Ex.PW1/D dated 23.7.2013, and therefore such amounts cannot be taken as discharge of liability towards the agreement subsequently entered into between the parties on 23.7.2013. Trial court has also rightly held that appellant/defendant failed to prove any agreement whereby appellant/defendant would be discharged on payment Rs.50,000/- to the respondent/plaintiff

7. In my opinion, trial court has rightly decreed the suit by making the following observations:-

> "27. In order to discharge the onus, plaintiff during the course of his deposition in Court as PW-1, had deposed that initially he <u>had entered into a C&F Agreement dated 31.03.2011 Ex.PW.1/B with M/s Adonis Pharmaceuticals, of which defendant was one of the</u>

Directors. PW-1 further deposed that as per the requirements of the said agreement, he had paid a sum of Rs.5 lakhs to this company, towards security vide cheque, copy of which is Ex.PW.1/C. PW-1 further deposed that in terms of the said agreement Ex.PW.1/B, he was entitled to get 2% on the security amount towards commission, and 1% towards expenses as C&F Agent of the said company. PW-1 had further deposed that the said company of which defendant was one of the directors, had failed to pay his commission and expenses, amounting to Rs.1,05,000/-. He further deposed that the said company of which defendant was one of the directors, also had to refund his security, and thus, he was liable to get a total sum of Rs.6,05,000/-.

28. PW-1 further deposed that the said agreement Ex.PW.1/B was terminated and subsequently a mutual settlement was arrived at between him, present defendant and one Nazar Ahmad. PW-1 deposed that the said memorandum of understanding was reduced into writing on 23.07.2013. The said memorandum of understanding was proved on record as Ex.PW.1/D. PW-1 deposed that as per this memorandum of understanding Ex.PW.1/D, defendant was supposed to pay a sum of Rs.4 lakhs, to him in his personal capacity and Nazar Ahmad had to pay a sum of Rs.2,05,000/- to him. PW-1 deposed that out of this settled amount of Rs.4 lakhs, defendant had paid him only a sum of Rs.50,000/- on 30.09.2013 but failed to pay the balance amount of Rs.3,50,000/-.

29. Perusal of cross examination of PW-1 as well as the defendant's evidence on record, it is apparent that initially the agreement Ex.PW.1/B was executed between plaintiff and M/s Adonis Pharmaceuticals, of which defendant was one of the Directors. It is also admitted position on record as emanating from the written statement filed by the defendant, as well as examination in chief of defendant and suggestions given to PW-1 during his cross examination, that the sum of Rs.5 lakhs towards security was given by plaintiff to M/s Adonis Pharmaceuticals. It further emanates from the written statement that after termination of the C&F Agreement Ex.PW.1/B, it was agreed jointly by the present defendant and Nazar Ahmad, to pay a sum of Rs.6 lakhs to the plaintiff.

30. As per the claim of the plaintiff and the evidence led on record, defendant in terms of agreement /memorandum of understanding dated 23.07.2013 Ex.PW.1/D, was required to pay a sum of Rs.4 lakhs, out of the total settled amount to the plaintiff. It has further emanated from testimony of PW-1 that a sum of Rs.50,000/- has been paid by defendant to him on 30.09.2013.

31. Defendant in his written statement has claimed to have paid a sum of Rs.3,88,840/- to the plaintiff from 06.05.2011 till 25.03.2013. The acceptance of this amount has been admitted by plaintiff, during the course of his cross examination conducted on behalf of

defendant. He however, stated that this amount was received by him from the period 01.04.2011 to 25.03.2013 in lieu of the work / services rendered by him to M/s Adonis Pharmaceuticals. Relevant portion of cross examination of PW-1 to this effect, is as under:-

> ***I have received a sum of Rs.3,88,000/- from M/s Adonis Pharmaceuticals during the period from 01.04.2011 to 25.03.2013 on the basis of settlement /agreement dated 31.03.2011 Ex.PW.1/B as well as in the lieu of work / services, I rendered to M/s Adonis Pharmaceuticals.***

32. No suggestion whatsoever was given on behalf of defendant, to the plaintiff that this amount was paid to him by defendant, not towards the work / services rendered by the plaintiff to M/s Adonis Pharmaceuticals, but towards the payment of settled amount, which was agreed vide memorandum of understanding dated 23.07.2013 Ex.PW.1/D.

33. Even otherwise, on perusal of the record, it is apparent that this amount was received by the plaintiff, much prior to the execution of the memorandum of understanding dated 23.07.2013 Ex.PW.1/D. Had this amount been paid by the defendant to the plaintiff in discharge of his liability as agreed by him vide memorandum of understanding Ex.PW.1/D, the same must have found mention in that agreement itself. But that was not to be.

34. It is apparent on perusal of Ex.PW.1/D dated 23.07.2013, on which defendant had not denied his signatures, that this is a tripartite agreement executed between plaintiff, the present defendant and one Nazar Ahmad. The relevant portion of this agreement Ex.PW.1/D, required for the purposes of disposal of the present suit ie. Para-2, 3 and 4, are reproduced as under:-

> ***2. That first party (VIJAY PAL SINGH DEFENDANT) and second party promised to pay Rs.5,00,000/- (Rs.Five Lac only) of security and Rs.1,05,000/- (Rs.One lac five thousand only) (2% commission on the amount deposited by the third party (PLAINTIFF USMAN GANI ANSARI) as a security and 1% for the expenses which was not paid since January 2013) within 10 months ie. May 2014, from the date of this agreement / memorandum of understanding by way of cheque or cash.***
>
> ***3. That, first party (VIJAY PAL SINGH DEFENDANT) agreed / promised to pay Rs.4,00,000/- (Rs.Four lac only) to third party (PLAINTIFF USMAN GANI ANSARI) within 10 months ie. May 2014 from the date of this agreement / memorandum of understanding by way of cheque or cash.***
>
> ***4. That second party agreed / promised to pay Rs.2,05,000/- (Rs.Two lac five thousand only) in his personal capacity to third party (PLAINTIFF USMAN GANI ANSARI) within 10 months, ie.May 2014, from the date of this agreement / memorandum of understanding.*** (emphasis supplied)

35. <u>Neither the execution of this document Ex.PW.1/D, nor his signatures thereon, has been disputed by the defendant.</u> Sh.S.K.Verma, Advocate, Ld.Counsel for defendant, however, relying upon the deposition of DW-1 tried to put across a contention that this agreement was executed at instance of plaintiff, just to facilitate him to get his payment of Rs.2,05,000/- from Nazar Ahmad, as defendant Vijay Pal had already paid a sum of Rs.3,88,000/- to the plaintiff and it was mutually agreed between plaintiff and defendant that, in addition to the sum already paid by defendant to the plaintiff, defendant shall pay a further sum of Rs.50,000/- towards discharge of his complete liability. Ld. Counsel for defendant relying upon cross examination of PW-1 had contended that this additional sum of Rs.50,000/- was paid by the defendant to plaintiff on 30.09.2013.

36. This contention of Ld.Counsel for defendant, raised on the basis of oral testimony of DW-1, to my mind, ***cannot be*** accepted, in view of the settled principles of Indian Evidence Act.

37. It is a settled proposition of law that whenever any transaction entered into between the parties, is reduced into writing, then oral evidence on the same is ***barred***. As per the Statute, no evidence shall be given in proof of such contract, except the ***said document itself***. This particular proposition of law has been brought on the Statute Book by Legislature. It is pertinent to make a mention of the relevant provision of law, which is reproduced as under:-

38. Chapter VI of Indian Evidence Act reads :-

> ***Chapter VI of the Indian Evidence Act titled, "OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE"***
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> ***Section 91 thereunder is the relevant provision. The relevant portion of the said section states as follows:-***
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> SECTION 91. ***Evidence of terms of contract, grants and other dispositions of property reduced to form of document :- When the terms of a contract... have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible..."***

39. Consequently, this deposition of DW-1 that at the time of execution of Memorandum of Understanding Ex.PW.1/D, he was liable to pay only a sum of Rs.50,000/- to the plaintiff and not Rs.4 lakhs, as mentioned therein, ***cannot be*** accepted being ***barred*** by Section 91 of Indian Evidence Act.

40. In view thereof, in order to find out liability of the present defendant, it is that very document ie. Ex.PW.1/D, execution of which has not been denied by the defendant, is required to be looked into.

As per this agreement, defendant was liable to pay a sum of Rs.4 lakhs to plaintiff within a period of 10 months of execution thereof, ie. by May 2014. As per the evidence which has come up on record, defendant after execution of this document, has paid a sum of Rs.50,000/- to the plaintiff on 30.09.2013 payment of which has been admitted by the plaintiff. Thus, defendant is liable to make payment of the balance sum of Rs.3,50,000/- to the plaintiff, as has been claimed by plaintiff in the present suit." (underlining added)

8. Learned counsel for the appellant/defendant sought to argue that since the appellant/defendant is stated in the agreement dated 23.7.2013 Ex.PW1/D as being a Director of M/s Adonis Pharmaceuticals Pvt. Ltd, and therefore it will not be the appellant/defendant but the company M/s Adonis Pharmaceuticals Pvt. Ltd which will be liable under the agreement Ex.PW1/D dated 23.7.2013, however this argument is misconceived because in terms of Clause 3 of the agreement Ex.PW1/D the appellant/defendant had agreed to be personally liable for the sum of Rs.4 lacs. Merely because in the first part of the agreement Ex.PW1/D the appellant/defendant is called as a Director of M/s Adonis Pharmaceuticals Pvt. Ltd would not mean that liability would be of the company and not the appellant/defendant because the clauses of the agreement Ex.PW1/D show that the total liability towards the

respondent/plaintiff was taken over personally by the appellant/defendant and Mr. Nazar Ahmad.

9. In my opinion also there is no substance in the argument urged on behalf of the appellant/defendant that the suit was bad for non-joinder of Mr. Nazar Ahmad, another Director of M/s Adonis Pharmaceuticals Pvt. Ltd and who was the third party to the agreement Ex.PW1/D dated 23.7.2013, inasmuch as liability of the appellant/defendant and Mr. Nazar Ahmad were independent of each other and each of these two persons agreed to be independently liable to the respondent/plaintiff in terms of the agreement dated 23.7.2013 and for the different amounts of Rs.4 lacs payable by the appellant/defendant and a sum of Rs.2,05,000/- being payable by Mr. Nazar Ahmad. Therefore the suit cannot be held to be bad for non-joinder of Mr. Nazar Ahmad as is argued on behalf of the appellant/defendant.

10. Learned counsel for the appellant/defendant then sought to argue that the respondent/plaintiff in his cross examination admitted that he had no proof that any commission was payable to him by Mr. Nazar Ahmad and thus there was no basis of liability towards

commission payment, however this argument is once again completely lacking in substance because the liability towards the respondent/plaintiff had been acknowledged and arisen in terms of the agreement dated 23.7.2013 Ex.PW1/D and that in fact in the preliminary para just before commencement of the main clauses of the agreement it is categorically admitted that there was liability towards the respondent/plaintiff on account of non-payment of 2% commission and 1% expenses since January, 2013. Also the issue in the present case can be looked at that liability of the appellant/defendant can be said to be not of the claim of the commission or expenses but really the claim was towards refund of the security deposit of Rs.5 lacs given by the respondent/plaintiff to M/s Adonis Pharmaceuticals Pvt. Ltd given when the business commenced between the parties in terms of the agreement Ex.PW1/B dated 31.3.2011. Paras 2 and 3 of the said agreement dated 31.3.2011 Ex.PW1/B clearly records the factum with respect to payment of security deposit of Rs.5 lacs paid by the respondent/plaintiff to M/s Adonis Pharmaceuticals Pvt. Ltd.

11. In view of the above, there is no merit in the appeal. Dismissed.

JANUARY 03, 2018 **VALMIKI J. MEHTA, J**