

(2012) 08 DEL CK 0302

In the Delhi High Court

Case No : Regular First Appeal (OS) No. 18 of 2011

Karan Promotors (P) Ltd. and Another APPELLANT

Vs

The Great Eastern Shipping Co. Ltd. and Others RESPONDENT

Date of Decision : 17-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6

Citation : (2012) 08 DEL CK 0302

Hon'ble Judges : Pradeep Nandrajog, J; Manmohan Singh, J

Bench : Division Bench

Advocate : Anil Sapra, Instructed by Mr. Tanuj Khurana, Mr. Ashish Batra, Mr. Yashvardhan Tiwari and Ms. Payal Juneja, for the Appellant; M.P. Raju, Advocate with Mr. Ashish Azad, Advocate in RFA(OS) No. 32/2009 and Mr. Anil K. Kher Instructed by Mr. D.R. Bhatia and Mr. Siddhartha Jain, Advocates in RFA(OS) No. 18/2011, for the Respondent

Final Decision : Partly Allowed

Judgement

Manmohan Singh, J.—RFA(OS) No. 32/2009 arises from the judgment and decree dated 4th March, 2009 passed in CS(OS) No. 408/2000 whereby the suit of Karan Promotors Pvt. Ltd. for recovery of Rs. 42,66,771/- against the Great Eastern Shipping Co. Ltd. (hereinafter referred to as the "Great Eastern") was dismissed and similarly, second RFA(OS) No. 18/2011 filed by the same company as well as its Managing Director Sh.Vinod Kumar Gupta against the dismissal of their suit for recovery of Rs. 1,13,95,591/- being CS(OS) No. 1181/1998 against M/s Ericsson Communications Pvt. Ltd. (hereinafter referred to as the "Ericsson"). Since most of the facts are same in both appeals, therefore, the same are being decided by common judgment.

2. The case of the appellants (the appellants here include earlier company/firm operated by Vinod Kumar Gupta) before the Court below was that :

(a) It had been doing the business of liaison and property consultants. The respondent/Great Eastern in RFA(OS) No. 32/2009 who was the owner of the

building, named, the Great Eastern Plaza at 2A, Bhikaji Cama Place, New Delhi, had booked certain floors of the said building to different parties and had retained with it first, second and third floors. However, the said company had negotiated lease of the entire building for and on behalf of subsequent purchasers.

(b) The said Great Eastern had engaged services of the appellants to find out tenant(s) for the entire building or parts of the same. The appellant through Sh.Vinod Kumar Gupta gave a proposal to one Ericsson whereby the area of 70000sq.ft. spread over in all the floors was offered by the appellants to Ericsson on a monthly rent of Rs. 200 per sq.ft., which included maintenance charges of the said area. There were discussions between the appellants, Ericsson and the Great Eastern in this regard and the deal was finalized with the efforts of the appellants and at the first instance, Ericsson agreed to take only first, second and third floors which were owned by the Great Eastern. The other portions were agreed to be taken at some later date.

(c) Accordingly, a Memorandum of Understanding was executed between Ericsson and the Great Eastern on 15th May, 1996 whereby it was agreed that Ericsson would take the first, second and the third floors on a monthly rent of Rs. 59,37,447.45/- on the terms and conditions incorporated therein. It was agreed that the rent would start from 1st July, 1996 but the premises were handed over to Ericsson to enable them to carry out interior work. A lease deed was executed by the Great Eastern in favour of Ericsson on 4th September, 1996 which was registered on 13th September, 1996.

(d) The discussion with regard to fourth and sixth floors of the said building which was agreed to be leased out at the later date. Though fourth and sixth floors of the said building were booked by different parties i.e. M/s Punj Lloyd Ltd. and M/s Living Media India Ltd. respectively having booked the same from the Great Eastern but for the purpose of dealing with the lease of fourth and sixth floors, the Great Eastern was given authority by the purchasers to lease out the said two floors in favour of Ericsson.

3. It is submitted by the appellants that they being property dealer were to get brokerage from both the parties equivalent to one month's rent from Ericsson as well as the Great Eastern. After the lease was executed for first, second and third floors, the Great Eastern paid a sum of Rs. 59,37,447/- to the appellants in two equal installments i.e. first installment paid in October, 1996 and the second installment was paid in 1997.

After the execution and registration of lease deed for first, second and third floors, another lease in respect of fourth floor was executed between Ericsson and M/s Punj Lloyd Ltd. on 10th February, 2007 on a monthly rent of Rs. 13,83,168/-, and subsequently, with respect to the sixth floor executed between Ericsson with M/s Living Media India Ltd. at a monthly rent of Rs. 12,18,521.70/-. The case of the appellants before trial Court was that on account

of finalization of the lease with respect to fourth and sixth floors, another commission @ Rs. 13,83,168/- being one month's rent for the fourth floor and Rs. 12,18,521.70/- being one month's rent for the sixth floor became due and payable by the Great Eastern to the appellant, as it is the Great Eastern who engaged the services of the appellants as a broker.

4. It was further the case of the appellants that the lease deeds for all floors mentioned were finalized and executed with the efforts of the appellants but the Great Eastern had only paid Rs. 59,27,447/- as monthly rent being the commission for first, second and third floors, however, the Great Eastern despite of promise did not pay the commission of Rs. 13,83,168/- payable for the fourth floor and Rs. 12,88,521.70/- for the sixth floor and despite of various notices were issued, they refused to pay the commission to the appellants on the reason that the appellants were not involved in materializing the lease of fourth and sixth floors. Therefore, the appellants filed the suit being CS(OS) No. 408/2000 against Great Eastern for the recovery of Rs. 42,66,771/- on account of brokerages with interest.

5. After filing the suit, an application was moved by one M/s Gesco Corporation Ltd. for being impleaded, substituted and added as a party in place of the Great Eastern. The said application was disposed of vide order dated 26th February, 2002 whereby M/s Gesco Corporation Ltd. was added in the array of the parties as defendant No. 2. Both the defendants filed separate written statements.

6. The following issues were framed:-

1. Whether Punj Lloyds and M/s Living Media India Ltd. has authorized the defendant to negotiate a lease with Ericsson Communication Pvt. Ltd. on their behalf as alleged in the plaint? OPP

2. In case issue No. 1 is proved in the affirmative, whether there existed any agreement between the plaintiff and the defendant under which the former was entitled to payment of brokerage in respect of the lease created in favour of Ericsson Communications Pvt. Ltd. qua the 4th and 6th floor Great Eastern Plaza, 2A, Bhikaji Cama Place, New Delhi? OPP

3. In case issue No. 2 is found in the affirmative, whether the brokerage payable to the plaintiff was equivalent to one month's rent fixed with the lessee namely Ericsson Communications Pvt. Ltd.

4. Whether the suit is barred by limitation? OPD.

5. Whether the suit is bad for non-joinder of parties. If so, to what effect? OPD

6. Relief.

7. Thereafter, evidence was led by the parties. The appellant examined its Director, Sh. Vinod Kumar Gupta as its witness, as PW-1. The Great Eastern examined one Deepak Nayar as DW-1 as the only witness.

8. After considering the pleadings and evidence of the parties, the learned Single judge dismissed the suit by coming to conclusion that there existed no evidence on record to establish any authority given by the Great Eastern of the suit property to the plaintiff to lease out the fourth and sixth floors as Great Eastern was neither the lessor nor the lessee of the said premises and there was nothing on record to show as to what efforts were made by the appellants in obtaining the lease agreements. As the appellants were not involved in materializing the lease for the said floors, hence not entitled for any relief.

9. With regard to issue No. 4 about the suit being barred by limitation, the learned Single Judge had decided the said issue against the appellant by coming to the conclusion that the suit filed by appellant was barred by limitation on the reason that the lease deed of the fourth floor was executed on 10th February, 1997 and if the appellant was entitled to commission in the sum of Rs. 13,83,168/- on the said date. Further, the plaintiff became entitled to Rs. 12,18,521.70/- being one month's rent by way of commission in respect of the sixth floor, the suit ought to have filed within three years. As the same was not filed within the period of limitation, hence the said issue was decided against the appellants. The other issues No. 5 & 6 were also decided against the appellants for non-joinder of parties.

10. We have heard the Learned Counsel for the parties. Learned Senior counsel appearing on behalf of the appellants has restricted his arguments by challenging the finding arrived by the learned Single Judge on issues No. 1 to 3. He submits that in case, this Court concurs with the view taken by the learned Single Judge on these issues which are inter-linked, no further discussions are not required for remaining issues.

11. It is not in dispute that at the relevant time, M/s Punj Lloyd and M/s Living Media India Ltd. were the owners of fourth and sixth floors of the suit property. The sixth floor was subsequently purchased by M/s Mahindra Gesco Developers Ltd. and both the floors were leased to Ericsson who was not a party in the suit.

12. The appellant in order to discharge the burden of issues No. 1 to 3 relied upon the exchange of correspondence i.e. letter dated 16th February, 1996 (Exht.PW-1/3) written by Ericsson to the Great Eastern with copy to Sh.Vinod Gupta, the Managing Director of the appellant; the letter dated 20th March, 1996 (Exht.PW-1/4) also sent by Ericsson to the Great Eastern with copy to Sh.Vinod Gupta; and similarly, the letter dated 10th October, 1996 (Exht.PW-1/5) sent through fax by the Great Eastern to Sh.Vinod Gupta. By referring these letters, the contention of the appellants is that ultimately, the deal for fourth and sixth floors was materialized due to the efforts of the appellant alone and Great Eastern became liable to pay the said amount being one month's rent for the fourth and sixth floors also, as it was the Great Eastern who had engaged the services of the appellant. Though the appellant had admittedly having received the brokerage of Rs. 59,37,447/- in two installments for the leases executed for first, second and third floors.

13. As far as the letter dated 16th February, 1996 (Exht.PW-1/3) is concerned, the said letter was addressed by Ericsson as proposed lessee to the Great Eastern as proposed lessor which indicates that certain negotiations were being held between them. The subsequent letter dated 20th March, 1996 (Exht.PW-1/4) also does not help the case of the appellant, as it is clear from the said letter that there was no authorization given to the Great Eastern by the purchasers of fourth and sixth floors to deal with the leasing of the said floors. As none of these letters show that any authority was given at any point of time by the said companies to the Great Eastern to act as their agent. Exht.PW-1/6 which purports to be a Memorandum of Understanding inter-se the Great Eastern, M/s Anand Weaving & Spinning Mills Ltd., M/s Punj Lloyd Ltd. and M/s Living Media India Ltd. as lessors and Ericsson as the lessee. The appellant has accepted the fact that there was no agreement in writing with the respondent in respect of payment of commission/brokerage equivalent to one month's rent for fourth and sixth floors. The appellants were also not the party to the said Memorandum of Understanding. The appellants were also not even aware about the date when the lease deed was executed in respect of sixth floor. Copies of lease deeds for fourth and sixth floors were not proved. It is evident that at that time, respondent was not the owner of the suit property and had no authority to ask the appellant to deal with the said floors. The Great Eastern was neither the lessor nor lessee in the said floors. Therefore, the two letters referred by the appellant, on the basis of which the suit was filed, do not help the case of the appellant.

14. In the cross-examination, PW-1 has admitted that fourth floor of the building, Great Eastern Plaza was owned by M/s Punj Lloyd Ltd. and the sixth floor was owned by M/s Living Media India Ltd. at that time. In the cross-examination, PW-1 has also admitted that on the basis of the two letters dated 16th February, 1996 (Exht.PW-1/3) and 20th March, 1996 (Exht.PW-1/4) the suit was filed. The following questions were asked from PW-1 who has given the answers thereof, the same read as under:-

Question: Whether these two letters are the only authority authorizing you to negotiate the lease agreements?

Answer: I do not remember, if there is any other. The date of lease agreement with the Punj Lloyds was 10.2.1997. I do not remember the date of lease agreement with M/s Living Media Ltd.

Question: Have you placed these two lease agreements on record? Answer: I do not remember.

Question: Whether any Board Resolution was passed by M/s Punj Lloyds and Living Media Pvt. Limited before authorizing defendant or anybody else to negotiate the lease agreement on their behalf with Ericsson? Answer: I am not aware. Question: Kindly give the dates when, where and in whose presence the meeting took place for leasing fourth and sixth floors of the Great Eastern Plaza

Building?

Answer: Three-four meetings took place in that regard in the office of Ericsson. But I do not remember the exact date, month and year of the meetings. I also do not remember as to how many persons were present in the said meeting. However, Mr. Ganguly on behalf of the Ericsson was present in the meeting but I do not remember if he was present in one meeting or all the meetings in how many meetings he was present.....

15. From the testimony of the PW-1, it is clear that the appellant has failed to prove in the evidence that Great Eastern was authorized by the owners of fourth and sixth floors of the building i.e. M/s Punj Lloyd Ltd. and M/s Living Media India Ltd. to negotiate the lease on their behalf. Hence, we concur the finding of the learned Single Judge that the appellant has failed to discharge the onus placed upon the appellant. There is no merit in the appeal, the same is dismissed with no order as to costs.

16. Now, we shall deal with our discussions in the second appeal being RFA(OS) No. 18/2011 which is filed by Karan Promoters (P) Ltd. and Sh.Vinod Kumar Gupta against dismissal of their suit being CS(OS) No. 1181/1998 against Ericsson for recovery of Rs. 1,13,95,591/- along with pendente lite and future interest @ 24% per annum towards commission/ brokerage charges i.e. equivalent to one month's rent in respect of first, second, third, fourth and sixth floors of the building.

17. During the pendency of the suit, admittedly the appellants filed an application under Order XII, Rule 6 of the Code of Civil Procedure, 1908 for passing a decree on admission, by stating that Ericsson in para 5 of its written statement had agreed for commission equivalent to 15 days rental and payment of commission equivalent to 1% of the annual rent to be payable to the appellant as mentioned in the written statement. The learned Single Judge dismissed the said application by order dated 14th September, 2000 holding that there was no unequivocal admission on the part of Ericsson to pay commission equivalent to 15 days rental. However, the learned Single Judge on the basis of the admission made in the written statement directed Ericsson to pay 1% of the annual rent amounting to Rs. 7,12,494/- to the appellants towards commission in respect of the deal for first, second and third floors.

18. The said suit was dismissed by the learned Single Judge vide judgment and decree dated 25th November, 2010, holding that the appellants had failed to prove that there is an agreement between the parties, as PW-1 in his testimony has accepted the fact that there was no agreement in writing with the respondent in respect of payment of commission/ brokerage equivalent to one month's rent. There was no document on record to show that Ericsson has been postponing the issue of payment on the ground that the same would be paid after the execution of the lease deed.

19. The stand of the appellants was based on the several letters which were

written by the appellants being letter dated 24th May, 1996 (Ex. PW 1/5), 23rd September, 1996 (Ex. PW 1/6), 25th September, 1996 (Ex. PW 1/7), 19th November, 1996 (Ex. PW 1/8), 24th December, 1996 (Ex. PW 1/9), 11th February, 1997 (Ex. PW 1/10), 14th March, 1997 (Ex. PW 1/11), 26th March, 1997 (Ex. PW 1/12), 30th April, 1997 (Ex. PW 1/14), 30th May, 1997 (Ex. PW 1/15), 16th July, 1997 (Ex. PW 1/16), 26th August, 1997 (Ex. PW 1/18), 16th September, 1997 (Ex. PW 1/19), 17th September, 1997 (Ex. PW 1/20), 26th October, 1997 (Ex. PW 1/21) and 27th October, 1997 (Ex. PW 1/22).

20. It is also held by the learned Single Judge that the dispatch of these letters were not proved and even mere issuance of such letters would not establish the existence of an oral contract. The learned Single Judge accepted the version of the Ericsson that as per the prevalent market practice taking into account the "nature of deal involved" the maximum amount payable was 1% of the annual rent.

21. The appellants were only entitled to 1% of the annual rent which had already been released to the appellants during the pendency of the suit towards brokerage commission in respect of the first, second and third floors only and they were not entitled for any other amount.

22. The learned Single Judge, after considering the evidence of the parties gave his finding to the effect that no doubt, the appellant No. 2 had acted as a broker to the deal who had written various letters to Ericsson to pay him the brokerage/ commission equal to one month's rent but Ericsson never refuted the claim of the appellants during the period of lease deed executed and registered. The learned Single Judge also arrived to the finding that the appellants had rendered services as broker to the deal for first, second and third floors of the suit property. Despite of having come to the above-mentioned conclusion, the learned Single Judge held that the appellants have failed to prove on record the brokerage/commission payable by Ericsson to the appellants.

23. Aggrieved by dismissal of their suit, the appellants have filed the present appeal being RFA(OS) No. 18/2011.

24. The following issues were framed:-

1. Whether there was any privity of contract between the plaintiff No. 1 and defendant? OPP
2. Whether there was any contract between plaintiff No. 2 and defendant, if so, to what effect? OPP
3. Whether the plaintiff provided any services to the defendant. If so, to what effect? OPP
4. Whether plaintiff is entitled to the commission/ brokerage from the defendant, as being claimed in para 19 of the plaint? OPP
5. Whether the plaintiff is entitled to the interest on the same and at what rate of

interest? OPP

6. Relief.

25. The appellants led their evidence and produced Sh.Vinod Kumar Gupta as PW-1. Similarly, Ericsson also examined one witness, namely, Swapan Gangoli who filed his affidavit in chief and was cross-examined by the appellants.

26. The findings of learned Single Judge on issues No. 2 & 3 were decided in favour of the appellants holding that there was a contract between the appellant No. 2 and Ericsson in the terms of that contract, the appellant had rendered services to Ericsson. On Issues No. 4 and 5, the findings were that on the basis of evidence on record the appellant No. 1 was entitled to commission equivalent to 1% of annual rent, since the said commission has been received by the appellants by order dated 14th September, 2000. Issue No. 1 was decided against the appellants holding that there was no privity of contract between the appellant No. 1 and Ericsson.

27. Let us now discuss the submissions raised by the parties on issue No. 1, as to whether the appellants had any privity of contract with Ericsson (respondent).

28. Exht. PW-1/3 is a lease of the Great Eastern Plaza, Bhikaji Cama Place, New Delhi, dated 16th February, 1996 which was prepared on the letter head of Ericsson. The same was signed by Mr.Tommy Eriksson in which the offer was made by Ericsson for renting/leasing of the premises for three years extendable to two more terms of three years each @ Rs. 150/- per sq.ft. exclusive of maintenance, rents and taxes. Area for rent was mentioned in the offer letter as 65,000sq.ft. which, in utilization, was just about 62% of the total area proposed for rent. A copy of the said document was also sent to appellant No. 2. Another letter dated 20th March, 1996 (Exht.PW-1/4) was written by Ericsson to the Great Eastern informing that Ericsson was in the process of finalizing the text for the Memorandum of Understanding, with information copy to appellant No. 2.

29. Appellant No. 2 vide letter dated 24th May, 1996 (Exht.PW-1/5) to Ericsson confirmed that he would be providing his services for getting 35984.53sq.ft. Lease Commercial Accommodation at 2A, Bhikaji Cama Place, New Delhi. It was specifically mentioned in the said letter that as agreed by Ericsson, it would pay him 25% commission on signing the MOU i.e. Rs. 14,84,362/- which was out of the total commission.

30. The lease agreement with regard to the first, second and third floors was registered on 13th September, 1996 between Ericsson and the Great Eastern to which appellant No. 2 was a witness. Appellant No. 2 on 23rd September, 1996 had written a letter to Ericsson (Exht.P-3) demanding thereby the brokerage equivalent to one month rent i.e. Rs. 59,37,447.45/-. In the said letter, reference of registration of the lease agreement was also mentioned. The receipt of the said letter was not denied by Ericsson. Thereafter, the appellants issued various reminder letters including letters dated 25th September, 1996, 19th November,

1996, 24th December, 1996, 11th February, 1997, 14th March, 1997 and 26th March, 1997 (Exht.P4 to P9) to Ericsson to expedite to pay the service charges/ commission i.e. one month lease rent which were received by Ericsson.

31. After about 11 months, first time Ericsson wrote a letter dated 21st April, 1997 (Exht.P10) to the appellant No. 1 intimating it that Ericsson never agreed to pay one month rent. The letters written by appellants were acknowledged. In the letter, it was agreed by the Ericsson to pay the commission as per the prevalent market rates, maximum of 1% of the annual rent in view of nature of the deal involved and the appellants were requested to collect the same as full and final settlement. The said letter was replied by the appellants vide letter dated 30th April, 1997 (Exht.P11) in which the appellants have reminded the Ericsson about the negotiation between the parties and efforts made by appellant No. 2. It was also indicated that the appellants have received one month rent as brokerage from the Great Eastern but the same was not paid by Ericsson despite of number of reminders issued by the appellants. The appellants also claimed the commission for fourth and sixth floors.

32. Thereafter, another letter dated 8th August, 1997 (Exht.P12) written by the appellants to Ericsson with reference to their discussion taken place on 4th August, 1997 at 11O'clock, E-8A, Hauz Khas, New Delhi with Mr.UIf Hellgeson, Director of Ericsson regarding overdue amount claimed by the appellants. In the said letter, it was also mentioned about the decision of Ericsson to pay brokerages equivalent to half month rent and the same was not accepted by the appellants, as according to them, the said amount fell much below their expectation and Ericsson's commitment.

33. One more letter dated 16th September, 1997 (Exht.P-13) was written by the appellants to Ericsson referring yet another meeting held on 9th September, 1997 for promising to settle the issue after discussion with Mr.Tommy Eriksson.

34. In reply, Ericsson wrote the letter dated 5th December, 1997 (Exht.P14) specifically denying the claim for one month rent as brokerage by stating that there was never any agreement between the parties to pay one month rent as brokerage as claimed by the appellants, however, in the sub-para of the said letter, the Ericsson agreed to pay a sum equivalent to 1% of the annual rent in full and final settlement. The extracts of the said sub-para read as under:-

As stated hereinabove, we have made our stand clear vide our letter dated 21st April 1997 and accordingly, you are requested to collect the cheque for a sum equivalent to 1% of the annual rent in full and final settlement, at any time suitable and convenient to you. If you, however, wish to have any further discussion on the subject, you are welcome to visit our office and discuss the matter after having prior appointment over phone.

35. Later on, the appellants issued a legal notice dated 3rd February, 1998 (Exht.P-15) to Ericsson. However, since the said amount was not paid by Ericsson, the appellants filed the suit for recovery of Rs. 1,13,96,561.90/- i.e. Rs.

85,39,137.15/- on account of brokerage commission and Rs. 28,56,454.75/- on account of interest.

36. It is also not disputed by Ericsson that prior to the execution and registration of the lease deed with respect to first, second and third floors, the appellant No. 2 had written letter dated 24th May, 1996 demanding from it 25% of the commission amount and thereafter also he had written various letters Exht.P-3 to Exht.P-9 but no replies were given by Ericsson.

37. Admittedly, the Ericsson in its written statement dated 14th April, 1999 in para 5 had made the offer to the appellants. The relevant extract from the said para of the written statement reads as under:-

...In order to put an end to the matter, the defendant even agreed to pay 15 days rental of the premises taken on lease, but the plaintiff No. 2 who had initially agreed to the amount in reference, failed to turn up and collect the cheque. Since the plaintiff No. 2 failed to accept the same, the defendant withdrew its offer to pay 15 days rental of the premises towards brokerage/commission.

38. In para 6 of the written statement, Ericsson has admitted that the appellant No. 2 and Ericsson held several discussion on the services to be provided by the appellant No. 2 and on the commission/brokerage payable to him. In para 5 of the said written statement, it was also stated that during negotiations, the appellant No. 2 had with Ericsson, the appellant No. 2 claimed a commission equivalent to one month's rental, but Ericsson did not agree to the same.

39. It is pertinent to mention that in fact, the statement made by Ericsson in para 5 of the written statement corroborated the contents of the letter issued by the appellants dated 8th August, 1997 (Exht.P-12) in which it was stated that the offer was made by Mr.Ulf Hellgesson to pay the brokerages equivalent to half month rent. It is also a matter of fact that in the two letters issued by Ericsson on 21st April, 1997 and 5th December, 1997 (Exht.P9 and P14) wherein Ericsson had agreed to pay a sum equivalent to 1% of the annual rent to the appellants.

40. No doubt that an acceptance of offer has to be given in so many words. But the contract of the parties can be proved by the conduct of the parties also. In the present case, there was total silence on the part of Ericsson despite of receiving the seven letters Exht.P-3 to Exht.P-9 in which the appellants were referring about the agreement for payment of commission as claimed in the said letters but no heed was given by Ericsson and in a letter even after eleven months, there was a total denial on behalf of Ericsson. But at the same time, it was agreed to pay 1% of the annual rent as full and final settlement. Not only that, Ericsson was still ready to discuss the matter. It is pertinent to mention that in the letter dated 8th August, 1997 (Exht.P-12) received by Ericsson wherein the reference of discussion with Mr.Ulf Hellgesson was mentioned who agreed to pay brokerage equivalent to half month rent. In the subsequent letter of Ericsson dated 5th December, 1997 (Exht.P-14), there was no denial of said meeting and

offer made by Mr.Ulf Hellgesson. Extracts of the letter dated 8th August, 1997 (Exht.P-12) are reproduced here as under:-

Reg. Payment of brokerage of 2A, Bhikaji Cama Place, 1st, 2nd, 3rd, 4th & 6th floors.

With reference to the discussion on 4th Aug. 1997, at 11O''Clock, E-8A, Hauz Khas undersigned had with Mr. Ulf Hellgeson, your director, regarding our overdue brokerage payment of 2A, Bhika ji Cama Place, New Delhi premises. Mr. Ulf Hellgeson has been kind enough to communicate your decision of paying the brokerage equivalent to half month rent.

Repeatedly we have brought it to your notice that this payment of brokerage equivalent to half month rent falls much below our expectation & your commitment.

However to resolve the issue amicably we would like to discuss the issue personally for final settlement particularly for the reason that the issue has been pending for a very very long.

We have a very different expectation from such a highly reputed company such as yours therefore would like to settle the issue on the basis of mutual discussion and for continuing in longer lasting relationship.

41. If that is the position, as mentioned above, then it is apparent on the face of conduct of Ericsson coupled with silence maintained, it is evident that there was an oral agreement between the appellants and the Ericsson at least to pay the commission/brokerages. The learned Single Judge while deciding the issues No. 2 and 3 has rightly observed and come to the conclusion that there was a contract between the appellant No. 2 and the Ericsson and the appellant No. 2 had rendered services to the Ericsson.

42. The arguments of the Ericsson cannot be accepted due to reasons that if there was no privity of contract between the appellants and Ericsson, then why the Ericsson in its two letters dated 21st April, 1997 and 5th December, 1997 had agreed to pay the commission/brokerages at the prevalent market rates of 1% of the annual rent. If there was no contract, why in para 5 of the written statement, Ericsson has made the offer to the appellants to receive 15 days rental on lease of first, second and third floors.

43. The learned Single Judge did not deal with said aspect mentioned above otherwise the findings on issue No. 1 would have been arrived in favour of the appellants. In fact, the statement made in para 5 of the written statement are similar with the statement made by the appellants in their letter dated 8th August, 1997 (Exht.P12) wherein an offer was made on behalf of Ericsson by Mr.Ulf Hellgesson to pay the brokerages equivalent to half month rental claimed by the appellants. It is clear that Ericsson made totally denial and changed its stand with malafide intention, as in the cross-examination, DW-1 had vaguely given his reply that the respondent-company had replied to all the letters

received from the appellants which, in fact, is untrue.

44. DW-1 in his testimony has admitted that Ericsson agreed to pay 15 days rental to appellant No. 2 in view of decision taken on behalf of the company by its Manager Mr.Ulf Hellgesson and another Officer Mr.Tommy Eriksson, and documents pertaining to that are available with the company. In all the letters written by the appellants i.e. Exht.P-3 to P-9, the demand was made by them to pay commission/brokerages amounting to Rs. 59,37,447.45/- for letting out first, second and third floors of the property, why there was silence on the part of Ericsson for more than 11 months.

45. The learned Single Judge has ignored the admission made by Ericsson in para-5 of the written statement, nor the Single Judge while arriving the finding on issue No. 1 has considered the two letters Exht.P9 and Exht.P14 which speak for themselves to the effect that at least Ericsson was ready to pay the prevalent market rates at the rate of 1% of annual rent in full and final settlement. In case, there was no oral contract between the parties, then why the said offer was made and agreed for further discussion on the subject as appeared from Exht.P-14 in normal case if there is contract, as the reply would have been that the question of paying the commission/brokerages does not arise. The learned Single Judge did not consider the crucial situation from this angle.

46. As per admitted pleadings of the parties, it is clear that it was appellant No. 2 who had identified the property in question which is not denied by Ericsson. There were admittedly the discussions between the appellants, Ericsson and the Great Eastern at least for the transactions with regard to first, second and third floors of the said property. The correspondence exchanged between Ericsson and the Great Eastern for the said dealing shows that the information copy was always sent to appellant No. 2. Therefore, we are of the considered view that the learned Single Judge was not correct that there was no verbal agreement between the parties in this regard despite of finding arrived by him that appellant No. 2 has acted as a broker to deal with the suit property and he had written various letters to Ericsson to pay the commission/brokerages equivalent to one month rent and the said company never refuted the claim of the appellants during the period of execution and registration of the lease deed with regard to first, second and third floors of the property. The learned Single Judge also ought to have taken inference from the fact that the Great Eastern has paid the sum equivalent to one month rent to the appellants as its share for the same deal.

47. As regards the relief claimed by the appellants for one month rent as brokerage for letting out the fourth and sixth floors of the suit property, we have not granted the said relief in appellants' appeal being RFA(OS) No. 32/2009. The same may also be read as part of this order.

48. In support of their case with regard to fourth and sixth floors, the appellants relied upon two documents i.e. letters dated 16th February, 1996 (Exht.PW1/3) and 20th March, 1996 (Exht.PW-1/4). PW-1 in his testimony has stated that

there was no other document pertaining to fourth and sixth floors apart from the above mentioned two letters. He accepted the fact that the owners of the fourth and sixth floors are companies by the names of M/s Punj Lloyd and M/s Living Media India Ltd. respectively. He also did not raise any bill to the said companies. In the evidence, he has also admitted that in the legal notice issued by the appellants, the reference of services rendered by them qua letting out the fourth and sixth floors was not mentioned. He also deposed that he did not remember whether any letter dated 10th October, 1996 (Exht.PW-1/5) was replied to by the Ericsson, nor he was aware as to when the lease deed(s) was executed in respect of the fourth and sixth floors of the building i.e. Great Eastern Plaza and he did not recollect the dates when those lease deed(s) were executed.

49. Under these circumstances, we are of the considered view that the appellants are not entitled for the amount claimed towards letting out the fourth and sixth floors of the suit property from Ericsson. The said claim of the appellants is, therefore, rejected. In view of above, the appeal of the appellants is partly allowed. The impugned judgment and decree is set aside. Accordingly, a decree is passed in favour of the appellants and against Ericsson for a sum of Rs. 59,37,447.45/-. Since the appellants have already received sum of Rs. 7,12,494/- during the pendency of the suit pursuant to order dated 14th September, 2000, therefore, the appellants are entitled to recover sum of Rs. 52,24,953.45/- along with pendente lite and future interest @ 9% per annum as market prevalent rate. The appellants are also entitled for costs throughout. Net result is that RFA(OS) No. 32/2009 is dismissed and RFA(OS) No. 18/2011 is partly allowed. Decree be drawn accordingly.