

(2008) 09 DEL CK 0061
In the Delhi High Court
Case No : C.S. (OS) 1620 of 1995

Punnamana Agencies

APPELLANT

Vs

Marubeni Corporation and Others

RESPONDENT

Date of Decision : 02-09-2008

Acts Referred:

Partnership Act, 1932 — Section 56, 69, 69(2)
Presidency Small Cause Courts Act, 1882 — Section 19

Citation : (2008) 09 DEL CK 0061

Hon'ble Judges : Sanjiv Khanna, J

Bench : Single Bench

Advocate : Abhijeet Chatterjee and Subodh K. Pathak, for the Appellant; Vikram Dholakia and N. Menon, for the Respondent

Judgement

Sanjiv Khanna, J.—The plaintiff, M/s. Punnamana Agencies as per the paragraph-1 of the plaint is a partnership firm and Mr. P.V. Kumar, who has instituted, filed and verified the plaint, is one of it's partners.

2. M/s Marubeni Corp. is the defendant No. 1 to the said suit. Mr. T. Tomota, Mr. H. Nakamura and Mr. Y. Sanada are defendant Nos. 2, 3 and 4. There is no specific order that the defendant Nos. 2, 3 and 4 have been proceeded against ex parte but none has been appearing for the said defendants and they have not adduced any evidence. Defendant No. 1 has also not led any oral evidence.

3. The cause title of the plaint states that the suit is for specific performance. However in the prayer clause the plaintiff has prayed for a decree of money for a sum of Rupees 32 lacs being the amount due and payable by the defendants in terms of the contract. The plaintiff has also claimed pendente lite and future interest as well as costs. Counsel for the plaintiff states that the present suit is one for recovery of money and should be treated as such in view of the prayer clause in the suit. I accept the statement of counsel for the plaintiff that the present suit is for recovery of money with pendente lite and future interest.

4. It is an admitted case of the parties that the plaintiff and Marubeni Corporation, Tokyo, Japan, had entered into agreement dated 18th October, 1988, marked Ex.P-1 (an admitted document) and another agreement dated 1st April, 1991, marked Ex.D-2 (an admitted document). It is a case of the plaintiff that the agreement Ex.P-1 dated 18th October 1988 and Ex.D-2 dated 1st April 1991 continued simultaneously. While it is the case of the defendant No. 1 that agreement Ex.D-2 had the effect of overriding and novating the earlier agreement Ex.P-1.

5. It is also admitted case of the parties that the Agreement Ex.D-2 was terminated vide letter dated 25th February, 1994, marked Ex.D-3 (an admitted document), which bears signatures of both Mr. P.V. Kumar, partner of plaintiff No. 1 and Mr. M. Tsukada, General Manager, Overseas Steel Tubular Products Department.

6. The plaintiff's claim is not based upon the two agreements Ex.P-1 and Ex.D-2 and the terms mentioned therein. The plaintiff claims that there was an oral agreement, pursuant to which defendants had agreed to pay commission on every contract awarded to the defendants and their principals in India. It is also the contention of the plaintiff that oral contract was in terms of established business norms and practice prevalent in the defendant No. 1 company that commission would be paid on each concluded contract to the plaintiff after receipt of payment by the defendant No. 1 company or their principals from their clients. It is stated in the plaint that percentage of commission would be agreed and mentioned in the written contract.

7. The plaintiff has relied upon two documents for payment of commission being agreement dated 20th January, 1993, marked Ex.PW1/2 (an admitted document) and 25th November, 1993, marked Ex.PW1/3 (an admitted document). It is also admitted case of the parties that payment in terms of Ex.PW1/2 and Ex.PW1/3 have been duly made and are not subject matter of the present suit.

8. The plaintiff, claims commission on the basis of agreement dated 9th June, 1992, entered into between Oil and Natural Gas Commission and Consortium of M/s Kawasaki Heavy Industries and Cooper Rolls Incorporation (KHI for short) for supply of seven gas compression packages to ONGC, to be installed at its SHG, Process Platform Complex, hereinafter referred to as SHG Agreement for short. The plaintiff claims that one M/s. C. ITOH and Company Ltd. of Japan had acted as the authorized representative of the consortium of KHI, but the defendants had entered into an oral agreement with the plaintiff and accordingly as per the terms of the oral agreement, on successful conclusion of the contract, commission is payable by the defendants. It is a case of the plaintiff that he is entitled to receive a sum of 10 lacs US Dollars or Rupees 32 lacs on the basis of conversion rate, when the suit was filed, and accordingly a prayer for recovery of the said amount is made.

9. Defendant No. 1 in their written statement has denied any such oral

agreement to pay commission under the SHG agreement. It is stated that defendant No. 1 is not concerned with the agreement dated 9.6.1992 and in fact does not admit authenticity, validity and relevance of the said agreement. It is denied that any such agreement is entered in the books of the defendant No. 1 and it is stated that defendant No. 1 is not a party to the SHG agreement.

10. On the basis of the pleadings of the parties, following issues were framed on 07.03.2001:

- (i) Whether this Court has no territorial jurisdiction to entertain the suit? OPD
- (ii) Whether the suit has been signed, verified and instituted by a registered partner? OPD
- (iii) Whether the plaintiff is entitled to any commission from the defendant No. 1 in respect of agreement dated 9th June, 1992 entered into between ONGC and the Consortium of Kawasaki Heavy Industries Ltd., Japan and Cooper Rolles Incorporated USA? OPD
- (iv) Whether the suit is not maintainable qua defendant No. 2 to 4? OPD
- (v) Whether the plaintiff is entitled to any commission from Defendant nos: 2 to 4 by virtue of agreement dated 9th June, 1992? OPP
- (vi) Relief?

Issue No. 1

11. Issue No. 1 pertains to territorial jurisdiction and onus is on defendant No. 1. Defendant No. 1 has not led any evidence. The issue, therefore, is to be decided in favour of the plaintiff. I may note here that defendant No. 1 in the written statement has stated that defendant No. 1 Corporation is duly authorized and existing under laws of Japan with it's principal office in Tokyo, Japan and the defendant No. 1 has a liaison office in Delhi. The plaintiff had produced Mr. K. Sreedharan, PW-2, who was an ex-employee of defendant No. 1. He has stated in his affidavit that the defendant No. 1, Marubeni Corporation Japan earlier had a liaison office and in the year 1992 Marubeni Corporation India Pvt. Ltd was incorporated. I may note here that the present suit was filed in the year 1995 and is not directed against Marubeni Corporation India Pvt. Ltd, but, against Marubeni Corporation, Japan. Mr. P.V. Kumar, PW-1, in his affidavit has stated that Marubeni Corporation was having its offices at New Delhi, Mumbai and in other places in India. In Ex D-2, the Agreement dated 1st April, 1991 the addresses of the defendant No. 1 are:

Marubeni New Delhi

World Trade Tower

Barakhamba Lane New Delhi - 110001 India

And

Marubeni Bombay

Mittal Chambers

Block No. 25, 2nd

Floor

Nariman Point

Bombay - 400021, India

Issue No. 1 is therefore decided in favour of the plaintiff.

Issue No.-2

12. In paragraph-1 of the plaint, it is stated that the plaintiff is a partnership firm with Mr. P.V. Kumar as one of it's partner. Defendant No. 1 in the preliminary objection-2 has alleged that the plaintiff is not a registered firm and Mr. P.V. Kumar is not shown as partner in the register of firms and, therefore, the suit is not maintainable in view of Section 69 of the Partnership Act, 1932. Section 69 of the Partnership Act reads as under:

69. Effect of non-registration.-(1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

(2) No suits to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(3) The provisions of Sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect?

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm; or

(b) the powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 of 1909), or the Provincial Insolvency Act, 1920 (5 of 1920), to realise the property of an insolvent partner.

(4) This section shall not apply-

(a) to firms or to partners in firms which have no place of business in 1[the territories to which this Act extends], or whose places of business in [the said territories] are situated in areas to which, by notification under [Section 56], the

CHAPTER does not apply, or

(b) to any suit or claim or set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in Section 19 of the Presidency Small Cause Courts Act, 1882 (15 of 1882), to outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 (9 of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

13. The present suit by the plaintiff for recovery, is based upon an alleged oral contract. It is, therefore, a suit to enforce a right arising out of a contract. To institute the present suit in terms of the Section 69 of the Partnership Act, 1932, the plaintiff is required to show and establish that the plaintiff firm is registered and Mr. P.V. Kumar, who had filed the present suit, is a partner as recorded with the registrar of firms. The plaintiff has not produced on record the Registration Certificate of the Partnership firm and has also not proved that Mr. P.V. Kumar is one of the partners, shown in the register of firms.

14. I do not agree with the counsel for the plaintiff that onus to prove this issue is on defendant No. 1. Obviously, the plaintiff has made averments in paragraph-I of the plaint, claiming that the plaintiff firm is a registered firm and Mr. P.V. Kumar is one of the partners of the said firm. I may note here that Mr. P.V. Kumar while signing and verifying the averments made in the plaint has described himself as proprietor of the plaintiff and not as a partner. Similar statement has been made by Mr. P.V. Kumar, PW-1, in paragraph-I of his affidavit by way of evidence. However, in paragraph 3 of the same affidavit, the Mr. P.V. Kumar, PW-1 has described himself as a partner of the said firm. Mr. P.V. Kumar in his cross examination by defendants, at the first instance, has stated the plaintiff is a registered proprietorship concern but on further cross examination admitted that the plaintiff is a partnership firm with son Mr. C. Suresh as one of its partner, who had subsequently resigned. However, Mr. P.V. Kumar, PW-1, could not give the date of his resignation etc. In these circumstances, issue No. 2 is decided against the plaintiff and in favour of the defendant No. 1. It is held that the plaintiff has not been able to establish and show that the plaintiff firm is registered under the provisions of Partnership Act, 1932 and Mr. P.V. Kumar is shown as one of the partners of the said firm in the register of firms. The suit is, therefore, barred u/s 69(2) of the Partnership Act, 1932.

Issue No. 3

15. It is an admitted case of both parties that Agreement dated 18.10.1988, Ex.P-1 and Agreement dated 1.4.1991, Ex.D-2 are identically worded and have same clauses (except for the dates). The two agreements are between the same parties and the plaintiff was to provide same services specifically mentioned in Article-I thereof, which reads as under:

PUNNAMANA shall provide MARUBENI with the following services:

1. To study, investigate and provide information concerning Industrial and Economical knowledge which will enable MARUBENI to have a clear business advantage with respect to the PROJECT;
2. To keep MARUBENI well informed concerning any new plans, contracts, enquiries, tender invitations, studies, policies, regulation, etc., which might bring MARUBENI new business in the oil and gas industry in the TERRITORY, especially with respect to the PROJECTS.
3. To translate or interpret documents or information from the Indian language to English, which relate to the foregoing 1. and 2.:
4. To provide MARUBENI with any others information, advice, guidance and assistance with MARUBENI may require or PUNNAMANA may deem advisable in connection with the foregoing 1. through 3.

16. Article 3 of the Agreement provides that defendant No. 1 will pay 10,000 US Dollars towards fee to the plaintiff for the professional services to be provided by the plaintiff to defendant No. 1. The Agreement marked Exhb. D-2, in Clause 12 stipulates that the Agreement shall be effective retroactively from the 1st day of April, 1991 for a period of six months unless terminated earlier pursuant to Article 13 thereof. Thereafter, the Agreement Exhb. D-2 shall be extended automatically for periods of six months each, unless one party notifies to the other their intention to terminate, thirty days prior to the expiry of the initial term of this Agreement or any extension thereof. In the earlier Agreement dated 18th October, 1988 marked Exhb. P-1, in Article 12, the relevant date mentioned is 1st October, 1988 and stipulates that the Agreement shall be effective from 1st October, 1988 and extensions shall be for a period of six months. Article 13 stipulates that M/s Marubeni may terminate this Agreement at any time by giving notice of 30 days. Rates of charges payable is also the same i.e.; 10000 US Dollars.

17. In these circumstances, I am not inclined to accept the contention of the plaintiff that Agreement dated 1.4.1991, Exhb.D-2 did not supersede the earlier Agreement dated 18.10.1988, Exhb. P-1 and both Agreements co-existed. There was no need for the parties to have two Agreements for providing same service in terms of Article-I thereof. Agreement dated 1st April 1991 Exhb. D-2 superseded and novated the earlier Agreement dated 18th October, 1988 Exhb. P-1. There is no reason and ground for the Agreement dated 18th October, 1988 Exhb. P-1 to exist and continue after Agreement dated 1st April, 1991 Exhb. D-2 was entered into. I may however note here that the plaintiff has not made any allegation for non-payment of amount payable under the Agreement Exhb.P-1 and the Agreement Exhb.D-2.

18. Agreement dated 1.4.1991, Exhb. D-2, does not provide for payment of commission on a concluded contract. Similarly, the Agreement Exhb. P-1 also does not provide for payment of commission on a concluded contract. The plaintiff solely relies upon an oral agreement in this regard and also relies upon

past practice and conduct of the parties as defendant No. 1 had agreed to pay commission on a concluded contract by entering into written contracts dated 20th January, 1993 and 25th November, 1993, Exhbs. PW1/2 and PW1/3. I may also note here that as per Exhb. PW1/2, defendant No. 1 had agreed to pay commission @ 0.5 % of the invoice value on 129, 425.25 US Dollars for supply of 195 metric tonnes of stainless steel pipes to ONGC and in Exhb. PW1/3, the defendant No. 1 had agreed to pay commission to the plaintiff @ 2.5 % on 4, 68, 165 Us Dollars in respect of another contract.

19. Both contracts dated 20.1.1993 and 25.11.1993 are in writing and signed by the parties. The rate of commission in contract Exhb. PW1/2 is 0.5 % and in Exhb. PW1/3, it is 2.5 %. I may also note here that these two written contracts have been executed after 9.6.1992 i.e. the date on which the plaintiff claims ONGC had entered into an agreement and awarded the contract to KHI. It is admitted case of the parties that there is no written agreement between the plaintiff and defendant No. 1 for payment of commission for this contract. Two written contracts by themselves do not prove and establish an oral contract. Neither do they establish a past practice that in all cases, whenever any contract was awarded, commission payment was made.

20. The Agreements dated 20th January, 1993 and 25th November, 1993 (Exhbs. PW.1/2 & PW.1/3 respectively) were executed after a long gap after the contract dated 15th June, 1992 between ONGC and KHI. In case there was any oral agreement between the parties in relation to the said contract for payment of commission, the parties in 1993 or thereafter when the Agreement dated 1st April, 1991 Exhb.D-2 was terminated by letter dated 25th February, 1994 (Exhb.D3), the parties would have mentioned or recorded the same in a written contract or a document. The plaintiff would have qualified his acceptance and not quantified the amount payable in full and final satisfaction of the Agreement dated 1st April, 1991, Exhb.D-1.

21. Execution of agreements for payment of commission dated 20th January, 1993 (Exhb.PW.1/2) and 25th November, 1993 (Exhb.PW.1/3) establishes that separate commission agreements were executed between the parties, when such payment was due and payable. Agreements, Exhbs. PW1/2 and PW1/3 have been executed in relation to contracts for which defendant No. 1 was a consortium leader. Further in these contracts the plaintiff was shown and mentioned as an agent. However, it is the plaintiff's own case that the contract dated 9th June, 1992 was between ONGC and KHI and not between ONGC and the defendant No. 1. It is also the case of the plaintiff that the plaintiff was not the authorized agent in the said contract.

22. It is an admitted case of the parties that Agreement dated 1st April, 1991, Exhb. D-2 was terminated by letter dated 25th February, 1994, Ex.D-3. The said letter of termination is signed by both the parties. Paragraph 3 to 5 of the said letter reads as under:

In consideration of your having provided and providing us with the services specified in Article of the Service Agreement from 1st October, 1993 to 31st march, 1994 (including the submission of the report mentioned above). We shall pay you the fee in the amount of U.S. Dollars Five Thousand only (U\$ 5,000.00) not later than 30th April, 1994 pursuant to the Service Agreement.

Each party shall release and forever discharge the other party from any claim, demand or liability arising out of, in relation to or in connection with the Service Agreement except for the obligations of each party herein.

Could you please show your acceptance to this letter by signing and returning to us one copy hereof.

23. The above clauses show that the parties after examining their accounts had agreed to settle their claims on payment of 5,000/- US Dollars and on the said payment, each party was to be released and forever discharge the other party from any claim, demand or liability in relation to service agreement. At the time of the signing of the said agreement also the plaintiff did not claim any right to get payment of any commission under the SHG agreement. Mr. P.V. Kumar, PW-1, was specifically cross examined by counsel for the defendant No. 1 in this regard. In his cross examination he admitted that by notice, Exhb. D-3, the Agreement Exhb. D-2 was terminated and he had not mentioned that any other amount was due and payable. However, he has stated that no amount was mentioned in the said letter as no amount was due and payable under the service agreement. It is pertinent to note that the claim of the plaintiff is that the purported commission is payable under the oral agreement which is however connected and linked with the service Agreements Exhbs. P-1 and D-2. Mere perusal of the letter dated 25th February 1994 Exhb.D-2 shows that the parties had made the payment specified therein as final settlement of their dues without any condition. In case the plaintiff was to get any amount over and above the amount mentioned therein on an oral agreement, as is being claimed by way of this suit, then the acceptance or discharge or liabilities would have been conditional and contingent upon receiving such payment. On the contrary the plaintiff executed unequivocal discharge of all claims and liabilities on payment of the amount specified.

24. Defendant No. 1 has not admitted authenticity, validity and relevance of the Agreement dated 9.6.1992. As per the plaintiff, the said agreement was between ONGC and KHI. Neither the plaintiff nor the defendant No. 1 was party to the said agreement. The plaintiff has filed copy of the said agreement dated 9.6.1992 as annexure-4. However, the said agreement has not been proved by either producing the original or copy thereof from the office of ONGC and KHI. This is a lapse on the part of the plaintiff.

25. Moreover, it is stated in the plaint that one M/s C. Itoh had acted as authorized representative of the consortium of Kawasaki Heavy Industries Ltd., Japan and Cooper Rolles Incorporated in the said contract. The plaintiff No. 1 as per his own statement had not acted as authorized representative in the said

agreement. Mr. P.V. Kumar, PW-1 in his examination in chief had tried to prove and establish that M/s. AG&P, Manila, a Subsidiary of the defendant No. 1 was the sub-contractor for module fabrication in the said project and defendant No. 1 had received payment because of their direct interest in M/s. AG&P, Manila. I may note here that above allegations have not been made in the plaint itself but in the replication.

26. PW-1, Mr. P.V. Kumar, in support of his contention that there was an oral agreement has referred to some reports/monthly statements between 1st January, 1993 to September-October-1993, which for the purpose of identification, were marked as Exhbs. PW1/D1 to PW1/D6. The said statements are unsigned. The plaintiff has not been able to prove and establish that these monthly statements/reports were sent by the plaintiff to the defendant No. 1. No dispatch register, postal receipts etc. have been produced. I may also note that these monthly statements and letters pertain to the period after the Agreement dated 9th June, 1992 was executed between ONGC and KHI. PW-1, Mr. P.V. Kumar has not produced any document or material for the period prior to 9th June, 1992 and on being questioned in this regard, he has stated in his cross-examination that he does not have the said reports as they were very old.

27. I may note that no written correspondence or letter written by the plaintiff for making any claim for payment of commission is placed in the court file. In the plaint it is stated that the plaintiff had send legal notices dated 8th December, 1994 and 14th February, 1994. Copy of the said notices have not been placed on record. Contents of the said notices are unknown.

28. Counsel for the plaintiff has submitted that the defendant No. 1 had failed to produce original books of accounts or statement of account and also failed to examine anyone as a witness. It is correct that defendant No. 1 has not produced any witness and has also not filed statement of accounts or books of accounts. I also find that the defendant No. 1 in reply to the averments made by the plaintiff in respect of books of accounts and credit of commission therein has given a somewhat evasive reply stating, inter alia, that there was no entry or agreement recorded in the books of account of defendant No. 1. However, on this ground, by itself, I am not inclined to accept the plea of the plaintiff that there was an oral agreement for payment of commission in respect of SHG agreement. This by itself is not sufficient to decide the issue in question in favour of the plaintiff.

29. It is important to state here that plaintiff has not been able to point out and has not claimed that any fixed rate of commission was agreed upon. The commission payable under Exhbs. PW1/2 and PW1/3 are different. In the plaint, the plaintiff has stated that they are entitled to 1 lac US Dollar or INR 32 Lacs as per conversion rate on the date of filing of the suit. Onus is on the plaintiff to prove and establish that there was a concluded contract and as per the said contract US\$1lac was payable as commission. I may note here that plaintiff had filed an application being I.A. No. 4887/97 for production of the books of

accounts by defendant No. 1, but the said application was dismissed on 9th September, 2005, as not pressed. The claim made by the plaintiff pertains to the period, when Foreign Exchange Regulations Act, 1973, was in force and the exchange regulations were strict. For receipt of any amount, in foreign exchange, written contract was required. It is, in fact case of the plaintiff himself that written contracts were executed in respect of two commission contracts being Exhbs. PW1/2 and PW1/3.

30. This brings me to the evidence of PW-2, Mr. K. Sreedharan, PW-3, Mr. S. Vittal and PW-4, Mr. K. Venkataraman. Mr. K. Sreedharan was an ex-employee of the defendant No. 1 and thereafter of Marubeni India Pvt. Ltd and was working in the Delhi office and he had left their services on 30th September, 1999. The said witness had filed evidence by way of affidavit at the request of the plaintiff and was not summoned for appearance. He has gone out of his way like other witnesses viz.; PW-3 and 4, Mr. S. Vittal and Mr. K. Venkataraman, to support the case of the plaintiff. He has stated that it was a normal practice for Marubeni Corporation-defendant No. 1 to pay commission on procurement of a contract, but there was no written agreement. He has also stated that he had contacted the plaintiff in connection with the SHG agreement and had interacted with other Indian agents or companies. He has referred to a blue sheet and stated in his affidavit that M/s. AG & P, Manila, the entity with whom ONGC entered into the contract was subsidiary of defendant No. 1 and it was understood that plaintiff would be paid commission after the relevant contract was recorded in the books of defendant company and the amount due and payable was one lac US Dollar or Rupees 32 lacs. In his cross-examination, PW-2 Mr. K. Sreedharan has stated that he does not remember what exact entries he had made in the Blue Sheet with regard to SHG agreement. In his cross-examination the said Mr. Sreedharan was asked a specific question in respect of the offer made by M/s. AG & P, Manila and to whom. In reply to the said question, Mr. K. Sreedharan had stated that he had not seen the offer of M/s. AG & P Manila, but presumably M/s. AG & P, Manila had made an offer to Consortium of KHI (not ONGC). He has also stated that he does not know nor did he have any interest in knowing how much commission was being paid to the plaintiff by the defendant No. 1 and he had never made any oral promise to the plaintiff to make the payment of any commission on SHG project. However, he has stated that in a few meetings some oral commitments were made but he does not remember the dates and number of meetings. He has stated that there was a lump sum figure because on percentage basis the amount payable would have been much higher. On the question whether any negotiation were held for finalizing the commission, he has replied in negative. Lastly, in his cross examination he has stated that he has no personal knowledge of the working of the other departments of the defendant as there were 9 Departments and he was looking after the Steel Project Department. Evidence of Mr. K. Sreedharan does not inspire confidence. It is difficult to accept that he would have been privy to the alleged oral agreement between the plaintiff and some of the officers of the defendant No. 1. Mr. Sreedharan is an ex-employee of

the defendant No. 1 but has appeared for the plaintiff and given his affidavit without even being summoned by the Court. The critical details of the alleged oral contract are missing in the deposition of Mr. Sreedharan. He has failed to give relevant details of the alleged Blue Sheet where the entries were made by him with respect to the contract between the plaintiff and Marubeni. The evidence of Mr. Sreedharan is bereft of many material particulars, like the dates of the meetings, the number of meetings, the percentage agreed upon etc. While he has mentioned that the payment was on lump sum basis as payment on percentage basis would have been much higher, this is contrary to contract Exhbs. PW 1/2 and PW 1/3. There is also no detail as to what was the agreed percentage and as the amount payable was substantial, the parties agreed to a lumpsum figure. The plaintiff has not made any such case in the plaint.

31. PW-3, Mr. S. Vittal and PW-4, Mr. K. Venkataraman have also filed their affidavits. PW-3, Mr. S. Vittal was working in ONGC as on 30.6.1989. With effect from July, 1999, he was associated with K.K. Birla Group of companies. PW-3 Mr. S. Vittal has gone on to confirm the alleged oral agreement between defendant No. 1 and the plaintiff in respect of SHG agreement. He has stated that the plaintiff had approached the defendant No. 1 for help to secure the contract. He has also gone on to say that the defendant No. 1 had a practice of paying commission fee to the plaintiff under oral agreements that were subsequently reduced into writing. He has also stated in respect of SHG contract that no commission was paid by defendant No. 1 to the plaintiff and for non-payment of the said commission, the plaintiff has filed the present suit. Similar statements have been made by PW-4, Mr. K. Venkataraman, who was working as Deputy General Manager in ONGC till 30th April, 1990. The evidence filed by both of them are on similar lines and same averments have been made in the affidavit by way of evidence. The two witnesses were not employees of the defendant No. 1 or the plaintiff. They cannot be privy to any oral understanding between the plaintiff and the defendant No. 1. In their cross-examination, both have admitted that they do not have any personal knowledge about what has been stated by them in their affidavits by way of evidence. They have also stated that agreement between ONGC and KHI was subsequent to their retirement from or leaving ONGC. The statement made by them that there was an oral contract is not based upon personal knowledge and, therefore, not reliable, merely hearsay and cannot be taken into consideration. Accordingly issue No. 3 is decided against the plaintiff and in favour of the defendant No. 1. The plaintiff has not been able to establish any oral contract and also establish and quantify the amount alleged to be due and payable by defendant No. 1 to the plaintiff.

Issue No. 4 & 5

32. Defendant Nos. 2 to 4 are officers of defendant No. 1. There is no privity of contract between defendant Nos. 2 to 4 and the plaintiff. It is not the case of the plaintiff that the said defendants have to pay commission to the plaintiff from their personal pocket. Claim of the plaintiff against the defendant No. 1 has also

been rejected. It is held that the defendant Nos. 2 to 4 are not personally liable to pay any amount to the plaintiff. There was no privity of contract between the plaintiff and defendant Nos. 2 to 4.

Relief

33. In view of the above discussion the suit filed by the plaintiff is dismissed with costs.