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**HIGH COURT OF DELHI AT NEW DELHI**

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FAO (OS) 125/2006

M/s Texcomash Export ..... Appellant

Through Mr.C. Mukund with Mr.Ashok Jain  
and Mr.Pankaj Jain, Advocates

versus

M/s Sunny International ..... Respondent

Through Mr.D.S. Narula, Advocate

**CORAM:**

**HON'BLE THE CHIEF JUSTICE**

**HON'BLE DR. JUSTICE S.MURALIDHAR**

1. Whether reporters of the local papers be allowed to see the judgment ?n
2. To be referred to the Reporter or not ?n
3. Whether the judgment should be reported in the Digest ?n

**ORDER**

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4.8.2008

This appeal is preferred by the original defendant against the order dated 9<sup>th</sup> January, 2006 passed in IA No.5765/2004 rejecting the prayer for rejection and/or dismissal of the plaint under Order VII Rule 11 read with Order XII Rule 6 of the Code of Civil Procedure.

There was an agreement entered into between the parties as per which the defendant agreed to give commission to the plaintiff for the orders procured. The commission settled as per

the agreement was at the rate of Rs.3/- per garment meant for children and at the rate of Rs.5/- per garment meant for ladies. The present suit is filed by the plaintiff (respondent herein) for rendition of accounts and for recovery of money wherein commission is claimed at the rate of 4.1% of the sales. In the suit an IA No.5765/2004 was preferred by the appellant / defendant for rejection / dismissal of the plaint. The prayer in the application is mainly based on admission made by the plaintiff through its agent in the proceedings before the DRI. A perusal of the said statement would show that though the said authorised representative at one place admitted that the commission was agreed at the rate of Rs.3/- per garment meant for children and Rs.5/- per garment meant for ladies and entire commission at that rate had been paid. At the same time the said representative also mentioned about the aforesaid letter dated 9<sup>th</sup> April, 1993 as per which, the plaintiff was entitled to commission of 4.1%. Thus, there is no clear admission on the part of the plaintiff.

It is also contended that the unilateral act on the part of the plaintiff in issuing a letter completely in variance with the understanding as expressed in the written agreement is not

maintainable since it is not even the case of the plaintiff that the defendant had admitted to such change of condition in the written letter dated 9<sup>th</sup> April, 1993. In any event it is urged that even if the letter dated 9<sup>th</sup> April, 1993 is stated to be a genuine document, the same cannot have the effect of displacing the written agreement. In our opinion, all these arguments can be agitated at the time of trial of the suit and it is not possible to accede to the prayer of the appellant for summary dismissal of the suit under Order VII Rule 11 of the Code of Civil Procedure.

In the result, the appeal is dismissed.

**CHIEF JUSTICE**

**(S.MURALIDHAR)  
JUDGE**

**August 04, 2008**  
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