

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

+ **FAO (OS) No. 438/2007**

Judgment reserved on: 23rd December, 2010

% Judgment delivered on : 17th January, 2011

V.K. CONSTRUCTIONS WORKS LTD & ORS. ...APPELLANTS
Through: Mr. Janendra Lal and
Ms. Yasmin Tarapore, Advocates for
appellant Nos. 3 to 5 & LR Nos. 4(iv) (v) (vi)
of appellant No. 2

Versus

M/S ABDUL KHALIQUE & ORS. ...RESPONDENTS
Through: Mr. Niloy Dasgupta, Advocate
for R-1.
R - 2 to 4 are formal parties.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE M.L.MEHTA

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

M.L. MEHTA, J.

1. This is an appeal against the order dated 6th July, 2007 passed by the learned Single Judge in I.A. No. 317/2005 filed by appellant No.3, I.A. No. 1091/2005 filed by appellants No. 1, 2

& 4 and I.A. No. 1271 filed by appellant No. 5, under Order 9 Rule 13 CPC in original suit bearing CS(OS) No. 2433 of 1996. Vide impugned order, learned Single Judge dismissed the applications, filed by the appellants for setting aside the ex-parte decree passed in favour of respondent No. 1 (plaintiff) and against appellants and respondents No. 2 to 4.

2. The brief chronology of facts and events resulting to the filing of the present appeal are that respondent No. 1 filed the aforesaid civil suit for recovery of Rs.14,89,325/- against defendants No. 1 to 9. Defendants No. 1 to 3 are the appellants No. 1 to 3, defendant No. 6 is appellant No. 4 and defendant No. 7 is appellant No. 5. The other defendants *viz* defendants No. 4, 5 and 8 are arrayed as respondents No. 2, 3 and 4 in the present appeal. Defendant No. 1 (appellant No. 1 herein) is a Public Limited Company, defendant No. 2 (appellant No. 2 herein) is the Chairman and defendants No. 3, 6 and 7 (appellants No. 3 to 5) are directors of the

appellant No. 1 company. In the plaint, the residential addresses of defendants No. 7 and 9 were furnished and they were duly served at those addresses. The Chandigarh office address was also stated to be the residential address of the Chairman and some other Directors. Defendants No. 1, 2, 7 and 9 were served, but other defendants remained unserved despite issuance of summons at all the given addresses, including the two project sites at Bombay. At the instance of the plaintiff, the name of defendant No. 9 was struck off from the array of the parties. Defendants No. 1, 2 and 7 did not appear despite service and as no written statement was filed on their behalf, their right to file the same was closed.

3. Since defendants No. 3 to 6 and 8 remained repeatedly unserved, the Joint Registrar, vide order dated 24th March, 1999 directed them to be served through publication in daily newspaper under Order 5 Rule 20 CPC. All the defendants were served by publication in Indian Express Delhi and

Chandigarh edition dated 28th July, 1999, and since they did not appear, they were proceeded ex-parte. Plaintiff (respondent No. 1) filed evidence by way of affidavit and, thereafter, an ex-parte decree was passed against the defendants.

4. Defendants No. 1, 2, 3, 6 and 7 are the appellants who filed applications under Order 9 Rule 13 CPC for setting aside the ex-parte decree. The same came to be dismissed by learned Single Judge of this Court vide impugned order dated 6th July, 2007. The present appeal has been preferred against the said order of the learned Single Judge.
5. Learned counsel appearing for the appellants has assailed the order of learned Single Judge on the ground that the appellants, as also respondents No. 2 to 4, were not served at their residential addresses and no effort was made by the plaintiff to get them served at their residential addresses. He submitted that plaintiff did not make any inquiry to ascertain

the correct addresses of the appellants and that Delhi address was a commercial address of the appellants and further that since it was no longer being used by them, the question of serving them at the said address did not arise and consequently, the publication at the said address was bad in law.

6. He further submitted that a copy of newspaper was not sent to the appellants as per Rule 8 Chapter 7-B Volume IV of the High Court Rules. Learned counsel relied upon ***M/s Durant Refrigeration Pvt. Ltd v. Northern Radio & Refrigeration Co. (P) Ltd*** 48 (1992) DLT page 680 and ***Shri Lachhman Dass v. Messers Veer Finance Co. and Others*** 5 (1969) DLT 306.
7. Based on these contentions, learned counsel submitted that the applications under Order 9 Rule 13 CPC of the appellants ought to have been allowed and they be provided opportunity to contest the suit of the plaintiff on merits.

8. From the submissions of learned counsel for the appellants it is noticed at the cost of repetition that the main contention centered around the fact that (i) the appellants were no longer doing the commercial activities at Delhi address which has since been closed and the plaintiff made no efforts to get them served at their residential addresses after making due inquiries in this regard. (ii) that the question of serving the appellants at Delhi address did not arise since they had closed their commercial activities and were not residing at this address. (iii) that no copy of the newspaper was addressed to them in terms of Rule 8 Chapter 7 B Vol IV of the High Court Rules.

9. Before dealing with the contentions of learned counsel for the appellants, we may record some more relevant facts borne out from the record. Defendant No. 9 was served and had also entered appearance. Written statement was also filed by defendant No. 9, though he was subsequently deleted

from the array of the parties. Defendant No. 7, who is appellant No. 5 herein, was also served, but chose not to appear and contest. It was specifically recorded by the Joint Registrar that defendants No. 1, 2 and 7 (appellants No. 1, 2 and 5) were duly served. Vide order dated 18th July, 2008, this Court declined to entertain the appeal of defendant No. 5. The appellant No. 1 (defendant No. 1) also did not press the present appeal. Appellant No. 2 (defendant No. 2) was the Chairman of the appellant Company. He was served through one Mr. Vijender Kumar. Defendants No. 2 and 7 (appellants No. 2 and 5, herein) raised a plea before learned Single Judge that though they have been served, in case the application of defendants No. 3 to 6 was to be allowed, then decree may also be set aside qua them. Appellant No. 2 has since expired and his LRs were allowed to be impleaded. LR No. 2(vi) Vinod Kumar Garg is also appellant No. 3 in the present appeal. LRs No. 2(i) and 2(iii) were stated to have no interest in the proceedings and were subsequently ordered to

be deleted vide order dated 4th May, 2010. LR No. 2 (ii) (R.K. Garg) was not served. As per order dated 4th October, 2010 it was assumed that he has no interest in pursuing the appeal. LR No. 2(v) is already respondent No.2. He was also defendant No. 4 in the suit. Practically, it was LR No. 2, Mrs. Vijay Gupta, who was the only one new in the array of parties.

10. In this background we note that defendant No. 9 and defendant No. 7 (appellant No. 5, herein) who are the Directors of the appellant's Company were admittedly served. The appeal of appellant No. 5 (defendant No. 7 herein) was not admitted. The appellant No. 2 (defendant No. 2, herein) was served through Mr. Vijender Kumar. Notice to him was issued at both, Delhi as well as Chandigarh address. There is no reason to disbelieve service of this appellant through Mr. Vijender Kumar. The appellant No. 1 which is the Company was also reported to have been served at the given addresses. The plea that the service was not effected at Delhi

address since it was closed, is untenable. It was undisputed that Delhi was the principal office whereas Chandigarh address was the registered office of the Company. Repeated summons were issued at both these given addresses. It is the plea of the appellants that the Delhi office was closed, but it is no where their plea that Chandigarh office was also closed. It is also not their case that the publication affected at Chandigarh was bad in law.

11. In the grounds of appeal as set out by the appellants, they have only referred to the closure of their commercial activities from Delhi address. It has not been denied by them that Chandigarh address was the registered office of the Company as also their residential address.
12. Vide order dated 5th November, 2008, the appellants were directed to file their various addresses as also of respondents No. 2 to 4 on affidavit along with dates. The said affidavit was filed by appellant No. 3 after few adjournments. It was noted

by the Court on 13th May, 2009 that the affidavit of this appellant was wonderfully vague and devoid of all material facts, especially with regard to the addresses at Chandigarh and Delhi in the relevant period of 1996-1999. As directed another affidavit was filed by this appellant. However, no affidavit was filed by appellant No. 4. In the mean, appellant No. 2 passed away on 10th June, 2009. As is evident from both the affidavits of appellant No. 3, he admits his residential address of Chandigarh, which is the same as mentioned in the plaint. It was also the registered office of the appellant company. In his affidavit he stated his permanent residential address and also of his wife (appellant No. 4) and parents as the same Chandigarh address. Though he stated that he sometime lived in Hyderabad and in New Delhi during this period but it was an admitted fact that Chandigarh continued to be their permanent residential address and they resided in the said premises.

13. From all that has been stated above, it comes out to be an established fact on record that appellants were issued summons at the given addresses which were their registered office at Chandigarh and principal office at Delhi. The Chandigarh address was also the residential address of appellants No. 1 to 4. The summons issued by Registered post at the given addresses are presumed to have been served upon them. In the given circumstances, when these appellants were residing at the Chandigarh address, which was also the registered office, though it was closed later, it was very convenient for them to inform Process Server about the registered office having been closed. In any case, there was no requirement of service of summons to the directors of the company at their residential addresses. As per Order 29 Rule 2 CPC the summons on a corporation may be served by leaving or sending it by post, addressed to the corporation at the registered office or if there is no registered office then on the place where the corporation carries on the business. To

the same extent is the provision under Section 51 of the Companies Act regarding service on a company. Order 29 Rule 2 CPC and Section 51 of the Companies Act are reproduced as under :-

Order 29 Rule 2:-

“2. Service on corporation.- Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served –

- (a) on the secretary or on any director, or other principal officer of the corporation, or
- (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.”

Section 51 of the Companies Act, 1956 :-

“A document may be served on a company or an officer thereof by sending it to the company or officer at the registered office of the company by post under a certificate of posting or by registered post, or by leaving it at its registered office:

[Provided that where the securities are held in a depository. The records of the beneficial ownership may be served by such depository on the company by means of electronic mode or by delivery of floppies or discs.]”

14. Having seen all that, it appears that when service was duly effected upon the appellants, there was no need of issue of service by way of publication. However, the learned Joint Registrar cautiously proceeded to issue service by publication in Indian Express. He had also taken the precaution of getting publication effected at both the registered as well as the principal office of the Company at Chandigarh and Delhi.
15. With regard to the submission of learned counsel for the appellants, that a copy of publication was not addressed to the appellants, it may be stated that as noted above there was no need to issue publication and in any case there was no such order passed by the Joint Registrar directing the Manager of the newspaper for sending a copy of the publication. In the case of ***M/s Durant Refrigeration Pvt. Ltd v. Northern Radio & Refrigeration Co. (P) Ltd*** (supra) relied upon by learned counsel for the appellants the Registrar had in the given circumstances, directed the Manager of

newspaper to send one copy of the publication to the defendant under postal certificate. Since that was not mandatory, the Joint Registrar in the present case did not deem it necessary to give such a direction to the Manager of the newspaper keeping in view the background of the facts that some of the Directors of the company had already been served.

16. In the case of ***Shri Lachhman Dass v. Messers Veer Finance Co. and others*** 5(1969) DLT 306 publication was effected in newspaper which was held not to be proper since the party was residing at Mainpuri where the said newspaper was not in circulation. Under the circumstances, the service was held to be insufficient in the absence of sending of copy of publication to the concerned party. That is not the situation in the present case.

17. In the end it may also be noted that the appellant company mainly comprised of family members. They were neither the

rustic villagers nor the illiterates to be unaware of the Court proceedings. They in their own way have been able to prolong the matter for about fourteen years.

18. For all the above reasons, we do not find any merit in the present appeal and the same is hereby dismissed with costs of Rs.10,000/-.

**M.L.MEHTA
(JUDGE)**

**SANJAY KISHAN KAUL
(JUDGE)**

JANUARY 17, 2011

Vld/AR.