

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

+ **CS(OS) No.2635 of 2000**

% **Date of Decision: 02. 07.2010**

Vasudeva Publicity Service & Another Plaintiffs
Through Mr.Ravi Kant Chaddha, Sr. Advocate
with Ms.Nidhi Lal, Advocate.

Versus

MRF Ltd. Defendant
Through Mr.C.M. Oberoi with Ms.Surekha
Raman, Advocates

**CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR**

- | | | |
|----|---|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

*

1. The plaintiff has filed this suit for recovery of Rs.58,43,756/- as the principal amount and Rs.20,84,176/- as interest, a total amount of Rs.79,27,932/- from the defendant on account of advertisement of defendant displayed through the plaintiff.

2. The plaintiff contended that he is engaged in the business of display of outdoor publicity/advertisements in Delhi and surrounding areas. According to the plaintiff, defendant had been availing the

services of the plaintiff for display of his advertisements. The defendant had allegedly approached the plaintiff in January 1998 for display of advertisements on traffic islands on Bhairon Marg Junction and Nehru Place Crossing and after negotiations, the plaintiff agreed to display defendants' advertisements at two traffic islands, Mathura Road, Bhairon Marg Junction near Pragati Maidan for one year from 15th January, 1998 to 14th January, 1999 and on four traffic islands at Nehru Place for one year from 1st February, 1998 to 31st January, 1999 at a monthly rate of Rs.50,000/- per island plus 5% service tax.

3. After settlement of all the terms for display of advertisement of the defendant and starting displaying the advertisements, plaintiff sent agreement/contract dated 2nd April, 1998 to the defendant to sign and return the same for records, as a concluded contract between the parties had already come into existence pursuant to which the plaintiff had already started displaying defendant's advertisements at sites.

4. The plaintiff categorically asserted that as per the practice, on oral instructions of the defendant, plaintiff used to perform work and written contract or instructions were sent later on, which was only a formality on the part of the defendant. It is contended that later on the period of contract was extended from 12 months to 19 months, i.e.,

from 15th January, 1998 to 14th August, 1998 as the first term and 15th August, 1998 to 14th August, 1999 as the second term. The terms and conditions which were agreed were specifically incorporated in the contract dated 2nd April, 1998. Since the period of contract was extended, therefore, the plaintiff send another contract form dated 21st September, 1998 for signatures and for keeping the contract in his record.

5. The plaintiff contended that his work was appreciated meetings which were held pursuant to plaintiff's letter dated 16th January, 1999. The contract was extended by the defendant till 14th January, 2000 and the monthly rent was re-negotiated at Rs.45,000/- per month per island plus service tax thereon. Consequent to modification of the rate at Rs.45,000/- per island, fresh contract forms dated 2nd February, 1999 were also sent for the signatures and for record by the plaintiff.

6. The plaintiff categorically asserted that during the period of display, the defendant was kept abreast of the same by addressing letters from time to time and also sending photographs of the display. The plaintiff also raised bills in respect of the advertisements displayed pursuant to contracts dated 2nd April, 1998; 21st September, 1998 and 2nd February, 1999.

7. The plaintiff pleaded that in consonance with the terms and conditions already agreed and entered, the contracts dated 2nd April, 1998, 21st September, 1998 and 2nd February, 1999 were sent to the defendant for signatures and keeping the contract for the purposes of record. The defendant, however, sent a letter dated 15th March, 1999 sending the contract only for one traffic island at Nehru Place. The other contracts sent by the plaintiff incorporating the terms and conditions agreed between the parties for other islands were not sent back by the defendant, though the plaintiff had already displayed the advertisement on the sites and the defendant's office at New Delhi had also been aware of it and had not objected to the display of advertisements.

8. Since the plaintiff had already displayed the advertisements in consonance with the terms and conditions agreed and the written contracts were sent subsequently for signatures incorporating the terms and conditions were not returned duly signed, therefore, the plaintiff protested and made oral and written representations and meetings were held between the parties in which the plaintiff was assured that the matter shall be looked into. However, later on at the request of the defendant, the plaintiff discontinued and removed the display of

defendant's advertisements from two traffic islands at Mathura Road and three traffic islands at Nehru Place on 20th April, 1999. The plaintiff also raised bills in respect of six sites from time to time which were received by the defendant and were also acknowledged. Since the amounts of the bills raised by the plaintiff were not paid, a notice dated 21st February, 2000 demanding an amount of Rs.58,43,756.85 paisa with interest thereon was sent. The notice was received by the defendant and was replied by reply dated 15th March, 2000 denying defendant's liability to pay the amount for the advertisements displayed by the plaintiff. On failure of the defendant to make the payments, the plaintiff has filed the present suit for recovery of Rs.79,27,932/-.

9. The claim of the plaintiff is contested by the defendant contending inter alia that there was no concluded contract between the parties as the defendant did not give his consent/approval for contract dated 2nd February, 1999 and the defendant did not approve the contract for six traffic islands, namely, four at Nehru Place and two at Mathura Road. It was contended that the policy and practice of the defendant in respect of display of advertisement with agencies was that the advertisements agency was to display advertisements only after prior approval of the defendant. In these circumstances, it is asserted that the defendant did not send back the fresh contract form after signing

and when the plaintiff wrote a letter dated 6th January, 1999 seeking whether defendant was interested to retain display after 5th January, 1999, further meetings took place between the parties and duration of display was agreed to be extended for a total period of two years from 15th January, 1998 to 16th January, 2000 at Rs.45,000/- per month plus 5% service charges for one site only. The defendant asserted that contract form dated 2nd February, 1999 in respect of display at Nehru Place which was signed and sent back under the cover of letter dated 15th March, 1999.

10. The defendant has contested the claim on the ground that plaintiff has no right or cause of action to maintain the suit as there was no concluded contract between the parties and the allegations regarding alleged discussions, understanding and agreement/approval of the display was denied. The contract form dated 2nd April, 1998 and 21st September, 1998 were also denied. It was pleaded that agreements/contract dated 2nd April, 1998, 21st September, 1998 were not discussed/negotiated or approved and, therefore, there was no question of extending the period of contract by a fresh contract. It was asserted that only one contract dated 2nd February, 1999 was signed in respect of one traffic island at Nehru Place crossing for two years and

the agreement was not for four islands which was forwarded to the plaintiff on 15th March, 1999.

11. On the basis of the pleadings of the defendants accepting the agreement dated 2nd February, 1999 for display of advertisement of one traffic island at Nehru Place crossing for Rs.45,000/- per month, on an application of the plaintiff, an amount of Rs.11,10,186/- was paid to him pursuant to order dated 24th May, 2002 after deducting an amount of Rs.23,814/- towards TDS.

12. On the basis of the pleadings and the documents of the parties, the following issues were framed on 14th February, 2003:-

- “1. Whether the plaintiff is entitled to any amount claimed in suit and if so to what amount? OPP
2. Whether the plaintiff is entitled to interest? If so on what amount, at what rate and for what period? OPP
3. Whether there exists any concluded contract pertaining to the advertisement/displays for which amounts are being claimed by the plaintiff? Onus on parties.”

13. The plaintiffs examined Shri Satish Vasudeva, plaintiff No.2 and proprietor of plaintiff No.1 and filed his deposition on affidavit dated 19th September, 2004. Additional deposition by an additional affidavit of Shri Satish Vasudeva dated 24th February, 2005 was also filed. On

behalf of defendant, the deposition of Mr.A. Rodricks, General Manager, was filed on affidavit dated 17th July, 2006. However, the written statement on behalf of defendant was signed and verified by Shri K. Jagdishwar Rao who was not examined by the defendant. The affidavit of Mr.Anthony Rodricks was exhibited as DW1/A.

14. Issues No.1 and 3 are `Whether the plaintiff is entitled to any amount claimed in suit and if so to what amount?' and `Whether there exists any concluded contract pertaining to the advertisement/displays for which amounts are being claimed by the plaintiff?' Both the issues are considered together.

15. Learned senior counsel, Mr.Chadha for the plaintiff, has very emphatically contended that plaintiffs have proved various facts and the documents which clearly show that as per the practice, the terms and conditions used to be settled between the parties and the advertisements were displayed and thereafter, written contract incorporating the terms and conditions for display of advertisements used to be sent to the defendant for their formal signatures and for the record of the parties. According to the plaintiffs, the defendant had been returning the signed contract later on after commencement of display of advertisement by the plaintiffs. It is asserted that no instance has been

shown by the defendant that the advertisements were displayed only after signing of the agreements in writing. The learned counsel contended that even as per the testimony of DW1, Shri Rodricks, the DM of the defendant company (Mr. Bhattacharya), had given oral recommendations to the Head Office of his company recommending the sites. In the circumstances, it is asserted that the plea of policy and practice of prior approval for display of advertisement as has been raised by the defendant, is an afterthought only to counter the claim of the plaintiffs. The emphasis has also been laid by learned senior counsel on Exhibit P5 and PW1/64A which is a contract dated 21st April, 1992 for the period from 1st April, 1992. Similarly reliance has also been placed on Exhibit DW1/P1 and Exhibit DW1/P2 which are contracts dated 17th January, 1994 for the period 1st January, 1994 onwards which was returned after signing on 28th April, 1994 though the agreement commenced on 1st January, 1994. Reliance has also been placed on Exhibit DW1/P3 and Exhibit DW1/P6 which is the contract dated 12th August, 1992 for the period 1st September, 1992 onwards which was signed and returned on 28th April, 1993 to the plaintiff for the purposes of record. Similarly, Exhibit DW1/P4 and DW1/P7 is a contract dated 17th January, 1994 for the period 1st January, 1994 onwards which was signed and returned to the plaintiffs on 28th April, 1994. Exhibit DW1/P5 and Exhibit DW1/P8 is a contract

dated 14th April, 1994 for the period 1st April, 1995 onwards which was signed and returned on 3rd January, 1995.

16. From these contracts of the earlier periods, it is apparent that the display of advertisements started earlier than the date on which the written contracts were signed by the defendant and returned to the plaintiffs. The defendant had made payments for these agreements. These documents belie the statement of Shri Rodricks, DW1, in his affidavit dated 20th July, 2006 that the policy and practice of the defendant was that the advertisements could be displayed after written approval/execution of agreement by the defendant from the Head Office. The said witness though has emphasized about the policy of the defendant company, however, no such policy has been produced and proved by the defendant rather DW1 in his cross-examination on 11th October, 2006 admitted that there is no written policy but it is a matter of practice. Though the said witness deposed that plaintiffs were aware of such a policy but how the plaintiff had been aware of such a policy has not been answered by the said witness of the defendant or anyone else on behalf of the defendant. The said witness did not state that he had disclosed about the said policy of the defendant to the plaintiff or to any of their representatives or even named any other person of the employee of the defendant who had disclosed the said policy of the

defendant to the plaintiffs or to any of plaintiffs' representatives. He did not depose as to who had disclosed the said policy of the defendant to the plaintiffs. No documents has been produced by the defendant to show and establish that the defendant had a policy that the advertisements were not to be displayed on account of oral instructions of its employees and representative or on account of oral agreement arrived at between the plaintiffs' and defendant's representatives at Delhi. The defendant has not proved that the officials at the branch office were not competent to negotiate the terms and conditions for display of advertisement or that the defendants' officials at its branch office at Delhi exceeded their authorization or the scope of their work. The DW1 rather admitted in the cross-examination that it was the normal practice of the defendant company to make oral representations or offers to the plaintiffs through company representatives at Delhi.

17. When confronted with the letter dated 28th April, 1994 which is exhibit DW1/P1 by which the agreement for display of advertisement dated 17th January, 1994 was signed on 28th April, 1994 and other documents dated 28th April, 1993; 28th April, 1994 and 3rd July, 1994 which were exhibited DW1/P3 to DW1/P5 and documents exhibited as PW1/64A, 65A and 65B, the said witness rather admitted that it was the normal practice of the defendant company to make representations

and offers orally. If that be so, the defendant cannot succeed in his plea that as per the policy and practice of the company prior written approval for display of advertisements was adhered to and it was the practice of the company and the plaintiffs were aware of it. Rather it has been established that plaintiffs used to commence display of advertisement much before the signing of the written contract incorporating the terms of display of advertisements on oral instruction and the terms agreed between the parties.

18. Learned counsel for the plaintiffs has relied on AIR 1968 SC 1028, Kollipara Sriramulu v. T. Aswathanarayana & Others; 79 (1999) Delhi Law Times 1, J.K. Industries Limited v. International Cooperative Alliance Domus Trust and others; 1991 (1) Arbitration Law Reporter 154, Ram Krishan Singhal v. Executive Engineer; 1986(1) Arbitration Law Reporter 428, M/s.Prahlad Singh Mulakh Raj v. Union of India & Others; AIR 1982 Calcutta 167, Nanalal madhavji Varma v. State of Andhra Pradesh; AIR 1999 SC 2544, K.S. Satyanarayana v. V.R. Narayana Rao; 2002 (3) Arbitration Law Reporter 235, Hindustan Construction Corporation v. Delhi Development Authority and another; 132 (2006) Delhi Law Times 196, Neha Bhasin v. Anand Raaj Anand & another and 73 (1997) Delhi Law Times 374, Old World Hospitality Pvt.

Ltd. V. India Habitat Centre in support of pleas and contentions raised on behalf of plaintiff.

19. In *Kollipara Sriramulu (supra)*, The Supreme Court while considering whether there was an oral agreement or not, had held that a mere reference to a future formal contract does not prevent the existence of a binding agreement between the parties unless reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. Thus whether there had been an oral contract or not would depend upon the intention of the parties and special circumstances of each particular case. In case of plaintiffs, despite formal agreements not signed between the parties, the advertisements had been displayed which were accepted and the payments were made in previous dealings between the parties which has been established by the plaintiffs. In these circumstances continuation of same practice i.e display of advertisements pursuant to conclusion of oral agreement cannot be ruled out completely. The defendant has not established that he was not bound unless the formal contract was signed between the parties. From the evidence led by the parties, it is rather established that pursuant to oral instruction by the branch office of the defendant the advertisement were displayed.

20. In Ram Krishan Singhal (*supra*), a single Judge had held that it is not necessary that a formal contract should have been signed by both the parties before a contract could be concluded, as a contract can come into existence by exchange of letters. In this matter, a tender for construction of road was accepted and general conditions of contract contained an arbitration clause and for the arbitration agreement it was held that even if it was not signed by both the parties, there was a written agreement. In M/s Prahlad Singh Mulak Raj (*supra*), relied on by the plaintiffs the tender had contained an arbitration clause and though no formal contract was signed, it was held that there was a concluded contract between the parties and the arbitration agreement could be filed in the Court and the disputes could be referred to the Arbitrator. In Nanalal Madhavji Varma (*supra*), it was held by a single Judge of Calcutta High Court that though the contract was in contravention of Article 299 (1) of the Constitution of India yet the compensation could be granted under section 70 of the Contract Act. In Neha Bhasin (*supra*), claimant had sung for the defendant company which songs were recorded and it was held that the claimant had not sung for the company gratuitously. The company had enjoyed the benefits of the recordings of the claimant and used the same in cassettes and CDs commercially. Despite no formal contract between

the parties, the company had the option not to use her recordings at all. But since the company used the recordings of the claimant, quasi contract came into existence and therefore, all the ingredients of section 70 of the Contract Act were satisfied and the company became liable to compensate the claimant.

21. This has been established by the plaintiffs that they had been displaying the advertisements for the defendant company for about 10 to 12 years prior to the transaction in the dispute and the advertisements were displayed on the oral instructions of the officials of the branch office of the defendant company at Delhi and written agreements were signed later on for the purposes of record. The Plaintiff no.2 in his deposition has categorically contended that in respect of disputed advertisements the defendant had insisted for immediate display of his advertisement on the traffic islands at Mathura Road and Nehru Place in view of the Auto Expo (Exhibition) which was held at Pragati Maidan at New Delhi. The contract forms were sent to the defendant which were later on not signed by the defendant. The contract forms also stipulates specifically "To sign and return for the records". For one site where the advertisement of defendant was displayed from 1.2.1998 along with other sites, the written approval Ex P/26 had been given on 15th March, 1999. In the circumstances, as has

also been held earlier that the plea of the defendant of prior approval and any such practice and procedure has not been established by the defendant.

22. On the preponderance of probabilities from the evidence on the record it also cannot be inferred that the plaintiffs did not display advertisements of the defendant at all the sites and only at one site which had been admitted by the defendant later on and the amounts in respect of the same had been paid to the plaintiffs during the pendency of the present suit. From the record it is apparent that the plaintiffs had been sending letters and bills in respect of all the sites. It is not acceptable that the defendant would have received the letters and bills only in respect of one site and not in respect of other sites, as all the letters and bills had been sent by the plaintiff for all sites simultaneously. The defendant in its deposition on affidavit dated 17th July, 2009 in paragraphs 9 and 10 has admitted that certain bills were received by him in respect of advertisements displayed by the plaintiffs at the traffic crossing at Nehru Place, which were, however, not in accordance with the contract and had not been approved by the defendant. In the cross examination the defendant attempted to explain that these bills were for earlier period. This explanation of the defendant cannot be accepted because if these bills were for earlier period they

could not be contrary to the contract as the earlier bills had been paid by the defendant. Therefore, these bills were for the period and for the advertisements which are disputed by the defendant. The plaintiffs have also produced the copies of relevant pages of the dispatch register whereas the defendant has not produced anything to rebut the documents produced by the plaintiff. If the defendant had been receiving the letters and bills for all the sites, then why no objection was raised earlier by the defendant has not been explained. The case of the defendant is not that the inspection was carried out by its officials and only one advertisement which is later on admitted by the defendant was found to be displayed, and other advertisements were not displayed. Considering the entirety of the evidence led on the record it cannot be inferred that the defendant had not received the correspondence and bills from the plaintiffs. In the circumstances, why the defendant did not object to display of other advertisements by the plaintiffs has not been explained satisfactorily.

23. The plaintiffs in the circumstances have been able to prove that that they had displayed the advertisements of the defendant on six sites. If the plaintiff had displayed the advertisements of the defendant on all the six sites, then whether the plaintiffs would be entitled to claim amounts for display of advertisement on other sites or not as for one site it is admitted by the defendant and the amount has been paid

during the pendency of the suit. The learned counsel for the Plaintiffs has also contended that even if it is inferred that there was no concluded agreement between the parties, as it has been established that the advertisements were displayed without any objection from the defendant and they have benefited from them and advertisements were not displayed gratuitously, they are entitled to claim the amounts for other advertisements at the same rates at which the amount has been paid to the plaintiffs for one of the advertisement. The learned counsel for the plaintiffs has relied on section 70 of the Contract Act and has contended that his case falls squarely within the purview of section 70 of the Indian Contract Act. Reliance has also been placed on Mulamchand v. State of Madhya Pradesh, AIR 1968 SC 1218 where the Apex Court had held as under:

“In other words if the conditions imposed by Section 70 of the Indian Contract are satisfied then the provisions of that section can be invoked by the aggrieved party to the void contract. The first condition is that a person should lawfully do something for another person or deliver something to him; the second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third condition is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these conditions are satisfied, Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. The important point to notice is that in a case falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific

performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. So where a claim for compensation is made by one person against another under Section 70 it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution. “

The plaintiffs have also placed reliance on “State of West Bengal v. B.K. Mondal and Sons, 1962 Supp(1) SCR 876 where the Apex Court held:-

“It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. In appreciating the scope and Page 1753 effect of the provisions of this section it would be useful to illustrate how this section would operate. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case Section 70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again Section 70 would not apply. In other words, the person said to be made liable under

Section 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under Section 70 arises.”

The Supreme Court has explained section 70 of the Contract Act in the case of State of W.B. v. B.K. Mondal and Sons, 1962 Suppl. (1) SCR 876 in the following words:

“14. It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. In appreciating the scope and effect of the provisions of this section it would be useful to illustrate how this section would operate. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case Section 70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again Section 70 would not apply. In other words, the person said to be made liable under Section 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under Section 70 arises.”

24. The defendant has contended that it is not open to the plaintiff to take and rely on the plea based on section 70 of the Contract Act, 1872

as the same is beyond the pleadings. It is also alleged by the defendant that in view of plea of agreement between the parties, the reliance cannot be placed by the plaintiffs on Section 70 of the Contract Act, 1872 as the said section can be relied on only if there had been no agreement between the parties. This contention of the defendant cannot be accepted because two issues have been framed separately. Issue no.3 is whether there was a concluded contract between the parties and issue no.1 is whether the plaintiff is entitled for the amount claimed. Thus even if it is to be held, that there was no concluded contract between the parties, the issue whether the plaintiff is entitled for the amount claimed is required to be adjudicated separately. In absence of any concluded contract, if the advertisement displayed were not for gratuitous reasons, the plaintiff would be entitled to rely on section 70 of the Contract Act, 1872 and the plea of the defendant that it is an afterthought cannot be accepted.

25. The defendant has also contended that it is not open to plaintiff to rely upon agreements and letters/bills as the same have not been proved as per the requirements of the provisions of Indian Evidence Act. According to Mr. Oberoi, Senior Counsel for the defendant, mere marking and reference as Exhibit in respect of documents is not the proof of the documents. The counsel for the defendant has relied on AIR

1971 SC 1865, Sait Tarajee Khimchand & Others v. Yelanaarti Satyam & Others; (2003) 8 SCC 745, Narbada Devi Gupta v. Virendra Kumar Jeswal & Others and (1995) Rajdhani Law Report 286, Sudhir Engineering Co. v. Nitco Roadways Ltd. in support of his pleas and contentions.

26. In Narbada Devi Gupta (*supra*), the Supreme Court had held that mere production and marking of a document as exhibit is not enough as execution of a document has to be proved by admissible evidence, however, whether documents produced are admitted by the signatories thereto and thereafter they are marked as exhibits, no further burden to lead additional evidence to prove the writing and its execution survives. In this case, the plaintiff-landlord had averred that signed blank stamp papers were given to the tenant to conduct pending litigation in his absence, however, no evidence was led in proof thereof. The tenant, however, had taken a specific plea of tenancy based on rent receipts signed by the landlord. The landlord had not disputed his signatures nor made any consequential amendment to the plaint nor had taken the plea of fraud and forgery and in such circumstances it was held by the Apex court that no further burden of proof was on defendant to lead evidence to prove writing about the rent and their execution. The said precedent relied on by the defendant is distinguishable. In Sait Tarajee

Khimchand & Others (*supra*), referring to Order XIII Rule 4 of the Code of Civil Procedure, it was held that mere marking of a document as an exhibit does not dispense with its proof. A single Judge of this Court in Sudhir Engineering Co. (*supra*), had held in reference to the Original Side Practice Direction 3/74 that when a document is produced in evidence and is marked as an exhibit, then it is only for identifying the documents and is not its proof as proof of the contents of the documents must be proved and established by independent evidence.

27. No doubt, a number of documents produced by the plaintiff appear to have merely been exhibited, however, considering the entire evidence of the parties, it cannot be held that there is no evidence about these documents. Some of the documents especially earlier bills have been categorically pleaded and some of them have not been specifically denied. Some of the documents have been produced by the defendant which can be relied on by the plaintiffs. Defendant has admitted some of the documents for the previous periods which reflect that the agreements for display of advertisements were signed much later than before the display was commenced. The plaintiffs have also produced their dispatch register and some evidence has been led in respect of the same which has not been refuted by the defendant nor any suggestion had been given to the witness of the plaintiffs that the plaintiffs had not

been maintaining any dispatch register or the entries made therein are forged. The postal receipts produced by the plaintiffs and exhibited, in the facts and circumstances, cannot be ignored and have to be accepted having been proved. When the documents which have not been admitted by the defendant were exhibited, no objection had been taken by the defendant about exhibition of documents. No doubt that the deposition was filed by the plaintiff on the affidavit, however, this objection should have been taken at the time of commencement of cross examination of such a deponent of the plaintiffs. The deposition of the defendant in its affidavit dated 17th July, 2009 is also that there were no agreements and the bills raised by the plaintiffs were not in accordance with contracts and had not been approved by the defendant. The defendant has also not stated that the bills and letters sent to him were forged. On the basis of entire evidence led by the parties, it has been inferred that the advertisements were displayed by the plaintiffs and the case of the defendant is that the agreements sent and the bills sent on the basis of alleged agreements were not in accordance with the terms agreed between the parties. The defendant has also failed to establish the alleged practice under which the plaintiffs could display the advertisements only after written approval/execution of the agreements by the defendant's Head office. The defendant has also not established that its officials at branch office

were not competent to give instructions to the plaintiffs for display of advertisements or they exceeded their authorization or that they could not negotiate the terms and conditions for display of advertisements. In the circumstances, it cannot be inferred that there is no evidence in respect of the documents of the plaintiffs and they have been merely exhibited. Considering the entirety of the evidence and that the defendant did not object to exhibition of documents and there being some evidence in respect of documents produced by the plaintiffs, the contention of the defendant that these documents could not be considered, cannot be accepted.

28. In the circumstances, it is inevitable to conclude that the plaintiffs had displayed advertisements of the defendant pursuant to the instructions by and on behalf of the defendant and on the ground that the written agreements sent by the plaintiffs to the defendant incorporating the terms and conditions for display were not signed would not show that the terms and conditions were not settled between the parties. The rate for the one of the site has been accepted by the defendant and even the amount had been paid during the pendency of the present suit. The amount claimed by the plaintiffs is not alleged to be excessive or exorbitant. The other terms and conditions for the display of other advertisements were also the same as in respect of one

of such advertisement which is accepted by the defendant. The only plea, therefore, could be whether the display of other advertisements by the plaintiff was without instructions and settlement of terms and conditions for display of advertisement. The defendant has failed to prove that the advertisements could be displayed only after written approval and signing of written contract by the defendant. The agreements rather categorically stipulates that they were to be signed for the purposed of record as the stipulate `To sign and return for the records.`. Therefore the issue no.3 is decided in favor of the plaintiffs holding that there had been concluded agreements between the parties for the display of advertisement of the defendant.

29. With the finding that there had been concluded agreements between the parties pursuant to which the advertisements were displayed by the plaintiffs, they would be entitled to claim the amounts. Even if for the sake of arguments, it is inferred that there had not been concluded agreement between the plaintiffs and the defendant for the display of the advertisements, yet relying on section 70 of the Contract Act, 1872, the plaintiffs shall be entitled for the amount claimed by them. Considering the entirety of evidence led by the parties, the probable inference is that all the three pre-requisites of section 70 of the Contract Act, 1872 are satisfied in the present case.

- i. The defendant had approached the plaintiffs for the display of its advertisements at six sites. The parties had reached an oral agreement regarding the terms and conditions of the display of advertisements. The plaintiff had sent copies of the agreements to the defendant for his signature. The plaintiffs had also from time to time sent several letters, bills and reminders. The defendant had also paid for the display at one of the sites. Further the said display of advertisements is not against any law.
- ii. The agreements that the plaintiffs had sent to the defendant had clearly stipulated the mode and amount payable to the plaintiffs for the service provided by them. Furthermore, the defendant has already paid the plaintiffs for the display of advertisements at one of the sites. This clearly shows that the services rendered were for consideration and was not gratuitous. The amount claimed by the plaintiffs is not exorbitant or such which cannot be claimed in the facts and circumstances as for one of the site at the same rate as has been claimed by the plaintiffs, the amount has already been paid.
- iii. The defendant was aware of the fact that the plaintiffs were displaying the advertisement of the defendant at all the six sites. But he never raised any objection to this until 15th March, 1998, which was more than 14 months since the advertisements were first displayed. The defendant quietly went on enjoying the services of the plaintiffs. Outdoor advertising increases the visibility of the defendant's products and is therefore beneficial to the business of the defendant. The plea of the plaintiffs that on account of Auto Expo (Exhibition) the defendant had insisted for immediate display of his advertisement has not been countered specifically in the evidence by the defendant. Further, the defendant had paid for the display at one of the sites, which in itself shows that the displays were beneficial to the defendant.

30. Thus all the three pre-requisites of section 70 are also satisfied and the plaintiffs on this ground are also entitled to be compensated for the services rendered by them. The rate at which the plaintiffs should be compensated is also not in dispute as the defendant has already paid for the display at one of the six sites. Therefore issue no.1 is also decided in favor of the plaintiffs and against the defendant holding that the plaintiffs are entitled for the amount claimed which is Rs.58,43,756/- (Rs. Fifty Eight lakhs forty three thousand Seven hundred and fifty six) and the suit is decreed for the said amount. Since an amount of Rs.11,10,186/- has already been paid to the plaintiffs after deducting the amount of Rs.23,814/- towards TDS pursuant to order dated 24th May, 2002, the plaintiffs shall be entitled for balance amount.

31. The next issue is issue no.2 about the entitlement of the plaintiffs for interest. The learned counsel for the plaintiffs for this issue had relied on the deposition of the plaintiff no.2 filed on affidavit dated 10th September, 2004 where in paragraph 35 it is deposed by the plaintiff no.2 that the defendant is liable to pay interest at the agreed rate of 24% per annum on the principal amount of Rs.58,43,756/- which was to the plaintiffs till filing of the present suit. Reliance has also been

placed on the deposition of the plaintiff no.2 in paragraph 35 where it is contended that interest at the rate of 24% per annum was agreed and the said rate of interest is also usual and customary market rate of interest which is being charged in commercial transaction of like nature. The plaintiffs have also claimed interest on the basis of notice dated 21st February, 2000 exhibit PW 1/54 where in para 6, the interest is claimed at the agreed rate of 24% per annum from the date of default in payment of respective bills till the amount of the bills is paid. The learned counsel for the plaintiffs has asserted that on the basis of the deposition on behalf of the plaintiffs they are entitled for interest at the rate of 24% per annum as it was categorically deposed that the market rate of interest was also 24% which testimony of the plaintiff no.2 has remained un-rebutted as no suggestion to the contrary was given to the witness in his cross examination.

32. The learned counsel for the defendant has refuted the claim of interest contending inter-alia that the deposition of the defendant in respect of payment of interest in accordance with the bill is categorical as it was deposed by DW1, Mr.A.Rodricks that the bills which had been submitted by the plaintiffs which he had admitted in the cross examination were not according to the contract and consequently the plaintiffs was asked to rectify the bills and submit the same and he was

categorical that there is no question of any interest to be paid to the plaintiff. Regarding the interest demanded by notice exhibit PW.1/54, the learned counsel relied on the reply dated 15th March, 2000 exhibit PW.1/59 where the defendant has categorically denied that the interest is payable at the rate of 24% as claimed in the notice. According to the learned counsel for the defendant one line deposition that the plaintiff is entitled to interest at the customary rate in case any amount is found due to him will not entitle plaintiffs for the interest at the said rate as the same has not been established despite the fact that the statement of the plaintiffs was not refuted in the cross examination on behalf of defendant.

33. Therefore what is to be determined is whether the plaintiffs are entitled for interest, and if so, on what amount at what rate and for what period. This Court has decreed the suit of the plaintiffs. The plaintiffs have claimed an amount of Rs.20,84,176/- as interest at the rate of 24% per annum on the principal amount of Rs.50,43,756/-. The suit was filed by the plaintiffs on 7th November, 2000, and therefore, it is assumed that amount of Rs.20,84,176/- is the interest claimed by the plaintiffs at the rate of 24% per annum till the said date. The amount of Rs.11,10,186/- after deducting an amount of Rs.23,814/-

towards TDS was paid after the institution of the suit pursuant to order dated 24th May, 2002.

34. The defendant has admitted the transaction in respect of one of the site on which advertisement on behalf of the defendant were displayed by the plaintiffs. The bill in respect of the said site raised by the plaintiffs, is therefore, also admitted which carries a stipulation that in case the amount is not paid, the defendant shall be liable to pay interest at the rate of 24% per annum. DW-1 Mr.Rodricks, the witness of the defendant was categorical that the bills were submitted by the plaintiffs. However, the plaintiffs were asked to rectify the bills. The witness has thus, meant that though a demand for interest was raised at the rate of 24% per annum, however, it was to be rectified as the rate of interest was not agreed at the said rate. This Court has already held that in respect of the other bills also the liability of the defendant is towards the plaintiffs for the payment of the amount due to the plaintiffs on account of displaying the advertisement of the defendant.

35. This is also not being disputed that a notice of demand Ext. PW-1/54 was given by the plaintiffs to the defendant which was received by the defendant and was even replied. The notice raises a demand of interest at the rate of 24% per annum, though the payment of interest

at the said rate was denied by the defendant in reply dated 15th March, 2000, which had been exhibited as Ext.PW-1/59.

36. In the circumstances, he cannot be held that the plaintiffs are not entitled for interest from the defendants. The defendant has also not refuted the deposition on behalf of the plaintiffs that the plaintiffs are entitled for interest at the rate of 24% per annum, which is the customary rate of interest. Though the learned counsel for the defendants has contended that merely not refuting the deposition of the witness of the plaintiffs shall not make the defendants liable, however, the liability to pay the interest cannot be absolved, in the facts and circumstances. It also cannot be held that the defendants are not liable to pay interest, if not at 24% per annum than at some other rate.

37. The Supreme Court a number of judgments reported as *Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority and others*, 2005 (6) SCC 678, *McDermott International Inc. v. Burn Standard Co. Ltd. and others*, 2006 (11) SCC 181, *Rajasthan State Road Transport Corporation v. Indag Rubber Ltd.*, (2006) 7 SCC 700 & *Krishna Bhagya Jala Nigam Ltd. v. G.Harischandra*, 2007 (2) SCC 720 and *State of Rajasthan Vs. Ferro Concrete Pvt. Ltd.* (2009) 3 Arb.LR 140 (SC) has held that in view of changed economic scenario and the consistent fall

in the rates of interest, the Court can take notice of the same and must necessarily reduced the interest in the facts and circumstances.

38. In the Rajendra Construction Company (Supra), the claimants had claimed interest in the suit, however, the matter was referred for arbitration, and arbitrator had awarded interest at the rate of 18% per annum on the principal amount from the date of the suit to the date of the award. The Apex Court keeping in view the facts and circumstances that a contract was entered into in 1987 and the work was completed in 1990 after extension granted by MHADA and that arbitrator had passed the award in 1995 with interest at 18% per annum had reduced the rate of interest from 18% to 10% per annum and had held that reduction of interest is proper and equitable and is in the interest of justice. In McDermott International Inc. (Supra), resorting to exercise its power under Article 142 of the Constitution of India in order to do complete justice between the parties, had directed that the claimants shall be entitled for interest at the rate of 6% per annum in place of 18% per annum. Relying on Mukund Ltd. v. Hindustan Petroleum Corporation Ltd. where the Supreme Court had confirmed the decision of the Division Bench upholding the modified award against the order of the learned single judge and had reduced the interest awarded by the learned single judge subsequent to the decree from 11% to 7½ % per

annum holding that 7½ % per annum would be reasonable rate of interest that could be directed to be paid to the claimants. For reducing the rate of interest long lapse of time was taken into consideration.

39. Similarly, in Rajasthan SRTC (Supra), since a long spell of time had passed since the amounts were claimed by the claimants and the interest at the rate of 12% per annum was considered to be burdensome to the company, therefore, the Apex Court in the facts and circumstances, had reduced the rate of interest from 12% to 6% per annum. In Krishna Bhagya Jal Nigam Ltd. (Supra), the Supreme Court considering the economic reforms in the country and that the interest regime has changed and the fact that interest rate had substantially reduced, reduced the interest from 18% to 9% per annum. Similarly, in UP Cooperative Federation Ltd. (Supra), the rate of interest was reduced in the entirety of the facts and circumstances.

40. In the present facts and circumstances also the claims are for the period 1998-99 and considerable time has already elapsed. The plaintiffs have also not specifically proved as to what is customary rate of interest and relies only on the fact that the deposition of the plaintiffs regarding customary rate of interest has not been refuted in the cross-examination by the defendant. Therefore, taking the totality of the facts

and circumstances, and the law laid down by the Supreme Court, it will be just and appropriate to award interest till the date of filing of the suit at the rate of 9% per annum. The plaintiffs have claimed an amount of Rs.20,84,176/- as interest till the filing of the suit at the rate of 24% per annum. Since the plaintiffs have been awarded interest till the filing of the suit at the rate of 9% per annum, therefore, the proportional interest at the rate of 9% per annum shall be Rs.7,81,566/- (Rupees seven lakhs eighty one thousand five hundred and sixty six only), and therefore, the issue is decided in favor of plaintiffs and against the defendant awarding an amount of Rs. 7,81,566/- (Rupees seven lakhs eighty one thousand five hundred and sixty six only) as interest till the date of filing of the suit.

41. The plaintiffs are also awarded pendente lite and the future interest from the date of institution of the suit till the recovery of the amount at the rate of 6% in the facts and circumstances. The plaintiffs shall be entitled for pendente lite interest at the rate of 6% on the amount of Rs.50,43,756/- till the amount of Rs.11,10,186/- and TDS amount of Rs.23,814/- was paid pursuant to order dated 24th May, 2002. From the date of payment of the said amount, the plaintiffs shall be entitled for pendent lite interest at the rate of 6% per annum on the balance amount after deducting the amount which was paid and

deducted pursuant to order dated 24th May, 2002. The plaintiffs shall be entitled for the future interest also at the rate of 6% till the amount decreed in favour of the plaintiffs is paid. The issue is decided accordingly.

42. Therefore, in the entirety of the facts and circumstances, the suit is decreed in terms of finding on the issues decided herein above. The plaintiffs shall also be entitled for a cost of Rs.10,000/- payable by the defendant. Suit is decreed accordingly and the decree sheet be drawn.

July 02, 2010
'Dev'

ANIL KUMAR J.