

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.138/2009 & CM No.5342/2009

M/S. DVH INDUSTRIES Appellant
Through: Mr.Vikas Dhawan with
Mr. Ravi Gupta &
Mr. V.K. Malik, Advs.

versus

\$ M/S. HARTLEY KNITS & ORS. Respondent
^ Through: Mr.S.C. Maheshwari,
Sr. Adv. with Mr. H.C.
Kharbanda & Mr. Jabar
Singh, Advs.

Date of Hearing : April 23, 2009

% Date of Decision : May 13, 2009

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN

HON'BLE MR. JUSTICE RAJIV SHAKDHER

1. Whether reporters of local papers may be
allowed to see the Judgment?

Yes

2. To be referred to the Reporter or not?

Yes

3. Whether the Judgment should be reported
in the Digest?

Yes

VIKRAMAJIT SEN, J.

1. The annals of the litigation are required to be placed in proper perspective. A suit for Mandatory Injunction was filed by the Respondent before us, namely, M/s.Hartley Knits. The Suit was valued at Rupees 5,01,000/- and a Court Fee of Rupees 7,800/- was affixed. However, in the so-called Suit for Mandatory Injunction it has been prayed to the Court to “(a) pass a decree for US\$1,27,085.50 with interest at the rate of 20 per cent per annum against the Defendants and (b) pass such other and further orders

as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case". On the very first hearing, the valuation was found to be deficient and the Plaintiff was called upon to make good the deficiency of Court Fee. On this being done, on 4.9.2000 Summons were issued to the Defendants. Defendants No.1, 2 and 3 entered appearance on 6.11.2000. The Appellant, who was originally arrayed as Defendant No.2, filed a Written Statement dated 25.9.2002. Noting that Defendant No.2 had admitted that it had received US\$76928.48 in connection with this very transaction, the Court had restrained that Defendant, who is the Appellant before us, from making payment of US\$76928.48 to any person except the Plaintiff. By Orders dated 4.9.2002 the Appellant/Defendant No.2 was directed to remit the said sum of US\$76928.48 to the Registrar-General of this Court. This Order was unsuccessfully challenged before the Division Bench of this Court and the further appeal to the Supreme Court was dismissed as withdrawn on 14.8.2003.

2. On 19.8.2003 the Joint Registrar erroneously observed that the suit had been valued for the purposes of Court Fee and jurisdiction below Rupees 20,00,000/- and, therefore, it was liable to be transferred to the District Court, Delhi. All the parties, which included Defendant No.2, who was represented at that hearing, were directed to appear before the District and Sessions Judge, Delhi on 6.11.2003. Obviously, the Joint Registrar had lost sight of

the fact that the deficiency in Court Fee had been made up and that the suit was for recovery of US\$76928.48 which was indubitably above Rupees 20,00,000/-. On 26.10.2004, the Suit was transferred back to the High Court of Delhi in the presence of learned counsel for the Plaintiff and the Defendant No.1.

3. The Suit was dismissed for non-appearance on behalf of the Plaintiff on 20.9.2005, on which date only the former Defendant No.1 was present. On 25.10.2005 the Plaintiff's application for restoration of the suit was allowed in view of the statement made by learned counsel for the erstwhile Defendant No.1 that it has no objection to the prayer being allowed. A perusal of the suit proceedings discloses that Defendant No.2 had stopped appearing in the hearings at the suit after 19.8.2003, that is, after the withdrawal of the Special Leave Petition challenging the Order directing it to deposit the sum of US\$76928.48. Issues were framed on 8.12.2005 in the presence of Plaintiff and Defendant No.1. Thereafter, by Orders dated 31.7.2006 the application filed by Defendant No.1 was allowed and it was deleted from the Array of Parties. Consequently, the original Defendant No.2, the Appellant before us, became Defendant No.1 in the Suit. On a subsequent hearing, the learned Single Judge observed that Summons in the suit post its restoration have not been issued to Defendants No.2 and 3 (by then Defendant No.1 and Defendant No.2 respectively) and for that reason fresh summons were

ordered, returnable for 6.11.2006. However, no summons were issued by the said date and the Joint Registrar again passed fresh orders for issuance of the summons on 2.5.2007. Thereafter, on 27.7.2007 time was given to the learned counsel of the plaintiff to file the Report submitted to him by the courier company, certifying that the Appellant stood served. On 13.08.2007, an Affidavit of service was filed by the Plaintiff stating that Defendant No.2/Appellant had been served through courier as well as by electronic mail. The Report of the Courier has been placed on the record. Since nobody had appeared for the Defendants, the case was put up for hearing on 10.12.2007. The Suit was decreed in favour of the Plaintiff and against the Defendants jointly and severally by Judgment dated 10.12.2007 for the recovery in Indian Rupees of a sum equivalent to US\$1,27,085.50 together with simple interest at the rate of 7 per cent per annum and costs of Rupees 51,416/-.

4. IA No.1834/2006 under Order IX Rule 13 CPC was filed by the Appellant on 15.1.2008 praying for recalling the ex parte Judgment and Decree dated 10.12.2007. This application has been supported by the Affidavit of Mr. Hasmukh Khatri, President of the Appellant. After several hearings, IA No.14722/2008 was filed on behalf of the Plaintiff/Decree Holder praying for the release to it of the amount deposited by the Judgment Debtor. By means of the impugned Order, IA No.1834/2006 under Order IX Rule 13 was

dismissed and IA No.14722/2008 filed by the Plaintiff was allowed, thereby ordering the release of US\$76928.48 to the Plaintiff/Decree Holder.

5. Arguments have been addressed before us to the effect that Notice of the application for restoration ought to have been served on the Appellant before it could have been allowed. However, since the Appellant/Defendant No.1 was not present at the hearing when the suit was originally dismissed, that is 20.9.2005, we are of the view that Order IX Rule 4 is the provision of the Code of Civil Procedure, 1908 which stands attracted and not Order IX Rule 9 thereof as contended by learned counsel for the Appellant. We find support for this view in *Damu -vs- Vakrya*, (1920) ILR 44 Bom 767 and *Makundi -vs- Parbhu*, AIR 1926 All 179. With profound respect, the distinction drawn by the Orissa High Court in the case of *Ratnakar Ray -vs- Kulamoni Roy*, AIR 1951 Orissa 266 does not alter the situation. The relevant provisions of Order IX are reproduced in juxtaposition in order to highlight all the nuances of the conundrum in contemplation:

Order IX Rule 2 - Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs - Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of	Order IX Rule 8 - Procedure where defendant only appears - Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the
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the plaintiff to pay the court-fee or postal charges, if any, chargeable for such service, or failure to present copies of the plaint as required by rule 9 of Order VII, the Court may make an order that the suit be dismissed. Order IX Rule 3 - Where neither party appears, suit to be dismissed – Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.	defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.
Order IX Rule 4 - Plaintiff may bring fresh suit or may restore suit to file - Where a suit is dismissed under Rule 2 of Rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in Rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.	Order IX Rule 9 - Decree against plaintiff by default bars fresh suit - (1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and when it satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as

	it thinks fit, and shall appoint a day for proceeding with the suit. (2) No order shall be made under this Rule unless notice of the application has been served on the opposite party.
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6. The absence of a provision akin to sub-rule (2) of Order IX Rule 9 requiring notice to be issued to the opposite party as a prerequisite, in Order IX Rule 4 is indeed conspicuous by absence, and cannot but lead to the conclusion that notice is required to be issued only to the party which is actually present at the hearing on which the dismissal of the suit occurred. If this was not the intention of the Legislature, it would have mandated the issuance of a notice even under Rule 4 of Order IX. The CPC in Order IX itself specifically postulates situations where some of the plaintiffs or defendants, as the case may be, are absent, and permits different treatment in that regard. This discussion is necessary since it has been contended by learned counsel for the Appellant that the concession made by learned counsel for the erstwhile defendant No.1 for restoration of the suit could not be legally efficacious so far as the Appellant is concerned, and that the application for the restoration of the suit should have been decided only after notice and hearing of the application. In our view, this argument is fallacious since the Appellant was not present on the date of hearing when the suit came to be dismissed.

7. The course adopted by the learned Single Judge is unassailable. It will be recalled that only the erstwhile Defendant No.1, namely, A.C.S. Logistics was represented on 20.9.2005 when the suit was dismissed for non-appearance of the Plaintiff. The present Appellant/Defendant No.1 was absent, and therefore was not legally entitled to be served once again. A modicum of diligence would indubitably have enabled the Appellant to follow the progress of the suit including the Court to which it had been transferred and retransferred. Requisite information is always available in the transferor Court. Even if a party is absent on one date of hearing, information regarding the date to which proceedings stand adjourned is not difficult to ascertain. A problem may arise if the subject suit or application is decided on the very date on which a particular party is absent but legal remedies have been duly provided. When a Judge is absent on a particular date, and the Court official/Reader adjourns proceedings for 'proper orders', on the adjourned date the suit cannot legally be dismissed, or defendant(s) set *ex parte* or the suit/application be allowed, for the simple reasons that the *lis* has not been adjourned for that purpose for that date. The Judge should instead direct the case to be adjourned to a date for a particular purpose, even simply for the appearance of parties. All previously served parties are legally bound to appear on such adjourned dates of hearings. Fresh notice to them is not required in law or in equity. A defendant who had

previously been set ex parte cannot expect to be served again; and the same applies to an absent party. However, notice of the restoration of the suit was ordered and was issued to Defendant No.1 the service of which is at the fulcrum of the dispute now raised in the Appeal. The Appellant/Defendant No.1/Judgment Debtor No.1 contends that it was neither serviced by courier nor by electronic mail.

8. Courts of law are always at pains to ensure that parties have been duly served, as a one-sided hearing is anathema to law. In the case before us, Defendant No.1/ Appellant had initially been duly served. It had not only filed its Written Statement but had also appeared before the Division Bench as well as the Hon'ble Supreme Court, by filing an appeal challenging the orders directing it to deposit with the Registrar-General of this Court the sum of US\$76928.48 admittedly received by it from the other Judgment Debtor. On the date when the Suit was erroneously transferred to the District Court, the Appellant was duly represented by counsel. He was, therefore, manifestly playing hide and seek in the litigation. He would not, therefore, be entitled to the stringent tests of service that would apply at the time of the initial service of the Summons. The service of notice of the restoration of the suit has been effected on the Appellant No.1 through courier, that is, by a third party. The Report unequivocally states that the notice was served on the "doorstep" of the

Appellant. There is no reason to disbelieve this Report. The Decree Holder/Respondent has stated on Affidavit that notice/information was served by E-mail. In response thereto, learned counsel for the Appellant has placed before us a copy of a Message dated 23.4.2009 stating that Email Hasmukh@DVHNY.com, which is the address at which the Plaintiff/Respondent had sent the E-mail "has not been in use since DVH's moving of offices in 2001. DVH has never received any documents or emails regarding this matter at this, or any other, email account. I stated this in a sworn statement which I submitted to the Court previously". This is indeed an evasive stand and leads us to the conclusion that the Appellant had once again received formal notice of the hearings in the Suit.

9. It will be relevant to reproduce Notification dated 21.4.1998 in the context of the provisions with which we are concerned, the relevant portion of which reads as follows:-

I. The following shall be inserted as rule 1(A) in Order XVII of the Code of Civil Procedure, 1908:-

Rule 1(A) On the occurrence of an unanticipated holiday or in the event of the Presiding Officer of a Court being absent owing to sudden illness or other unexpected cause, all cases fixed for the day in Question shall be deemed to have been automatically adjourned to next working day when the Presiding Officer is present and it shall be the duty of the parties or their counsel to attend Court on that day.

Explanation :-Nothing in this rule shall apply where another Presiding Officer has been assigned the work of the court for the said day.

10. So far as courts in Delhi are concerned, therefore, it is not expected that notices must issue to the parties who are already served, informing them of the next date of hearing. They must be present on the date, to which proceedings stand adjourned for 'proper orders'. On that date the Court shall postpone hearings for a particular and specific purpose.

11. There is a practice in the District Courts to issue notice to the unrepresented party in the event that the Judge/Presiding Officer is absent on a particular date of hearing, ostensibly on the ground that the Reader is not competent to pass any judicial orders. With due respect to the learned Single Judge, we are unable to concur with the decision in *Gobardhan Ram Bisheshar Ram -vs- Banarsi Ram*, AIR 1957 Allahabad 805. We affirm the law and the reasoning of the learned Single Judge in *Venutai Motiram Ghongde -vs- Sadashiv Parashramji Madghe*, AIR 1975 Bombay 68. So far as *Hukam Chand -vs- Mani Shibrat Dass*, AIR 1934 Lahore 984 and *Hari Krishan -vs- Madan Lal Sharma*, 32(1987) DLT 338 are concerned neither of the Judgments prescribe the issuance of a notice to the absent party; both cases merely hold that the *lis* cannot be dismissed in default unless the Judge/Presiding Officer has fixed the case for any aspect of the hearing. We agree with the Division Bench in *Firoz Khan -vs- Bibi Hasina Khanna*, AIR 1994

Patna 103 which has noted the ever-increasing span in which cases are decided, and have held that applications under Order IX Rule 13 should be allowed with circumspection and rigour. In such cases, it would not be in the interest of justice that an Affidavit of the absent party ascribing reasons for non-appearance should form the sole basis for setting aside the decrees. We would be loath to give punctilious approach or attitude which inexorably would be at the expense of justice.

12. No cogent and credible cause has been shown by the Appellant/Defendant No.1 for us to conclude that he did not receive the notice either through courier or through electronic mail. We would rather hold that he was deliberately absent in order to delay proceedings. Learned counsel for the Appellant has contended that Defendant/Respondent No.2 who had not “submitted to the jurisdiction of the Court” had informed the Appellant that the suit had been adjourned to 10.12.2007. We find this version to be incredulous and contradictory. Both the Defendants were watching the proceedings. No sufficient cause has been shown for setting aside the *ex parte* judgment and decree under Order IX Rule 13. As has been provided in that very provision, since the Appellant has undoubtedly and uncontrovertedly been served with the summons at the commencement of the hearings in the suit, we are not called upon to minutely survey the subsequent service of notice, which was

necessitated because the Appellant had chosen to stay away from the hearings despite specific knowledge of the pendency of the suit.

13. In this analysis, the Appeal as well as the application is dismissed. We are not inclined to impose costs for the reason that learned counsel for the Appellant had submitted that the deposited sum of US\$76928.48 be released to the Decree Holder on his furnishing security to the satisfaction of the Court.

(VIKRAMAJIT SEN)
JUDGE

May 13, 2009
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(RAJIV SHAKDHER)
JUDGE