

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

% RFA 312/2005

+ Date of Decision: 11th October, 2013

McCANN ERICKSON (INDIA) PVT. LTD. Appellant
! Through: Mr. Vikram Dholakia, Advocate

versus

\$ KAMINI SAIGAL & ORS. Respondents
Through: Mr. C.M.Lall with Ms. Ankita
Ubeja, Advocates for R-1
Mr. D.K. Malhotra & Mr. Rajesh
Malhotra, Advocates for R-2

AND

% RFA 372/2005

NESTLE INDIA LTD. Appellant
! Through: Mr. D.K. Malhotra & Mr. Rajesh
Malhotra, Advocates

versus

\$ KAMINI SAIGAL & ORS. Respondents
Through: Mr. C.M.Lall with Ms. Ankita
Ubeja, Advocates for R-1

Mr.VikramDholakia,Adv.
for R-2

CORAM:

*** HON'BLE MR. JUSTICE P.K.BHASIN**

JUDGMENT

P.K. BHASIN, J:

These appeals are directed against the judgment and decree dated 25th January,2005 passed by the learned Additional District Judge in a suit for recovery of Rs. 13,50,000/- alongwith interest thereon @ 24% p.a. from March,1994 onwards filed by respondent no.1 in both the appeals, Ms.Kamini Sehgal (hereinafter to be referred as 'the plaintiff'). The decree passed was against the appellants as well as respondent no.3 in both the appeals, M/s A.V. Communications, for a sum of Rs.13,49,800/- and all the three defendants in the suit were made liable for the payment of the decretal amount jointly and severally. The appellant in RFA No.372/2005 was arrayed as defendant no.1 in the suit and reference to it shall hereinafter be made as 'defendant no.1' and the appellant in RFA No.312/2005 was arrayed as defendant no.2 and it shall be referred to in this judgment also as 'defendant no.2' while respondent no.3 in these

appeals was impleaded in the suit as defendant no.3 and in this judgment also reference to it shall be made as defendant no.3. Since both the appeals were heard analogously they are being disposed of by this common judgment.

2. The plaintiff's case which has been noticed by the trial court in its judgment is as under:

"..... the plaintiff is engaged in carrying on business of producing TV serials and in the course of its business, the plaintiff produced a TV serial in the name of Jharokha which was telecast on DD2 Channel between April,1993 and November, 1994 for which a telecast fee was paid to Doordarshan and free commercial time was given to the plaintiff by Doordarshan as producer. The plaintiff was authorised by Doordarshan for booking spots/advertisements/ sponsorships during the course of the telecast of the said serial. The defendant no.1 keenly desired for the display of their products on the telecast of said serial and the defendant no.1 through T.S.A. predecessor of defendant no.2 which is an accredited advertising company, approached the plaintiff for allotment of time/slot. The predecessor of defendant no.2 disclosed to the plaintiff that they are the booking agents of various companies including defendant no.1 and on specific instruction of defendant no.1, bookings are made with the plaintiff for and on behalf of defendant no.1. The plaintiff was informed by the predecessor of defendant no.2, that the work and management of this assignment was entrusted to defendant no.3 for and on behalf of defendants and plaintiff was given clear impression that defendant no.3 is a part and parcel of theirs as both are working as a group. The plaintiff accepted the assignment of the defendants and proceeded to telecast the advertisements/spots of the products of defendant no.1 on its said TV serial. The plaintiff accordingly raised bills for the work assigned as per internal working arrangement of the defendants. In discharge of the part payment, the defendants through defendant no.3 issued cheque of Rs.1,50,000/- dated 23.6.94 and promised to pay the balance amount but the defendants failed to pay the balance amount. Looking into the future business prospects, the plaintiff did not press strongly for release of payment. Thereafter the plaintiff prevailed over

the defendants for early payment and accordingly the defendant no.3 once again handed over three cheques for Rs.50,000/-each. These cheques on presentation were returned unpaid due to insufficiency of funds. The plaintiff thereafter made repetitive requests for payment of the dues from time to time but in vain. The plaintiff vide its letter dated 6.3.95 reminded the defendant no.1 which was replied by defendant no.2 vide their letter dated 28.4.95. The defendant no.2 also informed the plaintiff that such payments were released in favour of defendant no.3 and defendant no.2 further disclosed that dealing with parties were on principal to principal basis. As per the plaintiff, the defendants have turned dishonest and with a view to secure wrongful gain, they are now disowning the liability.....”

3. Separate written statements were filed by defendants 1 and 2 opposing the suit claim. The relevant portions of the written statement of defendant no.1 are as under:

“C. That the Nestle India Ltd., defendant no.1, is a public limited Company dealing in sale and manufacture of processed food. The Company, for promoting its product, has to hire services of professional advertising Companies. The relationship between defendant no.1 and advertising Companies is on principal to principal basis. The advertising Companies are engaged by number of other Companies. For rendering their services, the advertising Companies raise bills against defendant no1. and the defendant no.1 pays directly to the advertising Companies. The defendant no.1 neither recognizes nor have any dealing with any person other than advertising Companies. The defendant no.1 has no control over the working of the advertising Companies and are not aware of their method of working. Advertising Company may be availing services of other persons/agencies for getting their work done but the defendant no.1 has no relationship with such person/agency.

D. In the present matter defendant no.2 was working as advertising Company. They undertook to provide their services for Advertising the product of defendant no.1 through various methods. One of the method is through Television. The relationship between defendant no1. and defendant no.2 were strictly on principal to principal basis. (emphasis added) The defendant no.2 never worked as an agent of defendant no.1. the defendant no.2 worked as an independent agency with no control from defendant no.1. For providing their services, defendant no.2 had

raised various bills which also included telecast of advertisement film in a programme 'Jharokha' shown on Television. The bills raised by the defendant no.2 have been paid long time back. The defendant no.1 has no dealing with either defendant no.3 or plaintiff.

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3. It is denied that defendant no.1 through defendant no.2, has ever approached plaintiff for allotment of time/slot for advertisement of Defendant no.1's products during telecast of T.V. Serial 'Jharokha'. The working relationship of defendant no.1 with defendant no.2 was on Principal to Principal basis. The Defendant no.2 were not the agents of defendant no.1. It is not within knowledge of defendant no.1, that defendant no.2 has approached the plaintiff.....

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7. With regard to averment as made in paragraph no.7, it is denied that there was any agreement between plaintiff and defendant no.1 for providing services to defendant no.1. The defendant no.1 has availed of, no service of plaintiff. The defendant no.1 had no dealing with plaintiff. The question of plaintiff's raising bill against defendant no.1 does not arise. It is denied that defendant no.1 was under any liability to make payment to plaintiff. It is again reiterated that there was no privity of contract between defendant no.1 and the plaintiff. It is denied that defendant no.3 issued cheque for or on behalf of defendant no.1..... It is however reiterated that defendant no.1 had made all payments of the bills raised by the defendant no.2 for providing services on principal to principal basis and nothing is due and payable to defendant no.2 and further defendant no.1 has no relation whatsoever with defendant no.3.

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10. With regard to averment as made in paragraph no.10, it is admitted that a letter written by plaintiff dt. 6.3.95 addressed to defendant no.1 was received by defendant no.1. Since the defendant no.1 had already released the payment to defendant no.2, with whom they had principal to principal relationship, the letter was handed over to defendant no.2 for reply. This, however, does not mean that defendant no.1 and defendant no.2 were having principal and agent relationship. It is denied that defendant no.1 had ever given any oral assurance to the plaintiff to compensate/pay any....."

4. The relevant portions from the written statement of defendant no.2 are also being re-produced below:

"3..... It has been incorrectly alleged, that the answering defendant had negotiated any assignment with the plaintiff. It may however be pertinent to mention that the answering defendant was approached by Defendant No 3 to sell spots in the T.V. serial produced by the plaintiff. The answering defendant then released advertisements to advertise products of Defendant No 1. Copies of the relevant release orders issued to Defendant No 3 are attached hereto as Annexure "A". The very fact that the advertisements were released by issuing release orders to Defendant No 3 establishes the fact that Defendant No 3 was acting as marketing agent for the plaintiff. The answering defendant had booked spots with Defendant No 3, who claimed to be entitled to arrange and effect such bookings and terms for the same were settled between the answering defendant and Defendant no 3. It is pertinent to mention that the working relationship of Defendant No 2 with Defendant No 1 was on a principal to principal basis. Defendant No 2 never acted as agents of Defendant No1. It is submitted that Defendant No 2 works for different companies to promote their products and is not controlled by them in its working. In the present case for advertising the products of Defendant No 1, Defendant No 2 has raised various bills, at different points of time, which have already been settled by Defendant No1 and nothing is due against Defendant No 1.

[illegible]

10.....So far as the letter dated March 6, 1995 sent by the plaintiff to Defendant No 1 is concerned the same was responded to by the answering defendant vide letter dated April 28, 1995 wherein the correct position had been explained. It is submitted that Defendant No 1 and the answering defendant have no role in the whole transaction. Further Defendant No 1 had already paid the whole amount to Defendant No 2 who had further effected payments to Defendant No 3 according to the agreed arrangements. Since the relationship of Defendant No 1 and Defendant No 2 is on principal to principal basis and not as agent principal, no liability arises against Defendant No 1. The plaintiff as such has no basis or justification for raising demands against either Defendant No 1 or against the answering defendant."

5. Defendant no.3 also filed separate written statement and the relevant pleas raised therein are as under:

"5. Para 5 of the plaint as stated is incorrect. In fact, after entering into arrangement with the plaintiff as enumerated in Additional Pleas the defendant No.3 approached the defendant No.2 for booking of advertisement during the Telecast of Serial 'Jharokha' who in turn introduced defendant No.1 as Potential Buyer of F.C.T. although there was no direct contact between defendant No.1 and defendant No.3. In fact, there was direct contact between the plaintiff and defendant No.3. The fact of the matter is that the present plaintiff is a house-wife and all business dealings and negotiations were carried on by Sh. Umesh Saigal husband of Mrs. Kamini Saigal. All the dealings were with Mr. Umesh Saigal who represented himself as the owner of the firm M/s Kamini Production although later on it transpired that he was carrying on business in the name of his wife Mrs. Kamini Saigal. In fact, one Mr. Chopra was at one time a Junior of Sh. Umesh Saigal met Mr. Agnihotri and told him about the Telecast of Serial 'Jharokha' that the replying defendant came in contact with Mr. Umesh Saigal and further negotiations were carried out between them.

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7. Para 7 of the plaint is not admitted as staged. In fact, the arrangement was that the replying defendant would be booking the spots at a pre-settled rate with the plaintiff and the defendant No.3 would raise the Bills against his Buyers for which the plaintiff has nothing to do. The plaintiff would raise the bills against the defendant No.3 at pre-settled rates which would be paid.

Additional Pleas: -

1. Shri Bhanu Agnihotri of A.V. Communications was approached by M/s Kamini Production through their representatives for selling advertisement time available with them with their T.V. Serial 'Jharokha' Telecast over Metro Net Work of Door Darshan every week. Initially rate of Rs.6800/- per 10 seconds F.C.T. (Free Commercial Time) was settled. It was further agreed that the defendant was to pay the price mutually agreed upon for the telecast of Commercial which took place at his

instance and was free to charge for the same any price that he could command from his Buyers in turn or any price they agreed to pay to him. In short the entire business relationship between the parties was governed by demand and availability of advertising time. Under these arrangements the defendant after due efforts was able to get some commercial for telecast with the plaintiff's programme which were duly telecast by her and after the bills were raised the defendant paid for the same. However, with increasing pressure on the plaintiff before every telecast to sell off the available commercial time to potential buyers the plaintiff would offer more and more discount to the defendant in return for more and more booking.

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3. That although there is a facility for using un-utilised F.C.T. of one telecast with the next one, (called Banking) there is a limit on the quantity of F.C.T which can be thus accumulated, and the rest goes waste. Apart from this the F.C.T. Bank has to be used up within a particular time frame. For example Door Darshan had directed that all accumulated F.C.T. with programmes running on its Metro Net Work should be used up by 31.10.1993 in that year. Hence, there was increasing pressure on the plaintiff before every telecast, and she offered more and more discount in her bid to get more and more commercials with every telecast so that F.C.T. is not wasted.

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6. That under the aforesaid arrangements the following business was done: -

Rate Rs.6800/- per 10 Seconds	
FCT used 30 Seconds	
FCT to be billed at this rate	
50% of total FCT used i.e. 15 seconds.	
	Rs. 10,200/-
Rate Rs.8925/- per 10 seconds	
FCT used 1280 seconds	
FCT to be billed at the aforesaid	
rate (50%) 640 seconds....	<u>Rs.5,71,200/-</u>
Total	Rs.5,81,400/-

Amount already paid Rs.5,31,425/-

Balance payable: Rs. 49,975/-

subject to the plaintiff giving bills for aforesaid FCT at aforesaid rates which plaintiff has failed to give hence this payment could not be claimed by the plaintiff."

6. On the pleadings of the parties following issues were framed by the trial Court:

- "1. Whether the suit is bad for mis-joinder of parties? OPD*
- 2. Whether the suit discloses any cause of action? OPD*
- 3. Whether the plaint has not been properly verified? OPD*
- 4. Whether the defendants have discharged their obligation of payments for the services rendered by the plaintiff? OPD*
- 5. Whether there is any privity of contract between defendant No.2 and the plaintiff in respect of booking of spots for the plaintiff's T.V. Serial Jharoka? OPP*
- 6. Whether any contractual relationship exists between the plaintiff and defendant No.1? OPD*
- 7. Whether the plaintiff is entitled to the amount claimed in the suit. If so, from whom? OPP*
- 8. Relief."*

7. Evidence was adduced by the plaintiff and defendants 1 and 2. Defendant no.3 after filing written statement walked out from the proceedings before the trial Court and did not adduce any evidence to substantiate its defence. The plaintiff had examined

herself as well as her son Yogesh Saigal since he used to be in contact with the advertising agents. Defendant no.1 examined one witness who had no personal knowledge about the transaction between the parties as he was employed with defendant no.1 during 1993-94 but he deposed on the basis of records of his Company. All the issues were finally decided against the defendants and consequently the plaintiff's suit came to be decreed in her favour and against all the defendants for a sum of Rs.13,49,800/-. However, the learned trial Court did not award any interest to the plaintiff from March,1994 till realization.

8. Only defendant nos. 1 and 2 felt aggrieved by the judgment and decree of the trial Court and so they filed separate appeals which are now being disposed of by this common judgment. The third defendant not only did not challenge the decree passed against it but it admitted its liability of a sum of Rs. 7,96,900/- before this Court. The plaintiff had also felt aggrieved with the refusal of interest to her by the trial Court and so she filed cross-objections dated 17th March, 2005 claiming interest on the decreed amount @ 24% p.a., as was claimed in the suit but which had not been awarded to her by the trial Court.

9. During the course of hearing of these appeals the arguments were restricted from both the sides to the main controversy between the parties which was about the nature of the actual business relationship between them. The case of the plaintiff was that the defendant no.1 Company, whose products were advertised by her during the free commercial time allowed to her by Doordarshan during the telecast of the serial 'Jharokha' produced by her, was liable to pay her the advertisement charges since the contract between her and defendant no.1 was entered into through M/s Tara Sinha Associates(TSA), predecessor of defendant no.2(It appears that this Company TSA merged with defendant no.2 Company and then the new Company came to be known as 'Tara Sinha McCnann-Erickson and then again as McCann Erickson (India) Pvt. Ltd., commonly known as 'McCann Erickson' and this position was not disputed by any of the counsel) and defendant no. 3 who as per the plaintiff's case were the advertising agents of defendant no.1. The stand of the defendants 1 and 2, however, was that the dealings between defendant no. 1 and 2 were on 'principal to principal' basis and similarly the dealings between defendant no.2 and defendant no. 3 were also on 'principal to principal' basis. It was also their stand

that the agreement between the plaintiff and defendant no.3 was an independent agreement under which it could claim from the plaintiff advertisement charges at pre-fixed rates between them and defendant no.3 could in turn sell the spots for advertisements during the free commercial time during the telecast of 'Jharokha' serial to its clients, like, defendant no.2, at any rates. Thus, the relationship between the plaintiff and defendant no.3 was also on 'principal to principal' basis and defendants 2 and 3 never acted as agents of defendant no. 1. All these aspects were covered under issue nos. 4, 5 and 6.

10. So, the main question to be answered is whether the defendant no.1 is also liable to pay any money to the plaintiff for the advertisement of its products on television during the telecast of plaintiff's serial Jharokha even if the entire charges, as claimed by it, stood paid by it to defendant no.2 which in turn claimed to have paid to defendant no.3 also as per the bills raised by it. There is no dispute that, as far as, the plaintiff is concerned she had not received the payment of advertisement charges being claimed in the suit for advertising the products of defendant no.1 from any one of the three defendants. In fact, the defendant nos. 1 and 2 claimed that they were not concerned whether the

plaintiff had been paid her dues or not from defendant no.3 to whom the entire payment had been made as per the bills raised by it on defendant no.2 and there was no privity of contract between the plaintiff and defendant no.1 or defendant no.2.

11. During the course of hearing of these appeals it was submitted by the counsel for all the parties no written agreements between defendant no.1 and 2 and between defendant no.2 and defendant no.3 had been brought on record and proved during the trial by any of these defendants and so this Court has to decide the true relationship between the parties on the basis of correspondence exchanged between them and the oral evidence adduced by them and on the basis of preponderance of probabilities also.

12. There is no dispute between the parties that the plaintiff had advertised the products of defendant no.1 during the telecast of her serial Jharokha on Doordarshan's Metro channel during the period 1993-94. The plaintiff had before filing of the suit for recovery served upon defendant no.1 a demand notice dated 6th March,1995 demanding payment of Rs.13,49,800/-. The defendant no.1 had admitted the receipt of that notice in its

written statement but it did not reply to that demand notice. According to the defendant no.1 only defendant no.2 was supposed get the advertisement charges from defendant no.1 which defendant no.2 had received and the defence of defendant no.2 also is that it had no concern with the plaintiff and booking of slots during the telecast of Jharokha serial were booked for the products of defendant no.1 by defendant no.3 which was the marketing agent of the plaintiff and there were no direct dealings between the plaintiff and defendant no.2. However, this defence is belied from some documents proved during the trial. Ex.P-1/D-2 is a letter dated 21st June,1993 written by the plaintiff to M/s Tara Sinha Associates, which subsequently merged with defendant no.2. This document was admitted on behalf of defendant no.2 at the stage of admission denial of documents and it reads as under:

"21-6-93

*To,
Tara Sinha Associates,
3, Community Centre,
Zamrudpur,
New Delhi.*

Dear Sir,

Sub: Spots on Jharokha in the metro channel on Thursdays at 8 PM

Kindly refer to our discussions. This is to confirm that spots are available on this program, which extends to Delhi and Bombay metros and is also available on the satellite, for Rs.10,000 per 10 secs.

We will be grateful for your early response.

Yours faithfully,

Sd/-

(KAMINI SAIGAL)"

13. There was another letter also written by the plaintiff to M/s Tara Sinha Associates, Ex.P-2/D-2, on 27th August, 1993 which reads as under:

*"14/6 Tilak Marg
New Delhi 110007
Tel: 381433*

27-8-93

*To,
Tara Sinha Associates,
Zamrudpur Community Centre,
New Delhi.*

Dear Sir,

Sub: Spots on 'Jharokha' in the metro channel for Delhi, Calcutta and Bombay telecast on Thursdays at 8 PM.

Refer our discussions on the above subject.

This is to confirm our special offer of spots on the above program at the rate of Rs.12,000 (inclusive of agency commission of 15%) per 10 secs.

Waiting for your early response.

Yours faithfully,

Sd/-

(KAMINI SAIGAL)"

14. These letters, about which the counsel for defendant no. 2 did not dispute before this Court that the same were written for the advertisement of the products of defendant no.1 and receipt whereof by defendant no.2 was not disputed, clearly show that there was direct contact between the plaintiff and the predecessor company of defendant no.2 for the advertisement of the products of defendant no.1 during the telecast of plaintiff's serial Jharokha.

15. Ex. P-1/D-3 is the slots confirmation letter written to the plaintiff by defendant no.3 and it reads as under:

"4.11.93

*M/s. Kamini Productions
N-130, Panchshila Park
New Delhi 11017.*

Kind Attn: MRS. KAMINI SAIGAL

Dear Madam,

We are pleased to confirm the following spots on your Programme 'Jharokha' on DD Metro Network.

<i>Client</i>	<i>Brand</i>	<i>Duration</i>	<i>Telecast dates</i>
<i>Nestle India Ltd</i>	<i>Nercafe Doka</i>	<i>40 seconds</i>	<i>4th, 11th, 25th Nov' 93 2nd, 9th, 30th Dec' 93</i>

Nestle India Ltd	Maggi Seasoners	30 seconds	25 th Nov. 2 nd , 9 th , 16 th and 23 rd Dec' 93
Nestle India Ltd	Nercafe Select	10 seconds	25 th Nov. '93 2 nd Dec. '93

Thanks & regards,
Yours sincerely,

for A.V. COMMUNICATIONS

Sd/-

(BHANU AGNIHOTRI)"

16. These documents, in the absence of any written agreements between defendant no.1 and defendant no.2 and between defendant nos. 2 and 3 having been proved by these defendants and which should have been proved to substantiate their defence of *inter se* 'principal to principal' relationship, do substantiate the case of the plaintiff taken in her plaint and reiterated by her in her evidence, that it was represented to her on behalf of defendant nos. 2 and 3 at the negotiation stage that both of them were a part of one advertising group and had been retained by defendant no.1 for advertising its products and that defendant no.3 had been entrusted with the job of management of the assignment. The defendant no.2 had to begin with negotiated with the plaintiff and then slots were booked by defendant no.3

since in its letter dated 4th November,1993 there was no reference to the rates for the slots which the plaintiff had already communicated to the defendant no.2. The defendants having not brought on record documentary evidence, which must be there, in respect their *inter se* relationship an adverse inference has to be drawn against them that if the same had been brought on record that would have negated their stand that their *inter se* relationship was of 'principal to principal'. Those facts were within their special knowledge and so just because the plaintiff had stated in her cross-examination that she did not know about the exact relationship between the defendants would not show that she was accepting that their relationship was on 'principal to principal' basis and defendant no. 1 was not liable to clear her dues.

17. The sole witness examined by defendant no.1 had admitted in cross-examination that bills used to be raised on defendant no.1 also by the plaintiff and he specifically admitted the receipt of bill dated 6th November,1993, Ex.PW-1/6, from the plaintiff for advertisement charges for two spots on 18/11/93 and 25/11/93 amounting to Rs.97,800/-. The plaintiff had also placed on record copies of many other bills raised in the name of defendant no.1.

Ex.PW-1/1-15 and Ex.PW-1/17-22. It was not suggested to her in cross-examination that those bills had not been received by defendant no.1 through defendant no.3 to whom it were sent alongwith covering letters addressed to defendant no.3 for being further delivered to defendant no.1 for payments. Even the witness of defendant no.1 Mr. Virat Mehta did not claim that his Company had not received the aforesaid bills raised in the name of defendant no.1 by the plaintiff. So, its not that the plaintiff never raised bills on defendant no.1 directly as was its defence. The witness of defendant no.1 no doubt had also stated that the amount of that consolidated bill, Ex.PW-1/16, for Rs.97,800/- was paid to defendant no.2 but that payment to defendant no.2, though there is no proof about that payment also, would also not show that the defendant no.2 was not acting as the agent of defendant no.1 or that defendant no.1 was not liable for making the payment of the dues of the plaintiff if its agents had defaulted in doing that after taking the money from defendant no.1. A principal party can always hand over the payment to its agent for being made over to some third party with whom the principal had any transaction through the agent. And if the agent makes the payment to that third party through another agent, like in the

present case defendant no.2 claims to have paid to defendant no.3, it would not create any 'principal to principal' relationship between defendant nos. 1, 2 and 3. If at all there was no contract between the plaintiff and defendant no.1 through defendants 2 and 3 then it would have immediately on receipt of the bill for Rs.97,800/- and other bills written back to the plaintiff as to why the bills were being sent to it for payment when it had not placed any order on the plaintiff for the advertisement of its products. Defendant no.1, however, did not do that and so after the filing of the suit against it no new story could be cooked up to avoid its liability towards the plaintiff. And, just because some bills used to be raised on defendant no.3 also by the plaintiff and defendant no. 3 in turn used to raise bills on defendant no.2 it cannot be said that they were not acting on behalf of defendant no.1 for the advertisement of its products during the telecast of plaintiff's serial Jharokha on television.

18. As far as the defence of the defendants that there was an agreement between the plaintiff and defendant no.3 for booking of time slots at pre-fixed rates is concerned the same has also not been proved. As noticed already, defendant no.3 after taking this plea in its written statement chose to walk out from the scene

without even making an attempt to substantiate this defence and they also did not choose to examine the proprietor of defendant no.3 to establish that. So, other two defendants cannot take any advantage from its defence that its relationship with the plaintiff was on 'principal to principal' basis relying upon the judgments of the Apex Court reported in (2005) 11 SCC 314, AIR 1994 SC 1303 and AIR 1977 SC 1724 wherein it was held that admissions of some facts made by a party to a suit are the best evidence against that party. In fact, the plea of the defendants that there an agreement between plaintiff and defendant no.3 for booking of slots at pre-settled rates is falsified from the bill dated 5th November, 1993 raised by defendant no.3 on defendant no.2, Ex.P-2/D-3, in which the rates of Rs.12,000/- per 10 seconds slot were shown and same rate was given earlier by the plaintiff to defendant no.2 vide letter dated 27th August,1993, Ex.P-2/D-2, which would have been at a higher rate if the defence of these defendants was correct. The sole witness examined by defendant no.2 had stated in his cross-examination that it came to be known that defendant no.3 was not the plaintiff's representative when the plaintiff had served defendant no.1 a demand notice dated 6th March, 1995. Still, a defence was taken that defendant no.3 was

the marketing agent of the plaintiff which cannot be accepted. Similarly, the fact that some cheques were given to the plaintiff by defendant no.3, which in any case had been dishonoured, will not convert the relationship between defendant no.1 on the one hand and defendants 2 and 3 on the other hand from 'principal and agent' to 'principal to principal', as was the submission of the learned counsel for these defendants-appellants. Similarly, if defendant no.3 had been booking slots for advertisement of products of other parties as well during the telecast of Jharokha serial that would also not show that this defendant was not dealing with the plaintiff on behalf of defendant no.1 while booking spots for the advertisement of its products.

19. There is another document also proved on record which demolishes the case of defendant no.1 that it had no direct privity with the plaintiff and confirms that defendants 2 and 3 were approaching the plaintiff on behalf of defendant no.1 only and not independently. That document is the demand notice dated 6th March, 1995. Ex. DW-2/D-2, which was admittedly served upon defendant no.1 by the plaintiff claiming the payment Rs.13,49,800/- before filing the suit for recovery. In that demand notice it was clearly written that the spots for advertisement of

the products of defendant no.1 were booked by defendant no.3 on behalf of defendant no.1 and further that the plaintiff had no agent. She had also claimed that she had not received the payment and she was informed that defendant no.1 was facing some financial problems. The defendant no.1 was requested to look into the matter being the main beneficiary and to ensure her payments were made without any further delay. The defendant no.1, however, chose not to refute the said claim of the plaintiff by not replying to the said demand notice. That conduct of defendant no.1 also belies its claim that it had no privity of contract with the plaintiff. If actually defendant no.1 was not dealing with the plaintiff through its agents it would have immediately written back to the plaintiff as to why the demand was being raised on it. Instead, it handed over that notice to defendant no.2 for being replied. That must have been done to bring to the notice of defendant no.2 that it had not made the payment of the advertisement charges for its products to the plaintiff and so it should deal with the situation and make the payment which it had received from defendant no.1, as was its stand throughout, and which stand now appears to be an afterthought. The defendant no.2 in its reply dated 28th April,1995

to the said demand noticed had claimed that defendant no.3 had raised bills for Rs.11,48,860/- and defendant no.1 had made the full payment to defendant no.3. There is, however, no proof even of the payments allegedly made by defendant no.1 to defendant no.2 or by defendant no.2 to defendant no.3 and it was rightly submitted by the learned counsel for the plaintiff that these *inter se* paper admissions of the defendants were not binding on the plaintiff.

20. It was also submitted by the counsel for defendants 1 and 2 that defendant no.3 had admitted in this Court also the entire liability towards the plaintiff and that is sufficient to set aside the decree against defendants 1 and 2. There is no doubt that during the pendency of these appeals defendant no.3 had admitted its liability for a sum of Rs.7,96,900/- on 8th May, 2007 and thereafter had made the payment of a sum of Rs.5,75,000/-. But even that circumstance would not show that defendant no.3 was the agent of the plaintiff. That fact coupled with the conduct of defendant no.1 in not replying to the plaintiff's demand notice dated 6th March,2005 and not objecting to the plaintiff raising bills in its name, which is witness Virat Mehta admitted, shows that there was some understanding between defendants 1, 2 and 3 that

after advertisement charges had been paid by defendant no.1, as it claimed to have done, to defendant no.2 then it would be the responsibility of defendants 2 or any other agency to which defendant no.2 would further delegate the job(which was defendant no.3 herein) to ensure that the payments of the bills of the plaintiff are made by them otherwise they(defendants no. 2 and 3) shall be liable to make payments to the plaintiff. Thus, defendants 2 and 3 had also undertaken with defendant no.1 to clear the dues of the plaintiff. This Court is, therefore, in full agreement with the conclusion of the trial Court that defendants 2 and 3 had acted as the agents of defendant no.1 while booking advertisement spots for its products during the telecast of plaintiff's serial Jharokha on television. The trial Court has also rightly held the liability of the three defendants to be joint and several despite the fact that defendants 2 and 3 were the agents of defendant no.1 since there was understanding between them and defendant no.1 that they shall also be liable to third party claims in case the payments received by them do not reach the producer of the serial during the telecast of which products defendant no.1 were to be advertised. These conclusions have been reached by this Court keeping in mind the ratio of the

judgments of Supreme Court reported as (1995) 6 SCC 566, AIR 1989 SC 1555 and AIR 1967 SC 181, which were cited by the learned counsel for defendant no.1 and in which guidelines were given to be kept in mind while finding out the relationship between the parties to a suit whenever a dispute arises as to whether one party was an agent of the other or an independent contractor or purchaser of the goods of the other party.

21. In fact, the admission of the liability of Rs.7,96,000/- by defendant no.3 before this Court shows that earlier in the written statement it had taken a false plea that only Rs.49,975/- were payable to the plaintiff.

22. Then it was also submitted by the learned counsel for the defendants 1 and 2 that the plaintiff was seeking recovery of Rs.13,50,000/-- without giving any details and the trial Court had also passed a decree for this amount without any proof that this much amount was actually due. In this regard the following para from the impugned judgment needs to be noticed:

*“20. In the present case also, the plaintiff in para 11 of the plaint has claimed a sum of Rs.13,49,800/- on account of defendants having availed the services. **The defendant no.1 on the one hand has denied that it had availed the services of plaintiff, while on the other hand, it has nowhere specifically denied the payment of the***

amount as claimed by the plaintiff. Similarly, the defendant no.2 in para 11 of the written statement has not denied that amount of Rs.13,49,800/- is not due to the plaintiff. Rather the defendant no.2 has gone on to say that the plaintiff has no right to claim the alleged amount from the defendant no.2 or from defendant no.1 nor these defendants are liable to pay the amount. When the defendant no.1 and 2 have admitted that the amount claimed by the plaintiff is due, they are liable to pay this amount to the plaintiff.....”

The trial Court has thus observed that the defendants 1 and 2 were not contesting the suit on the ground that the amount being demanded by the plaintiff from them was not the correct amount due to her but only on the ground that it was not their liability to make the payment to her. Even in the memorandum of appeal this observation of the trial Court was not challenged by these defendants as being factually incorrect. As noticed already, when the plaintiff had served upon defendant no.1 the demand notice dated 6th March, 1995 for the said amount defendant no.1 had not disputed that this much amount was not due and even defendant no.2 to whom the notice was handed over for being dealt with had written back to the plaintiff that as per her own signed statement, copy of which was annexed with the reply, a sum of Rs.9,00,000/- was due to her so how she was claiming Rs.13,49,800/-.

23. During the course of arguments before this Court the learned counsel for the plaintiff had admitted that out of the total suit amount a sum of Rs.9,00,000/-was the principal amount and the remaining amount was on account of interest accrued on the principal amount before the filing of the suit. This amount of nine lacs was admitted by the plaintiff in the statement of account signed by her and furnished to the defendants, copy of which was annexed with the reply given by defendant no.2 to the demand notice dated 6th March,1995

24. As a result of aforesaid discussion and conclusions the two appeals filed by defendant nos. 1 and 2 are liable to be dismissed.

25. Now I come to the cross-objection of the plaintiff claiming interest on the suit amount from the March,1995 till the filing of the suit, *pendente lite* and future @ 24% p.a., which was not awarded to her by the trial Court. The plaintiff had filed her reply to the appeal immediately on entering appearance on receipt of the notice of the appeal in March,1996 and in that reply she had prayed for awarding her interest also which the trial Court had denied to her. Learned counsel for the defendants had submitted that this Court permitted the plaintiff's reply to the appeals to be

considered as cross-objections and had also called upon the plaintiff to pay requisite court fees. It was submitted that cross-objections could be said to have been instituted only when requisite court fee had been paid by the plaintiff but by that time the time for filing of cross-objections in terms of Order 41 Rule 22 of the Code of Civil Procedure, 1908 had expired already. However, I do not find any merit in this submission. The plaintiff had filed reply to the appeal in March,1996 which was much before the formal admission of the appeal on 25th March,2008 and fixing of the date of hearing and, therefore, it cannot be said that cross-objection was time barred.

26. The furnishing of requisite court fees by the plaintiff on a subsequent date will not mean that the cross-objections would be deemed to have been filed on that date only. It is well settled that no suit or any other petition requiring court fees to be paid can be dismissed for non-payment of court fees straightaway. The concerned litigant has first to be called upon to furnish requisite court fees and only in case of failure to do that the suit/petition can be rejected under order VII Rule 11 of the Code of Civil Procedure,1908. In the present case, therefore, it cannot be said that the cross-objections of the plaintiff should have been

deemed to have been filed on the date when she furnished the court fees which according to her was payable.

27. The plaintiff had in the plaint, which was presented in April, 1996, claimed interest @ 24% p.a. from March, 1995 onwards till realization of the entire claimed amount but she did not plead or prove any agreement with the defendants whereby they had agreed to pay interest at the said rate in case of delay in making the payments. The learned trial Judge has not assigned any reason for not awarding any interest on the decreed amount but there being no proof of any agreement between the parties regarding the payment of interest for the delay in payments must weighed with the trial Judge while denying interest for the pre-suit period. So, no interest is being awarded by this court also for the pre-suit period. However, even *pendente lite* and future interest has also been denied to the plaintiff which the trial court had the discretion to award under Section 34 CPC. No, reasons have been assigned for not exercising that discretion in the suit which arose out of commercial transactions between the parties. In my view, the same deserves to be awarded and accordingly interest is awarded @ 6% p.a. on the principal sum of nine lacs of

rupees as provided under Section 34 of the Code of Civil Procedure,1908.

28. So, the two appeals filed by defendant nos. 1 and 2 are dismissed while the cross-objections filed by the plaintiff are accepted but partly. It is ordered that on the principal amount of nine lakhs of rupees the plaintiff would be entitled to get interest @ 6% per annum from the date of filing of the suit till the entire decretal amount is paid.

During the pendency of these two appeals both the appellants were directed to deposit half of the decretal amount as a condition of stay of the execution of the decree which they deposited separately and that amount was in turn ordered to be invested in a fixed deposit with a bank which was also done. That amount subsequently was released to the plaintiff subject to her furnishing a bank guarantee which she furnished. 3The respondent no.3 in the two appeals had also made some payments to the respondent no.1-plaintiff during the pendency of these appeals. So, the interest shall be payable on the reducing balance of the principal amount which shall be calculated by the executing Court if execution proceedings have to be initiated. The

bank guarantee furnished by the plaintiff would now stand discharged.

P.K. BHASIN, J

OCTOBER 11, 2013