Mr. Mohit Chaurasia vs M/S. Hotspot Retails Limited on 31 July, 2012

IN THE COURT OF SHRI. ASHISH AGGARWAL, CIVIL JUDGE-1,
SOUTH WEST DISTRICT, DWARKA COURTS, DELHI

CS No: 75/11
Unique case ID No: 02405C0370532011

Mr. Mohit Chaurasia,
S/o. Sh. P.S. Chaurasia
R/o. 94, Pocket-D, Mayur Vihar-2,
Delhi-110091 ...Plaintiff

Versus

1. M/s. Hotspot Retails Limited
   At B-13, Sector-63, Noida-201301 (UP)
   Also at
   D-I, Sector-3, Noida-201301 (UP)

2. M/s. Cellucom Retails India Private Limited
   Registered Office at K-22, Radial Road No.4,
   Connaught Place, New Delhi
   Also at
   B-13, Sector-63, Noida-201301 (UP)

3. Mr. Sanjeev Mahajan, CEO
   At B-13, Sector-63, Noida-201301 (UP)

4. Dilip Modi,
   Chairman,
   Hotspot Retail Limited
   At D-1, Sector-3, Noida-201301 ...Defendants

C.S NO. 75/11
Date of Institution: 20.08.2009.
Date on which judgment was reserved: 24.7.2012
Date of pronouncing judgment: 31.7.2012

SUIT FOR RECOVERY OF RS. 2,51,077/-

J U D G M E N T

1. This is a suit for recovery of salary and other emoluments.

Version of the plaintiff

2. The plaintiff has stated in the plaint that he was employed by defendant no.2. He continued in employment from January 2008 till February, 2009. He had joined the office of defendant no.2 at Naraina. He was issued appointment letter dated 16.12.2007. His "CTC" was fixed at Rs. 7,13,181/☐ per annum. His gross monthly salary was Rs. 44,765/☐

3. As per terms of appointment, in case an employee resigns and is willing to serve the notice period but the company relieves him immediately, the employee is deemed to have served the notice period and all components of salary shall be taken into computation.

4. In the month of January, 2009, 100% equity shares of the company were acquired by M/s. Hotspot Retails Limited (defendant no.1). The defendant no. 2 became a 100% subsidiary of defendant no.1. The defendant no.2 started terminating the services of its employees. Employees of defendant no.2 were forced to resign. The defendant no.2 did not honour the terms of employment and declined to give three months' gross salary in lieu of the notice period. Instead, it gave only three months' basic salary. On protest from employees, its CEO (defendant no.3) stated that full salary shall be given to the said employees. Yet, the defendant no.2 failed to comply with this undertaking.

5. The plaintiff was paid a sum of Rs. 32,314/☐as three months' basic salary. He was not paid other emoluments which were part of the gross salary and was also not given performance linked incentive. The plaintiff has accordingly submitted that he is entitled to receive payment of an additional sum of Rs. 2,51,077/☐

6. According to the plaintiff, the defendant has failed to make payment of the aforesaid sums of money and therefore the plaintiff has filed the present suit seeking recovery of Rs. 2,51,077/☐as computed hereunder :

Components	Sum
Basic	Rs. 10500 per mont
+ Management allowances	Rs. 10500 per mont
+ Cap Allowances	
	Rs. 22000 per month
Gross Salary other than retiral benefits	
	Rs. 43000 per month

Gross salary for 3 months	Rs. 129000
+ Privilege leave for 22 days	Rs. 28391
– Salary paid:	Rs. 32314(Given by Co.)

+ Performance Linked Incentive Rs. 126000 Net Payable Rs. 251077 Version of the defendants

7. The defendants have filed their written statement. They have stated in the written statement that this court does not have territorial jurisdiction to entertain the suit. It is further stated that the plaintiff had already settled his account with the defendant and nothing remains due. It is further stated that it is the plaintiff himself who chose not to serve for the notice period and resigned with immediate effect. Having resigned with immediate effect, the plaintiff gave up his claims for receiving any additional sum of money.

Issues

8. After completion of pleadings, the following issues were framed by Ld. Predecessor of the Court by order dated 10.11.2010 :

1. Whether the plaintiff is entitled for a decree of Rs.

2,51,077/□with pendente lite and future interest @ 18% p.a. against the defendants? OPP

2. Whether this court does not have the jurisdiction to try this case? OPD.

3. Whether plaintiff has concealed the material facts from this court? OPD.

4. Relief.

Plaintiff's evidence

9. The plaintiff adduced evidence in support of his case. He examined himself as PW□1. He tendered his affidavit Ex. PW1/1 in evidence. In his affidavit, he reiterated the averments made in the plaint. He identified and relied upon the following documents:

a) Appointment letter dated 16.12.2007 as Ex. PW1/A;

b) Confirmation letter dated 02.07.2008 as Ex. PW1/B;

c) Resignation letter dated 17.02.2009 as Ex. PW1/C;

d) Letter issued by the defendant no.2 as Ex. PW1/D;

and

e) Legal notice dated 09.04.2009 alongwith postal receipts as Ex. PW1/E. Plaintiff was cross□ examined at length and discharged.

10. Mr. Ajit P.G was examined by the plaintiff as PW-2. He tendered his affidavit Ex. PW2/A in evidence. In his affidavit, he deposed that his services had also been terminated by defendant no.2. Initially he was offered three months' basic salary. Subsequently he was paid three months' gross salary which is in accordance with the HR policy of defendant no.2. PW-2 was cross-examined and discharged. Plaintiff's evidence was closed. Defendants' evidence

11. The defendants adduced evidence in support of their case. They examined Mr. Subhasish Mohanty as DW-1. He tendered his affidavit Ex. DW1/A in evidence. In his affidavit, he stated that the suit is without jurisdiction. He also stated that the plaintiff has already settled his dues with the defendants and therefore cannot canvass his claim. He further stated that the plaintiff chose to resign with immediate effect and therefore is not entitled to the payment sought by him. He also stated that the plaintiff has not been performing well and is therefore not entitled to performance linked incentive. He identified and relied upon the following documents :

a) Board resolutions dated 03.11.2009 and 30.03.2010 as Mark A and Mark B respectively;

b) Appointment letter dated 16.12.2007 as Ex. DW1/B;

c) HR policy as Ex. DW1/C; and

d) No objection certificate as Ex. DW1/D.

DW-1 was cross-examined and discharged. Defence evidence was closed.

Findings of the court

12. My issue-wise findings are as under :

"Whether the plaintiff is entitled for a decree of Rs. 2,51,077/- with pendente lite and future interest @ 18% p.a. against the defendants? OPP"

13. The onus to prove this issue was upon the plaintiff. The plaintiff has sought recovery of a sum of Rs. 2,51,077/- alongwith interest. The plaintiff has claimed recovery of this sum of money from all the defendants. At the outset, it may be examined as to whether defendant nos. 1, 3 and 4 are liable to pay any sum of money to the plaintiff. Liability of defendant nos. 1, 3 and 4

14.The plaintiff has stated in paragraph no.1 of the plaint that "plaintiff was working with M/s Cellucom Retails India Private Limited - defendant no. 2...". The same plea finds mention in paragraph no.1 of the affidavit Ex. PW1/1 of the plaintiff. The documents placed on record by the plaintiff, particularly the letter of appointment Ex. PW1/A show that the plaintiff had been employed only by defendant no. 2. As such, it is only the defendant no. 2 who is required to pay salary and other emoluments to the plaintiff. The plaintiff has no privity of contract with defendant nos. 1, 3 and 4. Resultantly, the plaintiff cannot claim recovery of remuneration from defendant nos.

1, 3 and 4.

15.The defendant nos. 3 and 4 are only employees of the defendant no.2. The mere fact that the plaintiff and defendant nos. 3 and 4 have a common employer does not imply that defendant nos. 3 and 4 are liable for the dues of the company. There is nothing on record to establish that defendant nos. 3 and 4 have undertaken to or are otherwise liable to discharge the liabilities of the said company. They cannot be held vicariously responsible for the acts of the company.

16.The dues sought by the plaintiff are contractual in nature.

Defendant nos. 3 and 4 can at best be said to be acting on behalf of the company and are its agents. It is only the principal who is responsible for the said acts carried out in agency and personal liability cannot be fastened upon the agents. Reference in this behalf may be made to Sections 226 and 230 of the Indian Contract Act. This is not a case where the agent has not disclosed the name of the principal or where the agent has acted beyond the purview of his agency so as to invite personal liability in accordance with Sections 231 and 227 of the Indian Contract Act respectively.

17.Similarly, defendant no.1 is merely a holding company and holds shares of the defendant no.2. The defendant no.2 is a limited liability company and a distinct juristic entity. For its liabilities, the defendant no.1 cannot be held responsible. In holding so, I draw support from the decision of Hon'ble Supreme Court in the case of Tata Engineering and Locomotive Company Ltd. v. State of Bihar and Ors. 1964 (6) SCR 885, wherein the basic features of a company were highlighted as follows :

> "The true legal position in regard to the character of a corporation or a company which owes its incorporation to a statutory authority is not in doubt or dispute. The corporation in law is equal to a natural person and has a legal entity of its own. The entity of the corporation is entirely separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to the capital invested by them; similarly, the creditors of the members have no right to the assets of the corporation. This position has been well established ever since the decision in the case of Salomon v. Salomon and Co. ((1897) AC 22 HL) was pronounced in 1897; and indeed, it has always been the well recognised principle of common law."

In the case of Krishi Foundry Employees' Union v Krishi Engines (2003) 5 Comp L.J. 94 (AP), the Hon'ble Andhra Pradesh High Court held that a holding company cannot be held responsible for the dues of the subsidiary company. The Court relied upon the following passage from Palmer's Company Law, 24th Edn., 1987 :

> "... The legal principle is clear. In principle, 'the separate legal existence of the constituent companies of the group has to be respected' ... The rule in Aaron Salomon

> v Salomon & Co. Ltd. [(1987) AC 22 (HL)] thus prevails; ... That is particularly so when the creditors of the holding company are different from those of the subsidiary, as will normally be the case. However, the holding company is liable for a debt of the subsidiary if it has guaranteed that debt or if it can be established, as a matter of fact, that the subsidiary has acted in a particular transaction as an agent of the holding company or that there has been an abuse of the corporate form."

This decision was followed in the case of Walnut Packaging Private Limited vs The Sirpur Paper Mills Limited Company O.S.A. No. 21 of 2008 decided by Hon'ble Andhra Pradesh High Court on 31.12.2008.

The general principle that emerges is that ordinarily a holding company is not liable for the dues of the subsidiary company. This rule is subject to certain exceptions when the corporate veil may be pierced by the Court. However, in the present case, none of the exceptions have been shown to exist so as to justify lifting of the corporate veil. As such the defendant no.1 cannot be held liable to pay the contractual dues, if any, of defendant no.2.

18.From the above, there is no manner of doubt that defendant nos. 1, 3 and 4 are not liable for any of the dues claimed by the plaintiff. The suit of the plaintiff is liable to be dismissed as against defendant nos. 1, 3 and 4. Liability of defendant no.2

19.The plaintiff has prayed for recovery of a sum of Rs.

2,51,077/□ It is urged by the plaintiff that his services were abruptly terminated. According to the plaintiff, although the plaintiff was asked to submit a resignation letter, this was a mere eye wash and in fact his services had been terminated by the defendant. The plaintiff has submitted that in case of termination of the services by the employer without issuing ninety days' prior notice, the company is required to pay three months' gross salary to the employee. Yet, the employer company, instead of paying three months' gross salary, paid only basic salary of a sum of Rs. 32,314/□

20. On the other hand, the defendant no.2 has disclaimed its liability to pay the aforesaid sum of money on the following grounds :

> a) That the services of the plaintiff had not been terminated by the defendant. The plaintiff had voluntarily resigned from the company. Since the resignation was with immediate effect, under the HR policy, the plaintiff is not entitled to payment of gross salary.
>
> b) The plaintiff had already entered into full and final settlement and had issued "No Objection Certificate" Ex.

DW1/D. Hence, the issue of dues towards the plaintiff cannot be re□opened.

c) The plaintiff is not entitled to performance linked incentive since his performance was not up to the mark.

21. In order to evaluate the rival contentions of the parties, at the very outset, it must be examined as to whether the services of the plaintiff had been terminated by the defendant no.2 or whether the plaintiff had voluntarily resigned from the employment of the defendant no.2. According to the plaintiff, he was compelled to submit his resignation whereas the defendant no.2 has contended that the plaintiff had voluntarily resigned.

22. The resignation letter has been identified as Ex. PW1/C. The said letter states that it is the plaintiff who had himself resigned from employment. The plaintiff has tried to demonstrate that this letter was not intended to be acted upon and was in fact submitted under coercion and under the threat of forfeiture of gross salary. The question is whether the plaintiff can be permitted to take this plea in light of express language of the resignation letter. In my opinion, the plaintiff is indeed permitted by law to lead evidence to show that the said letter was sham and had been submitted under duress and threat of deprivation of emoluments. The plaintiff is at liberty to prove his plea that the company had, instead of itself terminating the service of its employees, compelled the employees to tender their resignation so as to comply with the undertaking of the company not to act to the detriment of its employees. While raising this plea, the plaintiff is not seeking to deviate from the terms of the letter. He is not seeking to vary or contradict its terms. He is proposing to show that the entire document was sham and was not intended to be acted upon. Such evidence is not barred by the provisions of Section 92 of the Evidence Act. In this behalf reference is made to the decision of Gangabai Vs. Chhabubai 1982 (1) SCC 4. In that case, the Hon'ble Supreme Court held that inspite of Section 92(1) of the Evidence Act, it is permissible for a party to a deed to contend that the deed was not intended to be acted upon but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. It was observed:

> "The bar imposed by Section 92(1) applies only when a party seeks to rely upon the document embodying the terms of the transaction and not when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose, oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties".

In the case of Parvinder Singh v. Renu Gautam 2004 (4) SCC 794, the Hon'ble Supreme Court has held as under:

> "An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction."

23. According to the plaintiff, the resignation letter Ex. PW1/C had been duly submitted by him but only as part of a different arrangement. The said document was sham and a facade for termination of employment by the company. Such a stand of the plaintiff is not hit by Section 92 of the Indian Evidence Act. From the above, it is clear that the plaintiff is permitted by law to demonstrate by evidence that the resignation letter was sham.

24.The next question is whether the plaintiff has succeeded in this attempt to prove that the plaintiff was forced to tender the resignation letter and his services had actually been terminated by defendant no. 2. The plaintiff has examined himself as PW1 and has reiterated his plea in his affidavit Ex. PW1/1. The plaintiff/PW□1 was cross□examined on behalf of the defendant. In cross□ examination he has maintained his stand that he had not voluntarily resigned but had been asked to tender his resignation as per the format prescribed by the defendant no.2. Nothing could be brought out in the cross□examination of PW□1 which could render his testimony doubtful or which could discredit the witness.

25.The testimony of PW□1 is strengthened by the deposition of PW□2 Mr. Ajit P.G. Mr. Ajit P.G was also employed with the defendant no.2 during the same period. He has also deposed that during the same period as the plaintiff herein, he was asked by the defendant no.2 to resign. This shows that indeed during February, 2009, the defendant no.2 company was terminating the services of its employees en masse.

26.The defendant no. 2 has contended in its written statement that it had not terminated the services of its employees and on the contrary, the plaintiff himself had voluntarily tendered his resignation. This plea was sought to be supported by defendant no. 2 through the testimony of DW□ 1 Subhashish Mohanty, who has reiterated the statement in his affidavit Ex. DW1/A. DW□1 was subjected to cross□examination. During cross□examination, he stated that he does not recall the number of employees who resigned on 17.02.2009 or during the month of February 2009. It is even more significant to note that the witness has pleaded ignorance as to where he was on 17.02.2009 i.e. the date on which the plaintiff tendered his resignation. The witness has stated in his cross□ examination "I do not remember where I was on 17.02.2009".

27.DW□1 does not recall as to whether he was in the office of the defendant no. 2 or not on 17.02.2009. In other words, the witness is not sure whether he was present in the office of defendant no.2 on that day. It follows from this that he cannot be sure of the events that occurred in the office on that day. His testimony as to what had happened in the office □whether plaintiff voluntarily resigned or was forced to do so, is not reliable. Had the witness known what had happened in the office of defendant no.2, he would at least be confident that he was present in the office on that day. The testimony of DW1 as to his whereabouts has eroded the credibility of the witness.

28.One can depose only on matters of which one has personal knowledge. If one has not seen the event, he cannot have personal knowledge of it and he is incompetent to testify. It would be absurd to assume that DW□1 would not remember where he was on that day but would remember the events that occurred in the office. The testimony of DW□1 to the effect that the plaintiff was not forced to resign but had voluntarily tendered his resignation is liable to be rejected.

29.It is also relevant to know that DW□1 has, in his cross□examination, revealed that during February, 2009, 5 to 6 employees used to resign every day. The large number of employees resigning from the company also suggests that there were external factors which had propelled the employees to resign.

30.From his own testimony as PW□1 as well as the testimony of PW□2 Mr. Ajit P.G, the plaintiff has succeeded in proving that he had not voluntarily resigned but has been forced to tender his resignation. In other words, the services of the plaintiff had been terminated by the defendant and the letter of resignation Ex.PW1/C was sham. The consequences thereof will be discussed hereinafter.

31.Admittedly, the terms of employment are contained in the appointment letter Ex. PW1/A and the HR Policy Ex. DW1/C. The appointment letter Ex. PW1/A is not a disputed document. The defendant no. 2 has also filed a copy of the appointment letter and has identified it as Ex. PW1/B. There is no difference between the two documents and its contents can therefore be relied upon. Similarly, no doubt has been cast upon the genuineness of the HR Policy Ex. DW1/C and its contents can also be read in evidence.

32.The appointment letter Ex. PW1/A prescribes that in case services of an employee are terminated without giving ninety days' prior notice, the company shall be liable to pay ninety days' salary. The expression used in clause 3b is "salary" as opposed to the expression "basic salary" as used in clause 2a. The expression "salary" would contextually imply a reference to gross salary, the components of which are provided in Annexure□1. These include customized allowance pool and performance bonus. It is also logical that for the notice period waived by the company, the employee is paid his gross salary since that is the sum that he would have earned had he worked for the company during the notice period. Hence this is the sum that reflects the actual loss suffered by the employee. For the compensation to be realistic and to make up for the loss suffered by him, the employee must be given the entire gross salary.

33.That the plaintiff is entitled to gross salary for the notice period is also reflected from the HR Policy Ex. DW1/C. The HR Policy lays down that salary payable to an employee for the notice period includes not only basic salary but also management allowances. The HR Policy is part of the employment contract and is binding on defendant no.2. In the present case, the plaintiff has proved by his testimony as well as the testimony of PW□2 that the company had terminated his employment with immediate effect. Hence, the plaintiff is entitled to recovery of gross salary for the notice period, in accordance with the HR Policy.

34.That the plaintiff is entitled to receive gross salary for the notice period is also reflected from letter dated 17.02.2009 Ex. PW1/D issued by the defendant no. 2 to the plaintiff. By the said letter, the defendant no. 2 has assured the plaintiff that he will be paid basic salary as well as leave encashment "etc." This shows that the defendant no. 2 has undertaken to pay not only the basic salary but also leave encashment and other emoluments. Defendant no. 2 is bound by this assurance and cannot be permitted to resile therefrom.

35.Counsel for defendant has urged that the letter dated 17.02.2009 Ex. PW1/D is forged and fabricated. The said letter is on the letter□head of the defendant no.2. It bears the signatures of the 'Authorized Signatory' of defendant no. 2. The defendants have not examined the authorized signatory of the company to depose as to whether the signatures on the document Ex. PW1/D are his or not. The genuineness of the document Ex. PW1/D could not be assailed during the cross□ examination of plaintiff. The defendants have miserably failed to prove that the document Ex. PW1/D is fabricated. Hence, it is open to the plaintiff to place reliance on the said letter.

36.Moreover, the letter dated 17.02.09 Ex. PW1/D adds strengths to the version of the plaintiff that he was forced to resign under threat of forfeiture of emoluments. Had the plaintiff voluntarily resigned and with immediate effect, the plaintiff would not be entitled to even basic salary for three months and the defendant would not have undertaken to pay the same. The very fact that the defendant no. 2 has been willing to pay basic salary for three months indicates that the plaintiff had not voluntarily resigned but had been forced to tender his resignation. From the above, it is clear that the plaintiff had been compelled to resign. Hence, the defendant no. 2 ought to pay to the plaintiff his gross salary for the notice period i.e. three months.

37.The claims of the plaintiff finds support not only from the letter of appointment Ex. PW1/A, the HR Policy Ex. DW1/C and letter dated 17.02.09 Ex. PW1/D, but also from the verbal assurance of defendant no. 3, as CEO of defendant no. 2. The plaintiff has stated in his affidavit Ex. PW1/1 that the defendant no. 3 had assured the plaintiff that he would be paid gross salary for three months. PW2 Mr. Ajit P.G. has also stated in his affidavit Ex. PW2/A that such an assurance was made to him too on behalf of defendant no. 2. The testimony of PW1 and PW2 has not been challenged regarding the making of the said assurance. It is not the case of defendant no. 2 that defendant no. 3 was not authorized to make this assurance. Defendant no. 3 is the CEO of the defendant no. 2 and is entitled to decide regarding remuneration payable to employees. His statement that the plaintiff would be given gross salary cannot be said to be beyond his powers and not binding on defendant no. 2. Such a plea has also not been raised by the defendants. Hence the plaintiff is entitled to seek enforcement of the said declaration of defendant no.3.

38.The plaintiff has succeeded in proving that the defendant no. 3 had, on behalf of defendant no. 2, assured payment of gross salary to the resigning employees. The defendants have denied this. However, the denial of the defendants could not be substantiated by evidence. As noted above, the solitary witness of the defendants DW□1 Mr. Subhasish Mohanty has pleaded ignorance of his whereabouts on 17.02.2009. He has also stated that he does not recall whether any discussion took place between the defendant no. 3 and the plaintiff. Since the witness is not aware of his whereabouts and he also does not remember whether any conversation took place between the plaintiff and the defendant no. 3, the witness is not competent to even deny the existence of the conversation pleaded by the plaintiff or its contents. The witness is not competent to state as to what was discussed between the plaintiff and defendant no. 3 and whether defendant no. 3 had made any assurance regarding emoluments payable to the plaintiff. Hence, no assistance can be obtained from the testimony of DW1 to ascertain as to what had been discussed between the plaintiff and defendant no. 3. No other witness has been produced by the defendants to throw light on the said conversation or to state whether it had even taken place. On the other hand, the plaintiff has

produced two witnesses to depose in this respect. The testimony of the plaintiff's witnesses has stood unrebutted and there is no reason to disbelieve them.

39.The defendants have failed to prove their contention that the defendant no.3 did not make any assurance to the plaintiff that the plaintiff would be paid gross salary of three months. According to the plaintiff, the said assurance had been made by the defendant no.3. The defendant no. 3, being a party in the suit, could have examined himself to deny the assertion of making the said assurance. There is no conflict in the interest of the defendants. The defendant no. 3 is within the control of defendant no. 2. His presence before the court could have been secured by the defendants. Having failed to do so inevitably attracts adverse inference and it must be presumed that he has been withheld since his deposition would have negated the plea of the defendants. This view is supported by the decision of Privy Council in Sardar Gurbakhsh Singh v. Gurdial Singh (1927) 29 Bom LR 1392 wherein it has been observed as under:

> "It is the bounden duty of a party personally knowing the whole circumstances of the case to give evidence on his behalf and to submit to cross□examination. Non appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case."

There is no other reason for which the defendant no. 3 must shy away from entering the witness box. He is the best person who could have elucidated as to whether any such discussion took place between him and the plaintiff. Yet, and despite the fact that defendant no.3 was a litigating party, the defendants did not examine him. The defendants have failed to produce cogent and convincing evidence to controvert the stand of the plaintiff that defendant no.3 had, on behalf of defendant no.2, assured the plaintiff that he would be paid gross salary for three months. This stand of the plaintiff has been proved by his own testimony and that of PW2. The plaintiff can therefore found his claim over gross salary for three months on the basis of said assurance. There is no reason not to give effect to this assurance.

40. The next contention of the defendants is that the plaintiff has already entered into a full and final settlement with the defendants. They have relied upon the "no objection certificate" Ex. DW1/D and have contended that by signing the said certificate, the plaintiff has given up his right to claim any additional sum of money from the defendants.

I do not find merit in this contention of the defendants. The "no objection certificate" Ex. DW1/D no where states that the plaintiff has been fully satisfied with the payment released to him or that he will not claim any additional sum of money from the defendants. The document Ex. DW1/D does not even remotely suggest that the plaintiff has waived his right to challenge the acts of the defendants or to claim recovery of the money owed to him. The signatures of the plaintiff on the document only indicates that he has received a cheque from the defendants, the payment of which is not denied by the plaintiff. Nothing more is suggested by the certificate Ex. DW1/D. It is not permissible to read into the document any more than that which it proclaims. Hence, by signing the document Ex. DW1/D, the plaintiff cannot be said to have given up his rights or to accept the payment received by him as a final settlement. The said contention of the defendants is not tenable

and is rejected.

41. From the above, it follows that the plaintiff is entitled to recover gross salary for three months from the defendant no. 2. The said gross salary is computed hereinafter.

42. It is not in dispute between the parties that the gross salary of the plaintiff was that prescribed in the appointment letter Ex. PW1/A. The gross salary includes basic salary of Rs. 10,500/-per month, management allowance of Rs.10,500/-per month and customized allowance pool of Rs.22,000/- per month. The total of this sum amounts to Rs.43,000/-per month. For three months, the plaintiff is entitled to receive a sum of Rs. 1,29,000/- The plaintiff is also entitled to claim leave encashment as was assured to him by defendant no. 2 through letter dated 17.02.2009 Ex. PW1/D. The plaintiff has sought to recover Rs. 28,391/-on this account. It is not the case of the defendants that the plaintiff is entitled to receive a lesser sum under this head. The plaintiff is thus entitled to claim a sum of Rs.28,391/-as leave encashment. Of the aforesaid sums, a sum of Rs. 32,314/-ought to be deducted since this is the sum which the plaintiff has admittedly received from the defendant no. 2. The plaintiff is therefore entitled to receive payment of a sum of Rs.1,25,077/-

43.The plaintiff has also claimed payment of a sum of Rs.

1,29,000/-as performance linked incentive. The plaintiff has claimed the aforesaid sum on the ground that he has been performing well and is therefore entitled to the said incentive. The defendant no. 2 has denied that the performance of the plaintiff was satisfactory.

44.As per the terms of employment, the grant of performance linked bonus was dependent upon the performance of the company as well as the employee. How well the company and the employee/plaintiff fared is a disputed question of fact. In my opinion, this court cannot embark into an inquiry regarding the performance of the company and of the plaintiff. Whether the plaintiff was performing well or not is for his superiors to decide. This is a subjective matter. This court cannot appraise the performance of the plaintiff on behalf of his employer. There are no appraisal reports placed before this court in order to objectively comment on his performance. DW-1 has stated in his cross-examination that the company and the plaintiff were not performing well. No material has been placed on record by the plaintiff so as to outweigh this statement. Merely because the performance of the plaintiff has not been called in question or that no memo has been issued to the plaintiff does not imply that his performance has been so exemplary as to deserve bonus. Grant of performance bonus is subject to the satisfaction of the employer. The court cannot substitute its opinion for that of the employer and cannot direct the defendants to grant the said bonus. Similarly, the balance sheet of the company has not been placed on record so as to evaluate its performance. Hence the claim of the plaintiff to the grant of performance linked bonus is declined.

45.The plaintiff has prayed for pendente lite interest and future interest at the rate of 18% per annum. However, considering the prevailing rates of interest and the other circumstances of the case, in my opinion, interest of justice would be served by the grant of pendente lite interest at the rate of 9 % per annum and future interest at the rate of 6% per annum on the sum adjudged.

46.From the aforesaid, it is concluded that the plaintiff is entitled to recovery of a sum of Rs.1,25,077/□with pendente lite interest at the rate of 9 % per annum and future interest at the rate of 6% per annum thereupon from the defendant no. 2. The plaintiff is not entitled to the recovery of any sum of money from defendant nos. 1, 3 and 4. The issue is decided partly in favour of the plaintiff and against the defendant no. 2.

"Whether this court does not have the jurisdiction to try this case? OPD."

47. The onus to prove this issue was upon the defendant.

According to the defendant, this court does not have territorial jurisdiction to try this case as no part of cause of action has arisen within the territorial jurisdiction of this court.

48.On the other hand, the case of the plaintiff is that this court is vested with territorial jurisdiction to entertain the suit since part of the cause of action has arisen within the territorial jurisdiction of this court.

49.This is a suit for recovery of contractual dues from the defendants. The territorial jurisdiction of this court to try such a suit is governed by Section 20 of Code of Civil Procedure which lays down as under:

"Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction □

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises".

50.From the above, it is clear that the suit can be tried by a court within whose jurisdiction either the defendants work or any part of the cause of action arose. In the present case, the defendants were, at the time of institution of the suit, not carrying on business within the territorial jurisdiction of this court.

51.It may be examined whether part of the cause of action has arisen within the jurisdiction of this court. Cause of action has been described in the case of A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies (1989) 2 SCC 163, as under:

> "A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

In the aforesaid case, it was held that a suit for breach of contract can be filed either where the contract was executed or where it should have been performed or where the breach occurred. The Hon'ble Supreme Court held that the place of performance of the contract is part of the cause of action.

Reference may also be made to the case of Laxman Prasad v. Prodigy Electronics Ltd. AIR 2008 SC 685. The facts of that case were that the defendant therein had been an employee of the plaintiff. Subsequently, the employment had been terminated. According to the plaintiff, the defendant was acting in breach of the negative clauses of the employment contract. The acts of the defendant complained of had been performed in Delhi whereas the agreement had been executed at Hong Kong. The Hon'ble Supreme Court held that courts of Delhi as well as of Hong Kong have territorial jurisdiction to entertain the suit for injunction restraining the defendant from acting in breach of employment contract. The suit having been instituted in Delhi was held to be maintainable.

52. The principles enunciated in the aforesaid decisions may be applied to the facts of the present case. In the present case, according to the plaintiff, he has worked under the employment of the defendant no. 2 company and is entitled to salary as per his terms of employment. The plaintiff has also prayed for performance linked incentive for the one year during which he worked for the defendant no. 2. In order to recover these dues, the plaintiff is required to prove that he had been employed by the defendant, that he performed his duties under the said employment and that he has not been paid the sum of money due to him for his performance. The plaintiff is required to further prove that his services were illegally terminated by the defendants and that the defendants had acted in breach of the terms of employment. Each of these constitute part of the cause of action and are assessed separately. I. Place of executing Employment Agreement

53.The plaintiff has stated in his amended plaint, "That the employment agreement was executed in PS Naraina jurisdiction." This plea taken in paragraph 16 of the amended plaint has not been controverted, specifically, by the defendants in their written statement. Failure to specifically deny in pleading amounts to admission of fact.

54.The defendants have stated in their written station that the "employment letter of the plaintiff is that of Gurgaon". The defendants have stated the place from where employment letter was issued. Whether this was the place of executing the employment agreement or not, has not been disclosed. If not Naraina, where the employment agreement was executed has not been disclosed by the defendants. There is no specific denial on the part of the defendants of the assertion of the plaintiff that the employment agreement had been executed at Naraina.

55.Even if it is assumed that the plea of the defendants does amount to a specific denial, then too, the place of executing the employment agreement becomes a disputed question of fact which the defendants ought to have proved by leading evidence. The onus to prove the issue of absence of territorial jurisdiction is on the defendants. Hence, the defendants ought to have adduced evidence to establish that the employment agreement was executed at a place beyond the territorial jurisdiction of this court. No such evidence has been led by the defendants. The solitary witness of the defendants is DW1 Mr. Subhasish Mohanty who has merely stated about the place of employment and the place of issuance of appointment letter. He has not deposed about the place of executing the employment agreement. Hence, the defendants have failed to prove that the employment agreement was executed outside the territorial jurisdiction of this court.

56.It is the employment agreement that forms the contract, the breach of which caused the grievance of the plaintiff. Hence, to obtain relief, the plaintiff is required to plead the execution of employment agreement and this forms part of the cause of action.

57. Since it is reflected from the pleadings that the employment contract was executed at Naraina, this court has territorial jurisdiction to entertain the suit.

II. Place of appointment, joining services, confirmation of services and discharge of duties.

58.In the present case, the plaintiff has averred in his plaint (amended) that "The plaintiff was first appointed and was working at 2 Floor, PVR Naraina Complex, above State Bank nd of Jaipur and Bikaner, Nariana Industrial Area, Phase I, New Delhi." The defendants have failed to disprove this averment of the plaintiff, which he has reiterated in his testimony. This shows that the appointment of plaintiff was at Naraina. The plaintiff has partially performed his part of the contract at Naraina, Delhi which is within the territorial jurisdiction of this court.

59.The defendants have, in their written statement, admitted that the appointment of the plaintiff was at Delhi. It is stated in the written statement that, "It is submitted that the plaintiff has alleged that his appointment was at Delhi and was posted at Naraina. However, this was prior to the defendant no. 2 was taken over by the defendant no. 1". According to the defendants, the plaintiff was initially appointed in Delhi but after the defendant no. 2 became subsidiary of defendant no. 1, its office was shifted. In my opinion, the shifting of office and the taking over of defendant no. 2 by the defendant no. 1 does not efface the fact that the plaintiff had initially been appointed at Delhi. The taking over of defendant no. 2 by the defendant no. 1 does not amount to termination of the employment agreement that the plaintiff had with the defendant no. 2. The plaintiff is, through the suit, seeking enforcement of the terms of the same agreement that he had executed with the

defendant no. 2 and in respect of which he had joined the office at Naraina. Hence, the appointment of the plaintiff at Naraina, prior to take over of defendant no. 2 by defendant no. 1, continues to form part of cause of action despite the take□over.

60.Moreover, the plaintiff has stated that, pursuant to his appointment, he had joined his duties at the Naraina office. This act of joining of duties signifies his acceptance of the employment contract and partial discharge of his contractual obligations. Unless the plaintiff proves that he had joined his duties and has performed his part of the employment contract, he cannot seek performance of the other part of contract which enjoins the defendant no. 2 to make certain payments of the employee. Hence, this forms part of the cause of action of the plaintiff.

61.Further, the contract of employment had attained finality after the service of the plaintiff got confirmed upon completion of probation period. This had happened at Naraina which is evident from the letter Ex. PW1/B. This confirmation in employment entitled the plaintiff to seek enforcement of the terms of employment. Hence this is part of the cause of action.

62.The plaintiff has prayed for performance linked incentive for his performance during a period of one year prior to the termination of employment. The basis of this claim is the satisfactory performance of the plaintiff. This prayer of the plaintiff calls upon the court to evaluate his performance during the aforesaid period. Part of this performance and discharge of duties had occurred at Naraina. Hence the plaintiff is drawing the attention of the court to his performance at the Naraina Branch, which he claims to have been without blemish. The manner of discharge of his duties by the plaintiff at the Naraina office is needed to be proved by the plaintiff to obtain this relief and it therefore constitutes part of the cause of action.

63.Since all the aforesaid parts of the cause of action have taken place at Naraina, Delhi, which is within the territorial jurisdiction of this court, this court is competent to try the suit.

64.The issue is decided in favour of the plaintiff and against the defendants.

ISSUE NO. 3.

"Whether plaintiff has concealed material facts from this court? OPD".

65.The onus to prove this issue was upon the defendants. The case of the defendants is that the plaintiff has concealed material facts. In the written statement, it is stated that the plaintiff has concealed the facts that the defendants do not owe him any money, that the plaintiff has already settled the dispute with the defendants and that the plaintiff had himself chosen to resign.

66.Whether the plaintiff is entitled to recover money from the defendants or not is a matter of contention before this court. This is a subjective matter and an expression of opinion. The plaintiff felt that he was entitled to recover money from the defendants and therefore instituted the suit. Claiming recovery of money cannot be condemned as falsehood. Moreover, this contention of the plaintiff has been supported by the plaintiff by evidence and has been partially upheld. The plaintiff

can therefore not be penalized for raising this contention and this cannot be held as misrepresentation or concealment of fact.

67.It has also been noted above that the plaintiff had not voluntarily resigned but have been forced to resign. It has further been held that the plaintiff had not, prior to institution of the suit, entered into any settlement with the defendants. Hence, these assertions of the plaintiff cannot be held to be false and the plaintiff cannot be held guilty of concealment of facts.

68.The issue is decided in favour of the plaintiff and against the defendants.

ISSUE NO. 4 - RELIEF

69. In view of the aforesaid facts and circumstances, the suit is decreed in favour of the plaintiff and against the defendant no. 2 in the sum of Rs.1,25,077/□with pendente lite interest at the rate of 9 % per annum from the date of institution of the suit till the date of decree and future interest at the rate of 6% per annum from the date of decree till the date of realization. The plaintiff is also entitled to recover costs of the suit from the defendant no.

2. Against the defendant nos. 1, 3 and 4, the suit of the plaintiff is dismissed.

70. Decree sheet shall be prepared. File be consigned to Record Room.

Announced in the open court (Ashish Aggarwal) st on 31 July, 2012 Civil Judge□I/Dwarka Courts, South West District, Delhi.