

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

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Judgment reserved on: 22.08.2012

Judgment delivered on: 27.08.2012

+ CS(OS) No. 1012/2005

HOTEL DIPLOMAT

..... Plaintiff

Through: Mr Sandeep Sharma and Mr Vikas Sharma,
Advs.

versus

FOLIO HOLDINGS (INDIA) PVT. LTD. AND ANR. Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

V.K.JAIN, J.

1. This is a suit for recovery of Rs 49,56,195/-. The case of the plaintiff is that defendant No. 2 represented that defendant No. 1 was a company incorporated under Companies Act and she was its Chief Executive officer in-charge and responsible for day-to-day conduct of its business. In January, 2000, defendant No. 2 contacted the plaintiffs to seek some rooms for running her office. She also represented that US \$200 million were being transferred as per the order of Folic holding Inc to Citibank, New York for credit to Citibank, N.A., New Delhi and the payment will be made on disbursements of this amount after receipt of payment by Citibank, New Delhi. Accordingly, rooms bearing No. 203, 101, 103, 104, 107,

108, 114, 3 and 5 in Hotel Diplomat were occupied by defendant No. 2 for staying there as also for running her office. The bills amounting to Rs 54,83,521/- were raised by the plaintiff for occupation of the above-referred rooms. The defendant made payment of Rs 11,85,500/-, leaving a balance of Rs 42,98,521/-. Believing the representation made by the defendants that US\$ 2 million were being transferred to Citibank, N.A., the plaintiff allowed them to vacate the premises without clearing the outstanding dues. Three undated cheques were then issued by defendant No. 2 to the plaintiff and she instructed the plaintiff to present the cheques only after receiving instructions from her. Since no instructions were forthcoming from the defendants, the plaintiff sent a letter to them asking them to make payment of the outstanding amount of Rs 42,98,521/- along with interest on that amount. Defendant No. 2 requested the plaintiff to calculate interest only up to 06.09.2001. This amount worked out to Rs 6,57,674/-. Out of this amount, Rs 2,01,479/- had been included in the cheque of Rs 45 lakh and, therefore, the balance interest amount of Rs 4,56,195/- was included in the remaining two cheques, one of Rs 1,48,851/- and the other of Rs 3,07,344/-. The plaintiff presented three cheques, one of Rs 45,00,000/-, the other of Rs 1,48,851/ and the last one of Rs 3,073,44/- to Central Bank of India, Parliament Street, new Delhi on 17.09.2002. The cheques, were, however, dishonoured with the remarks "account closed". The plaintiff is, therefore, now claiming a sum of Rs 49,56,195/- from the

defendants being the amount of those three cheques.

2. The defendants filed written statement, contesting the suit. It was admitted in the reply that the defendants has acquired, on rent, accommodation in Hotel Diplomat for their business activities. It is alleged that nine rooms in the plaint were occupied by the defendants with effect from 09.02.2000 till November, 2000. It is alleged that the plaintiffs had assured the defendants that they would be giving special tariff, including huge discount and concessions. The payments mentioned in para 8 of the plaint have been admitted in the written statement. It has, however, been denied that the total outstanding for occupation of rooms in Hotel Diplomat was Rs 54,83,521/-. It is further alleged that three blank cheques were forwarded to the plaintiff vide letter dated 30.04.2001 and those cheques were made for different purposes as is evident from the letter dated 30.04.2001. It is admitted that defendant No. 2 had instructed the bank to withhold payment of aforesaid three cheques.

3. The defendants have also taken certain preliminary objection. They have alleged that the suit is liable to be dismissed in view of Section 69(2) of Partnership Act as the suit in the name of the firm is not maintainable. The defendants have also denied the authority of Shri V. M. Mathew to file the present suit.

4. The following issues were framed on the pleadings of the parties on 19.01.2010:-

a. Whether the suit is liable to be rejected under Order 7 Rule 11 CPC? OPD

b. Whether the suit is barred in view of Section 69 of the Indian Partnership Act, 1932? OPD

c. Whether the suit is bad for mis-joinder of parties? OPD

d. Whether the plaintiff is entitled to the recovery of Rs 49,56,195/- is prayed for? OPP

e. Whether the plaintiff is entitled to any interest, in case the issued No. 3 is decided in favour for of the plaintiff and the rate and on the period thereof? OPP

f. Relief.”

5. The defendants were proceeded ex parte vide order dated 21.05.2010. The plaintiffs have filed the affidavit of one Mr. Anil Mathur by way of evidence. In his affidavit, Mr. Mathur, who claims to be Financial Controller and Constituted Attorney of the plaintiff has stated that in the month of January, 2009, the defendant No. 2 contacted the partner of the firm as she wanted some rooms in the hotel for running her office. She represented that she engaged in the business of providing loan from foreign banks and the rooms were required for her residence as well as for the office purposes. She also represented that US \$ 2 million were being transferred as per the order of Folic Holding Inc to Citibank for credit to Citibank, N.A. and the payment would be made on the disbursements of the said amount after receipt of that payment by Citibank, N.A. He further stated that rooms No. 203, 101, 103, 104, 107, 108, 114, 3 and 5 were booked by defendant

No. 1 who was staying there and also was running office from there. According to him, the total amount for the rooms occupied by the defendants was Rs 54,83,521/- This amount comprised of room tariff, food, beverages, laundry and applicable taxes. The defendants made payment of Rs 11,85,500/-, leaving a balance of Rs 42,98,521/-. He further stated that the cheques Ex.PW-1/4 to PW-1/6 were issued to them by defendant No. 2 and were forwarded to them by defendant No. 2 vide letter dated 30.04.2001 which is Ex.PW-1/7. She had instructed them to present the cheques only after receiving instructions from her. He has further stated that pursuant to the letter sent by them to the defendants, defendant No. 2 requested them to calculate the interest, which worked out to Rs 6,57,674/-. She issued two more undated cheques one for Rs 1,48,851/- and the other of Rs 3,07,344/-.

6. **Issue No. (a)**

The written statement does not indicate why the plaint is liable to be rejected under Order 7 Rule 11 CPC. The plaint does disclose a cause of action to file the suit since the case of the plaintiff is that the defendants who were occupying certain rooms in their hotels had not paid the balance outstanding of Rs 42,98,521/- Therefore, the issue is decided against the defendants and in favour of the plaintiff.

7. **Issue No. (b)**

Ex.PW-1/2 is the copy of form A and B filed by the plaintiff on 07.05.2010. This document shows that M/s Hotel Diplomat is a partnership firm and Shri

Sanjeev Lamba and Kailash Lamba are its registered partner. Since the plaintiff is a registered partnership firm since 16.10.1991, the suit for recovery of money on behalf of the plaintiff firm is maintainable. The issue is, therefore, decided against the defendants and in favour of the plaintiff.

8. **Issue No. (c), (d), (e) and (f)**

These issues are inter-connected and can be conveniently decided together. Ex.PW-1/3 (colly) are various bills raised by the plaintiff in respect of the rooms which the defendants had occupied in Hotel Diplomat. The amount of these invoices is stated to be Rs 54,83,521/-. Ex.PW-1/4 is the cheque bearing No.126509 of Rs 45,00,000/- dated 10.08.2002, issued by defendant No. 1 in favour of the plaintiff. Ex.PW-1/5 is the cheque bearing No. 1265010 dated 10.08.2002 of Rs 1,48,851/- in favour of the plaintiff, whereas Ex.PW-1/6 is the cheque No. 1265011 dated 10.08.2002 for Rs 3,07,344/-. These cheques were sent vide letter dated 30.04.2001. Ex.PW-1/8 is the letter dated 06.09.2001, written by defendant No. 2 as the CEO of defendant No. 1 to Manager, Citibank, Jeevan Bharti Building, New Delhi, conforming issue of cheque No. 1265009 for Rs 45,00,000/- to the plaintiff.

9. The deposition of Mr Anil Mathur, coupled with the bills Ex.PW-1/3 shows that an amount of Rs54,83,521/- was payable by defendant No. 1-company to the plaintiff towards room rent and other charges in respect of the rooms which the

company had taken in Hotel Diplomat through defendant No. 2 who is its Chief Executive Officer. Defendant No. 1 made payment of Rs 11,85,500/- to the plaintiff, thereby leaving an unpaid balance of Rs 42,98,521/- In fact, the liability to the extent of Rs 45 lakh has been admitted in the letter dated 06.09.2001 (Ex.PW-1/8) written by defendant No. 2 as CEO of defendant No. 1 to Citi Bank, New Delhi. This letter clearly indicates that at least Rs 45 lakh were payable by defendant No. 1 to the plaintiff, on the date this letter was written.

10. As regards interest, Mr Anil Mathur, in his affidavit by way of evidence, has stated that on receipt of letter dated 06.06.2002 (Ex.PW-1/9) from them, defendant No. 2 contacted the plaintiff and promise to clear the outstanding amount along with interest by 10.08.2002. She also requested them to calculate interest up to 06.09.2001, which worked out to Rs 6,57,674/-.

11. I see no reason to disbelieve the unrebutted deposition of Mr Anil Mathur in this regard, particularly when defendant No. 2 herself requested the banker of defendant No. 1 vide letter dated 06.09.2001 to pay Rs 45 lakh to the plaintiff. Had the defendants not agreed to pay interest, the bank would not have been asked to pay Rs 45 lakh and would have been asked to pay only the balance principal amount of Rs 42,98,521/-. I, therefore, hold that the plaintiff is entitled to recover interest amounting to Rs 65,7674/- in addition to the balance principal sum of Rs 42,98,521/-.

12. One issue which came up for consideration, during the course of arguments, was of limitation. The deposition of Mr Anil Mathur shows that three undated cheques Ex.PW-1/4 to PW-1/6 were given to them by defendants. The amount of Rs 45 lakh was already filled in the cheque Ex.PW-1/4 at the time it was delivered to the plaintiff. This would be evident from the letter dated 06.09.2001 written by defendant No. 2 to the bank of the defendants. The remaining two cheques were blank in the sense that neither the date nor the amount was filled on them at the time they were delivered to the plaintiff. This becomes clear from the fact that interest up to 06.09.2001 was calculated by the plaintiff, on the instructions of defendant No. 2, after it had already received all the three cheques and after giving adjustment for Rs 2,01,479/- which was covered in the cheque of Rs 45 lakh, the balance amount of Rs 4,56,195/- was covered by the plaintiff by filling up cheques Ex.PW-1/5 and PW-1/6, one for Rs 1,48,851/- and the other of Rs 3,07,344/-.

13. Section 18(1) of Limitation Act, 1963, to the extent it is relevant for our purpose, provides that where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

14. It is by now settled proposition of law that a dishonoured cheque constitutes acknowledgement within the meaning of Section 18 of Limitation Act. Reference in this regard can be made to the decision of this Court in **Rajesh Kumari v. Prem Chand Jain** AIR 1980 Delhi 80, where it was held that a cheque constitutes acknowledgement and whether it was dishonoured or encashed would be immaterial. It was further held by this Court that where a cheque was dishonoured a fresh period of limitation would start from the date of the cheque. Similar view was also taken in **S.C. Gupta v. Allied Beverages Co. Pvt. Ltd.** 163(2009) DLT 495 & also by Full Bench of High Court of Gujarat in **Hindustan Apparel industries v. Fair Deal Corporation** AIR 2000 Gujarat 261.

15. The next question which arises in this context is as to what would be the date of acknowledgement in a case where the cheque is delivered is undated and the date is later on put by the payee, with the consent/on the instruction of the drawer of the cheque.

In **Ashok Yeshwant Badave vs. Surendra Madhavrao Nighojakar and Anr.** AIR 2001 Supreme Court 1315, the Apex Court, on considering the provisions of Section 5 and 6 of Negotiable Instruments Act, held that a cheque is a Bill of Exchange drawn on a bank by the holder of an account payable on demand. It was further held that Bill of Exchange even though drawn on a banker if it is not payable on demand is not a cheque. The Apex Court concluded that a post dated

cheque is not payable till the date which is shown thereon arrives and will become cheque on the said date and prior to that date the same remains a Bill of Exchange. Therefore, the cheques Ex.PW-1/4 to PW-1/6 continued to be Bills of Exchange till a date was put on them by the plaintiff in accordance with the instructions of the defendants who had asked the plaintiff to present the cheques for encashment only after 10.8.2002.

In **MOJJ Engineering Systems Ltd. and Ors v. A.B. Sugars Ltd.** 154(2008) DLT 579, this Court was of the view that since an undated cheque cannot be encashed, the person who hands over an undated cheque for a certain amount to the respondent in terms of the contract between the parties also authorizes the payee to enter an appropriate date on it. In the case before this Court, the defendants had expressly authorized the plaintiff to fill up a date which could not be earlier than 10.08.2002 when these cheques were to be presented to the bank. Since the cheque Ex.PW-1/4 for Rs 45 lakh was otherwise duly filled except that no date had been put on it when it was delivered to the plaintiff, the cheque could have been completed by the plaintiff by putting an appropriate date on it in accordance with its agreement with the defendants.

In the context of a post dated cheque, this Court held in **D.C.M. Financial Services Ltd. v. Sunil Kala & Co.** 2002 (97) DLT700 that when the creditor is prevented by the debtor from presenting the cheque before a particular date, it is

the date on which the cheque can be presented which shall be deemed to be the date of the cheque. In that case a cheque dated 14.11.1995 was delivered by the defendant to the plaintiff. He, however, requested the plaintiff not to present the cheque since they did not have arrangement for its encashment. The cheque was eventually encashed on 12.12.1995. It was held by this Court that 12.12.1995 and not 14.11.1995 would be considered as the date of payment by the defendants to the plaintiff. The Court rejected the contention of the defendant that since the cheque could have been presented to the bank for the first time on 14.11.1995, that would be the date of payment.

In the case before this Court, though the cheque of Rs 45 lakh as also the other two cheques were undated when delivered to the plaintiff, it was the defendant who prevented the plaintiff from presenting the same to the bank by requesting that they would be presented only after 10.08.2002 by which they were expecting the payment to be received in their City Bank account. Therefore, 10.08.2002 would be the date of the cheque for the purpose of computing the period of limitation. Since a fresh period of limitation starts from the date of the acknowledgement and the cheque of Rs 45 lakh was dated 10.08.2002, the suit having been filed on 08.07.2005 is well within limitation. The issues are, therefore, decided against the defendants and in favour of the plaintiff.

Conclusion

In my finding on the issues, a decree for recovery of Rs 49,56,195/- with costs and pendente lite & future interest at the rate of 12% per annum is passed in favour of the plaintiff and only against defendant No. 1. Defendant No.2, who is stated to be the Chief Executive Officer of defendant No. 1 is not personally liable since she, while taking the rooms, was acting on behalf of defendant No. 1-company and did not furnish a personal guarantee to the plaintiff. The suit against defendant No. 2 is hereby dismissed, without any order as costs.

Decree sheet be drawn accordingly.

V.K.JAIN, J

AUGUST 27, 2012
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