

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

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Date of decision: 7th November, 2012

+ CS(OS) 2150/2010, IA No.14166/2010 (u/O 38 R 5), IA No.6878/2011 (u/O 37 R 2(3)).

RAKESH GUPTA

..... Plaintiff

Through: Mr. Jayant Nath, Sr. Adv. with Mr.
L.M., Asthana, Adv.

versus

KHODAY INDIA LTD & ANR

..... Defendants

Through: Mr. Ankur Sood & Mr. Aman
Avinav, Advs.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

IA No.8495/2012 (of the defendants for leave to defend).

1. The plaintiff has filed the present suit under Order XXXVII of the Code of Civil Procedure, 1908 (CPC) for recovery of Rs.1,80,81,800/- with future and *pendente lite* interest @ 24% per annum from the defendants. Summons for appearance and thereafter summons for judgment were issued to the defendants. An affidavit of one Mr. K.L. Swami working as Director of the defendant no.1 Company seeking leave to defend on behalf of both the defendants, has been filed. Though there is no application for leave to defend but vide order dated 28th March, 2012 the same was registered as an application for leave to defend. It may however be recorded that neither any

document to show that the said Mr. K.L. Swami is the Director of the defendant no.1 Company or is authorized by the defendant no.1 Company to seek leave to defend, has been filed nor any authority from the defendant no.2 Mr. Srihari Khoday in favour of the said Mr. K.L. Swami, has been filed. Notwithstanding there being nothing to show that the leave to defend has been filed on behalf of the defendants, arguments on merits have been heard.

2. The counsel for the defendants has sought leave on three grounds. Firstly, it is contended that the claim in suit is barred by limitation; the second plea is that this Court does not have territorial jurisdiction to entertain the suit and the last and final plea is that no cause of action against the defendant no.2 Mr. Srihari Khoday is shown.

3. The senior counsel for the plaintiff has contended that in the affidavit seeking leave to defend, no plea of limitation has been raised; that a plea of limitation is a mixed question of law and fact and cannot be allowed to be raised for the first time at the time of hearing and without any notice to the opponent and that the defendants ought not to be permitted to urge the said plea.

4. The counsel for the defendants however relies on Section 3 of the Limitation Act, 1963 to contend that the plea of limitation can always be raised.

5. This Court is of the opinion that even in the absence of any plea of limitation having been raised by the defendants while seeking leave to

defend, this Court while decreeing a suit is obliged to look into the question as to whether the claim in suit is within time or not. Reference in this regard can be made to ***Gannmani Anasuya Vs. Parvatini Amarendra Chowdhary*** (2007) 10 SCC 296. Thus the counsel for the defendants has been permitted to argue on the aspect of limitation.

6. The suit was filed on 7th October, 2010. The pleas in the plaint are, that the plaintiff had provided consultancy services to the defendant no.1 Company of which the defendant no.2 is the Managing Director and looking after its day to day affairs; that the said consultancy services were provided through M/s Astra Netcom Pvt. Ltd., a Company controlled by the plaintiff; that disputes arose about the payment of consultancy fee by the defendants to the plaintiff; that a Company Petition No.88/2004 for winding up of the defendant no.1 Company was filed by M/s Astra Netcom Pvt. Ltd. averring the defendant no.1 Company to be indebted in the sum of Rs.4,63,02,424/-; that the defendants then approached the plaintiff for settlement and two settlement agreements were executed between the defendants and the plaintiff at New Delhi on 2nd April, 2005 and whereunder the defendants agreed to pay the settled amount to the plaintiff and to the said M/s Astra Netcom Pvt. Ltd.; that the defendants came to New Delhi and the agreements dated 2nd April, 2005 were signed by the parties along with witnesses in the office of the plaintiff at New Delhi; that under the agreement dated 2nd April, 2005 with the plaintiff, the defendants had agreed to pay a total sum of Rs.2,40,31,800/- in instalments by post dated cheques as mentioned therein, from 23rd April, 2005 to 23rd October, 2006 ; that some of the cheques were dishonoured owing to insufficiency of funds in the

bank account of the defendants; that the defendants upon being informed of dishonourment of the cheques made part payment to the plaintiff at New Delhi in the office of the plaintiff on different occasions between April, 2005 to October, 2007 leaving a balance amount of Rs.1,80,81,800/-, for recovery whereof the suit is filed.

7. On the aspect of limitation, the counsel for the defendants has argued that the last payment as per the agreement dated 2nd April, 2005 was under a cheque dated 23rd October, 2006; that the suit has been filed beyond the prescribed period of three years of limitation therefrom. On the plea of the plaintiff in the plaint of part payment, the counsel for the defendants has invited attention to para 12 of the affidavit seeking leave to defend which is as under:-

“12. Despite the fact that the Defendants had no liability whatsoever, in order to buy peace they made payments to Astra and to the Plaintiff. In view of the fact that Astra Netcom P. Ltd. did not provide the services that were required to be provided under the agreement dated 13.01.2001 and could not place minimum business for 30% of the facility, the amounts paid by the Defendants to the Plaintiff constituted the full and final payment in final settlement and no further amounts could be claimed by the Plaintiff. The parties were no longer acting under the agreement dated 2.5.2004, which was void on account of coercion. The above-said payments were made as per a separate and distinct understanding between the parties. The total fees fixed under the Agreement dt. 05.01.2001 is Rs.4,09,00,000/- out of which amount paid is Rs.1,80,00,000/- to Astra Netcom P Ltd. And Rs.77,00,000/- to Mr. Rakesh Gupta. 50% of Rs.4.09 crores comes to

Rs.2,04,50,000/- [since balance 50% amount was not required to be paid on account of the fact that Astra failed to place the minimum business and was liable to refund the same.] The amount already paid is in excess of the 50% amount of Rs.2,04,50,000/-. Thus, in any case, no further or additional claim by the Plaintiff can be entertained.”

8. The counsel for the defendants has further contended that for part payment to extend the period of limitation, as per the proviso to Section 19 of the Limitation Act, there has to be an acknowledgment of payment in the handwriting of, or in a writing signed by, the person making the payment. It is contended that there is no acknowledgment by the defendants.

9. In this regard it may be stated that the plaintiff has given the details of the part payments aforesaid in Annexure 'B' to the plaint as under:-

“DETAILS OF PAYMENT RECEIVED FROM KHODAY INDIA LTD. W.E.F. 29.4.2005 – 9.10.2007

Date	Amount Rs.	Demand Draft	In Favour of
29.04.2005	6,00,000/-	ICICI Bank	Rakesh Gupta
27.12.2005	13,50,000/-	ICICI Bank	Rakesh Gupta
27.04.2006	10,00,000/-	220254	Rakesh Gupta
13.03.2007	20,00,000/-	542850	Rakesh Gupta
28.08.2007	5,00,000/-	563091 Citibank	Rakesh Gupta
09.10.2007	5,00,000/-	563092 Citibank	Rakesh Gupta”

10. The counsel for the defendants though admits the payment aforesaid, states that the same were vide cheques. It is further contended that the cheque for the last payment of Rs.5 lacs was dated 21st August, 2007 though the payment thereunder was realized on 9th October, 2007. Relying on ***Ashok K. Khurana Vs. M/s. Steelman Industries*** AIR 2000 Delhi 336 it is contended that the date of payment would be the date of the cheque i.e. 21st August, 2007 and not the date when the payment was realized thereunder. However the counsel candidly admits that there is no such plea in the affidavit seeking leave to defend.

11. The senior counsel for the plaintiff has of course rebutted the aforesaid argument.

12. Significantly, the defendants in the leave to defend have not denied the agreement dated 2nd April, 2005 which is self-contained and records the narrative aforesaid in the plaint leading to the execution of the agreement. The defendants though in para 12 re-produced hereinabove have stated that the payments were made as per a separate and distinct understanding between the parties, have not specified as to what was the separate and distinct understanding. Once the defendants admit the execution of the agreement admitting liability for payment and made payments thereafter, in the absence of the defendants showing as to on what other account the payments admittedly so made were, the vague plea of the said payments being on a separate and distinct understanding is but a moonshine and an illusory defence and cannot be accepted and if such defences were to be accepted the same would rather make the provision of Order 37 illusory. It

cannot be also lost sight of that the defendants in the agreement admitted the disputes in settlement whereof the said agreement was executed. Thereafter also the cheques issued by the defendants in favour of the plaintiff were being dishonoured. In such state of affairs, the plea of a separate and distinct understanding, in the absence of the defendants even stating the details and particulars thereof, has but to be rejected.

13. The counsel for the defendants has also contended that the limitation would stand extended by part payment, within the meaning of Section 19 of the Limitation Act, only if the party while so making the payment admits the liability for the balance amount. The senior counsel for the plaintiff to rebut the said argument has rightly contended that there is no such requirement under the language of Section 19 and there is a separate provision namely Section 18 to deal with such a situation. Section 19 provides for a fresh period of limitation to be computed from the date when payment on account of a debt is made before the expiration of the prescribed period by the person liable to pay the debt. The defendants, by non-traverse of the agreement dated 2nd April, 2005, admitted a debt to the plaintiff and by non-traverse of the payments admittedly made thereafter and non-pleading of the understanding on which the said payments are stated to have been made, have also admitted the said payments to be on account of the debt contained in the agreement dated 2nd April, 2005. Accordingly, the said payments would extend the period of limitation. The Supreme Court in ***Jiwanlal Achariya Vs. Rameshwarlal Agarwalla*** AIR 1967 SC 1118 held a cheque to be an acknowledgment of the payment in the handwriting of the person giving the cheque, within the meaning of proviso to Section 19 and a fresh

period of limitation to be beginning therefrom. To the same effect is the judgment of this Court in *Rajesh Kumari Vs. Prem Chand Jain* AIR 1998 Delhi 80, also holding that Section 19 is to be interpreted liberally so as to save the suits from being barred by limitation, so long as its benefit can reasonably be extended to assist a claim, otherwise legal and sustainable. The suit as aforesaid has been instituted within the prescribed period from the last of the aforesaid payments.

14. No merit is thus found in the plea of the defendants of the claim in suit being barred by limitation.

15. As far as the plea of territorial jurisdiction is concerned, the pleas in the plaint as stated hereinabove, of the agreement having been executed at New Delhi and the defendants having agreed to make the payments and having made the payments to the plaintiff at New Delhi have not been controverted in the affidavit seeking leave to defend. All that has been pleaded while challenging the territorial jurisdiction of this Court is that both the defendants are based in Bangalore and carrying on business at Bangalore and signed the cheques at Bangalore and received the legal notice preceding the suit at Bangalore.

16. Not only by non-traverse of the plea of the agreement having been signed at New Delhi but also on the doctrine of ‘debtor must seek the creditor’, the jurisdiction of Court at Delhi would be made out. The plaintiff in the agreement dated 2nd April, 2005 also is shown to be a resident of Delhi. The witnesses to the agreement have also given their addresses of

Delhi. Ordinarily, a document would be witnessed by persons locally available.

17. At this stage, yet another plea of the defendants though not argued, of the defendants having been coerced into signing the agreement dated 2nd April, 2005 may be noticed. The same is also a bald one and bereft of any details which are required to be pleaded in support of such a plea under Order 6 Rule 4 of the CPC. The senior counsel for the plaintiff has in this regard contended that the defendants had defaulted on the agreement dated 2nd April, 2005 with M/s Astra Netcom Pvt. Ltd. also and CS(OS) No. 1367/2010 was filed by the said Company against the defendants which was decreed and RFA(OS) No.47/2012 preferred whereagainst was also dismissed by a Division Bench of this Court on 7th May, 2012. Attention is invited to the said judgment of the Division Bench rejecting the plea of coercion taken by the defendants in those proceedings also.

18. Regarding the cause of action against the defendant no.2, the counsel for the defendants has contended that the only plea against the defendant no.2 is of being the Managing Director of the defendant no.1 Company and which would not make him liable for the dues of the defendant no.1 Company. The senior counsel for the plaintiff has invited attention to the agreement dated 2nd April, 2005 whereunder the defendant no.2 had made himself personally liable to the plaintiff for any claims thereunder. It is worth noting that it is the defendant no.2 who has signed the said agreement on behalf of the defendant no.1 Company. Needless to state that there is no plea in the affidavit seeking leave to defend on the said count. The defendant

no.2 having agreed to become liable for the dues of the defendant no.1 cannot now contend that there is no cause of action against him. Even otherwise, as aforesaid, the defendant no.2 has not even filed any affidavit and the person who has filed the affidavit on his behalf has not even stated as to how he is authorized on behalf of defendant no.2.

19. No merit is thus found in any of the three contentions urged by the defendants in support of the application for leave to defend. The same is accordingly dismissed.

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20. Consequent to the dismissal of the application for leave to defend, the suit has to be decreed as claimed. The plaintiff has claimed interest @ 24% per annum. Considering that the transaction between the parties was a commercial one, need is not felt to interfere with the said claim. Moreover no argument also on that aspect has been urged by the defendant no.2.

21. The suit is thus decreed in favour of the plaintiff and against the defendants jointly and severally for recovery of Rs.1,80,81,800/- with interest @ 24% per annum from the date of institution till the date of recovery.

Costs as per schedule.

RAJIV SAHAI ENDLAW, J

NOVEMBER 7, 2012

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