

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

+ **RFA(OS) 30/2013**

KHODAY INDIA LTD. & ANR. Appellants
Through: Mr.Gopal Jain, Advocate.

versus

RAKESH GUPTA Respondent
Through: Mr.Sanjay Jain, Sr.Advocate
with Mr.Lalit Asthana,
Advocate.

% Date of Decision : August 12, 2013

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL
HON'BLE MS. JUSTICE PRATIBHA RANI

J U D G M E N T (ORAL)

: REVA KHETRAPAL, J.

1. This appeal seeks to assail the judgment dated 07.11.2012 passed by the learned Single Judge whereunder the learned Single Judge rejected the application for leave to defend filed by the Appellant No.2 and decreed the suit in favour of the Respondent and against the Appellants No.1 and 2 jointly and severally in the sum of ₹ 1,80,81,800/- (Rupees One Crore Eighty Lakhs Eighty One Thousand and Eight Hundred only) with interest at the rate of 24% per annum from the date of the institution till the date of recovery.

2. The background facts are that the Appellant no.1, Khoday India Limited had entered into an agreement with the Respondent dated

13.11.2000, which was subsequently amended on 5.5.2001 to change the name of the Appellant No.1. The agreement envisaged that the Respondent/Plaintiff would provide consultancy services to the Appellant No.1 Company of which the Appellant No.2 is the Managing Director. The said consultancy services were to be provided by the Respondent through M/s Astra Netcom Private Limited, a Company controlled by the Respondent.

3. Pursuant to the agreement, the Respondent through its Company, M/s Astra Netcom Private Limited provided the consultancy services to the Appellants till a dispute arose between the parties with regard to the payment of the consultancy fee and certain cases were filed by the Respondent including a Company Petition bearing C.P.No. 88/2004 before the High Court of Karnataka, Bangalore for winding up of the Appellant/Company on account of non-payment of dues amounting to ₹ 4,63,02,424/- (Rupees Four Crores Sixty Three Lakhs Two Thousand Four Hundred and Twenty Four only) to the Respondent. During the pendency of the winding up proceedings, however, two Settlement Agreements were executed between the parties at New Delhi on the 2nd day of April, 2005, one in the name of M/s Astra Netcom Private Limited and the other in the name of Mr. Rakesh Gupta, the Respondent herein. The Appellants admittedly came to Delhi and the Agreements dated 2nd April, 2005 were signed by the parties in the office of the Respondent at New Delhi. By the Agreement dated 2nd April, 2005 entered into between the Appellants and the Respondent, with which we are concerned, the Appellants admitted liability/dues on account of consultancy fees,

which were settled at ₹ 2,09,00,000/- (Rupees Two Crores and Nine Lacs only), ₹ 10,00,000/- (Rupees Ten Lacs only) were settled on account of out of travelling expenses and ₹ 21,31,800/- (Rupees Twenty One Lacs Thirty One Thousand and Eight Hundred only) for payment of service tax. Thus, the total liability amounting to ₹ 2,40,31,800/- (Rupees Two Crore Fourty Lacs Thirty One Thousand and Eight Hundred only) was admitted by the Appellants, which the Appellants agreed to pay to the Respondent. It was further agreed that the total liability would be paid by the Appellant No.1 to the Respondent, Mr. Rakesh Gupta by way of monthly instalments. The following payments were accordingly made by the Appellant No.1 by means of cheques of Punjab National Bank, M.G. Road, Bangalore in favour of the Respondent in full and final settlement of the accounts:-

Sl.No.	Chq.No.	Chq.Date	Chq.Amount
1.	390980	23.04.2005	8,50,000
2.	390981	23.05.2005	8,50,000
3.	390982	23.06.2005	8,50,000
4.	390983	23.07.2005	13,50,000
5.	390984	23.08.2005	13,50,000
6.	390985	23.09.2005	13,50,000
7.	390986	23.10.2005	13,50,000
8.	390987	23.11.2005	13,50,000
9.	390988	23.12.2005	13,50,000
10.	390989	23.01.2006	13,50,000

11.	390990	23.02.2006	13,50,000
12.	390991	23.03.2006	13,50,000
13.	390992	23.04.2006	13,50,000
14.	390993	23.05.2006	13,50,000
15.	390994	23.06.2006	13,50,000
16.	390995	23.07.2006	13,50,000
17.	390996	23.08.2006	13,50,000
18.	390997	23.09.2006	20,00,000
19.	390998	23.10.2006	5,81,800
		Total	2,40,318.00

4. The aforesaid payments are duly reflected in the Agreement itself (Clause 5 of the Agreement). Further vide Clause 10 of the Agreement, the Respondent, Mr. Rakesh Gupta duly acknowledged the receipt of aforesaid cheques and in his individual personal capacity indemnified Khoday India Limited (Appellant No.1) against any future claims by whomsoever relating to the subject matter of the Agreement. Similarly, Khoday India Limited (Appellant No.1) and Mr. Srihari Khoday (Appellant No.2) indemnified the Respondent, Mr. Rakesh Gupta against any claims relating to the subject matter of the Agreement. Subsequently, however, it transpired that some of the cheques were dishonoured on account of insufficiency of the funds in the bank accounts of the Appellants and the Appellants upon being informed about the dishonor of the said cheques made part payments to the Respondent in New Delhi in the office of the Respondent on

different occasions, that is, between April, 2005 to October, 2007. In this regard, the Respondent/Plaintiff has given the details of the part payments aforesaid in “***Annexure B***” of the plaint as under:-

Date	Amount Rs.	Demand Draft	In favour
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

5. The Appellants admit the aforesaid payments as having been made by them to the Respondent. There is however a dispute with regard to the mode of payment. While it is alleged by the Respondent that the said payments were made by demand drafts to him, according to the Appellants the same were paid vide cheques. Be that as it may, the Appellants having failed to pay the balance amount of ₹ 1,80,81,800/- (Rupees One Crore Eighty Lakhs Eighty One Thousand and Eight Hundred only), the Respondent instituted a suit under Order XXXVII of the Code of Civil Procedure, 1908 for recovery of the said amount with future and *pendente lite* interest at the rate of 24 per cent per annum from the Appellants from the due date till the date of realization of the amount.

6. Summons for appearance were issued and thereafter summons for judgment to the Appellants, who sought leave to defend by filing an affidavit of one Mr. K.L. Swamy working as Director of the Appellant/Company. It may be noted that no application for leave to

defend was filed by the Appellants nor any document was filed to show that the said Mr. K. L. Swamy was authorized by the Appellant/Company to seek leave to defend. Notwithstanding, the learned Single Judge treated the affidavit filed by the said Mr. K.L. Swamy as an application for leave to defend.

7. It appears from the impugned judgment that three contentions were raised by the counsel for the Appellants before the learned Single Judge. The very same contentions are sought to be raised before us. The first is that the suit is barred by limitation; the second plea which is urged is that this Court does not have territorial jurisdiction to entertain the suit; and finally it is contended that no cause of action has accrued against the Appellant No.2, Mr. Srihari Khoday. The learned Single Judge after noting that in the affidavit seeking leave to defend no plea of limitation had been raised, nevertheless proceeded to adjudicate upon the said plea in the light of the judgment of the Supreme Court rendered in ***Gannmani Anasuya Vs. Parvatini Amarendra Chowdhary (2007) 10 SCC 296***, in which it is laid down that Section 3 of the Limitation Act, 1963 predicates that the plea of limitation can always be raised and the Court while decreeing a suit is obliged to look into the question as to whether the claim in suit is within time or not. The learned Single Judge, however, found no merit in the plea of the Appellants of the claim in the suit of the Respondent being barred by limitation.

8. Adverting to the aspect of limitation, the counsel for the Appellants has argued before us that the last payment as per the Agreement dated 2nd April, 2005 was under a cheque dated 23rd

October, 2006 and the suit filed on 7th October, 2010 was well beyond the prescribed period of limitation. It has also been contended by the counsel for the Appellants that the part payments, reflected in “***Annexure B***” to the plaint, alleged to have been made on different dates between 29.04.2005 and 9.10.2007, were made as per a separate and distinct understanding between the parties and cannot provide any benefit to the Respondent for the purpose of extending the period of limitation. In any event, 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 hand-writing of, or in a writing signed by, the person making the payment. There is no such acknowledgment by the Appellants in the present case and, thus, the said payments are of no avail to the Respondent.

9. The counsel for the Appellants further contended relying on ***Ashok K. Khurana vs. M/s Steelman Industries AIR 2000 Delhi 336*** and ***Jiwanlal Chariya Vs. Rameshwarlal Agarwalla AIR 1967SC 1118*** that the relevant date for the purpose of calculating limitation would be the date of cheque and not the date when the payment was realized thereunder. An additional affidavit on behalf of the Appellants is filed in the course of hearing of the Appeal which is dated 12th August, 2013 (i.e. today). In this affidavit, it is stated that the cheque No. 563092 i.e. the last cheque, was handed over to the Respondent on 21.08.2007 in Bangalore as is evident from the acknowledgment of the receipt of the cheque and an air-ticket to Bangalore filed with the Additional Affidavit. It is argued that this leaves no room for doubt that the limitation period commenced from

21.8.2007 and came to an end on 20.8.2010. The suit, which was filed on 7th October, 2010 is therefore clearly time barred. It is further asserted in the Additional Affidavit that another cheque was handed over to the Respondent on the same day, that is, 21st August, 2007 being Cheque No. 563091, which was realized on 28.08.2007, and this further showed that the suit was time barred and should have been dismissed as such. The counsel for the Appellants also sought to contend that suit was not filed on 7th October, 2010 but on 21st October, 2010.

10. We have carefully examined the aforesaid contentions of the counsel for the Appellants in support of his plea that the suit is barred by limitation and we find the same to be wholly misconceived. The execution of the Agreement dated 2nd April, 2005 has been admitted by the Appellants and by necessary inference the Appellants have admitted their liability for payment and the issuance of post-dated cheques mentioned therein on the said date to the Respondent. The Appellants have further admitted the payments made thereafter as detailed in “**Annexure B**” to the plaint, though have sought to explain away the same by raising a plea which appears to us to be *ex facie* false that the said payments were made on a separate and distinct understanding. The said plea, in our opinion, has been rightly rejected by the learned Single Judge as ‘moonshine’ and ‘illusory defence’. The Appellants by admission of Agreement dated 2nd April, 2005, admission of debt due to the Respondent and admission of the payments admittedly made by them to the Respondent thereafter, and by their failure to give the details of the separate and distinct

understanding whereunder payments were subsequently made, must be deemed to have acknowledged the debt due to the Respondent and as such the suit is clearly within time. Assuming arguendo that the payments reflected in “***Annexure B***” were made by way of cheques as alleged by the Appellants, the suit would still be within time. It is trite that 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 expiry of the prescribed period by the person liable to pay the debt. In the present case, even according to the Appellants, the last of the cheques handed over by the Appellants to the Respondent was dated 9.10.2007. The present suit was filed on 7.10.2010 as is evident from the endorsement on the plaint and, therefore, cannot be said to be barred by limitation. As regards the reliance placed by the Appellants on the judgment in ***Jiwanlal Achariya Vs. Rameshwarlal Agarwalla AIR 1967 SC 1118*** to contend that limitation will run from the date when the cheque was handed over to the Respondent, that is, 21st August, 2007, suffice it to note that it has been categorically laid down in the aforesaid decision that it is the “*earliest date on which the payment could be made that would be the date where the conditional acceptance of a post-dated cheque becomes actual payment when honoured*”. It stands to reason that a creditor can present the cheque for payment only after it is delivered to him. It equally stands to reason that a creditor cannot present a post-dated cheque for encashment on a date prior to the date of the cheque. The appellants in the instant case have not disputed that the last of the cheques is dated 9.10.2007. Thus, even assuming (though there is no

authentic document placed on record in this regard) that the cheque dated 9.10.2007 was delivered to the Respondent on 21.08.2007, he could not have presented the same for payment prior to 9.10.2007. We are, therefore, of the opinion that a fresh period of limitation began on 9th October, 2007 which was the date of post-dated cheque. This is also perfectly in consonance with the ratio of the judgment of the Supreme Court in ***Jiwanlal Achariya Vs. Rameshwarlal Agarwalla (Supra)***, the relevant extract whereof is reproduced hereunder:-

“It has been held by the High Court that the acceptance of the post-dated cheque on February 4, 1954 was not an unconditional acceptance. Where a bill or note, is given by way of payment, the payment may be absolute or conditional, the strong presumption being in favour of conditional payment. It follows from the finding of the High Court that the payment was conditional i.e. that the payment will be credited to the person giving the cheque in case the cheque is honoured. In the present case the cheque was realised and the question is what is the date of payment in the circumstances of this case for the purpose of S. 20 of the Limitation Act. S. 20 inter alia lays down that where payment on account of debt is made before the expiration of the prescribed period by the person liable to pay the debt, a fresh period of limitation shall be computed from the time when the payment was made. Where therefore the payment is by cheque and is conditional, the mere delivery of the cheque on a particular date does not mean that the payment was made on that date unless the cheque was accepted as unconditional payment. Where the cheque is not accepted as an

unconditional payment, it can only be treated as a conditional payment. In such a case the payment for purposes of S.20 would be the date on which the cheque would be actually payable at the earliest, assuming that it will be honoured. Thus if in the present case the cheque which was handed over on February 4, 1954 bore the date February 4, 1954 and was honoured when presented to the bank the payment must be held to have been made on February 4, 1954, namely, the date which the cheque bore. But if the cheque is post-dated as in the present case it is obvious that it could not be paid till February 25, 1954 which was the date it bore. As the payment was conditional it would only be good when the cheque is presented on the date it bears, namely, February 25, 1954 and is honoured. The earliest date therefore on which the respondent could have realised the cheque which he had received as conditional payment on February 4, 1954 was 25th February, 1954 if he had presented it on that date and it had been honoured. The fact that he presented it later and was then paid is immaterial for it is the earliest date on which the payment could be made that would be the date where the conditional acceptance of a post-dated cheque becomes actual payment when honoured. We are therefore of opinion that as a post-dated cheque was given on February 4, 1954 and it was dated February 25, 1954 and as this was not a case of unconditional acceptance, the payment for the purpose of S. 20 of the Limitation Act could only be on February 25, 1954 when the cheque could have been presented at the earliest for payment. As in the present case the cheque was honoured it must be held that the payment was made on February 25, 1954. It is not in dispute that the proviso to S. 20 is complied with in this case, for the cheque itself

is an acknowledgment of the payment in the handwriting of the person giving the cheque. We are therefore of opinion that a fresh period of limitation began on February 25, 1954 which was the date of the post-dated cheque which was eventually honoured.”

11. We, thus, affirm the finding of the learned Single Judge that the suit as aforesaid has been instituted within the prescribed period from the last date of the payment made by the Appellants. It may be noted at this juncture that learned counsel for the Appellants in a desperate bid to defeat the suit sought to contend that the suit was filed not on 7.10.2010 but on 21.10.2010. This argument is being noted to be rejected. There is an endorsement made by the Registry on the plaint itself which shows that the suit was filed on 7th October, 2010. It was refiled on 21st October, 2010 after removal of office objection and it is this date of refiling which is sought to be pressed into service by the Appellants.

12. Adverting next to the plea of territorial jurisdiction, it is asserted in the plaint that the agreement between the parties was executed at New Delhi and the Defendants had agreed to make the payments and had in fact made the payments to the Plaintiff at New Delhi. These facts have not been controverted in the affidavit seeking leave to defend by the Appellants, as indeed they could not have been. The Appellants, however, seek to challenge the territorial jurisdiction of this Court by contending that the Appellants are carrying on business at Bangalore and had signed the cheques at Bangalore and received legal notice from the Respondent at

Bangalore. It may be noted that in the additional affidavit filed today, that is, 12th August, 2013, the Appellants have further sought to urge that the last two payments were made to the Respondent at Bangalore. This assertion is made on the basis of photocopy of an airline ticket purporting to show that the Respondent had travelled to Bangalore by air on 21st August, 2007. We do not see how the aforesaid airline ticket dated 21st August, 2007 can advance the case of the Appellants, as the Appellants have placed nothing on record to show that the cheques dated 21st August, 2007 and 9.10.2007 were handed over to the Respondent at Bangalore. In any event, in our opinion, this fact even if assumed to be correct does not establish lack of jurisdiction in this Court. This being so, the plea of the Appellants that this Court lacks territorial jurisdiction also fails.

13. The plea with regard to cause of action advanced by the Appellants is also untenable. A bare look at the agreement dated 2nd April, 2005 shows that the said Agreement was signed by the Respondent wherein the Respondent was made personally liable by the Appellant No.2 for any claims thereunder. It may be noted that the Appellant No.2 too had signed the Agreement on behalf of the Appellant No.1/Company and had also agreed to become personally liable for the dues of the Appellant No.1. The Appellants are, thus, estopped from contending that no cause of action had accrued in favour of the Respondent. Thus, all the three pleas of the Defendants must necessarily fail.

14. Resultantly, we affirm the findings of the learned Single Judge dismissing the application for leave to defend and uphold the decree

passed by him in the sum of ₹ 1,80,81,800/- (Rupees One Crore Eighty Lakhs Eighty One Thousand and Eight Hundred only) with interest. We, however, modify the rate of interest and reduce the same from **24 per cent to 8 per cent per annum from the date of the institution of the suit till the date of recovery.** The reduction of the interest has been made by us in view of the fact that the Supreme Court has from time to time laid down that in the absence of any agreement or statutory provision or a mercantile usage, interest payable can be only at the market rate. We also note that in the connected Suit being CS(OS) No. 1367/2010, which also relates to the agreement dated 2nd April, 2005 between the same parties, the rate of interest awarded is 8 per cent, which has been upheld in Appeal by the Division Bench in its judgment dated May 07, 2012 passed in RFA No.47/2012 titled ***“Khoday India Ltd. & Anr. Vs. Astra Netcom India Pvt. Ltd.”***

15. The inevitable conclusion is that the Appeal is dismissed with the aforesaid modification in the rate of interest payable by the Appellants. There will be no order as to costs.

**REVA KHETRAPAL
JUDGE**

**PRATIBHA RANI
JUDGE**

August 12, 2013
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