

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

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Date of decision: 6th May, 2016

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RFA No.94/2015

ASHOK KUMAR TIWARI

..... Appellant

Through: Mr. K. N. Jayasankar & Mr. J.L. Joel,
Advs.

Versus

RAJESH KUMAR YADAV

..... Respondent

Through: Mr. Amit Kumar, Adv. for R-1

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree dated 26th November, 2014 of the Court of the Additional District Judge (ADJ)-03, South East, Saket Courts, New Delhi decreeing CS No.306/14 filed by the respondent/plaintiff under Order 37 of the CPC for recovery of Rs.3.10 lacs with *pendente lite* and future interest at 24% per annum against the appellant/defendant consequent to dismissal of the application filed by the appellant/defendant for leave to defend as barred by time (of one day).

2. The appeal came up before this Court on 20th March, 2015 when the counsel for the respondent/plaintiff being on caveat also appeared. Vide subsequent order dated 7th August, 2015, subject to the appellant/defendant

depositing a sum of Rs.1,30,000/- in this Court, execution of the decree was stayed and the trial court record requisitioned.

3. Admit.

4. Considering that in the event of the appeal being allowed, the suit will have to be remanded for decision in accordance with law, with consent, the counsels have been finally heard on appeal.

5. The respondent/plaintiff on 12th May, 2014 instituted the suit from which this appeal arises, pleading (i) that the respondent/plaintiff keeping in view the friendly relations with and the genuine need and requirement of the appellant/defendant, during the period of February, 2010 to April, 2010 advanced a total sum of Rs.3,10,000/- in cash to the appellant/defendant; however no receipt was executed since it was a friendly loan and the appellant/defendant assured to return the loan within a period of one year; (ii) that when the respondent/plaintiff raised a demand, the appellant/defendant in discharge of his liability issued two cheques both dated 10th May, 2011, one for Rs.1,80,000/- and another for Rs.1,30,000/- respectively in favour of the respondent/plaintiff; that the appellant/defendant had assured and promised that the said cheques on presentation would be encashed; (iii) however on

presentation the said cheques were dishonoured for the reason of insufficiency of funds in the account of appellant/defendant and the respondent/plaintiff was informed of the said dishonour on 20th May, 2011 and 16th May, 2011 respectively; and, (iv) that the respondent/plaintiff repeatedly called upon the appellant/defendant to make payment but to no avail and ultimately got issued legal notices dated 10th June, 2011 and 8th June, 2011 but the appellant/defendant neither made the payment nor replied.

6. Summons for appearance were issued and upon the appellant/defendant entering appearance, vide order dated 29th August, 2014 summons for judgment were ordered to be issued to the appellant/defendant and the suit adjourned to 16th October, 2014 for report and consideration. On 16th October, 2014, the appellant/defendant appeared in person and filed an application for permission for filing leave to defend. The said application was dismissed observing that it was the right of a defendant to seek leave to defend within the prescribed period and the suit posted for consideration on 17th October, 2014.

7. On 17th October, 2014, the counsel for the appellant/defendant appeared and submitted an application for leave to defend but not supported with detailed affidavit, *inter alia* on the grounds (i) that he had never taken any loan from the respondent/plaintiff and the cheques were never given against any

consideration and were taken by the respondent/plaintiff from the house of the appellant/defendant without his permission and misused; (ii) that the appellant/defendant however owes an amount of Rs.18,000/- to the respondent/plaintiff; (iii) that the suit was time barred; the respondent/plaintiff had put the date of issuance of the cheque as 10th May, 2011 which meant that the alleged loan become time barred on 10th May, 2014; the loan stated to have been given before April, 2010 itself had become time barred; (iv) that the respondent/plaintiff had already instituted two proceedings under Section 138 of the Negotiable Instruments Act, 1881 before the Courts at New Delhi and Faridabad with respect to the said cheques; (v) that the original cheques had also not been filed before the Court; and, (vi) that the respondent/plaintiff was earning less than Rs.14,000/- per month and could not have given the loan of Rs.3,10,000/-.

8. The respondent/plaintiff filed a reply to the aforesaid application for leave to defend pleading (i) that the application for leave to defend had not been filed within the prescribed time and was late by one day; (ii) denying that he had taken the cheque without permission of the appellant/defendant and had misused the same; and, (iii) the suit was within time and in fact the appellant/defendant had turned dishonest.

9. No rejoinder was filed by the appellant/defendant inspite of opportunity.
10. The leaned ADJ in the impugned order with respect to the plea of limitation in the application for leave to defend held that since the cheques were presented on 16th May, 2011 and 20th May, 2011 and were dishonoured on the same day, the limitation for institution of the suit for amount thereof was till 20th May, 2014 and the suit filed on 12th May, 2014 was within limitation. With respect to the other pleas in the application for leave to defend, besides observing that there was a delay of one day in filing the application for leave to defend, it has also been reasoned that the appellant/defendant had nowhere pleaded as to what he did after discovering that his cheques were missing i.e. he did not file any criminal complaint or send any notice to the respondent/plaintiff or give instructions to his banker for 'stop payment' as was expected by a prudent person and thus his defence appeared to be afterthought, very weak and not tenable.
11. Being *prima facie* of the opinion that irrespective of the delay of one day on the part of the appellant/defendant in filing leave to defend, the suit claim as per the averments in the plaint was barred by time, I have at the outset asked the counsels to address on the aspect of limitation.

12. Though the counsel for the appellant/defendant had taken the plea of the suit claim being barred by time but is unable to substantiate the same. The counsel for the respondent/plaintiff also generally states that since the suit was for recovery of the amount which was subject matter of cheques and had been filed within the period of three years from the date of dishonour of the cheques, the same was within time.

13. The suit though undoubtedly was for recovery of money which was the subject matter of cheques which had been dishonoured but the consideration for which the cheques were stated to have been issued was the friendly loan given by the respondent/plaintiff to the appellant/defendant between February, 2010 to April, 2010. We have thus to see the limitation provided for a suit therefor. Article 19 of the Schedule to the Limitation Act prescribes limitation of three years commencing from the date when the loan is made for a suit for money payable for money lent. It is further the plea of the respondent/plaintiff that the appellant/defendant had assured to return the loan amount within a period of one year. Though the loan is stated to have been made on different specified dates between February, 2010 to April, 2010 but even if one year is taken from the end of the month of April, 2010 and the period of limitation is counted therefrom even then the period of three years would expire in April, 2014,

while the suit was instituted on 12th May, 2014. Thus the suit on the original cause of action was barred by time. The respondent/plaintiff however relies on cheques dated 10th May, 2011 given by the appellant/defendant in re-payment of the said loan. The said cheques would be acknowledgment in writing of the liability owed by the appellant/defendant to the respondent/plaintiff within the meaning of Section 18 of the Limitation Act. However such acknowledgment in writing would extend the period of limitation by three years but from the date when the acknowledgment was so signed i.e. from the date of the cheque. Once it is so, the said further period of limitation also would expire on 10th May, 2014 and the suit instituted on 12th May, 2014 would still be barred by time.

14. I have recently in judgment dated 3rd May, 2016 in RFA No.208/2016 tilted *Empire Home Appliances Private Limited Vs. M/S Suraj Enterprises* and other connected matters dealt in detail with the law on the said aspect and need thus to discuss the same here is not felt and the same may be read as part of this judgment.

15. In this light, the suit claim as per the averments in the plaint itself is clearly barred by time and once that is so, irrespective of the

appellant/defendant having filed the application for leave to defend late, the suit under Section 3 of the Limitation Act is to be dismissed as barred by time.

16. Even otherwise I am of the view that considering the fact that the appellant/defendant had appeared before the learned ADJ on 16th October, 2014 and moved an application for permission to file leave to defend and had filed leave to defend on the very next date, the delay of one day in filing thereof ought to have been condoned. Rule 3 (7) of Order XXXVII empowers the Court to excuse the delay of the defendant in applying for leave to defend.

17. On merits also I am of the view that considering the fact that there was no proof at all of the respondent/plaintiff having advanced any loan to the appellant/defendant and the admitted fact of the friendly relations between the parties, a case for grant of leave to defend, may be subject to condition of deposit, was made out.

18. However since the suit claim has been found to be barred by time, no purpose would be served in granting leave to defend and need for remanding suit for decision in accordance with law is not felt.

19. The appeal is allowed.

20. The impugned judgment and decree is set aside and the suit of the respondent/plaintiff from which this appeal arises is dismissed as barred by time.

21. However the parties are left to bear their own costs.

22. Decree sheet be prepared.

23. The amount of Rs.1.30 lacs deposited by the appellant/defendant in this Court together with interest earned thereon be returned to the appellant/defendant after 31st August, 2016.

RAJIV SAHAI ENDLAW, J

MAY 06, 2016

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(Corrected and released on 16th June, 2016)