

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

% Judgment delivered on: 03.08.2015

+ RFA No.693/2014

SHRI RAJINDER KUMAR

.....APPELLANT

Vs

BHARAT PETROLEUM CORPORATION LTD.
AND ANR.

....RESPONDENTS

ADVOCATES WHO APPEARED IN THIS CASE:

For the Appellant: Mr. Rajinder Dubey, Advocate

For the Respondents: Mr. Anil K. Batra and Mr. Prins Kumar,
Advocates for R-1
Mr. Lalit Sankhla, Advocate for R-2

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. This is an appeal directed against the judgment and decree dated 05.09.2014, passed by the Additional District Judge, South District, New Delhi.

1.1 By virtue of the impugned judgment, the learned Additional District Judge had dismissed the suit on the ground that it is barred by limitation. The learned Additional District Judge has come to the conclusion, in this behalf, based on the prescription contained in Article 35 of the Limitation Act, 1963 (in short the Limitation Act).

2. In order to examine the legal and factual tenability of the conclusion reached by the learned ADJ, the following averments made by the appellant

/ plaintiff, in the plaint (which are also replicated in the appeal) are required to be noticed.

3. It is the case of the appellant / plaintiff that respondent no.2/ defendant no.2 had sought financial help from him. Accordingly, a sum of Rs.7 Lakhs was withdrawn by him and advanced to respondent no.2 / defendant no.2 on 10.06.2010. In order to establish the fact that this transaction took place between the appellant/plaintiff and respondent no.2 / defendant no.2, it is averred in paragraph 4 of the plaint that necessary funds were available in his account on 01.06.2010 and that, he had withdrawn money to advance the said sum to respondent no.2 / defendant no.2.

3.1 It is further averred by the appellant / plaintiff that respondent no.2 /defendant no.2 to secure the repayment of the loan advanced issued a post dated cheque bearing no.892531, dated 11.02.2011, in a sum of Rs.7 Lakhs, drawn on Punjab National Bank at its branch located at Mehrauli, Hauz Khas, New Delhi.

3.2 The appellant / plaintiff further avers in paragraph 6 of the plaint that since respondent no.2/defendant no.2 did not have sufficient funds, on the due date, she had requested that the time for repayment of the loan be extended till April 2011.

3.3 The appellant / plaintiff avers that, to his surprise, when cheque was presented for encashment on 21.04.2011, the same was dishonoured despite the representation of the respondent no.2 / defendant no.2, to the contrary. It is stated by the appellant / plaintiff that he received his bankers return memo dated 25.04.2011 with the remarks, 'drawer's signature differs'.

3.4 The appellant / plaintiff further avers that on his communicating this fact to respondent no.2/defendant no.2, he was assured that on resubmission of the cheque in issue, for encashment, it would be honoured. To his

surprise, the contrary proved to be correct, as once again, the cheque was returned by his banker vide cheque return memo dated 27.04.2011 for the same reason, which was set out, in the earlier memo, which is, that the 'drawer's signature differs'.

3.5 Once again, the appellant /plaintiff appears to have communicated this fact to respondent no.2/defendant no.2, whereupon, she declined to make the payment and in fact, threatened him.

3.6 Consequently, the appellant/plaintiff took recourse to issuance of a notice dated 10.05.2011 via his advocate. It is averred by the appellant / plaintiff that despite the said notice having been served, no response was received from respondent no.2 / defendant no.2.

3.7 It is, in these circumstances, that the appellant / plaintiff appears to have instituted the suit in the trial court on 24.02.2014.

4. I may only record that respondent no.1 / defendant no.1 i.e Bharat Petroleum Corporation Ltd. appears to have been impleaded in the suit as a proforma party as no relief is claimed against the said entity. The only reason, perhaps, for this, appears to be the fact that an averment has been made in the plaint that respondent no.2/defendant no.2 had made a request for grant of loan by the appellant / plaintiff, for running her petrol pump smoothly, in respect of which, she had apparently been granted a license by respondent no.1/defendant no.1.

5. The learned ADJ, as noticed above, proceeded to dismiss the suit, on the ground that since more than three years had expired from the date set out in the cheque, the suit, as filed, was barred by limitation, under Article 35 of the Limitation Act. The question, therefore, is : whether Article 35 of the Limitation Act would apply to the instant case? Therefore, for the sake of convenience, the provisions of Article 35 of the Limitation Act are set out hereinbelow :-

Description of Suit	Period of Limitation	Time from which period begins to run
35. On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue.	Three years	The date of the bill or note.

5.1 The first and foremost aspect, which emerges, on a bare perusal of Article 35 of the Limitation Act is, that it is applicable only qua a bill of exchange or a promissory note, which are, firstly payable on demand; and secondly, not accompanied by any writing, which restrains or postpones the right to sue. The expressions, 'promissory note' and 'bill of exchange' are defined in Sections 4 and 5 of the Negotiable Instruments Act, 1881 (in short the N.I. Act). For the sake of convenience, the two definitions are set out hereinbelow :-

..4. "**Promissory note**". A "promissory note" is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

5. "**Bill of exchange**" - A "bill of exchange" is an instrument in writing, containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

A promise or order to pay is not "conditional", within the meaning of this section and section 4, by reason of the time for payment of the amount or any instalment thereof being expressed to be on, the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

The sum payable may be "certain", within the meaning of this section and section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an instalment, the balance unpaid shall become due.

The person to whom it is clear that the direction is given or that payment is to be made may be a "certain person", within the meaning of this section and Section 4, although he is mis-named or designated by description only..."

5.2 Similarly, the term: cheque, is defined in Section 6 of the N.I. Act. The relevant portion of the said provision (dehors the explanations), which are not relevant for our purposes, is extracted hereinafter :-

“..6. “Cheque” – A “cheque” is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and is includes the electronic image of a truncated cheque and a cheque in the electronic form..”

5.3 A bare perusal of the averments made in the plaint would show, to which I have made a reference above, what was delivered to the appellant / plaintiff was a post dated cheque and not a promissory note. The question is, therefore, is a post dated cheque a bill of exchange?

5.4 A reading of the definition of a cheque contained in Section 6 of the N.I. Act would show that it is a bill of exchange drawn on a specified banker, which is, payable on demand. The appellant/plaintiff has asserted that the cheque in issue was a post dated cheque. Therefore, on the date, the post dated cheque, was drawn or issued, it would possibly had the attributes of a bill of exchange, however, the instrument metamorphosed into a cheque within the meaning of Section 6 of the N.I. Act when, the date written on the cheque was reached i.e. 11.02.2011. Therefore, a post dated cheque is, in effect, a bill of exchange, payable on a future date. [See

Ashok Yeshwant Bedeve Vs. Surendra Madhavrao Nighojakar and Anr., AIR 2001 SC 1315]. Article 35 of the Limitation Act, is attracted to those bill of exchange or even promissory notes, which are payable on demand. In the case of a post dated cheque, even if, the drawee were to make a demand, prior to the date written on the cheque, it would have a no efficacy as the instrument will become payable only on the date set out therein, and on dates falling thereafter, albeit within the prescribed period of validity. Therefore, in my view, in the instant case, the provisions of Article 35 of the Limitation Act, could not have been applied.

5.5 Furthermore, in this regard, it may be relevant to note that the expression, ‘payable on demand’ has been construed to mean, ‘payable at once’. [See ***Aiyappankutty vs Mathoo Mathai & Ors. AIR 1954 Ker 65 and Syndicate Bank vs Channaveerappa Beleri & ors. (2006) 11 SCC 506, at para 12, pages 518-519***]. The other possible interpretation could, perhaps, be that the expression ‘payable on demand’ would mean, that a specific demand has to be raised within a period of three years from the date of the instrument. In my view, even if this interpretation given, which to my mind is somewhat strained, in the context of Article 35, it would not change the period of limitation.

5.6 The second condition for triggering Article 35 of the Limitation Act, only fortifies this view as a post dated cheque intrinsically is, a writing which, restrains or postpones the right to sue till the date provided on it, is reached.

5.7 The assertions made in the plaint is suggestive of the fact that it is a suit for recovery of the amount, said to have been loaned by the appellant / plaintiff to respondent no.2 / defendant no.2. The cheque in issue was handed over to the appellant / plaintiff, apparently, as a security for repayment of the loan. The appellant / plaintiff has sued for recovery of the

loaned amount along with interest and not sued on the basis of the cheque in issue.

5.8 Intrinsically, the averments also point to the fact, as indicated above, that the cheque in issue was reflective of a writing, that the loan given by the appellant / plaintiff to respondent no.2/defendant no.2 on 10.06.2010 was not payable before 11.02.2011.

5.9 The averments in the plaint are also indicative of the fact that it is the case of the appellant/plaintiff that at the say so of respondent no.2/defendant no.2, the presentation of the cheque in issue was deferred till 21.04.2011. The appellant / plaintiff has, further averred that on the assurance of the respondent no.2/defendant no.2, the cheque in issue was presented, once again, whereupon, it was dishonoured, on 27.04.2011, for the second time.

6. In these circumstances, it is quite clear that the exact nature of the loan transaction could have only emerged after evidence was led by the parties in the matter. The trial court, in my opinion, having regard to the averments made in the plaint, could not have dismissed the suit, at the very threshold, based on the provisions of Article 35 of the Limitation Act, by treating the action instituted by the appellant / plaintiff as an action on a bill of exchange.

6.1 Quite clearly, in my view, having regard to the averments made in the plaint, the provisions of Article 35 of the Limitation Act were not applicable. Limitation, is often, as in this case, a mixed question of fact and law, and therefore, the suit could not have been dismissed, without calling upon the parties to lead evidence in the matter.

7. Accordingly, the impugned judgment and decree is set aside. The trial court will, recommence, proceedings in the suit, from the point, it is presently positioned.

8. The appeal is, accordingly, disposed of, in the aforesaid terms.

RAJIV SHAKDHER, J

AUGUST 03, 2015

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