

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

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Date of decision: 3rd May, 2016

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RFA 208/2016

**EMPIRE HOME APPLIANCES
PRIVATE LIMITED**

..... Appellant

Through: Mr. Ravi Varma & Mr. Abhinav
Sharma, Advs.

Versus

M/S SURAJ ENTERPRISES

..... Respondent

Through: None.

AND

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RFA 209/2016

EMPIRE HOME APPLIANCES PRIVATE LTD.

.... Appellant

Through: Mr. Ravi Varma & Mr. Abhinav
Sharma, Advs.

Versus

**M/S FRIENDS HOME MAKERS
TRADING COMPANY**

..... Respondent

Through: None.

AND

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RFA 210/2016

**EMPIRE HOME APPLIANCES
PRIVATE LIMITED**

..... Appellant

Through: Mr. Ravi Varma & Mr. Abhinav
Sharma, Advs.

Versus

M/S BIDJEY & CO.

..... Respondent

Through: None.

AND

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RFA 211/2016

**EMPIRE HOME APPLIANCES
PRIVATE LIMITED**

..... Appellant

Through: Mr. Ravi Varma & Mr. Abhinav
Sharma, Advs.

Versus

M/S R R & COMPANY

..... Respondent

Through: None.

AND

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RFA 212/2016

**EMPIRE HOME APPLIANCES
PRIVATE LIMITED**

..... Appellant

Through: Mr. Ravi Varma & Mr. Abhinav
Sharma, Advs.

Versus

M/S VASHITHA ELECTRONICS

..... Respondent

Through: None.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. All the appeals impugn the identical orders of dismissal *in limine*, i.e. without even issuing the summons to the respondents / defendants, of suits filed by the appellant for recovery of money, as barred by time.
2. Considering that the orders were passed without hearing the respondents, need is not felt to issue notice of the appeals to the respondents to go into the correctness of such orders. If the appeals succeed and the suits remanded, upon service of summons, the respondents shall have liberty to,

in their respective written statement, take all pleas available to them including of the suit claim being barred by time and this order will not come in the way of their taking the said pleas.

3. In this view of the matter, the counsel for the appellant has been finally heard.

4. The appeals are listed subject to objection raised by the Registry as to the court fees paid. According to the Registry, court fees is payable also on interest accrued after the date of institution of the suit.

5. There is no merit in the said objection which is overruled.

6. According to the appellant/plaintiff, the respondent/defendant in each of the appeals / suits were its distributors to whom goods were supplied on credit more than three years prior to the institution of the suit and the suits were filed for recovery of the price due of the said goods. It was further the case of the appellant / plaintiff that the respondent / defendant in each of the suits had, within the period of three years of the date when the price of goods was due, issued cheques for part of the amount due and the suits were filed within three years of the date of dishonour of the said cheques though beyond three years from the date of the cheque in each of the cases.

7. The learned Additional District Judge (ADJ), in the impugned order in each of the suits, though held that a suit on a cheque can be filed within three years of the date of return of the cheque as dishonoured but proceeded to hold that since in the present case the cheques were in acknowledgement of past liability, it was the date of the cheque and not the date of dishonour of the cheque which was relevant and since the suits had been instituted beyond three years from the date of the cheques also, they were beyond time.

8. The counsel for the appellant relies on *Steel Authority of India Ltd. Vs. Rohini Strips Ltd.* MANU/DE/9786/2007 to contend that the suit on a cheque can be instituted within three years of the date of dishonour and on *Jhang Biradari Housing Residents Society Vs. Bharat Bhushan Sachdeva* 222(2015) DLT 578 to contend that a right to sue is not to be confused with cause of action and contends that though a right to sue may accrue within three years of the date of the cheque, a cause of action for suing would accrue from the date of dishonour of the cheque. It is further his contention that once the cheque had been issued, the suits were maintainable on the basis of dishonoured cheque alone irrespective of the consideration for which the cheque was given.

9. On enquiry, whether the suit claim was for any amount in excess of the amount of the cheque and interest due thereon, the counsel states that the suit claim was restricted to the cheque amount plus interest due thereon and not on the total amount due for price of goods; however pre-cheque interest claimed in the suit will not be pressed in the event of the appeals being allowed.

10. On yet further enquiry it is informed that while the cheques subject matter of RFAs No.209/2016, 210/2016 and 212/2016 were returned with the endorsement of “Account Closed”, the cheque subject matter of RFA No.208/2016 was returned with the endorsement of “Payment Stopped” and the cheques subject matter of RFA No.211/2016 were returned with the endorsement of “Exceeds Arrangement” and “Account Closed”.

11. Attention of the counsel for the appellant / plaintiff was however invited to my judgment in ***BPL Ltd. Vs. Hindustan Traders Co.*** MANU/DE/1767/2008 and which in turn was based on two earlier judgments of this Court and holding i) that the limitation prescribed in Articles 14 & 15 of Schedule of the Limitation Act, 1963 for recovery of price of goods sold and delivered where no fixed period of credit is agreed

upon is prescribed as three years commencing from the date of delivery of the goods and where the price is agreed to be paid for after the expiry of fixed period of credit, with effect from three years when the period of credit expires; and, ii) that however where the cheque for the price is issued after the date of delivery of goods, under Article 35 of the Schedule to the Limitation Act, the limitation commences from the date of the cheque and not from the date of presentation or dishonour thereof.

12. The counsel for the appellant / plaintiff stated that different views appear to have been taken in the judgments relied upon by him and in ***BPL Ltd.*** supra and the judgments relied upon in it and in addition has drawn attention to para 17 to 19 of judgment dated 4th December, 2015 in Civil Appeals No.10941-10942/2013 titled ***New India Assurance Company Ltd. Vs. Hilli Multipurpose Cold Storage Pvt. Ltd.***, para 8 of ***Surendra Vs. Smt. Padma*** ILR 2000 KAR 579, para 18 of ***G. Basavaraj Vs. H.M. Shivappa Patel*** MANU/KA/2256/2011, ***Mountain Mist Agro India (Pvt.) Ltd. Vs. S. Subramaniam*** MANU/DE/9018/2007 and ***Mountain Mist Agro India (Pvt.) Ltd. Vs. S. Subramaniam*** MANU/DE/0159/2008 (DB).

13. I have examined the two sets of judgment to see whether there is any such inconsistency and which is required to be resolved by a larger bench or whether the law has got settled by *New India Assurance Company Ltd.* supra. Unfortunately, neither set of judgment is considered in the other set of judgments.

14. *Steel Authority of India Ltd.* supra cited by the counsel for the appellant / plaintiff was concerned with an application for grant of leave to defend a suit filed under Order XXXVII of the CPC. In the initial paragraphs no.5 to 7 of the judgment, while setting out the grounds on which leave to defend was sought, there is no mention of the ground of limitation having been raised. However while crystallizing the defence, in paras 9 and 10 of the judgment, there is a mention of the claim in suit being barred by time. The learned Single Judge while dealing with the said plea in para 18 of the judgment, after noticing that the cheques on which the suit was filed were dated 16th March, 2000 and had been returned unpaid for the reason “not arranged for” vide a bank memo dated 1st June, 2000 and that the suit was filed on 23rd May, 2003, held that the limitation would commence to run from the date when the cheques in question were returned unpaid to the

plaintiff and the suit was within limitation. Leave to defend was refused and the suit decreed.

15. I find FAO(OS) No.380/2007 titled ***Rohini Strips Ltd. Vs. Steel Authority of India Ltd.*** to have been dismissed by the Division Bench of this Court vide judgment dated 28th September, 2007. The Division Bench though noticed Article 35 of the Schedule to the Limitation Act but held i) that on joint reading thereof with Sections 6 and 64 of the Negotiable Instruments Act, 1881 (NI Act), the cause of action in the suit was dishonour of the cheque and not merely issuance of the cheque; ii) that on issuance of the cheque, the suit could not have been filed; iii) that it was only on dishonour of the cheque that the right to sue accrued; and, iv) that the period of limitation would start from the date of dishonour of the cheque.

16. The Division Bench of this Court in ***Jhang Biradari Housing Residents Society*** supra was concerned with a suit not for recovery of money but for declaration of ownership rights in immovable property. Dealing with the plea of limitation, it was held i) the pleadings qua cause of action and constituting the accrual of cause of action are totally different; ii) in a plaint, the complete cause of action has to be pleaded and limitation has

no concern with the said pleading; iii) thereafter a distinct pleading has to be made as to when did cause of action to sue accrued; iv) limitation commences when the cause of action to sue accrues; right to sue accruing is not to be confused with the cause of action; and, vi) wrong alleged when committed, infringing upon a right would give rise to a right to sue; simultaneously, would accrue the cause of action to sue.

17. I had in ***BPL Ltd.*** supra relied upon ***Ashok K. Khurana Vs. M/s Steelman Industries*** AIR 2000 Delhi 336 and on ***Technofab Engineering Ltd. Vs. Nuchem Weir India Ltd.*** 136 (2007) DLT 223.

18. The Division Bench of this Court in ***Ashok K. Khurana*** supra was concerned with a suit instituted on 16th March, 1998 for recovery of price of goods and in part payment whereof the plaintiff pleaded that the defendant had on 18th March, 1995 delivered a cheque dated 11th March, 1995 which was encashed. The Trial Court dismissed the suit as barred by time on a preliminary issue of limitation. Setting aside the said decree, it was held i) that the trial court misread the judgment of the Supreme Court in ***Jiwanlal Achariya Vs. Rameshwarlal Agarwalla*** AIR 1967 SC 1118 which was a case of post dated cheque and applying the same to a case of ante-dated

cheque had dismissed the suit; ii) supreme court in *Jiwanlal Achariya* supra was concerned with the suit instituted on 22nd February, 1957 for recovery of money lent against promissory note dated 4th February, 1954; iii) the plaintiff relied on payment by cheque on 25th February, 1954 to bring the suit within time; iv) the defendant's case was that the post dated cheque was handed over on 4th February, 1954 and therefore three years period of limitation ran from that date and the suit was out of time; v) supreme court held that where a bill or note is given by way of payment, the payment may be absolute or conditional with the strong presumption being in favour of conditional payment; vi) in the facts of that case, the payment vide post dated cheque dated 25th February, 1954 was found to be conditional i.e. that the payment will be credited to the person giving the cheque in case the cheque is honoured; vii) it was held that since the cheque was realized, the date of payment for the purpose of Section 20 of the Limitation Act would be the date of unconditional payment i.e. the date when the cheque would be actually payable at the earliest if honoured i.e. the date which the cheque bore; viii) it was further held that though the cheque was handed over on 4th February, 1954 but could not be presented till 25th February, 1954, the date of payment for the purpose of Section 20 of the Limitation Act would be 25th

February, 1954; ix) it was yet further observed that the fact that the cheque was presented later and was paid would be immaterial for it is the earliest date on which the payment could be made that would be the date where the conditional acceptance to a post dated cheque becomes actual payment when honoured; x) reliance in this regard was placed on an earlier decision of the Supreme Court in **Commissioner of Income Tax Vs. Messrs. Ogale Glass Works Ltd.** AIR 1954 SC 429 and on a host of other case law; and xi) that since the earliest date when the plaintiff in **Ashok K. Khurana** could have presented the cheque was the date when according to him the ante-dated cheque was delivered to the plaintiff, the date of payment would be said date of delivery if proved and not the date of the cheque and the issue of limitation could not have been decided without evidence.

19. **Technofab Engineering Ltd.** supra was concerned with a plea of limitation in a winding up petition. In that case cheques dated 15th October, 1999 and 28th October, 1999 issued in part payment were dishonoured and upon proceedings under Section 138 of the NI Act being filed payment thereof was made on 15th July, 2002. It was held relying on **Rajesh Kumari Vs. Prem Chand Jain** AIR 1998 Delhi 80 that issuance of a cheque by a debtor is payment on account of a debt or interest within the meaning of

Section 19 of the Limitation Act and extends the period of limitation by further period of three years from the date of issue of the cheque even if the said cheque on presentation is dishonoured. Dishonour of the cheque, it was held does not result in extinguishing the liability of the debtor and constitutes effective payment for the purpose of Section 19. It was further held that once payment by cheque is accepted by the creditor, he is entitled to extend period of limitation under Section 19 and the said advantage cannot be wiped off and undone by tortuous act by either side by withholding the payment. It was accordingly held that upon issuance of cheques dated 15th October, 1999 and 28th October, 1999, the period of limitation was extended for three years therefrom and upon payment of the amount of the said cheques on 15th July, 2002, the period of limitation was further extended by three years and the petition filed for winding up on 13th July, 2005 was within time.

20. Of the judgments subsequently cited by the counsel for the appellant / plaintiff i) ***Mountain Mist Agro India (Pvt.) Ltd.*** supra is not found to be concerned with the aspect of limitation but with the aspect of cause of action in the context of determining the territorial jurisdiction of the Court; ii) ***Surendra*** supra holds that once the suit is for recovery of amount which is

the subject matter of a cheque which has been dishonoured, the past history of the transaction is immaterial; iii) *G. Basavaraj* supra simply relies upon *Surendra*; and, iv) *New India Assurance Company Ltd.* supra has been cited only to contend that if there are inconsistent judgments, the earliest binding judgment is to be followed.

21. Having given my considered thought to the controversy, I am of the view that suits filed by the appellant / plaintiff indeed are barred by time. My reasons for holding so are as follows.

22. The suits cannot be treated simpliciter as suits for recovery of amounts which have been subject matter of cheque and the past history cannot be ignored. The plaintiff in a suit for recovery of amount which is subject matter of a cheque is also required to plead and prove the consideration for which the cheque was issued. No claim for recovery of money, even if a cheque therefor issued by the defendant in favour of the plaintiff had been dishonoured, can be entertained unless the consideration for which the cheque was issued is pleaded and proved. Unlike Section 138 of the NI Act which presumes consideration, there is no such presumption in the suit for recovery of money on the basis of the cheque. The appellant /

plaintiff herein, also knowing so, has pleaded the consideration being the price of the goods sold, supplied and delivered by the appellant / plaintiff to the respondents / defendants. I am therefore, with respect, unable to agree with the view of the Karnataka High Court in ***Surendra*** and followed in ***G. Basavaraj*** supra that the past history of the transaction is irrelevant. Supreme Court, as far back as in ***Khan Bahadur Shapoor Freedom Mazda Vs. Durga Prasad Chamaria*** AIR 1961 SC 1236 held that an acknowledgement of liability only extends limitation; it does not confer any right or title on the person whose right is acknowledged. I may also state that the learned Single Judge of the High Court of Karnataka also reasoned that a suit for recovery of amount of the cheque is not covered by any of the articles given in the Schedule of the Limitation Act and thus the suit would be governed by the residuary Article 113 where the period of three years commences from the date when the right to sue accrues and the right to sue in the case of dishonor of cheque accrues on dishonour of the cheque and not from the date of the cheque. Attention of the learned Single Judge does not appear to have been drawn to Article 35 which provides limitation for a suit on a bill of exchange or promissory note payable on demand and not

accompanied by any writing reserving or postponing the right to sue of three years commencing from the date of bill or note.

23. The limitation for a suit for price of goods sold and delivered by the appellant/plaintiff to the respondent/defendant in each of the suit from which these appeals arise, provided in Article 14 of the Schedule is three years. It was not the case of the appellant / plaintiff herein that the price was agreed to be paid after the expiry of fixed period of credit. The suits were admittedly instituted more than three years after the date of sale and delivery of goods. However the appellant / plaintiff sought to extend the period of limitation by relying upon the payments made by cheques which were dishonoured. The said cheques were of a date before the expiry of period of three years from the date of sale and delivery of goods but were not presented for payment immediately and when presented later, though within the period of their validity, were dishonoured. It is not the case that the cheques were ante-dated. The cheques though dishonoured are deemed to be payment within the meaning of Section 19. The question for consideration is what would be the date when “the payment was made” i.e. whether the date of the cheques when they could have been earliest presented for payment or the date when the cheques were presented (though

within the period of their validity) and were dishonoured. In my view the question is squarely answered by the judgments of three Judges of the Supreme Court in *Jiwanlal Achariya*, and of this Court in *Ashok K. Khurana, Technofab Engineering Ltd.* and *BPL Ltd.* supra.

24. The Full Bench of High Court of Gujarat also in *Hindustan Apparel Industries Vs. Fair Deal Corporation* AIR 2000 Guj 261 was concerned with “whether the payment by cheque which is dishonoured amounts to acknowledgment of a debt or liability”. It was held i) that a statement in the form of a cheque will obviously amount to acknowledgment in writing withing the meaning of Section 18 of the Limitation Act; ii) it is the stage of issuance of the cheque that there surfaces an intention on the part of the drawer to acknowledge the liability / debt owing to the person in whose favour the cheque is issued; iii) in case the cheque is honoured, it would amount to part payment in writing within the meaning of Section 19 of the Limitation Act; iv) however even if the cheque is dishonoured, it would still be an acknowledgment in writing of the debt within the meaning of Section 18 of the Act.

25. A Single Judge of this Court also in *Sumitra Baluja Vs. Bharat Chemical Industries* MANU/DE/0023/1980 held that a acknowledgment within the meaning of Section 18 of the Limitation Act is to be treated to have been made when it was actually made and that it is the factum of acknowledgment which extends the limitation and once it is established to have been executed at a particular time, the limitation starts running from then. It was further held that the acknowledgment under Section 18 is not deferrable to any future date and that it is the singular act of the debtor acknowledging the debt, which of its own, completes the act resulting in an extension of limitation and which is thus the date when acknowledgment actually is made that a fresh limitation starts and to hold it otherwise would permit a creditor to obtain an acknowledgment even after the expiry of the period prescribed for a suit and get that ante-dated and such an acknowledgment will not save limitation under Section 18. Accordingly, acknowledgment resulting from drawing of the cheques was held to have been made on the dates which the cheques bore.

26. A Division Bench of the High Court of Madhya Pradesh also in *Balchand Champalal Bhandari Vs. India Pictures* AIR 1967 MP 280 held that whenever a cheque or similar instrument is passed by the debtor to the

creditor, the date on which acknowledgment implicit in the cheque is made is the date when the period of limitation commences. The said judgment was expressly followed by this Court in **Rajesh Kumari** supra.

27. In the aforesaid light, there cannot be said to be any inconsistency in the judgments relied upon by the counsel for the appellant / plaintiff and the judgments to which his attention was drawn by me. Unlike the present case where the appellant / plaintiff, to bring the suit within limitation has to necessarily rely on Section 18 and / or 19 for extension of limitation, **Steel Authority of India Ltd.** supra was not concerned therewith; that was a case of a suit for recovery of amount which was subject matter of cheque simpliciter. Similarly, **Jhang Biradari Housing Residents Society** supra as aforesaid was not a suit for recovery of money but a suit for declaration of title to immovable property and the period of limitation provided wherefor commences from the date when the right to sue first accrues. However the limitation for a suit for recovery of price of goods as the subject suits, does not commence from the date when the right to sue accrues but commences from the date of sale and delivery of goods and the extension of limitation by issuance of cheques which were dishonoured claimed by the appellant / plaintiff commences from the date when the acknowledgment was so signed

and which can only be the date of the cheque and not the date of dishonour of cheque. To hold otherwise, would be doing violation to the language of Section 18. Moreover, the cheques subject matter of RFAs No.209/2016, 210/2016 and 212/2016 were returned with the endorsement of “Account Closed”.

28. No error can thus be found with the conclusion reached by the learned ADJ of the claim in the suits from the averments in the plaints itself being barred by time.

There is thus no merit in the appeals.

Dismissed.

No costs.

MAY 03, 2016

‘gsr’

(corrected & released on 16th June, 2016)

RAJIV SAHAI ENDLAW, J.