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

% Date of decision: 25.7.2016

+ C.R.P. 105/2016 & CM Nos.26112-26114/2016

GYANENDRA SINGH NAGAR Petitioner
Through Mr.Kamal Kumar Pandey, Adv.

versus

CANARA BANK Respondent
Through Mr.V.K.Tandon, Adv.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

CM No.26113/2016

Exemption allowed, subject to all just exceptions.

CM No.26114/2016 (delay)

For the reasons stated in the application the delay of 152 days in filing the present revision petition is condoned. Application is allowed.

C.R.P. 105/2016 & CM Nos.26112/2016

1. By the present petition the petitioner seeks to impugn the order dated 19.11.2015. The brief facts which led to filing of the petition is that the petitioner had a Savings Account with the respondent Bank at South Extension Branch. The petitioner presented a cheque of Rs.3,50,000/- payable in his favour drawn on Canara Bank for encashment/clearing. The respondent bank presented the cheque for clearing on 19.07.2008 and

credited the amount to the account of the petitioner. The amount was subsequently withdrawn by the petitioner. It is the case of the respondent that on 26.08.2011 the respondent was informed from the concerned department of its Head Office about un-reconciled outstanding entries at its branch which include wrong payment of Rs.3,50,000/- to the account of the petitioner as the cheque in question had been returned unpaid.

2. The respondent thereafter filed a suit for recovery of the said amount. The said suit was rejected as the same was time barred. The Court held that there is a bald averment that in August 2011 the bank discovered its mistake and it is not sufficient in itself to avail the benefit of Section 17 of the Limitation Act. The respondent has thereafter filed the present suit.

3. By the impugned order the application filed by petitioner under Order VII Rule 11 CPC was dismissed. It was held that in view of Order VII Rule 13 CPC, the present suit could be filed despite dismissal of the earlier suit based on the same cause of action. The Court also concluded that there is an explanation given regarding the discovery of the mistake and hence the respondent may be entitled to the benefit of Section 17 of the Limitation Act inasmuch as a specific averment has been made in para 6 of the plaint that on 26.10.2011 the respondent bank was informed by the concerned department from its Head Office about un-reconciled outstanding entries of its branch and upon verification this included wrong payment of Rs.3,50,000/- to the account of the petitioner. Accordingly, the Court held that the question of limitation could not be decided at the preliminary stage without giving the parties an opportunity to lead evidence.

4. I have heard learned counsel for the parties. Learned counsel for the petitioner has submitted that for application of Section 17 of the Limitation

Act the bank was obliged to plead reasonable diligence in discovery of the mistake. As the same has not been done, he urges that the suit would be barred by limitation. He further submits that payment which had been credited to his account in 2008 is sought to be reversed subsequently in 2011 after so much delay making it impossible for the petitioner to recover the amount from the customer who had tendered the payment.

Order VII Rule 11 CPC reads as under:-

“11. Rejection of plaint.- The plaint shall be rejected in the following cases:—

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;
- (e) where it is not filed in duplicate;
- (f) where the plaintiff fails comply with the provision of Rule 9

Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff.”

5. Reference may be had to the judgment of the Supreme Court in the case of ***Ramesh B. Desai and Ors. vs. Bipin Vadilal Mehta and Ors.***, AIR 2006 SC 3672: MANU/SC/2996/2006 where in para 16 the Court held as follows:

“16. A plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. The question whether the words "barred by law" occurring in Order VII Rule 11(d) CPC would also include the ground that it is barred by law of limitation has been recently considered by a two Judge Bench of this Court to which one of us was a member (Ashok Bhan J.) in Civil Appeal No. 4539 of 2003 (Balasaria Construction Pvt. Ltd. v. Hanuman Seva Trust and Ors.) decided on 8.11.2005 and it was held: -

After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time.”

6. In my opinion, there is no infirmity in the impugned order. The question urged by the learned counsel for the petitioner would be a mixed question of law and fact and can only be adjudicated upon after evidence has been completed by the parties. Regarding the contention of the petitioner

about damages suffered by him due to the delay, of the respondent, needless to add it is for the petitioner to take steps as per law.

7. Accordingly, the present petition is dismissed. No observations made herein would influence the final outcome of the suit.

JAYANT NATH, J

JULY 25, 2016

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