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

Reserved on : 9th May, 2018

Date of Decision: 23rd May, 2018

+ **RFA 119/2017 & CM No.4008/2017**

RAJ KAMAL MISRA Appellant

Through: Mr. Nidhesh Gupta, Senior Advocate
with Mr. Raunak Singh, Advocate.
(M:9910374731)

versus

ANIL KHANNA Respondent

Through: Mr. Arun Khosla, Advocate.
(M:9818255789)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present appeal arises out of the impugned order dated 6th June, 2016, by which the application under Order VII Rule 11 Code of Civil Procedure, 1908 (hereinafter ‘CPC’) has been allowed and the suit filed by the Appellant/Plaintiff (*hereinafter ‘Plaintiff’*) has been rejected as being barred by limitation.

2. Briefly the case of the Plaintiff is that the Plaintiff and the Respondent/Defendant (*hereinafter ‘Defendant’*) were on friendly terms for a long time. The Defendant approached the Plaintiff in 2007 for a friendly loan and the following sums were advanced by the Plaintiff to the Defendant.

“i. Rs 2,85,000/- on 4.08.2007

ii. Rs 5,00,000/- on 16.4.2008

iii- Rs 5,00,000/- on 14.5.2008

iv. Rs 8,00,000/-on 1.05.2009”

The Defendant sought the loan on the ground that he needed financial assistance for his daughter's studies. The interest payable as agreed, was 12% compounded quarterly. The Defendant then executed a promissory note for a sum of Rs.21,62,137/- which was the amount due as on 29th December, 2009. The said amount included the principal and the interest payable till the said date. According to the Plaintiff, since a huge sum was outstanding, an agreement was entered into by the Defendant for deposit of title deeds of a property belonging to the Defendant i.e. farm land at Dadri and a gold wrist watch. The title documents of the farm land were, however, not given to the Plaintiff. At the same time, the Defendant also handed over two post-dated cheques dated 30th September, 2010 and 30th December, 2010 for Rs.10 Lakhs each. The Plaintiff pleads that the Defendant had verbally requested him not to encash the said cheques. Thereafter, the Plaintiff made a demand for repayment of the loan on 27th February, 2013 and email correspondence took place between February, 2013 and April, 2013. The Plaintiff then states that the Defendant, despite repeated demands, failed to repay the loan and suggested to the Plaintiff to accept Rs.10 Lakhs as the total settlement. Under these circumstances, the suit for recovery came to be filed on 21st November, 2015.

3. The case of the Defendant is that the transaction was in relation to the purchase of a watch, which was given by the Defendant to the Plaintiff. It was an expensive *Rolex Gold Date-Just President Watch*, which was sold by the Defendant to the Plaintiff for Rs. 8 Lakhs. It is thereafter pleaded that the Plaintiff obtained signatures on blank papers on which the mortgage deed and promissory note have been typed out. Insofar as the two cheques are concerned, the Defendant claims that the same were given to the Plaintiff

towards purchase of leather jackets. The Defendant then pleads that since the transaction was 'foggy' he admitted in an email "*in a noble and ethical manner that he would pay Rs.10 Lakhs.*" Thus, the Defendant contended that the suit is liable to be dismissed. In fact, it was claimed that the Defendant is liable to recover Rs. 8 Lakhs from the Plaintiff.

4. An application under Order VII Rule 11 CPC was filed by the Defendant, which was heard by the Trial Court and the plaint was rejected on the ground that it is barred by limitation.

5. In the present appeal, learned Senior Counsel for the Plaintiff, Sh.Nidesh Gupta submits that the Trial Court has failed to consider Sections 18 and 19 of the Limitation Act. It is further submitted that the promissory note and the cheque dated 30th December, 2010 would extend the limitation period in favour of the Plaintiff. It is further contended that the cheque dated 30th December, 2010 was a clear admission of debt and the email dated 1st April, 2013 further admits to the payment which is to be made. Since, there is a clear admission even as of April, 2013, by the Defendant, the limitation gets extended to 2016, and the suit was filed within time. He relies on the following judgments:

- ***Sant Lal Mahton v. Kamala Prasad and Ors. AIR (38) 1951 SC 477***
- ***Jiwanlal Achariya v. Rameshwarlal Agarwalla AIR 1967 SC 1118***
- ***Rajesh Kumari v. Prem Chand Jain 1997 (42) DRJ 280***
- ***Liverpool & London S.P. & I Association Ltd. V. M.V. Sea Success I and Anr. (2004) 9 SCC 512***
- ***Bhushan Steel & Strips Ltd v. Bhartiya Loha Udyog (P) Ltd. 2010 (115) DRJ 344***

It is also submitted by Sh. Gupta that the averments in the plaint ought to be taken as correct while deciding the application under Order VII Rule 11 CPC.

6. On the other hand, learned counsel for the Defendant Sh. Arun Khosla submits that the cheques, which were handed over, were unconditional in nature, though they were post-dated and since the same were handed over in 2009, the limitation does not get extended. He further submits that the Plaintiff's grounds of appeal are completely lacking and in fact there is no ground pleaded to challenge the impugned order and if a ground is not pleaded, the same cannot be urged at the time of oral arguments. Sh. Khosla further submits that the transaction was for purchase of a watch, for which some amount was paid by the Plaintiff and the neither the remaining amount was paid nor was the watch returned. In fact, the Plaintiff is guilty of deceit as the second cheque of Rs.10 Lakhs was taken from the Defendant by misrepresenting to the Defendant that the first cheque of 30th September, 2010 was misplaced. He further submits that both the cheques having not been presented, constitutes payment in itself and, therefore, the suit itself is not maintainable. In his submission, the relevant date is when the cheques were handed over, and limitation begins from the said date. Hence, according to him, the suit is barred by limitation. He relies upon the following judgments:

- ***M/s Modern Insulators Ltd. v. The Oriental Insurance Co.Ltd.JT 2000 (2) SC 289***
- ***Maurice Mayahas v. W.Morley and Anr. AIR 1925 Cal 937***
- ***I.T. Commr v. Ogale Glass Works Ltd. AIR 1954 SC 429***
- ***Gorilal v. Ramjeelal AIR 1961 MP 346***

- **K. Saraswathy v. P.S.S. Somasundaram Chettiar** AIR 1989 SC 1553

Analysis & Findings

7. A very short point is involved in this case - Whether the suit is barred by limitation?

8. In an application under Order VII Rule 11 CPC, the Court has to consider the averments made in the plaint alone along with the documents. Defense of the Defendant or any documents filed therewith is not liable to be looked at as held in several judgements. In **Bhanu Ram v. Janak Singh and Ors. (2012) 8 SCC 701** the Supreme Court held:

“8. The law has been settled by this Court in various decisions that while considering an application under Order VII Rule 11 Code of Civil Procedure, the Court has to examine the averments in the plaint and the pleas taken by the Defendants in its written statements would be irrelevant. [vide C. Natrajan v. Ashim Bai and Anr.: (2007) 14 SCC 183, Ram Prakash Gupta v. Rajiv Kumar Gupta and Ors.: (2007) 10 SCC 59, Haradesh Ores (P) Ltd. v. Hede and Co.: (2007) 5 SCC 614, Mayar (H.K.) Ltd. and Ors. v. Owners & Parties, Vessel M.V. Fortune Express and Ors.: (2006) 3 SCC 100, Sopan Sukhdeo Sable and Ors. v. Assistant Charity Commissioner and Ors.: (2004) 3 SCC 137, Saleem Bhai and Ors. v. State of Maharashtra and Ors.: (2003) 1 SCC 557]. The above view has been once again reiterated in the recent decision of this Court in The Church of Christ Charitable Trust & Educational Charitable Society, represented by its Chairman v. M/s Ponniamman Educational Trust represented by its Chairperson/Managing Trustee: JT 2012 (6) SC 149.

9. As rightly pointed out by learned Counsel for the Respondents, the questions of law, as raised in the

second appeal, before the High Court are no longer needed to be decided in view of the settled law that only the averments in the plaint can be looked into while deciding the application under Order VII Rule 11. This aspect has been rightly dealt with by the High Court.”

9. Thus, the court has to go by the averments in the Plaint and the written statement is irrelevant. Going by the averments in the present suit, the loan was disbursed between 4th August, 2007 to 1st May, 2009. The loan agreement is dated 29th December, 2009. According to the plaint, the cheques were issued on 29th December, 2009 but were dated 30th September, 2010 and 30th December, 2010 along with a verbal request not to get the same encashed. The relevant paragraphs of the plaint are set out hereinbelow:

“7. That the defendant also entered into an agreement with the plaintiff on 29.12.2009 agreeing to deposit title deed of his Dadri land property along with gold watch as security for above said loan. However, the defendant admittedly did not actually handed over title deeds of the security. The defendant also handed over two post dated cheques drawn in the name of plaintiff amounting to Rs. 10,00000/(Rs.Ten lakh) which verbally requested not to get encashed. The defendant agreed that he has already taken loan amounting to outstanding loan of Rs 21,62,137 as on 29.12.2009. It is submitted that as per the assurance given by the defendant for repayment of outstanding loan on demand, the plaintiff for first time demanded repayment of loan from defendant on 27.2.2013.

8. That vide email dated 27 Feb 2013 the plaintiff requested the defendant and demanded to repay the loan and interest thereon as per promissory note dated 29.12.2009, the defendant replied that he was in USA. The defendant expressed his inability to pay the loan and interest thereon on time but assured that he will return to India soon and arrange funds to clear his legal and lawful liability towards the plaintiff.”

10. Averments made in the paragraphs above have to be taken as correct. Thus, the verbal request of the Defendant to the Plaintiff has to be taken as being correct. In the case of a post-dated cheque, the date which is mentioned on the cheque would be the date from when the limitation would begin, as held in **Ashok Yeshwant Badave v. Surendra Madhavrao Nighojakar and Anr AIR 2001 SC 1315**.

“18. For prosecuting a person for an offence under Section 138 of the Act, it is inevitable that the cheque is presented to the banker within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier. When a post dated cheque is written or drawn, it is only a bill of exchange and so long the same remains a bill of exchange, the provisions of Section 138 are not applicable to the said instrument. The post-dated cheque becomes a cheque within the meaning of Section 138 of the Act on the date which is written thereon and the 6 months period has to be reckoned for the purposes of proviso (a) to Section 138 of the Act from the said date. Thus while respectfully agreeing with the law laid down by this Court in the case of Anil Kumar Sawhney, we hold that six months period shall be reckoned from the date

mentioned on the face of the cheque and not any earlier date on which the cheque was made over by the drawer to the drawee.”

11. In the case of cheques, which are blank, the date of handing over of the cheque may be the date of the cheque, however, in case of a post-dated cheque, the date mentioned on the cheque is the date of the cheque. The date of the cheque in the present case has to be, therefore, taken as 30th December, 2010, which is when the period of limitation would begin.

12. Thereafter, the correspondence between the parties began from 27th February, 2013 to 1st April, 2013. The email correspondence has been placed on record and the same has to be taken into consideration. A perusal of the emails reveals that the Defendant has repeatedly admitted having availed of the loan as is evident from emails dated 28th February, 2013 and 1st April, 2013 which read respectively as under:

*“Dear Raj
I can see how dearly you love me & the esteem you hold me in. none the less, despite the barbs, my conscience is clear despite my restraints. Please allow me to present figures the 10L loan was taken in 2009 when my daughter was going to university. I had honestly thought that despite the written stuff, you would not charge me interest. In any case, what I am proposing is what is doable. 10% simple interest over 5 years is 5L in 3-4 months. Please do me the additional favour of accepting this proposal. We can do this on 10th Oct on my return or tomorrow if you are here. Thank you”*

*“Dear Raj,
Neither do I lack trust in your intentions, nor I changed my mine. I am and shall remain grateful eternally.
You also didn’t trust in me. However you had sought*

legal advice had sign the undertaking took my watch as well as the cheques. Because that was the correct thing to do.

All I am requesting is the reversal of that process. It has nothing to do with trust. Please do not look at it more than that.

As for changing my mind- absolutely no. you know my situation. You have no idea how I have arranged these funds so as to reply (sic repay) by debt. You also know that I had resisted compounding interest earlier too, but I had few choices. It will be genuinely impossible for me to pay that as you well know.

Should I come into money, you know that I will even make that good. But in the meantime, while I am still in deep distress, I didn't think it was too much to ask you to consider changing the interest portion to simple interest. It remains my request.

I will have the cheque ready. Muthu had called and I told him that I was taking with you on email.

Shoud he come to my house, please instruct him to bring the above and shall wait for him.

Please confirm."

13. A perusal of these emails leaves no doubt whatsoever that the Defendant has admitted that he owes money to the Plaintiff. In any case, the emails constitute a fresh cause of action for the Plaintiff as per Sections 18 and 19 of the Limitation Act. An admission on email would be an acknowledgment. The first admission is when the cheque dated 30th December, 2010 was given i.e., on 29th December, 2009. However, since the date of the cheque is 30th December, 2010, the limitation would run from 30th December 2010. Within the three-year period from 30th December, 2010, the Defendant has admitted and acknowledged the availing of the loan. The suit came to be filed in 21st November, 2015, which is within the

three-year period from the acknowledgement.

14. Moreover, a perusal of the plaint reveals that there are several averments which relate to the oral understandings and representations between the parties. These oral representations would have to be proved at trial but at this stage the said oral statements would have to be treated as being true.

15. The contention of the Defendant's counsel, is that since the cheques were not presented, the date on the cheque cannot be considered, but what has to be considered is the date when they were handed over. The authorities relied upon by Sh. Khosla in support of the proposition "*a cheque unless dishonoured is payment*", cannot be disputed. However, in this case the narration does not end with the handing over of the cheques, but with the further plea that the Plaintiff being told not to present the same. Moreover, the cheques were also post-dated i.e., 30th, September, 2010 and 30th December, 2010. The Defendant cannot take advantage of his own conduct i.e. firstly handing over the cheques and asking the Plaintiff not to present the same and by post dating it and thereafter arguing that since the Plaintiff did not present the cheques, the limitation period has run out. The Defendant in his emails has repeatedly acknowledged the debt.

16. Case law under Section 20 of the Negotiable Instruments Act to the effect that when the cheque is tendered, if the same is encashed, then the date of payment would be the date when the cheque was handed over, is not disputed. However, what has happened in this case, is exactly the contrary i.e. as stated earlier the Plaintiff was asked not to present the cheques. The Supreme Court in ***Jiwanlal Achariya v. Rameshwar Lal Agarwalla, AIR 1967 SC 1118*** has clearly held that wherever the payment of the cheque is

conditional, the mere delivery of the cheque on a particular date does not result in the commencement of limitation period. When the cheque is post-dated, the payment is conditional, and the date on the cheque would be relevant for the purpose of limitation. The Supreme Court observed as under:

“8. This brings us to the question of limitation. The facts are not in dispute now. The promissory note was executed on February 4, 1954. On the same date a post-dated cheque bearing the date February 25, 1954 was given by the defendant-appellant to the plaintiff-respondent, the intention being that on being realised it would be credited towards part payment. It was realised sometime after February 25, 1954 and was credited towards part payment, the appellant himself having made an endorsement admitting this part payment. But it is contended on behalf of the appellant that as the post-dated cheque was given on February 4, 1954, that must be held to be the date on which part payment was made. 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 Section 20 of the Limitation Act. Section 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 Section 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 the 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 Section 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 Section 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.”

17. In ***Bhushan Steel & Strips Ltd. v. Bhartiya Loha Udyog (P.) Ltd., 2010 (115) DRJ 344***, a learned Single Judge of this Court has also held that the issuing of a cheque is a valid acknowledgment. The Court held as under:

“46. In 1997 (42) DRJ 280 Rajesh Kumari v. Prem Chand Jain on construing the principle of Section 19 of the Limitation Act 1963 it was held by a Bench of this Court that a payment by cheque satisfies the requirement of Section 19. Dishonoring of a cheque would not result in extinguishing the liability of the debtor to the extent of the amount of the cheque; the cheque remains an effective payment for the purpose of Section 19 of the Limitation Act.

47. Cheque dated 17.4.1997 was a valid acknowledgment made by the defendant of his liability and was well within the period of limitation. Present suit filed on 05.08.1999 is, thus, not barred by time.”

18. From the above authorities and facts, it is concluded that, going by the averments made in the plaint, the loan amounts were given between 2007

and 2009. The date of the cheques, which were handed over on 29th December, 2009 as they were post-dated, would be taken as 30th September 2010 and 30th December, 2010 as they were conditional. An oral condition i.e., request not to get the same encashed, accompanied the handing over of the cheques. Thus, the cheques themselves constitute acknowledgment. E-mails written between February, 2013 to April, 2013 were within the period of limitation when calculated from 30th December, 2010. The suit has been filed within the 3-year period from April, 2013. Hence, the suit is not barred by limitation. The Trial Court erred in holding that the application under Order VII Rule 11 CPC is liable to be allowed. The Trial Court order is set aside. Suit is remanded back for further proceedings and trial to be conducted, in accordance with law. Since this is a monetary claim, the Trial Court may consider the disposal of the suit expeditiously.

19. List on 3rd July before the Trial Court for directions. Trial court record be sent back.

20. Appeal is allowed in the above terms. Miscellaneous application also stands disposed of.

न्यायमेव जयते

**PRATHIBA M. SINGH
JUDGE**

MAY 23, 2018/dk