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

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Delivered on: 15<sup>th</sup> November, 2019

+ **RFA 178/2019**

M/S SMC COMRADE LTD

..... Appellant

Through : Mr.Prince Jain, Advocate.

versus

M/S NARNOLI BUILLION & ORS

..... Respondents

Through : Mr.C.L.Dhawan, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE YOGESH KHANNA**

**YOGESH KHANNA, J.**

**CAV 222/2019**

Counsel as above appears for the respondent/caveator.

The caveat is discharged.

**CM APPL.No.10258/2019**

The reasons mentioned in the application the delay of 05 days in refiling of appeal stands condoned.

The application stands disposed of.

**CM APPL.No.10257/2019**

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

**RFA 178/2019**

1. This appeal is preferred by the appellant/plaintiff against the judgment and decree dated 13.08.2018 passed by the learned Additional District Judge-12/Central District, Tis Hazari Courts, Delhi (hereinafter referred as the learned '*Trial Court*') in CS No.16718/2016 whereby the

suit of the appellant for recovery of Rs.14,24,739/- was dismissed post trial.

2. The brief facts are:-

*a)* the appellant company is a duly incorporated company under the Companies Act and has filed this suit through Sh.Ram Kumar, its principal officer, who was authorised by a Board's resolution dated 25.07.2006 to institute the suit and adduce evidence;

*b)* it was the case of the appellant that defendant No.4 was running jewellery business for the last several years had introduced the defendants No.1 to 3 to the appellant stating *inter alia* they also are in the same business and would make the payment of goods, if supplied to them;

*c)* in the month of April 2006, the defendants No.1 to 3 approached the appellant company and purchased 1 KG gold for consideration of Rs.9,21,462/- and assured they would deposit the payment in the account of appellant company as per trend and trade practice of the commodity market. The appellant issued the delivery letter to M/s Brink Arya India Private Limited on 25.04.2006 and instructed them to handover 1 KG gold to defendants No.1 to 3. The appellant company issued letter dated 25.04.2006 to defendants No.1 to 3 and requested / directed them to deposit the amount in account. The said letter was duly received by the defendants No.1 to 3;

*d)* on 26.04.2008 the defendants No.1 to 3 received 1 KG gold from the appellant company through M/s Brink Arya India Private Limited and were to pay the consideration amount within 24 hours, but they failed to do so on alleging some compelling circumstances; and

e) appellant company also approached the defendants No.4 and requested him to persuade the defendants No.1 to 3 to make the payment. Since the defendants No.1 to 3 failed to make the payment, the appellant lodged FIR with the police against them and only after the said complaint, the defendants No.1 to 3 started making the payment of outstanding dues in installments and paid three installments of Rs.20,000/-, Rs.6,000/- and Rs.5,000/- thus totaling Rs.31,000/- and thereafter did not pay a single penny.

3. The abovesaid suit for money recovery was filed on the grounds viz the parties had an open, mutual and current account and as such the limitation would start from the close of the financial year, per Article 1 of the Limitation Act.

4. In the written statement, besides various other objections, the objection qua limitation was taken stating *inter alia* the transaction of purchase was of dated 26.04.2006 and admittedly three payments totaling to Rs.31,000/- were made and the last of such payment was made on 08.08.2006, hence the suit filed on 04.11.2009 was beyond limitation.

5. Vide the impugned judgment dated 13.08.2018, the learned Trial Court held appellant company was though entitled to recovery of suit amount, but dismissed the suit on grounds of limitation and proper authorisation to institute the suit.

6. Amongst other, the issues No.3 & 5 as framed by learned Trial Court are relevant. Let met first take up the issue No.3 which says *Whether the relief sought is time barred? OPD.* This issue was decided by the learned Trial Court in the following manner:-

*Whether relief sought is time barred? OPD.*

*It is contended by counsel for the plaintiff counsel that admittedly as per own case of the plaintiff, the defendant approached the plaintiff company in April, 2006 on 25.04.2006 and purchased 1 Kg gold from plaintiff company and which was delivered on 26.4.2006 through M/s. Brinks Arya (P) Ltd. and made payment of Rs.20,000/-, Rs. 6000/- and Rs. 5000/- totaling Rs. 31,000/- to the plaintiff which was kept in suspended account and reflected in the defendant no.2 accounts on 31.03.2007 hence limitation period is to be counted from 31.03.2007 hence suit is within limitation as article 1 of schedule of Limitation Act and not article 113 will apply. 16. In order proved the same he relied upon the running account statement of defendant company mark PX maintain by plaintiff who has deposed that defendant no.1 to 3 made payment of Rs. 31,000/- .*

*17. On the other hand Ld. Counsel for defendant has contended that payment of Rs. 31,000/- was made by the defendant No. 1 vide cheque Nos. 130179 dated 29.6.2006; Cheque No. 130180 dated 3.7.2006 and Cheque No. 130181 dated 8.8.2006 and not on 31.3.2007 for the purpose of maintaining relation with the plaintiff and not as part payment towards purchase of Gold and he further contended that even otherwise since last payment of Rs. On 08.08.2006 hence limitation is to be counted from 08.08.2006 and not from 31.03.2007. He further contended that in the plaint, no date has been mentioned deliberately when the said cheques were encashed and concealed material facts and fabricated account statement to create the evidence that suit is within limitation. He also argued that the statement of account filed by the plaintiff company, Mark PX relied by plaintiff to prove that part payment of Rs.31,000/- was received on 31.3.2007 is false and fabricated and that is why in the said statement, no date of cheque is mentioned. Further, deliberately the plaintiff had not placed on record bank's statement of account showing that the aforesaid cheques were encashed into the bank account of the plaintiff.*

*18. In order to prove the same the defendant has relied upon the testimony of DW1 Mukesh Soni. In his evidence led through affidavit, Ex. DW1/A, he has deposed that defendant No. 1 wanted to make relation and only on submissions of the plaintiff, the defendant No. 1 paid a sum of Rs. 20,000/-, Rs. 6000/- and Rs. 5000/- to the plaintiff vide aforesaid cheques for preparation of relevant documents in order to develop relations with other companies and he or any other defendant has never acknowledged the liability as alleged by the plaintiff company. In his cross examination, no suggestion has been given to him that Rs. 31,000/- was not paid through cheque in the manner as deposed by the DW1 hence, the said fact remains un rebutted. Further, no suggestion has been given to the DW1 that any payment of Rs. 31,000/- was made by defendant No. 1 or any other defendants on 31.7.2007.*

*19. I have considered the submission and gone through the evidence of respective parties. The limitation period is to be started from the date of last payment of gold allegedly sold by the plaintiff to the defendants. Plaintiff neither in the plaint nor PW2 Puneet Goel in its evidence affidavit has mentioned when the payments of Rs.31,000/- was made by the defendants to the plaintiff and through which mode. Plaintiff has taken the vague plea that part payment of Rs. 20,000/-, 6000/- and Rs. 5000/- was made by defendant Nos. 1 to 3 and thereafter stopped making payment. Verbatim same facts have been mentioned by the star witness of Plaintiff in his evidence affidavit. on*

31.3.2007. Hence plaintiff have failed to proved when the defendants made last payment.

20. On the other hand defendants through the testimony of DW1 Mukesh Soni has proved that payment of Rs. 31,000/- was made by the defendant No. 1 vide cheque Nos. 130179 dated 29.6.2006; Cheque No. 130180 dated 3.7.2006 and Cheque No. 130181 dated 8.8.2006 and not on 31.3.2007. Said facts has not been denied by the plaintiff as no suggestion has been given to DW1 that payment of Rs. 31,000/- was not made in the manner as deposed by DW1, hence, there is no ground to disbelieve the testimony of DW1 that the DW1 has made the last payment of Rs. 5000/- on 8.8.2006 to the plaintiff company. Even if it is presumed that the said amount of Rs. 31,000/- was paid towards part payment of the gold, though denied by the defendants the period of limitation will start from the date when the last payment was made i.e. 8.8.2006 and not from 31.03.2007 when the plaintiff company reflected the same in the account of defendant no.2 on 31.03.2007 hence, the suit is file after three year from the date of last payment made by defendants The present suit has been filed on 4.11.2009. As per article 113 of Schedule of Limitation Act the limitation for recovery of money is three year therefore same is barred by limitation.

21. I do not find force in the contention of the counsel for the plaintiff that earlier the said payment was made by M/s. Narnoli Bullion, defendant No. 1 to the plaintiff and was remain in suspense account and it was claimed unidentified and claimed in the account of defendant No. 1, Narnoli Bullion only on 31.3.2007 and on request of Mukesh Soni, the payment is to be considered to be made by the defendant to the plaintiff on 31.3.2007 as there is no pleading. Rather pleading is contrary that the defendants no.1 to 3 made the payment. Further, even in its evidence and even no such suggestion has been given to the defence witness that payment was made by Narnoli Bullion i.e. the third party and same was transferred into the account of Narnoli Overseas on 31.3.2007 on the request of Sh. Mukesh Soni, proprietor of defendant No. 1. Hence, the said contention of the plaintiff's counsel is beyond pleadings as well as the plaintiff also failed to prove the said contention through testimony of plaintiffs witnesses hence, I reject the same.

22. Now, the next contention of the counsel for the plaintiff that as per Article I of Schedule to the Limitation Act, the period of limitation is to be computed from the date of close of year in which last item is admittedly proved or entered into the account. He contended that the plaintiff is a company which was maintaining a running account of defendants and transactions are tallied only after expiry of the current year. Hence, the period of limitation is to be count from 31.3.2007 and not from the date when the actual payment was made. Therefore, suit is within limitation.

23. I am not agree with the said contention. Article I of Schedule to the Limitation Act is only applicable in cases when there is a mutual account by both the parties. Article I is reproduced as under:-

| Description of suit                                                                                    | Period of Limitation | Time from which period begins to run                               |
|--------------------------------------------------------------------------------------------------------|----------------------|--------------------------------------------------------------------|
| 1. For the balance due on a mutual, open and current account, where there have been reciprocal demands | Three years          | The close of the year in which the last item admitted or proved is |

*between the parties.*

*entered in the account; such year to be computed as in the account.*

24. xxx xxx

25. Now applying the ratio of aforesaid Judgment in present case it is evident it was one way transaction that the plaintiff had sold the gold to the defendants and in place of same, the defendants have to make the payment of purchased goods. It is not the case of plaintiff that defendant has to supply anything. Hence I held that there was no mutual account between plaintiff and defendant. Hence, Article I of Schedule to the Limitation Act will not apply and Article 113 of the Limitation Act would be applicable i.e. in which limitation is for three years. hence, in these circumstances, period of limitation commence when the last payment of Rs. 5000/- made by the defendant No. 1 to the plaintiff vide cheque dated 8.8.2016. Hence, three years have expired on 7.8.2009 and the present suit has been filed on 4.11.2009 i.e. filed after three years."

7. I have gone through the impugned judgment. Admittedly, the last payment was received by the appellant on 08.08.2006, hence the suit ought to have been filed within three years from such payment. However the suit was filed in October 2009 much beyond the limitation. Though, the learned counsel for appellant tried to bring into service Article I of the Limitation Act, but the learned Trial Court has aptly dealt with such proposition. Even otherwise, an account is said to be open, mutual and current account if it satisfy the conditions as were described *Kesharichand Jaisukhal v. The Shilling Banking Corporation* AIR 1965 SC 1711 viz:-

10. The next point in issue is whether the proceedings are governed by Art. 85 of the Indian Limitation Act, 1908, and if so, whether the suit is barred by limitation. The argument before us proceeded on the footing that an application under s. 45(D) of the Banking Companies Act is governed by the Indian Limitation Act, and we must decide this case on that footing. But we express no opinion one way or the other on the question of the applicability of the Indian Limitation Act to an application under s. 45(D). Now, Art. 85 of the Indian Limitation Act, 1908 provides that the period of limitation for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties is three years from the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account. It is not disputed that the

*account between the parties was at all times an open and current one. The dispute is whether it was mutual during the relevant period.*

*11. Now in the leading case of Hirada Basappa v. Gadigi Muddappa [(1871) VI Madras High Court Reports 142, 144] Holloway, Acting C. J. observed:*

*"To be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."*

8. Before this Court, the learned counsel for the appellant has now tried to bring his case under Section 17 of the Limitation Act and had argued in October 2009 they came to know respondent No.2 was not the sole proprietor of M/s.Narnoli Bullion Overseas, but it was his wife who was the sole proprietor of such firm hence fraud was committed upon the appellant which they came to know only in October, 2009, hence Section 17 of the Limitation Act would be applicable. Section 17 of the Limitation Act notes:-

***17. Effect of fraud or mistake.—***

*(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,—*

*(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or*

*(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or*

*(c) the suit or application is for relief from the consequences of a mistake; or*

*(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him, the period of limitation shall not begin to run until plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production: Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against, or set aside any transaction affecting, any property which—*

*(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or*

*(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or*

*(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.*

*(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the court may, on the application of the judgment-creditor made after the expiry of the said period extend the period for execution of the decree or order: Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be.*

9. Admittedly, sole proprietorship firm is not a legal entity. Its totally immaterial if Mr.Mukesh Soni or Mrs.Rajni Soni was sole proprietor of M/s. Narnoli Bullion Overseas, as the allegations in the plaint were, primarily, against respondents Mr.Mukesh Soni and Mr.Rajni Soni and their son Sandeep Soni – respondent No.3. Admittedly, respondent No.3 has been deleted from the array of parties by the learned Trial Court since was minor at the time of transaction. Hence, the fact whether M/s.Narnoli Bullion Overseas was a sole proprietorship firm of Mr.Mukesh Soni or of Smt.Rajni Soni was not material at all and the fraud/mistake as alleged, this case is not as envisaged *per* Section 17 of the Limitation Act.

10. Hence, there is no reason to differ from the learned Trial Court on issue of limitation. There is no use to examine issue No.5 as framed by learned Trial Court qua authorisation of Mr.Ram Kumar to institute the suit since the suit itself is barred by time.

11. In view of above, the appeal stands dismissed. The pending application, if any, also stands dismissed. No order as to costs.

**YOGESH KHANNA, J.**

**NOVEMBER 15, 2019/M**