

**IN THE COURT OF CIVIL JUDGE 07,
CENTRAL DISTT.,TIS HAZARI COURTS,DELHI
Presiding Officer: Ms. AANCHAL, DJS**

Civil Suit No. 386/13

Sh Sanjay Mahajan
213, Shastri Nagar, Delhi

..... Plaintiff

vs.

Sunil Sharma
16/9803, Behind 1C/3,
Bajaj Blood Bank
New Rohtak Road
New Delhi-110005

M/s Tel me Telecome &
Media Products India Pvt Ltd.
518, Indra Prakash Building,
21, Barakhamba Road,
Connaught Place, New Delhi

.....Defendants

Date of Institution of suit	:	06.07.2007
Date on which reserved for judgment	:	23.07.2014
Date of Judgment	:	02.08.2014

JUDGMENT

(1) Vide this judgment this Court shall decide the present suit for recovery

of Rs. 68,800/-(sixty eight thousand and eight hundred only).

(2) In brief the facts of the case are that :

Being business friends, the defendant no. 1 borrowed a sum of Rs 40,000/- (Forty thousand only) on 05.07.2004 from the plaintiff which was given by the plaintiff through a cheque no. 733101 dt. 05.07.2004 drawn on Dena bank, Ashok Vihar Delhi in the name of defendant no. 2 at the request and assurance of the defendant no. 1 to pay the above said loan within six months with interest @ 24 % p.a. But after six months, the defendant No. 1 neither paid the principal amount nor interest to the plaintiff and when the plaintiff demanded his loan amount he always postponed the matter. The plaintiff sent a demand notice dt. 03.04.2007 through his Counsel, which was duly served upon the defendant no. 1 to which the defendant no. 1 did not reply.

With these averments, plaintiff has claimed a sum of Rs 40,000/- and interest @ 24 % per annum w.e.f 05.07.2004 to 05.07.2007 as Rs. 28,000/- totaling to Rs. 68,800/-.

(3) Defendants filed the written statement and the suit of the plaintiff is preliminary objected on the ground that suit of the plaintiff is barred by time and without cause of action. On merits, it is denied that defendant no. 1 borrowed any sum from the plaintiff or the plaintiff issued the cheque in the name of defendant No. 2 at the request of defendant no. 1 as loan demanded by defendant no. 1 or the loan of the cheque

amount was given to the defendant no. 1 in his personal capacity or any demand was ever raised on the part of the plaintiff at any point of time. It is further asserted that plaintiff was appointed as Distributor for Karnatka and Maharastra by defendant no. 2 and the plaintiff took 10 pieces of T-918 and 10 pieces of T-919 mobiles vide challan No. 019, which were returned by him on 21.06.2004 out of which six pieces of mobile phones were used by the plaintiff and again the plaintiff had taken one phone T-918 vide challan no. 029 which was not returned by him and plaintiff was also supplied advertising material etc. for Karnataka amounting to Rs. 10,000/- but accounts were not settled by the plaintiff despite demand made by defendant No. 2 and the plaintiff had on his own issued the cheque in favour of defendant no. 2 on being the distributor of defendant No. 2 and the plaintiff has filed the present suit only to escape from his liability to compensate the defendant No. 2 for the loss which the defendant No. 2 had suffered for the act of omission and commission on the part of the plaintiff.

- (4) Plaintiff filed the replication to the written statement filed by the defendant wherein it is admitted by plaintiff that he was appointed Distributor for Karnatka and Maharastra by defendant No. 2 and he took 10 pieces of T-918 and 10 pieces of T-919 vide challan no. 019 and again took one mobile T-919 vide challan No. 029 and it is denied that six pieces out of 10 mobile phones were used by the plaintiff. It is further asserted that defendant No. 1 had checked those mobiles and received the same and he had returned the one mobile No. T-919

received by him on 20.09.2004 and by receiving notice on 03.04.2007, defendant No. 2 never called the plaintiff to settle the account. Further, the averments made in the plaint are reaffirmed and reiterated.

(5) From the pleadings of the parties, the following issues were framed vide order dated 25-04-2011 passed by Ld predecessor of this Court:

1. *Whether the plaintiff is entitled for decree of Rs. 68,800/- as prayed for? OPP*
2. *Whether the suit is barred by law and is without any cause of action? OPD*
3. *Relief.*

(6) In order to substantiate his case, the plaintiff has examined himself as PW1 and Sh Syad Faisal Huda, Forensic Expert as PW2 and relied upon the following documents:-

- (a) Statement of account as ExPW1/1.
- (b) Receipt of one set of T-918 dt. 20.09.2004 as ExPW1/2.
- (c) Receipt of 10 T-918 Mobile and 10 T 919 mobiles dt. 21.06.2004 as ExPW1/3.
- (d) Delivery challan dt. 29.06.2004 as ExPW1/4.
- (e) The copy of notice dt. 03.04.2007 as ExPW1/5.
- (f) Original registered AD as ExPW1/7.
- (g) The copy of UPC as ExPW1/6.
- (h) Detailed report given by PW2 as ExPW2/A.

(7) On the other hand, defendant No. 1 is examined as DW1 on behalf of both the defendants and he relied upon the following documents:-

- (a) Memorandum of association as ExDW1/1.
- (b) Copy of agreement of distributorship between plaintiff and defendant No. 2 as ExDW1/2.
- (c) Copy of challan as ExDW1/3 & 4.
- (d) Copy of reply given by defendant as ExPW1/5 alongwith its acknowledgment card and receipt ExPW1/6,7&8 respectively.

(8) Final arguments heard and record alongwith the written submissions filed are perused carefully.

(9) Now this Court shall proceed to give the issue-wise findings which are as under

ISSUE NO. 1

Whether the plaintiff is entitled for decree of Rs. 68,800/- as prayed for? OPP

The onus to prove this issue lies upon the plaintiff. The plaintiff claims that he gave cheque for sum of RS. 40,000/- in the name of defendant no. 2 at the request of defendant no. 1 who asked for a friendly loan to him to be repaid within 6 months. The defendants claim that the cheque was given by the plaintiff on his own on being the distributor of defendant no. 2 and no loan was taken. Defendants further pleaded that the plaintiff has filed the present suit in order to avoid to compensate defendant no. 2 for the losses caused due to return of 6 mobiles out of 20 mobiles in used condition and non-return of one mobile.

The plaintiff has not produced any documentary evidence to substantiate the fact that the cheque was given towards loan. He is the only witness of this fact. He admitted that there was a distributorship agreement existing between him and defendant no. 2 and neither produced any record nor deposed that this agreement had come to an end before the issuance of this cheque. He further admits that before the issuance of this cheque, he had taken 20 mobile phones from the defendant company. He also disclosed that he has no knowledge about the value of these mobiles. As per the case of plaintiff as projected from Ex PW1/2, the business transactions were in existence between plaintiff and defendant no. 2 by 20.09.2004. The plaintiff has not produced anything on record to show that he was also sharing friendly relations with defendant no. 2 particularly besides business terms. On the contrary the formality in relations is apparent from the fact that each and every act whether it is delivery of mobiles or acceptance of mobile on being returned by plaintiff, were carried in writing. It surfaces the formality in relationship from both the sides. These facts suggested that there were the formal business relations existing between the parties which can not be equated with friendly relations. If such was the case, why did the plaintiff advanced the loan without any agreement or document in writing endorsing this fact? And if it was in fact a friendly loan in nature, why the plaintiff advance loan for six months as per plaint for an interest @ 24% per annum? Strangely, during cross examination, plaintiff stated that the question of paying interest does not arise as the defendant had obtain loan only for the period of one week, which is contrary to his own pleadings. Thus, this court is of the opinion

that the evidence produced on behalf of plaintiff does not support the case of the plaintiff and it is held that the plaintiff has failed to prove the essential fact that he had advanced the sum of Rs. 40,000/- through cheque to defendant as loan.

It is contended on behalf of the plaintiff that receipts of mobile phones which do not say that any of the mobile was returned after use and Ex. PW 2/2, the report of expert on examination of handwriting and figures present on Ex PW1/4 (receipt of 1 mobile) with specimen writing and signatures of defendant no. 1 proves that the plaintiff had returned all the mobiles obtained from defendants. Therefore nothing remains to be paid to defendant no. 2 or 1 and it disproves the defendants case. It is stressed that under such circumstances, the plea of plaintiff may be taken as true.

This court has given thoughtful consideration to the contentions raised. No doubt, no substantial challenge has been put to the report of forensic expert Ex. PW 2/A by the defendants and defendants have not even produced the stated accountant cum store keeper to disprove the evidence produced by plaintiff. But in the present case, onus to prove the issue under consideration lies upon the plaintiff. Absence of any due towards defendants which can not be prior to the date of return of one mobile i.e. 20-09-2004 does not imply that the plaintiff had advanced a loan to the defendants or the plaintiff had given the cheque without consideration on 05-07-2004. But the admitted document Exb PW1/2 infers that as on the date of cheque i.e. 05-07-2004, the plaintiff owed the

mobiles from defendant No.2. Further, plaintiff has nowhere pleaded in the plaint that the defendant no. 2 retained the money given by him through cheque. Since the beginning, the plaintiff alleged to advance loan to defendant no. 1 through defendant no. 2. The plaintiff thus sued for recovery of loan amount and this was the substantiate ground of claim which later on during trial was completely varied. This is the case where either there is no such substantial pleading or these facts are concealed and wrong facts have been pleaded. The law is that no amount of evidence can be looked into upon a plea not put forward vide "**Siddik Mahomed Shah Vs. Mf. Saeen**" AIR 1930 PC 57(1) and "**Watkins Mayor and Co. Vs. Jullundue Electric Supply Co. Ltd.**" AIR 1955 Punj 133.

In view of the discussions, it is held that on failure of the plaintiff to prove the advancement of friendly loan to the defendant no. 1 though a cheque in favour of defendant no. 2, the issue under consideration is decided against the plaintiff.

ISSUE NO.2

Whether the suit is barred by law and is without any cause of action? OPD

Onus to prove this issue lies upon the defendants. Evidence produced on record shows that the money through cheque was paid by the plaintiff to defendant no. 2 on 06.07.2004. As per the case of plaintiff, this amount was paid as loan. Article 20 of schedule of The Limitation Act,

1963 provides that the period of limitation of three years for filing suit for recovery of such amount shall start commencing from the day when money is paid. It implies that this period of limitation should expire on 05.07.2007. The present suit was filed against defendant no. 1 on 05.07.2007 and then defendant no. 2 was allowed to be impleaded vide order dt. 06.12.2010 passed by Ld. Predecessor of this Court. Section 21 of The Limitation Act provides that suit against an added party shall be deemed to be instituted on the day when it is added as a party unless the Court orders it to be deemed impleaded from an earlier date. It is not disputed that defendant no. 2 is not ordered to be deemed impleaded as a party from any other day. Hon'ble Apex Court in ***Ramalingam Chettiar vs P.K. Pattabiraman reported as AIR 2001 SC 1185***, has held that *in the absence of any order that the impleadment of newly added or substituted party shall take effect from the date of institution of a suit, the period of limitation so far as the newly added or substituted persons are concerned shall run from the date of their impleadment in the suit*". Thus the suit is deemed instituted against defendant no.2 w.e.f. 06.12.2010 i.e. the day on which the period of filing of the suit had already expired. Expiry of the period of limitation of filing a suit bars the legal remedy before the court. Thus it is held that the suit of the plaintiff against the defendant no. 2 is barred by law and due to failure on the part of plaintiff to prove the existence of any friendly loan as discussed during the decision of earlier issue, it is held that the suit of the plaintiff against the defendants is without any cause of action.

RELIEF

In view of the above discussion, it is held that the plaintiff is not entitled for any relief and the suit of the plaintiff is hereby dismissed without cost. Parties to bear their own costs.

Decree-sheet be prepared accordingly.

File be consigned to Record Room.

**Announced in Open Court
Today i.e. on 02.08.2014**

**AANCHAL
CIVIL JUDGE-07(CENTRAL)
DELHI**

CS NO. 386/2013

Sanjay Mahajan vs Sunil Shamra

02.08.2014

Present : None

Vide separate judgment of even date, it is held that the plaintiff is not entitled for any relief and the suit of the plaintiff is dismissed without cost.

Parties to bear their own costs.

Decree-sheet be prepared accordingly.

File be consigned to Record Room.

**Announced in Open Court
Today i.e. on 02.08.2014**

**AANCHAL
CIVIL JUDGE-07(CENTRAL)
DELHI**