

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

% *Judgment Reserved On :August 23, 2016*
Judgment Delivered On : August 29, 2016

+ **RFA(OS) 2/2016**

KEMBIOTIC LABOURATORIES & ORSAppellants

Represented by: Mr.N.S.Dalal, Advocate with
Mr.Amand Mudgal and
Mr.D.P.Singh, Advocates

versus

RANA INDERJIT SINGHRespondent

Represented by: Mr.V.K.Teng, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. Rana Inderjit Singh, the respondent sued the appellant No.1 : Kembiotic Laboratory and its three partners : appellants No.2 to 4 as partners thereof on the plea that in the year 2001 appellants No.2 to 4 offered to him to collaborate with their business on 50% shareholding basis and desired him to advance to them loan in sum of ₹53.5 lacs and therefore in Hong Kong he gave US\$ 1,13,829.78 to appellant No.2, who promised that on returning to India he will complete the necessary formalities regarding collaboration and till then the money received would be treated as on loan with the partnership firm. As per him he received no further communication from the partners of the firm and he came to India in November, 2002 when, from the account of the partnership firm

maintained with State Bank of Bikaner & Jaipur Branch, Kirti Nagar and State Bank of Mysore Branch Punjabi Bagh, 11 cheques totaling ₹53.5 lacs were issued in his name, details whereof are as under:-

Sl.No.	Cheque No	Date	Amount	Drawn on
1.	055916	20.12.2002	3,50,000/-	State Bank of Bikaner and Jaipur, Kirti Nagar, New Delhi.
2.	035841	25.01.2003	5,00,000/-	State Bank of Mysore, Punjabi Bagh, New Delhi
3.	035842	25.02.2003	5,00,000/-	-Do-
4.	035843	25.04.2003	5,00,000/-	-Do-
5.	035844	25.05.2003	5,00,000/-	-Do-
6.	035845	15.07.2003	5,00,000/-	-Do-
7.	035846	25.08.2003	5,00,000/-	-Do-
8.	035847	25.09.2003	5,00,000/-	-Do-
9.	035848	25.11.2003	5,00,000/-	-Do-
10.	035849	25.10.2003	5,00,000/-	-Do-
11.	035850	25.01.2004	5,00,000/-	-Do-
Total			53,50,000/-	

2. As per Rana Inderjit Singh the cheques were obviously to return the sum of ₹53.5 lacs received in the name of respondent No.1, which under the circumstances had to be treated as a loan because the understanding that defendants No.2 to 4 would collaborate with him in the business run under the name and style of appellant No.1 with his share being 50% was not given effect to. The cheques when presented for encashment were returned dishonoured.

3. In the joint written statement filed by the appellants they denied any amount received by appellant No.2 from Rana Inderjit Singh but admitted that the cheques were issued. In para 6 of the preliminary objections it was denied that there was any discussion for Rana Inderjit Singh to do business with them on 50% shareholding basis. However, in paragraph 11 of the

preliminary submissions, explaining the circumstances under which the cheques were issued it was pleaded that Rana Inderjit Singh offered to invest ₹53.5 lacs in the business of the defendants and to give security for the amount the defendants would receive from Rana Inderjit Singh the cheques in question were issued. It was pleaded that Rana Inderjit Singh never invested ₹53.5 lacs.

4. From the pleadings of the parties it is apparent that whereas Rana Inderjit Singh pleaded having paid US\$ 1,13,829.78 to appellant No.2 and the cheques being issued when the agreement to collaborate did not go through and as per the original oral agreement the money had to be treated as a loan, the appellants pleaded that the cheques were issued as security for Rana Inderjit Singh to invest ₹53.5 lacs but he did not do so.

5. At the trial Rana Inderjit Singh failed to establish that he gave US\$ 1,13,829.78 to appellant No.2. At the same time the appellants failed to establish that the cheques were issued by way of security for an investment yet to be made by Rana Inderjit Singh. Returning a verdict in favour Rana Inderjit Singh the learned Single Judge has reasoned :-

“No doubt, plaintiff has not led any documentary evidence to show that the amount of ₹53.50 lacs was paid by the plaintiff to the defendant No.2 in Hong Kong, however, the fact that the amount of ₹53.50 lacs was paid by the plaintiff to the defendant No.2 becomes clear from two crucial aspects. The first crucial facts is that undoubtedly original chequest of the suit amount were given by the defendants to the plaintiff and the same were in possession of the plaintiff. Section 114 illustration (i) of the Indian Evidence Act, 1872 provides that when the original instrument comes back into the hands of the issuer of the same, then it is presumed that the obligation under the cheques would be discharged, however, once the original instruments being the cheques continue to remain with the obligee, viz the plaintiff and in whose favour the cheques were issued, a presumption arises that the amount was paid under the cheques by the plaintiff to the defendant No.2 for defendant No.1 and the

obligation is not discharged by payment of amount due under the cheques. This presumption has not been adequately rebutted on behalf of the defendants inasmuch as, there is no valid explanation how the original cheques continued to remain with the plaintiff as onus to prove this was on the defendants as per issue No.3 framed. In fact, this is the crucial second fact/reason for holding that the plaintiff has proved that the amount of ₹53.50 lacs was paid to the defendants, inasmuch as, cheques were given in the year 2002 but till the due dates of the cheques from December, 2002 to January, 2004, no letter or any notice was ever written by the defendants to the plaintiff that in this entire period and for this long period plaintiff is illegally holding on to the subject cheques and the subject cheques should be returned by the plaintiff to the defendants because as per the defendants no amount was paid by the plaintiff to the defendants and the cheques were thus allegedly given only as security. The very fact that no communication whatsoever was ever issued by the defendants to the plaintiff for return of the cheques shows that the cheques were given for a valuable consideration and which valuable consideration was the amount of ₹53.50 lacs. Clearly therefore defendants have failed to prove that the plaintiff retained the cheques with himself although allegedly as per the defendants plaintiff did not give any amount to the defendants under the subject cheques which were given as security. Defendants have failed to discharge the onus upon them of issue No.3 that the plaintiff fraudulently withheld the cheques and as is the case of the defendants as per the written statement.

In view of the above, issue Nos.2 and 3 are held in favour of the plaintiff and against the defendants and therefore defendants are held liable to pay the amount of ₹53.50 lacs.”

6. The argument of the appellants was simple. The respondent made a positive assertion of having paid US\$ 1,13,829.78 to appellant No.2 in Hong Kong and since as per him the consideration for the cheques was the payment made, upon not proving having made the payment the benefit of the presumption under Section 118 of the NI Act, 1881 would not be available to the respondent. Conceding that the appellants also failed to

discharge the burden on them that the cheques were issued as security for a payment yet to be received, the appellants argued that a negative fact could not be proved by the appellants.

7. No serious attempt was made to question the reasoning by the learned Single Judge, who has reasoned that the cheques were issued as per the appellants in October, 2002; and the dates of the month of December, 2002, January, February, April, May, July, August, September, October and November, 2003 and January, 2004 was a crucial aspect coupled with the fact that till the year 2004 no letter was written by the appellants to Rana Inderjit Singh that since he had not transmitted ₹53.5 lacs to appellant No.1 the cheques which were issued as security should be treated as cancelled.

8. Section 118 of the NI Act, 1881 raises a presumption that a cheque is drawn for consideration. The opening words of the Section : ‘Until the contrary is proved’ would obviously mean that the proof has to be that no consideration was paid, meaning thereby, until it is proved that there was no consideration the presumption under Section 118 operates. Thus, notwithstanding the rejection of the case put forward by the holder of a cheque, if the case put forward by the drawer also fails the question would arise as to what happens to the presumption.

9. Let us take a practical view of the matter. A plaintiff sues on a promissory note and pleads a cash consideration, which the plaintiff fails to prove. The defendant, having admitted execution of the promissory note pleads that it was without consideration and pleads that he gave the same to the plaintiff because the plaintiff insisted that first the defendant should give to him the promissory note and only then he would give the cash. Except for so stating the defence, we cannot think of any possible evidence which the defendant could lead to establish that there was no consideration.

Surely the defendant is not expected to conceive all kinds of considerations and then say that none were received. Therefore, the resolution of the practical difficulty would have to be found in the Indian Evidence Act, 1872 and in particular Sections 101 to 104 thereof.

10. Section 3 deals with proved, disproved and not proved. '*Burden of proof*' is used in two senses. Firstly, with reference to the matter arising out of the pleading, the burden casts; and secondly as to who has to first prove a particular fact. The former is known as '*legal burden*' and it never shifts. The latter is the '*evidentiary burden*' and it shifts from one side to the other as was explained by the Supreme Court in the decision reported as AIR 1961 SC 1316 Kundan Lal Vs. Custodian Evacuee Property. Legal burden finds its reflection in Section 101 of the Evidence Act and the evidentiary burden is reflected in Sections 102 of the Evidence Act. Section 103 amplifies Section 101 regarding proof of a fact and Section 104 deals with the person who has to give evidence.

11. Presumptions may be of fact or of law. Presumptions of fact are inferences logically drawn from one fact as to the existence of another fact. The expression '*may presume*' is defined as per Section 4 of the Evidence Act to mean that a Court may presume a fact with regards such facts as are proved unless and until it is disproved. Section 4 of the Evidence Act would therefore guide that if a fact is to be presumed, the presumption remains until the contrary is proved.

12. Now, what would be the evidence to conclude that '*the contrary is proved*' so that the presumption is rebutted.

13. Suffice it to state that the contrary would be proved by establishing facts on a preponderance of probabilities and no more.

14. Pertaining to a negotiable instrument the defendant therefore would have two options. The defendant can either show that consideration did not

exist or could show that under the particular circumstances of the case, the non-existence of the consideration is so probable that a prudent person ought to suppose that no consideration existed. In the judgment reported as AIR 1959 Rajasthan 1 Heera Chand Vs. Jeevraj the Full Bench of the Rajasthan High Court guided that in the assessment of a preponderance of probability the entire circumstances of a particular case had to be considered and the evidence of the parties could not be considered in separate water tight compartments. In Kundan Lal's case, explaining the methods by which a defendant could rebut the presumption raised by Section 118 of the NI Act, 1881, the Supreme Court held that the evidence required to shift the burden need not necessarily be direct evidence i.e. oral or documentary evidence; it may comprise circumstantial evidence or presumption of law or facts.

15. Now, in the instant case both parties have failed to establish the respective fact asserted. The respondent failed to prove having paid US\$ 1,13,829.78 to appellant No.2 and the appellants failed to prove that the cheques were issued as security for payment yet to be received. Therefore, the learned Single Judge has rightly held that circumstances enwombing the facts asserted would be relevant.

16. The appellants admit that the cheques were issued in October, 2002 but claimed that they were towards security for ₹53.5 lacs which the respondent had offered to invest with them. As per the appellants the respondent did not invest any money with them. The dates of the cheques which are 11 in number span over one year commencing from December, 2002 and ending on January, 2004. The appellants have to explain as to why they did not write any letter to the respondent informing that since he promised investment had not been made the cheques which were offered as security should be returned. This would be the normal conduct of any

person who had issued the cheques in the circumstances pleaded by the appellants. The appellants have failed to render any satisfactory explanation for not having so written to the respondent.

17. We conclude by holding that the respondent would be entitled to the benefit of the presumption in his favour raised under Section 118 of the NI Act, 1881 and since the presumption has not been rebutted, notwithstanding the respondent having failed to prove consideration being paid as claimed by him he would be entitled to the decree passed by the learned Single Judge which we find is with interest @ 9% per annum simple.

18. The appeal is dismissed without any order as to costs in the appeal.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

AUGUST 29, 2016

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