

Samir Jasuja Vs. M/S Assotech Realty Private Ltd. and ors.

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SooperKanoon Citation : sooperkanoon.com/1094835

Court : Delhi

Decided On : Oct-21-2013

Judge : Vipin Sanghi

Appellant : Samir Jasuja

Respondent : M/S Assotech Realty Private Ltd. and ors.

Advocate for Def. : Mr. Mittal, Mr. Chawla

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Order reserved on:

03. 10.2013 % + Order delivered on:

21. 10.2013 CS(OS) 2229/2009 SAMIR JASUJA Through: Plaintiff Mr. Siddharth Yadav and Mr. Wasim Ashraf, Advocates versus M/S ASSOTECH REALTY PRIVATE LTD & ORS..... Defendants Through: Mr. Puneet Mittal, Advocate for defendant No.1. Mr. Navin Chawla, Mr. Pranav Sarthi & Mr. Manik Godra, Advocates for defendant No.2. CORAM: HONBLE MR. JUSTICE VIPIN SANGHI

ORDER

VIPIN SANGHI, J.

I.A. No.16461/2011 (by defendant No.1 to seek leave to defend) I.A. No.8458/2012 (by defendant No.2 to seek leave to defend) 1. The plaintiff has filed the present suit under the summary procedure contained in Order 37 CPC. The case of the plaintiff is that he had joined defendant No.1-M/s Assotech Realty Private Limited, in the position of Marketing Advisor vide letter dated 23.09.2005. The monthly remuneration agreed as payable to the plaintiff was Rs.1,25,000/- per month (all inclusive), plus service tax plus 0.1% of all sales less applicable TDS. The plaintiff claims that the Directors of defendant No.1, including defendant No.2, were immensely satisfied with his performance and requested the plaintiff to take over the position of Private Equity and Joint Ventures Advisor in addition to his existing position of Marketing Advisor. The plaintiff claims that this position was offered on a monthly remuneration of Rs. 3 lacs (all inclusive) plus service tax as applicable plus incentives.

2. The plaintiff claims that a retainership agreement was signed between the plaintiff and defendant No.1 on 26.07.2006. As per the terms contained therein, the plaintiff was committed a retainership fees for a fixed period of one year. The plaintiff claims that the salient features of the Agreement were as follows: (i) The plaintiff was committed 1% of all private equity deals which were not introduced through him but conducted by defendant No.1 or through a special purposes vehicle (SPV) of defendant No.1; (ii) The plaintiff was committed a fixed fees of Rs. 5 lakh on Joint Ventures entered between defendant No.1 and a third party OR any land acquired by defendant No.1 other than land purchased by defendant No.1 or its SPV, through auctions; (iii) In case the plaintiff through his sole efforts brought any deal into defendant No.1, in that case a partnership or participation was offered to him in the form of shareholding, in the SPV so that he was assured a minimum profit of Rs. 5 crore. The plaintiffs share in the profit was to increase in accordance to the profits of the SPV and/or defendant no.1; (iv) Lastly, in case option (iii) herein above was exercised, the plaintiff was to be immediately made Marketing Head Or Project Head, for the new project for a further period of two (2) years.

3. The plaintiff claims that the said conditions were not entirely acceptable to him, inasmuch, as the profits committed were low and insufficient compared to the

prevailing market practice. The plaintiff claims that defendant No.2 committed to the plaintiff that he shall receive a sum in excess of Rs.1 crore towards incentives/benefits in the first two years itself of his taking over as Marketing or Project Head, in addition to the share in profit which was to be in excess of Rs. 5 crore. The plaintiff has made several other averments which may not be entirely relevant for the present purpose.

4. The plaintiff claims that through his sole efforts, the plaintiff procured a new project at Village Caterpuri, Gurgaon, for defendant No.1. He claims that he was instrumental in bringing about a collaboration agreement between the landowners and defendant No.1, and defendant No.1 would have earned profits in excess of Rs. 150 crores upon completion of the project.

5. The plaintiff details in paras 9 and 10 the transactions which took place with regard to the collaboration agreement stated to have been entered into on 23.09.2006 between the landowners and a wholly owned and controlled company of defendant No.1, namely, M/s Srjan Technologies Private Limited. The plaintiff claims that on account of his work, on 01.10.2006, the plaintiff was transferred to the post of Project Head of the new project at Gurgaon, which was to be effective from 01.04.2007. He claims that his monthly retainerhip was unilaterally reduced from Rs. 3 lacs to Rs. 2.50 lacs. The plaintiff goes on to claim that several differences arose between him, defendant No.1 and defendant No.2 and that he was not permitted to freely work in the interest of the new project at Gurgaon. He further submits that the relevant clearances have not been obtained from the government to proceed with the said project, and that the Agreement with the land owners expired on 23.03.2008. However, as per his information, he claims that the same stands extended. The plaintiff claims that his legitimate dues towards salary, marketing incentives and other dues have been denied by the defendants.

6. In para 17 of the plaint, the plaintiff has claimed that in order to settle the pending matters, meetings were held between the plaintiff and the defendant in October, 2007 in New Delhi. The plaintiff claims that he informed the defendant No.2 that an amount of Rs.1,15,10,984/- was payable by defendant No.1 in the form of a salary, fees/profits and incentives. He claims that the defendant No.2,

while expressing personal displeasure at the treatment meted out to the plaintiff, agreed to make good the loss suffered by the plaintiff. He claims that defendant No.2 personally felt responsible for misdeeds of defendant No.1, as he is the promoter and chairman of defendant No.1 company. The plaintiff claims that defendant No.2 agreed to clear, at the outset, a sum of Rs. 1 crore towards the plaintiffs dues and assured that the balance amount of approximately Rs.15 lacs will be cleared in his next visit to India. The plaintiff claims that defendant No.2- being the largest shareholder of defendant No.1, (in excess of 70%) was agreeable to make part payment of the unpaid dues to the plaintiff from his personal account. The plaintiff claims that in terms of the said understanding, defendant No.2 issued to the plaintiff a cheque dated 21.09.2007 payable at Smith Barney Citibank, New Jersey, U.S.A. for a sum of US\$250,000 equivalent to Rs.1 crore (exchange rate being calculated at US\$1 = Rs. 40/-), leaving a balance outstanding of Rs. 15 lacs.

7. The plaintiff gives the breakup of the amount that he claims as due and payable to him, as follows: (A)MARKETING AGREEMENT On Account Salary One month notice Marketing incentive up to July 2006 Marketing incentive up to April 2007 Amount Months Total (Rs.) Service Tax 1,37,700 15,300 Grand Total 12,62,700 1,40,300 1,25,000 1,25,000 9 1 11,25,000 1,25,000 20,80,000 Recd. 3,00,000 Balance - 17,80,000 2,17,872 19,97,872 2,50,000 30,600 2,80,600 2,50,000 (B) PRIVATE EQUITY AGREEMENT On Account Amount NH630,000 Constructions Srjan and 5,00,000 Mathurs SEZ Gurgaon 5,00,000 CS(OS) No.2229/2009 Months Total (Rs.) 6,30,000 Service Tax 77,112 Grand Total 7,07,112 5,00,000 61,200 5,61,200 5,00,000 61,200 (C) WRONGFUL TERMINATION On Amount Account Termination 2,50,000 Months 24 Total (Rs.) 60,00,000 Service Tax Grand Total 60,00,000 Outstanding salary of Rs.2,50,000 for May, 2007. (i) Total for A+B+C = Rs.1,15,10,984 (ii) Outstanding salary = Rs.2,50,000 Total Amount payable (i) + (ii) = Rs.1,17,60,984 (Rupees One crore seventeen lakh sixty thousand nine hundred & eighty four only) 8. The plaintiff claims that the aforesaid cheque was delivered by the wife of defendant No.2 in Delhi. The said cheque was presented by the plaintiff on 22.09.2007. In the meantime, defendant No.2 left back for USA on 12.10.2007. However, defendant No.2 stopped payment of the said cheque and the plaintiff received an intimation about the same from the bank

on 25.10.2007. The plaintiff claims that the liability of defendant No.1 towards the plaintiff was never denied by either defendant No.1, or defendant No.2 or any other Director of defendant No.1. Since the defendants have not paid the said amount, the plaintiff has preferred the present suit on the basis of the dishonoured cheque aforesaid, claiming an amount of Rs. 1 crore with interest.

9. Both the defendants are contesting the suit by filing the aforesaid applications to seek leave to defend the suit.

10. The first submission of Mr. Mittal, learned counsel for defendant No.1 is that the invoices raised by the plaintiff from time to time, which have been placed on record in original have all been paid. He submits that the plaintiff has not disclosed in the plaint the amounts received by him from defendant No.1 towards his remuneration for the services rendered by him. However, in the reply to the application of defendant No.1 to seek leave to defend, the plaintiff has admitted having received Rs.43,62,000/- towards his remuneration.

11. Mr. Mittal submits that the claim made by the plaintiff does not even fall within the ambit of Order 37 CPC. He has drawn my attention to the breakup of the amount claimed by the plaintiff which is extracted hereinabove. Defendant No.1 has disclosed in the affidavit filed with the application that-in terms of the Agreement dated 25.09.2005, the plaintiff has been paid a total amount of Rs. 13,87,700/- for the period up to 30.07.2006. With effect from 26.07.2006, the plaintiff was appointed as Private Equity and Joint Venture Advisor. Defendant No.1 has further disclosed that for the period after 26.07.2006, the plaintiff has been made payment of Rs. 29,74,360 up till 05.05.2007. The details of the payment made have also been disclosed in the affidavit. Defendant No.1 states that monthly remuneration of Rs. 3,00,000/- plus TDS was payable only upto September, 2006-when the Carterpuri agreement was signed (on 23.09.2006). There had been excess payment of Rs. 50,000/- plus TDS to the plaintiff. Defendant No.1 states that the retainership fee of the plaintiff was reduced from Rs. 3 lacs to Rs. 2.50 lacs in terms of the tripartite agreement dated 23.09.2006. The said agreement was initially for a period of 18 months i.e. till 23.03.2008, but the same was extended by 6 months up till 23.09.2008 vide addendum agreement

dated 20.02.2008.

12. Defendant No.1 further states that the services of the plaintiff were retained for developing Assotech Palam Vihar Project pursuant to the tripartite agreement, but due to failure on the part of the plaintiff to perform his duties with due care and diligence, huge loss was caused to the defendant to the tune of Rs. 75 lacs. The defendant states that the title of the properties offered for development vide tripartite agreement dated 23.09.2006 was found to be defective. The plaintiff had failed to take due care and carry out due diligence and, thus, the defendant company had to rescind the tripartite agreement and suffer a huge loss of Rs. 75 lacs. Defendant No.1 states that the plaintiff has not provided any service to defendant No.1 after 30.04.2007, and till that date his dues have been duly satisfied. Defendant No.1 submits that it has nothing to do with a cheque dated 21.09.2007 for US\$ 250,000 issued by defendant No.2 in his personal account and capacity. Defendant No.1 denies that the said cheque was issued in discharge of the liability of defendant No.1, since there was no outstanding liability owed by defendant No.1 to the plaintiff. Defendant No.1 states that, on the contrary, defendant No.1 is entitled to recover a sum of Rs. 75 lacs as costs and damages from the plaintiff.

13. Mr. Mittal submits that the claim is not maintainable under Order 37 CPC. The plaintiff has claimed Marketing Incentives up to July, 2006 of Rs.19,97,872/-. However, no details of the same have been furnished. Similarly, there are no details furnished regarding the Marketing Incentives claimed up to April, 2007 in the sum of Rs. 2,80,600/-. Mr. Mittal points out under the heading Private Equity Agreement, the plaintiff has made a claim for Rs.7,07,112/- on account of NH Constructions and Rs. 5,61,200/- on account of SEZ Gurgaon. However, there is no averment made in the plaint in relation to the said projects/accounts. So far as Srjan and Mathurs is concerned, Mr. Mittal has referred to Rescission of Agreements dated 12.08.2008 entered into between defendant No.1 and the owners of the land, whereby the Agreements dated 23.09.2006 and the addendum dated 20.02.2008 were cancelled. The Rescission Agreement record that there was a defect in the title of the owners in the revenue records, and that was the reason for cancellation of the agreement. He submits that it was the obligation of

the plaintiff to carry out due diligence and to ensure that the title of the land owners-with whom defendant No.1 entered into agreements, were clear in all respects which he had failed to do. Mr. Mittal, therefore, submits that no amount can be claimed by the plaintiff in respect of Srjan and Mathurs projects/accounts. Mr. Mittal, further submits that the third head of claim is on account of so called Wrongful Termination of the plaintiffs services. He submits that the plaintiff has claimed a sum of Rs. 60 lacs under this head. This claim, being a claim for damages, has to be established by leading evidence in trial, and cannot be claimed under the provisions of Order 37 CPC. The said provision can be invoked only in respect of a debt or liquidated demand of money as provided for there under.

14. Mr. Mittal submits that both the defendants being separate legal entities, and defendant No.2 having no personal debt to discharge in favour of the plaintiff, his alleged acknowledgment of debt, if any, on behalf of defendant No.1 is not binding on defendant No.1. He submits that defendant No.2 has, in fact, not acknowledged any debt on behalf of defendant No.1 allegedly owed to the plaintiff. Mr. Mittal submits that plaintiff has also initiated proceedings under Section 138 of the Negotiable Instruments Act in respect of the aforesaid dishonoured cheque. However, the defendant No.1 company has not been prosecuted in the said complaint and the said complaint has been initiated only against defendant No.2. Had the liability been that of defendant No.1, and had the cheque been issued by defendant No.2 on behalf of defendant No.1, the plaintiff would have proceeded against defendant No.1 as well in those proceedings. Mr. Mittal submits that the plaintiff claims in para 27 of the plaint to have sent a legal notice to defendant No.1 in March, 2008. However, no such document has been filed on record. Lastly, Mr. Mittal submits that a reading of the plaint itself does not disclose a plausible and inspiring case. On the other hand, defendant No.1 has disclosed that triable issues arise in the present case and, consequently, leave to defend should be granted to defendant No.1 unconditionally. Mr. Mittal has placed reliance on the judgment of the Supreme Court in *M/s Mechalec Engineers & Manufacturers v. M/s Basic Equipment Corporation*, AIR1977 Supreme Court 577, to submit that since the defendant has raised triable issues indicating that it has a fair or bona fide or reasonable defence, the plaintiff is not entitled to leave to sign judgment. He

submits that the defence set up by the defendant is a positively good defence and even if that were not the case, the defendant would be entitled to unconditional leave to defend. He also places reliance on the judgment of this Court in *M/s Associates India Financial Services (P) Ltd. Vs. M/s Atwal and Associates & Ors.*, decided on 09.08.2012 in CS(OS) No.2109/2002, wherein the plaintiff had not disclosed as to how the amount claimed in the suit arose from the written agreement relied upon by the plaintiff. The Court held that the object of Order 37 CPC is that, on the basis of the documents specified therein, the liability towards the plaintiff is admitted. Only when the liability-which is admitted in the dishonoured instrument, or in the written document containing a liquidated demand is payable to the plaintiff, suits can be filed under Order 37 CPC. Reliance is also placed on the decision in *V.S.Saini and Anr. Vs. D.C.M. Ltd.*, decided on 24.04.2012 in RFA No.195/2004, wherein the Court held;

11. Finally in my opinion, in the facts of the present case, it cannot be said that on mere breach of service bond the entire damages which are claimed under a service bond would automatically become payable and such suits had to be decreed. If I accept the argument of the respondent/plaintiff it would mean not only in an Order 37 CPC suit but in every suit where the service bond is relied upon, once there is found to be due execution of service bonds, the suit for recovery of money should/ought to be decreed without allowing the defendants/appellants in the suit to contest the case during the trial to show that the amount as claimed is not payable including for the reasons that actually the amounts which were spent on the employee were not as alleged by the employer, also that the damages which are said to be payable under service bonds are in the nature of penalty, inasmuch as, the employer may have suffered a lesser damage or probably no damage. I may note that Section 74 of the Contract Act provides for imposition of reasonable damages and the liquidated damages provided in the agreement are only the upper limit beyond which damages cannot be granted.

15. He also places reliance on *Hari Niwas Gupta Vs. Om Propmart (P) Ltd. & Ors.*, 187(2012) Delhi Law Times 285, wherein the Court had held that where the plaintiff had not made full disclosure of the facts in the plaint, the defence raised by the defendant called for allowing the application to seek leave to defend, as the

defendants had raised triable issues.

16. Mr. Chawla, learned counsel for the defendant No.2, apart from adopting the submissions made by Mr. Mittal submits that there was no debt or liquidated sum of money payable by either of the defendants to the plaintiff. Defendant No.2 is a businessman and a citizen of USA having business interest in USA and India. He is Chairman and shareholder of Defendant No.1. The scope of the plaintiff's appointment as a Marketing Advisor of defendant No.1 included the responsibility of verifying the titles and conducting other due diligence for the purchase of defendant No.1. In respect of one such project, as aforesaid, the plaintiff failed to conduct due diligence in respect of the documents of title of the land owners and to obtain the necessary permissions after defendant No.1 had invested substantial amounts of money. Consequently, defendant No.1 suffered substantial losses.

17. Defendant No.2 discloses that since he wanted to make investments in real estate in India, and the plaintiff was also advising the defendant No.1 company, he suggested to defendant No.2 that he would make investments on behalf of the defendant No.2. Being unaware of the lapses of the plaintiff vis-a-vis defendant No.1, the defendant No.2 issued the cheque in question dated 21.09.2007 for USD250,000. The said cheque was used to make investment in real estate on behalf of, and in the name of defendant No.2. However, the plaintiff tried to misappropriate the same by filing his own name in the blank cheque. After the issuance of the said cheque, defendant No.2 became aware of the lapses on the part of the plaintiff vis-a-vis defendant No.1, and so defendant No.2 informed the plaintiff that he was not interested to make any investment. The plaintiff was instructed not to deposit the cheque in the bank for clearance and to return the cheque. In spite of this, the cheque was deposited by the plaintiff.

18. Mr. Chawla submits that in response to para 14.16 of the application of defendant No.2, the plaintiff has required that defendant No.2 be put through strict test in proving the said assertion. In para 14.16, defendant No.2 has stated that, he is settled in USA and wanted to make investments in real estate in India and the plaintiff was also advising the said company Assotech (Defendant No.1) in real estate investments, the Plaintiff suggested to the defendant No.2 that he would

make the investments on behalf of the defendant No.2. This itself shows that the plaintiff also considers that the defence of defendant No.2 raises triable issues.

19. Mr. Chawla has drawn my attention to several e-mails exchanged between the parties, to show that the said cheque had been issued for the purpose of making investment for and on behalf of the defendant No.2, and not towards liquidation of the so-called dues of the plaintiff owed by defendant No.1. Mr. Chawla submits that on 23.05.2007, the plaintiff had been informed by the defendant No.1 company that defendant No.1 did not have any subsisting agreement with the plaintiff as on that date, and that the defendant No.1 did not wish to avail of any of plaintiff's services for the project in question. The plaintiff was requested not to make any commitments on behalf of the company and to return whatever files, or other e-mails the plaintiff had in his possession. Mr. Chawla submits that after this communication was issued, defendant No.2 sent an e-mail on 25.05.2007 to the plaintiff. In this e-mail defendant No.2 stated, we will honour the plaintiff's rights under the Agreement signed with defendant No.1.

20. On 28.08.2007, defendant No.2 sent an email to the plaintiff as a follow up to the conversation that the two had on that morning (defendant No.2's time). In this email, in relation to the Palam Vihar Project, defendant No.2 had stated that defendant No.1 did not have the wherewithal to invest Rs. 40 crores over to next three to four months. Defendant No.2 had stated that in the intermediate time frame, defendant No.2 could possibly come up with about Rs. 5 crore himself, so he would be interested in participating as an individual if the plaintiff could find other investors who are comfortable with the financial structure and undocumented payments upfront. The submission of Mr. Chawla is that the cheque of US\$250,000 was issued in the aforesaid background. On 23.09.2007, defendant No.2 first sent an email to the plaintiff in respect of the planned investment of Rs. 1 crore by defendant No.2 personally, inter alia, stating;

1. I am not comfortable with risking more than One Cr.

2. I could not get comfortable about paying 4 instalments of 2.5 CR before the work is done i.e. we have a license to build.

21. After the issuance of the said email, defendant No.2 had issued a second email on 23.09.2007 which, inter alia, reads as follows:

Hi Samir, In reference to the e-mail I sent you few minutes ago, I just wanted to explicitly mention that please do not deposit the check to the bank because we really dont have a deal, either you can mail it back to me or just destroy it and send me an email to that effect. I will let my bank know about it.

22. Mr. Chawla submits that the plaintiff sent an email on 11.10.2007 to defendant No.2 stating that he had deposited the cheque before he got the mail of defendant No.2. In this email, the plaintiff, inter alia, stated as follows:

The cheque was deposited before I got your mail and after you had told me many times that I could have the money it would be adjusted against the my long pending dues from Assotech. It is unfortunate that you have to turn around, once again, by asking me to return the cheque to you. Kindly ensure that the cheque gets cleared. (emphasis supplied) 23. To the aforesaid email, defendant No.2 sent a response on the same day, wherein defendant No.2 stated as follows:

Hi Samir, You are telling me about the check after 3 weeks, this is not right. I find this deplorable. I want the money back if you already have it. I will call my bank right now to stop any payments. Any issues with Assotech are not my personal issues. Naresh (emphasis supplied) 24. Mr. Chawla submits that defendant No.2, without any delay, had contemporaneously refuted the plaintiffs claim that the money under the said cheque could be adjusted against the plaintiffs so-called long pending dues from defendant No.1. It is also pointed out that in his aforesaid communication, the plaintiff did not claim that the cheque had been issued towards satisfaction or partial satisfaction of the plaintiffs claim owed by defendant No.1. The claim of plaintiff was that, it could be adjusted against the alleged claims of the plaintiffs. Therefore, there is no truth in the plaintiffs case that the cheque - when initially issued, was meant to satisfy a part of the plaintiffs claim against defendant No.1. Mr. Chawla submits that a further email was sent by defendant No.2 to the plaintiff on 12.10.2007 which reads as follows:

Hi Samir, I just got home because of weather problem in NYC the connections were delayed and flight cancelled. It is past 5 AM here. By putting the check in, you have potentially jeopardized repatriation issues since the money in this case was not routed thru NRE acct. It is still salvageable for me per my bank. It can be treated as mistake. I expect full cooperation that the money transfer will be treated as a mistake. If I dont accomplish that in next 24-48 hrs., I wont have any recourse but to go all out and exercise whatever in my judgement will get me there. We are at a stage that all this can be put behind. This was totally between two individuals and I will consider an error. Whatever your gripes may be against Assotech, put it in writing, I will try to get those resolved after talking to Neeraj and if you want to take legal action against Assotech I am Ok with it. Let us not confuse the issues. You know very well, I dont get into day to day affairs of Assotech. I am going to try to sleep but talk to Zubin he can coordinate with my bank. He is not in a position to be a go between you and Neeraj, that only I can do. So far I have not talked with anyone but it will be difficult to stay this way after next 24 hours because just to retain the repatriability I will have to take whatever actions, deemed to fulfil that goal. Let us not end our relationship this way. Naresh.

(emphasis supplied) 25. Mr. Chawla submits that from a reading of the aforesaid email, it is clear that defendant No.2 emphatically claimed that the plaintiff had misused the cheque issued to him. Reference is also made to the email communication of the plaintiff to defendant No.2 sent on 14.10.2007. In this connection, the plaintiff, inter alia, stated; The cheque was issued by you to me and given by Bina on Monday Sept 18th. I did not proceed to deposit the same for next 4 days. We then spoke on Friday evening when you explained to me in detail the problems you were facing from Neeraj with the operations of Assotech and your discomfort about Neeraj insisting to handle the Gurgaon project, exclusively. Therefore, you suggested that now as I had already the cheque, hence I should proceed to utilise the same towards recovery of my legitimate dues vis a vis Assotech. You, on your part, being the Chairman and largest shareholder of Assotech would have adjusted the account. It was in light of this that the cheque was deposited on Saturday 22nd Sept. (emphasis supplied) 26. Mr. Chawla submits that the aforesaid communication of the plaintiff completely belies the plaintiffs claim that the cheque, when initially issued, was given for the purposes of

settling any outstanding dues of the plaintiff owed by defendant No.1. From the aforesaid extract, it shows that the cheque was allegedly issued on Monday 18th September, 2007, and, according to the plaintiff, the alleged suggestion came from defendant No.2 later on - that as the plaintiff already had the cheque, he could proceed to utilize the same towards recovery of his legitimate dues vis a vis defendant No.1. Mr. Chawla submits that defendant No.2 responded to the aforesaid email on the same day in the following manner:

Samir, I am not sure if we were even in the same room if this is how you recollect stuff, I am wondering if with all the distortions and inaccuracies, what your intentions are?. I have nothing else to say because I dont want to get into any e-mail duels. We will keep on going talking past each other. Let me end this by saying whatever you have in writing from Assotech or me, we will honor. Naresh.

(emphasis supplied) 27. Defendant No.2, therefore, contemporaneously disputed the plaintiffs claim, as extracted above, by claiming that the same were distortions and inaccuracies and even doubted the plaintiffs intentions.

28. Mr. Chawla submits that all the aforesaid correspondences leave no manner of doubt that it is the plaintiff who, dishonestly, misappropriated the blank cheque issued by defendant No.2 for the purpose of making investments on the advise of the plaintiff, by depositing the same in his own account unauthorizedly, purporting to adjust his alleged dues, allegedly owed by defendant No.1.

29. Mr. Chawla submits that the aforesaid correspondence not only raises triable issues but puts in serious doubt the claim of the plaintiff in the present suit. Mr. Chawla submits that the plaintiff in his reply to the application of defendant No.2 for grant of leave to defend the suit, in paragraph 14.20 has referred to an e-mail dated 14.10.2007, however, the said e-mail has not been filed by the plaintiff on record. CS(OS) No.2229/2009 examination whether any such e-mail, as alleged by the plaintiff, was issued and if so, its effect. Mr. Chawla submits that the plaintiff is seeking to draw a presumption regarding the existence of liability on the premise that defendant No.2 had issued a cheque for US\$ 2,50,000. He submits that the said presumption is rebuttable and the defendant No.2 has disclosed facts sufficient, which if proved during trial, would rebut the said presumption. Mr.

Chawla submits that in the present case defendant No.2 has disclosed facts sufficient to raise serious triable issues and the present is not a fit case for rejection of the present application of defendant No.2 to seek leave to defend the present suit.

30. In support of his submission, Mr. Chawla places reliance on International Computers Consultants Vs. Home Computer Services Pvt. Ltd., 68 (1997) DLT407(DB), where the plaintiff had filed the suit under Order XXXVII CPC founded upon a dishonoured cheque for Rs.27,000/The Trial Court did not consider the defence set up by the defendant - to the effect that the cheque had been delivered for supply of computers, which the plaintiff had failed to supply and, therefore, no amount was payable to the plaintiff. The Division Bench while setting aside the order refusing leave to defend to the defendant, and granting the leave to defendant to defend the suit, observed as follows:

(16) The learned Trial Court has gone into detailed merits of this plea, and relying on Section 118 of the Negotiable Instruments Act and also Section 114(c) of the Indian Evidence Act has come to the conclusion that the cheque was duly signed and executed by the defendant and there is a presumption that it was for consideration. During the arguments, learned Counsel for the plaintiff has also relied upon the presumptions arising under Sections 138 and 139 of the Negotiable Instruments Act. There is no dispute so far as the presumptions arising under these provisions are concerned. However, the presumption that arises is rebuttable and not irrebuttable. The defendant has raised a defense which if is accepted by the Court, would certainly rebut such presumption. (emphasis supplied).

31. On the other hand, the submission of learned counsel for the petitioner is that the defendants have not met the averments of the plaintiff contained in the summons for judgment. He submits that it is the summons for judgment which is to be heard by the Court and, therefore, the defendants were obliged to deal with the averments made in the summons for judgment rather than set up their own defence in their respective applications. In this regard reference is made to Order XXXVII Rule 3(4), (5) & (6) CPC. Learned counsel submits that upon service of

summons for judgment, the defendant has to apply on such summons for leave to defend the suit. (See Order XXXVII Rule 3(5)). He submits that it is the summons for judgment which is heard, as is evident from Order XXXVII Rule 3 (6).

32. Learned counsel for the plaintiff submits that the engagement of the plaintiff as Consultant/ Advisor on retainership basis w.e.f. 01.07.2006 was in addition to his engagement as Marketing Advisor with defendant No.1. He submits that the plaintiff continued to serve as a Marketing Advisor until May 2007, and while serving as Marketing Advisor, he was additionally engaged as Consultant/Advisor on retainership basis w.e.f. July 2006. In this regard, he places reliance on e-mail communication of defendant No.1 which states that w.e.f. 15.04.2007 the plaintiff will take care of Assotech Palam Vihar project and, therefore, he will not be heading the marketing or any other related portfolio in Assotech Reality Pvt. Ltd. Consequently, according to the plaintiff, he was entitled to two sets of remuneration - one as Marketing Advisor @ Rs.1.25 lakhs per month plus service tax plus 0.1% of sales less TDS, and as Consultant/ Advisor on retainership basis w.e.f. 01.08.2006. Mr. Yadav submits that the plaintiff continued as a Marketing Advisor with defendant No.1 up to May 2007. Consequently, the plaintiff served defendant No.1 as Marketing Advisor for 20 months, whereas he has been paid salary for only 10 months. Mr. Yadav submits that defendant No.2 was aware of the differences between the plaintiff and the Director of defendant No.1, and this is evident from the e-mail dated 25.05.2007 - yet the cheque for US\$ 2,50,000 was issued to the plaintiff. This was towards the unpaid dues of the plaintiff.

33. Learned counsel for the petitioner submits that the defence set up by defendant No.2 is sham, illusionary and moonshine, as it is not stated in which part of India the investment in real estate had to be made by the plaintiff on behalf of the defendant No.2; what was the size of the property to be purchased by the plaintiff for and on behalf of defendant No.2; whether the property was to be residential, or commercial, or farm land; what was the role of the plaintiff in such transaction, as the plaintiff did not have a power of attorney from defendant No.2. The plaintiff also disputes that the cheque was blank when given. Mr. Yadav submits that under the R.B.I. guidelines, no property could be purchased in India by a foreign national or a person of Indian origin, in foreign currency. He submits

that the conduct of defendant No.2 - in issuing the said cheque when, according to him, the plaintiff had committed serious lapses in relation to the intended purchase of land for Srjan, is not reconcilable.

34. Mr. Yadav has sought to place reliance on the following decisions in support of his submission: i) Hindustan Apparel Industries v. Fair Deal Corporation, New Delhi, AIR2000 Guj. 261; ii) M.D. Overseas Ltd. v. Uma Shankar Kamal Narain &Ors., 2006 (86) DRJ769 iii) Vipin Gupta v. Prem Singh, 134 (2006) DLT402(DB); iv) V.K. Enterprises & Anr. v. Shiva Steels, (2010) 9 SCC256 v) Structural Waterproofing Company Pvt. Ltd. v. Continental Foundation Joint Venture & Ors., AIR2003 Del 356; vi) 35. Sanjay Kohli v. Vikas Srivastava & Ors., 2012 (130) DRJ458 I have heard learned counsel for the parties and considered the submissions and the documents relied upon by them. I am of the view that the defendants have not only been able to raise a good defence, but they have also been able to cast a serious doubt on the plaintiffs claim in the suit. The plaintiff cannot maintain the suit under Order 37 CPC to claim damages, as a claim for damages can be sustained only upon the actual sufferance of damages being proved in a trial. Damages are alleged to have been caused on account of the alleged wrongful termination of the plaintiffs services by defendant No.1. It would, therefore, be for the plaintiff to prove, firstly, that the termination was wrongful and, secondly, the sufferance of damages-which are quantified at Rs.60 Lakhs under the heading C in the aforesaid tabulation. It cannot be presumed that the plaintiff suffered the damages, even if the plaintiff were to prove that the termination is wrongful. The quantum of damages, if any, would also have to be established in a trial.

36. Pertinently, the plaintiff claims several amounts under the heading Marketing Agreement. Salary is claimed for nine months, apart from one month notice period. This is on the basis that the plaintiff was discharging dual responsibilities and was entitled to two sets of payment - one under the Marketing Agreement, and the other under the Private Equity Agreement as a Consultant/ Retainer. The plaintiff does not disclose as to what steps he took when defendant No.1 stopped making payment of salary under the Marketing Agreement dated 25.09.2005 after he took over as Consultant/ Retainer under the Private Equity Agreement dated

26.07.2006. Not a shred of paper has been placed on record, and no averment has been made in the plaint to show that, in his contemporaneous understanding, he was entitled to two sets of payment and that the defendant had withheld the payment under the marketing agreement dated 25.07.2006. Apparently, no demand was ever raised contemporaneously by the plaintiff - claiming any amount as due and payable under the Marketing Agreement from the time he took over as a Consultant/ Retainer under the Private Equity Agreement dated 26.07.2006. So far as the claim for salary for the notice period is concerned, it needs examination whether a person - who gets appointed in another capacity with higher remuneration in the same organisation, could claim salary for the notice period on the ground that his services in respect of the earlier appointment stood discontinued without adequate notice. Once again, I may observe that the plaintiff does not appear to have raised any demand for one month's salary as a Marketing Advisor on account of his alleged termination in that capacity at the time of his appointment under the Private Equity Agreement.

37. There is absolutely no material placed on record, and the averments are also lacking as to on what account the plaintiff claims marketing incentives up to April 2007 of Rs.2,50,000/- The claim of the plaintiff under the heading Marketing Agreement, therefore, appears to be wholly unsubstantiated at this stage. There is nothing to suggest that this is an admitted or even an undeniable liability of defendant no.1 towards the plaintiff.

38. Same is the position with regard to the claim made under the heading Private Equity Agreement. So far as the claim for Rs.7,07,112/- on account of NH Constructions project is concerned, there is not an iota of averment made in the plaint to disclose as to when the so-called project was undertaken, and what role the plaintiff had to play in respect thereof. Similar is the position with regard to the SEZ Gurgaon project whereunder the plaintiff claims Rs.5,63,200/-. How these amounts have been calculated is not disclosed.

39. So far as the Srejan and Mathurs project is concerned, the defendants have disclosed that on account of the plaintiff's lapses the said agreement had to be rescinded, as the title of the owners was found to be defective and, in the process,

defendant No.1 company suffered a loss of Rs.75 Lakhs. The submission of learned counsel for the plaintiff is that it was not the obligation of the plaintiff to carry out due diligence in respect of the title of the land owners. In my view, what is relevant for the defendants purpose is the fact that the said project did not take off at all, as the title of the land owners was in dispute and the agreement had to be cancelled. The original document, whereby the agreement with the land owners was cancelled has been placed on record by the defendants. The rescission of the agreement is dated 12.08.2008. This rescission of agreement is entered into between the land owner Mr. Awadhesh Bihari Mathur , Srejan Technologies Pvt. Ltd. and M/s Assotech Realty Pvt. Ltd. It records that the parties had entered into an agreement on 23.09.2006 and addendum dated 20.02.2008. It further records that on account of a defect in the title of the owner in the revenue records, the parties have not been able to proceed with the agreement and agreed to rescind the same. A sum of Rs.20 Lakhs was refunded by the land owner Mr. Awadhesh Bihari Mathur out of Rs.55 Lakhs. The rescission of agreement, inter alia, records as follows:

All the parties hereby acknowledge that the agreement in question was brought about through Mr Samir Jasuja who was instrumental in bringing the parties together. Mr Samir Jasuja was required to scrutinise the Title documents of the Ownership and facilitate the execution of the project. Since the project could not be executed due to defective title and agreement has to be annulled, Assotech Realty reserves its right to initiate Legal Proceedings in this regard against Mr Samir Jasuja as per the Law.

40. Even if one were to proceed on the basis that the defendant No.1 inserted aforesaid clause on account of the fact that the services of the plaintiff had been terminated by them, what is of significance is that a third party, namely the land owner has acknowledge the fact that there was a defect of title in the land, the agreement whereof, had been arrived at with the endeavour of the plaintiff. There was no need for a third party, i.e. the land owner to paint the plaintiff black while entering into the rescission of agreement. This certainly raises a triable issue as to whether, or not, it was the plaintiffs obligation to carry out due diligence, and if so, whether he failed in doing so. In any event, since the agreement was rescinded, it

needs examination whether the plaintiff can still claim any amount despite such rescinded agreement. The plaintiff has not disclosed as to on what basis he has arrived at the figure of Rs.5,61,200/-.

41. The cornerstone of the plaintiffs case is that defendant No.2 had issued cheque for US\$ 2,50,000 which, according to the plaintiff, translates to Rs.1 Crore at an exchange rate of Rs.40 per US Dollar.

42. The plaintiff is seeking to raise a presumption with regard to existence of a liability and its acknowledgement by the defendants on account of issuance of the said cheque by defendant No.2. Since the employment of the plaintiff was with defendant No.1, and not defendant No.2, the plaintiff has claimed that the cheque had been issued by defendant No.2 - being the Chairman and majority stakeholder of defendant No.1, on account of defendant No.1.

43. The presumption - that the cheque was issued for valuable consideration, which is attached to issuance of a cheque is a rebuttable presumption as held in *International Computer Consultants* (supra). It needs examination whether defendant No.2 has disclosed facts sufficient to conclude that - if the matter proceeds to trial and the defendant establishes its defence, the said presumption would stand rebutted.

44. In my view, the correspondence which undertook between the plaintiff and defendant No.2, as also the plaintiffs own averments in the suit leave no manner of doubt that defendant No.2 has been able to raise a serious issue with regard to the purpose for which the cheque for US\$ 2,50,000 was issued by him and given to the plaintiff. The consideration for which the said cheque was issued, does not appear to be the settlement of the alleged outstanding dues of the plaintiff, allegedly owed by defendant no.1, but appears to be the understanding between the plaintiff and defendant no.2 - that the plaintiff shall use the money to acquire real estate for defendant no.2 personally. The correspondence between the plaintiff and defendant No.2 from 23.05.2007 shows that; (i) Firstly, defendant No.2 did not undertake to honour the commitments of defendant No.1 personally in his e-mail dated 25.05.2007. He says that we will honour the plaintiffs rights under the agreements signed with defendant No.1. He has not stated that he will

personally honour any such commitments or rights of the plaintiff. He also does not acknowledge that there are any dues or outstandings of the plaintiff owed by defendant no.1. It a generalised statement made by the Chairman of defendant No.1. The use of the expression we, instead of I, clearly shows that defendant No.2 did not intend to take upon himself the liability of defendant No.1. The use of the expression we shows that he spoke for defendant no.1 - the company. (ii) The e-mail dated 28.08.2007 of defendant No.2 shows that the same is in respect of the Palam Vihar project. This e-mail was preceded by a conversation held between plaintiff and defendant No.2 on the same morning. From the e-mail, it appears, that in relation to the Palam Vihar project defendant No.1 was expected to invest Rs.40 Crores over the next 3-4 months. Defendant No.2 had a doubt whether defendant No.1 had the wherewithal to do so. Therefore, he offered that, in the intermediate time frame, he could, possibly, come up with Rs.5 Crores himself, i.e. on his own account, and he made it clear that he would be participating as an individual, and not for and on behalf of defendant No.1, if the plaintiff could find other investors for the said project. This e-mail of defendant No.2 shows that the plaintiff and defendant no.2 were communicating with each other in respect of an investment to be made by defendant No.2 in a reality project. (iii) On 23.09.2007, defendant No.2 sent an e-mail in respect of the investment of Rs.1 Cores to be made by him personally. He states that he is not comofortable with risking more than Rs.1 Crore. It remains to be examined as to why defendant No.2 would send an email to the plaintiff about not being comfortable about risking more than One Cr.

, if the cheque of US\$ 2,50,000 had been given to settle the outstanding dues allegedly owed by defendant No.1 - as claimed by the plaintiff. The second paragraph of the e-mail dated 23.09.2007 clearly shows that defendant No.2 had sent the e-mail regarding the investment of Rs.1 Crore by defendant No.2 in a reality project. Pertinently, there was no contemporaneous response from the plaintiff to the first e-mail of 23.09.2007 - to controvert the position taken by defendant No.2. (iv) On the same day, sometime later, defendant no.2 sent another email to the plaintiff, making refrence to the mails sent few minutes ago. Defendant no.2 expressly instructed the plaintiff that please do not deposit the cheque in the bank because we really do not have a deal. Defendant no.2 asked

the plaintiff to either mail back the cheque to him or destroy and send a mail to that effect to defendant no.2. The stand of defendant no.2 in this email contemporaneously does not support the plaintiffs claim that the cheque had been issued by defendant no.2 to settle his alleged outstanding dues, due from defendant no.1. Defendant no.2 referred to a deal, which did not fructify and, therefore, asked the plaintiff not to present the cheque. The plaintiff did not respond to even this e-mail of defendant No.2 dated 23.09.2007 till as late as on 11.10.2007. (v) The stand taken by the plaintiff in his e-mail of 11.10.2007 is at complete variance with the stand taken by him in the suit. The plaintiff claims in paragraphs 17 to 19 of the plaint that the cheque had been specifically issued by defendant No.2 to settle the plaintiffs claim partially which were allegedly due & payable by defendant No.1. However, in his e-mail dated 11.10.2007 the plaintiff claims that defendant No.2 had told me many times that I could have the money and it would be adjusted against my long pending dues from Assotech. This clearly shows that - even according to the plaintiff, when the cheque was issued, it was not given with the intention of settling the claim of the plaintiff towards defendant No.1 but, subsequently, defendant No.2 had told me many times that the plaintiff could encash the cheque to adjust the plaintiffs claims against defendant No.1. Pertinently, there is not an iota of an averment in the plaint as to when defendant no.2 told the plaintiff that he could have the money, and that the same would be adjusted against his alleged long pending dues from defendant no.1. It is not disclosed as to in what mode and manner, when, and where he was so told by defendant no.2. Obviously, these are all matters of trial. It shall be for the plaintiff to establish that he was permitted by defendant no.2 to use the cheque in question to settle his own alleged outstanding dues. (vi) The aforesaid position is reiterated by the plaintiff in his e-mail dated 14 .10.2007 wherein the plaintiff stated that defendant No.2 had suggested that now as I have already the cheque, hence I should proceed to utilise the same towards recovery of my legitimate dues vis--vis Assotech. While the plaintiff claims in his two e-mails of 11.10.2007 and 14.10.2007 that defendant No.2 had suggested that the cheque already issued may be utilised to liquidate the plaintiffs alleged outstanding dues from defendant No.1, there is no specific date, time, or place when and where defendant No.2 made such a suggestion to the plaintiff. (vii) The promptitude with which defendant

No.2 responded to the plaintiffs e-mails and the tenor of his communications brings out a striking contrast, when one reads the e-mails sent by the plaintiff in response to those of defendant No.2. Defendant No.2 in his e-mails was prompt, emphatic and categorical in his assertions, while the plaintiff has taken his own sweet time to respond to the e-mails of defendant No.2, and is vague and non-specific.

45. From the aforesaid discussion, a serious issue arises as to what was the purpose of issuance of the cheque for US\$ 2,50,000 by defendant No.2 to the plaintiff. It cannot be accepted at this stage that the same was issued to settle the outstanding dues of the plaintiff, allegedly owned by defendant No.1. On the contrary, from the correspondence relied upon by defendant No.2, it appears that the same was issued with the purpose of making an investment in reality. The correspondence shows that, even according to the plaintiff, subsequent instructions from defendant no.2 were that it may be used to settle the outstanding dues of the plaintiff. In this light, it is clear that the presumption sought to be raised by the plaintiff against the defendants - on the basis of the fact that the aforesaid cheque had been issued by defendant No.2, may get washed away if the defendants are permitted to defend the suit.

46. It is pertinent to note that while making his submissions, learned counsel for the plaintiff has completely shied away from dealing with the submission of Mr. Chawla based on a reading of the aforesaid email communication. No submission has been made by him to meet the case set up by defendant no.2 in this regard.

47. The submission of learned counsel for the plaintiff that under the law defendant No.2 could not have invested monies to purchase real estate in India, is neither here nor there. The issue is not whether, legally speaking, defendant No.2 could have made such an investment. The issue is whether he had issued the cheque of US\$ 2,50,000 for that purpose, or for the purpose claimed by the plaintiff.

48. I also find no merit in the plaintiffs submission that the defendants have not dealt with the averments made by the plaintiff in the summons for judgment, and have filed their application to seek leave to defend without dealing with the said

averments. Order 37 Rule 3 (5) states that the defendant may, at any time within ten days from service of summons for judgment, by affidavit or otherwise disclose such fact as may be deemed sufficient to entitle him to defend the suit. The expression apply on such summons for leave to defend such suit only connotes that it is after the summons for judgment are served on the defendant, that he has to so apply to seek leave to defend the suit. The hearing of the summons for judgment where the defendant has applied for leave to defend, is the same thing as the hearing of the application of the defendant to seek leave to defend the suit. The defendant is not expected to meet the averments made in the summons for judgment, para by para, in his application to seek leave to defend. It is for the defendant to disclose such fact as may be deemed sufficient to entitle him to defend the suit, and the defendant is not bound down by the facts which the plaintiff has stated in the summons for judgment to verify his claim. The purpose of the summons for judgment is to verify the cause of action in the plaint and the amount claimed by the plaintiff on solemn affirmation. This is necessary to bind the plaintiff in respect of the averments made by him in the plaint. The summons for judgment, therefore, is virtually a re-production of the plaint in the summary suit. If the defendants were to be required to traverse and meet each and every statement made by the plaintiff in the summons for judgment, it would virtually turn an application seeking leave to defend into a written statement. However, that is not the purpose, as the defendant has only to disclose such facts as may be deemed sufficient to entitle him to defend the suit.

49. Reliance placed on Hindustan Apparel Industries (supra) is misplaced. The issue before the court was whether the payment by cheque, which is dishonoured amounts to acknowledgement of debt and liability. In this case the issue arose in the context of Section 18 of the Limitation Act. It does not proceed to say that the mere issuance of a cheque leads to an irrebuttable presumption against the drawer that the cheque had been issued for consideration.

50. The decision in M.V. Overseas Limited (supra) is also of no avail. In that case the Court found that the defence set up by the defendant was contradictory. In the present case the position is to the contrary. It is the plaintiffs claim made in the suit which appears to be contradicted by his own two e-mails dated 11.10.2007 and

14.10.2007, as aforesaid.

51. The decision in Vipin Gupta (supra) is of no avail to the plaintiff. This case turned on its own facts. The Court found that the defence of the two cheques in question being lost, and being misused by the plaintiff, was sham in the light of the other documents accepted by the defendant.

52. The decision in V.K. Enterprises (supra) does not advance the plaintiffs case. In this case the defence set up by the defendant was that there was interpolation in the Cheque. The Court disbelieved this assertion of the defendant, since the ledger accounts relating to the dues demonstrated that the dues had been settled between the parties. There was merely an oral denial by the defendant, which was not supported by any corroborated evidence from the side of the defendant. The position is absolutely and materially different in the present case.

53. In Structural Waterproofing Company (supra), though the Court found that there was no dispute regarding the supplies made by the plaintiff to the defendant, and the defendant was found not to have made out a case for grant of leave to defend the suit, the same was granted since there was no written document strictly admitting the liability of defendant No.2. In the present case, there is no admission of any liability by either of the defendants. Therefore, this case has no bearing on the facts of the present case.

54. Sanjay Kohli (supra) is a decision relied upon by the plaintiff to buttress his claim for interest. Since this Court is not inclined to decree the suit at this stage, and the Court is inclined to grant unconditional leave to defend the suit to both the defendants, the occasion to consider this decision at this stage does not arise.

55. In my view, the suit itself was not maintainable under the provisions of Order 37 CPC as the claim in the suit is, inter alia, founded on a claim for damages for the alleged wrongful termination of the plaintiffs contract. The plaintiff suppressed the relevant email communications exchanged with defendant No.2 in respect of the cheque in question-which is the foundation of the suit. Had the said correspondences been disclosed by the plaintiff, it is unlikely that the Court would have proceeded to treat the present suit as one capable of being decided by

following the procedure prescribed under Order 37 CPC. Even otherwise, during the course of arguments, the court repeatedly put questions to learned counsel for the plaintiff in respect of the defence set up by the two defendants, but got no satisfactory reply. Despite it being made clear in court that the court was inclined to grant leave to defend to both the defendants unconditionally, learned counsel for the plaintiff continued to argue the matter on a couple of dates and consumed several hours of judicial time. In my view, it is high time that the parties should be made accountable for the unnecessary waste of time of the court, and so as to instil a sense of responsibility and accountability in the parties and their respective counsels, in my view, imposition of costs on the concerned party would not only serve as a deterrent, but also appropriately penalize the party wasting the valuable time of the court which is, as it is, burdened with a large number of pending cases. I propose to, therefore, impose token costs on the plaintiff.

56. In view of the aforesaid discussion, both the applications are allowed with Costs quantified at Rs.10,000/- each to be paid by the plaintiff to the Delhi Legal Services Authority within four weeks. (VIPIN SANGHI) JUDGE OCTOBER21 2013
SI/BSR/sr

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