



R.F.A. No. 12 of 2017  
Shri Karma Loday Bhutia v. Shri Bir Bahadur Rai @ B.B. Rai

**THE HIGH COURT OF SIKKIM: GANGTOK**  
**(Civil Appellate Jurisdiction)**

**30<sup>th</sup> September 2019**

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**SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**  
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**R.F.A. No. 12 of 2017**

Shri Karma Loday Bhutia,  
S/o Shri Tseten Bhutia,  
R/o Arithang,  
P.O. & P.S. Gangtok, East Sikkim.

.... Appellant/Defendant

**versus**

Shri Bir Bahadur Rai @ B. B. Rai,  
S/o Shri Buddha Lal Rai,  
R/o Linding Busty,  
P.O. & P.S. Gangtok, East Sikkim.

.... Respondent/ Plaintiff

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**Appeal under Order XLI, Rules 1 and 2 of the Code of Civil  
Procedure, 1908.**

**Appearance:**

Mr. A. K. Upadhyaya, Senior Advocate with Mr. Sonam  
Rinchen Lepcha, Advocate for the Appellant.

Mr. N. Rai, Senior Advocate with Mr. Sunil Baraily,  
Advocate for the Respondent.

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**J U D G M E N T**  
**(30.09.2019)**

**Bhaskar Raj Pradhan, J**

1. This Appeal under Order XL1, Rules 1 and 2 of the Code of Civil Procedure, 1908 is against the judgment and decree both dated 29.08.2017 passed by the Learned District Judge, East



Sikkim at Gangtok in Money Suit No.11 of 2015 decreeing the suit in favour of Bir Bahadur Rai (The Plaintiff).

### **The Complaint**

2. Bir Bahadur Rai's case was that he and Karma Loday Bhutia (Defendant) were both contractors known to each other. Karma Loday Bhutia was entrusted with the contract to construct the Panchayat Ghar at Rakdong-Tintek. As Karma Loday Bhutia was unable to pursue the contract he executed an irrevocable power of attorney (exhibit-2) in favour of Bir Bahadur Rai. Thereafter, Bir Bahadur Rai commenced the construction of the Panchayat Ghar investing his own money and completed it. When he came to learn that Karma Loday Bhutia had received payments from the running bills he issued legal notice dated 30.03.2012 (exhibit-3) to Zilla Panchayat to stop payment. On 27.02.2013 the Department sanctioned the final bill slip of Rs. 7,89,000/- (exhibit-4) and handed over a cheque for the said amount to Karma Loday Bhutia in the presence of Bir Bahadur Rai. Thereafter, Karma Loday Bhutia issued two cheques i.e. State Bank of Sikkim's cheque dated 06.03.2013 for Rs.7,89,000/- (exhibit-5) and HDFC Bank's cheque dated 12.03.2013 for Rs.7,90,000/- (exhibit-6) to Bir Bahadur Rai. Both the cheques were dishonoured vide return memos dated 19.03.2013 (exhibit-7) and 15.03.2013 (exhibit-8).



Although, Bir Bahadur Rai informed Karma Loday Bhutia about it he did not pay the amount due. He could not therefore make the labour payments for which the labourers complained to the Panchayat (exhibit-9). The President of the Panchayat issued letter dated 17.04.2013 (exhibit-10) to Bir Bahadur Rai informing him about it. Bir Bahadur Rai waited till March 2015 for payment and issued legal notice dated 23.03.2015 (exhibit-11) to Karma Loday Bhutia. Thereafter, he filed the suit for recovery of Rs.15,79,000/-.

### **The Written Statement**

3. Karma Loday Bhutia disputed the execution of the irrevocable power of attorney. He denied he was not capable to pursue the contract work. He asserted that he had executed the contract work and completed it on 30.06.2011. Karma Loday Bhutia explained that the irrevocable power of attorney was executed by him as Bir Bahadur Rai had assured him that he had an enlistment of a Grade-B contractor but when he failed to produce it he refused to get it registered and cancelled it. Karma Loday Bhutia specifically denied that Bir Bahadur Rai had executed the work. He asserted that it was him who had executed the work after taking loans from friends, relatives and financial institutions. He denied issuing the two cheques in favour of Bir Bahadur Rai and asserted that he had procured the cheques deceitfully. He also stated that in fact the



Panchayat had called him due to the complaint by the labourers after which he settled the dispute with them and drew a 'milapatra'.

### **The Issues Framed**

4. The learned District Judge framed four issues on 12.05.2016. They were:

- “1. Whether the Plaintiff was appointed by the Defendant as his Attorney to execute the contract work for construction of Panchayat Ghar at Rakdong Tintek?*
- 2. Whether the Defendant had executed the contract work and had issued to the Plaintiff two cheques bearing No.066152 dated 06.03.2013 of Rs.7,89,000/- (SBS) and No.421328 dated 12.03.2013 of Rs.7,90,000/-?*
- 3. Whether the present suit is barred by limitation?*
- 4. Whether the Plaintiff is entitled to the relief claimed?”*

### **The Trial**

5. During the trial Bir Bahadur Rai examined himself, Tulsi Pradhan (P.W.2) and Binod Rai (P.W.3) both his co-villagers. Karma Loday Bhutia examined himself, Om Prakash Gurung-Junior Engineer (D.W.2) and B. B. Gurung-Panchayat Member (D.W.3).

### **The Impugned Judgment and Decree**

6. Based on the oral and documentary evidence led by the parties during the trial the learned District Judge passed the



impugned judgment dated 29.08.2017 decreeing the suit in favour of Bir Bahadur Rai for a sum of Rs.15,79,000/- along with interest @ 8% per annum from the date of filing of the suit till the realization of the decreed amount. Bir Bahadur Rai was further granted a decree for a sum of Rs.31,580/- payable by Karma Loday Bhutia being the court fees deposited by Bir Bahadur Rai.

7. The learned District Judge came to the conclusion that the power of attorney was validly executed by Karma Loday Bhutia in favour of Bir Bahadur Rai and he had not cancelled it; after completion of the contract work Karma Loday Bhutia had issued the two cheques to Bir Bahadur Rai of Rs.7,89,000/- and Rs.7,90,000/- which bears his signatures; suit was not barred by limitation and that Bir Bahadur Rai was entitled to the reliefs claimed.

### **The Rival Contentions**

8. Aggrieved thereby Karma Loday Bhutia has preferred the present appeal. Mr. A. K. Upadhyaya, learned Senior Advocate for Karma Loday Bhutia submitted that the Plaintiff has to prove its own case and cannot take advantage of the weakness of the Defendant. He relied upon the judgment of the Supreme Court in re: **State of M.P. v. Nomi Singh**<sup>1</sup> for the said proposition. The Supreme Court had held that it is settled principle of law

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<sup>1</sup> (2015) 14 SCC 450



that in respect of relief claimed by a Plaintiff, he has to stand on his own legs by proving his case. It was submitted that therefore, Bir Bahadur Rai was required to prove that the irrevocable power of attorney was valid and enforceable in law and that he had himself executed the contract work and completed the same using his own resources. Bir Bahadur Rai however, failed to do so. On the contrary Karma Loday Bhutia has been able to cogently prove that it was he who executed the work. It was submitted that Bir Bahadur Rai had admitted that the cheques were not directly handed over to him by Karma Loday Bhutia and he could not identify the handwritings appearing thereon. Karma Loday Bhutia on the other hand had deposed that he had not issued the cheques in favour of Bir Bahadur Rai for executing the work as his attorney.

**9.** Mr. N. Rai, learned Senior Advocate for Karma Loday Bhutia on the other hand supported the judgment of the learned District Judge. It was submitted that unlike a criminal case the Civil Court may come to the conclusion on the basis of preponderance of probabilities. The fact that Karma Loday Bhutia had in fact executed the irrevocable power of attorney and issued the two cheques under his signature in favour of Bir Bahadur Rai coupled with the oral and documentary evidence led by him leads to the conclusion on the basis of preponderance of probabilities that the two cheques totaling to



Rs.15,79,000/- were issued by Karma Loday Bhutia as the work was in fact executed by Bir Bahadur Rai.

### **The Consideration**

**10.** Before examining the issues it would be relevant to consider the concept of proving a civil case on the basis of preponderance of probability. Section 3 of the Indian Evidence Act, 1872 provides that a fact is said to be “*proved*” when, if considering the matters before it, the Court either believes it to exist, or considers the existence so probable that a prudent man might, under the circumstances of a particular case, to act upon the supposition that it exist. The conformational effect of evidence in civil and criminal cases is not always the same. Preponderance of probability is sufficient for a decision in a civil case. Due regard must be given to the “*burden of proof*”. The standard of proof in a civil case is lesser than a criminal prosecution. Therefore, a higher degree of probability providing assurance to the Plaintiff’s case set up would shift the “*onus of proof*” upon the Defendant. It is equally exigent to discern the essential difference between “*burden of proof*” and “*onus of proof*”. The “*burden of proof*” lies upon the person who has to prove the fact. This “*burden of proof*” never shifts. “*Onus of proof*” on the other hand shifts. In the present suit for recovery of money Bir Bahadur Rai was required to create a high degree of probability to discharge his “*burden of proof*” so as to shift



the “*onus of proof*” upon Karma Loday Bhutia. If Bir Bahadur Rai succeeded to do so Karma Loday Bhutia would be required to discharge his “*onus of proof*” and in the absence thereof the “*burden of proof*” lying on Bir Bahadur Rai would be held to be discharged.

*Issue No.3*

**11.** Issue No.3 is taken up first. Issue No.3 was whether the suit was barred by limitation? The learned District Judge has held that since the suit was for realization of money the period of limitation was three years and as the two cheques are dated 06.03.2013 and 12.03.2013 the suit filed was within the period of limitation. The said cheques were dishonored on 19.03.2013 and 15.03.2013 and thus the suit filed on 16.07.2015 was within the period of limitation.

*Issue No.1*

**12.** Issue No.1 is taken up next. Bir Bahadur Rai produced and exhibited the original irrevocable power of attorney (exhibit-2) which had been signed by the executant i.e. Karma Loday Bhutia and the recipient i.e. Bir Bahadur Rai. It was signed in the presence of two witnesses i.e. Tulsi Pradhan (P.W.2) and Binod Rai (P.W.3). Both the witnesses deposed that they had signed it in favour of Bir Bahadur Rai. It has been executed under the seal and signature of an Oath Commissioner who was however, not examined. The irrevocable power of attorney





recited that Karma Loday Bhutia was entrusted with contractual work for the construction of the Panchayat Ghar at Rakdong-Tintek for the sum of Rs.29 lakhs but being unable to fully fulfill the work and effectively deal with it he has decided to appoint Bir Bahadur Rai as his attorney *“to take over the said construction work and to do all acts and deeds in relation thereto”*. It also acknowledged that Bir Bahadur Rai had immensely contributed in respect of obtaining the contract work and had interest therein. Bir Bahadur Rai was cross-examined. Karma Loday Bhutia put to him that the irrevocable power of attorney was invalid which was denied. To the suggestion that a contract awarded to the contractor cannot be sublet Bir Bahadur Rai said he was not aware. Karma Loday Bhutia did not put any further question on the irrevocable power of attorney although in the written statement he had denied the execution thereof. Instead, Karma Loday Bhutia during cross-examination admitted his signatures on the irrevocable power of attorney. He also admitted that it was with regard to construction of the Panchayat Ghar and that he had appointed Bir Bahadur Rai as his lawful attorney through the irrevocable power of attorney to take charge of the construction of the Panchayat Ghar at Rakdong-Tintek. He admitted that he had not filed any document to show that he had cancelled the irrevocable power of attorney. Karma Loday Bhutia admitted



that as per the irrevocable power of attorney he had sublet the contract work to Bir Bahadur Rai and that it was not submitted to the concerned Department for approval. He admitted that the concerned department was not aware of the irrevocable power of attorney having been executed by him in favour of Bir Bahadur Rai.

**13.** Consequently, the learned District Judge's finding on issue No.1 is affirmed and it is held that Karma Loday Bhutia had in fact executed the irrevocable power of attorney.

*Whether after being appointed as attorney by Karma Loday Bhutia did Bir Bahadur Rai commence the construction of the Panchayat Ghar at Rakdong-Tintek investing his own money and completed the same?*

**14.** Bir Bahadur Rai had pleaded that after being appointed as an attorney of Karma Loday Bhutia he had commenced the construction work, invested his own money and completed it. Karma Loday Bhutia on the other hand denied the assertion. The learned District Judge however, did not frame the necessary issue which ought to have been framed on the rival pleadings. The issue was: Whether after being appointed as attorney by Karma Loday Bhutia did Bir Bahadur Rai commence the construction of the Panchayat Ghar at Rakdong-Tintek investing his own money and completed the same? This issue was an issue of fact to be established by cogent evidence. Instead the learned District Judge framed issue No.2 as quoted



above. As both the parties were fully aware about their pleadings and led necessary evidence this Court shall examine first if Bir Bahadur Rai has been able to establish that he had invested his money and completed the contract work as claimed.

**15.** Beside stating that he had done so, during cross-examination Bir Bahadur Rai admitted that he did not make any claim for payments for executing the work; the Department had not issue any letter of authority to him to execute the work; He did not make the final payment to the laborers as claimed in exhibit-9 and exhibit-10; apart from the power of attorney he did not have any other document pertaining to the agreement between him and Karma Loday Bhutia concerning the contract work; he did not file any document or bill showing that he had made payment or the accounts of expenditure pertaining to the said work; he did not hand over any such document or bill to the concerned department as well and he had not deposited any bills, voucher etc. showing the payment made by him in the said contract work.

**16.** Bir Bahadur Rai's other two witnesses did not throw much light on his involvement in the contract work after the execution of the irrevocable power of attorney. A feeble attempt was made by Binod Rai though. He stated that after a few weeks of signing of the agreement Bir Bahadur Rai asked him to assist him in



the construction work and he was his employee on a salary basis. Binod Rai however, stated that he had stayed there for 3-4 days only. He also stated that thereafter also he was sent by Bir Bahadur Rai 2-3 times to the construction site with cash for labour payment which he handed over to B.B. Gurung. During cross-examination however, he admitted that he was a close friend of Bir Bahadur Rai; he did not have any document to establish that he was engaged by Bir Bahadur Rai; Bir Bahadur Rai did not pay him any amount for looking after his work, not even his expenses. Bir Bahadur Rai did not get a confirmation from B. B. Gurung about Bimal Rai handing over money to him for labour payment. Bimal Rai's evidence cannot be construed as satisfactory evidence to prove that after his appointment as Karma Loday Bhutia's attorney, Bir Bahadur Rai had invested his own money, commenced and completed the contract work.

**17.** Along with the irrevocable power of attorney and the two cheques, Bir Bahadur Rai also produced three other documents. First was a complaint dated 13.04.2013 (Exhibit-9) by labourers about non-payment of their dues by him as the sub-contractor. The second was a communication dated 17.04.2013 (Exhibit-10) by B. B. Gurung, President, Rakdong-Tintek GPU to Bir Bahadur Rai about it bringing to his notice the receipt of the complaint against him for non-payment and requiring him to be present on 21.04.2013 to discuss the



matter. Exhibit-9 and exhibit-10 were exhibited by Bir Bahadur Rai. Both were attested copies. It was Bir Bahadur Rai's own case that due to the failure of Karma Loday Bhutia to honor the cheques issued in his favour totaling to Rs.15,79,000/- he could not make the labour payments. Bir Bahadur Rai also produced final bill slip (exhibit-4) dated 27.02.2013 with his signature which does reflect that he had signed it when Karma Loday Bhutia had received the final payment. From the said documents all that could be inferred is that Bir Bahadur Rai was probably involved in the contract work as a sub-contractor but to what extent is not clear.

**18.** Bir Bahadur Rai did not examine any of the labourers he claimed to have hired for the construction of the Panchayat Ghar. There is not a single independent person who even claimed to have seen him at the contract site leave alone the site engineers. Bir Bahadur Rai has neither produced oral nor documentary evidence to prove that he had in fact invested his own money for the contract work. An investment of 15,79,000/- is a huge amount and it is unbelievable that Bir Bahadur Rai did not have a single piece of evidence to show the investment although even in the legal notice dated 30.03.2012 (exhibit-3) issued by him to the Department and legal notice dated 23.03.2015 (exhibit-11) issued to Karma Loday Bhutia he had asserted that he had in fact constructed the Panchayat Ghar



from his investments and expenses. It was incumbent upon Bir Bahadur Rai to prove the facts he asserted. Bir Bahadur Rai has failed to prove that after being appointed as attorney he commenced the contract work investing his own money and has completed the same.

**19.** Framing of issue is crucial to arrive at a correct conclusion. An erroneous issue may misdirect the Court. Similarly, failure to fix the burden of proof upon the party who asserts the fact may also lead the Court to determine and appreciate facts incorrectly.

**20.** The Learned District Judge did not examine whether Bir Bahadur Rai had been able to prove that after being appointed as an attorney by Karma Loday Bhutia he had in fact invested his own money, commenced and completed the contract work as no such issue was framed.

*Issue No.2*

**21.** This Court shall now examine issue no.2 framed by the learned District Judge. Issue No.2 actually incorporates two issues.

**22.** The first part related to the assertion made by Karma Loday Bhutia that he had executed the contract work. The Learned District Judge was examining a suit filed by Bir Bahadur Rai against Karma Loday Bhutia. Whereas Bir Bahadur Rai had asserted that it was he who had done the



contract work, Karma Loday Bhutia had denied this assertion and asserted that it was in fact he who had done so. The examination of the evidence led by Karma Loday Bhutia must be appreciated keeping this fact in mind.

**23.** The second part relates to the assertion of Bir Bahadur Rai that the two cheques were issued by Karma Loday Bhutia. Therefore, the burden of proof was on Bir Bahadur Rai to prove the fact he asserted.

**24.** It would be apposite to refer to Section 101 and 102 of the Indian Evidence Act, 1872 at this juncture. Section 101 provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Section 102 provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

**25.** The learned District Judge examined the evidence and in view of the communication dated 13.04.2013 (exhibit-9) issued by six labourers to the President of the Rakdong-Tintek Unit complaining about the failure of the sub-contractor to make payments to them came to the conclusion that Bir Bahadur Rai was involved in the construction work. The learned District



Judge also held that the two cheques had in fact been issued by Karma Loday Bhutia in favour of Bir Bahadur Rai and that it had not been deceitfully obtained. Consequently, the learned District Judge held that Karma Loday Bhutia was liable to make the payment to Bir Bahadur Rai without considering what the consideration was and if he had been able to prove it.

*Did Karma Loday Bhutia execute the contract work?*

**26.** Although it was Karma Loday Bhutia's case that he had executed the work after having taken loan from financial institutions, friends and relatives for completion of the work he did not produce any document to substantiate that he had taken loan from relatives. He admitted so in his cross-examination. He produced only a legal notice dated 16.03.2011 (exhibit-H) issued by a lawyer for the State Bank of Sikkim to prove the fact that he had taken loan and advances from financial institutions. The letter reflects that Karma Loday Bhutia had an overdraft account showing debit balance of Rs.4,61,082/- as on 28.02.2011. Karma Loday Bhutia admitted in his cross-examination that exhibit-H does not disclose that he had taken loan from State Bank of Sikkim for completion of the contract work. He also produced a photo copy of an undertaking dated 14.07.2013 (document-Y) executed by him stating that he would repay the amount of loan taken from B.B. Gurung. B.B. Gurung stated that the undertaking was in fact





executed by Karma Loday Bhutia to repay the loan taken from him for the purpose of the construction. During cross-examination he admitted that document-Y was only a photo copy and denied the suggestion that it was not executed by Karma Loday Bhutia. The said document was not exhibited being photocopies. Karma Loday Bhutia had not been able to sufficiently prove that he had in fact taken loans and advances to complete the contract work.

**27.** Karma Loday Bhutia produced attested copy of the work order (exhibit-A) issued in his favour. Om Prakash Gurung (D.W.-2), the Junior Engineer for Karma Loday Bhutia proved the work order.

**28.** The work order (exhibit-A) issued in favour of Karma Loday Bhutia is dated 11.02.2009. It provided the following details:-

“Completion Time:	9 (Nine) months
Total Sanctioned Amount:	Rs.29,00,000/-
Electrification:	Rs. 1,76,025/-
Contingency:	Rs. 1,01,630/-
Amount Civil Work put to Tender:	Rs.26,22,345/-
Tender Rate ATPAR:	Rs.26,22,345/-
Work Order Value:	<u>Rs.26,22,345/-”</u>

**29.** To prove his assertion Karma Loday Bhutia produced attested copies of Government approvals for procurement of 128 and 300 bags of cement dated 16.03.2009 (exhibit-A) and 11.08.2009 (exhibit-B colly); attested copy of cash memo dated



12.08.2009 (exhibit-B colly) for purchase of 127 bags of cement; attested copy of cash memo dated 16.10.2009 for Rs.32,400/- for purchase of timber (exhibit-C); original receipt of Rs.34,750/- for purchase of timber (exhibit-D); original receipt of Rs.1,50,000/- (exhibit-L) for construction of trust and GCI sheet roof of the Panchayat Ghar and original receipt of Rs.1,05,040/- for the RCC work for the Panchayat Ghar (exhibit-M).

**30.** None of the aforesaid documents were proved by their makers. Karma Loday Bhutia however, exhibited all of them as recipient of the said receipts without any protest from Bir Bahadur Rai. All these documents relate to the construction of the Panchayat Ghar and apparently involve Karma Loday Bhutia as the contractor executing the work.

**31.** Karma Loday Bhutia produced exhibit-K i.e. original notebook with handwritten title "*Construction of Panchayat Ghar at Rakdong Tintek, E/Sikkim*". The said notebook contains attendance of seven labourers for the month of January 2011 till May 2011. None of the labourers were examined. Karma Loday Bhutia exhibited the notebook as labour payment register maintained by him. He deposed that labourers were hired by him for the construction of Panchayat Ghar and a labour payment register was maintained by him which was submitted to the labour department from time to time and



returned after verification. He did not identify the handwriting and signature appearing in exhibit-K. Bir Bahadur Rai did not make an issue of it. During cross-examination Karma Loday Bhutia admitted that the contract work commenced from February 2009 and was completed in June 2011. He also admitted that he had filed labour payment register of January 2011 to May 2011 and not for the year 2009 and 2010. He denied the suggestion that he had not done so as the payment was made by Bir Bahadur Rai.

**32.** Karma Loday Bhutia produced original show cause notice dated 18.02.2010 (exhibit-E) issued by the Zilla Panchayat requiring him to show cause for the delay in construction; attested copies of recommendations for extension of time till 31.07.2010 (exhibit-F) and 30.06.2011 (exhibit-G); attested copy of completion report dated 14.11.2011 issued by the Audit-cum-Vigilance Committee (exhibit-I colly), completion certificate from the Zilla Panchayat reflecting completion date as 30.06.2011 (exhibit-I colly); handing over certificate issued by the Zilla Panchayat reflecting handing over the Panchayat Ghar on 30.06.2011 (exhibit-J) and attested copy of labour clearance certificate dated 14.02.2012 issued by the Department of Labour giving its no objection for release of final bill in favour of Karma Loday Bhutia (exhibit-N).



**33.** None of the aforesaid documents were proved by their makers. They were however exhibited by Karma Loday Bhutia as the recipient of the documents without any protest. All these documents also relate to the construction of the Panchayat Ghar and involve Karma Loday Bhutia as the contractor.

**34.** Om Prakash Gurung (D.W.2) Junior Engineer deposed that in the year 2009 Karma Loday Bhutia was awarded the contract through the work order dated 11.02.2009. After the award of work he being the Junior Engineer under the Zilla Panchayat had shown the construction site and explained the details of the work to Karma Loday Bhutia. He was the immediate site engineer of the construction work. Karma Loday Bhutia started executing the work. Om Prakash Gurung (D.W.2) used to visit the work site from time to time and verify the progress of the work. After 50% of the progress of the work Om Prakash Gurung (D.W.2) processed the first running bill of the construction work of Karma Loday Bhutia. After processing the first running bill Om Prakash Gurung (D.W.2) was transferred to the Department of Animal Husbandry. Om Prakash Gurung (D.W.2) asserted that Bir Bahadur Rai was not connected to the work in question which was awarded to Karma Loday Bhutia and who completed the work to the satisfaction of the Department and the bills were paid to him. In his cross-examination Om Prakash Gurung (D.W.2) admitted that he did



not know that Bir Bahadur Rai had been appointed attorney by Karma Loday Bhutia to execute the construction of the Panchayat Ghar. He admitted that all Government contract works were governed by Sikkim Public Works Manual and subletting of Government contract work is not allowed under it. He admitted that if someone is found subletting the contract work awarded to him the Department/Government has power to cancel the contract work and to award it to another contractor. He admitted that the Zilla Panchayat office was also not aware that Karma Loday Bhutia had in fact sublet the contract work to Bir Bahadur Rai. He admitted that since he was transferred to the Department of Animal Husbandry he could not say who completed the contract work.

**35.** B. B. Gurung (D.W.3) came to the witness box as witness for Karma Loday Bhutia. He deposed that he was earlier the Panchayat and later the President of the same Panchayat Unit at the relevant time. According to him in the year 2009 Karma Loday Bhutia was awarded a contract for construction of Panchayat Ghar. Karma Loday Bhutia started executing the work and he used to supervise the work as well. Om Prakash Gurung, Junior Engineer used to visit and inspect the construction site. Karma Loday Bhutia hired number of labourers for the construction of the Panchayat Ghar and all the payments were made by him. He had issued letter dated



03.07.2013 (exhibit-O) to Karma Loday Bhutia to be present on 14.07.2013 before him for decision against the complaint lodged by the labourers against him. Karma Loday Bhutia appeared before him and the matter was amicably settled as Karma Loday Bhutia made the necessary payments to the labourers and a “*milapatra*” dated 14.07.2013 (exhibit-P) was executed acknowledging the receipt of the payments from him. During his cross-examination B.B. Gurung admitted that exhibit-9 is a complaint made by the labourers against the sub-contractor Bir Bahadur Rai regarding the default in making payment even after 18 months of completion of work. He also admitted that exhibit-10 was a letter sent to him by Bir Bahadur Rai. However, he denied that the labourers mentioned in exhibit-9 were engaged by Bir Bahadur Rai. In fact he volunteered to say that the labourers were engaged by Karma Loday Bhutia. B. B. Gurung admitted that the labourers reported the matter before him against Bir Bahadur Rai for non-payment of their money and that he appeared on 21.04.2013 and asked for two more days to make the labour payment.

**36.** The evidence led by Karma Loday Bhutia proves that he was awarded the contract. It also proves that he started the execution of the contract work. It probablises that he hired labourers and paid them; purchased some materials and paid



for them. It proves that when he could not complete the work on time extension was sought for and granted to him. It also proves that the completion certificates were issued to him once the work was completed. Bir Bahadur Rai had to stand on his own feet to establish the case he sought to make out. Karma Loday has been able to make it probable that it was him who had executed the work.

*The issuance of the two cheques*

**37.** Bir Bahadur Rai had stated in his plaint that after receiving the final bill of the contract work Karma Loday Bhutia had issued the two cheques in his favour which were dishonoured.

**38.** Bir Bahadur Rai produced the two original cheques i.e. exhibit-5 and exhibit-6). Exhibit-5 was signed by Karma Loday Bhutia as the drawer of the cheque in the front and two signatures at the back. Bir Bahadur Rai had also signed at the back at two places. Bir Bahadur Rai was the drawee of the said cheque. Exhibit-6 was also signed by Karma Loday Bhutia as the drawer of the cheque in the front and one signature at the back. Bir Bahadur Rai had signed at two places at the back. Bir Bahadur Rai was the drawee of this cheque too.

**39.** Karma Loday Bhutia admitted during his cross-examination that signatures on the two cheques were in fact his. He also admitted that he had neither lodged any First



Information Report before any Police Station alleging that Bir Bahadur Rai had deceitfully obtained the said two cheques nor directed the banks to stop payment.

**40.** Bir Bahadur Rai produced and exhibited the original cheque return memos of the State Bank of Sikkim (exhibit-7) and HDFC bank (exhibit-8) returning both the cheques one on account of account being closed and the other for insufficient funds.

**41.** Bir Bahadur Rai was cross-examined on this aspect. He admitted that the two cheques were not directly handed over to him by Karma Loday Bhutia. Bir Bahadur Rai could not identify the handwriting appearing on the said two cheques. He denied the suggestion that the cheques were procured from a third person and they were meant for the said person and not for him. He also denied he had obtained it deceitfully for illegal gain. He admitted that he had not filed any private complaint under the Negotiable Instruments Act, 1881 for the dishonour of the cheques. He admitted that he had not lodged any complaint before the Sadar Police Station for the same. It is therefore, quite certain that the two cheques had in fact been issued by Karma Loday Bhutia in favour of Bir Bahadur Rai. It is also evident that the two cheques were presented for payment by Bir Bahadur Rai but were dishonoured.





*Presumption as to negotiable instruments under Section 118(a) and the relevance of the debt being “legally enforceable debt or other liability” under Section 138 of the Negotiable Instruments Act, 1881*

**42.** Bir Bahadur Rai did not lead any evidence at all to prove the fact that he had commenced the construction work, investing his own money and completed it. He sought to rely upon the irrevocable power to attorney and the issuance of the cheques by Karma Loday Bhutia to prove the fact that it was him who had executed the work. The learned District Judge has held that Karma Loday Bhutia after completion of the contract work issued the two cheques. The learned District Judge also held that the two cheques had been issued by Karma Loday Bhutia by affixing his signature thereon in favour of Bir Bahadur Rai and therefore he was liable to make the payment to him. The fact that Karma Loday Bhutia had in fact issued the two cheques which were dishonored is sufficiently proved. The fact that Bir Bahadur Rai had commenced the construction work and completed it investing his own money has not been proved. However, it must be examined whether the mere fact that Bir Bahadur Rai has been able to prove the execution of the irrevocable power of attorney and the issuance of the two cheques which were dishonored would lead to a presumption that Bir Bahadur Rai executed the said work. For this purpose it is important to examine Section 118 (a) and Section 138 of the Negotiable Instruments Act, 1881 (the said Act).



**43.** Section 118 of the said Act provides for presumptions as to negotiable instruments. Section 118 (a) of the said Act provides:-

***“118. Presumptions as to negotiable instruments.-Until the contrary is proved, the following presumptions shall be made:-***

***(a) of consideration-****that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;*

xxxxxx

*Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.”*

**44.** Section 138 of the said Act reads as under:-

***“138. Dishonour of cheque for insufficiency, etc., of funds in the account.*** *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:*

*Provided that nothing contained in this section shall apply unless—*



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- (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*
- (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
- (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*

*Explanation.—For the purposes of this section, “debt or other liability” means a legally enforceable debt or other liability.”*

**45.** The cheques having been issued by Karma Loday Bhutia in favour of Bir Bahadur Rai a presumption is raised under Section 118 (a) of the said Act that the same were for consideration. In a case of a negotiable instrument the presumption under Section 118 of the said Act has to be made until the contrary is proved. Karma Loday Bhutia could show either by direct evidence or circumstantial evidence that the negotiable instrument was not supported by consideration.

**46.** In re: ***Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal***<sup>2</sup> the Supreme Court while hearing a civil appeal arising out of a suit under Order XXXVII of the Code of Civil Procedure, 1908 filed by a holder of a promissory note, the

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<sup>2</sup> (1999) 3 SCC 35



defendant agreeing to pay the amount specified therein to the Plaintiff, held as under:

*“12. Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under Section 118(a) in his favour. The court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the plaintiff. To disprove the presumption, the defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of*



*the case, shall act upon the plea that it did not exist. We find ourselves in the close proximity of the view expressed by the Full Benches of the Rajasthan High Court and the Andhra Pradesh High Court in this regard.”*

**47.** Has Karma Loday Bhutia been able to rebut the presumption under Section 118 (a) of the said Act by showing a preponderance of probabilities in his favour and against Bir Bahadur Rai is the vexed question which this Court must answer.

**48.** The only conclusion one could arrive at on a meaningful and purposeful reading of the plaint is that it was Bir Bahadur Rai's case that the consideration for the issuance of the cheque was his investment in the contract work. As held by the Supreme Court in re: **Bharat Barrel & Drum MFG.Co. (Supra)** it was open to Karma Loday Bhutia to prove that the case set up by Bir Bahadur Rai was not true and rebut the presumption under Section 118 (a) of the Act by showing a preponderance of probabilities in his favour and against Bir Bahadur Rai. The words “*until the contrary is proved*” in the said section does not mean that Karma Loday Bhutia must necessarily show that the cheques were not supported by any form of consideration but he could ask the Court to consider the non-existence of consideration so probable that a prudent man ought, under the circumstances of the case to act upon the supposition that the consideration did not exist.



**49.** Although Bir Bahadur Rai claimed to have invested his own money not an iota of evidence was led by him to show that he had invested even a penny. Karma Loday Bhutia on the other hand led substantial evidence not only to show that he had executed the work himself but he had also invested his money. Appreciating the evidence led by Karma Loday Bhutia to this limited extent Karma Loday Bhutia has been able to rebut the presumption against him under Section 118(a) of the said Act on preponderance of probabilities.

**50.** The question which still remains unanswered is why did Karma Loday Bhutia issue the cheques in favour of Bir Bahadur Rai for such a huge amount of Rs.15,79,000/-. The evidence led by the parties does not permit this Court to come to a definite conclusion.

**51.** The irrevocable power of attorney acknowledged that Bir Bahadur Rai has immensely contributed in respect of obtaining the said work and had interest therein. Bir Bahadur Rai during the cross-examination of Karma Loday Bhutia suggested to him that as per irrevocable power of attorney he had sublet the contract work to him. It was Bir Bahadur Rai's version that after the execution of the irrevocable power of attorney he had invested his own money, commenced and completed the contract work. Om Prakash Gurung (D.W.2) the only site Engineer and a Government Servant examined by Karma Loday



Bhutia during the trial admitted that as per the Sikkim Public Works Manual subletting is not permissible and if someone is found subletting the contract work awarded to him the Department has power to cancel the said contract work on the suggestion made by Bir Bahadur Rai himself. It is therefore, probable that the cheques were issued by Karma Loday Bhutia for subletting as suggested. Section 138 of the Negotiable Instruments Act, 1881 provides that it would be an offence if any cheque drawn for any "*legally enforceable debt or other liability*" is dishonored. Subletting being impermissible and illegal as per Bir Bahadur Rai's own assertion, the cheques issued by Karma Loday Bhutia in favour of Bir Bahadur Rai could not have been considered as cheques drawn for any "*legally enforceable debt or other liability*". An agreement of sub-contract contrary to law cannot also be enforced. Bir Bahadur Rai having failed to establish any "*legally enforceable debt or other liability*" against Karma Loday Bhutia, the suit filed by him must necessarily fail.

*Issue No.4*

**52.** In view of the findings above, issue No.4 is held against Bir Bahadur Rai. It is held that Bir Bahadur Rai is not entitled to relief claimed.

**53.** Consequently, the judgment and decree both dated 29.08.2017 are set aside. The Appeal succeeds.



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**54.** No order as to costs. Karma Loday Bhutia had deposited an amount of Rs.3 lakhs as security for the present appeal. The amount shall be returned to Karma Loday Bhutia along with interest earned thereon.

**55.** Copy of this judgment be sent to the Court of the learned District Judge, East Sikkim at Gangtok.

**( Bhaskar Raj Pradhan )**  
**Judge**  
30.09.2019