

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

+ CS(OS) No.633/2005

% Date of decision: 22nd December, 2009

PARASUCO JEANS INC. Plaintiff

Through: Mr. Navin Chawla & Mr. Sharath
Sampath, Advocates

Versus

THE ORIENTAL FOUNDATION & ORS. ... Defendants

Through: Mr. Amit Chadha, Sr. Advocate with Mr.
Divyam Aggarwal, Advocate for the
defendants No.1,2&4.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. The suit of the plaintiff for recovery of US\$ 4,96,530/- (equivalent of Rs.2,15,49,402/-) from the defendants No.1 to 6 jointly and severally is for consideration. The plaintiff is a company incorporated under the laws of Quebec, Canada and is engaged in the business of garments. The defendant No.1 is pleaded to be a partnership firm of the defendants No.2 to 4 and is stated to be carrying on business in India, also in the field of garments. The defendants No.5&6 are banks. It is *inter-alia* the case of the plaintiff that it had had transactions with the defendant No.1 firm and for which reason the defendant No.1 firm was also entered in the records of the plaintiff; the plaintiff also

has business transaction with one M/s Inter Oriental based in Hong Kong, China; that the name of the said Chinese concern M/s Inter Oriental is similar to the name of the defendant No.1; that the plaintiff intended to make payment to the said Chinese concern but mistakenly wire transferred the money through its business software system to the extent of US\$ 4,88,800/- on 21st April, 2005 and US\$ 7,730/- on 24th April, 2005 to the account of the defendant No.1 through the defendants No.5&6 banks. It is further the case of the plaintiff that the plaintiff immediately on realizing the mistake called upon the defendant No.1 to refund the monies and upon the refusal of the defendant No.1 to do so, on 7th May, 2005 instituted the present suit for recovery of monies and for permanent injunction restraining the defendants from dealing with the said monies.

2. The suit came up first before this court on 10th May, 2005 when the plaintiff sought the *ex parte* relief of appointment of a court commissioner for tracking the amount stated to have been wrongly transmitted to the defendants. This court vide *ex parte* order of that date, though not appointing the court commissioner, directed that till further orders the defendants No.1 to 4 shall not withdraw any amount from or operate the account in the defendants No.5&6 banks and also directed the defendants No.5&6 banks to furnish to this court copies of the statement of account. The defendants No.1 to 4 were also restrained from alienating, transferring or encumbering the assets or investments, if any, made out of the suit amount.

3. In fact, the suit as originally filed was only with respect to the US\$ 4,88,8000/- transferred on 21st April, 2005. The defendants No.1 to 4 in their written statement while claiming that a total sum of US\$ 5,00,000/- had been agreed to be paid by the plaintiff to the defendant No.1 in settlement of the past claims of the defendant No.1 against the plaintiff, pleaded that besides US\$ 4,88,8000/-, in accordance with the said settlement a further sum of US\$ 7,730/- had also been received by it from the plaintiff. The plaintiff thereafter sought amendment of plaint which was allowed to cover the said sum of US\$ 7,730/- also. It is the case of the plaintiff that in fact it was to pay a total sum of US\$ 6,25,705/- to the Chinese concern and besides US\$ 4,88,8000/- another sum of US\$ 1,29,175/- and US\$ 7,730/- was also transferred on 24th April, 2005 mistakenly to the

defendant No.1; however on discovering the mistake, instructions were given to the bank for stopping the said transfers but of which it appeared only US\$ 1,29,175/- was stopped and US\$ 7,730 was transmitted to the defendant No.1; that the plaintiff remained under the impression that the transferred sum of US\$ 7,730/- had also been stopped and realized that had been paid only from the written statement of the defendants.

4. On the application of the plaintiff for interim relief, subsequently it was informed that the defendants No. 1 to 4 had invested a sum approximately Rs.2.01 crores received from its bank aforesaid in mutual funds. On 14th July, 2005 the defendant No.1 was restrained from withdrawing the amount of mutual fund to the extent of Rs. 2 crores as well as an amount of Rs.11,25,027.11p with the defendant No.5 bank and an amount of Rs.1 lac with the defendant No.6 bank and the defendant No.1 was restrained from dealing with the said amounts in any manner till further orders. Thereafter on 22nd March, 2006 the earlier interim orders were confirmed and continue to be in force.

5. On the pleadings of the parties, on 29th March, 2006, the following issues were framed:-

1. Whether the suit is liable to be dismissed for concealment of material facts? OPD1,2 and 4
2. Whether the amount of US \$ 496,530 (equivalent to Rs.2,15,49,402/-) was remitted by mistake by the Plaintiff to the account of Defendant No.1? OPP
3. Whether the amount of US \$ 496,530 (equivalent to Rs.2,15,49,402/-) was rightly credited in the account of Defendant No.1 whose partners are Defendants No.2 and 4 as asserted by them in their written statement? OPD1,2 and 4
4. Whether Defendant No.3 has been wrongly impleaded as one of the Defendants to the proceedings? OPD3
5. Whether Defendants No.5 and 6 wrongly released the amount of US \$ 496,530 (equivalent to Rs.2,15,49,402/-) to Defendant No.1? If so, its effect? OPP
6. Whether the Plaintiff is entitled to a decree in its favour for the amount of US \$ 496,530 (equivalent to Rs.2,15,49,402/-) or any such other amount against the Defendants jointly and severally? OPP

7. Whether the Plaintiff is entitled to a decree of permanent injunction as claimed? OPP

8. Relief.

6. The plaintiff has examined only one witness namely Mr. Salvatore Parasuco. The defendants No. 1, 2 and 4 examined the defendant No.2 and one Mr. Deepak Datwani as DW-3. The officials of the defendants No.5&6 bank were also examined. The counsel for the plaintiff and the senior counsel for the defendants No.1, 2 and 4 have been heard. Though the written statement has been filed on behalf of defendants No.1, 2 and 4 only and not on behalf of defendant No.3 who was also claimed to be the partner of the defendant No.1, there does not appear to be on record any order proceeding *ex parte* against the defendant No.3. However, since from the record it transpires that the defendant No.3 had been served and further since the defendant No.3 failed to appear in spite of service he is deemed to be *ex parte*.

7. My issue-wise finding is as under:-

Re. Issue No.1: Whether the suit is liable to be dismissed for concealment of material facts? OPD1,2 and 4.

8. This issue was framed on the plea of the defendants No.1, 2 and 4 of the plaintiff having concealed the payment of US\$ 7,730/- from the plaintiff as originally filed and having approached the court first with a case of only one earlier transaction with the defendant No.1. It is contended that the plaintiff has subsequently admitted other transactions also with the defendant No.1.

9. The plaintiff has explained that the suit was filed in a extreme hurry immediately after discovering the wrongful transfer of money not due to the defendant No.1 and upon wrongful refusal of the defendant No.1 to refund the same and it is this hurry and factum of the plaintiff being located in Canada and the suit being filed in this court, far away, which led to the aforesaid error.

10. In my view, considering the primary nature of the suit i.e. of recovery of money and not for any discretionary relief of injunction or specific relief, it cannot be said that

the claim of the plaintiff can be defeated on the ground of concealment. The senior counsel for the defendant No.1, 2 and 4 has contended that had the plaintiff disclosed the earlier transactions with the defendant No.1, the *ex parte* relief granted may not have been granted to the plaintiff. It is contended that the plaintiff intentionally concealed the other transactions for the reason of obtaining the *ex parte* injunction.

11. I do not find any merit in the said contention also; to my mind it was irrelevant for the purposes of the relief claimed, whether the earlier transaction between the plaintiff and the defendant were a solitary transaction as contended in the plaint as originally filed or there were other transactions also, as pleaded by the defendants No.1, 2 and 4 and as subsequently admitted by the plaintiff. In fact, to my mind, the possibility of a mistake/wrongful transaction would have been much more if there had been multifarious transactions between the parties than in the event of a solitary transaction. I, therefore, do not find any intent on the part of the plaintiff to derive any advantage by such concealment. Moreover, even after the complete facts had been placed before the court, this court confirmed the order of injunction as aforesaid and which order has attained finality and it cannot be said that non-disclosure of full facts has led to any advantage to the plaintiff or on disclosure thereof has led to any advantage to the defendants No.1, 2 and 4. The senior counsel for the defendants No. 1, 2 and 4 cited several judgments on the general principles of concealment but in view of above, it is not felt necessary to deal with them. The issue No.1 is decided in favour of the plaintiff and against the defendants No.1,2&4.

Re. Issue No.4 Whether Defendant No.3 has been wrongly impleaded as one of the Defendants to the proceedings? OPD3

12. The defendant No.3 has chosen not to appear before the court. The defendants No.1, 2 and 4 on whose plea the issue was framed have also not led any evidence to show that the defendant No.3 is not a partner of the defendant No.1. The best evidence in this regard was with the defendants No.1 to 4 which they have chosen to conceal. Though ordinarily, the burden to prove that the defendant is a partner is on the plaintiff but in the facts of the present case and the defendant No.3 and/or the defendants No.1 to 4 having

failed to discharge the onus of the issue, the issue is decided in favour of the plaintiff and against the defendants No.1 to 4.

Re. Issue No.5 Whether Defendants No.5 and 6 wrongly released the amount of US \$ 496,530 (equivalent to Rs.2,15,49,402/-) to Defendant No.1? If so, its effect? OPP

13. Though the plaintiff has made a claim for recovery against the defendants No.5&6 banks also but nothing has come on record to show that once the money had been put by the plaintiff through its bank in the banking channel and had reached in the hands of defendants No.5&6, the defendants No.5&6 had any duty to stop the transfer or that transfer or payment thereof to the defendant No.1 was contrary to instructions or wrongful in any other manner. The counsel for the plaintiff has also not addressed any arguments qua the claim of the plaintiff against defendants No.5&6. The plaintiff is thus held to have not made out any case of recovery of money against the defendants No.5&6. The issue No.5 is thus decided in favour of the defendants No.5&6 and against the plaintiff.

Re. Issues No.2&3 Whether the amount of US \$ 496,530 (equivalent to Rs.2,15,49,402/-) was remitted by mistake by the Plaintiff to the account of Defendant No.1? OPP & Whether the amount of US \$ 496,530 (equivalent to Rs.2,15,49,402/-) was rightly credited in the account of Defendant No.1 whose partners are Defendants No.2 and 4 as asserted by them in their written statement? OPD1,2 and 4.

14. These issues are opposite each other and the decision of the one will govern the other. The crux of the controversy between the parties is whether the money admittedly paid/credited by the plaintiff to the bank account of the defendant No.1 was done so mistakenly or whether the same was due from the plaintiff to the defendant No. 1 and paid/credited in pursuance to the settlement. This court while framing two issues has thus placed the burden on the parties.

15. The senior counsel for the defendants No.1, 2 and 4 has argued at length on onus. Realizing that the defendants No.1,2&4 may have not discharged the onus placed on them of issue No.3, the senior counsel took pains to urge that if the plaintiff fails to prove the issue No.2 of which the burden is on him, the suit is to necessarily fail and the

occasion for decision of issue No.3 would not arise. His contention is that even if the defendants fail on issue No.3, the suit cannot be decreed; it was urged that for the suit to be decreed the plaintiff has to discharge the onus placed on him of issue No.2. In fact, it was suggested that there was no need to frame issue No.3. It was further urged that the decision of issue No.3 was not dependent upon the decision of issue No.2. The plaintiff has to prove the mistaken payment and the said proof is not dependent upon the defendants No. 1, 2 and 4 proving whether the payments were due to them or not. It was contended that if the plaintiff was unable to prove the mistake on the basis whereof the suit was filed, the plaintiff would not be entitled to a decree.

16. I am however unable to accept the aforesaid contention of the senior counsel for the defendants No.1, 2 and 4. The stage of framing the issues is an important stage in the decision of the suit and though the court is at any stage of the proceedings entitled to even *suo moto* re-frame/re-cast the issues but the parties and the counsels are guided in the matter of trial by the tenor of the issues framed and by the onus placed thereon. The stage, for the defendants No.1,2&4 to object to the framing of the issue No.3 was at the time of framing of the issues and not now. Once this court has formed an opinion that considering the nature of the controversy, not only is the plaintiff to prove mistaken payment to the defendant No.1 but the defendants No.1, 2 and 4 are also to justify that the payment received was due to them, as claimed by them, I see no reason to re-cast the said issues. There was nothing apparent before this court to show that the monies received by defendants 1, 2 and 4 were due to them. I also find the conduct of the plaintiff, of instituting the suit and of demanding back the payment within hours of making thereof, to be repugnant to the normal human conduct, had the money been due. If the plaintiff had made the payment, as contended by the defendants in pursuance to any settlement, I fail to fathom as to why the plaintiff would, within few hours change his mind. Neither is there any plea nor is there anything to show that there was any threat or compulsion on the plaintiff to make the payment. The only thing which the defendants have urged is that since the plaintiff wanted to resume business with the defendants, it had agreed to clear the old dues. However, it is not as if the defendants had instituted any recovery proceedings or given even any legal notice to the plaintiff or lodged complaints

against the plaintiff before any Trade Association owing where to the plaintiff felt under any compulsion to make the payment. In fact, it appears from the version of the defendants also that the dues were stale. Nothing has been disclosed as to the importance of or the need for the plaintiff to resume business ties with the defendants No.1,2 & 4. Not only so, it has not even been pleaded as to what happened in those few hours between the time of payment/credit and when the plaintiff demanded the refund, to make the plaintiff change its mind.

17. Seen in this light, it is found that this court not only placed the onus of mistaken payment on the plaintiff but also called upon the defendants to justify that the payment was due to them. Thus the defendants No.1, 2 and 4 cannot wriggle out of the obligation to discharge the onus which has been placed on them of issue No.3, by relying upon the seriatim in which the issues have been framed. It is a matter of chance that the issue of which the onus is on the plaintiff appears earlier to the issue of which the onus is on the defendants. No advantage can be taken by the defendants thereof. I, therefore, deem it proper to deal with the two issues together in as much as the evidence/material thereof is interlinked.

18. The contentions of the senior counsel for the defendants No.1, 2 and 4, on the plaintiff having not discharged the onus of the issue may be culled out as under:-

- a. It is argued that the plaint as originally filed and the amended plaint are signed and verified by two different persons; since the case is of mistake, the signatory to the two plaints could not be changed without the permission of the court.
- b. That the person who committed the mistake has not appeared in the witness box as was incumbent on him to do.
- c. It is urged that the official of the plaintiff who gave the wrong instructions or who punched the wrong name in the business software of the plaintiff or who committed the mistake has not been examined.

- d. That the plaintiff, to be able to prove the mistake was required to prove the existence of the Chinese concern having similar name to the defendant No.1, that the plaintiff had business with such Chinese concern for which payments were required to be made and all of which has not been done. In fact, it has not even been proved that there was/is any Chinese concern of a similar name to that of the defendant No.1 owing where to there could be possibility of confusion.

It is urged that the best person to prove the aforesaid would have been a representative of the Chinese concern, to prove the invoices against which the payments were due from the plaintiff to the said concern.

- e. Regarding PW-1/6 referred to in the affidavit of the witness of the plaintiff, it is contended that the same is a photocopy and does not prove either the existence of the Chinese concern or the monies being due from the plaintiff to the said concern; it is a photocopy showing that payments were subsequently sent by the plaintiff to the Chinese concern as claimed by the witness of the plaintiff. It is, however contended that the same even if read does not establish that the Chinese concern had done any work for the plaintiff and PW-1/6 is described as a self serving document being a print out from the plaintiff's own computer.
- f. Reliance is placed on *Sudhir Engineering Co. Vs Nitco Roadways* 1995 Rajdhani Law Reporter 286 to contend that mere putting of an Exhibit mark does not admit the document into evidence. Reliance in this regard is also placed on *J. Yashoda Vs K. Shobha Rani* (2007) 5 SCC 730.
- g. It is further urged that nothing has been disclosed as to what action was taken by the plaintiff against the person who had committed the mistake. It is contended that the plaint as originally filed is signed and verified by Mr. Carmine Nino Iannuzzi while the amended plaint is signed by one Mr. Domnic Parasuko. It is urged that since Mr. Carmine Nino Iannuzzi had

first pleaded mistake and also because Mr. Domnic Parasuko in his cross examination admitted that it is Mr. Carmine Nino Iannuzzi who had made the mistake, the non-examination by the plaintiff of Mr. Carmine Nino Iannuzzi is fatal especially when no reason is given therefor.

- h. It is urged that no evidence has been led to show issuance of any instructions for stopping the payment of US\$ 1,29,175 as pleaded.

19. I have perused the cross examination of Mr. Salvatore Parasuco I do not find the defendants 1, 2 and 4 to have challenged therein the existence of the Chinese concern. As far as admission into evidence of Exhibit PW-1/6 is concerned, undoubtedly the same is a photocopy and the counsel for the defendants before commencement of the cross examination of Mr. Salvatore Parasuco had got their objection in this regard noted. I may however, at this stage, itself also record that the defendants No.1,2&4 also along with the affidavit of their witness defendant No.2 filed a large number of documents which are copies. The parties concerned are commercial people, who while transacting business are not guided by principles of preservation of records or documentation of their transactions. An element of faith is essential in all such dealings. No lawyer is sitting besides every commercial person, to guide as to the requirements in the event of a dispute. The courts, while adjudicating such disputes are to decide considering the said realities and decisions of courts *dehors* the same would not do justice between the parties. Seen in this light, the court is to decide as to the version of which party is more in consonance with preponderance of probabilities. The courts cannot also be unmindful of the changing modes of communication. The carbon/office copy of letters, which used to be the only mode of communication, can no longer be insisted on in present days. The communications today in the days of cheap telephony are less and less documented. Office copies for future reference, of communications sent, remain in the computers only.

20. The senior counsel for defendants No. 1, 2 and 4 has also referred to –

- i. ***Sri Kishan Rathi Vs Mondal Brothers*** AIR 1967 Cal 75 on the person having special knowledge, only being competent to depose of same;

- ii. ***Gulla Kharagjit Carpenter Vs Narsingh Nand Kishore Rawat*** AIR 1970 MP 225 on adverse inference from material witness failing to enter witness box;
- iii. ***Shiva Prasad Singh Vs Maharaja Sris Chandra*** AIR 1943 Patna 327 holding that party pleading over payment under mistake is bound to show that it was such mistake which caused him to pay;
- iv. ***Sri Sri Kishore Chandra Singh Deo Vs Babu Ganesh Prasad Bhagat*** AIR 1954 SC 316 again on burden being on a party pleading, to establish mistake satisfactorily;
- v. ***Gopal Krishanji Ketkar Vs Mohd. Haji Latif*** AIR 1968 SC 1413 on the rule of best evidence, irrespective of onus;
- vi. ***Niranjan Kaur Vs New Delhi Hotels Ltd*** AIR 1988 Delhi 332 following the above;
- vii. ***Bajranglal Poddar Vs Sita Ram Kedia*** AIR 1949 Cal. 457 on onus being on the plaintiff and effect of non production of principal person involved in the transaction;
- viii. ***M. Krishnaswami Naidu Vs Secretary of State*** AIR 1943 Mad 15 on onus being on plaintiff regardless of whether allegations made are in affirmative or negative.

21. Per contra, the counsel for the plaintiff referred to –

- i. ***Smt Kumari Devi Vs Noor Mohd. Mian*** AIR 2002 Patna 132 on onus being on beneficiary, irrespective of, on whom placed;
- ii. ***R.V.E. Venkatachala Gounder Vs Arulmigu Viswesaraswami*** (2003) 8 SCC 752 on the courts being guided in decision by test of probability to a prudent person;
- iii. ***Lakhan Sao Vs Dharamu Chaudhary*** (1991) 3 SCC 331 on the defendant after having led evidence, being not entitled to ask the court not to look into it;
- iv. ***Smt Rabti Devi Vs Ram Dutt*** AIR 1998 SC 310 on burden of proof piling into insignificance when both parties have adduced evidence.

22. I am of the view that the facts of the present case are not such where any adverse inference has to be drawn for the non appearance as witness on behalf of the plaintiff of any person who had misspelt the name of the party to whom payment was intended or for the amended plaint being signed and verified by a different person or for not proving that

monies were in fact due to the Chinese concern. It may be mentioned that even the defendant No.4, who is stated to have effected settlement on behalf of defendant No.1 did not appear as witness. The question to be determined is whether the payment was intended by the plaintiff for the defendant No.1 or not. If not, defendant No.1 can retain it only if able to show that even if it was not intended for it, monies were in any case due from the plaintiff to it. However, if defendant No.1 is unable to prove so, it can under no rule of law be permitted to retain the monies neither intended to be paid to it nor due to it.

23. From the statement of the sole witness of the plaintiff and more importantly, as observed above, from the conduct of the plaintiff of instituting the suit soon after the transmission of payment and from the absence of any explanation whatsoever for such conduct of the plaintiff, I am satisfied that the plaintiff has established that the payment transmitted by it was not intended for the defendant No.1. The explanation given by the defendants No. 1,2 and 4 of the payment being made in terms of settlement for payment of total sum of US \$ 5,00,000 is not an explanation for, as to why the plaintiff, if so making the payment, after settlement and which settlement as per the defendants was of own volition of the plaintiff and aimed towards desire of the plaintiff to recommence the business dealings with the defendants, would renege from the same and demand back the payment and on refusal commence legal proceedings.

24. That takes me to the next stage i.e., whether the defendants 1, 2 and 4 have established that the said payments were due to them from the plaintiff. The evidence in this regard is in the form of examination of the witness of the plaintiff and evidence led by the defendants themselves. The case in the written statement is that the relationship had first commenced in the year 1998; that the defendant No.1 was rendering services to the plaintiff and for which invoices were raised by the defendant No.1; that the plaintiff for such services was making payments to the defendant No.1, either as commission or as fee for the work done; the plaintiff remitted payments to the defendant No.1 either through banker or through letter of credit; that the plaintiff did not pay majority of invoices of the defendant No.1; a huge amount accumulated, but to no avail, finally in August, 2004, the defendant No.1 conveyed to the plaintiff that they would not be able to

do business with the plaintiff unless entire outstanding of US \$ 7,91,714.82 inclusive of interest was cleared; that meeting was held at Paris between 21st September to 24th September, 2004; on 10th October, 2004 the plaintiff sent a request to the defendant No.1 for developing some designs which the defendant No.1 agreed to do subject to past dues being cleared; that between 22nd November, 2004 to 26th November, 2004 Mr. Sal Parasuco and Mr Lino Catalino visited India and offered to settle all claims for US \$ 5,00,000/- which was agreed to by the defendant No.1.

25. The plaintiff has denied that there were any dues as aforesaid or that any settlement was reached.

26. The case of the defendant No.1 in its written statement is of having raised invoices of US \$ 7,91,412.82 on the plaintiff. However, no such invoices have been proved. No attempt, to prove any books of account of the defendant No.1 showing any account if any maintained of the plaintiff or such outstanding in the said account, has even been made. Though in the written statement it is attempted to be portrayed that transactions continued from 1998 to 2004 but no dates or particulars are given. It is inconceivable that amounts if any outstanding would not be reflected in the books of account required to be maintained by the defendant No.1.

27. Upon the aforesaid queries being put to senior counsel for the defendants, he contends that invoices have been proved and are part of Exhibit DW1/56. The said exhibit mark was given in affidavit by way of examination in chief of defendant No.2. He deposed that the plaintiff had commenced operations in India through M/s Elanco Ltd, incorporated in Hong Kong and the dealings of the defendant No.1 were with the said Elanco Ltd. He gave Exhibit DW1/56 to summary of statement of account of unpaid invoices (alongwith invoices and supporting documents). The same are from 1998 to 2000. The senior counsel for the defendants contends that there is no bar to payment of time barred debts. However, the said witness in his cross examination admitted that none of the invoices was supported with proof of any work done by the defendant No.1 for the plaintiff or for Elanco Ltd; he also admitted that there was no written agreement for

payment of commission; he could not show proof of having sent the invoices; he admitted that there was no writing of defendant No.1 having demanded payment of such invoices from the plaintiff; he admitted that no legal notice had been issued by the defendant No.1 demanding payment; he admitted that there was no writing of any settlement of US \$ 5,00,000/-; he was ignorant of the accounts of the defendant No.1 and denied knowledge whether any outstanding from the plaintiff had been shown in accounts of the defendant No.1. The defendants also examined as DW3 Mr Deepak Datwani of M/s J.B. Exports Pvt Ltd. The supporting documents of some of the invoices relied upon by the defendant No.1 are of the said company. However, the said witness in examination admitted that all payment due to them had been received from the plaintiff; he also admitted his signatures on a settlement deed with the plaintiff. The said witness does not advance the case of the defendants in any way.

28. The invoices cannot be said to have been proved in accordance with Law. Ex.DW1/56 is merely the summary of statement of account. The annexures thereto cannot be said to have been proved. Even the summary of statement of account cannot be said to have been proved. It is at best secondary evidence. No foundation for leading secondary evidence has been laid. Primary evidence in the form of books of accounts maintained in the usual course of business, showing the sum of US\$7,91,914.82 recoverable or due from plaintiff or from Elanco Ltd. has not been produced.

29. The counsels have also taken me through e-mails collectively given Exhibit PW1/11. The counsel for the plaintiff has emphasized that a reading thereof belies the contention defendants of any huge amount of the US \$ 7,91,914.82 being due. It is pointed out that there is no mention whatsoever of any due. It is contended that when the defendant No.1 is from reading thereof found to be repeatedly reminding for US \$ 10,000/- due at one time, it is inconceivable that it would have remained quiet for such huge amount or not made mention thereof in any of the e-mails.

30. After going through evidence and documents I find the defendants to have failed to establish, any monies to be due to them from the plaintiff, for them to justify retaining

the monies received from the plaintiff and subject matter of suit. The defendants have utterly failed to show any such outstanding in their books of accounts. Without any such outstandings being shown as per law, the witness of the defendants cannot be believed specially when he feigns ignorance of position in accounts/balance sheet. Even though I have found the invoices also to have not been proved in accordance with law, without the said invoices being reflected in accounts required to be maintained in law, no credence can be given thereto. I had during the hearing, put to the senior counsel for the defendants that such dues if any in foreign exchange, could not be written off also by the defendant No.1 without obtaining prior permission of the Reserve Bank of India. The explanation given of the same being applicable only to dues of exports effected and not to dues on account of commission for services rendered does not convince me. In any case, I am not inclined to hold in favour of a party who has not complied with laws of reflecting dues if any in its books of account. There is no option but to hold that there were no dues.

31. Resultantly the issue No.2 is decided in favour of the plaintiff and conversely the issue No.3 is decided against the defendant No.1.

Re. Issue No.6 Whether the Plaintiff is entitled to a decree in its favour for the amount of US \$ 496,530 (equivalent to Rs.2,15,49,402/-) or any such other amount against the Defendants jointly and severally? OPP

32. As a result of the findings on issues above, the plaintiff is held entitled to a decree for an amount of Rs.2,15,49,402/- against the defendants No.1 to 4 jointly and severally.

Re. Issue No.7 Whether the Plaintiff is entitled to a decree of permanent injunction as claimed? OPP

33. In view of the suit having been decided in favour of the plaintiff, the interim orders restraining the defendants No.1 to 4 from receiving from its bank the amount invested in the mutual funds and the sum of Rs.11,25,027.11p with the defendant No.5 bank and Rs.1 lac with the defendant No.6 bank save in accordance with this decree are made absolute. The issue is accordingly decided in favour of the plaintiff and against the defendants No.1 to 4.

Re: Issue No.8: Relief

34. Decrees aforesaid for recovery of Rs.2,15,49,402/- and injunction are passed in favour of plaintiff. The suit remained pending in this court for the last over four years. The plaintiff has in the plaint claimed interest at the prevailing bank rate. The counsel for the plaintiff has argued that the defendants having deprived the plaintiff of the monies and having illegally withheld the same are entitled to commercial rate of interest. It is further contended that the defendants having invested the monies in the mutual funds would have earned 30 to 40 per cent return thereof and cannot be permitted to retain any illegal benefit and the plaintiff is entitled to the entire amount now releasable on encashment of the said mutual funds. It is also contended that the plaintiff is also entitled to actual costs of this litigation. The counsel for the plaintiff has filed memo of costs including counsel's fee of US\$ 1,46,831/-. The plaintiff having succeeded in the suit and it having been held that the monies subject matter of the suit were received by the defendants No.1 to 4 from the plaintiff under mistake and the defendants No.1 to 4 illegally refused to return the same, the plaintiff is certainly entitled to interest.

35. This court by way of interim orders had restrained the defendant No.1 from withdrawing the amount of mutual fund to the extent of Rs.2 crores. The contention of the counsel for the plaintiff that the plaintiff is entitled to the prevalent value of the mutual funds and the defendants No.1 to 4 cannot be permitted to retain any benefits accrued from the monies illegally retained by them is correct. Accordingly, it is directed that the plaintiff is entitled to the entire value of the said mutual funds, whatever the same may be. As far as the cash amounts of Rs.11,25,027.11p and Rs.1 lac were concerned, since the defendant No.1 was restrained from withdrawing the said amounts from the defendants No.5&6 banks, the plaintiff shall also be entitled to the interest earned on the said amounts till the date of payments. It is further clarified that in the event the value of the mutual funds is less than the principal/initial amount of Rs.2 crores, the plaintiff is awarded interest on the said sum of Rs.2 crores at the rate of 15% per annum from the date of institution of the suit and till the date of payment. It is further directed that the plaintiff shall be entitled to execution of the decree either by directly receiving the

amounts aforesaid from the Banks / Mutual Funds or otherwise in accordance with law from the defendants No.1 to 4 jointly and severally.

36. Coming to the question of costs, the plaintiff shall be entitled to costs in accordance with law from the defendants No.1 to 4 jointly and severally. The defence of the defendants No.1 to 4 having been found vexatious, the plaintiff is also held entitled to compensatory cost under Section 35 A of the CPC. As far as the counsel's fee is concerned, the defendants No. 1 to 4 who are commercial people are deemed to have known the special costs which the plaintiff, a Canadian company would be incurring in litigating far away in this court. As such, the counsel's fee is assessed at Rs.5 lacs.

Decree sheet be drawn up.

**RAJIV SAHAI ENDLAW
(JUDGE)**

**December 22, 2009
PP**