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

Reserved on: 14th February, 2014

Decided on: 7th July, 2014

+ CS(OS) 674/1998

VIRTUS DORDRECHT B.V. & ANR. Plaintiffs

Through: Mr. L.K. Singh and Mr. S.K. Singh,
Adv.

Versus

VIKRAM BHARGAVA & ORS. Defendants

Through: Mr. Deepak Chawla and Mr. Raghav
Paul, Adv. for defendant no. 1(c)
Mr. B.K. Sood, Mr. Meharjit Singh,
and Mr. Manik Sood, Adv. for D-2 to
D-4.
Mr. Arun Bhatia, Adv. for D-6

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K. PATHAK, J.

1. Plaintiffs have filed this suit against the defendants for recovery of Rs.2,14,66,030/- together with pendent lite and future interest @ 18% per annum; for declaration that the properties, as detailed in Annexure 7 'collectively' and Annexure 12, are the properties purchased from the funds of plaintiffs and defendants have no right, title or interest therein; a decree of permanent injunction to the effect that defendants be restrained from selling,

transferring, mortgaging or alienating the said properties.

2. Case of the plaintiffs, as set out in the plaint, is that plaintiff no. 1 was a private limited company having its office at P. Buck Ref 101, 3315 BB Dordrecht, Netherlands. Shri Nico de Deugd was the sole shareholder/director/principal officer of plaintiff no.1, thus, was competent to sign and verify the plaint on behalf of the plaintiff no. 1. Plaintiff no.2 was a company having its office at Chavornay, Switzerland and Shri Thomas Bliesener was its director, thus, was competent to sign, verify and initiate legal proceedings on behalf of the plaintiff no.2. Defendant no.1 was sole proprietor of M/s V3M Transworld. Defendant no. 3 was a partnership firm of which defendant no. 4 was the managing partner. Defendant no. 5 is wife of defendant no. 1. Defendant no. 6 is wife of Shri Jai Prakash who was an employee of defendant nos. 1 and 2.

3. It is alleged that defendant no. 1 had approached plaintiff no.1 in the month of July/August, 1996 and represented that he was a merchant trader dealing in exports of agro commodities, that is, grains, oilseeds, oils etc. Defendant no.1 invited plaintiff no.1 to join hands with him in his export business of said commodities from India to other countries. Defendant no.1 suggested that they should start a joint business venture for the export

purposes. Plaintiff no. 2 was known to plaintiff no. 1 and was also engaged in the business of agro commodities. Plaintiff no.1 requested the plaintiff no. 2 to join the joint venture business of trading of agro commodities, to which plaintiff no.2 readily agreed. It was agreed between the parties that plaintiffs would sign export contract with defendant no.1 and monies would be remitted by the plaintiffs in the bank account of the defendant no.1, in pursuance of said contract, as advance against the export of agro-commodities such as grains, oilseeds, oils etc. After the contract had been signed, defendant no. 1 suggested that apart from procuring the goods from the market it would be more profitable if the parties purchased suitable agricultural land and cultivate the same for growing such products and thereafter export the same, instead of procuring material from the market. Defendant no.1 suggested that amounts sent for the purpose of exports could be utilized for purchase of land and its cultivation. Defendant no.1 further suggested that in case the plantation project did not materialize he would export the material to plaintiffs, against the amounts remitted by them in his account.

4. Sometime in the month of September, 1996, defendant no.1 introduced the defendant no.2 to plaintiffs. It was represented that defendant

no.2 was a consultant in Trade Promotion and had held various prestigious posts in the Government organizations. It was further represented that defendant no.4, wife of defendant no.2, was running a real estate company in the name and style of defendant no. 3 and defendant no. 2 would facilitate purchase of land through defendant nos. 3 and 4. Defendant no.1 further suggested that defendant no.2 shall also be included as one of the partner and/or shareholder in the joint venture company to be floated in due course. Curriculum Vitae of defendant no.2 was also sent to plaintiffs by the defendant no.1. It was further suggested that each of the shareholders would contribute US \$ 75,000/- towards the equity shareholding company and the balance investment, required for the project, would be raised through a foreign loan component.

5. Vide letter dated 4th October, 1996 defendant no. 3 offered to sell the land situated in Churu District, Bikaner (Rajasthan) @ ₹52,000/- per acre. It was further represented that land was suitable for the cultivation of desired products. Deadline for the transfer of land was fixed as 31st January, 1997. On the above assurances plaintiffs remitted various amounts in the account of defendant no.1. Amounts were sent as advance payment towards the exports, pending the finalization of purchase of land. Defendant no.1

represented that he would write to Reserve Bank of India confirming the receipt of this amount as advance against exports to be made by him to the plaintiffs. Plaintiffs remitted US \$460,595/- in the account of defendant no.1. However, till the beginning of 1997 joint venture company, as proposed by the defendant no.1, was not established. Defendant nos. 1 and 2 informed the plaintiffs that due to some local restrictions the land could not be purchased in the name of the company, therefore, they would proceed, as an interim/temporary measure, to purchase the land in the joint names of plaintiffs and defendant nos. 1 and 2. However, defendants failed to fulfill this obligation for implementation of the project and/or in the alternative make exports of agro commodities as agreed against the amounts remitted by the plaintiffs. Plaintiffs made independent enquiries and came to know that defendant nos. 1 and 2 had purchased the land in their personal names and in the name of their wives, that is, defendant nos. 4 and 5 from the amounts transferred by the plaintiffs, in the account of defendant no.1. On making further enquiries, plaintiffs also came to know that defendant no.1 had already transferred a part of his share in the land bearing Khasra No. 562/462/83 (100.9 Bighas) and a part of Khasra No. 565/462/83 (88 Bighas) to one Smt. Angoori Devi-defendant no. 6, who is wife of Jai

Prakash, an employee of defendant nos. 1 and 2. In nutshell case of the plaintiffs is that defendant nos. 1 and 2 had defrauded them. Defendants, in furtherance of their common conspiracy, had misappropriated the total amount of US \$ 4,60,595/- equivalent to ₹1,79,63,205/- remitted by the plaintiffs in the account of defendant no.1, which amount they were liable to pay to plaintiffs. Defendants were also liable to pay interest @ 18% per annum amounting to US \$ 92,179.60 equivalent to ₹35,02,825/-. According to the plaintiffs, defendants were jointly and severally liable to pay ₹2,14,66,030/- to the plaintiffs, inasmuch as plaintiffs were also entitled to a decree of declaration that properties, as detailed in the plaint, were purchased from the funds of plaintiffs, thus, defendants had no right, title or interest therein.

6. Initially, one Mr. Yashwant Prakash, Advocate appeared for the defendant nos. 1 and 5. However, no written statement was filed on their behalf. Subsequently, Mr. Yashwant Prakash appeared in Court and stated that he had appeared in Court on the oral instructions of defendant nos. 1 and 5, who later stopped giving instructions to him. Accordingly, vide order dated 5th May, 2000 defendant nos. 1 and 5 were proceeded against ex-parte. During the pendency of suit defendant no. 1 died and his legal

representatives, that is, defendant nos. 1(A) to (C) were brought on record. They have filed written statement alleging therein that suit was without any cause of action; Suit was not valued properly for the purposes of court fee and jurisdiction; Mere decree of declaration could not be passed without any consequential relief, thus, suit was liable to be dismissed; Plaint was not verified in accordance with law. Only part of the plaint was verified. Paras 33 and 34 were not verified. No agreement was placed on record by the plaintiffs. In fact, no such agreement was arrived at. The suit was filed to obtain wrongful gains and to harass the defendants. Delhi Courts had no territorial jurisdiction since properties were situated in District Churu, Rajasthan. Shri Nico de Deugd was not competent to sign or verify the pleadings on behalf of the plaintiff no. 1 since company was not in existence in the eyes of law, inasmuch as, no registration certificate was placed on record. Defendant no. 1 was neither proprietor nor shareholder nor partner of M/s V3M Transworld. It was denied that Shri Jai Prakash was employee of defendant nos. 1 and 2. Whole transaction as alleged in the plaint was denied. It was denied that defendant no.1 had approached the plaintiffs and suggested for constitution of a joint venture company for exports of agriculture produce. It was alleged that neither any agreement was signed

nor any money was remitted by the plaintiffs in the account of defendant no.1 in pursuance of the alleged agreement. Defendant nos. 1A to 1C have stated that to the best of their information, certain goods were imported by the plaintiffs to Switzerland and some money was remitted as sale consideration of the goods received by the plaintiffs. It was denied that defendant no.1 had suggested for purchase of land and its cultivation. It is alleged that joint venture company never came in existence. It was denied that defendant no.1 had introduced the defendant no.2 or had sent Curriculum Vitae of defendant no. 2 to plaintiff no. 1. It was alleged that answering defendants were not aware about any letter dated 4th October, 1996 of defendant no. 3. It was alleged that entire story of the plaintiffs was highly improbable and suffered from variations. On the one hand, plaintiffs had alleged that payment was sent as advance for exports of agriculture produce; while on the other a plea had been taken that money was to be utilized for the purchase of land. Indian Laws do not permit any foreigner to purchase immovable property/agricultural land in India. These defendants have denied that land was purchased by defendant no.1 from the money sent by the plaintiffs. It is alleged that defendant no.1 had good income and ancestral properties and had purchased the lands from his own resources. It

is denied that defendant no.1 had cheated the plaintiffs or had purchased the lands from the money of the plaintiffs. It is also denied that part land was transferred in the name of Smt. Angoori Devi, in order to defraud the plaintiffs. It has been prayed that suit be dismissed. Plaintiffs have denied the allegations as contained in the written statement of defendant no. 1A to 1C in the replication and have reiterated the averments made in the plaint.

7. Defendant nos. 2 to 4 have alleged in their written statement that there was no privity of contract between the plaintiffs and defendant nos. 2 to 4. They never approached the plaintiffs for remittance of any money nor had received any amount from the plaintiffs. It is denied that plaintiff no.1 was a private limited company or was competent to sue the defendants in India. It is denied that Shri Nico de Deugd was competent to sign, verify and institute the suit on behalf of the plaintiff no.1. Defendant nos. 2 to 4 have alleged that defendant no. 4 was the sole proprietor of defendant no. 3. Defendant no. 2 was introduced to Shri Nico de Deugd by defendant no.1 but no concrete proposal of acquisition of lands for the plaintiffs was concluded. No contract came into existence between the plaintiffs and these defendants. Defendant no.2 has denied that he had offered his services or had agreed to join the so called joint venture. According to him, no such talks ever took

place between the parties. Defendant no. 3 had offered to assist the defendant no.1 in acquisition of land in the area where defendant no.1 or his nominee may be interested to acquire the land. Defendant no.2 was a renowned consultant and used to be invited by various forums, organizations and associations to deliver lectures and defendant no.1 or the plaintiffs could have acquired his Curriculum Vitae from any such sources. Defendant no. 2 has denied having given his Curriculum Vitae either to defendant no. 1 or to plaintiffs. It is alleged that defendant no. 3 gave an offer on 4th October, 1996 to the defendant no.1 regarding sale of land at Churu. It is denied that defendant no. 3 had made representation that the said land was suitable for the purpose of plantation. It is alleged that it was not the responsibility of the defendants to ascertain the suitability of land for the purpose of plantation. Defendant no. 3 had only located the land and negotiated with the sellers and made the offer to defendant no.1. Defendant no. 2 has alleged that he did not make the alleged representation to the plaintiffs and his name has been introduced in the transaction for motivated and mischievous reasons. Defendant nos. 2 to 4 have stated that they have no knowledge or information regarding the nature of alleged project or its requirements as they were not concerned with the same. It is alleged that defendant no. 3

had categorically mentioned the terms of payment for acquisition of land in the offer letter dated 4th October, 1996 made to defendant no.1. Although, the initial offer was valid till 19th November, 1996 the date was extended by 31st January, 1997 at the request of defendant no.1. Defendant nos. 2 to 4 were not aware of any advance payments made by the plaintiffs to the defendant no.1. Defendant nos. 2 to 4 were not concerned with the exports or any other project relating to exports nor they had agreed to participate in the alleged project. Defendant nos. 2 to 4 were also not aware about the alleged remittances made by the plaintiffs to defendant no.1. Defendant no. 1 had agreed to purchase 471 acres of land @ ₹52,000/ per acre but defendant no.1 paid only ₹1,18,00,000/- on different dates, which was not even sufficient to cover cost of 376.7 bighas or 235.21 acres of land. The cost for 376.7 bighas, including the stamp duty was ₹1,24,43,520/-. Accordingly, defendant no.1 was still indebted to the defendant nos. 3 and 4 to the extent of ₹6,43,520/-. Since defendant no.1 did not make the balance payment answering defendants had to purchase the balance land from their own resources. Defendant no.2 has alleged that he had only indicated to defendant no.1 about the revenue laws relating to agricultural lands prevalent in the State of Rajasthan and also communicated to defendant no.1

about the ceiling of holding which an individual can possess. Defendant nos. 2 to 4 were not aware about any dealings which may have taken place between the plaintiffs and defendant no.1. It has been categorically stated in the written statement that no interaction took place between the plaintiffs and defendant no. 2 as regards the alleged project. It was denied that defendant nos. 2 to 4 had played fraud upon the plaintiffs or that they had defrauded them in conspiracy with the other defendants. It has been prayed that suit be dismissed with costs. Plaintiffs have filed replication wherein they have denied the allegations as contained in the written statement and have reiterated the averments made in the plaint.

8. Defendant no. 6 has also filed written statement stating therein that there was no privity of contract between the plaintiffs and defendant no. 6. It has been specifically stated that there was no connection whatsoever with respect to the dealings and/or transactions between the plaintiffs and defendant nos.1 to 5. Defendant no. 6 further took a plea that suit was bad for mis-joinder of necessary parties. It is alleged that defendant no. 6 was neither necessary nor a property party to the suit. The entire suit was based on the alleged dealings between the plaintiffs and defendant nos. 1 to 5 with which defendant no. 6 had no connection. It is further alleged that suit was

barred by limitation. Suit was not valued properly for the purposes of court fee and jurisdiction. It is denied that Shri Nico de Deugd was competent to sign and verify the pleadings on behalf of plaintiff no.1. It is denied that Jairprakash, husband of defendant no. 6, was an employee of defendant nos. 1 and 2. Defendant no. 6 has alleged that her husband was an agriculturist. Defendant no. 6 has denied the allegations regarding the exports, joint venture project and other dealings, as have been alleged in the plaint. It is alleged that defendant no. 6 had no connection with the plaintiffs and other defendants. Defendant no. 6 has reiterated that she was legal owner of the lands, that is, 100.9 Bighas situated in Khasra No. 562/462/83 and 88 Bighas in Khasra No. 565/462/83 in village Meetasar, District Churu, Rajasthan having purchased the same from her own funds and resources. Defendant no. 6 has alleged that she was in physical possession of the said land. Plaintiffs have filed replication and have denied the allegations as contained in the written statement.

9. From the pleadings of the parties following issues were framed on 8th March, 2011:-

- (i) Whether the plaintiff is entitled to recovery of Rs.2,14,66,030/-? If so, against which of the defendants?
OPP
- (ii) Whether the plaintiff is entitled to interest? If so, at what

- rate and against whom? OPP
- (iii) Whether the suit is barred by limitation? OPD
 - (iv) Whether the suit is bad for mis-joinder of parties? OPD
 - (v) Whether there is no cause of action against defendant no. 6? OPD-6
 - (vi) Whether there is no privity of contract between the plaintiff and defendants nos. 2 and 4 and 6? OPD-2 to 4 & 6
 - (vii) Whether the suit has been properly valued for the purposes of Court fee and jurisdiction? OPP
 - (viii) Whether the suit has been properly verified in accordance with law? OPP
 - (ix) Whether the suit has been signed and instituted by a duly authorized person? OPP
 - (x) Whether the suit is not maintainable in the present form as alleged by defendant no. 6? OPD-6
 - (xi) Relief.

10. Shri Nico de Deugd has stepped in the witness box as PW1. He has tendered his affidavit in his examination-in-chief wherein he has given exhibit marks to several documents as Ex. PW1/1 to Ex. PW1/15. Learned Local Commissioner, before whom evidence has been recorded, has noted that the documents were given corresponding exhibit marks, but insofar as mode of proof was concerned the same is kept open to be decided at the time of final hearing by the Court. As regards defendant nos. 2 to 4 are concerned, defendant no. 2 has stepped in the witness box as DW1. Shri Jai Prakash, husband of defendant no. 6, has stepped in the witness box as Attorney of defendant no. 6. He has also placed on record certified copies

of the sale deeds as Ex. D6/A-1 to A-15.

11. I have heard learned counsels for the parties, perused written submissions of the defendants and the complete record carefully. It is trite law that mere marking of a document as exhibit does not amount that the same stands proved in accordance with law. If a document is marked during the evidence, the question regarding mode of proof and its evidentiary value can still be gone into at the time of final hearing. Admission of a document in evidence is not to be confused with proof of document. In *Sudhir Engineering Company vs. Nitco Roadways Ltd.* 1995 (34) DRJ, it has been held thus :-

The marking of a document as an exhibit, be it in any manner whatsoever either by use of alphabets or by use of numbers, is only for the purpose of identification. While reading the record the parties and the Court should be able to know which was the document before the witness when it was deposing. Absence of putting an endorsement for the purpose of identification no sooner a document is placed before a witness would cause serious confusion as one would be left simply guessing or wondering while was the document to which the witness was referring to which deposing. Endorsement of an exhibit number on a document has no relation with its proof. Neither the marking of an exhibit number can be postponed till the document has been held proved; nor the document can be held to have been proved merely because it has been marked as an exhibit.

12. Accordingly, exhibit PW1/1 to PW1/15 cannot be taken as proved in

accordance with law. Question of admissibility of these documents in evidence has to be gone into before venturing to return issue-wise findings. Ex. PW1/3 is Memorandum of Understanding which has only been signed by the plaintiff no.1. It has not been signed by the defendant no.1. This Memorandum of Understanding is alleged to had been executed between the plaintiff no. 1 and defendant no. 1. However, it does not contain signatures of defendant no. 1 and does not qualify the ingredients of an agreement between the plaintiff and defendant no.1. Memorandum of Understanding Ex.PW1/3, thus, cannot be taken as proved. PW1/8 is a printed business plan of 'Aquamarine Marine Green Development' company. According to the plaintiff this was the joint venture, which was agreed to be constituted by and between the plaintiffs, defendant no. 1 and defendant no. 2. Again, this document has not been signed by either of the parties. Contents of this document have also remained unproved. Ex.PW1/8 also cannot be read in evidence. Ex. PW1/3 is yet another document bearing signatures of defendant no.1 and Mr. T. Bliesener of plaintiff no.2. This document has also remained unproved since it does not contain signatures of PW1 nor has he identified the signatures of the executants of this document. PW1/4 is the 'Curriculum Vitae' of defendant no.2. Again this document has not been

signed by defendant no. 2. In fact, this document does not contain signatures of anyone. Thus, this document has also remained unproved and cannot be read in evidence for any purpose whatsoever. Similar is the position of Ex. PW1/5 which is a fax message allegedly sent by the defendant no.1, however, it does not contain the signatures of defendant no. 1 nor its delivery has been proved. PW1/6 'collectively' are money transfer confirming advices. It is not understood as to how PW1 could have proved this document. Money was not transferred by plaintiff no.1 through these documents. In fact, this document emanates from plaintiff no. 2. No official from the bank had been summoned to prove the remittances. PW1/10 to PW1/15 are the certified copies of the sale deeds and jamabandis, issued by the Court of Metropolitan Magistrate, Delhi. It appears that these documents were filed before the Metropolitan Magistrate in some criminal proceedings. These documents also could not have been proved by the PW-1. No efforts were made to summon the record from the concerned court, thus, have remained unproved. In fact, revenue records ought to have been summoned to prove these documents. Ex. PW1/7 bears the signatures of PW1 and defendant no.1, thus, it has been proved by the PW1. Signatures on Ex.PW1/9 have not been disputed by the defendant no. 2, inasmuch as,

this document has been proved by the PW1 by identifying signatures of other signatories. As per the PW1, Ex. PW1/14 is photocopy of statement of account of defendant no. 1, however, in my view, PW1 is not competent to prove this document, inasmuch as, the same does not even contain signatures of defendant no.1 or any other person on behalf of V3M Transworld. In fact, the alleged statement is on a plain paper and is not even on the letter head of either defendant no.1 or V3M Transworld. Be that as it may, this document has also remained unproved.

13. In para 21 of his affidavit, PW1 has deposed that plaintiff no.1 and plaintiff no. 2 had demanded the refund of advance given by them to the defendants telephonically as also in writing on a number of occasions. Photocopies of the correspondences have been given exhibit marks, PW1/11 and PW1/12 respectively. Plaintiffs also wrote directly to the bank on 2nd October, 1997 vide exhibit PW1/13. I have perused the above documents and find that Ex.PW1/11 is a copy of fax message dated 1st October, 1997 sent by Mr. Thomas Bliesenner to defendant no.1. Similarly, a perusal of PW1/13 shows that the same is the copy of fax message dated 2nd October, 1997 sent by Mr. Thomas Bliesenner to Vijaya Bank. Both these documents do not bear the signatures of PW1 nor does it show that these fax messages

were sent by the PW1 and were delivered to the recipient. PW1 is not competent to prove these documents, inasmuch as, no official from the bank was summoned to prove the alleged remittances. In fact, the fax message allegedly sent by Mr. Thomas Bliesenner to defendant no.1 was also forwarded to Vijaya Bank, thus, could have been easily summoned from the bank. PW1/12 is a letter dated 19th September, 1997 written to defendant no.1 by PW1 and the same stands duly proved. Ex.P-1 is a letter dated 4th October, 1996 written by defendant no. 3 to plaintiff no. 1 offering the sale of 475 acres of land @ Rs.52,000/- per acre. Ex.P-2 is the Agreement to Sell dated 28th November, 1996 executed by defendant no. 3 in favour of defendant no. 1, in respect of the lands offered for sale vide letter dated 4th October, 1996 (Ex.P-1).

Issue Nos. (i), (ii), (iv) (vi) and (vii)

14. The above-noted issues are decided together. It is trite law that onus to prove a fact lies on the person who alleges the same. Accordingly, onus to prove the facts, as alleged in the plaint, rests upon the plaintiff. The facts alleged in the plaint, thus, have to be proved by the plaintiffs by cogent evidence, be it ocular or documentary.

15. In Rangammal vs. Kuppuswami and Anr. MANU/SC/0620/2011,

Supreme Court has held thus: “Section 101 of the Indian Evidence Act, 1872 defines ‘burden of proof’ which clearly lays down that whosoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.” The transactions involved in this case are purely commercial in nature, inasmuch as, correspondences were allegedly exchanged in respect of the alleged transactions, thus, only bald assertion of PW1 is not sufficient to prove the facts alleged in the plaint but have to be supported by documentary evidence. Case, set up by the plaintiff, as is evident from the facts narrated herein above, is that plaintiffs, defendant no. 1 and defendant no. 2 had agreed to form a joint venture company in order to purchase lands in District Churu, Rajasthan and cultivate the same for

growing agricultural produce and thereafter export the same to foreign countries on profit sharing basis. Plaintiffs and defendants had agreed to contribute US \$ 75,000/- towards the equity shareholding of the company and balance investment, required for the project, was to be raised through a foreign loan component. Land was to be in the name of joint venture company and for procuring the land services of defendant no. 3 were to be availed. Defendant no. 4 was managing partner of defendant no. 3, who offered to sell the land @ ₹52,000/- per acre vide letter dated 4th October, 1996. Deal was to be concluded by 31st January, 1997. Defendant no. 2 was roped in the joint venture business since he was having expertise in the field of plantation. On the assurances extended by defendant nos. 1 and 2, plaintiffs remitted US \$ 4,60,595/- in the account of defendant no.1, however, joint venture company could not be established till beginning of 1997. Defendant nos. 1 and 2 informed the plaintiff that due to some local restrictions the entire land could not be purchased in the name of company and, therefore, they would proceed as an interim and/or temporary measure to purchase the land in the joint names of plaintiffs and defendant nos. 1 and 2. Defendants did not fulfill their obligations towards the project; instead they purchased the lands in their individual names and also in the name of

their wives, that is, defendant nos. 4 and 5. Not only this, defendant no.1 also transferred certain portions of land to defendant no. 6, who is wife of employee of defendant nos. 1 and 2. Thus, defendants in furtherance of their common conspiracy misappropriated the total amount of US \$ 4,60,595/- remitted by the plaintiffs to the defendant no.1. On this premise, recovery of the aforesaid amount has been claimed along with interest @ 18% per annum from the defendants.

16. PW1 has deposed in line with the averments made in the plaint. He has reiterated the above facts in his affidavit, however, his oral bald statement cannot be accepted as a gospel truth in absence of supporting documents, inasmuch as, plaintiffs are guilty of violating the law of this country. No document has been placed on record or proved that parties had agreed to buy land in District Churu, Rajasthan and thereafter cultivate the same and grow agricultural produce for export purposes.

17. No joint venture company came into existence, as has been admitted by PW1 in his cross-examination. Even a perusal of his examination-in-chief makes it clear that no such joint venture company ever came in existence. Learned counsel for the plaintiffs has heavily placed reliance on PW1/9 which has been signed by the plaintiffs, defendant no. 1 and

defendant no. 2. However, this document is not sufficient to prove that a joint venture company in the name of 'Aquamarine Marine Green Development' was formed in accordance with law or came into existence. Business plan of 'Aquamarine Marine Green Development Company' which has been given exhibit mark Ex.PW1/8 has remained unproved. This has not been signed by any of the parties. This is a simple printed brochure which is not sufficient to prove that said joint venture company was ever incorporated. PW1 has admitted in his cross-examination that defendants did not contribute US \$ 75,000/- each. Even the plaintiffs have not contributed the same as no remittance of US \$ 75,000/- was made by each of the plaintiffs nor any documentary evidence in this regard has been placed on record. Plaintiffs have claimed that they had remitted US \$ 4,60,595/- to defendant no.1, however, such remittances have remained unproved. Ex.PW1/11 and Ex. PW1/13 have remained unproved as has been held in para 13 hereinabove. Even otherwise, these fax messages are not sufficient to prove the remittances of alleged amounts. No official from the bank has been summoned nor any statement of account of defendant no.1 was summoned from the bank and proved on record. On the sketchy ocular evidence led by the plaintiffs, it cannot be concluded that plaintiffs had

remitted US \$ 4,60,595/- to the defendant no.1 that too for the alleged project. Ex.PW1/7 is confirmation receipt which talks about the receipt of US \$ 3,50,000/- by defendant no. 1 but as per this document said amount was remitted for the exports of agricultural products such as wheat, oilseeds, oilseed-extraction, groundnuts, sugar, fishmeal etc. PW1/7 does not refer to any such deal of purchase of land by defendant nos. 1 and 2 from defendant nos. 3 and 4 either in the name of 'Aquamarine Marine Green Development' or in their individual or joint names. Be that as it may onus to prove remittances was on the plaintiffs which they have failed to prove by documentary evidence. Plea of plaintiffs that the land was to be purchased in the names of plaintiffs and defendant nos. 1 and 2, from the funds remitted by the plaintiffs otherwise cannot be accepted for the simple reason that no such land could have been purchased in the names of plaintiff nos. 1 and 2 without seeking prior permission of Reserve Bank of India. Under Section 31(1) of Foreign Exchange Regulation Act, 1973 ('FERA', for short), which was in force at the relevant time, no such remittances could have been made for purchase of land by the plaintiffs. FERA was repealed in the year 2000 on promulgation of Foreign Exchange Management Act, 1999 which came in force on or from 1st June, 2000. Transactions involved

in this case are prior to 1st June, 2000 when FERA was in force.

18. Relevant it would be to refer and reproduce Section 31 of FERA which reads as under :-

“Restriction on acquisition, holding, etc., of immovable property in India.—

“(1) No person who is not a citizen of India and no company (other than a banking company) which is not incorporated under any law in force in India shall, except with the previous general or special permission of the Reserve Bank, acquire or hold or transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India: Provided that nothing in this sub-section shall apply to the acquisition or transfer of any such immovable property by way of lease for a period not exceeding five years.

(2) Any person or company referred to in sub-section (1) and requiring a special permission under that sub-section for acquiring, or holding, or transferring, or disposing of, by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India may make an application to the Reserve Bank in such form and containing such particulars as may be specified by the Reserve Bank.

(3) On receipt of an application under sub-section (2), the Reserve Bank may, after making such inquiry as it deems fit, either grant or refuse to grant the permission applied for: Provided that no permission shall be refused unless the applicant has been given a reasonable opportunity for making a representation in the matter: Provided further that if before the expiry of a period of ninety days from the date on which the application was received by the Reserve Bank, the Reserve Bank does not communicate to the applicant that the permission applied for has been refused, it shall be presumed that the Reserve Bank has granted such permission. Explanation—In computing the period of ninety days for the purposes of the second proviso, the period, if any, taken by the Reserve Bank for giving an opportunity to the applicant for making a

representation under the first proviso shall be excluded.

(4) Every person and company referred to in sub-section (1) holding at the commencement of this Act any immovable property situate in India shall, before the expiry of a period of ninety days from such commencement or such further period as the Reserve Bank may allow in this behalf, make a declaration in such form as may be specified by the Reserve Bank regarding the immovable property or properties held by such person or company.”

19. A perusal of aforesaid provision makes it clear that plaintiffs could not have purchased any immovable property situated in India without seeking prior permission of Reserve Bank of India. Even a joint venture company could not have purchased the same unless incorporated under the laws in force in India. Admittedly, no such prior permission was taken by the plaintiffs, thus, no such land in Rajasthan could have been purchased in the name of plaintiffs. Thus, plea of plaintiffs that it was agreed by and between the plaintiffs and defendant nos. 1 and 2 that the land would be purchased in the names of plaintiffs, on the face of it, is improbable and cannot be accepted.

20. Be that as it may, there is no correspondence exchanged between PW1 and defendant nos. 3 and 4 with regard to land deal. In fact, PW1, in his cross-examination, has admitted that he had no discussion with defendant nos. 3 and 4 with regard to land deal. According to him it was

defendant no. 1 who had been dealing with defendant nos. 3 and 4. No correspondence was exchanged between the plaintiffs and defendant nos. 3 and 4. No money was remitted by the plaintiffs to defendant nos. 2 to 4. No offer of sale of land was given by the defendant nos. 3 and 4 to plaintiffs. This fact has been admitted by PW1 in his cross-examination which clearly shows that there was no privity of contract between the plaintiffs and defendant nos. 3 and 4. As regards defendant no. 2, PW1 has failed to point out any letter written by any of the plaintiffs to the defendant no. 2 with regard to the alleged project and/or for purchase of land. No such document has been placed on record. Reliance has been placed on Curriculum Vitae of defendant no.2 (Ex. PW1/4) as also on Ex.PW1/7 which are not sufficient to prove the privity of contract between the plaintiffs and defendant no.2 with regard to land project. As regards Curriculum Vitae, the same has remained unproved, inasmuch as, it does not bear the signatures of defendant no.2 and is of no consequence. In his cross-examination, PW1 has admitted that this Curriculum Vitae was not handed over by defendant no.2 to him personally. According to him the same was sent to him by the defendant no.1. Similarly, Ex. PW1/7 is also not sufficient to indicate that any such agreement was arrived at between the plaintiffs and defendant nos.

1 and 2 that they would purchase and develop the land as has been alleged by the plaintiffs. In view of the above, plaintiffs have failed to prove that there was any privity of contract between the plaintiffs and defendant no. 2 in respect of alleged land deal.

21. As regards defendant no. 6, PW1, in his cross-examination, has admitted that there was no privity of contract between the plaintiffs and defendant no. 6. A specific suggestion was given in the form of question no. 164 that there was no privity of contract between the plaintiff nos. 1 and 2 on the one hand and defendant no. 6 on the other and in answer to this question PW1 admitted the suggestion to be correct.

22. For the foregoing reasons, I am of the view that plaintiffs have failed to prove that the alleged amounts were remitted; parties had agreed to purchase lands at Churu and cultivate the same for growing agricultural produce for export purpose and that the the land was purchased by the defendant nos. 1, 2, 4 and 5 for the alleged project from the amounts allegedly remitted by the plaintiffs. Accordingly, I am of the view that plaintiffs are not entitled to amounts claimed in the plaint. Since plaintiffs have been held not entitled to recovery of the claimed amount, thus, question of award of any interest does not arise.

23. In view of the above discussions, above issues are decided in favour of the defendants and against the plaintiffs.

Issue Nos. (iii)

24. Onus to prove this issue was on the defendants. However, defendants have failed to point out how the suit is barred by limitation. Plaintiffs have alleged that during the period 5th September, 1996 till 23rd January, 1997 various amounts were remitted in the account of defendant no.1. Suit has been filed on 30th March, 1998, that is, within a period of three years from the date of alleged first remittance. Accordingly, in my view, suit is not barred by limitation.

25. For the foregoing reasons, this issue is decided in favour of the plaintiffs and against the defendants.

Issue No. (v)

26. Learned counsel for the defendant no. 6 has contended that since there was no privity of contract between the plaintiffs and other defendants, therefore, she was not a necessary party to the suit. It may be noted that initially defendant no. 6 was not impleaded as defendant. Subsequently, defendant no. 6 has been impleaded vide order dated 10th April, 2003 on the pretext that certain portion of the lands purchased by the defendant no. 1

was clandestinely transferred in the name of defendant no.6. The said order has remained unchallenged. Accordingly, I do not deem it necessary to answer this issue at this stage.

Issue Nos. (viii) and (ix)

27. Plaintiffs have alleged that plaintiff no.1 was a private limited company having its office at Netherland. PW1 was sole shareholder/director/principal officer and was competent to sign and verify the plaint on behalf of plaintiff no.1 company. It is further case of the plaintiffs that plaintiff no.2 was a company having its office at Switzerland and Mr. Thomas Bliesenner being director of the said company was competent to sign, verify and initiate the legal proceedings on behalf of the plaintiff no. 2. It may be noted that certificates of incorporation of the plaintiffs have not been placed on record nor proved. No board resolution has been placed on record. PW1 has attempted to justify non filing of certificates of incorporation and the Board Resolutions on the pretext that both the companies were 100% ownership companies. However, fact remains that PW1 has admitted, in his cross-examination, that M/s Virtus Dordrecht B.V. (plaintiff no.1) was incorporated under the laws of Holland and plaintiff no.2 was incorporated under the laws of Switzerland. Since

plaintiff nos. 1 and 2 have been incorporated under the laws of Holland and Switzerland respectively as has been admitted by the PW1, I am of the view that it was necessary for the plaintiffs to produce and prove relevant documents to prove the fact alleged on this point. No other material has been placed on record to show that plaintiffs were 100% owned companies by the individual person(s) and were akin to sole proprietorship firm. No cogent evidence has been led to show that Nico de Deugd and Thomas Bliesener were the principal officers of the respective plaintiff. Accordingly, I am of the view that plaintiffs have failed to prove that suit has been signed, verified and instituted by a competent person on behalf of the plaintiffs. As regards verification of the plaint is concerned, I find that the same has been verified properly. Both the above issues are decided accordingly.

Issue No. (x)

28. No cogent argument could be advanced by the defendant no. 6 to show that suit is not maintainable in the present form. This issue is decided in favour of the plaintiff and against the defendant no. 6.

Issue No. (xi)

29. In view of the findings returned on issue nos. (i), (ii), (iv), (vi) and

(vii), I am of the view that plaintiff is not entitled to any relief. Suit is dismissed. No order as to costs.

A.K. PATHAK, J.

July 07, 2014
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