

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

% **Date of decision: 13th May, 2019**

+ **CS(COMM) 617/2018 & IA No.2451/2018 (u/O XXXIX R-1&2 CPC).**

**YVES DEPOORTER @ YVES PHILIPPE J.
DEPOORTER**

....Plaintiff

Through: Mr. Kamal Bansal and Mr. Anshul
Singal, Advs.

Versus

WASHINGTON CAPITAL GROUP & ORS. Defendants

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The plaintiff has instituted this suit against the defendants no.1 to 8 namely (i) Washington Capital Group; (ii) David Young; (iii) William Jones; (iv) Steven Smith; (v) Amit Malik Sharma; (vi) Marcus Levy; (vii) Brilliance China Automotive Holdings Ltd.; and, (viii) LXX, Inc., pleading that (a) the plaintiff, a Belgian citizen, has been availing the services of stockbrokers for trading in shares listed on various stock exchanges; (b) the defendant no.1, on its website www.washingtoncapitalgroup.com claims to be an offshore institutional brokerage company but the plaintiff is not aware of the constitution thereof; the defendants no.2 to 6 claim to be the CEO, Vice President, Director (M&A), Accounts Head and Senior Investment Advisor/Marketing Strategist (M&A) respectively of the defendant no.1 and have been dealing with the plaintiff and participating in the transaction and are responsible for the day-to-day affairs of the defendant no.1; (c) the defendant no.1 approached the plaintiff to provide its brokerage services of stock investments; one Mr. Reynolds of

the defendant no.1 proposed investment in defendant no.7 listed on the Hong Kong Stock Exchange and the plaintiff lured by the representations of the defendant no.1/its Mr. Reynolds, of projections with respect to stocks of defendant no.7, agreed to try defendant no.1 by making an initial purchase of 10,000 shares of defendant no.7; however the bank account of which defendant no.1 provided details to the plaintiff, for transfer of payment was not in the name of the defendant no.1 but in the name of another; on the plaintiff raising question with respect thereto, the defendant no.1 offered to open a brokerage account in the name of the plaintiff, and one Mr. Amit Malik of the defendant no.1 vide his e-mail dated 23rd November, 2016 e-mailed invoice, account application form and banking instructions held with an Indonesian bank; however the banking details were not in the name of the defendant no.1 but again in the name of some other entity and the plaintiff refused to transmit monies; the defendant no.1 vide its e-mail dated 24th November, 2016 informed the plaintiff that the banking details provided were of the Stock Transfer Agent and the plaintiff would be remitting direct payments to the said Stock Transfer Agent; the plaintiff still remained doubtful and vide his e-mail dated 24th November, 2016 informed the defendant no.1 that the plaintiff would transact subject to purchase being made on account of the plaintiff held with HSBC Bank, Hong Kong; however the defendant no.1 continued to lure the plaintiff and vide e-mail dated 30th November, 2016 informed the plaintiff that the shares of the defendant no.7 purchased on behalf of the plaintiff were making profits and the plaintiff should immediately remit payment in order to avail such profit and again forwarded instructions of an

alternative bank i.e. Bank of Communications and assured that the defendant no.1 would issue an appropriate receipt of payment; induced therefrom, the plaintiff vide his e-mail dated 1st December, 2016 told the defendant no.1 that he had remitted payment of HKD 97,061.00 on 30th November, 2016 to Jakarta Bank account for purchase of the 10,000 shares of defendant no.7; the defendant no.1 vide its e-mail dated 2nd December, 2016 forwarded the receipt of payment for the said shares; the defendant no.1 vide its e-mail dated 19th April, 2017 to the plaintiff informed the plaintiff of likely major moves which required the plaintiff's oral instructions to the defendant no.1 and sought convenient time for defendant no.1 to contact the plaintiff; thereafter the defendant no.6 vide e-mail dated 9th May, 2017 provided his contact details to the plaintiff; (d) the defendant no.6 proposed an investment in defendant no.8 and though the plaintiff resisted but under persistent inducement of defendant no.1, vide e-mail dated 14th June, 2017 forwarded payment advice confirming remittance of payment of USD 61,357.00 to defendant no.1 and defendant no.1 vide its e-mail acknowledged receipt of payment advice and promised issuance of receipt upon receiving the funds; (e) by so trapping the plaintiff, the defendant no.6 further induced the plaintiff to buy another tranche of shares of defendant no.8 and the plaintiff, under such inducement, vide e-mail dated 6th July, 2017 agreed to further transaction in shares of defendant no.8 and on 25th July, 2017 made payment of USD 39,981.99; the defendant no.1, vide its e-mail dated 3rd August, 2017 forwarded receipt qua payment received; (f) on 30th August, 2017, the defendant no.6 proposed purchase of 2,50,000 shares of defendant no.7 and the plaintiff vide his e-mail dated 31st

August, 2017 forwarded the details of remittance of payment of USD 72,911 as demanded and the defendant no.1 vide e-mail dated 1st September, 2017 assured issuance of receipt upon credit of funds to the account; (g) thereafter the defendant no.1 started taking time in corresponding with the plaintiff and also inspite of assurances failed to furnish statement of portfolio of the plaintiff; ultimately when the statement of portfolio was forwarded, the same did not reflect transactions in shares of defendant no.7 and the queries of the plaintiff remained unanswered; (h) the defendant no.1 further lured the plaintiff to buy more shares of defendant no.8 and on 21st September, 2017 issued a payment receipt in respect thereof; (i) till 30th September, 2017 the plaintiff made total investment of USD 2,21,395.05 and should have had 2,50,000 shares of defendant no.7 and 50,000 shares of defendant no.8 with corporate financing of USD 1,50,000/-; (j) the defendant no.1 vide email dated 18th October, 2017 suddenly informed the plaintiff of the need for liquidation of loan financed for purchase of shares on the alleged ground of conflict of interest; (k) the plaintiff, vide his e-mail dated 18th October, 2017 directed the defendant no.1 to sell all shares of defendant no.7 and pay off the loan and deposit the balance amount in the plaintiff's bank account; as on that date, as per statement portfolio forwarded by the defendant no.1, the plaintiff was holding 2,50,000 shares of defendant no.7 of the value of 52,50,000 HKD equal to USD 6,73,076.92 and after paying off loan of USD 1,50,000/-, the plaintiff should have been left with USD 5,23,076.92 and 50,000 shares of defendant no.8; (l) however the aforesaid instructions were not implemented inspite of repeated requests and reminders of the plaintiff;

and, (m) after repeated reminders of the plaintiff, the defendant no.3 contacted the plaintiff and accepted full responsibility and assured better management of the portfolio of the plaintiff; however still the instructions of the plaintiff were not abided by.

2. The plaintiff has instituted the present suit, (i) for mandatory injunction directing the defendant no.1 to sell 50,000 shares of the defendant no.8 at USD 3.50 per share or handover the original share certificates of 50,000 shares of defendant no.8 and to sell 2,50,000 shares of defendant no.7 listed on Hong Kong Stock Exchange at 1114:HK or handover the original share certificates of 2,50,000 shares of defendant no.7; (ii) alternatively, for recovery of USD 7,42,994.96 (Rs.4,85,17,571); (iii) for award of damages for delays and loss of prospective profits; (iv) for permanent injunction against creation of third party rights against the shares in the account of the plaintiff maintained by the defendant no.1; and, (v) for interest and costs.

3. The suit came up before this Court first on 21st February, 2018 when summons thereof were ordered to be issued. Summons issued to defendants no.1 to 6 were returned with the report that there was no such firm or persons at the addresses given. Subsequent order dated 17th August, 2018 records that the defendants no.1 to 7 had been served through e-mail and since none appeared for them, they were vide the said order proceeded against *ex parte* and restrained from creating third party interest in the shares purchased on behalf of the plaintiff. On 12th February, 2019, the counsel for the plaintiff stated that he had filed an affidavit of service of defendant no.8 through fax; since none appeared

for the defendant no.8, vide the said order the defendant no.8 also was proceeded against *ex parte*.

4. On 12th February, 2019, after verifying whether the plaintiff was entitled to a decree forthwith, it was ordered that the plaintiff was required to lead his *ex parte* evidence. Considering the nature of the claim, it was further directed that the plaintiff/his witnesses appear before this Court for tendering their affidavit by way of examination-in-chief in evidence.

5. The plaintiff in his *ex parte* evidence has filed his only his own affidavit and the counsel for the plaintiff states that no other witness is to be examined.

6. The plaintiff is present in Court in person and has tendered in evidence his affidavit by way of examination-in-chief along with the documents referred to therein. I have also put some questions to the plaintiff and the answers of the plaintiff whereto have been recorded separately.

7. Needless to state the affidavit by way of examination-in-chief of the plaintiff is on the same lines as the plaint, except for change from third person to first person.

8. The documents filed by the plaintiff and tendered in evidence comprise of printouts of the website of the defendant no.1, defendant no.7 and defendant no.8, e-mails exchanged by the plaintiff with the defendants no.1 to 6 and referred to in the plaint, price of shares of defendant no.1 quoted at stock exchange, web printout of the online

account of the plaintiff's portfolio with the defendant no.1 and copy of passport of the plaintiff.

9. The plaintiff, on questioning by the Court has stated, (i) that he has never met any of the defendants no.2 to 6 and only communicated with them by phone or by e-mail; (ii) that save for checking the website of defendant no.1, he did not make any enquiry whether any person by the names of defendants no.1 to 6 at all exist; however on verification whether the procedure informed to him by defendants no.1 to 6 of transacting in stock in Hong Kong was correct, the same was found to be correct; (iii) that he did not transmit any money in the bank account in the name of the defendant no.1 or any of the defendants no.2 to 6 and transmitted the monies in the account of what was informed by the defendants no.1 to 6 to be the Stock Transfer Agent in Indonesia; (iv) that he did not make any enquiry from the Stock Transfer Agent in Indonesia and only checked the website of the Stock Transfer Agent in Indonesia; (v) that though he subsequently sent e-mails and letters to the Stock Transfer Agent in Indonesia but no response was received thereto; and, (vi) that he did not check any authority/entitlement in law of defendant no.1 stationed in India to deal in stocks in Hong Kong as he believes that a broker can trade anywhere.

10. I have enquired from the counsel for the plaintiff, whether not on the basis of aforesaid evidence, it is well-nigh possible that no person exists by the name of defendants no.1 to 6 and defendants no.1 to 6 are merely websites/e-mail identities and that even if the plaintiff were to be

granted a decree as sought, from whom would the plaintiff recover the monies.

11. The counsel for the plaintiff states that it is possible but after the decree is passed, the plaintiff will determine the identities of the defendants no.1 to 6.

12. What follows is that a decree is sought from this Court against persons whose very existence and identity is unknown.

13. I may also mention that though the defendants no.2 to 6 as officers/directors of defendant no.1 have been impleaded but the very constitution of defendant no.1 is not known to the plaintiff i.e. whether it is a sole proprietary or a partnership or a limited liability partnership or a limited company, and if so, who are the partners, proprietors, shareholders, directors thereof. Moreover in the prayer paragraph of the plaint, decree for mandatory injunction and in the alternative for recovery of USD 7,42,994.96 is sought only against the defendant no.1.

14. However as per the own case of the plaintiff, the monies claimed to be paid by the plaintiff for acquisition of the subject stocks and shares have also not been paid to the defendant no.1 but to some Stock Transfer Agent in Indonesia. In the ordinary course of human conduct, the plaintiff, even if had paid money to another at the instance of the defendant no.1, while suing for recovery of the said monies, besides the defendant no.1 would have also claimed recovery from the person to whom monies were paid. It is inexplicable why the plaintiff has not done so. Moreover, the identity of the Indonesian entity in whose account monies are claimed to have been paid is also not known. In fact there is

no proof that any shares were transacted or payments thereof made. What has been produced is only e-mails exchanged including of defendant no.1 of confirmation of transfer of shares for the values mentioned therein. It is well-nigh possible for any person to create several e-mails identities and have correspondence *inter se* the said identities. However without the identity of the natural or juristic person behind the e-mail address being established, I would be loath to grant any relief whatsoever to the plaintiff.

15. It cannot be lost sight of that the plaintiff is a foreign national and on the basis of the decree of this Court on showing receipt of payment thereunder would be entitled to repatriate monies out of India. It is thus the duty of the Court to ensure that there indeed has been monetary transaction between identifiable persons and monies are recoverable from one to another with respect thereto. Merely because the defendants are *ex parte* would not justify the Court to pass a money decree in favour of the plaintiff and against the persons of unknown identity and of which decree diverse consequences can follow.

16. I am thus left with no option but to dismiss the suit.

The suit is dismissed.

No costs.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J

MAY 13, 2019

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(Corrected and released on 30th May, 2019).