THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 01.07.2010

CS(OS) No. 1975/1997

TIRUPATI TEXKNIT LIMITED ..... PLAINTIFF

Vs

ALLAHABAD BANK ..... DEFENDANT

Advocates who appeared in this case:

For the Plaintiff : Mr Rajiv Bansal, Advocate
For the Defendant: Mr Ashim Vachher, Advocate

CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ? No
2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

RAJIV SHAKDHER, J

1. This is a suit filed by the plaintiff for recovery, rendition of accounts, and delivery by the defendant of: list of unpaid instruments; computers; floppies; paid instruments in original; and copies of returns of different branches of the defendant. The relief of delivery is essentially sought against the defendant with respect to details of paid and unpaid refund orders issued qua unsuccessful applicants of the public issue of shares of the plaintiff.

1.1 The core issue in the suit is essentially the plaintiff's grievance that it had appointed the defendant through the aegis of Bank of Credit and Commerce International (Overseas) Ltd. (hereinafter referred to as 'BCCI') as the banker for handling refund orders, in respect of over-subscribed public issue of equity shares, made by it, in January, 1990. A mandate which, according to the plaintiff, required the defendant to fully account for the money received for the said purpose by the defendant. The plaintiff has sought recovery of a sum of Rs 5,73,072/- along with interest at the rate of 18% per annum w.e.f. 03.04.1997; and

rendition of accounts with respect to the amounts actually disbursed; consequential repayments of amounts so ascertained; and also delivery of documents, which would enable it to ascertain the said information.

PLAINTIFF'S CASE

2. In this context, it would be necessary to note the plaintiff's allegations against the defendant. On 11.01.1990 the plaintiff issued a prospectus for a public issue of equity shares. It is alleged that on 12.03.1990, the Board of Directors of the plaintiff passed a resolution appointing the BCCI as its bankers for handling refund orders in respect of over-subscribed public issue. Consequently, on 13.03.1990 the plaintiff sent a formal letter to the BCCI confirming their appointment as the Refund Banker, in respect of its public issue which, closed on 15.02.1990. The necessary application form, copy of the resolution, and a copy of the Memorandum and Articles of Association were enclosed therewith. It is the plaintiff's case that the defendant in turn accepted the engagement, under BCCI, to effectuate the functions of the Refund Banker, which were essentially entrusted to BCCI, in respect of areas, other than Bombay (now Mumbai). The basic premise of the defendant's engagement was that the 100% funding would be provided by the plaintiff; coupled with an obligation to reconcile statements of both paid and unpaid refund orders. Accordingly, the plaintiff provided funds to BCCI in the sum of Rs 11,89,54,800/-, out of which, BCCI transferred a sum of Rs 10.33 crores to the defendant, on 24.04.1990. It is, however, averred by the plaintiff that it had remitted, apart from the above, additional funds to the defendants, the details of which are as follows:

Amount (Rs)	**Date of Remission**
5,00,000/-	12.09.1990
3,00,000/-	01.07.1991
1,60,000/-	07.03.1992
12,800/-	21.06.1993

2.1 Well after the closure of the public issue, the plaintiff vide letter dated 24.12.1990 (Ex. PW1/8) informed the defendant that the net unpaid outstanding balance after

reconciliation which appeared against in the defendant's account, in its books, was a sum of Rs 5,30,006/-. This, according to the plaintiff, was a figure which had been arrived at after adjusting duplicate refund orders issued by them to the defendant. Accordingly, the plaintiff called upon the defendant to issue a cheque in the sum of Rs 5,30,006/- so that the account could be finally settled.

2.2 By a further communication dated 22.06.1991, the plaintiff, it appears, once again called upon the defendant to close the refund order account, and issue to it, an upto date statement of account. In addition to this, a demand was made that the amount standing to the plaintiff's credit be remitted to it. The plaintiff returned the unused cheque leaves in respect of the said account, which was in its possession.

2.3 By a further communication dated 05.01.1995 (Ex. PW1/11), the plaintiff reiterated their demand for return of money. What is noticeable is that in this communication the demand was scaled down to a sum of Rs 2,62,262/-. This apart, in the said communication the plaintiff alluded to the fact that they had been verbally, in touch with one Mr Chhabra, presumably an employee of the defendant, and the computer agency, for reconciliation of the account. The reference was also made to the fact that the computer agency had not maintained proper accounts, and had resultantly, debited instrument not pertaining to the plaintiff.

2.4 By another communication dated 26.06.1995 (Ex. PW1/12), (said to have been issued to the defendant), the plaintiff sought information with respect to paid dividend warrants for reconciliation of the refund order account. To be noted, during the course of arguments it was put to the learned counsel for the plaintiff that the reference to the unpaid dividend warrant is perhaps incorrect, which was accepted by the learned counsel for the plaintiff. He submitted that the reference ought to have been to the refund order account, and not the dividend warrant account. This mistake seems to have crept in, even in the pleadings.

2.5 By a further communication dated 30.10.1995 (Ex. PW1/13), the plaintiff sought refund of a sum of Rs 2,62,262/- from the defendant. In this letter reference was made to an earlier letter of 05.01.1995 (Ex. PW1/11).

2.6 In between, it appears that the plaintiff's sister concern, T.T. Finance Ltd. had filed a complaint with the Banking Ombusdman. It was alleged in the complaint that the defendant had been illegally holding the balance funds in the "allotment money account" to exert pressure on the plaintiff to settle the issue with regard to their refund order account. What is not disputed is that by an order dated 08.08.1996, the Banking Ombusdman had recommended that the defendant and plaintiff should reconcile the refund order account. Accordingly, as averred in the plaint, on 16.09.1996, the defendant evidently submitted a certified statement of account to the plaintiff pertaining to the refund order account, and demanded in turn a sum of Rs 2,31,559/- on account of short-funding by the plaintiff; in addition to interest in the sum of Rs 3,78,681/- on the aforementioned amount.

2.7 Thereupon, on the aspect of reconciliation, the plaintiff wrote letters to the defendant on 06.02.1997 (Ex. PW1/15), 24.02.1997 (Ex. PW1/17) and 12.03.1997 (Ex. PW1/18). The plaintiff on this issue also communicated with the Banking Ombusdman vide letter dated 07.02.1997 (Ex. PW1/16) and 31.03.1997 (Ex. PW1/19). A copy of the letter dated 31.03.1997 (Ex. PW1/19) was marked to the defendant. The Banking Ombusdman by a letter dated 09.04.1997 (Ex. PW1/20) opined that since it was not an issue over which it could rule, it was best if, the plaintiff were to reconcile its accounts with the defendant.

2.8 Finally, the plaintiff through its advocate issued a legal notice dated 12.05.1997 (Ex. PW1/21). By this notice it demanded a sum of Rs 62,35,042/- from the defendant. This demand included a sum of Rs 5,73,072/- towards the outstanding debit balance appearing in its refund order account, maintained in the plaintiff's book, and Rs 56,61,970/- towards what it claimed ought to be the unclaimed refund amount, based on the past experience of its share transfer agent Allied Computers Techno Pvt. Ltd. (hereinafter referred to as 'Allied Computers'). The said claim in the sum of Rs 56,61,970/- includes an interest element,

equivalent to a sum of Rs 27,90,230/-, calculated at the rate of 15.5% p.a. for the period 24.12.1990 to 31.03.1997, (i.e., six years and 90 days) on a principal sum of Rs 28,71,740.

2.9 The defendant rebutted the contentions of the plaintiff made in the aforementioned legal notice vide its reply dated 27.05.1997 (Ex. PW1/22). In the reply, the defendant, in particular, stressed upon the fact that since there was a short-funding by the plaintiff to the tune of Rs 2,31,559/-, in respect of the refunds made by the defendant; the plaintiff was liable to pay the said amount along with interest at the rate of 16.5% per annum with quarterly rest. Accordingly, a sum of Rs 7,42,951/- was demanded by the defendant from the plaintiff. The plaintiff, in these circumstances, approached this court by instituting the instant action.

<u>Defendant's case</u>

3. The defendant, on the other hand, has denied the case set up by the plaintiff as is indicated in the aforementioned paragraph i.e., 2.9. As a matter of fact the defendant has averred in the written statement that the amount paid to the BCCI for making payment against refund orders was a sum of Rs 11,87,90,600/- and not Rs 11,89,54,800/- as averred in the plaint. Though it is admitted that the defendant had received funds from BCCI to the tune of Rs 10.33 crores, on 24.04.1990 for the purpose of processing refund orders of unsuccessful applicant of the share issue.

3.1 What is specifically denied is the fact that the plaintiff paid an additional amount of Rs 5 lacs on 12.09.2009. The defendant has taken the stand that since it did not have a branch, in every area, it was mandated to appoint other banks as a Refund Banker. In one such area, Punjab & Sindh Bank was appointed, and it was money received from Punjab & Sindh Bank, G-Block, Connaught Circus Branch, New Delhi, which was received in the account of the defendant and not from the plaintiff. It is also averred that the said sum of Rs 5 lakhs was part and parcel of the total funding equivalent to Rs 10.33 crores.

3.2 With regard to payment of sum of Rs 3 lacs and Rs 1.60 lacs in February, 1992 and March, 1992 respectively, it is accepted by the defendant that the said sum was paid. The defendant, however, has taken stand that since the balance, in the refund order account, had dipped to Rs 12,000/- and because, the defendant was still receiving the refund orders at its various branches, the plaintiff remitted the said amounts: Accordingly, Rs 3,00,000/- was remitted in February, 1992; while Rs. 1.60 lacs was remitted on 07.03.1992.

3.3 In so far as payment of Rs 12,800/- is concerned the same has been specifically denied by the defendant. The defendant has, as a matter of fact, claimed that inadvertently an entry equivalent to Rs 12,800/- was debited in the refund order account on 07.10.1992, whereas it had to be debited in the interest warrant account of the plaintiff. Therefore, on discovering the mistake, the defendant passed a contra-entry on 21.06.1993, thereby reversing the earlier entry.

3.4 As regards the plaintiff's demand of a sum of Rs 5,30,006/- conveyed through its communication dated 24.12.1990 (Ex. PW1/8) is concerned, the defendant took the stand that the reconciled statement of account as on 22.12.1990, sent by the plaintiff, was inaccurate. The defendant contends that as per its books on 22.12.1990, the balance in their refund account was Rs 8,18,518/-, and if the adjustments are made in respect of a sum of Rs 7,90,700/- and Rs 1,35,798/- which were payable by the plaintiff, it would show a debit balance of Rs. 1,07,980/-. The defendant claimed that, therefore, the figure of Rs 5,30,006/- demanded by the plaintiff on 24.12.1990 was not correct. The defendant further claims that on 07.01.1991, it advertently paid a sum of Rs 6.00 lacs to the plaintiff and hence, factually thereafter, there was no balance outstanding in favour of the plaintiff.

3.5 The defendant specifically denies the contents of the communication dated 05.01.1995 (Ex. PW1/11); in particular, it denies that on the said date there was a debit balance to the extent of Rs 2,62,262/- outstanding in favour of the plaintiff. The defendant claims that there was as a matter of fact a debit balance to the extent of Rs 6,758/-. The defendant further avers that since it continued to receive requests from various branches

with regard to refund orders the balance increased to Rs 2,39,818/- and, accordingly, at the relevant date the demand was made with regard to short-funding to the tune of Rs 2,31,559/.

3.6 The defendant has also averred that even though it was not required to make payments with regard to refund orders pertaining to Bombay (now Mumbai)— only with a view to accommodate the request of the plaintiff made vide its letter of 10.09.1990, it made a payment to the extent of Rs 3,73,769/- through its branch at Fort Bombay (now Mumbai).

3.7 The receipt of communication dated 26.06.1995 (Ex. PW1/12) and 30.10.1995 (Ex. PW1/13) is specifically denied.

3.8 The defendant has also taken the stand that pursuant to the order of the Banking Ombudsman dated 08.08.1996, which was passed on the complaint of the plaintiff's sister concern T.T. Finance Pvt. Ltd., an undertaking was furnished on 28.01.1997 by the plaintiff, that not only would it pay the entire dues to the defendant in respect of the refund order account, but would also make efforts to reconcile the accounts. As a matter of fact it is stated that on 28.01.1997 an indemnity bond was furnished by the plaintiff's sister concern i.e., T.T. Finance Pvt. Ltd. in favour of the defendant.

3.9 On the issue of supply of information with regard to refund order account the defendant has averred that it has been always willing to provide the said information. The defendant while accepting the receipt of letter dated 05.02.1997 (Ex. PW1/14), denies the plaintiff's letter dated 07.02.1997 (Ex. PW1/16). The defendant also denies the analysis made by the share transfer agency, i.e., Allied Computers that the unclaimed refund orders were in the range of 5% of the total amount which different companies were called upon to refund. The defendant avers that a perusal of the data supplied by Allied Computers would itself show that the unclaimed refunds are at an average, in the range of 0.08% and, not 5% as stated in the body of the letter.

3.10 The defendant, therefore, took the stand that there being no cause for action, the plaintiff was not entitled to any of the reliefs as prayed for in the suit.

4. A specific objection is taken by the defendant with respect to deficit court fee and incorrect valuation of the suit.

5. Based on the case set up by the plaintiff and the defendant the following issues were cast in the matter on 03.03.2004:

(i) Whether the defendant is liable to render to the plaintiff statement of account in respect of the public issue refund orders handled by the defendant on the plaintiff along with list of unpaid instruments, computers floppies, spools paid instruments in original and copies of returns from each branch?

(ii) Whether the defendant is liable to pay to the plaintiff the amount which may be found due to the plaintiff on rendition of refund order account by the defendant?

(iii) Whether the plaintiff is entitled to a sum of Rs 1,03,30,000/- from the defendant in any event of failure of the defendant to render accounts?

(iv) Whether an amount of Rs 5,73,072/- is due to the plaintiff from the defendant in addition to the amount which may be found due to the plaintiff on rendition of refund order account by the defendant.

(v) Reliefs.

<u>Submissions of Counsels</u>

6. The learned counsel for the plaintiff Mr Bansal based on the case set up in the plaint, submitted that: the defendant has received funds from plaintiff, admittedly to the tune of Rs 10.33 crores. The plaintiff had demanded the return of a sum of Rs 5,30,006/- vide its communication dated 24.12.1990 (Ex. PW1/8). The plaintiff had reiterated its demand vide a subsequent communication dated 05.01.1995 (Ex. PW1/11) and 30.10.1995 (Ex. PW1/13). He, however, conceded that the amount demanded by virtue of communication dated 05.01.1995 (Ex. PW1/11) and 30.10.1995 (Ex. PW1/13) was scaled down to Rs 2,62,262/-. In these circumstances, the learned counsel submitted that the plaintiff was entitled to the sum demanded by it along with interest (which, according to him, formed part of his relief for recovery in the sum of Rs 5,73,072/-).

6.1 On the issue of rendition of accounts, the learned counsel for the plaintiff submitted that the letter of its share transfer agent dated 05.02.1997 (Ex. PW1/14) would clearly demonstrate that, at an average, the unclaimed refund was to the extent of 5% of the total amount to be refunded. Therefore, on a rough and ready estimate, it was entitled to at least a sum of Rs 28,71,740/-; which was indicated by the plaintiff in its letter to the Banking

Ombudsman dated 31.03.1997 (Ex. PW1/19); a copy of which was sent to the defendant. The learned submitted that on the said amount it was entitled to simple interest at the rate of 15% p.a. Therefore, the quantum of interest for the period 24.12.1990 to 31.03.1997, according to the counsel, worked to Rs 27,90,230/-. Thus, as on 31.03.1997 a sum of Rs 56,61,970/- being payable, was demanded under this head.

6.2 Mr Bansal also relied upon various communications issued on the aspect of reconciliation of the refund order account; most of which have been referred to by me, in the earlier part of my narration. However, Mr Bansal, chose to specifically refer to letters dated 05.01.1995 (Ex. PW1/11), 26.06.1995 (Ex. PW1/12), 30.10.1995 (Ex. PW1/13), 05.02.1997 (Ex. PW1/14), 06.02.1997 (Ex. PW1/15), 24.02.1997 (Ex. PW1/17), 24.02.1997 (Ex. PW1/17), 12.03.1997 (Ex. PW1/18) and 31.03.1997 (Ex. PW1/19). In this regard reference was also made to the legal notice dated 12.05.1997 (Ex. PW1/21).

6.3 Mr Bansal further contended that since all the refund orders, (which were uniformly dated 24.04.1990) carried a validity period of three months, they could not have paid by the defendant beyond 23.07.1990. In other words, the defendant was not entitled to refund money based on Refund orders after the expiry of the validity period.

7. Against this, the learned counsel for the defendant Mr Vachher made the following submissions:

(i) The relief for recovery was barred by limitation. According to Mr Vachher, the cause of action, if any, would have arisen on 24.12.1990 when, a demand was raised on the defendant to pay a sum of Rs 5,30,006/- vide letter dated 24.12.1990 (Ex. PW1/8). To be noted, Mr Vachher being conscious of the fact that the defence of limitation was not taken in the written statement; submitted that though this defence had not been raised, the court was obliged to take cognizance of his submission in view of the mandate of Section 3 of the Limitation Act, 1963. For the said purpose he relied upon the following judgments: ***Noharlal Verma vs Distt. Cooperative Central Bank Ltd., Jagdalpur (2008) 14 SCC 445*** and ***Gannamani Anasuya vs Parvatini Amarendra Chowdhary AIR 2007 SC 2380***

(ii) Mr Vachher further contended that contrary to what had been argued by Mr Bansal that the plaintiff had to submit both paid and unpaid instrument, the obligation undertaken by the defendant was **only** with regard to reconciliation of **paid instrument**. For this purpose he relied upon the letter dated 17.04.1990 (Ex. PW1/5) issued by the defendant to the plaintiff by which the defendant had accepted the terms of appointment as the Refund Banker, under the aegis of BCCI.

(iii) It was next contended by Mr Vachher that even though the plaintiff claimed recovery of a sum of Rs 5,70,372/-; the claim was not proved. He submitted that neither book of accounts nor any primary document evidencing the fact that the defendant was liable to pay the said amount had been produced as evidence. The testimony of the witnesses alone unsubstantiated by a paper trail, it was submitted by the learned counsel, did not establish the liability of the defendant to pay the said amount.

(iv) It was also contended by the learned counsel that in so far as claim for unpaid refund orders was concerned, it was based on the analysis of Allied Computers; which was flawed. A bare perusal of the said letter dated 05.02.1997 (Ex. PW1/14) would show that the unclaimed refund orders even as per the data supplied by Allied Computers ranged between 0.05% to 0.08% and **not** 5% as contended by the plaintiff. Mr Vachher, however, conceded that even though there was short-funding by the plaintiff which was communicated by the defendant to the plaintiff vide letter dated 26.09.1994 (Ex. PW1/10), and by virtue of reply dated 27.05.1997 (Ex. PW1/22) to the legal notice, the defendant had not filed any claim in that regard. Mr Vachher, further conceded that except for the legal notice none of the letters had been replied by the defendant.

(v) It was also the contention of Mr Vachher that in so far as the relief for rendition of accounts was concerned it was incorrectly valued by the plaintiff. It was his contention that in a suit for rendition of accounts the valuation for the purposes of jurisdiction and court fee had to be identical. In the instant case it was submitted, the plaintiff had done the contrary, and therefore, the suit would have to be dismissed on this short ground alone. Mr Vachher in support of this contention drew my attention to paragraph 28(d) of the plaint

wherein, the relief for rendition of accounts for the purposes of court fee was valued at Rs 2,50,000/- and a court fee of Rs 4784/- had been affixed by the plaintiff, whereas for the purposes of jurisdiction this very relief was valued at Rs 1,03,30,000.00. The plaintiff, according to Mr Vachher, should have affixed a court fee on a valuation of Rs 1,03,30,000/-. In support of his submission the learned counsel relied upon the judgment of Division Bench of this Court in ***Maiden Pharmaceuticals Ltd vs Wockhardt Ltd 157 (2009) DLT 65***.

(vi) On merits, with regard to the issue of rendition of accounts, the learned counsel relied upon the statement of Mr Sunil Kumar Meena (DW1). It was the learned counsel's submission that the said witness has proved the statement of account (Ex. DW1/1). It was contended that no question was put to the witness that this statement of account, as produced, was not correct. The learned counsel submitted that in view of Section 4 of the Bankers Book Evidence Act, 1891 the account of the defendant had to be taken as true unless contrary was proved. Reliance in this was placed on the following judgments: ***Union Bank of India vs M/s Noor Dairy Farm & Ors. 1 (1998) B.C. 691 at page 697 – 698 paragraph 11*** and ***Kalipada Sinha vs Mahaluxmi Bank Ltd AIR 1961 Cal. 191 at page 192 paragraph 3***. Mr Vachher further relied upon Exhibit DW1/2 (i.e., the statement of account) to show that there were endorsements on the said document which demonstrated that the information with regard to paid refund orders was received by the plaintiff. In this regard reliance was also placed on the evidence of Mr Rameshwar Singh (PW5) who had stated in his cross-examination that the paid instruments were "received"; though he went on to say that they were not complete. The contradiction in the testimony was sought to be demonstrated by relying upon the examination-in-chief of Rikhab Chand Jain (PW1), who stated that the instruments were not received, and that he was unable to identify the signatures of the recipients. Mr Vachher contended that this demonstrated the falsity of the plaintiff's claim.

8. In rejoinder, apart from reiterating its case, Mr Bansal submitted that since statement of account was furnished by the plaintiff only in September, 1996 a fresh cause of action arose in favour of the plaintiff and hence, the claim for recovery was within time. In this

regard, reliance was placed on paragraph 4 of the written statement to buttress his submission that the defendant had not refuted the fact that a statement of account was sent to the plaintiff on 16.09.1996. In support of his submission the learned counsel relied upon the judgment in the case of ***Shri Amar Nath Satya vs Shri Amar Nath Satya 55 (1994) DLT 683*** at page 686 & 687, paragraph 16 & 17.

8.1 Mr Bansal also contended that even if it was assumed that the entire list of paid instrument, which had been filed by the defendant as evidence is taken to be correct, even then the amounts indicated therein do not add up to more than Rs 37 lacs and, accordingly, the defendant would have to account for the balance sum.

8.2 It was, however, conceded by Mr Bansal during the course of arguments that since these amounts were received by the plaintiff towards share application money, the plaintiff could not rightfully claim ownership of the said money, and that the money, in fact was that of the persons who had applied for the shares and had been unsuccessful in that regard.

Reasons:

9 Let me first discuss the evidence on record.

9.1 In support of their respective case each party has examined witnesses. Even though the plaintiff cited seven witnesses, it finally examined only five witnesses, while the defendant cited only one witness. It may be pertinent to briefly refer to what has come through in the testimony of each of the witnesses cited by both parties.

9.2 Mr Rikhab Chand Jain (PW1), who was at the relevant point in time Managing Director-cum-Chairman of the plaintiff company proved the Board of Directors Resolution dated 27.08.1997 (Ex. PW1/1) which authorized him to institute the present suit. He deposed that pursuant to a public issue made by the plaintiff on 11.01.1990, on 12.03.1990 the Board of Directors appointed BCCI as the Refund Banker for the purposes of handling refund orders in respect of over-subscribed share application money received from applicants to the public issue. BCCI, according to PW1, was conveyed the offer of appointment on 13.03.1990 (Ex. PW1/3), which was accepted by BCCI, vide its letter dated 03.04.1990. It is pertinent to note that the original document, i.e., letter dated 03.04.1990

has not been filed. It is also pertinent to note that the counsel for the defendant has taken objection to the admissibility of the document. It is further pertinent to note; however, that since the document is a photocopy and no leave or permission of the court was obtained to lead secondary evidence in respect of this document, ordinarily it could not have been relied upon by the plaintiff- except for the fact that the defendant in the instant case cannot derive much mileage from the same in view of the fact that it is not in dispute that BCCI was appointed as the refund manager. This is clear from the stand taken by the defendant in the pleadings that it was appointed as the refund manager for all other territories in India except Bombay (now Mumbai) on terms indicated in letter dated 05.04.1990 (Ex. P3) under the aegis of BCCI.

9.3 PW1 has further deposed that on 24.04.1990, the plaintiff remitted funds equivalent to a sum of Rs 11,89,54,800/- to BCCI for the purpose of payment of refund orders. Out of the said sum, according to PW1, a sum of Rs 10.33 crores was remitted to the defendant on the very same date. Reference is also made to certain other remittances by PW1, i.e., Rs 5 lacs, Rs 3 lacs, Rs 1.60 lacs and Rs 12,800/- on 12.09.1990, 01.07.1991, 07.03.1992 and 21.06.1993 respectively. PW1 has claimed that by a letter dated 12.09.1990 (Mark 'B') floppies and spools containing list of refund orders issued by the plaintiff was supplied to the defendant by its share transfer agent i.e., Allied Computers. To be noted the original of this letter has not been filed, and once again objection has been taken to the admissibility of the document by the learned counsel for the defendant.

9.4 In addition to above, the PW1 in his deposition has stated that it has filed in court, hard copy of the list of warrants running into 2603 pages (Ex. PW1/6), which gives details of the warrant issued by the plaintiff (sic refund orders issued by the plaintiff). PW1 also deposed that the said list is also kept with the defendant. Furthermore, PW1 deposed that on 24.12.1990 a demand for the unpaid balance of Rs 5,30,006/- lying with the defendant was made vide communication dated 24.12.1990 (Ex. P5). The letter dated 24.12.1990 (Ex. P5) was accompanied by a statement of reconciliation of account as on 22.12.1990. In his deposition, PW1 categorically states that, a request to close the refund order account was

made by the plaintiff vide its communication dated 22.06.1991 (Ex. P7). The fact that the defendant demanded a sum of Rs 2,50,103/- on account of short-funding vide its communication dated 26.09.1994 (Ex. P8) is also alluded to by PW1. PW1 has also in his deposition referred to various letters dated 05.01.1995 (Ex. PW1/11), 26.06.1995 (Ex. PW1/12) and 30.10.1995 (Ex. PW1/13). PW1 affirmed the fact that demand was scaled down to Rs 2,62,262/-. PW1 also adverted to the fact that floppies were submitted by their share transfer agent Allied Computers for the purposes of reconciliation of account.

9.5 PW1 also alluded to the proceedings before the Banking Ombudsman, and the order dated 16.08.1996 (Mark 'D') passed by the Banking Ombudsman. In his deposition, PW1 also adverted to the fact that the defendant on 16.09.1996 had submitted a certified statement pertaining to the refund order account whereby, a demand in the sum of Rs 2,31,559/- with interest equivalent to Rs 3,78,681/- was raised on the ground of alleged short-funding. PW1, however, stated that the defendant did not provide the plaintiff with the list of unpaid instruments, computer floppies and spool, list of instruments, copies of return from each branch.

9.6 PW1 also referred to the letter dated 05.02.1997 (Ex. PW1/14) which referred to the data of various companies with regard to the unclaimed refund account. Based on this, PW1 deposed that 5% of the total refund amount remained unclaimed. In his deposition, PW1 accepted the fact that Rs 5 lacs was funded by Punjab & Sindh Bank. Using this as a premiss, PW1 stated that the quantum of refund was more than 10% of the funded amount; the total funding to Punjab & Sindh Bank being in the range of Rs 50 lacs. Similarly, PW1 referred to letter dated 06.02.1997 (Ex. PW1/15) written under his hand to the defendant for supplying the necessary information for the purposes of reconciliation, and for reiterating what Allied Computers had stated in their earlier letter to the plaintiff. For this very purpose PW1 also adverted to letter dated 07.02.1997 (Ex. PW1/16) and 31.03.1997 (Ex. PW1/19) written to Banking Ombudsman, and letters dated 24.02.1997 (Ex. PW1/17) and 12.03.1997 (Ex. PW1/18) written to the defendant. PW1 categorically deposed to the effect that the Banking Ombudsman made it clear that the issue obtaining between the plaintiff and the

defendant pertained to reconciliation of accounts, and that it had no role to play in that regard. Lastly, PW1 adverted to the legal notice dated 12.05.1997 (Ex. P14), and the demand for money made therein, as also, the reply of the defendant dated 27.05.1997 (Ex. P15) to the same.

9.7 In the cross-examination PW1 denied the suggestion that the defendant was only required to furnish reconciliation of the statement of paid instrument. It was sought to be explained that letter dated 17.04.1990 (Ex. P4) was only a letter written by the defendant to BCCI, and was not the agreement which obtained between the plaintiff and the defendant. On a specific question being asked as to whether he could show any agreement which is entered into between the plaintiff and the defendant, PW1 deposed that he could not file any agreement on record. He, however, denied the suggestion that the letter dated 05.04.1990 (Ex. P3) made a reference only to paid instruments. PW1 also denied the suggestion that the correct amount funded to BCCI was a sum of Rs 11,87,90,600/-. PW1 denied the suggestion that defendant had furnished details of paid instruments, and the receipt of the same was duly acknowledged by the plaintiff. On the document being shown, he deposed that he could not identify the signature of the recipient, and also that there was no stamp of the plaintiff on the document (DW1/2). As to whether the amounts mentioned in paragraph 8 of his affidavit filed by way of examination-in-chief had been remitted by the plaintiff over and above the sum of Rs 10.33 crores, PW1 asserted in the affirmative, and in that regard, relied upon the defendant's letter dated 26.09.1994 (Ex. P8). PW1, however, went on to say that he was not sure as to whether those amounts were received by the defendant from the plaintiff, or from BCCI, or even from the Punjab & Sindh Bank. As regards the sum of Rs 12,800/- PW1 deposed that he did not remember whether the said entry was made inadvertently and later reversed. As regards the delivery of floppies by Allied Computers, PW1 referred to letter dated 12.05.2006 (Mark 'B'). It was accepted that no original of the said document was filed. PW1 further accepted the fact that against the amount of Rs 5,30,006/-, which was due, the defendant had paid a sum of Rs 6 lacs to the plaintiff on 07.01.1991. PW1 denied the fact that on 22.06.1991, there was an excess amount lying in

the account of the plaintiff. PW1 also denied that letters dated 05.01.1995 (Ex. PW1/11) and 26.06.1995 (Ex. PW1/12) had not been received by the defendant. On being asked to show the proof of receipt, PW1 adverted to the stamp of the bank on the office copy of the letter dated 05.01.1995 (Ex. PW1/11) and letter dated 26.06.1995 (Ex. PW1/12). Similarly, the suggestion that the letter dated 30.10.1995 (Ex. PW1/13) was not received by the defendant, was also denied. Suggestions were also made to the plaintiff with regard to the documents referred to in paragraph 18 by way of examination-in-chief. Suggestions were also made to the effect that the letter dated 05.02.1997 (Ex. PW1/14) was not received by the bank or that the contents were wrong. Suggestions with regard to the contents of letter dated 06.02.1997 (Ex. PW1/15), 24.02.1997 (Ex. PW1/17), 07.02.1997 (Ex. PW1/16), 12.03.1997 (Ex. PW1/18) and complaint dated 31.03.1997 (Ex. PW1/19) and lastly, legal notice dated 12.05.1997 (Ex. PW1/21) being inaccurate was denied by PW1.

9.8 Mr M.K. Doogar (PW2), who is a contractor of Morgan Venture Ltd. (In short 'MVL'), formerly known as Doogar & Associates Ltd. adverted to the fact that in the years 1990-91 and 1991-92 MVL had acted as advisors and merchant bankers in respect of public issues for several companies, and that in his experience 5% to 7% of the refund orders remained unclaimed, depending upon the issue and its size. In his cross-examination PW2 accepted the fact that he was deposing in his personal capacity, and not as the director of MVL. He also accepted the fact that he had not produced any document to show the actual quantum of funds raised by way of public issue between 1990-92, and the amount which remained unclaimed, in respect of companies, served by MVL.

9.9 Mr N.K. Rastogi (PW3), who was working at the relevant time as a director of Mass Services Private Limited (in short 'MSPL') stated in his testimony that between 1990-91, MSPL had handled several public issues, and that "some percentage" of refund orders remained unclaimed because of undelivered post, misplacement of warrant, shifting of applicant etc. In his cross-examination he accepted the fact that he had not produced any document to show what was that "some percentage" of refund orders which remained unclaimed.

10 Mr V.M. Joshi (PW4), incorrectly shown as PW7, was at the relevant time, i.e., 1999-2000 vice-president of Allied Computers. PW4 proved his letter dated 05.02.1997, and reiterated the contents thereof, including the fact that his experience would show that the unclaimed refund should be at least 5% of the total refundable amount, and the defendant should have returned a sum of Rs 50 lacs as unclaimed refund. In his cross-examination to a suggestion as to whether refund orders or statement of account was directly given by the defendant to the plaintiff he stated that he had no personal knowledge. He further adverted to the fact that even though he had not verified the statement of account of the plaintiff and the defendant, simply by virtue of his past experience, in his view, the unclaimed refund should be in the range of 5% to 7% of the total refundable amount.

10.1 Mr Rameshwar Singh (PW5), who was working as the Finance Manager of plaintiff from 1988-1992 reiterated in sum and substance the averments both in the plaint and the deposition of PW1. In the cross-examination PW5 more or less took the same stand as PW1. To a specific answer whether he had any personal knowledge of letter dated 06.02.1997 (EX. PW1/15) he stated that he had personal knowledge as one Mr Batro had typed the letter. To a specific question as to how he had personal knowledge of a letter issued in 1997 when, he had left the plaintiff in 1992; PW5 stated that he kept track of events pertaining to plaintiff and the defendant because he was involved in the public issue. On being asked whether he could produce any official document to that effect that he was keeping a track of the case, PW5 stated that he could not produce any document. To another specific question as to whether document (Ex. DW1/2) (pages 1 to 204) filed by the defendant under index dated 10.12.2003 had been received by the plaintiff; PW5 specifically stated that they had been received by the plaintiff, though they were not complete. He further volunteered that he had no knowledge of the same.

10.2. The defendant produced, as indicated above, only one witnesses, i.e., Mr Sunil Kumar Meena, who was the manager in the Amarpura Branch of the defendant between 14.01.1995 till 09.07.2002. DW1 testified that the defendant was appointed as the refund manager by BCCI for centres other than Bombay (now Mumbai). The said appointment

was accepted by the defendant vide its letter dated 17.04.1990. DW1 also accepted the fact that on 24.04.1990 out of the total amount of Rs 11,87,90,600/- received by BCCI it transferred Rs 10.33 crores to the defendant. With regard to remittance of additional amounts, DW1 in his testimony, reiterated what was stated in the pleadings by the defendant, including the fact that on 07.01.1991 the defendant had paid a sum of Rs 6 lacs to the defendant, although the amount outstanding was only Rs 5,30,006/-.

10.3 DW1 also alluded to the fact that vide letter dated 26.09.1994 (EX. PW1/10), the defendant had raised a demand on account of short-funding. DW1 more particularly accepted the fact that the plaintiff had issued a letter dated 05.01.1995 whereby, it was indicated that the amount receivable from the defendant was Rs 2,62,262/-. DW1, however, deposed that the actual position was that on 05.01.1995 only a sum of Rs 6,758/- was outstanding. He further adverted to the effect that, because of demands raised by various branches towards refund order payments, the balance rose to Rs. 2,39,818/-, and therefore the balance payable by the plaintiff was Rs. 2,31,559/- along with interest.

10.4 DW1 stated, consistent with the stand taken in the pleadings that, on a request received from the plaintiff, payments to the tune of Rs 3,73,769/- were made even with respect to the Fort Bombay Branch even though it was outside the mandate of the agreement arrived at with BCCI and the plaintiff.

10.5 DW1 alluded to the fact that the Banking Ombudsman vide its order dated 08.08.1996 recommended reconciliation of the refund order account as between the plaintiff and the defendant.

10.6 DW1 also adverted to the effect that on 16.09.1996, the defendant had submitted a certified statement pertaining to refund order account whereby, it had raised a demand for Rs 2,31,559/- alongwith interest in the sum of Rs 3,78,681/- on account of short funding.

10.7 DW1 proved the statement of account (EX. DW1/1). DW1 also deposed to the effect that the defendant had handed over all the paid instruments with regard to public issue to the plaintiff. It was specifically stated by DW1 that the said instruments were handed over by defendant to the plaintiff, which was duly acknowledged by the representatives of

the plaintiff. DW1 also testified to the effect that not only was the plaintiff handed over all the paid instruments but also the list of refund orders paid by various branches were also handed over to the plaintiff, and that the plaintiff, on the other hand, had not furnished the list of all instruments issued by the plaintiff, computer floppies and spools despite repeated request.

10.8 DW1 also testified that as per Allied Computer's own calculation the amount of refund was only in the range of 0.08% and not 5%. He further accepted the fact that by letter dated 07.02.1997, the information provided by Allied Computers was forwarded by the plaintiff to the defendant. DW1 stated that on account of short-funding the defendant was required to recover an amount in the sum of Rs 2,31,559/- along with interest to the tune of Rs 3,78,681/-.

10.9 In the cross-examination DW1 explained the job functions of a Refund Banker and expressly stated that the money which is transferred to the refund order account belongs to the public, and the company (plaintiff herein) had no right to take the money back. DW1 also adverted to the fact that the list of paid instruments along with original instruments were handed over to the company datewise on a daily or weekly basis. In response to the question as to what was the validity period of the refund orders, the DW1 stated that generally it was three months, however, whether it was three or six months he did not remember; in all probability it was three months, but as to what was the exact validity period, he would require to look at the record. DW1 specifically stated that a reconciliation of the paid instrument was carried out through a private agency engaged by the defendant, and that the statement of paid instruments prepared by the said agency was handed over along with the paid instruments to the plaintiff. To a specific question as to who was the private agency, DW1 responded by stating that it was Soft Bit Infro-Tech. To a further question as to whether there was any written agreement with the said agency, DW1 responded by stating that since the events had transpired 16 years ago he did not have the agreement in his possession though if need be he would be in a position to trace the same. As to whether the plaintiff was informed with regard to engagement of Soft Bit Infro-Tech,

DW1 said it was an internal arrangement of the defendant which did not concern the plaintiff. In so far as the demand made by the plaintiff vide letter dated 24.12.2009 was concerned, DW1 stated that the bank had as a matter of fact paid a sum of Rs 6 lacs on 07.01.1991 in excess of the amount which was claimed, which was Rs 5,30,006/-. DW1, however, accepted the fact that plaintiff vide letter dated 22.06.1991 had asked the defendant to close the refund order account. DW1 also accepted the receipt of letters dated 05.01.1995 (EX. PW1/11) and 30.10.1995 (EX. PW1/13). To a specific suggestion as to whether the defendant had supplied the list of unpaid instruments, the computer floppies, spools, list of paid instruments, copies of returns of each of the branches showing the amount placed at their disposal to make refund orders presented to them, and the amount which remained unutilized; the witness answered in the negative. DW1 also accepted the fact that plaintiff's letter dated 24.02.1997 (EX. PW1/17) and 12.03.1997 (EX. PW1/18) were not replied by the defendant. The witness also accepted the fact that a list of refund orders running into 2603 pages was supplied during the pendency of the suit. To an another specific question as to whether the defendant had carried out exercise of identifying/classifying the refund orders which had been paid, and those which remained unpaid, DW1 said that the said exercise could not be done since the plaintiff could not provide the necessary data in a floppy. As to whether there was any communication in that regard, DW1 stated that no letter had been written in that connection.

11. Before I deal with other issues, let me first deal with two defences set up by the defendant herein with regard to the claim for recovery of monies being barred by limitation, and the deficiency in court fee on account of incorrect valuation of the relief of rendition of accounts for the purposes of court fee.

11.1 As regards the limitation, admittedly there is no defence set up in the written statement. Mr Vachher, however, contended before me that irrespective of such a position obtaining, the court under Section 3 of the Limitation Act, 1963 (hereinafter referred to as 'Limitation Act') was duty bound to examine as whether the remedy sought to lay claim to the alleged unclaimed refund, that is, the instant suit had lost its efficacy on account of

expiry of period of limitation. In my view Mr Vachher is right. And to sustain this contention one need not look further than Sub-Section (1) of Section 3 of the Limitation Act, which reads as follows:

> *3. Bar of limitation –*
> *(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instated, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.*

(Emphasis is mine)

11.2 A plain reading of the said provision puts at rest any contention to the contrary. The Supreme Court has in terms, in the case of ***Noharlal Verma vs Distt. Cooperative Central Bank Ltd., Jagdalpur (2008) 14 SCC 445*** made similar observations in paragraph 32 and 33 at page 452. The relevant observations on this aspect are as follows:

> *"32. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation, a court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits.*
> *33. Sub-section (1) of Section 3 of the Limitation Act, 1963 reads as under:*
> *3. Bar of limitation ………*
> *Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in absence of such plea by the defendant, respondent or opponent, the court or authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation." (Emphasis is mine)*

11.3 On the other hand, in rebuttal Mr Bansal has cited the judgment of a single Judge of this court in the case of ***Shri Amar Nath Satya vs Shri Amar Nath Satya 55 (1994) DLT 683*** at page 686 & 687, paragraph 16 & 17. A bare reading of the observations made in that case would show that, the only caveat that the court has entered is that, where the bar of limitation is dependent on proof of facts which are disputed, the court shall decide the issue of limitation only on the fact being proved during the course of the proceedings. There can be no quarrel with this proposition.

11.4 In the instant case, Mr Vachher has raised the defence of limitation based on a demurer that the letter dated 24.12.1990 (Ex. PW1/8) whereby, a demand admittedly was raised by the plaintiff calling upon the defendant to pay a sum of Rs 5,30,006/- would be the point in time when the cause of action ought to have arisen. Therefore, without joining issue for the moment as whether the demand was valid, Mr Vacher has asked for a decision on the aspect of limitation. Therefore, notwithstanding absence of a specific plea, I propose to deal with it.

11.5 The relevant averment in respect of cause of action has been made in paragraph 26 of the plaint; being pertinent I shall shortly extract the same hereinbelow. The defendant in the corresponding paragraph of the written statement without going into the specifics has generally denied the averments made therein. The defendant has as a matter of fact gone on further, by stating that no cause of action has arisen in favour of the plaintiff. In these circumstances it becomes necessary to extract the relevant averments made in paragraph 26 of the plaint:

> *"The cause of action in favour of the plaintiff and against the defendant arose on 17.04.1990 when the defendant undertook the responsibility of furnishing reconciled statement of paid instruments. It further arose on 24.12.2990 when the plaintiff sent the reconciled statement to the defendant and requested the defendant to refund the unpaid balance of Rs 5,30,006/-. It further arose on 12.06.1991 when the defendant was asked to close the refund order account and refund the balance amount therein. The cause of action further arose on 16.09.1996 and 08.01.1997 when the defendant submitted incomplete information in respect of the refund order account to the plaintiff. The cause of action arose on all dates when the plaintiff called upon the defendant to refund the balance amount lying in the refund order account and to render to the plaintiff the statement of account of the public issue refund orders along with*
>
> *(i) List of unpaid instruments.*
>
> *(ii) Computer floppies and spools.*
>
> *(iii) List of paid instruments.*
>
> *(iv) Copies of returns from each branch.*
>
> *And the defendant failed to comply with the requisitions despite repeated requests and reminders from the plaintiff. The cause of action is continuing and subsisting."*

11.6 In view of the aforementioned state of pleadings, for the purposes of limitation, the best case scenario for the plaintiff, in view of a vague denial in the written statement of the said averments made in the plaint, would be that, they have to be taken as true and correct. Based on this premise let me examine the averments. As indicated above, there is no denial that on 24.12.1990 a demand for recovery of money was made for the first time by the plaintiff. In so far as letter dated 12.06.1991 was concerned the same even though proved by PW1, would in my view not extend the period of limitation. By this letter the plaintiff only sought closure of the refund order account; issue of statement of account; and, remission of amount standing to its credit. Similarly, no fresh cause of action would arise in favour of the plaintiff by virtue of the fact that defendant may have sent some information to the plaintiff, even though incomplete, with respect to the refund order account vide letters dated 16.09.1996 and 08.01.1997. The reason being that: even if one were to take the averments made therein as correct, in view of the defendant having not specifically denied the averments the limitation which commenced from 24.12.1990, had already expired. It is trite law that the limitation stands extended by acknowledgement of liability under the provisions of Section 18 of the Limitation Act, only if the acknowledgement of liability is made before expiration of the period of limitation in writing, by the party, against whom such claim is made. See observations of the Supreme Court in ***Food Corporation of India vs Assam State Cooperative Marketing & Consumer Federation Ltd. & Ors. (2004) 12 SCC 360 at page 366 paragraph 14***. It is only in such a situation that a fresh period of limitation would commence from the date on which an acknowledgement in writing, which is signed, is issued by a party against whom the claim is made. The acknowledgement of liability need not be accompanied by promise to pay either "expressly" or by "implication".

11.7 However, having said so, one would also be required to be mindful of the fact the averments made in the plaint have to be read in a "meaningful manner", and appreciated in the context of the evidence adduced by parties in the case. In the instant case, there are averments in paragraph 8 of the plaint to the effect that the plaintiff remitted fresh funds to the defendant, i.e., a sum of Rs 5,00,000/-, Rs 3,00,000/-, Rs 1,60,000/- and Rs 12,800/- on

12.09.1990, 01.07.1991, 07.03.1992 and 21.06.1993, respectively. Similarly, in paragraph 11 of the plaint an averment has been made that the defendant vide its letter dated 26.09.1994, had informed the plaintiff that after reconciliation of the refund order account, it had found that there was late funding by the plaintiff and, therefore, the plaintiff was liable to pay interest to the tune of Rs 1,59,911/-. The defendant has, as indicated above, refuted the claim of the plaintiff with regard to remission of Rs 5 lacs. The defendant has taken the stand that Rs 5 lacs was, as a matter of fact remitted by Punjab & Sindh Bank on 12.09.1990, and it was part of the total funding of Rs 10.33 crores. As regards the receipt of Rs 3 lacs, the defendant has averred that since in June, 1991 it had been receiving requests from its branches for funds to enable payment of refund orders, and because the balance available had come down to Rs 12,000/-, the plaintiff made a payment of Rs 3 lacs. Consequently, the balance increased to Rs 3,12,628/-. Similarly, in February, 1992 the debit balance was a sum of Rs 1,35,170/-; to shore up the funds available, the plaintiff on 07.03.1992 deposited a sum of Rs 1.60 lacs. However, in respect of payment of Rs 12,800/- on 21.06.1993 the defendant has averred that it was only a contra-entry which was reversed on the said date, and that there was no actual flow of funds from the plaintiff to the defendant. A perusal of stand taken in response to averments made in paragraph 12 of the plaint puts the matter beyond doubt wherein, while admitting the receipt of letter dated 05.01.1995, the defendant denied that the liability towards the plaintiff stood at Rs 2,62,262/- as alleged. The defendant went on to aver that on 05.01.1995 the balance had dipped to Rs 6758/-, and since the defendant was receiving request from its branches for remission of funds the infusion of additional funds was made by the defendant. Resultantly, in the ultimate analysis instead of the defendant having to pay the plaintiff, the defendant was to receive a sum of Rs 2,31,559/-. The testimony of DW1 Sunil Kumar Meena supports these assertions made in the written statement. On an appreciation of the averments made by the defendant, and the testimony on record in support thereof, it is quite clear that the defendant carried on with processing of the refund orders till after 05.01.1995, therefore, in my opinion the cause of action, if any, would arise only thereafter. The fact that the

plaintiff was equally complicit in allowing the defendant to process the refund orders beyond the validity period of three months which expired on 23.07.1990 is evident from the fact that on 07.03.1992 it deposited monies in the account of the defendant. Therefore, the letter issued on 22.06.1991 (Ex. PW1/9) would have very little relevance in so far as the plaintiff's stand that it had asked for closure of refund order account. I shall deal with this aspect in greater detail in latter part of my judgment while dealing with arguments of Mr Bansal on this aspect. Suffice it to say that in these circumstances, the submission of Mr Vachher that the claim is barred by limitation cannot be accepted and hence, is accordingly rejected.

11.8 This brings me to the other issue of valuation fixed by the plaintiff for the purposes of payment of court fee. Mr Vachher on this aspect of the case, as noticed above, argued that the valuation for the purposes of court fee and for the purposes of jurisdiction has to be identical. In this connection, he drew my attention to the averments made in paragraph 28(b) of the plaint, wherein the relief of rendition of accounts has been valued at Rs 2,50,000/- for the purposes of court fee on which a court fee of Rs 4784/- has been affixed, whereas for the purposes of jurisdiction the valuation is pegged at Rs 1,03,30,000/-, on the basis that, the plaintiff estimates that on account being rendered by the defendant, the said amount shall be found due. There is an averment made, also to the effect that, the plaintiff undertakes to pay full court fee on this relief as and when the defendant renders account. In support of his submission Mr Vachher has relied upon the judgment of the Division Bench of this court in the case of ***Maiden Pharmaceuticals Ltd vs Wockhardt Ltd. 157 (2009) DLT 65 (DB)***.

11.9 Mr Bansal on the other hand submitted that the division Bench could not have ruled contrary to the earlier judgment of the Division Bench in the case of ***Fenner India Ltd. vs Salbros Enterprises Pvt. Ltd. 67 (1997) DLT 673, P.M. Diesel vs Patel Field Marshall Industries 1998 PTC 260 (DB)*** and ***Wockhardt Veterinary Ltd vs M/s Raj Medicos & Anr. 1998 RLR 353.*** Mr Bansal submitted that the said judgment of the Division Bench was not good law. It was Mr Bansal's submission that in the event the Division Bench disagreed

with the judgment of an earlier Division Bench it ought to have referred the matter to a larger bench.

12. In my view, the contention of Mr Bansal cannot be accepted. The Division Bench in ***Maiden Pharmaceuticals*** *(supra)* has specifically alluded in paragraph 45 and 46 at pages 84 and 85 as to the reasons why they chose to furrow a different path. The relevant extracts from the aforementioned paragraphs of the judgment in ***Maiden Pharmaceuticals*** *(supra)* explain the rationale:

> ***"45.*** *Thus, in our view, the Division Bench in Wockhardt v. M/s. Raj Medicos (surpa-14) while reversing the learned Single Judge's judgment has failed to notice and apply the judgments of the Hon'ble Supreme Court in Commercial Aviation (supra-6) and Abdul Hamid Shamsi (supra-5). In fact, the Division Bench in Fenners India Ltd. (supra-10) has relied upon the Commercial Aviation (supra-4) judgment of this Court reported in AIR 1986 Delhi 439, without noticing the judgment of the Supreme Court in appeal and in particular para 23 thereof in Commercial Aviation (supra-6). Even on this ground, the judgment of the Division Bench cannot be relied upon in view of the Supreme Court's judgment in Commercial Aviation (supra-6).*
>
> ***46.*** *In our view, the said reasoning does not even refer to let alone follow the reasoning of the Hon'ble Supreme Court as laid down in Commercial Aviation (supra-6). On the contrary, this judgment which relies upon the Commercial Aviation (supra-4) has failed to notice the law laid down in para 23 (extracted earlier) of the judgment of the Supreme Court, reported in AIR 1988 SC 1636, in appeal against the said judgment. Furthermore, the learned Single Judge of this Court in Pfizer Products, Inc. v. B.L. and Co. and Ors. (supra-17), had considered the entire case law……."*

12.1 The sum and substance of the judgment in the case of ***Maiden Pharmaceuticals*** *(supra)* is that: suits which fall under the provisions of Section 7 of the Court Fees Act, 1870 (hereinafter referred to as 'Court Fee Act') are those, in which, it is not possible for the plaintiff to arrive at an accurate valuation of the reliefs sought for, in order to determine the court fee to be paid. A suit for accounts is one such action, which falls under sub-clause (f) paragraph (iv) of Section 7 of the Court Fees Act. The said provision reads as follows:

"***according to the amount at which the relief sought is valued in the plaint or memorandum of appeal***". As is clearly evident the plaintiff has been given the liberty to state the amount at which he values the relief sought. Section 8 of the Suit Valuation Act, 1887, however, provides that except for those suits which fall under Section 7 paragraph (v), (vi), (ix) and (x) of clause (d), the value for the purposes of computation of court fee and that for the purposes of jurisdiction would be the same. In other words in respect of suits falling under paragraph (iv) of Section 7 of the Court Fee Act the valuation for the purposes of court fee and jurisdiction would ordinarily be the same save and except for the caveat entered under Rule 4 of Delhi High Court Rules, 1967 which, permits the plaintiff to give his own valuation for the purposes of court fee and jurisdiction. The court would not ordinarily examine the correctness of the valuation fixed by the plaintiff save and except a case where the plaintiff has valued the suit "arbitrarily" – which tends to be a valuation not borne out from the records, and thus tantamounting to the plaintiff not exercising his discretion reasonably in that regard. The observations of the Division Bench being apposite are extracted below:

> *"The plaintiff has not been given absolute right or option to place any valuation whatever on such relief and where he manifestly and deliberately undervalues and underestimates the same the Court is not silent and impotent spectator thereof and has clear jurisdiction to interfere. Any stage of the trial would certainly include even the time when the suit is first taken up for consideration by the Court.*
>
> *(g) Before rejecting the valuation as fixed by the plaintiff the Court has to see if there is positive material or objective standard on the record to indicate that he has undervalued the suit but if there is no positive material or objective standard, the Court has to accept the plaintiff's valuation."*

12.2 In my opinion contrary to what has been submitted by Mr Bansal, the judgment in ***Maiden Pharmaceuticals*** *(supra)* is in line with the judgment of the Supreme Court in ***Abdul Hamid Shamsi vs Abdul Majid & Ors (1988) 2 SCC 575*** and ***Commercial Aviation & Travel Company & Ors. vs Vilma Pannalal (1988) 3 SCC 423***.

12.3 The question, therefore, arises is whether the plaintiff had deliberately under valued the suit when he had before him "***positive material or an objective standard to arrive at a correct valuation***". The material on which reliance is placed, in the instant case, reveals optimism and 'fond hope' [See ***Commercial Aviation*** *(supra)*] which in my view cannot be the basis for arriving at a conclusion that the plaintiff deliberately valued the relief despite availability of positive material to the contrary, only to avoid payment of appropriate court fee. In the instant case the basis for arriving at the jurisdictional value of Rs 1,03,30,000/- was the letter dated 05.02.1997 (Ex. PW1/14) of Allied Computers, the share transfer agent of plaintiff, which alluded to the fact that the experience of the Allied Computers had demonstrated that ordinarily, 5% of the total refundable amount remained unclaimed. It is clear the plaintiff is hoping that it would be entitled to a certain amount of money on rendition of accounts; this is not necessarily the amount he would receive against claim for rendition of accounts. It cannot be held on this basis that the plaintiff has undervalued his reliefs for the purposes of court fee. It is nobody's case, as it cannot be, that the plaintiff's claim for recovery of Rs 5,73,072/- along with interest at the rate of 18% per annum was not within the pecuniary jurisdiction of this court. In 1997 this court could entertain claims of Rs 5 lacs or more. It was only after enactment of the Delhi High Court (Amendment) Act, 2003 which was notified on 16.07.2003, that the pecuniary jurisdiction of this Court got enhanced to Rs 20 lacs and above. The suit was thus, otherwise, clearly maintainable before this Court.

12.4 Furthermore, I notice from the record that even though the objection with regard to incorrect valuation for the purposes of court fee has been adverted to by the defendant in the written statement there was no application made under Order 7 Rule 11 (b) for rejection of the plaint.

12.5 In this particular case, having come to the conclusion on merits; that the very basis for rendition of accounts is not proved; (an aspect which I shall advert to shortly) in my view, nothing turns on this objection of the defendant. Accordingly, the objection raised by the defendant in this regard is rejected.

13. This brings me to the issues which have been actually framed in the suit. For the purposes of convenience I am reversing the order of the issues struck for purposes of determination.

ISSUE NO. 4

13.1 It pertains to the plaintiff's claim for recovery of a sum of Rs 5,73,072/- over and above the amount which may be found to due to the plaintiff, on rendition of refund order account. The success of this claim would obviously depend upon the proof placed on record by the plaintiff in that regard. In this connection, it may be noted that the plaintiff relies upon the testimony of PW1, who proved the letter dated 24.12.2009, and the statement annexed thereto on 24.12.2009 (Ex. P5 and P6 respectively) to demonstrate that as on 22.12.2009 the defendant was liable to pay for a sum of Rs 5,30,006/- to the plaintiff. PW1, in his testimony, has also accepted the fact that on 05.01.1995 this amount had dipped to Rs. 2,62,262/-. It is important to note that in the letter dated 05.01.1995 (Ex. PW1/11) there is an admission to the effect by the plaintiff that the defendant paid to the plaintiff a sum of Rs 6,00,000/- on 07.01.1991; and that the plaintiff on the other hand had remitted further funds in the sum of Rs 3 lacs on 01.07.1991 and 1.60 lacs on 07.03.1992; thereby giving rise to a debit balance in favour of the plaintiff to the extent of Rs. 2,62,262/-. The receipt of this letter cannot be in dispute as, DW1 has accepted in his testimony that this letter dated 05.01.1995 (Ex. PW1/11) was received by the defendant. It is to be noted that with this letter firstly; no reconciliation statement was sent/attached secondly, DW1 in his testimony has clearly stated that Rs 3 lacs was received by the defendant from Punjab & Sindh Bank, and not from the plaintiff; and that the said sum of Rs 3 lacs was part of the overall funds furnished to the defendant by BCCI, for payment of refund orders which, as indicated above, amounted to a figure of Rs 10.33 crores. PW1 in his testimony has been, in my view, deliberately vague on this aspect. PW1 could not state with certainity as to who remitted the said sum of Rs 3 lacs and whether it was money paid over and above initial funded amount, i.e., Rs 10.33 crores. As noticed above, a short statement was annexed to letter dated 24.12.1990 (Ex. P5 and P6). These, however, in my view, do not constitute a

reconciliation statement. In the overall analysis of material placed before me, it is not clear from the testimony of PW1 as to how the plaintiff arrived at a figure of Rs 2,62,262/-. PW1 apart from be confronted that the amount of Rs 5,30,006/-, as claimed vide letter dated 24.12.2009, was not payable, was also confronted with the fact that, it was the plaintiff which was liable to pay monies to the defendant, on which interest, at the relevant point in time to the extent for Rs 1,59,591/-, had accrued. The plaintiff, apart from the testimony of PW1, has not produced any evidence in the form of books of accounts, vouchers or any other primary documents to prove that the said sum of Rs 5,73,072/- was payable. As a matter of fact the said figure finds a mention in the legal notice dated 12.05.1997 (Ex. PW1/14) sent by the plaintiff. The relevant extracts from the legal notice reads as follows:

Date	Narration	Debit	Credit
	Opening balance as on 1.4.94	262262.00	
1.5.94	C-813007 Ch issued Manisha		610.00
1.5.94	C-618553 Ch issued uncleared		610.00
13.9.94	C-211229 DD to Bangalore	2213.00	
31.3.96	Amt Transfer Fr Share Call Mon	308007.00	
19.6.96	C-477165 (Del) Chq Issd to ANA 600.00 C-477165 (DEL) Chq Issd to Kan 600.00	1200.00	
3.4.97	C-411122 DD 989270 3.4.97 Gora	610.00	
	Total **Closing Balance**	574292.00 **5,73,072.00** DR	1220.00

13.2 DW1 in his testimony, on the other hand, has stated that on 05.01.1995 a sum of Rs 2,31,559/- was receivable from the plaintiff which included an element of interest on account of short-funding. I find that there is no confrontation on this issue. Therefore, in my opinion, the plaintiff has not been able to prove that a sum of Rs 5,73,072/- was due to it. On the contrary it is quite possible that on account of short-funding (which includes an element of interest) money was due to the defendant. Since the defendant admittedly has raised no counter claim in that regard, I am not called upon to adjudicate this aspect of the matter.

ISSUE NO. 3

14. This issue relates to the entitlement of the plaintiff to recover a sum of Rs 1,03,30,000/-. The claim is based primarily on the letter dated 05.02.1997 (Ex. PW1/14), written by Allied Computers, the share transfer agent to the plaintiff. This letter has been proved by Mr P.M. Joshi (PW4). In his testimony PW4 adverted to the effect that it was his experience, that at least 5% of the total refundable amount remained unclaimed. In his letter dated 05.02.1997 (Ex. PW1/14) he had given several examples of companies, which had unclaimed refunds piled up out of funds made available towards payment to unsuccessful applicants. PW4 based on his experience stated that the defendant should have, in this case, unclaimed refund orders equivalent to Rs 50 lacs. In this regard, the plaintiff also sought to rely upon the testimony of PW2, Director of MVL, who more or less supported the assertion of PW4. He put the range of unclaimed refund orders between 5 % to 7%. PW3, Director of MSPL, however, did not indicate the percentage of refund orders which remained unclaimed.

14.1 In the cross-examination, though, PW4 accepted the fact that he had not verified the statement of accounts of the plaintiff and the defendant, as also the fact that, he had no knowledge of the details of the refund orders, or of statement of account issued as these had been directly given by the defendant to the plaintiff. He also accepted the fact that he had not produced any document showing the accounts of his client, based on which, he had fixed the range of unclaimed refund orders between 5% to 7%. This aspect came through even in the testimony of PW2 and PW3 that they had not produced any documents on record to show that they were unclaimed refund orders.

14.2 In my view, unsubstantiated opinions of PW2, PW3 and PW4 can be termed only as mere conjecture and surmise. Such nebulous evidence cannot form the foundation of the kind of claim made by the plaintiff. The plaintiff's claim is clearly pivoted on the experience of his share transfer agent which is not backed by contemporaneous documentary proof. In contrast DW1 in his testimony has proved the statement of account (Ex. DW1/1), and the list of paid instruments (DW1/2). In the cross-examination DW1 was

neither confronted with respect to the accuracy or completeness of the statement of account or of the list of paid instruments (EX. DW1/2). Therefore, Mr Bansal arguments at the Bar that even if the list of paid instruments of the defendant are taken to be correct then the total sum adds up to a figure of not exceeding Rs 37 lacs though attractive cannot be countenanced at this stage. In my view, this line of argument cannot be permitted at this juncture as this was the very issue which the cross-examiner ought to have put to the defendant who may well have had an explanation in that regard. The testimony of the plaintiff's witnesses is less than credible, which is apparent from the following. While in the testimony of PW5, who is the employee of the plaintiff, it has come through that the list of paid instruments (DW1/2) had been "received", even though according to him, they were not completely. PW1, who is the Managing Director of the plaintiff completely denied having received the list of paid instruments (DW1/2). It is obvious that the plaintiff witnesses were wanting to hold back information, which is, in their knowledge. The document in issue DW1/2 has signatures appended on it; pointing to receipt. Therefore, it would be unsafe to rely wholly on testimony of PW5 and PW1. If I were to weight the evidence, adduced by both parties, the evidence of DW1 comes through as more reliable witness.

14.3 In this connection, I may also notice Mr Bansal's submission; a submission which was made with great vehemence, that by an order dated 12.05.2003, passed by my predecessor, while disposing of IA No. 3482/1999; a direction had been issued to the defendant to supply a list of both paid and unpaid instruments. Mr Bansal submitted that this direction of the court, which had attained finality, to date, has not been complied with by the defendant.

14.4 In my view, the plaintiff was well within its right to take appropriate steps to enforce compliance of the order. Admittedly, no such steps were taken by the plaintiff. The plaintiff, in my opinion, cannot seek to sustain its prayer for a final relief of rendition of accounts merely on the basis of directions issued in the said order, if in the wake of the evidence on record, such a relief at the final stage cannot be granted. The learned judge at that stage,

decidedly did not have the benefit of the entirety of evidence before him. Therefore, the contention of the plaintiff in this regard being untenable, is rejected.

15. In the course of the argument, Mr Bansal had conceded that the monies which were handed over by BCCI to the defendant for the purposes of processing refund claims did not belong to the plaintiff, as these were the monies which ultimately belonged to the applicant. Furthermore, it is neither pleaded nor has it been urged before me that any unsuccessful applicant had laid a claim before the plaintiff that it had not received back the application money. As a matter of fact, in my view, I have not been able to appreciate the distinction that Mr Bansal sought to draw in this regard with respect to his claim for the sum of Rs 5,73,072/-, and the claim on account of rendition of accounts in the sum of Rs 10,03,30,000/-. In my opinion, both emanate from the same transaction. If it was Mr Bansal's attempt to show that over and above Rs 10.33 crores he had given extra funds to the defendant, and therefore, the claim of Rs 5,73,072/- arose, I am afraid, as indicated above, he has not been able to prove the same. Therefore, the claim of the plaintiff in the sum of Rs 1,03,30,000/- in my opinion is not proved. The claim is based on a pure conjecture.

ISSUE NO. 1

16. As regards issue no. 1, it is important to take note of the fact that the defendant's engagement was circumscribed by the conditions put forth in its letters to BCCI dated 05.04.1990 (EX. P3) and letter dated 07.04.1990 (Ex. P4). A copy of letter dated 17.04.1990 (Ex. P4) was sent to the plaintiff. The defendant accepted the engagement on the following terms:

"(i) 100% funding on dayone.

(ii) Rs 1/- per instrument in all towards processing charges.

(iii) We take the responsibility of furnishing **reconciled paid statement of instruments**.

(iv) Other Bank's charges if any will be settled by us.

(v) We can handle similar business in future also, so, please send us the offers."

16.1 A perusal of clause (iii) would show that the only obligation which the defendant had undertaken was to furnish ***reconciled statement of paid instruments***. DW1 in his examination-in-chief stated as follows:

> *"The defendant Bank had also handed over all the paid instruments with regard to the said public issue to the representative of the plaintiff company and acknowledgements vis-à-vis the said paid instruments had also been obtained by the defendant bank from the plaintiff company. The said list of paid instruments handed over by the defendant to the plaintiff which was duly acknowledged by the representatives of the plaintiff are collectively attached herewith and the same are marked as Exhibit DW1/2 (Collectively)."*

16.2 In the cross-examination of DW1 it has come through that a private agency by the name of Soft Bit Infro-Tech was appointed for preparation of paid instruments. The fact that a computer agency was employed to reconcile the accounts appears to be in the knowledge of the plaintiff when contents of letter dated 05.01.1995 (Ex. PW1/11) are perused. In the said letter the plaintiff complained that the computer agency had botched up the accounts by debiting entries, which according to it ought not to have been debited. Furthermore, DW1 during his cross-examination was not specifically confronted with the issue, that the list of paid instruments (Ex. DW1/2) was not supplied or what was supplied was incomplete. DW1 was confronted with respect to the non-supply of list of unpaid instruments, computer floppies and spools. While formulating the question the cross-examiner very craftily also slipped in list of paid instruments. In response to the question DW1 emphatically stated that the suggestion was incorrect. As observed above, the accuracy of document and Exhibit DW1/2 was not put in issue. PW5, as indicated above, accepted the receipt of documents (Ex. DW1/2). He, however, said that they were not complete. Therefore, on an appraisal of the terms of engagement and the testimony on record, it is quite clear that the engagement of the defendant obliged it, to submit reconciled statement of the paid instrument. Towards this end the statement of account (Ex. PW1/1) has been furnished by the plaintiff, the veracity of which has not been put into issue. The said statement has been proved by DW1. DW1 has also proved the list of paid instrument sent by it, which includes in it details of various branches appointed by the defendant for the

purposes of furnishing the refund claims. The fact that they are not complete would not impact the reliefs claimed by the plaintiff, as in my opinion, the plaintiff is not entitled to the said monies assuming there are some unclaimed refund orders. As observed above, it is not the case of the plaintiff that it has received requests from unsuccessful applicant for payment of application money. The only obligation of the defendant was to submit a statement of paid instruments which, as is evident from the testimony of DW1, the defendant did supply. The said list bears the signatures of the recipients. The fact that the list of paid instruments was received by the plaintiff has come through in the testimony of PW5. The testimony of PW2 to the contrary seems is unreliable as also PW5's testimony that it was incomplete. I may only add that once the plaintiff had a list of paid instruments it could very easily have drawn up on its own a list of unpaid instruments. Accordingly, this issue is decided in favour of the defendant, since the defendant in my opinion was only liable to supply list of paid instruments.

ISSUE NO. 2

17. In so far as issue no. 2 is concerned the same is found, in view of the discussions above, against the plaintiff and in favour of the defendant. As opined above, the plaintiff is not entitled to any amount whatsoever. The defendant has rendered an account which is not challenged in cross-examination. Therefore, the defendant, in my view, is not liable to pay any sum to the plaintiff. This issue is also found against the plaintiff and in favour of the defendant.

18. In view of the aforesaid discussion, I am of the view that the suit of the plaintiff has to be dismissed. It is ordered accordingly. The costs shall follow the result of the suit.

RAJIV SHAKDHER, J

JULY 01, 2010
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