**IN THE HIGH COURT AT CALCUTTA**
**COMMERCIAL DIVISION**
**ORIGINAL SIDE**

**Present:**
**The Hon'ble Justice Sugato Majumdar**

**CS-COM/175/2024**
**[OLD NO. CS/6/2020]**

**FINORCHEM LIMITED**
**VS**
**PULINAT ETTAN THOMAS**

| | | |
|---|---|---|
| For the Plaintiff | : | Mr. Aritra Basu, Adv.<br>Mr. Patita Paban Bishwal, Adv.<br>Ms. Sohini Dey, Adv. |
| For the Defendant | : | Mr. Aniruddha Mitra, Sr. Adv.<br>Mr. Sayan Banerjee, Adv. |
| Hearing concluded on | : | 15/07/2025 |
| **Judgment on** | **:** | **01/08/2025** |

**Sugato Majumdar, J.:**

The instant suit was instituted by M/s. Merchen Limited, a Company incorporated under the provisions of the Companies' Act, 1956 having place of business at 9A, Saket Apartment- 2, Hochimin Sarani, Kolkata-700071.

The original entity had been admitted for Corporate Insolvency Resolution Process before the National Company Law Tribunal, Chennai. In that proceeding M/s. Acme Chem Limited had submitted the resolution plan which was approved and consequently the later Company became 100% shareholder. Subsequently, the name of the original Plaintiff was changed to M/s Finorchem Ltd. The plaint was directed to be amended in terms of the

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Order dated 09/04/2024. Name was changed in the cause title and the plaint was re-verified.

The plaint case may be summarized as follow:

i. Once the management of the Plaintiff/Company had been taken over by Acme Chem Limited, it initiated and negotiations with the Defendant to join as a business consultant in the Plaintiff/Company which was particularly specified in the agreement dated 02/08/2019 in relation to operations of the Plaintiff and its group concerns. The Defendant had represented that he would be invaluable as a business consultant and was an expert from rubber chemical field. He further represented that he had a team of experts from the rubber chemical field whose names are mentioned in the plaint. These representations are manifest from the e-mails sent by the Defendant on 30th July, 2019, 31st July, 2019 and 1st August, 2019.

ii. The Plaintiff required a team of experts from rubber chemical field. Both the parties then agreed that the Defendant and his seven associates, namely, Dr. Jayabalan Lakhmanan, Mr. Thomas Valera, Mr. Yashavant VA, Mr. Praveen Patil, Mr. Manoj Choudhury, Mr. Mukesh Singh and Mr. Mathew would join together since the Plaintiff was not interested in recruiting the Defendant alone. The Plaintiff made it clear that if the experts or any of them did not join, the Plaintiff would look for a new team elsewhere. In the circumstances, the Plaintiff made over a letter dated 02/08/2019 from the registered office which was received

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and accepted by the Defendant in the same address within jurisdiction of this Court. On request of the Defendant, the Plaintiff had also made an advance payment of Rs.50,47,422/- after deducting a sum of Rs.5 lakhs as tax deducted from the source. In the letter of appointment, it was made clear that the appointment of the Defendant as a business consultant would commence when the Defendant along with other experts would simultaneously join.

iii. The Plaintiff could be able to appoint Praveen Patil, Manoj Choudhury, Mukesh Singh and Mathew independently as employees. It is contended in the plaint that they are less important persons and a scheme would not take effect unless the three others, namely, Jayabalan Lakhmanan, Thomas Valera and Yashavant VA who are principal experts.

iv. It is contended that the Plaintiff is entitled to a declaration and/or legal character that the Defendants appointment as a business consultant under the letter of appointment dated 02/08/2019 had not commenced. This position was made clear by the Plaintiff in terms of its letter dated 23/11/2019. According to the Plaintiff, on complete failure of the contract the Plaintiff is entitled to get back the sum of Rs.55,47,422/- which had been paid in advance to the Defendant, with interest at a rate of 12% per annum on and from 04/08/2019 till recovery. Accordingly, instant suit is instituted for recovery of that money.

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The Defendant contested the suit by filing written statement along with the counter-claim. Sum and substance of the defense case are as follow:

a) It was pleaded that the suit is bad in law, not maintainable, failed to disclose cause of action and is hit by principles of waiver, acquiescence and estoppel.

b) It was further pleaded that since the Defendant is an expert in the rubber chemical field, he was approached by the Plaintiff to work as a business consultant with designation "Chairman Emeritus" of the Plaintiff/Company. The Defendant accepted the proposal and consequently on 2nd August, 2019, a letter of appointment was issued by the Plaintiff containing terms of appointment. As the Plaintiff expressed its desire to appoint a team of experts in rubber chemical field, it was agreed that the Defendant will recommend some experts for appointment. Accordingly, the Defendant did recommend some experts. The Plaintiff was required to negotiate with the individual experts, so to be engaged, and finalize their appointments. Among the experts recommended by the Defendant, four of them joined the service of the Plaintiff in the month of August 2019. In so far as the others are concerned the Defendant had never any authoritative position over those individuals to force them to join the Plaintiff/Company. In any event, the appointment of the Defendant was independent of other experts/persons whom the Defendant had recommended. Since joining, the Defendant discharged all his responsibilities in terms of job profile as detailed in the letter of appointment.

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c) It was agreed that the Defendant would be paid a sum of Rs.1.50 crores as an upfront payment, on joining the Plaintiff/Company the Defendant paid a part payment of Rs.50 lakhs only. In spite of repeated follow ups, the balance of payment was not made. At no point of time, the Plaintiff denied its liability to pay the balance amount of Rs.1 crore to the Defendant but deferred such payments. Ultimately, the balance amount of Rs.1 crore was not paid.

d) In terms of the agreement the Defendant was to get a sum of Rs.15 lakhs every month as consultancy fees for services to be rendered. Over and above this monthly payment component, Defendant was entitled to travelling, food and lodging expenses as actually incurred. In spite of raising such bills, the Plaintiff did not reimburse the Defendant a sum of Rs.58,770.47p on that account. The Plaintiff also neglected and failed to pay consultancy fees for the months of August, September, October and November 2019, though the Defendant rendered extensive service. During the period of service the Defendant had parted with several key and vital information and documents for smooth kick start of the manufacturing and marketing activities.

e) On or about 07/09/2019, the Defendant was shocked to receive an e-mail from the Managing Director of the Plaintiff, alleging that apparently the essential part of the original discussion was that Dr. Balan, Mr. Thomas Valera and Mr. Yashavant were supposed to join the Plaintiff/Company with the Defendant but they did not

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join. Defendant was also shocked to receive a letter dated 23/11/2019 from the Plaintiff wherein it was alleged that the Defendant's appointment had not commenced as it was supposed to commence on joining of other experts and sought refund of Rs.55 lakhs. The Defendant refuted all the allegations.

f) In the context of facts pleaded in the written statement, the Defendant denied the allegations made in the plaint. A counter-claim is raised by the Defendant from the Plaintiff particulars of which are given as follow:

| | | |
|---|---|---|
| i) | Balance payment payable on appointment | Rs. 1,00,00,000/- |
| ii) | Fees for the month of August, 2019 | Rs. 17,70,000/- |
| iii) | Fees for the month of September, 2019 | Rs. 17,70,000/- |
| iv) | Fees for the month of October, 2019 | Rs. 17,70,000/- |
| v) | Fees for the month of November, 2019 | Rs. 17,70,000/- |
| vi) | Reimbursement of expenses for travel, food and lodging | Rs.58,770/- |
| vii) | Severance fee as per Clause 14 of the agreement dated 02/08/2019 | Rs.5000000/- |

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viii) Interest at a rate of 18% p.a Rs.5977468/-

**Total** **Rs. 28116238/-**

On the basis of rival pleading of the parties, the following issues were framed:

1. Is the suit maintainable in its present form?

2. Are the claims and the counter-claim barred by the laws of limitation?

3. Is the Plaintiff right in alleging that the Defendant's appointment did not take effect as all the seven experts did not join the Plaintiff along with the Defendant?

4. Whether the appointment of the Defendant was dependent upon all the seven other experts joining the Plaintiff Company?

5. Whether the Plaintiff is entitled to its claim for refund of Rs.55,47,422/- or any part thereof?

6. Whether the Defendant is entitled to fees and expenses as agreed upon as per the Terms of Engagement dated 2nd August, 2019?

7. Whether the Defendant is entitled to the sum of Rs.2,81,16,238/- as claimed?

8. Whether the Defendant is entitled to any compensation for the valuable knowledge imparted to the Plaintiff?

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9. What other reliefs the parties are entitled to?

10. Whether the appointment of the Defendant as a business consultant in the Plaintiff did not fructify in view of the fact that t6he experts did not join the Plaintiff?

11. Whether the Defendant is entitled to the reliefs claimed in the written statement and the counter-claim?

12. Whether the reliefs claimed in the written statement and the counter-claim are barred by limitation?

Both the parties adduced oral and documentary evidences.

**Issue No.1, 2 & 12:**

These issues were not argued or pressed by the Learned Counsels for the parties. The suit was filed in time. The counter-claim was also filed within the period of limitation. These issues are decided, therefore, in favour of the parties and decided accordingly.

**Issue No.3, 4, & 10:**

These three issues are inter-related and together invite adjudication whether there was a valid and enforceable contract between the parties herein. Therefore, these issues are considered together.

The Learned Counsel for the Plaintiff argued that in terms of the agreement dated 02/08/2019 experts could only have been appointed by the Plaintiff on being so recommended by the Defendant. The Defendant failed to

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recommend the names and failed to perform obligations under the agreement, thus caused breach of the agreement.

It was further argued that effectiveness of the agreement was dependent on joining of the other experts. Since those experts did not join, appointment of the Defendant did not come into effect. Therefore, the claim of the Defendant is not tenable since there is no subsisting agreement.

The third limb of argument of the Learned Counsel for the Plaintiff was that the agreement between the parties dated 02/08/2019 was a contingent contract. Referring to Section 31 of the Indian Contract Act, 1872 the Learned Counsel argued that contingent contract is a contract to do or not to do something if an uncertain event, collateral to the contract, happens or does not happen. In other words, contingent contracts are based on the occurrence or non-occurrence of an event that is not guaranteed. In this case, enforcement and actualization of the terms and conditions were dependent on joining of other experts from the rubber chemical field. As the other experts did not join, the future or the contingent event did not take place. The Defendant could have enforced the terms and condition if the happening of the future uncertain event became impossible. There is no evidence that joining of the other experts became impossible. Therefore, in view of the provision of Section 33 of the Indian Contract Act, 1872 the Defendant's claim is not enforceable.

The fourth limb of argument of the Learned Counsel for the Plaintiff was that the counter-claim in the present case could have been decreed only if these would have been an unambiguous admission of the Plaintiff. Since, it is manifest from the rival pleadings that disputed questions of law and fact require

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adjudication there cannot be any decree for the counter-claim. The Learned Counsel relied upon-

1. **Balraj Taneja & Anr. Vs. Sunil Madan & Anr. [(1999) 8 SCC 396]**
2. **C.N. Ramappa Gowda Vs. C.C. Chandre Gowda [(2012) 5 SCC 265]**

The first limb of argument of the Learned Counsel for the Defendant was that P.W. 1 has no personal knowledge in respect of the events which took place after execution of the agreement dated 02/08/2019. P.W. 1 was not aware at all whether the Defendant rendered any service to the Plaintiff. Referring to various questions put to the P.W. 1 in examination-in-chief as well as cross-examination it was argued that the witness failed to clarify the events and sometimes made contradictory statements. The sum and substance of this part of the argument was that absence of personal knowledge of P.W. 1 rendered his evidence unauthentic. The Plaintiff, thus failed to produce the best evidence, namely, the evidence of a person having personal knowledge. According to the Learned Counsel, evidence of the Plaintiff cannot be relied upon.

The second limb of argument was that the entire cross-examination of D.W. 1, who was the Defendant himself, aimed to show that the rubber experts did not join along with the Defendant. But the fact that four experts did join is admitted in paragraph 11 of the plaint itself. This means contingency was fulfilled and an enforceable agreement came into being.

The third limb of argument was that the agreement dated 02/08/2019 neither recorded the number of the other rubber experts nor recorded their

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names who were to join simultaneously with the Defendant. Admittedly, four experts joined. Therefore, the obligations of the Defendant to recommend the experts were fulfilled.

The fourth limb of argument of the Learned Counsel for the Defendant was that the Plaintiff cannot be permitted to introduce new terms and conditions in the final agreement. There was no mention either the number or the names of the experts. There is no evidence in support of the Plaintiff's contention about any agreement on joining of seven rubber experts.

The fifth limb of argument was that since entering into agreement, the Plaintiff allowed the Defendant to render service thus availed benefit thereof. Thus and therefore, the Plaintiff is liable to pay the Defendant the claimed amount. Existence of certificates showing tax deduction at source (TDS Certificates) amply demonstrate that.

The last point argued was that Section 31 of the Contract Act defines contingent contract. The pre-condition, if at all for commencement for employment was there, the same was fulfilled on joining of the four experts. Therefore, there is no space to say that a contingent contract failed for non-happening of a future uncertain event.

I have heard rival submissions.

I most elemental question that awaits for decision is whether there was any binding and enforceable contract between the parties or whether there was any contingent contract whose contingency remained unfulfilled rendering the agreement as ineffective, non-executory and unenforceable.

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Section 31 of the Indian Contract Act, 1872 deals with contingent contract. The section provides as follow:

> **"31. "Contingent contract" defined.—** A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen."

Section 32 of the Act provides:

> **"32. Enforcement of contracts contingent on an event happening.—** Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.
>
> If the event becomes impossible, such contracts become void."

Section 31 defines contingent contract i) to do or not to do something ii) if some event, collateral to the contract, does or does not happen. Section 32 contemplates two situations. The first is the case of non-happening of the event and the other is impossibility of happening. In the former case the contract is not enforceable whereas in the second case the contract is rendered void. In both the cases performance is postponed to a future date and contractual obligation arises at that future date on happening of the contingency. Unless the future event happens there is no obligation and the contract is not enforceable if that event does not occur.

Factual aspects of the present case may be considered now.

Before signing of the agreement dated 02/08/2019 (Ext. D) the Plaintiff sent a draft agreement to the Defendant by electronic mail on 30/07/2019. This draft agreement was marked as Ext. B. Clause 1 of the draft agreement stated that appointment of the Plaintiff as business consultant of the Defendant would commence immediately after joining of such individuals as mentioned in

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the annexure. The annexure contained names of seven persons. This Clause along with the annexure set out or rather purported to state that commencement of the employment would be immediately after joining of the named seven persons. In other words, joining and effectively working and execution of the agreement was contemplated to be contingent on joining of the seven persons.

Final contract being Ext. D dated 2nd August, 2019 was executed after discussion between the parties. Although the final contract being Ext. D mentioned joining of other experts, their names and numbers are absent. In the final agreement, Clause 1 provided that the appointment of the Defendant in the Plaintiff/Company has the business consultant would commence on joining simultaneously with joining of other experts from rubber chemicals field. It further contained that the experts would be selected and recruited based on recommendation of the Defendant and approval of the Plaintiff. It was clarified in the Clause 1 that the experts should be absorbed in the Plaintiff/Company for smooth running of business. Number of persons or their names were absent in this final agreement but joining and final commencement of service of the Defendant was stated to start from simultaneous joining of the experts. This is the very contingency on which commencement of the Defendant's tenure depended. The agreement might have suffered, vagueness or uncertainty for which it could be voidable but this is not pleaded; neither of the parties pleaded that. Therefore, the intention of the parties should be ascertained. P.W. 1 had no personal knowledge, as deposed on correspondences between Mr. Holani and the Defendant. In the process of interpreting the terms of the contract a court can look into the conduct of the parties preceding the execution of the contract. Since P.W. 1 could not highlight on this issue, the statements of the

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Defendant, deposed as D.W. 1 may be looked into. It is contended in the plaint that the Plaintiff required a team of experts from rubber chemicals field for running of the Plaintiff's business. It was agreed that the seven experts associated with the Defendant would join. The Plaintiff made it clear that if the experts or any of them did not join, the Plaintiff would look for a new team elsewhere. The professed objects of appointment of the seven experts were to create a team work for the purpose of the business. It was in contemplation of the Plaintiff that these seven persons should be appointed simultaneously to make the appointment effective and create a composite team work. That is why, the seven names figured in the draft agreement. The intention of the Plaintiff is manifest. It was heard again and again by the Defendant that names and numbers of the experts were not specified though there was no denial that experts are to be appointed. DW 1 in course of examination-in-chief (question no. 16) stated that basically he had suggested seven people to be inducted but told Mr. Holani not make it a part of the agreement. This question was asked in terms of Ext. B. This testimony of the Defendant makes it amply clear that even though a plea was taken of uncertainty of number and names, seven persons were contemplated to be inducted and it is at the instance of the Defendant that those names were not incorporated in the final agreement. DW 1 reiterated in cross-examination in question no. 122 that in the draft document Mr. Holani and himself had mentioned seven experts but on suggestion of the Defendant those names were not incorporated in the final agreement because their joining was subject to the personal decisions and subject to the approval of the Plaintiff. In view of this evidence and admission the Defendant cannot be heard to say that numbers were uncertain and names were not known in order to dig out vagueness in the agreement. Intention of the parties was manifest that seven

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experts were to be appointed even though numbers and names are not in Clause 1 in the final agreement. This is an admitted position and this intention of the parties is manifest.

Clause 1 of the agreement is very clear and conspicuous. This Clause stated that appointment of the Defendant would commence on simultaneous joining of other experts from rubber chemicals field. From forgoing discussions, it is clear and established that seven experts were to be appointed based on recommendation of the Defendant and approval of the Plaintiff. The Defendant accepted this term as pre-condition for his appointment. Subsequently, a plea was taken that their appointment dependent on their own will and approval of the Plaintiff but the Defendant agreed to the terms and bound himself with its terms and conditions as stipulated in Clause 1. Once it is accepted and agreed upon that the Defendant's appointment was dependent of simultaneous joining of other experts, he is bound by such term; there was no exit rout from that. It is admitted that seven experts were not appointed or did join. The case of the Defendant was that four of them joined. It is not established that the Defendant recommended the names of all the seven experts. Therefore, obviously and very clearly, in the absence of joining all the seven other experts the Defendant's appointment did not take place. It is not a case that their appointment became subsequently impossible. No such plea is there. Therefore, it is safe conclusion, in view of discussions made above, that there was a contingent contract between the parties dated 02/08/2019. Since the contingency failed, no formation of contract took place and the contract became unenforceable under Section 32 of the Contract Act, 1872.

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It is inevitable conclusion, therefore, that there was no binding and enforceable agreement or contract between the parties.

Issue No.3,4 and 10 are decided in favour of the Plaintiff.

**Issue No.5,6,7, 8, 9 & 11:**

It is the case of the Defendant that the agreement came into being and he took money on the strength of the agreement. The case of the Plaintiff, on the other hand, is that the money was nothing but advance payment. As decided above, the executory contract could not be performed and stood unenforceable in view of failure of the contingency on which the agreement dependent. The Defendant cannot be allowed to retain the money so received from the Plaintiff for his unjust enrichment. Money was paid on expectation of fulfillment of the contingency. The contingency did not happen. Therefore, the Defendant is liable to refund money taken under an unenforceable contract. This is based on the principal *"Nul ne doit senrichir aux depens des autres"*—No one ought to enrich himself at the expense of others. This doctrine at this stage of English common law was remedied by *indebitatus assumpsit* which action lay for money had and received to the use of the Plaintiff. In **Mahabir Kishore & Ors. Vs. State of Madhya Pradesh [(1989) 4 SCC 1],** the Supreme Court India observed that it lay to recover money paid under a mistake, or extorted from the Plaintiff by duress of his goods, or paid to the Defendant on a consideration which totally failed. In **Mafatlal Industries Ltd. Vs. Union of India [(1997) 5 SCC 536],** the principal so laid down was considered by the Nine Judges Bench of the Supreme Court of India with reference to this case. The principal laid down in **Mahabir Kishore's** case was reiterated that the principal of unjust enrichment requires – first that the Defendant has been

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enriched by the received of a benefit; that this enrichment is an expense of the Plaintiff and thirdly that retention of the enrichment is unjust. This justifies restitution. Money can be refunded under provision of section 72 of the Indian Contract Act, 1872, which itself embodies the principle of equity (see **Mafatlal Industries Ltd. Vs. Union of India [(1997) 5 SCC 536] ).** Similarly, the Defendant cannot rely upon an unenforceable contract to vindicate his right to demand any money as claimed here. In absence of any executed and enforceable contract, the Defendant cannot claim money as prayed for in the counter-claim.

For reasons stated above, this Court is of opinion that Plaintiff's case succeeds and the Plaintiff is entitled to recover the money from the Defendant and the Defendant is liable to pay the amount to the Plaintiff with interest. This is also conclusion of this Court that the Defendant has not right to claim any money as prayed for.

In nutshell, the plaint case succeeds and the counter-claim fails.

These issues are decided in favour of the Plaintiff.

It is ordered, therefore, that the Defendant shall pay the principal sum adjudged of Rs.55,47,422/- to the Plaintiff with interest at a rate of 8% per annum from the date of institution of the suit. The decretal amount shall be paid within three months from the date of decree in case of failure of which the Defendant shall be liable to pay additional interest of 2% per annum from the expiry of the three months on the principal sum adjudged till repayment. After expiry of the said period of three months, the Plaintiff shall be at liberty to draw up execution proceeding to enforce the decree in case of non-payment.

The counter-claim stands dismissed.

The suit is disposed of.

Let the decree be drawn up.

**(Sugato Majumdar, J.)**