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OSA (CAD) NOS.150 AND 154 OF 2021

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**JUDGMENT RESERVED ON  
24 / 01 / 2024**

**JUDGMENT DELIVERED ON  
14 / 03 / 2024**

**CORAM :**

**THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN  
AND**

**THE HONOURABLE MR. JUSTICE R.SAKTHIVEL**

**OSA (CAD) NOS.150 AND 154 OF 2021**

**AND**

**CMP NO.21109 OF 2021 IN OSA (CAD) NO.150 OF 2021**

**AND CMP NO.21249 OF 2021 IN OSA (CAD) NO.154 OF 2021**

Accudyne Industries India Private Limited

Represented by its Authorised Signatory

Mr.Sridhar Jawahar

No.4, Rajarajan Street, Visalakshi Nagar,

Ekkaduthangal, Chennai – 600 097.

... Appellant in both OSAs'

(Cause title accepted vide order

dated 10.11.2021)

**Vs.**

M/s.R.P.Rajarajan Enterprises

Represented by its Managing Partner

R.Parthiban S/o. K.A.Rishikesavam

Having its office at No.39, Habibullah Road,

T.Nagar, Chennai – 600 017.

... Respondent in both OSAs'



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**PRAYER IN OSA (CAD) NO.154 OF 2021:** Original Side Appeal filed

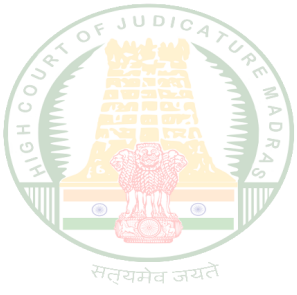
under Order 36 Rule 1 of Original Side Rules read with Section 13 of the Commercial Courts Act, 2015, praying to set aside the Judgment and Decree dated 19.02.2021 passed in C.S.No.692 of 2012 and dismiss the judgment and decree to the extent of directing the appellant to pay a sum of Rs.1,40,14,080/- (Rupees One Crore Forty Lakh Fourteen Thousand and Eighty only) along with interest at the rate of 12% from 29.10.2008 to the respondent.

**PRAYER IN OSA (CAD) NO.150 OF 2021:** Original Side Appeal filed

under Order 36 Rule 1 of Original Side Rules read with Section 13 of the Commercial Courts Act, 2015, praying to set aside the Judgment and Decree dated 19.02.2021 passed in C.S.No.692 of 2012 to the extent of dismissal of the counter-claim filed by the appellant, and allow the counter-claim by directing the respondent to pay a sum of Rs.1,18,43,273/- (One Crore Eighteen Lakh Forty Three Thousand Two Hundred and Seventy Three only) along with interest at the rate of 24% from 29.11.2007 till the date of payment.

For Appellant : Mr. P. H. Aravindh Pandian  
(in both OSAs' ) Senior Counsel for  
Mr. Thriyambak J. Kannan

For Respondent : Mr. V. Anand  
(in both OSA's)



OSA (CAD) NOS.150 AND 154 OF 2021

## COMMON JUDGMENT

WEB C R.SAKTHIVEL, J.

By this common Judgment, the following appeals are being disposed of :

(i) OSA (CAD) NOS.154 of 2021 preferred assailing the Judgment and Decree dated 19.02.2021 passed in C.S.No.692 of 2012, by the defendant therein, praying to set aside the same.

(ii) OSA (CAD) NOS.150 of 2021 preferred assailing the rejection of the counter-claim in Judgment and Decree dated 19.02.2021 passed in C.S.No.692 of 2012, by the defendant therein, praying to allow the counter-claim.

2. For the sake of convenience, henceforth, the parties will be referred to as per their array in the suit *i.e.*, ‘appellant’ and the ‘respondent herein’ will be referred to as ‘defendant’ and ‘plaintiff’ respectively.



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### **3. Case of the Plaintiff in brief**

3.1. The plaintiff owns lands admeasuring 1.67 Acres in S.Nos.60/11C, 60/12, 61/17C, 61/18, 61/19 and 61/20B at Old No.101, New No.55, Thandalam Village, Sriperumpudur Taluk. The defendant proposed a built-to-suit lease arrangement. After discussions, a registered Lease Deed was executed on 29.11.2007. It was agreed that the plaintiff as lessor would construct an industrial shed with approximately 30,000 sq.ft of factory space and 7,000 sq.ft of office space and hand it over to the defendant as lessee within six months from the date of execution of the lease deed. As per the agreement, necessary building construction permissions and licenses had to be obtained by the plaintiff and other permissions relating to running the industry had to be obtained by the defendant.



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3.2. At a subsequent meeting, the said period had been altered

and the date of commencement was changed to 01.04.2008 owing to the

delay primarily attributable to the defendant, who changed the construction specifications frequently, and also owing to the delay on account of rainfall. The construction commenced and proceeded till the roof level under regular supervision of the defendant through its Managing Director and representatives. Further, the defendant was dependent on a Multi National French company for its business. The industrial shed had to be constructed according to the needs of the foreign company and therefore, the specifications kept changing. Though the plaintiff incurred additional expenses, the changes desired by the defendant's side were carried out duly by the plaintiff.

3.3. The issue of construction of toilet for the office space generated a dispute between the plaintiff and the defendant and this was resolved in a meeting held on 26.08.2008. It was resolved that the



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construction of the toilets for the office space would be carried out with no

additional charges on the defendant. The other specifications regarding

roof height and flooring level were agreed to be uniform. It was further

agreed that the plans from the municipality should be obtained by the

plaintiff and only after the defendant approves the drawings and plans,

construction should be commenced by the plaintiff; that the revised

drawings approved by the municipality should be handed over to the

defendant by 30.10.2018; and that the entire construction should be

completed on or before 30.12.2008.

3.4.The agreement arrived at in the aforementioned meeting

brought about substantial variation in the terms and conditions of the

registered Lease Deed dated 29.11.2007. The changes in the construction

were on account of additional open space of 6698 sq.ft required in addition

to the originally agreed 6400 sq.ft of open space mentioned in the Lease

Deed.



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3.5. Further, owing to the drop of export potential of the

defendant in July 2008 and other difficulties faced by the defendant, the plaintiff was blamed by the defendant for deviation from the agreed plan and approved drawing by letter dated 02.08.2008. The plaintiff by letter dated 07.08.2008 set out the details of the requirement of the defendant and sought clarification regarding the location of the toilets for resuming construction. It had been also stated that the period fixed for completing construction namely 30.12.2008 should be extended further.

3.6. The defendant had also taken up the issue of additional rent for the additional space vide letter dated 02.08.2008 which was refuted by the plaintiff by letter dated 07.08.2008. The plaintiff had made clear that many modifications have been sought by the defendant and there were also many deviation in the approved plan. The plaintiff claimed they had spent more than Rs.1.5 Crores towards construction and that the ground level was raised for the entire lease area.



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3.7. Further, the defendant by letter dated 29.10.2008

terminated the lease exercising Clause No.5.2 and Clause No.8.5 of the registered Lease Deed dated 29.11.2007. The defendant alleged that the construction had not been done in accordance with the specifications and the drawings. The plaintiff had issued a reply on 02.11.2008 stating that a huge amount of money had been spent on construction. The plaintiff also pointed out that there was no delay on their part in the construction.

3.8. The defendant then issued a legal notice dated 08.12.2008, and for the first time, allegations were raised against the plaintiff. The plaintiff issued a reply through their advocate on 18.12.2008. The plaintiff claimed that the amount alleged to have been incurred by the defendant to a sum of Rs.1,43,54,324/- was not sustainable. The defendant issued a rejoinder to the notice of the plaintiff. The plaintiff replied through their counsel on 05.01.2009. The plaintiff claimed that they had spent a sum of Rs.3.75 Crores on construction. The rent agreed was Rs.9,73,200/- per



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month. They also estimated that they would have realized rent up to

Rs.8,31,69,504/- for the six-year lock-in period. The plaintiff therefore is

entitled to a total amount of Rs.12,06,69,504/- which consists of the rent

and construction cost. However, the plaintiff claimed the rents payable by

the defendant only for three years namely, from 30.12.2008 to 29.12.2011

while reserving their right to claim rent for the rest of the lock-in period.

3.9.The plaintiff had therefore filed a Civil Suit for a declaration that the termination of the Lease Deed by the Defendant vide letter dated 29.10.2008 is illegal; for recovery of a sum of Rs.3,85,89,216/- together with interest from the date of termination of the lease *i.e.*, 29.10.2008 till the date of realization; and also for costs, before the Hon'ble Single Judge of this Court.



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#### **4. Case of the defendant in brief and counter claim**

4.1.The defendant filed their written statement, in which they claimed that the suit is barred by law of limitation as the period of limitation expired on 29.10.2011. The defendant also questioned the authority of the person who verified the plaint. The defendant also stated that the plaintiff was not a registered partnership firm and hence, the suit was not maintainable.

4.2.Further stated that, the plaintiff was to start construction on 20.03.2008 and to complete the same within a period of six months; that the plaintiff was required to develop, construct, and lease to the defendant, the office and factory building at the said place; that the defendant had paid to the plaintiff a total sum of Rs.1,17,02,840/-; and that, however, the plaintiff deviated, did not carry out the construction as per the terms agreed, failed to complete the construction and handover the



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possession within six months from 29.11.2007. Therefore, the defendant

terminated the Lease Deed dated 29.11.2007 on 29.10.2008 and sought

return of Rs.1,17,02,840/- which had been paid by the defendant to the

plaintiff as advance in terms of the registered Lease Deed dated

29.11.2007 together with interest at 24% per annum from the date of

payment i.e., 29.11.2007 till the date of filing counter-claim and further

claimed subsequent interests on counter-claim. The defendant therefore

prayed to dismiss the suit with costs and allow the counter-claim.

5.A reply statement was filed by the plaintiff denying the averments stated in the written statement including the counter-claim and reiterating a few plaint averments.

6.Based on the above pleadings, the Hon'ble Single Judge framed the following issues:

*“1.Whether the plaint has been validly signed and verified?”*



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2. *Whether the present suit is maintainable on account of the plaintiff being an unregistered partnership?*
3. *Is the suit barred by limitation?*
4. *Is the Shed subject matter of the lease was delayed in construction due to the variations required by the defendant?*
5. *Whether the termination of the lease by the defendant through letter dated 29.10.2008 is valid?*
6. *Is the plaintiff entitled to recover money from the defendant for the entire term of the lease under the lease deed dated 29.11.2007, including the lock-in period?*
7. *To what relief the plaintiff is entitled?"*

6.1. On 28.08.2019, the following additional issues were framed:

*"1. Whether the plaintiff is in breach of its obligations as contained in the agreement dated 29.11.2007 entered into with the defendant?*

*2. Whether the construction was completed, and possession was delivered to the defendant by the plaintiff within the period mutually agreed on by the parties?.*

*3. Whether the defendant is entitled to receive from the plaintiff a sum of Rs.1,18,43,274/- including an interest of Rs.1,40,434/- on the principal amount of Rs.1,17,02,840/- paid as advance in terms of the lease deed dated 29.11.2007?"*



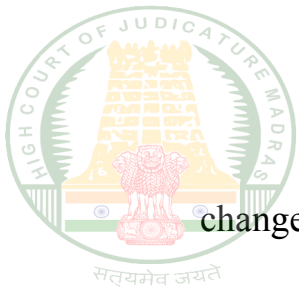
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6.2.To prove the case, Mr. R. Parthiban, Managing Partner of

the plaintiff firm was examined as P.W.1 and Ex-P.1 to Ex-P.12 were marked on the plaintiff's side. On the defendant side, J. Sridhar, Finance Controller of the defendant company, was examined as D.W.1, and Ex-D.1 to Ex-D.11 were marked. Notably, the defendant side marked Ex-D.1 through cross-examination of P.W.1.

6.3.After considering the rival submissions and the evidence on record, the Hon'ble Single Judge held that the plaint has been duly verified by the Managing Partner of the plaintiff firm; that the plaintiff is a registered firm; that the plaint was presented on 28.10.2011 which is well within the period of limitation; and that therefore, the suit is maintainable. Accordingly, the Hon'ble Single Judge answered Issue Nos. 1, 2 and 3 in favour of the plaintiff.

6.4.With regard to Issue 4 and Additional Issue No.1, the Hon'ble Single Judge held that the construction was delayed due to the



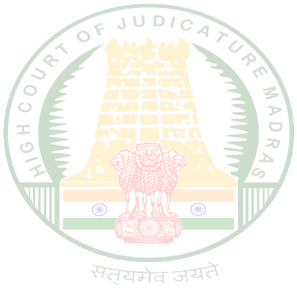
changes sought by the defendant, and the plaintiff was not in breach of Ex-

WEB COPY – Lease Deed dated 29.11.2007.

6.5. With regard to Issue No.5, the Hon'ble Single Judge held that the termination is invalid as it is premature. With regard to Additional Issue No.2, Hon'ble Single Judge held that, as a consequence of the decision on Issue No.5, the Additional Issue No.2 pales into insignificance.

6.6. With regard to Issue 6, the Hon'ble Single Judge held that the plaintiff is entitled only to the base rent for a period of three years at the rate of 3,89,280 per month and accordingly, directed the defendant to pay a sum of Rs.1,40,14,080/-.

6.7. With regard to Additional Issue No.3, the Hon'ble Single Judge held that, since the termination was held invalid, the defendant is not entitled to the counter-claim raised.



6.8. With regard to Issue No.7, the Hon'ble Single Judge held

WEB COPY as extracted hereunder:

*“115. The suit is partly decreed.*

*(a). The termination of the lease deed by the defendant by letter dated 29.10.2008 is declared as illegal.*

*(b). The defendant is directed to pay a sum of Rs.1,40,14,080/- together with interest at 12% per annum from 29.10.2008 till date of realisation.*

*(c). The counter claim of the defendant is dismissed.*

*(d). The plaintiff is entitled for costs of the suit.”*

7. Feeling aggrieved with the Judgement and Decree dated 19.02.202 and the rejection of the counter-claim, the defendant has preferred these two appeals.

## **8. Arguments**

8.1. Mr.P.H.Aravindh Pandian, the learned Senior Counsel appearing for the appellant / defendant would argue that the defendant was ready and willing to perform their part of the contract. In accordance with



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Ex-P.2 – Lease Deed, the defendant obtained the necessary permissions

from the Tamil Nadu Pollution Control Board to establish the industry and

the same was communicated to the plaintiff on 08.01.2008 vide Ex-D.1.

Thereafter, the defendant required open space of 6698 sq.ft in addition to

the open space indicated in Ex-P.1 and the same was communicated to the

plaintiff on 20.03.2008 vide Ex-P.12 / Ex-D.4. In Ex-P.12 / Ex-D.4, both

parties have agreed in writing that the date of commencement of

construction shall be 01.04.2008 and both parties have also signed therein.

This would imply that the plaintiff had to complete the construction by

30.09.2008. The plaintiff raised some issues regarding the construction

cost of toilets which was already included and specified in the original

contract. In the meeting held on 26.08.2008, the issue regarding toilets was

resolved and further, the plaintiff agreed to provide facility to the

defendant for fit-outs by 15.11.2008. However, the plaintiff failed to

perform their part of the contract. Hence, on 29.11.2008, the defendant

terminated the contract by exercising Clause No.5.2 and Clause No.8.5 of



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Ex-P.2 - Lease Deed and sought for refund of the advance amount of

Rs.1,17,02,284/- along with 24% interest from 29.11.2007 till the date of

filing counter-claim, along with subsequent interest. Thereafter, after

exchange of notices, the plaintiff filed the aforementioned Civil Suit.

8.2.The learned Senior Counsel would further argue that, the Hon'ble Single Judge without properly appreciating the evidence on record, partly decreed the Suit and dismissed the counter-claim of the defendant. The defendant filed a complaint before consumer forum and the same was dismissed as not maintainable. However, the defendant's counter-claim is maintainable in law. The Hon'ble Single Judge failed to consider the fact that the entire construction was executed out of the advance money paid by the defendant and the plaintiff failed to execute the construction as required by the defendant. Further, the plaintiff did not deliver possession of the industrial area within the stipulated time. Hence, awarding base rent to the plaintiff would amount to unjust enrichment. He



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accordingly prayed to allow these appeals, set aside the Judgement and

Decree passed by the Hon'ble Single Judge and allow the counter-claim of the defendant.

9.Per contra, Mr.V.Anand, the learned counsel for the plaintiff would argue that the plaintiff was ready and willing to perform their part of the contract. The defendant had not fulfilled their part of the contract in accordance with Ex-P.2- Lease Deed. Ex-P.12 / Ex-D.4 document would show that the construction was to commence only from 01.04.2008 and the delay in commencement is primarily attributable to the defendant. The defendant in the month of July 2008 asked the plaintiff to hold on the construction until further notice. There was a delay of 13 days on account of rainfall. Then, since the defendant did not confirm the location of the toilets in the factory and office area, there occurred a delay. The construction was completed up to the roof level under the supervision of the defendant. The defendant was frequently changing the specifications



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for construction. The plaintiff carried out the desired changes of the defendant duly. In the meeting held on 26.08.2008, the issue of construction of toilet was resolved and both parties orally agreed to extend the construction deadline till 30.12.2008 considering the 13 days rain period and the delay caused by the defendant. As the export potential of the defendant dropped in July 2008, the defendant wanted to wriggle out of the contract. All of a sudden, before the deadline, the defendant terminated Ex-P.2 – Lease Deed which is illegal and arbitrary. The plaintiff spent about 3.75 Crores on the construction. The rent agreed per month was Rs.9,73,200/-. The plaintiff would have realized rent up to Rs.8,31,69,504/- for the six-year lock-in period. However, the plaintiff claimed the rents payable by the defendant only for three years namely, from 30.12.2008 to 29.12.2011 while reserving their right to claim rent for the rest of the lock-in period. The Hon'ble Single Judge awarded only base rent for three years to a tune of Rs. 1,44,14,080/- along with interest at the rate of 12% per annum from 29.10.2008 till the date of realization. He



would further argue that the Hon'ble Single Judge dismissed the counter-

claim of the defendant for refund of the advance amount after considering

the fact that the plaintiff incurred huge expenditure on construction. There

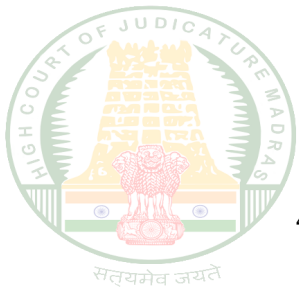
is no warrant to interfere with the same. Accordingly, he prayed to dismiss

the appeals.

### **10. Points for determination**

10.1. This Court has carefully considered the rival submissions and the evidence on record. The following points arise for determination.

- 1) Whether the delay in construction is attributable to the plaintiff or the defendant?
- 2) Whether the termination of Ex-P.2 - Lease Deed by the defendant vide letter dated 29.10.2008 valid in the eyes of law?
- 3) Whether the plaintiff is entitled to the base rent?



4) Whether the defendant is entitled to the counter-claim?

WEB COPY 5) Is there any warrant to interfere with the Judgement and Decree dated 19.02.2021 of the Hon'ble Single Judge?

### **11. Decision and Discussion**

11.1. At this juncture, this Court deems fit to state that, the defendant sent Ex-D.7 - Notice dated 29.10.2008 terminating the Lease Deed between the parties and therefore, the cause of action arose on 29.10.2008. The plaintiff presented the plaint before this Court on 28.10.2011, which is well within the period of limitation. Further, the plaintiff filed Ex-P.1 – Acknowledgement of Registration of Firm dated 02.03.2005 issued by the Registrar of Firms, Chennai (Central) which shows that the plaintiff firm is duly registered under the Indian Partnership Act, 1932. Notably, the partnership deed also forms part of Ex-P.1. Thus, the plaintiff firm is a registered firm. Furthermore, in Ex-P.1, partners of



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the plaintiff firm have authorized Mr. R. Parthiban, Managing Partner, to

execute lease deeds and other documents on behalf of the firm. This Court

perused the Original Plaint and noticed that the plaint has been duly

verified by the said Mr. R. Parthiban. Therefore, the suit is maintainable.

The appellant has not agitated the decision of the Hon'ble Single Judge

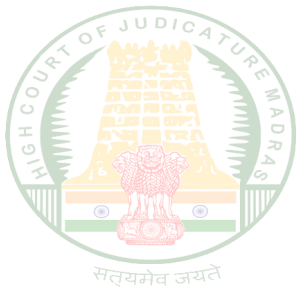
pertaining to Issue Nos.1,2 and 3 of the Civil Suit in this Appeal.

Therefore, this Court upholds the findings of the Hon'ble Single Judge in

respect of Issue Nos.1,2 and 3 therein.

### **12. Point Nos.1 and 2**

12.1.As per Ex-P.2 - Lease Deed dated 29.11.2007, the plaintiff as lessor had to construct an industrial area with approximately 30,000 sq.ft of factory space and 7,000 sq.ft of office space on 51,200 sq.ft of land and hand it over to the defendant as lessee within six months from the date of execution of the lease deed *i.e.*, by 28.05.2008. Relevant clause thereof (Clause D) reads thus.



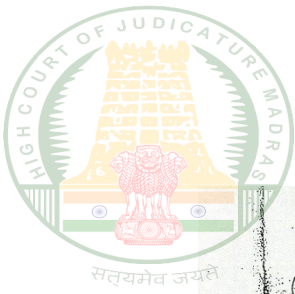
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*“D.The LESSOR understands that the payment of rent and other outgoings by the LESSEE shall be subject to the LESSOR putting the LESSEE into exclusive possession of the factory building, within a period of six (6) months from the date of execution of this Lease Deed (except as may otherwise be provided for herein);”*

12.2.However, in Ex-P.12 / Ex-D.4 both parties have agreed in writing that the date of commencement of construction shall be 01.04.2008 and both parties have also signed therein. Relevant portion of Ex-P.12 / Ex-D.4 is reproduced hereunder :



For MILTON ROY INDIA (P) LTD.,

CHETAN R. DESAI  
MANAGING DIRECTOR.

For. K.P. RAJENDRAN & ENTERPRISES

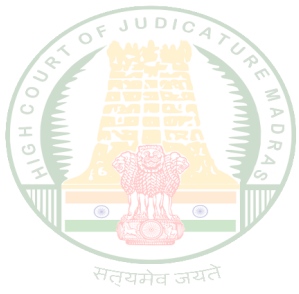
Agreed. 26/3/2008  
(R. P. RAJENDRAN)

Date of commencement of construction  
will be 1st April 2008.

C. RAMESH  
MILTON ROY

Certified to be a true copy.  
Dated this 19th day  
of March 2008  
M. S. S. S. S.  
Court Officer (S.S.)

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12.3. In view of Clause 8.4 and 8.5 alluded to *infra*, Ex-P.2-

WEB COPY Lease Deed can be modified by any changes agreed upon in writing and

signed by both parties. Thus, the date of commencement of construction in

Ex-P.2 – Lease Deed was modified to 01.04.2008 vide Ex-P.12 / Ex-D.4

by both parties. This is not a case of novation as pleaded by the plaintiff as

there is no new contract involving the parties. Notably, the plaintiff's

counsel did not press on the plea of novation in this appeal. For reference,

Clause 8.4 and 8.5 of Ex-P.2 is extracted hereunder :

*“8. Miscellaneous:*

*8.1. . . .*

*8.2. . . .*

*8.4 No amendment or modification of this agreement is to be valid or binding on any party unless it is made in writing, refers expressly to this agreement and is signed by or on behalf of all parties*

*8.5. Any notice or other communication given or made in accordance with this agreement must be -*

*a. in writing, may, in addition to any other effective mode of service, be sent by registered or recorded delivery post,*

*b. and must be addressed to the and served on the Parties at*



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*their addresses shown on the first page of this agreement or any other address that each may notify the other from time to time in writing as being its address for service for the purposes of this agreement.”*

13.This Court deems fit to extract Clause 5 of Ex-P.2-Lease

Deed for ready reference :

*“Clause 5*

*“5.TENURE & TERMINATION OF LEASE DEED:*

*5.1.The Term of the Lease Deed shall be six (6) years commencing on the Rent Commencement Date (the “Lock in Period). The LESSEE shall have the option to renew the Lease Deed for one (1) additional three (3) years period upon the terms and conditions set forth herein and upon mutual agreement of the rental payments for such additional three (3) years period (the “Renewal Period”).*

*5.2.The LESSOR agrees to complete construction of the Premises and satisfy the conditions of item 4.2(a) and (b) hereof within six (6) months from the date of execution of this Lease Deed (the Outside Completion Date”). Notwithstanding anything to the contrary contained herein, if the LESSOR does not deliver the Industrial Building in accordance with the specifications set forth herein (as may be modified upon mutual*



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*agreement between the LESSOR and the LESSEE) and the LESSOR has not obtained the unconditional and unqualified plan sanction approval permitting the occupation and use of the Premises for undertaking the industrial activity by the LESSEE, with twelve (12) months from the date of execution of the Lease Deed, the LESSEE shall have the option to terminate the Lease Deed and the Token Advance and any Security Deposits (together with any interest accrued thereon) shall be immediately returned to the LESSEE together with all interest accrued thereon. Additionally, the LESSOR shall reimburse the LESSEE for all amounts paid by the LESSEE with respect to (i) Stamp Duty paid by LESSEE in connection with this Lease Deed. (ii) all fees incurred by LESSEE in connection with LESSEE'S environmental due diligence conducted at the Lease Deed Premises and (iii) all fees incurred by LESSEE in connection with LESSEE'S title search conducted for the Lease Deed Premises.*

*5.3.LESSEE's Right to terminate: The LESSEE's has the right to terminate this Lease Deed, without being imposed with any penalty, for any of the following grounds:*

- a.The Rent Commencement Date not becoming effective;*
- b.The LESSOR not delivering the Premises to the LESSEE free, clear, unencumbered with for its use and*



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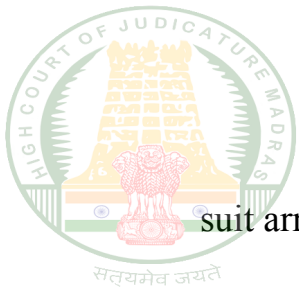
*occupation by the LESSEE within twelve (12) months of the date the Lease Deed is executed by the Parties;*

*c.The LESSOR not delivering the Premise to the LESSEE arising out of non-receipt of approval of the plan sanction papers or rejection of the plan sanction papers within twelve (12) months o the date the Lease Deed is executed by the Parties;*

*5.4. In the event of termination of the Lease Deed by the LESSEE for any or all of the reasons as set forth herein, the LESSOR shall immediately upon receipt of the written notice from the LESSEE notifying the termination of the Lease Deed, return to the LESSEE all monies paid by the LESSEE whether as by way of Token Advance, Security Deposits or by whatever name called without any deductions whatsoever (unless otherwise specifically set forth herein) “*

No need to offer explanation for the above extract as it's self-explanatory.

14.Perusal of Ex-P.12 / Ex-D.4 further reveals that both parties were uncertain about various aspects and specifications of the construction. The plaintiff has pleaded that this being a large-scale built-to-



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suit arrangement, the construction progressed under the regular supervision

of the defendant and their representatives, who frequently kept changing

their requirements; that the defendant company was dependent on a French

Multinational Company and the construction had to be done according to

the needs of the foreign company; that, therefore, drawings and

specifications kept changing; that this led to delay in construction; and that

the defendant is trying to wriggle out of the contract due to a drop in the

defendant's export potential. This is further supported by letters to the

defendant on various dates. Further, P.W.1 has deposed about the frequent

changes demanded by the defendant. On the other hand, though the

defendant in its written statement denied that the commencement date of

construction was agreed to be 01.04.2008, they admitted the same at the

time of trial. As stated *supra*, both parties have signed in Ex-P.12 / Ex-D.4.

The written statement of the defendant, excluding the counter-claim, is

nothing more than an evasive denial of the plaint averments. The

defendant side has not examined any of their people directly connected



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with the Ex-P.2 - Lease Deed. As a matter of fact, D.W.1 has himself

admitted that he is deposing only based on records and that he joined the

defendant company only in November, 2012. Further, he has deposed that

he did not receive any oral instruction from the persons directly connected

with Ex-P.2 - Lease Deed. The defendant has not produced anything to

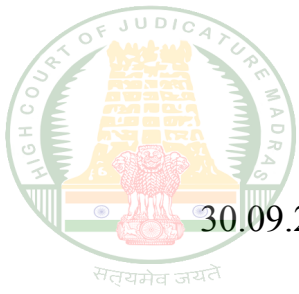
show that it was ready and willing to perform its part of the contract. In

essence, the plaintiff has pleaded and proved that the shift in the date of

commencement from 29.11.2007 to 01.04.2008 is due to the delay on the

side of the defendant.

15. Then, the defendant sent a letter dated 02.08.2008 (Ex-P.4 / Ex-D.5) to the plaintiff wherein they stated that they had provided the plaintiff with all the necessary drawings duly signed for the purpose of construction of the office and factory buildings to be undertaken by the plaintiff. Further stated that the construction has already commenced from 01.04.2008 and that the plaintiff has to complete the construction by



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30.09.2008. The plaintiff has replied to the same vide letter dated

WEB CC 07.08.2008 (Ex-P.3) wherein he has stated that the defendant instructed the

plaintiff to stop the construction work until further notice in a meeting held

on 02.07.2008; that toilet locations are yet to be confirmed; that 13 days

delay due to rain had to be adjusted as per the terms; and that the period

for which the work was stopped on defendant's instruction should be

adjusted with the deadline for construction. Notably, in view of Clause 4.3,

for each day of delay caused by any natural disturbance, the Outside

Completion Date shall be extended by one day. Consequently, to resolve

the issues, a meeting was held on 26.08.2008. In Ex-P.5 – minutes of the

said meeting, *interalia* it is stated that the deadline was extended till

30.12.2008 and the plaintiff was to provide the facility for fit-outs by

15.11.2008. Notably, the defendant had signed in Ex-P.5 – minutes of the

said meeting, but, the plaintiff had refused to sign therein. The plaintiff,

though denied the other contents of Ex-P.5, has admitted in his evidence

that in the said meeting, both parties agreed to the extension of the



deadline till 30.12.2008 keeping in mind the delay caused on the side of

WEB COPY the defendant and also the delay on account of rainfall. The defendant does

not dispute the contents of Ex-P.5 and the same is prepared by their company and duly signed by their Managing Director - Mr.Chetan Desai.

Ex-P.5 states that the extension of deadline till 30.12.2008 is owing to the two months of stalled construction and on account of rainfall. This would show that both parties have orally agreed to the extension of time for performance of contract, but, one of the party *i.e.*, the plaintiff has not signed the minutes of the meeting for certain apprehensions.

15.1.The learned counsel for the plaintiff cited the Judgement of the Hon'ble Supreme Court in ***Keshavlal Lallubhai Patel and Ors. Vs. Lalbhai Trikumlal Mills Ltd., reported in AIR 1958 SUPREME COURT 512*** to support his argument that oral agreements on extension of time for performance of contract are valid. However, the same is not applicable to the case on hand as Clause 8.4 of Ex-P.2 provides that such modifications



can be effected only in writing duly signed by both parties. The underlying

principle therein would not be applicable when there is an express

agreement to the contrary. Since the oral agreement on extension of time

for performance is not reduced into writing and duly signed by both

parties, it does not modify or alter Ex-P.2 in view of Clause 8.4 and 8.5

alluded to *supra*.

15.2.However, the oral agreement coupled with Ex-P.3 and Ex-P.5 would show that the 2 months stall in construction is attributable primarily to the defendant. In Ex-P.3, the plaintiff claims that the defendant instructed the plaintiff to stop the construction work until further notice in a meeting held on 02.07.2008. The defendant has not disputed the same.

16.According to the defendant, vide Ex-D.6, they sent an e-mail to the architect of the plaintiff pointing out the corrections in the existing drawings and requesting to rectify the same, despite which, the



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plaintiff did not fulfil their part of the contract. The learned senior counsel

WEB COPY for the appellant / defendant has submitted that the e-mail is a document as

per Section 3 of the Evidence Act, 1872; that D.W.1 who is the Finance Controller of the defendant firm, in his chief examination by way of affidavit has complied with the substantial requirement of Section 65B of the Evidence Act; and that, therefore, Ex-D.6 would be admissible in law.

16.1. In support of the above argument, he relied on ***Super Cassettes Industries Ltd. Vs. Shreya Broadcasting Pvt. Ltd., reported in 2019 SCC Online Del 7314***. Essential facts of the case are: The plaintiff therein is a copy right holder for various literary, music and other works. In random monitoring, the plaintiff therein came to know that the defendant therein has been broadcasting plaintiff therein's copyright work without their permission / licence. P.W.2 recorded the programmes wherein copyrighted work of the plaintiff therein were broadcasted. In the pursuant Suit, P.W.2 marked the CDs / DVDs containing those recordings. The



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defendant therein raised objection that 65B Certificate has not been

WEB COPY produced and hence, the same is inadmissible in view of *Anwar P.V. Vs.*

*P.K. Basheer, reported in (2014) 10 SCC 473.* The Hon'ble Delhi High Court rejected the objection of the defendant therein by observing that the affidavit of P.W.2 satisfies the requirement laid down under Section 65B of the Indian Evidence Act and also the law laid in *Anwar P.V's case (supra)*.

16.2. Notably, the Hon'ble Supreme Court in *Arjun Panditrao*

*Khotkar v. Kailash Kushanrao Gorantyal., reported in (2020) 7 SCC 1*

has held that certificate under sub-section (4) of section 65B is mandatory and a condition precedent to admit any electronic record as secondary evidence. There is no prescribed form for a certificate under Section 65B.

In this case, Ex-D.6 was produced by D.W.1 on the date of filing his chief affidavit. D.W.1 *qua* Financial Controller of the defendant company *qua* a responsible official with authorization to use the relevant devices/network, has duly complied with all the substantial requirements of a certificate



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under Section 65B in his chief affidavit. Therefore, keeping in mind the

WEB COO aforementioned case laws, this Court is of the view that Ex-D.6 is

admissible as per law. No doubt that mere admission of a document does

not amount to proof. In this case, D.W.1 was not working with the

defendant at the time of sending of the alleged e-mail. Further, neither the

sender nor the recipients of the email were examined. Further, there is no

sufficient proof that the said e-mail was actually sent to and received by

the recipients. Therefore, this Court is of the considered view that, Ex-D.6

is not proved by the defendant. Even assuming that Ex-D.6 is proved,

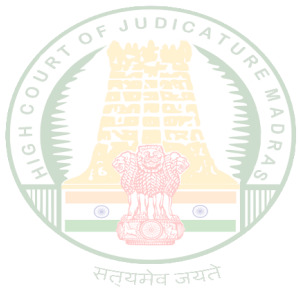
Clause 8.5 alluded to *supra* requires any communication to be in writing

and sent via post in addition to any other mode of communication.

Consequently, the defendant fails in its pursuit to establish that the plaintiff

has not performed his part of contract by not producing the drawings and

plan duly approved and that the delay is caused by the plaintiff.



17. In essence, the plaintiff has proved that the initial delay of

6 months in commencement of construction and the subsequent delay of 2

months is primarily attributable to the defendant. The defendant has failed

to prove that there was delay on part of the plaintiff. In such

circumstances, the defendant terminating Ex-P.2-Lease Deed vide letter

dated 29.10.2008 exercising Clause No.5.2 and Clause No.8 (*supra*)

claiming that the plaintiff failed to hand over the industrial area is not

justifiable as the delay is primarily attributable to them. Therefore, the

same is invalid. **Point Nos.1 and 2 are answered accordingly in favour**

**of the plaintiff and against the defendant.**

**Point Nos. 3, 4 and 5**

18. The plaintiff never handed over possession of the property

to the defendant as per the terms and requirements of Ex-P.2 – Lease Deed.

D.W.1 in his cross-examination has deposed that the construction was

almost over as on 30.09.2008. The Plaintiff has pleaded that it received



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Rs.1,03,75,008/- from the defendant under Ex-P.2 as an advance. To the

contrary, the defendant has mentioned in its counter-claim that

Rs.1,17,02,840/- was given to the plaintiff as advance. Notably, the

plaintiff has not disputed the same. Further, plaintiff has pleaded that they

incurred Rs.3.75 Crores on Construction. However, they have not

substantiated the same. In such circumstances, this Court is of the view

that, the plaintiff carried out the construction out of the advance money

paid by the defendant only. In view of the decision in Point Nos.1 and 2,

the defendant is not entitled to refund of the advance money of

Rs.1,17,02,840/-. The plaintiff is entitled to retain the same as

compensation towards the construction cost incurred by it.

19. Further, the plaintiff has not adduced any evidence to show that the building was idle and could not be rented out after the construction. Now that the plaintiff is enriched with the superstructure constructed on their land out of the advance money given by the defendant,



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granting it base rent would amount to enriching it at the cost of the

defendant in an unjust manner, which is not permissible under law.

Therefore, this Court decides that the plaintiff is entitled to retain the advance money of Rs.1,17,02,840/- as compensation, however, is not entitled to base rent. **Point No.3 is answered accordingly in favour of the**

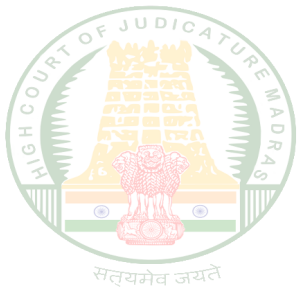
**defendant and against the plaintiff. Point No.4 is answered accordingly in favour of the plaintiff and against the defendant.** The

Hon'ble Single Judge is not justified in awarding base rent. Therefore, the Judgement and Decree dated 19.02.2021 is liable to be interfered to the aforementioned extent. **Point No.5 is answered accordingly.**

## **20.Resultantly,**

(i)OSA (CAD) No.154 of 2021 is partly allowed without costs

in the following manner :



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(a) The Judgement and Decree dated 19.02.2021 of the Hon'ble

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Single Judge to the extent that the plaintiff is entitled to a declaration that the termination of the Lease by the defendant vide letter dated 29.10.2008 is illegal, is **confirmed**.

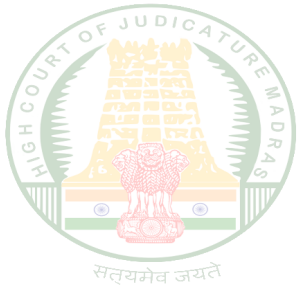
(b) The Judgement and Decree dated 19.02.2021 of the Hon'ble

Single Judge to the extent of awarding the plaintiff with base rent for a sum of Rs.1,40,14,080/- together with interest at the rate of 12% per annum from 29.10.2008 till the date of realization, is **set aside**.

(c) The defendant is **not entitled** to claim the advance money of

Rs.1,17,02,840/- from the plaintiff.

(d) The plaintiff's entitlement to the cost of the Civil Suit is retained.



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(ii) OSA (CAD) No.150 of 2021 is **dismissed**. No costs.

WEB CON Consequently, connected Miscellaneous Petitions are closed.

[R.SUBRAMANIAN, J.]

[R.SAKTHIVEL, J.]

14 / 03 / 2024

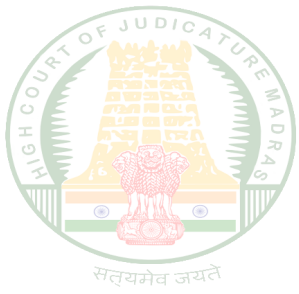
Index : Yes

Internet : Yes

Neutral Citation : Yes

Speaking Order

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OSA (CAD) NOS.150 AND 154 OF 2021

**R.SUBRAMANIAN, J.**

**AND**

**R.SAKTHIVEL, J.**

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**PRE-DELIVERY JUDGMENT MADE IN**  
**OSA (CAD) NOS.150 AND 154 OF 2021**

**14 / 03 / 2024**