



(CAD).No.106 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 30.10.2023

Pronounced on : 12.01.2024

CORAM

**THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR
AND
THE HONOURABLE MR.JUSTICE P.DHANABAL**

ORIGINAL SIDE APPEAL(CAD)No.106 of 2022

M/s.Devahi Tools

Represented by its Propreitor,

Mr.E.D.Munusamy,

No.29/23, Dhanapal Street,

Gandhi Nagar, Ekkattuthangal,

Chennai-600 032.

....Appellant

Vs.

M/s.Beta Die Casting Equipment Inc.,

200, Beverly Street,

Cambridge, Ontario, Canada,

Represented by its Area Manager,

Mr.Rajasekar Prasad,

Having area office at:

No.296, N Block,

2nd Floor, Anna Nagar East,



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Chennai- 600 012.

...Respondent

PRAYER : Original Side Appeal filed under Section 13 (1) of the Commercial Courts Act 2015 read with Clause 15 of the Letters Patent to set aside the judgment dated 30.03.2022 passed in C.S.No.357 of 2013 and dismiss the suit with cost.

For Appellant : Mr. S.Sivaraman

For Respondent : Mr. G.Krishna Kumar

ORDER

P.Dhanabal.J

This appeal has been preferred as against the decree and judgment passed by the learned Single Judge in C.S.No.357 of 2015 dated 30.03.2022 wherein the plaintiff has filed a suit as against the defendant for the relief of recovery of money and to direct them to return four machines under the custody of the defendant or direct the defendant to pay the value of the machines for a sum of Rs.4,411,404/- with the interest at the rate of 18% per annum.



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2. The Trial Court has decreed the suit by directing the defendant to pay a sum of Rs.55,73,782/- towards repayment of the amount received as advance with further interest at the rate of 12% per annum on the sum of Rs.26,87,100/- and further the defendant to pay a sum of Rs.39,25,655/- towards the sale proceedings of the machine with further interest at the rate of 12 % per annum on the sum of Rs.17,96,965/- from the date of the plaint to till the date of payment and further the defendant was directed to return Toshiba Cold Chamber Die Casting Machine within 30 days from the date of receipt of copy of this decree and further the defendant was directed to pay a sum of Rs.3,00,000/- towards the cost of the suit.

3. Aggrieved by the above said decree and judgment, the defendant has filed this appeal before this Court.

FACTS OF THE CASE:

4. The gist of the plaint averments are as follows:

4.1. The plaintiff company is engaged in the business of the selling second hand die casting machinery and equipment. The defendant is



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carrying on business in Pressure Die Casting Dies and Components. The defendant and the plaintiff have business relationship in India since 2005 and the defendant represented as a Sales agent in India on commission basis. In the year 2010, the plaintiff and the defendant agreed that the defendant shall act in the capacity of the Sale Agent for the plaintiff in India and the plaintiff shall pay the defendant compensation computed in accordance with the terms of the agreement in the consideration of the Defendant's sales services and in accordance with the sales Commission structure agreed between them.

4.2. The plaintiff agreed to pay the defendant \$500 per month i.e., \$ 6000 for the year 2011. The plaintiff wired \$32,500 to the defendant in January 2011 which included \$6000 advance payment for the Pune office and \$9700 advance payment for the commission of Pranav Sale Project. However, the said project was cancelled and the defendant never commissioned the Pune office. Therefore, the plaintiff money of \$15700 was available with the defendant. The balance amount of \$16800 was adjusted against the future expenses for the Chennai office i.e., \$6000 and sales



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commission in respect of Tyche Sale project. (\$10800).

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4.3. Further, the defendant confirmed the receipt on above said money wired by the plaintiff and requested a loan of \$50,000 for constructing a building at Arkonam Road, Survey No.230-B/19, Kondancherry Village, Kondacherry Post, Thiruvallur Taluk that could be used as base for selling the used Die Casting Machines supplied by the plaintiff. A number of email correspondences took place between the plaintiff and the defendant over the structure and built up area of the proposed building. By email dated 22.01.2011, the defendant suggested to the plaintiff to have a formal agreement for the advance payment which the defendant would pay in the form of commission, the defendant would make in future by selling the plaintiff's machines. The defendant requested for a loan of \$35000 from the plaintiff for finishing the building construction through an emails dated 10.07.2011 and 12.07.2011 (already \$5700 was available with the defendant as explained above). The defendant and his Chartered Accountant made the plaintiff to believe that money in the form of loan cannot be sent to a company in India and thereafter, it is agreed



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money could be sent against some invoices. Accordingly, the plaintiff has asked for three invoices from the defendant and the defendant filled up the invoices as “Start up,Repairs and Commissioning of the machines”. Such services were never performed by the defendant. The plaintiff sells the machines on “as is where is ” basis without any refurbishing or warrantly and this clearly stated in all the invoices of the Plaintiff. Thereby, the plaintiff effected wire transfer of \$12950 on 16.08.2011, \$13450 on 23.08.2011 and \$8600 on 8.10.2011 to the defendant. Thus, a total of \$35000 was wired to the defendant towards the loan requested by the Defendant in addition to the sum of \$15700 already available with the defendant.

4.4. By email dated 02.09.2011, the defendant informed the plaintiff that he understood the break-up figures and calculations given by the plaintiff for the above said amount of \$15700. It was finally agreed that an “Advance Payment Agreement” could be signed for the said amount of \$50700. On 19.10.2011, an advance payment agreement was entered into between the plaintiff and the defendant in the presence of Mr.S.Sivaraman,



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Advocate, High Court Chambers, High Court Building, Chennai – 600104

within the jurisdiction of this Court.

4.5. After the agreement dated 19.10.2011 was executed, the following six machines were shipped to the defendant along with two other machines by the plaintiff for the purpose of selling them locally to various customers in India. The four machines were purchased by the plaintiff from MMI Industries (Yixing) Co,Ltd., from the China company through invoice dated 11.05.2012 and consigned to the defendant's warehouse at Kodancheri Village, Thiruvallur – 631402. The plaintiff paid \$54960 to MMI Industries, China company, besides that the plaintiff paid the duty of \$26400 on the import of the machines in India. Thus the plaintiff spent \$81360 on the purchase of the said four machines. The machines arrived at the Chennai Port within the jurisdiction of this Hon'ble Court and they were transported to the warehouse at Thiruvallur. The defendant also acknowledged the same. The other two machines were purchased by the plaintiff from a Malaysia company and the machines were shipped from the Port of Tanjong Pelepas, Malaysia and consigned to the defendant and the



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duty for importing the machines was also paid by the plaintiff. Thereby, the plaintiff paid entire cost of the above said 6 machines and duty was also paid by the plaintiff and the defendant was only a consignee. In the month of May 2012, the defendant sold 1 out of the 6 machines to M/s.Feroz Metal Castings Ltd., Guntur-522001, Andhra Pradesh for a sum of Rs.21,31,000/- + GST Rs.42,620/- = Rs.21,73,620/- under Invoice dated 16.05.2012. The defendant can retain \$2000 service charge offered by the plaintiff as a sign of good will and 10% of the sales amount as commission, that is, \$3734. Therefore, the defendant ought to have wired the balance amount of \$33905 to the plaintiff. The defendant did not disclose the sale of the machine and did not remit the sale proceeds to the plaintiff as per the agreement. The defendant sent an e-mail to the plaintiff on 06.07.2012 undertaking to send the payment for the aforesaid amount within 2 weeks from the date of the email. However, no money was sent to the plaintiff. 5 other machines are kept by the defendant at the warehouse. The defendant has with him the Advance payment of \$50700 paid by the plaintiff, \$33905 being the sale proceeds of the 125 Toyo Machine to M/s. Feroz Metal Castings Ltd. and 5



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machines valued at a cost of \$92668.

4.6. Thereafter, a series of email correspondences were exchanged between the plaintiff and the defendant. In spite of that, the defendant refused to sent the machines and the said advance amount and the sale proceeds of the machines sold by the defendant. Therefore, the plaintiff sent a legal notice to the defendant through his counsel dated 22.01.2013. The defendant received the said notice and sent an email to the plaintiff's counsel dated 02.01.2013 acknowledging the receipt of the notice dated 22.01.2013. Thereafter, on 20.02.2013, the defendant sent a letter to the plaintiff's counsel stating that his counsel was not in head quarters and he would issue a reply later. On 02.03.2013, the defendant sent a reply. The defendant admitted the execution of the Advance Payment Agreement, and the receipt of the advance payment of \$50700 and also admitted that the said amount was towards the future services to be rendered by the defendant. The defendant unlawfully retaining the 5 machines belonging to the plaintiff and the advance amount of \$50700 and the sale proceeds of one machine sold to M/s. Feroz Metal Castings Ltd. Therefore, the defendant is



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liable to pay the above said money payable to the plaintiff and also the defendant is liable to return the above said machines.

5. The gist of the written statement averments are as follows:

5.1. The suit is not maintainable since the proprietary concern is not a legal entity. The suit showing the proprietary concern M/s. Devahi Tools as the defendant is legally untenable and the suit is liable to be dismissed in limine. The plaintiff is a company registered in Canada and they never had any office in Chennai at the time of entering into an agreement in 2005. The agreement relied upon by the plaintiff is invalid since the terms do not specify anything with respect to the refurbishing of second hand machinery and the connected expenses incurred or the service to be rendered by the defendant and there is no jurisdiction to file the suit before this Court.

5.2. There were 4 scrap machinery that were dispatched from Malaysia which costed \$31,200/- out of which 2 scrap machines were refurbished by the defendant and were sold by the plaintiff directly to a person in Hosur for \$77,600/-. The remaining two scrap machines are still



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with the defendant. There is no cause of action for the suit since the advance payment agreement was not signed by both the parties. The defendant also denied the averments made in the plaint. The plaintiff after selling the machines imported in the name of the defendant demanded the entire sale value. In fact, the plaintiff billed one of the purchase and obtained the amount directly. The defendant refused to accede to the demand on the ground that the plaintiff is not entitled to anything more than the invoice value. The plaintiff however, refused to see reason and threatened and intimidated the defendant taking advantage of the inadequacy of the English language and the business terminologies. The plaintiff issued a legal notice with the false averments and also sent emails to the defendant's customers making false and derogatory allegation against him. The plaintiff forced the defendant to sign the advance payment agreement as the defendant was under immense pressure as he had invested money and time in refurbishing the machinery.

5.3. The defendant also issued suitable reply to the notice issued by the plaintiff and subsequently the defendant issued a legal notice claiming



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compensation for the illegal termination of the sale agreement and damage caused to his reputation. Without replying to the defendant's reply notice dated 02.03.2013 and to his legal notice dated 22.06.2013, filed the present suit making absolutely baseless claims.

5.4. The plaintiff exported the machines directly to the customers and received the payments directly from them. The amounts were paid as commissions for the sales and services done by the defendant, hence he denied the averments of the plaintiff. The defendant denies that an amount of \$50,700 was received by him under the heads mentioned in the plaint. The defendant suitably replied in his notice dated 02.03.2013, that the alleged advance payment agreement, the defendant received \$50,700 to be adjusted over a period of 3 years from 18.10.2011 against agency commission payable to him. The defendant earned himself service commission of \$35,000 as mentioned in the agreement itself, leaving an amount of \$15,700 to be adjusted on or before 17.10.2014. The defendant requested for the loan but the said proposal never came through as the plaintiff was trying to get a foothold in the defendant's factory premises.



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The defendant denies receiving any amount as a loan for building the factory. The amounts cited were payable as sales commission and service charges to him. The old discarded die casting machines were sold on the assurance of refurbishing, servicing and installation. The plaintiff's agreements to pay the defendant separate service charges are specifically for this purpose.

5.5. Further, as stated earlier, 8 machines imported in 2 lots of 4 each from Malaysia and China were invoiced in the name of the proprietary concern M/s.Devahi Tools and the statement that the machines are valued more than that shown in the invoice is unsustainable. The acknowledgement dated 22.06.2012 referred to by the plaintiff was given to the Customs authorities and merely reflects the international trading practice that the ownerships of the goods remains with the plaintiff till payment is complete. The sale agreement between the plaintiff and the defendant is completely independent and distinct from the transaction of import of old die casting machines by the defendant. Out of the 4 used die casting machines that were



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imported from Malaysia, the defendant sold 2 to M/s.Alubee Die Casters, Hosur, under Invoice dated 11.01.2012. From the advance received from the sale, the defendant remitted \$23,000 to the plaintiff's account as part payment of the invoice dated 04.01.2012. However, the plaintiff who invoiced the 4 machines directly to the defendant, billed M/s.Alubee Die Casters directly for \$33,400 and received the said amount. Thus, the plaintiff received a sum of \$56,400 against the invoice dated 04.01.2012. Thereafter, on 16.05.2012, the defendant sold the 3rd of the 4 machines to one M/s.Feroz Metal Castings Ltd. In respect of the advance payment agreement, after deduction of the sales commission and service charges \$35,000 an amount of \$15,700 alone is outstanding amount. Further defendant, deducting the total amount of \$56,400 received from the sale of the 3 machines, an amount of \$43,739 + Rs.10,44,336/- alone remains to be paid towards the import of the 8 die casting machines. Despite the plaintiff's repeated emails, the defendant had told the plaintiff that it could take back the machines, after paying the defendant and to the statutory authorities.



5.6. The machinery having been imported in the defendant's name from Malaysia and China, the question of the same being re-exported to the plaintiff in Canada does not arise. The plaintiff is not entitled to any amount more than the import value. The contention that the 5 machines are valued over \$92,668/- is denied, the import value of the 8 machines even according to the plaintiff's import invoices is only \$1,00,139 + Rs.10,44,336/- (customs duty). The 5 machines that were imported by the defendant are retained in his factory which can be sold only if they are refurbished and repaired. These machines are blocking a huge place in the defendant's factory premises and the defendant is unable to sell the same due to the obstacles created by the plaintiff. The plaintiff has not established his claims and thereby this suit is liable to be dismissed.

ISSUES BEFORE THE TRIAL COURT:

6. Based on the above said pleadings and perusing the records, the learned Single Judge had framed the following issues:

“(i) Whether the suit is maintainable and whether the Court has jurisdiction to examine the issues raised by the plaintiff?”



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(ii) *Whether the advance payment agreement dated 19.10.2011 entered into between the plaintiff and the defendant was with respect of future services to be rendered by the defendant and whether the said agreement is lawful and binding on the parties?*

(iii) *Whether the plaintiff had shifted four machines after the agreement dated 19.10.2011 along with the other machines to the defendant and whether such consignment had been acknowledged by the defendant?*

(iv) *Whether the defendant had sold one of the machine to M/s.Feroz Metal Castings Ltd., and whether the defendant had paid consideration to the plaintiff?*

(v) *Whether there was an obligation that the defendant to return the five machine?*

(vi) *Whether the defendant is liable to pay to the plaintiff a sum of Rs.71,34,065/- as claimed in the plaint together with interest?*

(vii) *Whether the defendant is liable to pay a sum of Rs.49,11,404/- together with interest towards the value of the said five machines?*

(viii) *To what other reliefs are the parties entitled*



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to?”

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7. In order to prove the case of the plaintiff, they have examined P.W.1 and P.W.2 and marked documents Exs.P1 to P32. On the side of the defendant, no one was examined and no documents were marked. After hearing both the sides and perusing the records and evidence, the Trial Court has decreed the suit in favour of the plaintiff and directed the defendant

(a) to pay a sum of Rs.26,84,100/- towards repayment of the amounts received as advances with interest thereon at 12% per annum from the date of plaint till the date of realisation;

(b) to pay the plaintiff a sum of Rs.17,96,965/- towards the net sale proceeds received by the defendant (after deducting commission) for and on behalf of the plaintiff with interest thereon at 12% per annum from 16.05.2012 till the date of payment;

(c) to return four Toshiba Cold Chamber Die Casting Machines (DC-135H-T machines – 3 sets and DC-135-H-FT machine – 1) with serial



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Nos.821A09, 821A11, 821A51, 821A13 AND 1 Toyo Cold Chamber Die Casting Machine (125 Ton Model BD 125 V2CW-T) with Serial No.4035081 to the plaintiff within 30 days from the date of receipt of a copy of the decree;

(d) to pay the plaintiff a sum of Rs.3,00,000/- (Rupees three lakhs only) as costs, which comprises the court fee of about Rs.1,23,980/-, lawyer's fees and other expenses.

8. Aggrieved by the decree and judgment, the present appeal has been filed by the appellant/defendant on the following grounds:

“A. The Learned Judge erred in relying on the evidence of PW1, notwithstanding PW1 having categorically asserted during cross-examination that he knew nothing about the details of the case nor the contents of the documents filed in support of the suit claim.

B. The learned Judge overlooked the evidence given by the PW1 with regard to the Advance Payment Agreement, the place of execution of the document to prove the claim made by the Plaintiff with regard to the



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advance payment of Rs.26,87,100/- (RUPEES TWENTY SIX LAKHS

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12% per annum since the PW1 admitted he had no knowledge about the document.

C. The learned Judge erred in concluding that the cause of action has arisen partly within the jurisdiction of this Court in-spice of the evidence given by PW1 that he doesn't have knowledge about the place of the alleged execution of the Advance Payment Agreement and also about the value of the machineries received by the Appellant.

D. The Learned Judge failed to appreciate that Clause 4 of the very same document (Exhibit P-8 the Advance Payment Agreement dated 19.10.2011) relied on by the Hon'ble Court in granting relief to the Plaintiff, specifically provides that in the event of default by the Defendant, Plaintiff could use the Defendant's Office and Warehouse for the period of seven years in lieu of the default.

E. The Learned Judge failed to appreciate that it is a matter of record that the Plaintiff had has left its machineries in the Defendant's Warehouse



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from 2013, and continues to remain there till date. Thus the default Clause 4 of Exhibit P-4 stood implemented and therefore the question of making of any payment under Ex P-4 did not arise.

F. The learned judge erred in deciding that the appellant is liable to pay a Sum of Rs. 21,31,000 + GST of INR 42,621 aggregating Rs. 21,73,620 towards the alleged sale of a machine to M/s. Feroz Metal Casting Ltd without the relevant Invoice or related documents being produced and marked as exhibits and merely relying upon the exchange of emails.

G. The learned Judge overlooked the evidence given by PW1 that the plaintiff does not have a warehouse or an area office in Chennai but have directed to return the four Toshiba machines to the respondent/plaintiff within 30 days from the date of receipt of the decree.”

ARGUMENTS:

9. The learned counsel appearing for the appellant/defendant would contend that the Trial Court has no jurisdiction to entertain this suit



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and there is no plaintiff's company situated in India and their company is located at Canada, and there is no branch office in Chennai. Therefore, this Court has no jurisdiction to entertain this suit. The respondent/plaintiff said to be employee of the plaintiff's company has no knowledge about the details of the case, during the cross-examination, he also admitted the same. P.W.1 having failed to substantiate the plaint averments, the respondent/plaintiff is not entitled to any relief sought for in this suit.

9.1. According to the appellant/defendant the advance payment agreement ExP4 having been abandon by P.W.1 by categorically stating that he has no knowledge about the said agreement/Ex.P4, he is not entitle to a sum of Rs.26,87,100/- with interest at 12 % per annum. More over the P.W.1, at the time of cross examination has clearly denied the documents Exs.P3, P5 and P4. The learned Single Judge failed to consider that the respondent/plaintiff had left its machinery in the defendant's warehouse from 2013 and continued to remain there till date. Thus the default Clause 4 of Ex.P4 stood implemented and therefore, the question of making of any payment under Ex.P4 would not arise. The amount advanced by the plaintiff



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was commission paid for the sales and services done by the defendant and not for the purposes mentioned by the respondent/plaintiff, thereby the plaintiff failed to prove the case, the said aspects have not been considered in the impugned judgment.

9.2. The evidence of P.W.2 is not acceptable and he is not a party to the document Ex.P4 and there is no piece of evidence produced by P.W.2 to show that the plaintiff's company had an office within the jurisdiction of this Court and the plaintiff's company does not have a warehouse and an area of office at Chennai but despite that the appellant/defendant was directed to return the machinery to the respondent/plaintiff within 30 days. P.W.1 has no knowledge about the entire transaction between the respondent/plaintiff and the appellant/defendant in spite of that the case was decreed. The respondent/plaintiff is not entitled to the amount except the amount mentioned in the invoices. Therefore, judgment and decree passed by the learned Single Judge is liable to be set aside.

10. The learned counsel appearing for the respondent/plaintiff would



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contend that the respondent/plaintiff's company engaged the appellant/defendant as his agent to run the business in India and they entered into Advance Payment Agreement with regard to the business and the appellant/defendant was paid a sum of \$50,700. Further the respondent/plaintiff's company imported machines by buying machines in the name of the appellant/defendant for selling of those machines and in total, 6 machines were imported, 4 from China Company and 2 from Malaysia. Among those 6 machines, one machines was sold by the appellant/defendant without the knowledge of the respondent/plaintiff's company. The appellant/defendant sold one of those machine to M/s.Feroz Metal Castings Ltd at Gundur, Andhra Pradesh. Further, the respondent/plaintiff agreed to pay the appellant/defendant \$500 per month i.e., \$6000 for the year 2011 and the respondent/plaintiff also wired \$32,500 to the appellant/defendant in January 2011 and also \$9700 advance payment for the commission of Pranav Sale Project, and thereafter, it was cancelled. Therefore, the respondent/plaintiff's money of \$15,700 was available with the appellant/defendant. The balance of \$16,800 was adjusted against the



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future expenses at Chennai Office.

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10.1. The appellant/defendant also confirmed the receipt of above said money and also requested a loan of \$50,000 for constructing a building at Kondancherry Village, Thiruvallur Taluk, for the use of storing the machines. The appellant/defendant also requested a loan of \$35,000 from the respondent/plaintiff for constructing a building through e-mails and the respondent/plaintiff also agreed, but due to the advice of his Chartered Accountant, the money in the form of loan cannot be given to a company in India and thereby, it was agreed to sent against some invoices. Accordingly, the respondent/plaintiff asked three invoices from the appellant/defendant and the appellant/defendant also filled up the invoices as “Start up, Repairs and Commissioning of the machines”. Such services were never performed by the appellant/defendant. The respondent/plaintiff sells the machines on “as is where is ” basis without any refurbishing. Thereby, the respondent/plaintiff effected wire transfer on various dated for a total of \$35,000. Already a sum of \$15,700 was available with the appellant/defendant and thereby, totally the appellant/defendant had



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received the said amount \$50,700. On 19.10.2011, an advance payment agreement was entered into between the respondent/plaintiff and the appellant/defendant at Chennai in the office of advocate Mr.S.Sivaraman, thereby a part of cause of action arose in Chennai. Further, machines were also handed over to the appellant/defendant through Chennai Port and thereby, also this Court has jurisdiction where a part of cause of action arose.

10.2. The total amount of \$35,000 was not towards any commission or services rendered by the appellant/defendant. The appellant/defendant is only entitled to 10% of the commission. If so, the appellant/defendant had sold the respondent/plaintiff's machines for a sum of \$350000, but no such sales took place. The respondent/plaintiff purchased 4 machines from China company and 2 other machines from Malaysia. The respondent/plaintiff paid entire cost of the above said machine and the duty was also paid by the respondent/plaintiff and the appellant/defendant was only a consignee. In the month of May 2012, the appellant/defendant sold 1 out of the 6 machines to M/s.Feroz Metal Castings Ltd., Guntur-522001, Andhra



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Pradesh for a sum of Rs.21,31,000/- + GST Rs.42,620/- = Rs.21,73,620/-

under Invoice dated 16.05.2012. The appellant/defendant is entitled to 10% from the above said amount. The remaining amount ought to have wired by the appellant/defendant to the respondent/plaintiff but he did not disclose the sale of the machine and not remitted the sale proceeds to the respondent/plaintiff's company. Thereafter, the respondent/plaintiff demanded the said money but the appellant/defendant did not pay the above said amount and other 5 machines are also kept by the appellant/defendant in the warehouse. Therefore, the appellant/defendant is liable to pay the advance payment of \$50,700 and the amount of Rs.21,73,620/- towards the sale of one machine to M/s.Feroz Metal Castings Ltd and he also liable to return the other 5 machines to the respondent/plaintiff's company. The value of the above said 5 machines is \$92668.

10.3. Thereafter, the respondent/plaintiff issued a notice to the appellant/defendant but he failed to repay the said amount and return the machines. In order to prove the case of the respondent/plaintiff, P.W.1 and P.W.2 were examined and Exs.P1 to P32 were marked. On the side of the



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appellant/defendant, no one was examined and no documents were marked.

Therefore, the respondent/plaintiff P.W.1 has categorically deposed about the case of the respondent/plaintiff and the learned Single Judge also analysed all the evidences and the documents and decreed the suit. The respondent/plaintiff clearly proved his case and receipt of amounts by the appellant/defendant, but the defendant failed to adduce any evidence on his side and thereby, the learned Single Judge has decreed the suit, therefore, the present appeal is liable to be dismissed.

POINTS FOR DETERMINATION:

11. This Court has heard both the sides and perused the records. Upon hearing the learned counsels for both sides and perusing the pleadings, documents, judgment of this Court and grounds, the points for determination in this appeal are as follows:

(1)Whether this Court has territorial jurisdiction to entertain this suit?

(2)Whether the advance payment agreement dated 19.10.2011, was



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executed between the parties and the same is binding on the parties?

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(3) Whether the money of \$50,700 was paid towards service charges to the appellant/defendant or paid as sales commission and for future services?

(4) Whether the appellant/defendant is liable to pay a sum of Rs.17,96,965/- towards the sale of one machine to M/s.Feroz Metal Castings Ltd, Guntur, Andhra Pradesh?

(5) Whether the respondent/plaintiff is entitled to sum of \$50,700?

(6) Whether the respondent/plaintiff is entitled to return a sum of Rs.4911404/- with interest at 18% per annum, in the event of non returning the machines?

(7) Whether the respondent/plaintiff is entitled to sum of Rs.26,50,000 towards the business loss suffered by him with interest at 18% per annum?

(8) Whether the appeal is liable to be allowed or not?

(9) To what other reliefs the parties are entitled to?

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Point no:1

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12. The case of the respondent/plaintiff is that the respondent/plaintiff's company is situated at Canada and the appellant/defendant was acting as agent of the company and thereby, they entered into an Advance Payment Agreement dated 19.10.2011 at Chennai. On various dates, the respondent/plaintiff's company has wired transaction totally an amount of \$50,700 to the appellant/defendant and further, the respondent/plaintiff's company purchased 4 machines from China company and 2 other machines from Malaysian company, totally 6 machines were imported to India in the name of the appellant/defendant. Among the above said 6 machines, one of them was sold by the appellant/defendant without the knowledge of the respondent/plaintiff's company for a sum of Rs.21,73,620/-. Thereafter, the appellant/defendant failed to repay the sale proceeds of that machine sold by him to the respondent/plaintiff's company. Thereafter, the respondent/plaintiff's company sent so many e-mails with regard to the repayment, but the appellant/defendant failed to repay the amount and failed to return the remaining 5 machines and therefore, the



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respondent/plaintiff filed this suit.

WEB COPY 13. The contention of the appellant/defendant is that the he admitted the receipt of sum of \$50,700 and in that amount, a sum of \$35,000 was adjusted for the sales commission and services charges, \$15,700 alone is outstanding against the advance received. Further, he also admitted the sale of one machine to M/s.Feroz Metal Castings Ltd, Guntur, Andhra Pradesh, and further, he is also ready to return the remaining machines.

14. Further, the appellant/defendant raised the plea with regard to the territorial jurisdiction of this Court to entertain this suit. Further, the contention of the appellant/defendant is that he invested so many lakhs for put up construction to store the machines and thereby, he has to be compensated for the above said amount. In order to prove the case of the respondent/plaintiff, they have examined P.W.1 and P.W.2 and marked documents Exs.P1 to P32 and no witnesses have been examined on the side of the appellant/defendants and no documents were marked. The main contention of the appellant/defendant is that this suit is not maintainable



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and this Court has no jurisdiction to entertain this suit since the respondent/plaintiff has no any company in India and the respondent/plaintiff's company is located at Canada. In this context, the learned counsel appearing for the respondent/plaintiff argued that the agreement dated 19.10.2011 was entered into between the respondent/plaintiff and the appellant/defendant at Chennai and the machines were also delivered to the appellant/defendant to the Chennai Port. The respondent/plaintiff also produced Ex.P3 - acknowledgement dated 22.06.2012. On perusal of Ex.P3, it reveals that the appellant/defendant received the machines at Chennai Port and he also gave the acknowledgement. Therefore, part cause of action arise at Chennai and this Court has jurisdiction to try this suit. In this context, the respondent/plaintiff has produced Ex.P4 – agreement and this agreement shows that it was executed in the office of advocate at Chennai and the appellant/defendant also not denied the fact that the machines were delivered at Chennai port and thereby, the respondent/plaintiff categorically stated that the delivery of machines to the appellant/defendant at Chennai



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and therefore, the respondent/plaintiff has proved that part of cause of action arose at Chennai and thereby, this Court has territorial jurisdiction to try this case. The learned Single Judge also in the judgment elaborately discussed in this aspects and fairly came to the conclusion that this Court has jurisdiction to try this case. Thus, point no:1 is answered.

Point nos:2,3 and 5.

15. According the respondent/plaintiff the advance payment agreement was executed between the respondent/plaintiff and the appellant/defendant at Chennai and as per the agreement, the appellant/defendant received a sum of \$50,700. The appellant/defendant also admitted the receipt of above said amount, particularly in the written statement the appellant/defendant in paragraph number 20 stated that

“it will be relevant to state that the appellant/defendant had given a detailed reply dated 02.03.2013 giving details of the transaction and amounts received from the respondent/plaintiff, however, despite receipt of the same, the respondent/plaintiff failed to issue any rejoinder. As stated earlier of the amount \$50,700 under the advance payment agreement, only the amount \$15,700 remains to be adjusted



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against future sales upto 17.10.2014”.

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16. Further, there are so many exchanges of e-mails between the parties with regard to the agreement and the payments, but the appellant/defendant nowhere denied the agreement – Ex.P4.

17. Therefore, the appellant/defendant admitted the Ex.P4 – agreement and the same is binding on the parties. The appellant/defendant in the written statement pleaded that the advance payment agreement primarily is invalid, as in the said agreement the parties' signatures were not attested, it is now apparent that the respondent/plaintiff is all along been conspiring to knock away the appellant/defendant's factory and the land, as evident from the respondent/plaintiff's insistence that the appellant/defendant must get his signature attested by an advocate without allowing the advocate to change or alter any of the terms contained therein. Though the appellant/defendant denied the agreement in one place, he in another place admitted the amount mentioned in the agreement. Therefore,



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once the appellant/defendant admitted the receipt of the amount he has to prove the repayment and the adjustment towards the amount. In this context, the appellant/defendant pleaded in the written statement that in respect of the advance payment agreement after deduction of sales commission and service charges \$35,000, an amount of \$15,700 alone is outstanding against the advance received. Similarly, after deduction, the total amount of \$56,400 received from the sale of 3 machines, an amount of \$43,739 + Rs.10,44,336/- alone remains to be paid towards the import of the 8 die casting machines. Since the appellant/defendant himself admitted that the he has to pay a sum of \$15,700, he has to prove his contentions, but in order to substantiate his contention he was not examined as witness and failed to examine any witnesses.

18. The respondent/plaintiff's contention is that the above said amount \$50,700 was paid to the appellant/defendant towards sales commission and future services and the agreement was only for 3 years but the appellant/defendant denied the same. The respondent/plaintiff's



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company also stated that it has continued to sent money to the appellant/defendant for construction of building to store the machines but the appellant/defendant denied the same and his contention is that the entire amount was paid for the sale commission and service charges. In this context, respondent/plaintiff also in his evidence stated that he do not know about the execution of the agreement and the respondent/plaintiff P.W.1 has no nexus with EX.P4 agreement and thereby, there is no clear cut evidence for what purpose the amount was paid. In this context while referring Ex.P4 – agreement, in that agreement itself it is stated that

“The two parties agree that Beta would advance payment to Devahi the amount mentioned in the point 2 of this advance payment for future services rendered by Devahi by acting as an agent in India in selling Beta's machinery and equipments. Devahi will set up a sales force to act as agents in selling Beta's machinery and equipment for which Devahi is entitled to service charges in the form of sales commission which shall be based on the Sales Agency Agreement already signed by both parties.”

19. In Ex.P2 amount of advance payment mentioned as follows:



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<i>“January 10,2011 (wire transfer)</i>	<i>USD \$ 15,700</i>
<i>August 16,2011 (wire transfer)</i>	<i>USD \$ 12,950</i>
<i>August 23,2011 (wire transfer)</i>	<i>USD \$ 13,450</i>
<i>October 8,2011 (wire transfer)</i>	<i>USD \$ 8,600</i>
<i>Total amount</i>	<i>USD \$ 50,700”</i>

20. Therefore, from the above said recitals of the agreement, it is clear that the amount was already paid. The date of agreement was 19.10.2011, but the entire amount was transferred before to the date of the agreement for future services rendered by the M/s.Devahi Tools by acting as an agent in selling the M/s.Beta's machinery and equipments. Therefore, it is clear from the recitals that the agreement entered into between the parties and the payment of said amount was already transferred prior to the date of agreement Ex.P4, for the future services.

21. The appellant/defendant contention is that the above said amount was already sent for sale commission and future services. Already he sold so many machines and thereby, sales commission adjusted for a sum of \$35,000 and the remaining \$15,700 has to be payable to the



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respondent/plaintiff's company. In order to prove the contention of the appellant/defendant he failed in examining the witnesses before this Court.

Per contra, the respondent/plaintiff side evidences show the payment received by the appellant/defendant and the appellant/defendant also admitted the receipt of amount and in order to rebut the respondent/plaintiff side evidence, no rebuttable evidence adduced by the appellant/defendant. In order to substantiate his contention he failed to adduce any evidence. Therefore, the contention of the respondent/plaintiff is acceptable one. Therefore, as discussed supra this Court is of the opinion that the agreement Ex.P4 was duly executed between the parties and the same is binding on the parties and the amount was paid for future services. Though the agreement amount was already sent prior to the agreement, the same was for future services.

22. Now coming to the point in respect of payment received by the appellant/defendant, already this Court in the previous para decided that the appellant/defendant admitted the receipt of money from the



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respondent/plaintiff and failed to prove the repayment, while so, whether the respondent/plaintiff is entitled to receive the said money from the appellant/defendant and the appellant/defendant is liable to pay the said money to the respondent/plaintiff has to be decided. At this juncture, it is relevant to refer the agreement between the parties, as per Ex.P4 – agreement, there is default Clause 4 which reads as follows:

“ In the event that Devahi default on the advance payment and cannot or will not pay the advance payment back to Beta, for any reason whatsoever, Devahi agrees to lease out the whole building including the whole office and whole warehouse and the land on which the building stands on along with associated driveways and accesses, to Beta or its nominee in India for a period of seven (7) years from the date of default. In addition, Devahi agrees to allow Beta or its nominee in India to sublease the said building and land if Beta or its nominee deems it necessary”

22.1. Therefore, as per the agreement in any default of the advance payment and the appellant/defendant is unable to pay the advance payment money the warehouse of the appellant/defendant has to be leased out to the respondent/plaintiff but, during the agreement period, the



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respondent/plaintiff's company has not followed that default clause of the agreement. Since there is a specific default clause that in the event of default of payment then the respondent/plaintiff has to retain the warehouse for a period of 7 years and thereby, the appellant/defendant is not liable to pay any cost to the respondent/plaintiff's company towards the advance amount. Further, it is admitted fact that the warehouse of the appellant/defendant is still being used by the respondent/plaintiff for storing the machines, thereby also as per clause 4 of the agreement, the respondent/plaintiff used the warehouse of the appellant/defendant. The learned Single Judge has failed to consider the above said aspects which was agreed by the parties through the agreement dated 19.10.2011 – Ex.P4. Therefore, the respondent/plaintiff is not entitled to any relief with regard to the advance payment as per the clause 4 of agreement dated 19.10.2011. Thus, the points 2,3 and 5 are answered accordingly.

POINT NO:4

23. The respondent/plaintiff contention is that the



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respondent/plaintiff's company imported 4 machines from China company and 2 machines from Malaysia and totally these 6 machines were entrusted to the custody of the appellant/defendant and the appellant/defendant also admitted the receipt of machines. Further the contention of the respondent/plaintiff is that amongst the above said 6 machines, one of the machines was sold by the appellant/defendant to M/s.Feroz Metal Castings Ltd, Guntur, Andhra Pradesh. The appellant/defendant also not disputed but admitted the sale of the above said machine and sold the above said machine to M/s.Feroz Metal Castings Ltd and did not state above the price sold to the respondent/plaintiff's company. However, the respondent/plaintiff pleaded that the appellant/defendant sold the machine to one M/s.Feroz Metal Castings for a sum of Rs.21,73,620/-. Further the respondent/plaintiff sent e-mail to the appellant/defendant with regard to the above said amount and the appellant/defendant also replied through e-mail by admitting the claim of the respondent/plaintiff. The e-mail copy was marked as Ex.P21, Ex.P27. Therefore, the appellant/defendant himself admitted the sale of machine to the M/s.Feroz Metal Castings Ltd. Further,



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the appellant/defendant contention is that some of the machines were not purchased by the respondent/plaintiff's company and he only purchased the machines but in the reply notice he has not stated about the above said facts. Per contra, Ex.P3 shows that the 4 machines from China company received by the appellant/defendant and Ex.P20 also reveals that the appellant/defendant received machines. In order to prove that the appellant/defendant only purchased the machines and the payment was made by him, no evidence was adduced by him, therefore, in absence of contrary evidence, the respondent/plaintiff's evidences are acceptable and according to the respondent/plaintiff's evidence, the respondent/plaintiff's company imported the 6 machines, one of them was sold by the appellant/defendant for a sum of Rs.21,73,620/- and the same was not paid to the respondent/plaintiff's company. Thereby, the appellant/defendant is liable to pay the said amount. The learned Single Judge also after analysing the above said aspects has directed the appellant/defendant to pay the above said amount, after deducting the commission amount and arrived at Rs.17,96,965/-. This Court also as discussed supra is of the opinion that the



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appellant/defendant is liable to pay the amount of sale of machine to the

M/s.Feroz Metal Castings Ltd. Thus the point no.4 is answered.

POINT 6 :

24. The respondent/plaintiff has sought for the relief of sum of Rs.49,11,404/- towards the value of the machines in the event of non-returning the machines. In order to prove the contention of the respondent/plaintiff P.W.1 has stated before this Court that the respondent/plaintiff's company had purchased 4 machines from China and 2 machines from Malaysia and the same were imported in the name of the appellant/defendant and the appellant/defendant also acknowledged the receipt of 6 machines. Among the 6 machines, one was sold by the appellant/defendant to M/s.Feroz Metal Castings Ltd and 5 machines are retained by the appellant/defendant. Still the machines are under the custody of the appellant/defendant. Therefore, the appellant/defendant has to return the machines to the respondent/plaintiff's company. The appellant/defendant also in one place denied the custody of the machines and in another place he admitted that he is ready to hand over the machines



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to the respondent/plaintiff's company. In this context, the appellant/defendant in his written statement in paragraph 29 submits that

“after the harassment by the respondent/plaintiff's repeated e-mails, the appellant/defendant had told the respondent/plaintiff, that it could take back the machines after paying the appellant/defendant and answering the statutory authorities. Further as stated earlier, the respondent/plaintiff is not entitled to any amount more than the import value, and any such demand cannot be countenanced, as the same is ex-facie illegal”

25. Therefore, the appellant/defendant himself admitted the custody of the machines and also ready to return back the same. In view of the above said submissions, it is appropriate to grant the relief to the respondent/plaintiff's company with regard to return back of the machines. The learned Single Judge also elaborately discussed in the aspect of entitlement of the respondent/plaintiff in this regard and granted the relief to the respondent/plaintiff's company. Therefore, the respondent/plaintiff is entitled to return back the remaining 5 machines. Though the



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respondent/plaintiff has not specifically prayed for return back the machines from the appellant/defendant, the respondent/plaintiff has prayed for payment of Rs.49,11,404/- for the machines under the custody of the appellant/defendant in the event of non returning the machines. The learned Single Judge has granted the relief to return back the machines. The appellant/defendant also not raised any ground to that regard, thereby, this Court need not go into that aspects, since the appellant/defendant himself admitted to return back the machines. Already this Court has decided that the appellant/defendant himself admitted the respondent/plaintiff to take back the machines and thereby, this Court also granted the relief to the respondent/plaintiff to take back the machines. Thereby, the relief sought in respect of the payment for the value of the machines on ground of non-returning of the machines would not arise. In view of the above decision arrived the respondent/plaintiff is not entitled to relief of sum of Rs.49,11,404/-. Thus the point no.6 is answered.

POINT 7:



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26. The respondent/plaintiff has sought for the relief of damages with interest at the rate 18 % per annum for business loss and calculated the amount for a sum of Rs.26,50,000/-. There is no evidence adduced by the respondent/plaintiff to calculate the above said amount with regard to the loss of business and there is no recitals in the agreement with regard to the damages and even as per the agreement Ex.P4 if any failure on the part of the appellant/defendant the respondent/plaintiff can retain the warehouse for a period of 7 years and there is no any provision for the damages. Moreover, there is no evidence adduced by the respondent/plaintiff towards the loss of business. Though the machines were placed in the custody of the appellant/defendant there is no evidence to show that the appellant/defendant refused to return back the machines and no steps were taken by the respondent/plaintiff to take back the machines, particularly, this Court restrained the appellant/defendant from selling the machines and thereby, the respondent/plaintiff himself got injunction in his favour and failed to take the machines and to take steps to return back the machines from the appellant/defendant in accordance with law. Therefore, the



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respondent/plaintiff has failed to prove his case with regard to the damages.

Therefore, the respondent/plaintiff is not entitled to the relief in respect of the prayer of damages for a sum of Rs.26,50,000/-. Thus the point no.7 is answered.

POINT 8:

27. The respondent/plaintiff has sought for the relief directing the appellant/defendant to pay a sum of Rs.71,34,065/- [Rs.26,87,100/- on account of the Advance Payment money, Rs.17,96,965/- on account of the sale of machine to M/s. Feroz Metal Castings Ltd and Rs.26,50,000/- towards business loss suffered by the respondent/plaintiff] and no prayer for return of machines however, the learned Single Judge ordered to return the machines.

28. During the time of arguments, the learned counsel appearing for the appellant fairly conceded that there is no objection to return back the machines. The learned Single Judge has elaborately discussed about the entitlements of the parties and fairly came to an conclusion with regard to



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the payment of sale of one machine to M/s. Feroz Metal Castings Ltd and returning of remaining 5 machines to the respondent/plaintiff. But at the same time, the learned Single Judge failed to note that as per the agreement, there is a default clause that in the event of non payment by the appellant/defendant the respondent/plaintiff is entitled to use the warehouse of the appellant/defendant for a period of 7 years, thereby, the relief with regard to the advance amount of Rs.26,87,100/- is not sustainable and thereby, the order of learned Single Judge to direct the appellant/defendant to pay a sum of Rs.26,87,100/- to the respondent/plaintiff with interest is set aside and in other aspects, the judgment of trial Court is confirmed.

29. In respect of the relief granted for a sum of Rs.17,96,965/- with interest at the rate of 12% per annum from 16.05.2012 till the date of realisation and within 30 days, the return of 5 machines are confirmed. As far as the relief for the compensation, the learned Single Judge has not passed any orders. In this context, the respondent/plaintiff also not



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challenged against the said non-awarding towards business loss. Therefore, this Court need not interfere with the order of the Learned Single Judge to that regard. In view of the above discussion, this Court is of the opinion that the judgment and decree passed by the learned Single Judge is liable to be set aside in respect of the decree for a sum of Rs.26,87,100/- with interest .The decree in respect of the Rs.17,96,965/- with interest towards the sale of machines to M/s. Feroz Metal Castings Ltd and direction to return the 5 machines to the respondent/plaintiff's company are to be confirmed. The parties are directed to bear their own cost. Thus, the point no.8 is answered.

POINT 9:

30. In view of the above said discussion, the respondent/plaintiff is only entitled to the relief of Rs. 17,96,965/- with interest at the rate of 12 % per annum and also he is entitled to relief of return of 5 machines from the appellant/defendant.

31. In the result, this appeal is partly allowed and judgment and decree passed by the learned Single Judge in CS.NO.357 OF 2013 is modified and the Civil Suit No.357 of 2013 is partly decreed.



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(i)The plaintiff is entitled to sum of Rs. 17,96,965/- with interest at the rate of 12 % per annum from 16.05.2012 till the date of payment for the sale of machine to M/s.Feroz Metal Castings Ltd and the defendant is directed to pay the above said amount with interest;

(ii)The plaintiff is entitled to return back the 5 machines and the defendant is directed to return the machines mentioned in the plaint within 30 days from the date of receipt of a copy of this judgment; as per the plan identified by the plaintiff.

(iii)The relief in respect of the advance payment of Rs.26,87,100/- and the business loss for a sum of Rs.26,50,000/- are dismissed;

(iv)The parties are directed to bear their own cost.

(D.K.K.J)

(P.D.B.J)

12.01.2024

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