IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.05.2015

CORAM

THE HONOURABLE MRS. JUSTICE **S.VIMALA**

C.S.No.621 of 2013

Reserved on : **29.04.2015**
Pronounced on : **07.05.2015**

Florens Containers Inc., a Company incorporated in California and having its registered office at 303, Second St., Suite 355 South, San Francisco, C.A. 94107-1328, U.S.A.
Rep. by its Power of Attorney Holder
Mr.Dharmendra Vasu ... Plaintiff

Vs.

M/s.Meridian Logistics
having its office at
5/232 H Annai Indhra Nagar,
2nd Street, Tuticorin - 628 002. ... Defendant

PRAYER: Plaint under Order IV Rule 1 of O.S.Rules r/w. Order VII Rule 1 of C.P.C., praying for passing of a decree and Judgement :

(a) directing the defendant to pay to the plaintiff the sum of USD 173781.01 equivalent to Rs.78,20,149.50 @ 1 USD = 45 INR) (as of 31st July, 2011) and further late payment charges together with interest at 18% p.a. (as per the particulars of claim as Document No.8) hereof from the date of the filing of the suit till payment and or realization thereof.

(b) directing the defendant to pay to the plaintiff the sum of USD 67698.84 equivalent Rs.30,46,447.80 for the use and enjoyment of the containers at 150% of the per diem rental rates of the containers under the respective lease agreement till the date of plaint as Document No.10).

(c) that in the event of the defendant failing to return the containers and/or the Plaintiff being unable to recover the containers leased to the Defendant, direct the defendant to pay the plaintiff USD 161583.00 equivalent Rs.7271235.00 being the repair and depreciated value of the containers leased to the defendants (as per the particulars of claim as per Document No.9)

(d) for the costs of the suit

For Plaintiff : Mr.M.Narendran
for M/s.King & Patridge

For Defendant : Ex parte on 16.12.2014

JUDGMENT

The plaintiff's Company is a company incorporated under the law's of people's republic of China carrying on business as lessors of equipment such as containers etc. of various sizes. These containers are used for stuffing of cargo for carriage on ships all over the world.

2. The defendant is doing shipping business and inter alia the defendant took the containers on lease and utilized it for stuffing of cargo for carriage by sea to various destinations.

3. In the course of business transaction, the plaintiff leased out containers of various sizes and various types to the defendant under equipment agreement, which consisted of two parts, namely, a) an equipment agreement, b) business terms and conditions.

4. The defendant has paid various amounts towards payment of lease rental on three dates namely 19.02.2008, 26.08.2008 and 24.09.2008, totalling USD20618.52. From September 2008 onwards, the defendant did not make any payment towards lease rental. The defendant is yet to return 114 containers. The defendant failed to discharge the contractual obligations under agreement.

5. The plaintiff sent a letter dated 13.10.2009 terminating the agreement and demanding immediate return of all the leased equipments, but that request was not complied with. The defendant issued a reply advising the plaintiff that the plaintiff alone should take steps to recover the containers which were lying at Colombo. The plaintiff made it clear that it is only the defendant's obligation to return the containers to the Plaintiff.

6. The defendant did not also make any declaration regarding loss of equipments. Thereafter, the Plaintiff issued legal notice dated 18.06.2011 demanding outstanding lease rentals, interest on late payment of lease rentals and the value of 114 containers. The defendant sent a reply stating that he did not enter into any contract with the plaintiff and that he did not take delivery of containers due to global recession.

7. The Plaintiff addressed various communications to the defendant requesting the defendant to provide current location of the containers in its possession/control/custody and to return the same to the plaintiff. The defendant failed to notify the plaintiff regarding the whereabouts of the containers. Because of the non-return of the containers, the plaintiff is also entitled to depreciated/replacement value of the containers. Therefore, the plaintiff has no other option except to file the suit seeking direction to the defendant, to pay the plaintiff, the value of lease rental money, for use and enjoyment of the containers, depreciated value of the containers and for costs.

8. The service on the defendant was completed on 15.09.2014 and the defendant was set ex parte on 16.12.2014, as the defendant did not appear before the Court.

9. Now the point for consideration is whether the Plaintiff is entitled to recover a) lease rentals, b) depreciated value of the containers, c) fee for lessee's use and enjoyment of the containers.

10. It is the case of the Plaintiff that as per clause 4(a) & (b) of the Business Terms and Conditions of

the Agreement, he is entitled to the remedies as claimed in the plaint and as per his claim made upon those terms and conditions, he is entitled to a decree as prayed for.

11. Perusal of clause 4(a) & (b) of the Business Terms and Conditions of the Agreement reveals that Clause 4(a) sets out the conditions on the happening of which the Lessee is considered to have defaulted under the Agreement and under clause (b), the lessor is entitled to the following remedies:

Upon any default set out under Clause 4(a) Lessor is entitled to cancel the agreement and upon any such cancellation the Lessee (a) shall pay a fee for Lessee's use and enjoyment of the containers held by Lessee at daily rate equal to 150% of the per diem rental rates (b) shall immediately return all the containers to the Lessor (c) the Lessor may retake possession of the containers free of any claim of Lessee and the Lessee waives any and all rights to a judicial hearing prior to Lessor's repossession of the containers.

12. It is for the Court to consider whether the defendant is guilty of any default/neglect of the terms and conditions of the Business Terms and Conditions of the Agreement.

13. Even though the defendant has sent a reply notice stating that he did not enter into any business contract with the plaintiff and that he did not take the containers on lease from the plaintiff, the earlier reply given by the defendant would falsify the contents of the legal reply sent by the defendant. Under the earlier reply, the defendant has taken the defence that it is for the plaintiff to get the containers back and it is not his obligation to send back the containers. Therefore, the contention in the reply notice that he did not take the containers on lease is only an afterthought and his defence must be rejected.

14. Once it is proved that the defendant has entered into business contract with the plaintiff, then it is the duty to pay the lease rental and on proof of default, the defendant is liable to surrender the containers and in the event of failure to file declaration of loss, he is liable to pay the depreciated value of the vessels.

15. Clause 10 of the Business Terms and Conditions of the Agreement specifically provides for the payments of the Replacement Value or Depreciated Value as soon as the loss is declared by the Lessee. The clause

10(a) & (b) contemplates as follows:

(i) Where a container is lost or destroyed, the lessee is required to send a written declaration of loss to the lessor as soon as the loss comes to the knowledge of the lessee;

(ii) The lessee is required to pay to the lessor the Replacement Value (RV) or the Depreciated Replacement Value (DRV) for the container as may be applicable;

(iii) Where the container is lost, it shall be off-hired on the date of declaration of loss provided the RV or DRV is paid within 30 calender days of lessor's invoice otherwise the container would be off-hired on the date the invoice is paid. In other words, if the invoice for RV and DRV remains unpaid, the lease rentals continues to run and is payable.

16. On plain reading of Clause 10(b) quoted above, it is apparent that the lessee's liability to pay the lease rental (where the containers are lost, destroyed or not returned to the lessor i.e. the plaintiff) ceases, only on the date of declaration of loss by the lessee, provided the applicable RV or DRV is paid within 30 calendar days of the lessor's invoice otherwise the container is off hired on the day the

invoice is paid.

17. Despite receipt of invoices and debit notes from the plaintiff for the late payment charges, the defendant has failed to make any payment.

18. Under Clause 3(b) of the Business Terms and Conditions Agreement, the late payment charge of 2% per month is payable on all outstanding dues. The particulars of claim have been set out under Ex.P9.

Unpaid outstanding Lease rentals	USD 109676.00
Interest Charges	USD 64104.50
Total	USD 173781.1

This amount is claimed with late payment charges at 2% per month and interest @ 18% p.a. from the date of filing of the suit till the date of realization.

19. The use and enjoyment of the containers has been claimed at 150% of the per diem rental rate of the containers under the lease agreement till the date of plaint. This claim is supported by the details furnished under Ex.P11.

20. So far as the containers are concerned, it is neither returned nor it has been declared as lost. As the Plaintiff is unable to recover the containers, the

defendant must be directed to pay the plaintiff the depreciated value of the containers as per the particulars of the claim made (USD 161583.00) in Ex.P10.

21. These claim made which are supported by documents are not under challenge. The entitlement of the plaintiff to the amount claimed is also not under challenge. The claim made by the plaintiff is proved through oral and documentary evidence. Therefore, the suit is decreed as prayed for with costs.

sd/.S.V.J

07.05.2015

//Certified to be a true copy//

Dated this the day of 2015.

R.s/08.07.2015 COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.