

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**SUIT NO.1590 OF 2011**

Valation Finance & Marketing Private  
Limited,  
a Company incorporated under the  
provisions of the Companies Act, 1956  
having its registered office at  
Sadhana House, 4<sup>th</sup> Floor, P.B. Marg,  
Behind Mahindra Towers, Worli,  
Mumbai – 400 018 (India)

.... Plaintiff

vs.

- 1 DEVOURX PTY LTD,  
A Company incorporated in the  
Commonwealth of Australia, having  
its Registered office at 53,  
Ostend Street, Lidcombe,  
New South Wales, Australia 2141.
- 2 ENERGENICS HOLDINGS PTE. LTD.  
A Company incorporated in Singapore,  
having its registered office at 89,  
Science Park #03-06, The Rutherford,  
Singapore 118261.
- 3 Energenics Pte Ltd.  
A Company incorporated in Singapore,  
having its registered office at 89,  
Science Park Drive, #03-06,  
The Rutherford, Lobby B,  
Singapore Science Park, 1  
Singapore 118261

.... Defendants

Mr. Zal Andyarujina alongwith Mr. Kunal Dwarkadas alongwith Mr. Shrivardhan Deshpande i/by Desai & Diwanji for the Plaintiff.

Coram : **Smt. R.P. SondurBaldota, J.**

Date : 23<sup>rd</sup> March, 2016

### **JUDGMENT**

1 This Suit is for a declaration that the plaintiff is the sole and exclusive owner of and is entitled to all the rights, title and interest in two machines described in the plaint as DX005 and DX006 (shipped in container numbers DX0004 and DX0005) under Invoice No.VFM120701 dtd.4<sup>th</sup> December, 2007. The plaintiff also seeks damages in the sum of Rs.32,05,78,467/-. The writ of summons is served upon the defendants. They have failed to appear before the court. Hence, the suit is taken up for exparte hearing.

2 The plaintiff-Company carries on business of rendering financial services, trading, dealing, importing and exporting merchandise, goods, machinery and equipments relating to industries including textile, engineering, electrical, mining and shipping. Defendant no.1 is a company incorporated in the Commonwealth of Australia and is engaged in the business of supplying and licensing machines used for fine grinding and mixing applications for use in mining, quarrying, cement production and power generation industries etc. It holds exclusive intellectual property rights in relation to that

technology and the machines supplied by it. Defendant no.2 is a company incorporated in Singapore and is engaged in the business of providing management consultancy services and is a supplier of alternative energy solutions and technologies. Defendant no.2 is an agent of defendant no.1 and has a strategic partnership with defendant no.1 having exclusive marketing and distribution rights of the machines in Asia and is responsible for the business operations of defendant no.1 in Asia. Defendant no.3- Company also incorporated in Singapore is a subsidiary of defendant no.2. One Nakul Jagjivan is associated with the plaintiff as well as defendants no.2 and 3 as a shareholder and as a director. A statement is made on behalf of the plaintiff and repeated in the written submissions that the plaintiff does not seek any relief against defendants no.2 and 3 in this suit. Therefore the relief is restricted against defendant no.1 alone.

3           The brief statement of facts alleged in the plaint is as follows:

          In December, 2007, pursuant to the negotiations between the plaintiff and defendant no.2 acting as agent of defendant no.1, an oral contract was entered into between the plaintiff and defendant no.1 for the sale and purchase of the machines described above for the total value of US\$7,00,000. It was agreed that the machines would be supplied by an outright sale from defendant no.1 to the plaintiff and the purchase price

would include all costs of commissioning the machines at the plaintiff's facilities in India. It was also agreed that defendant no.1 was to train the plaintiff's employees/representatives for operating the machines and the plaintiff was to bear the costs of the training. The plaintiff intended to use the machines for leasing, hiring out/licensing to third parties in consideration for processing fees and/or lease rentals and/or license fees. Defendant no.2 was to undertake delivery of the machines from the Plant of defendant no.1 in Australia to the plaintiff's facilities in India.

4           For the purpose financing the purchase of the machines, the plaintiff had entered into Financing Agreement dtd. 4<sup>th</sup> August, 2007 with one J.V. Gokal and Company Private Limited ("JVGCPL" for short). This was because the plaintiff did not have requisite credit facilities and therefore not in a position to open a Letter of Credit in favour of defendant no.1 to purchase the machines. The terms of the Financing Agreement were that JVGCPL would open the Letter of Credit with its bank for purchase and import of the machines into India on behalf of the plaintiff. Any value added tax and/or octroi and/or customs payable on the machines was to be borne by the plaintiff. It was agreed that the plaintiff will reimburse JVGCPL the value of the machines on presentation of the invoice together with other shipping documents and the right, title and interest in the machines would stand transferred to the plaintiff from JVGCPL

upon the plaintiff handing over the duly endorsed negotiable set of documents. JVGCPL is partly owned by Nakul Jagjivan and closely associated with the plaintiff.

5           Upon finalisation of the contract, defendant no.1 issued invoice dtd.4<sup>th</sup> December, 2007 for both the machines with the name of JVGCPL as the Purchaser and the plaintiff as the Importer of the machine. JVGCPL opened a Letter of Credit dtd. 31<sup>st</sup> December, 2007 with Union Bank of India for the total value of shipment as US\$7,00,000. Defendant no.3 on behalf of JVGCPL collected the machines from the facilities of defendant no.1 at Melbourne on 4<sup>th</sup> January, 2008 Accordingly, the Letter of Credit was amended on 9<sup>th</sup> January, 2008 to add therein that defendant no.3 was appointed as Agent for inspection and collection of goods from defendant no.1. The machines were shipped as "Ex-works" from Melbourne, Australia on 9<sup>th</sup> January, 2008 with Bill of Lading Nos. 855724112 and 524705622 both dtd. 9<sup>th</sup> January, 2008 issued in favour of the plaintiff. On 31<sup>st</sup> January, 2008, the plaintiff paid JVGCPL by cheque Rs.2,75,97,500/- and Rs.47,415.50 as commission and service charges of JVGCPL. On the same day, JVGCPL transferred the amount of US\$7,00,000 to defendant no.1 towards price of the machines sold under the invoice.

6           While the machines were in transit, the plaintiff by it's email dtd.8th February, 2008 addressed to defendant no.2

had expressed concern about processing fees sought to be levied by defendant no.1, as indicated on the website of defendant no.1. The concern of the plaintiff was that if the plaintiff were made to pay the processing fees by defendant no.1, it would attract customs duty and would impact the bottom-line of defendant no.1. Defendant no.2, by return email dtd. 11th February, 2008 confirmed that defendant no.1 had decided to sell the machines outright to the plaintiff and defendant no.1 was insisting on an ongoing small payment of 10% as a processing fees for selling the machines to the plaintiff. Such processing fees could be paid in the form of technical assistance, or royalty or both. Defendant no.2 had suggested that this understanding should be reduced into an agreement between the plaintiff and defendant no.1. However no such agreement was executed between them.

7 Subsequently the machines came to be delivered at Javaharlal Nehru Port, Mumbai on 28<sup>th</sup> February, 2008. At the time of collecting the machines, the plaintiff noticed that defendant no.1 had failed to ship certain accessories / component parts of the machines. When this was brought to the notice of defendant no.1, the parts were sent by air and arrived at Mumbai on 17<sup>th</sup> April, 2008. The plaintiff was also informed by letter dtd. 2<sup>nd</sup> April, 2008 that defendant no.3 is the authorized distributor of the spare parts of the machines supplied by defendant no.1. The plaintiff transported the machines to it's two different plants, one

at Baroda and other at Beed. Then the correspondence ensued between the parties for erection, installation and commission of the machines under the provision and guidance of defendant no.1. In June 2008, representatives of defendant no.1 and defendant no.2 visited the plaintiff's plant at Baroda and Beed for commissioning the machines and demonstrating their working as well as the use. They however could not commission the machines and recommended certain additional parts to be purchased i.e. a bag filter and a multi clone system. It was agreed that selected engineers of the plaintiff would be sent to Australia to receive training, in operation and maintenance of the machines from defendant no.1. The engineers of the plaintiff did visit Australia for the purpose of training. On 3<sup>rd</sup> July, 2009 an employee of defendant no.1 furnished user identification and password to start the machine at Baroda. When that machine was sought to be commissioned, there were several technical problems including tripping of electronic panel. When this was communicated to defendant no.1, its Director Mr. Mark Pilgrim on 4<sup>th</sup> July, 2009 apologized for the mistake on the part of his employee of supplying the user identification and password for Baroda machine stating that he had no authority. He also intimated that the training provided to the engineers of plaintiff in Australia in January 2009 did not include commissioning of machines. He claimed that the management of defendant no.1 had no notice from the employees of defendants no.1 and 2 of the intended demonstration of Baroda machines. But within a short-time thereafter defendant no.1 asked

the plaintiff to shift the machine at Beed to Baroda for the purpose of repairs as the machines lying idle had gathered dust as well as rust.

8           After the machine was lying uncommissioned for more than two years, the plaintiff addressed e-mail dated 26<sup>th</sup> March, 2010 to defendant no.2 to express its disappointment with the inordinate delay and starting of the machines despite the untiring efforts and co-operation from the plaintiff. Then defendant no.1 agreed to send four engineers to visit Baroda plant to commission the machines. On 5<sup>th</sup> April, 2010 defendant no.1 raised an invoice for an amount of US\$80,000/- as the amount payable for commissioning the machines. It refused to proceed with the commission unless the amount was paid. As the plaintiff was unable to commission the machine on its own and as it was contractually disallowed from doing so, it had no other alternative but to make the payment to defendant no.1. Accordingly on 8<sup>th</sup> June, 2010 it paid the amount via interbank wired transfer. Despite receiving the payment and making several promises defendant no.1 failed to commission the machines and the same have been lying idle since the date of purchase in the year 2008. In addition to the sum of US\$80,000/- paid for the commissioning the machines, the plaintiff had paid octroi, customs duty, clearing forwarding and transportation charges on the machines and the spare parts to the extent of Rs.1,38,89,145/-. It incurred expenses of Rs.1,35,30,883.44 ps. towards

miscellaneous costs during the period 2008 to 2011. Thus the total loss suffered by it is of Rs.24,29,68,000/- on account of failure on the part of defendant no.1 to commissioning the machines.

9 In the meantime, defendant no.1 filed a suit at Singapore against defendant no.2 alleging breaches of the licence agreement dated 1<sup>st</sup> February, 2008 and sought delivery of the two machines supplied to the plaintiff. In that suit it alleged that there was joint venture agreement between the two for formation of a joint venture company, in which defendant no.1 was to hold 30% of the shares and defendant no.2 the balance 70% shares. Pending the finalization of the joint venture agreement, defendant no.2 had placed an order for four DEVOUR X Machines under the licence agreement. Two machines were to be delivered in India, one at Singapore and one to be stored in Australia. Strangely defendant no.1, alleged in the suit that it did not know whereabouts of any of the four machines, and demanded redelivery of the machines. As alleged in that suit, the two machines brought to India were sold to JVGCPL and not to the plaintiff.

10 The plaintiff alleges that defendant no.1 has, in breach of the contract of sale of the two machines with it, has brought the Singapore Suit falsely claiming that the machines were licensed to defendant no.2. Despite specific knowledge that the machines have been sold to the plaintiff, it sought redelivery

of the same. The plaintiff has not been impleaded to the Singapore Suit. The plaintiff alleges that the filing of Singapore Suit by defendant no.1 is solely with a view to avoid compliance of its obligations under the contract with the plaintiff and with the specific aim of delaying and defeating the rights of the plaintiff. Therefore, it has filed the present suit for declaration of its rights to the two machines and for damages.

11 As already mentioned hereinabove, despite service of writ of summons, the defendants, defendant no.1 in particular, have failed to appear before the Court to contest the suit.

12 In the above facts of the case and the reliefs claimed in the suit, the points that would arise for consideration of the court are as follows.

- 1 Whether the plaintiff is the owner of the two suit machines.
- 2 Whether defendant no.1 has committed breach of the contract of sale of the suit machines.
- 3 Whether the plaintiff is entitled for damages.
- 4 If answer to point no.3 is in the affirmative, what should be the quantum of damages?

13 The plaintiff examined four witnesses being (i) Mr. Nakul Jagjivan, (ii) Mr. Shridhar Venkatesh, (iii) Prashant Wakare and (iv) Bharat Gajjar (the Expert on damages) to

establish its case. It has also produced extensive documentary evidence. PW-1, in his affidavit of examination-in-chief stated the details of purchases of the two machines, the method of financing the machines, the delivery of machines and shipment of documents. The financing arrangement between the plaintiff and JVGCPL was deposed to by Mr. Shridhar Vyankatesh. PW-3 Mr. Wakare had visited Australia and received training at defendant no. 1's facility on how to operate and maintain the machines, that were identical to the machines sold to the plaintiff.

14           The plaintiff produced Invoice dtd. 4<sup>th</sup> December, 2007 in respect of both the machines. Pursuant to the financing agreement between the plaintiff and it, JVGCPL opened an irrevocable Letter of Credit dtd. 31<sup>st</sup> December, 2007 with Union Bank of India towards purchase of the machines, with total value of shipment recorded as US\$ 7 Lacs. The machines were collected by defendant no.3 from defendant no.1's facility from Melbourne, Australia and delivered to the plaintiff. The packing list dtd. 4<sup>th</sup> December, 2007 and goods collection notice dtd. 4<sup>th</sup> January, 2008 issued by defendant no.1 makes specific reference to the machines and the invoice. The original Bills of Lading bearing stamp of Union Bank of India, Mumbai Samachar Branch have been produced as the evidence of title to the two machines. For the proof of payment of the purchase price of the machines, the plaintiff produced photocopy of the

cheques issued, certified copy of the plaintiff-bank account and the certified copy of the bank account maintained by defendant no.1 with the Commonwealth Bank of Australia, Sidney.

15           As mentioned above, the machines were collected by defendant no.3, which is the subsidiary of defendant no.2, acting as it's agent, from the facility of defendant no.1 in Melbourne, Australia. Defendant no.1 issued a packing list dtd. 4<sup>th</sup> December, 2007 and goods collection invoice dtd.4<sup>th</sup> January, 2008, both making specific reference to the machines and the invoice. The plaintiff has produced original packing list. The original packing list and the goods collection invoice bear the endorsement of Union Bank of India, Mumbai Samachar Marg, which has been proved by PW-1. Then the machines were shipped "ex-works" in two separate containers bearing No. DX-0004, and DX-0005. Accordingly two separate Bills of Lading, both dtd. 9<sup>th</sup> January, 2008 were issued in favour of the plaintiff as deposed by PW-2. The plaintiff has produced the original Bills of Lading. Mr. Andyarujina, the learned counsel for the plaintiff submits that it is well settled that the Bill of Lading is a document of title. The endorsement and the delivery of the Bill of Lading operates as symbolic delivery of cargo. The property in the goods passes by such endorsement and delivery of the Bills of Lading, just as property in goods would pass by actual delivery of the goods. In this connection, he relies upon decision of the Apex Court in British India Steam Navigation Co. Ltd. vs.

Shanmughavilas Cashew Industries and Ors., reported in 1990 (3) Supreme Court Cases, page 481. By that decision, the Apex Court has held that “The Bill of Lading is the symbol of the goods, and the right to possess those passes to the transferee of the Bill of Lading. In other words, its transfer is symbolic of the transfer of the goods themselves and until the goods have been delivered, the delivery of the duly endorsed Bill of Lading operates as between the transferor or transferee, and all who claim through them, as a physical delivery of the goods would do”. In view of the above, the Bill of Lading coupled with the evidence of payment of purchase price of the machines clearly establishes that the plaintiff is the owner of the two machines. Therefore, the first point for determination is answered in the affirmative.

16           After the machines were purchased and delivered, defendant no.1, under the agreement for sale of the machines, was to commission the machines and demonstrate their working and use. For that purpose, in or around June, 2008, three representatives of defendants no.1 and 2 namely Mr. Wayne Pearce, Mr.Mark Pilgrim and Mr. Ronen had visited plaintiff's facility at Baroda and Beed. They, however, failed to commission the machines. Thereafter extensive correspondence ensued between the parties. Several suggestions had come from defendant no.1, which were followed by the plaintiff as deposed in the evidence of the witnesses. In the month of December,

2009, defendant no.1 promised to send another team of engineers to commission the machines, but the promise was not kept and the machines remained un-commissioned. On 5<sup>th</sup> April, 2010, defendant no.1 raised an Invoice bearing No.VFM040 510 on the plaintiff for an amount of US\$80,000/- claiming to be the amount payable by the plaintiff in consideration of defendant no.1 commissioning the machines. It is the plaintiff's case and evidence that despite the fact that the agreement executed between the parties covered commissioning of the machines, the bill was raised. The plaintiff had to concede to the demand as by then it's situation had become difficult. The plaintiff had invested substantial amount in the machines. For more than two years after the purchase, the machines were lying idle for want of commissioning. Further the plaintiff was contractually disallowed from commissioning the machines. It was therefore compelled to pay a sum of US\$ 80,000/- via inter bank wire transfer on 8<sup>th</sup> June, 2010. That amount was received by defendant no.1 on 9<sup>th</sup> June, 2010. These facts have been established not only by the uncontroverted deposition of PW 1 and 2 but also by the extensive correspondence produced on record. The breach stands established by one more circumstance. Defendant no.1 has filed proceedings in the High Court of the Republic of Singapore, which were subsequently consolidated with four other suits filed by defendants no.3 and 4 against certain third parties including defendant no.1 with respect to the disputes inter se. In it's consolidated defence to

the proceedings against it and the counter-claim, defendant no.1 has claimed that the machines that had been in fact sold to the plaintiff were licensed to defendant no.2 and demanded that the machines be returned to it. This contention taken up in the proceedings at Singapore is behind the back of the plaintiff, since the plaintiff is not impleaded to those proceedings. The above facts established by the plaintiff shows that the defendants have committed breach of the agreement for sale of the machines to the plaintiff and the plaintiff would be entitled for damages for breach of the agreement. The points for determination at serial no. 2 and 3 are therefore answered affirmatively.

17            This brings us to the question of measure and proof of the damages payable to the plaintiff on account of breach of the agreement for sale. Mr. Andhyarujina submits that the machines sold to the plaintiff failed to satisfy the warranty and the purpose, for which they were acquired. The machines that were never commissioned by the defendants became commercially useless to the plaintiff. In the circumstances, the plaintiff would be entitled to two courses to measure damages. It may claim on the basis of the profits, which it has lost because the machines were commissioned and did not perform that with which they were warranted to do. Such claim would put the plaintiff in the same position, as it would have been in, had, the contract for the purchase of the machines infact being

performed as intended. The second course is to recover capital cost incurred. The claim of this kind would put plaintiff in the same position as it would have been in, had it never entered into the contract for purchase of the machines. Mr. Andhyarujina, in the facts and circumstances of the present case, submits that the plaintiff can adopt both the courses to measure the damages incurred by it.

18           Mr. Andhyarujina refers to decision of the Queen's Bench in *Cullinane v. British "Rema" Manufacturing Co. Ltd.*, reported in (1954) 1 Q.B. Page 292, which had held that the above mentioned two courses to measure damages are and must be alternative and they cannot be cumulative, because otherwise the claimant would be obtaining duplication of compensation. Therefore, the claimant was expected to elect one of the two courses. But the subsequent decision in the case of Shetland Seafarms Ltd. v. The Braer Corporation, reported in 1999 S.L.T. page 1189 after discussing the decision in Cullinane case, holds that there is no reason in principle why a claimant should not be entitled to recover damages for both, wasted expenditure and loss of profits, provided that in the calculation of loss of profits, there is deduction of all the expenditure that would necessarily have been incurred in producing gross return.

19           In Shetland's case, the court distinguished Cullinane case on facts in following terms:

“At first sight, it might seem that this decision establishes a general rule that a plaintiff in such a case must elect between the two bases of claim; but in my view the decision should not be interpreted in that way. In Cullinane, the majority of the Court of Appeal seem to have treated the loss of profits claim as being based on gross profits (of Evershed MR, at pp 302 and 304-305; Jenkins LJ, at pp 308 and 312). Moreover, since the claim for loss of profits was restricted to a period of three years, and allowed for depreciation in only those years, the plaintiff was in effect seeking damages for the whole cost of acquiring the profit making asset but allowing for only part of that cost in the calculation of his claim for loss of profits (Evershed MR, at p 306). For these reasons, the majority of the court considered that the two heads of the claim involved duplication”.

The Court then considered the decision of the High Court of Australia in T.C. Industrial Plant Pty. Ltd. v. Robert's Queensland Pty Ltd., and quoted the same with approval in following words”

“In T.C. Industrial Plant Pty Ltd. v. Robert's Queensland Pty Ltd. the High Court of Australia explained this latter point in the following way: “We understand their Lordships to mean that in such a case the plaintiff, having paid for the machine at the beginning, should not have to pay for it a second time (in effect) by having its value, spread over the period of its life, subtracted from what otherwise would be his damages. The reason obviously is that where the plaintiff adopts, as the amount the machine would have been worth to him if it had been as warranted, the amount of the profits, he would

have made by using it to the point of exhausting its useful life, he is entitled to recover the whole amount of those profits, without making provision for replacement of the cost of the machine; for those profits are what he was really buying when he bought the machine in reliance upon the warranty. But the same result may be produced by claiming for recoupment of his capital outlay and in addition for the excess of the estimated profits over the amount of the capital outlay; and that is all that is done by a plaintiff who claims his capital outlay and in addition profits estimated after deduction of depreciation. See per Jenkins LJ at p.308. The justification for the refusal of the majority of the Court in Cullinane's case to follow such a course lies, we venture to think, in the fact that since nothing was proved about the probable amount of the profits that would have been made in the final seven years of the machine's life, and therefore, nothing about any probable excess of profits during the whole ten years of the machine's life over amounts of depreciation equalling the total capital cost, the plaintiff failed to show that the damages assessed on the loss-of-profits basis would be greater than damages assessed by reference to capital expenditure and interest. What was perfectly clear was that the plaintiff could not have damages assessed on the one basis plus damages assessed on the other basis: ((1964)) 37 ALJR, at p. 293)."

The decision in Shetland's case is applicable to the facts and circumstances of the present case, wherein the expenses incurred by the plaintiff in purchasing the machines is a wasted expenditure and in addition there is loss of future profits. Therefore, I am inclined to accept submissions of Mr.

Andhyarujina that the plaintiff will be entitled to recover damages under both the courses.

20 As regards the quantum of the damages, the plaintiff has annexed particulars of claim to the plaint, wherein he claims a sum of Rs.3,26,24,680/- as the expenses incurred for procuring the machines and a sum of Rs.24,29,68,601/- towards the projected profit had the machines be commissioned as on 31<sup>st</sup> March, 2011 i.e. till filing of the suit totalling to Rs.32,05,78,467/-. The plaintiff has examined Mr. Bharat P. Gajjar, as an expert on calculation of damages. In his deposition, he has stated his educational qualification as well as the experience of evaluating damages. He has stated that his company has carried out more than 9000 assignments of Composite Valuation and more than 600 Projects' Vetting /Techno-Economic Viability/Feasibility study for industries and service organisations. He has produced in evidence his report on the capital loss as well as loss of profits suffered by the plaintiff in the suit transaction. The loss estimated by him in his report is of Rs.9,32,00,000/- towards the capital loss, which includes interest @12% per annum on the amount from 1<sup>st</sup> April, 2008 to 31<sup>st</sup> March, 2014 and loss of profit as Rs.77,90,00,000/- for the same period, totalling to Rs.87,22,00,000/-. The report refers to the basis of calculation of loss of profit at para 6.2. The witness has considered the gross revenue on reasonable basis taking into account the non-commissioning of the machines.

21           The report of the witness of the witness is seen to be a detailed report taking into consideration all the relevant factors. As regards the loss of profit, the witness has calculated the same on Leasing Assumption. In the facts of the case, however, though the evidence of the export is unchallenged, I am inclined to accept the quantum of damages claimed in the plaint as correct and reasonable. The fourth point for determination is answered accordingly. Hence, the order.

#### ORDER

1           The suit is decreed in terms of prayers (a), (b) and (c ) with further interest @18% per annum on the decretal amount from the date of the decree till payment.

(Smt. R.P. SondurBaldota, J.)