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

SUMMARY SUIT NO.700 OF 2011

Rabo India Finance Limited .. Plaintiff
Vs.
OPC Assets Solutions Pvt. Ltd. & Anr. .. Defendants

Mr.Rahul Narichania, senior advocate a/w. Mr. Sriniwas Deshmukh and Ms.Pratiksha Avhad i/b Mulla and Mulla for Plaintiff.

Mr.Chetan Kapadia a/w. Mr.Rashid Boatwalla and Mr.Rahul Jain i/b Manilal Kher Ambalal and Co. for Defendant No.1.

CORAM : K.R.SHRIRAM, J.
RESERVED ON : 24TH NOVEMBER 2016.
PRONOUNCED ON : 4TH JANUARY 2017.

P.C.

1 This summary suit is filed on 20th September 2010 seeking a decree against Defendant No.1 to pay to the Plaintiff an amount of Rs.27,96,61,028.42 as on 31st July 2010 along with further interest @ 18% p.a. from 1st August 2010 till payment and/or realization and in the alternative a decree against Defendant No.2 to pay an amount of Rs.27,96,61,028.42 along with interest.

2 The Plaintiff is a financial institution and had purchased rent receivables from Defendant No.1 in respect of goods rented by Defendant No.1 to Defendant No.2. The Plaintiff paid the entire purchase consideration

to Defendant No.1. It is the case of the Plaintiff that the Defendant No.1 had given an undertaking to provide the details of the rented goods and their locations and agreed to repay the purchase consideration in case it failed to give such details. It is stated that Defendant No.1 though provided details, it did not provide the entire details. Defendant No.2 defaulted in paying rent in respect of the goods. The Plaintiff followed up with Defendant No.2 for payment of defaulted rents. As the Plaintiff wanted to proceed against the rented goods to recover the due rent amounts, the Plaintiff called upon Defendant No.1 to verify location of the goods. However, they were unable to locate goods as Defendant No.2 did not co-operate and it is the case of the Plaintiff that Defendant No.1 was negligent in renting goods without verifying the location where the goods were to be deployed. It is also the case of the Plaintiff that Defendant No.1 did not verify the location of the goods before it entered into Deed of Assignment with the Plaintiff and hence became liable to refund the purchase consideration to the Plaintiff.

3 The Plaintiff has filed the present suit against Defendant No.1 and Defendant No.2. The suit as against the Defendant No.2 has been decreed by this Court by an Order dated 7th January 2014. However, since Defendant No.2 is in liquidation, the Plaintiff has not been able to recover any amount in execution of the decree from Defendant No.2.

4 After the Decree was passed against Defendant No.2, the Plaintiff has proceeded against Defendant No.1, owner of the rented goods and is claiming Rs. 27,96,61,028.42, as on 31st July 2010 alongwith interest at the rate of 18% per annum, from Defendant No.1. Defendant No.1 has contested the suit and filed its Written Statement dated 13th March 2014. After the pleadings were completed, issues have been farmed by this Hon'ble Court by its Order dated 18th March 2014.

5 The material facts relating to the present case are as follows:

By a Master Rental Agreement ("MRA") entered into between Defendant No.1 and Defendant No.2, Defendant No.1 agreed to let out goods on terms and conditions set out therein. The goods were to be mentioned in various rental schedules to be executed.

6 The relevant clauses of the MRA are reproduced hereinbelow for ease of reference:

> '*Under this master agreement, OPC agrees to let, and the Renter agrees to take on rent, on the terms and conditions set out below and in the Schedule, the goods (the "Goods") described in paragraph 1 of the Schedule.*
>
> *1.3 "Schedule" means any schedule substantially in the form attached as Exhibit 1 to this Agreement from time to time made subject to this Agreement ...*

2. <u>Term and rentals:</u>

2.1 Subject to Section 2.3, the term of the renting (the "Renting Term") and the rentals shall be as set out in paragraph 2 of the Schedule ...
2.4 The rental instalments are payable quarterly in advance, as applicable, on each payment date which shall commence on the 1st day of every calendar quarter month beginning or calendar quarter as the case may be, i.e. in the case of calendar quarters, on the 1st day of January, April, July and October.

3. <u>Renter's covenants</u> :

The Renter (and if the Renter comprises more than one person, each such person jointly and severally) agrees :

3.1 Payment

to pay punctually and without demand, deduction, counterclaim or set-off to OPC at its address given above or to its order the security deposit and rentals (as set out in paragraph 2 of the Schedule) plus applicable taxes (including service tax, if applicable) and levies (as set out in Section 10.7 below) and all other sums due from the Renter to OPC hereunder at the time specified for such payment in this Agreement or the Schedule. In respect of any sums payable under this Agreement, time shall be of the essence and that a condition of this Agreement is that failure to pay any sums within five days after the due date shall be a repudiation of this Agreement ...

3.2 Inspection and delivery

3.2.1 to obtain and accept delivery of the Goods on OPC's behalf as its agent from the supplier thereof at the Renter's sole cost and expense and to provide to OPC, promptly after the delivery of the Goods, evidence of such delivery, and to ensure that the Goods are properly installed in accordance with the instructions of the manufacturer and the best industry practices.

3.2.2 to pay all shipping, transportation and installation charges and other expenses incurred in connection with the shipping, transportation and installation of the Goods.

3.2.3 to inspect the Goods upon delivery of the Goods to the Renter and to notify OPC immediately in writing of any defect in the Goods, provided that if no such notification is given, it shall be conclusively presumed that the Goods are complete and in good order and condition and fit for the purpose for which they are required and in every way satisfactory to the Renter.

3.2.4 to allow OPC or its duly authorized agent or representative, upon reasonable notice, at any time, access to inspect the Goods and any records, logbook, manual or handbook forming part of the Goods.

3.6 ***Dealings with or affect the Goods***

3.6.1 to keep the Goods in its own possession at the location (the "Specified Location") stated in paragraph 1 of the Schedule (or at such other location(s) as OPC may agree) and in compliance with any policy of insurance affecting the Goods, and neither to sell or offer for sale, assign, mortgage, pledge, sublet, lend or otherwise deal with or dispose of the Goods, nor to allow the creation of any charge or lien over them, nor without the prior written consent of OPC, to attach the Goods to any land or premises so as to cause them to become a permanent or immovable fixture on such land or premises. The Renter agrees that if for any reason the location of the Goods is changed, the Renter shall immediately notify OPC in writing of such change in the location of the Goods. Also, if any location where the Goods are kept or used is owned or controlled by a third party or if any third party has any right, title or interest in or to such location, then Renter shall enter into appropriate contracts with such third party to ensure that such third parties are notified of and recognize OPC's right under this Agreement. The Renter shall ensure that OPC's rights under this Agreement are not impaired in any manner and, where required, a third party will recognize and allow such rights to be enforced. Nothing contained herein shall be deemed to be OPC's consent to keep the Goods in any location other than a Specific Location or as agreed by OPC.

3.6.2 neither to sell, transfer or otherwise dispose of, nor mortgage or change, nor otherwise encumber any land or building on or in which the Goods are kept, nor to agree to do any such thing, nor to *agree to create any floating charge, unless the Renter has prior to such event obtained waivers satisfactory to OPC excluding the Goods from its effect or unless any such act does not affect the Goods at any time (whether or not they or any part of them have become affixed to such land or building) and for that purpose to enter upon such land or building and sever the Goods if affixed to it.*

3.8 ***Return of Goods***

3.8.1 to delivery-up the Goods serviced and maintained in good repair and working order as provided in Section 3.3 at the expiry of the Renting Term or upon earlier determination of this Agreement or the renting under it at such address in India as OPC shall notify to the Renter, and if necessary, to allow the OPC, its agents or representatives access to any premises where the Goods may be for the purposes of removing them, and at OPC's sole request and as its agent, to sell the Goods at the best price reasonably available and on such terms as OPC may require. Also, for the avoidance of doubt, at the expiry of the Renting Term or upon earlier determination of this Agreement, OPC shall have the right to enter the premises of the Renter and seize the Goods, without the intervention of the court, and for this purpose the agents, servants or representatives of OPC shall have the right to enter the Renter's premises and seize, dismantle or repossess the Goods. Further, OPC shall have the right to sell the Goods as seized, dismantled or repossessed by auction or private treaty.

6. ***<u>Default or breach</u>***

6.2 Without prejudice to OPC's right to arrears of rentals or other sums due or for damages for breach of this Agreement OPC may terminate all or part of this Agreement or any renting transaction under any Schedule of this Agreement or all renting transactions under all Schedules then in effect on the occurrence of any of the following events by giving notice in writing to the Renter.

6.2.1 if the Renter shall not pay any of the rentals or any sums agreed to be paid by the Renter to OPC under this Agreement punctually on the date when due and does not cure such breach within ten days after receipt of notice thereof; or

6.2.2 if the Renter shall be in breach of any provision of this Agreement and where such default is capable of being cured shall not have cured such default to the satisfaction of OPC within fifteen days after receipt of notice thereof; or

6.2.3 if there shall be any default in payment of any rentals or other sum of money due to be paid or the Renter shall commit any breach of any of the terms of any other renting or any lease in force between OPC or any of its Affiliates and the Renter or any of its Affiliates and the Renter or its Affiliate does not cure such breach within ten days after receipt of notice thereof; or

6.2.4 if the Renter shall do or allow to be done any act or thing that may prejudice or endanger OPC's property or rights in the Goods; or

*7. **Consequence of termination***

Forthwith upon the renting of the Goods being determined as above or if the renting of any Goods under any Schedule executed pursuant to this Agreement is terminated by OPC or the Renter for any reason, in addition to the return or seizure of the Goods and the other rights and remedies available to OPC, the Renter shall pay to the OPC :

7.1 all arrears of rent, including apportioned rent for any broken period and all other amounts then due and payable under this Agreement or the relevant Schedule;

7.2 as liquidated damages an amount equal to the aggregate amount of all future rentals that had OPC's consent to the Renter's possession of the Goods not been determined were agreed to be paid by the Renter to OPC until the end of the Renting Term referred to in paragraph 2 of the Schedule computed on a present value basis at a discounting rate of six percentage;

*9. **Disposal of the Goods***

In the event OPC repossesses the Goods pursuant to the terms hereof, OPC shall take such steps as are commercially reasonable to dispose of the equipment, in such manner, upon such times and upon such terms as OPC may determine. For greater certainty, it is agreed that OPC shall be under no obligation to dispose of any Goods prior in *time to any other similar goods OPC may have in its possession and which is then available for sale or lease. The Renter acknowledges that OPC will have from time to time similar goods in its possession for sale or lease. The Renter further acknowledges and agrees that since OPC will have always available for sale or lease its own or other similar goods, it is not commercially reasonable for the Renter to require OPC to sell or lease any repossessed Goods and thereby deprive OPC of an opportunity to sell or lease its own equipment.*

*10. **Generally***

10.1 OPC shall at all times retain the ownership of the Goods and the Renter shall have no interest in the Goods, save as is provided by this Agreement ...

10.10 The Renter will not, without the consent of OPC (that OPC may withhold in its sole discretion for any or no reason) assign this Agreement or any of its rights or benefits or interest under this Agreement to any other person. However, the parties hereby expressly agree that OPC may assign this Agreement and its rights and obligations hereunder to any other person, without the consent of the Renter.

EXHIBIT 1

FORM OF THE SCHEDULE

SCHEDULE NO : (insert number of schedule) of the under mentioned Goods taken on rent on the terms and conditions of the Master Rent Agreement, dated ________ (the "Agreement"), and made between (1) One Point Contact Services Private Limited ("OPC") and (2) Subhiksha Trading Services Limited (the "Renter")

*1. **Goods***

(insert details of the goods, including a description, serial no's etc., the supplier and the specified location (if applicable) for each item.

(Specified Locations must be clearly stated)"

7 Pursuant to the MRA, Defendant No.1 and Defendant No.2 entered into 18 rental schedules (along with 18 subsequent amendments). The rental schedules numbered STSL-01 to STSL-08 were entered into on 12th February 2008, and those numbered STSL-17 to STSL-24 were entered into on 28th February 2008 and the rental schedules numbered STSL-33 and STSL-34 were entered into on 13th March 2008 (respective amendments were entered into on 18th February 2008, 29th February 2008 and 14th March 2008) ("said Rental Schedules").

8 The rental schedule included the "specified location" in accordance with the form of the schedule. However, the details of the goods including description, serial numbers etc. and the supplier were not included . Only a general description of the details of "Goods" viz. ("furniture fit-outs") in STSL-1 and 2 or ("furniture fit outs, IT Assets") in STSL-3 or ("retail store assets") in STSL-4 to 18, 17 to 24, 33 and 34 were given. The instalment due dates and total rental payable were also duly specified.

9 By 18 Deeds of Assignment, the Defendant No.1 assigned in favour of the Plaintiff, the rights under the MRA and the said Rental Schedules. Such assignment was carried out on a without recourse to the Defendant No.1 basis, which meant that the Defendant No.1 shall not be liable to the Plaintiff if the Defendant No.2 were to commit any default of its obligations

under the Rental Schedules read with the MRA. All rights of Defendant No.1 to claim, receive and recover receivables and all rights which were vested in Defendant No.1 under the MRA, *inter alia*, including right to inspection, taking physical possession of assets, raising demand to pay, proceed against the goods for recovery of the dues including taking possession thereof and renting them to a third party were assigned to the Plaintiff. As per Clause 7 of the Deeds of Assignment, on the occurrence of an event of default under the Rental Schedules, the Defendant No.1 could take steps but only on prior written permission of the Plaintiff and for benefit of the Plaintiff. Defendant No.1 was otherwise not entitled to take steps against Defendant No.2 and/or the goods. Clause 5.2 expressly recorded that the Plaintiff has no recourse against Defendant No.1 for compensation or damages or any other basis for any other loss or costs incurred by the Plaintiff in collecting rental payments or enforcing receivables. 8 Deeds of Assignment were entered into on 20th February 2008 in respect of STSL-1 to STSL-08, 8 on 3rd March 2008 in respect of rental schedules STSL-17 to STSL-24 and 2 on 19th March 2008 with respect to STSL-33 and STSL-34.

10 The relevant clauses of the Deed of Assignment are reproduced hereinbelow for ease of reference:

"Definition

"Escrow Account" or "Account" means an Escrow account opened by OPC and RIF in the name and style of 'R.I.F. Ltd. OPC Escrow' account No.00600350048433 which is established for the purposes of these presents (amongst others) and which is under the sole control of RIF and which is referred to in clause 3.1.

"Rental Schedule" means the schedule containing and identifying details of each item or a set of Equipment forming part of the Rental Agreement entered into between OPC and Renter and which on signing by that Renter brings into existence a Rental Agreement in respect to that item or set of Equipment.

*2. **ASSIGNMENT***

2.1 In consideration of RIF having agreed to pay OPC the sale consideration of the duly acknowledged notice of assignment by the Renter and in consideration of the amounts undertaken to be paid by RIF as per OPC doth hereby irrevocably assign, transfer and release unto RIF and RIF hereby acquires and takes over from OPC, the Receivables and the OPC right, title and interest in and to the Receivables and <u>all the rights, title and interest of OPC under the Master Rental Agreement</u> dated October 31, 2007 together with Schedule No.STSSL-01 dated February 12, 2008, free from all encumbrances or other impediments together <u>with the right to claim, receive and recover the said Receivables</u> TO HOLD all the receivables along with the beneficial interest so assigned unto RIF absolutely and forever to the end and intent that RIF shall hereafter be deemed to be the full and absolute legal and beneficial owner thereof and legally and beneficially entitled to demand, receive and recover the same in its own name and right.

2.2 OPC hereby grants, transfers and assigns unto and to the use of RIF all the legal equitable and beneficial right, title and interest in the Receivables, which are and shall be lawfully due and owing to OPC from the Renter and to have and to receive and appropriate them for RIF's absolute use and benefit with absolute power, authority and liberty to RIF to enforce payment thereof by suit or otherwise in accordance with the terms and conditions of this Agreement.

4.2 Undertaking by OPC

(a) OPC shall not, without RIF's prior consent in writing:

i) do anything which would result in any waiver, set off or reduction arising in respect of a Renter's obligations under any Rental Agreement when the Receivables under that Rental Agreement have been assigned under these presents;

ii) do anything to modify the Rental Agreement in any way in so far as they relate to the Receivables or

iii) notify to any Renter any present value of or other payment amount in connection with, any Rental Payment due by that Renter without prior notice of that amount to RIF, unless specifically agreed in writing by RIF.

b) i) Where the Renter defaults in its obligations under that Rental Agreement in respect of receivables assigned under these presents, in a manner that would entitle OPC to terminate the renting of any equipment's then on receipt of a written request from RIF to do so OPC will promptly terminate the renting of that equipment under that Rental Agreement.

ii) OPC shall not without obtaining the prior written consent of RIF initiate or take any steps towards voluntary liquidation proceeding or winding up of OPC

4.3 ***Rental Agreement to be held by RIF***

4.3.1 OPC has delivered to RIF,

(a) A certified copy of each Master Rental Agreement; and

(b) the original of the Rental Schedule, the receivables in respect of which are being assigned under these presents to RIF.

4.3.2 OPC shall give notice to each Renter of this Assignment forthwith upon execution hereof in a form and manner satisfactory to RIF.

5. ***DEFAULT BY RENTER***

5.1 ***Default***

OPC and RIF will immediately notify each other if either of them becomes aware that :
*(a) (**payment default**) Renter has made, or is in the reasonable opinion of OPC or RIF likely to make default in payment of any Rental Payments due to RIF; or*

*(b) (**other default**) OPC has become entitled to terminate any Rental Agreement, or the renting of any Equipment under any Rental Agreement, in respect of which OPC has sold the Receivables to RIF; or to repossess the Equipment.*

*5.2 **No Recourse to the Company***

Without prejudice to the obligations of OPC expressed in this agreement or as constructive trustee of any Receivables, OPC will not be liable to compensate RIF by way of damages or on any other basis for any loss or costs incurred by RIF :

(a) in collecting or attempting to collect or in failing to receive, any Rental Payments sold to the Financier; and

(b) in enforcing or attempting to enforce any Receivables sold to RIF.

*6.2 **Power of Attorney***
(a) Without prejudice to the rights of RIF as an assignee and with a view to facilitate the recovery of the Receivables, OPC doth hereby appoint RIF as their attorney or agent to demand, sue for an recover and give effectual discharge thereof and for that purpose to file suits, plaint, claim, petition, original application in any court of competent authority or take any other legal proceedings, to declare and sign plaint, application, affidavits and other papers required for conduct of the suit or the other proceedings, to employ advocates, to compromise or refer to arbitration any dispute regarding the aforesaid Receivables and to do all other acts and things as could have been done by OPC in the matter of recovery of the Receivables and enforcement of their rights under the Rental Agreement. Further with respect to any right, title and interest of OPC in the Rental Agreement that OPC may not be able to assign pursuant to any requirement of law (including but not limited to rights that are personal in nature), OPC hereby appoints RIF as its agent to exercise such rights in its name.

(b) In consideration of RIF purchasing the Receivables upon the terms and conditions set out herein at the request of OPC. OPC hereby unconditionally and irrevocably undertakes to deliver in favour of RIF power(s) of attorney as may be required from time to time by RIF to authorize RIF to do all or any of the aforesaid acts, deeds and things.

6. ***REMEDIES OF RIF***

6.1 Without prejudice to any other rights of RIF, on the occurrence of a default or an event of default (howsoever described) under a Rental Agreement in respect of the Receivables which have been sold to RIF, RIF may in its absolute discretion :

(a) (RIF exercises remedies) exercise all of OPC's powers or remedies by which OPC can recover the Receivables;

(b) (OPC exercise remedies) by notice in writing require OPC to exercise any one or more of OPC powers or remedies by which OPC can recover the Receivables;

(c) ...

(d) save for efflux of time, upon termination of the Rental Agreement without affecting the other obligations of the Renter, RIF shall be entitled to demand the Renter to hand over the possession of the Equipment to RIF. Without affecting the generality of the sale of the Receivables, RIF shall be entitled to let these Equipment to any person upon such terms it deems fit but for a period not exceeding the end of the Renting Term ...

6.3 ***Other rights of RIF***

OPC has represented to RIF that as per terms the Rental Agreement :

(i) OPC may notwithstanding he right of the termination of the Rental Agreement and demand for payment of the unpaid Rentals, OPC shall also, at their option and in addition to claiming the liquidated damages be entitled to dismantle and remove the equipment from the place where it shall have been kept and take away

there from and sell the Equipment by public auction or private treaty and for that purpose, they shall have right to enter into premises/place where the Equipment is located; and

(ii) OPC may without prejudice to any of their other rights under the Master Rental Agreement, by notice in writing terminate all or any of the Rental Schedules under the Master Rental Agreement and the Rental of the Equipment created thereby and thereupon, or upon the termination by effluxion of time as the case may be the Renter shall forthwith deliver the Equipment at the Renter's own expenses to OPC and in accordance with any directions given by OPC, and in default thereof OPC may repossess and retake the Equipment, and for that purpose OPC by their servants and agents may :

(a) enter upon any land, building or premises where the Equipment is or where OPC or its agents or servants reasonably suspect the Equipment is;

(b) for the purposes of such entry open any inside or outside gate, door or fastening; and

(c) detach and dismantle the Equipment from any part of the freehold to which it may be affixed.

The aforesaid rights under clause 6.3 shall inure for the benefit of RIF and OPC shall obtain prior written permission from RIF in order to carry out the activities as specified in 6.3 hereinabove.

*7. **Restriction on OPC***

On the occurrence of an event of default under a Rental Agreement other than in relation to the obligation of the Renter to return the Equipment, OPC shall not be entitled to exercise any of its rights and remedies under the Rental Agreement without prior consent of RIP and shall, if so directed by RIF exercise any of such rights in accordance with the directions from RIF."

11 In view of the 18 Deeds of Assignment, 18 notices of assignment (8 on 20th February 2008, 8 on 3rd March 2008 and 2 on 19th March 2008)

were addressed by Defendant No.1 to Defendant No.2, intimating Defendant No.2 about the assignment of the right, title and interest of Defendant No.1 in the receivables under the MRA and the Rental Schedules in favour of the Plaintiff. The notices of assignment were duly accepted by Defendant No.2.

12 A Tripartite Rent Receivable Escrow Agreement was entered into between the Plaintiff, Defendant No.1 and HDFC Bank Ltd. on 20th February 2008 in order to enable the Plaintiff to receive rents paid by Defendant No.2 under the assigned rental schedule.

13 In view of the rental schedules containing a general description of the goods like "furniture fit-outs", "furniture fit outs, IT assets" and "retail store assets", Defendant No.1 sent a format for the details of the list of assets to be submitted by Defendant No.1 to the Plaintiff. The Plaintiff approved the said draft on 27th March 2008 itself. Accordingly, the Defendant No.1 addressed a letter dated 27th March 2008 stating that they would provide the list of assets given on rent to Defendant No.2 with respect to each rental schedule which was not yet provided. The Defendant No.1 agreed to provide the list of assets on or before 15th April 2008, failing which Defendant No.1 would refund the purchase price to the Plaintiff.

14 The Defendant No.1 provided to the Plaintiff the list of assets by their letter dated 11th April 2008. The details were provided as per the format and accordingly contained the name of the Vendor, description of the asset, quantity, value and location. The location specified in the format named the State, as the rental schedules already included the "specified locations" as contemplated in the form of the Schedule to the MRA. Perusal of the details of assets of rental schedule No.STSL-01 to STSL-08, STSL-17 to STSL-24 and STSL-33 to STSL-34 reflect that diverse categories of assets in varying quantities formed subject matter of the Rental Schedules. Thus, the general description which was earlier included in the Rental Schedules was now supplemented with insertion of details of the goods, including a description, the supplier and the value. As the location was already detailed earlier, the letter dated 11th April 2008 specified only the State in the column of location.

15 The Plaintiff accepted the list of assets provided by Defendant No.1 with their letter dated 11th April 2008 as per the format sent by the Plaintiff. The Plaintiff did not raise any grievance in respect of the details of the list of assets provided. Thus, the Defendant No.1, it was submitted by Shri Kapadia, counsel for Defendant No.1 had duly complied with their promise

to provide the list of asset with each rental schedule as per the format on or before 15th April 2008 failing which Defendant No.1 would have been liable to refund the purchase price. Shri Kapadia further submitted that on due performance of its promise and acceptance of promise thereof by the Plaintiff, the agreement to refund the purchase price stood discharged by performance.

16 The Defendants also submitted that as a result of having accepted performance, not only did the Plaintiff not raise any grievance with Defendant No.1 after receiving details by the Defendant No.1's letter dated 11th April 2008, but the Plaintiff continued to accept monthly rentals under all the 18 Rental Schedules from Defendant No.2. On a default in payment of rentals by Defendant No.2, by letters dated 26th November 2008 and 8th December 2008, the Plaintiff called upon Defendant No.2 to pay the rental due on 15th November 2008 and 1st December 2008 respectively, failing which penal interest would be imposed. Emails exchanged between the Plaintiff and Defendant No.2 on 16th December 2008 make it clear that meetings were held between the Plaintiff and Defendant No.2 to consider restructuring of the defaults committed by Defendant No.2. Shri Kapadia submitted that pertinently, the Plaintiff also sought information on diverse

subjects from Defendant No.2 but the Plaintiff did not make any request for giving exact location of the assets, which shows the Defendant No.1 had provided all details it was required to provide.

17 In response to a request from the Plaintiff, Defendant No.1 by its letter dated 19th January 2009 (**Exh.P-84**) provided to the Plaintiff a compiled list of rental assets.

18 In view of the default and failure to restructure by Defendant No.2, the Plaintiff requested Defendant No.1 to appoint a firm of Chartered Accountants to verify and take physical inspection of assets. On the request of the Plaintiff, the Defendant No.1 held discussions with C.A. Firms and upon appointing M/s. Venkat Associates, Chartered Accountants also took steps in that regard. However, M/s. Venkat Associates, Chartered Accountants did not get the needed co-operation from Defendant No.2 and thus the efforts to cause physical verification of the rental assets through a firm of Chartered Accountants did not yield the desired result. In fact, the Plaintiff sought postponement of physical audit till such time that a list of storewise installation was available by its email date 13th February 2009. The Defendant No.2 also informed the Plaintiff by its letter dated 2nd March

2009 that in view of their exit from some properties and relocation of some assets to some warehouses, verification of assets was difficult and Defendant No.2 itself was not in a position to accurately verify and provide the exact location of assets. The Defendant No.2 requested for time of four weeks to furnish data as required.

19 At their end, the Defendant No.1 had informed the Plaintiff by their letter dated 3rd March, 2009 (**Exh.P-95**) that Defendant No.2 was under an obligation to keep the leased assets at the location specified in para 1 of the rental schedule as per the MRA and if there was any change of location Defendant No.2 was obliged to notify about the changed location of the rented assets.

20 After exhausting efforts to restructure the default with Defendant No.2 and thereafter physically verify goods with co-operation of Defendants No.1, the Plaintiff vide letter dated 9th July 2009 (**Exh.P-78**) terminated the agreement with Defendant No.2 and demanded (a) return of goods; (b) payment of Rs.23,90,37,873/- along with further interest failing which the Plaintiff would be constrained to adopt appropriate proceedings in accordance with law. The Plaintiff thereafter issued a notice u/s. 433, 434

and 439 of the Companies Act, 1956 to Defendant No.2 claiming a sum of Rs.24,25,74,324/- (**Exh.P-79)**. By letter dated 19th August 2009 (**Exh.P-80**) the Defendant No.2 refuted the claims made in the said statutory notice.

21 The Plaintiff thus exhausted its avenues of (a) negotiating with Defendant No.2, (b) seeking co-operation of Defendant No.1 to verify assets lying with Defendant No.2, (c) calling upon Defendant No.2 to provide location of assets and threatening legal consequences to Defendant No.2 if the goods are not returned and monies are not paid. Thereafter, instead of suing the Defendant No.2 for recovery of money and reliefs in respect of the Goods, the Plaintiff for the first time addressed a legal notice dated 31st October 2009 to the Defendant No.1 demanding payment of Rs. 19,73,33,400/-. The Plaintiff claimed that the Defendant No.1 had not given each respective and specific location that would enable the Plaintiff to trace out the goods/ assets let out and thereby enforce the rights of their clients against Defendant No.2. Based on the allegation that the Defendant No.1 had committed breach of their obligation to provide with specific locations, the Plaintiff claimed that the Defendant No.1 should refund the entire purchase price along with interest on their failure to provide the list of assets let out to Defendant No.2.

22 By reply dated 8th December 2009 (**Exh.P-98**), Defendant No.1 informed the plaintiff that the letter dated 27th March 2008 provided for refund of purchase price only upon not providing the details of assets; the details of assets had been provided by letter dated 11th April 2008; the Plaintiff had accepted receipt of the said details and not raised any objection thereafter; the Plaintiff had thereafter accepted monthly rentals from Defendant No.2, it was only after Defendant No.2 committed default and despite Defendant No.1 having gone out of their way to co-operate with the Plaintiff in recovering the amounts and identifying the assets, though not obligated, the Plaintiff was mis-utilising the said co-operation by Defendant No.1 and trying to take advantage thereof. In substance, it was alleged that the Plaintiff was attempting to find a convenient scapegoat in Defendant No.1 by making this frivolous demand.

23 The Plaintiff has thereafter filed the present Summary Suit alleging breach of obligations and undertaking contained in letter dated 27th March 2008. The Plaintiff sought various reliefs against the Goods in the present Suit but has thereafter deleted the same by the amendment dated 15th January 2013. This Court granted unconditional leave to defend the Suit by its order dated 7th January, 2014 in Summons for Judgment No.5 of 2013.

Thereafter the Defendant No.1 filed its Written Statement on 13th March, 2014.

24 The Defendant No.1, *inter alia*, raised the following defence in their Written Statement :

(a) Defendant No.1 had furnished details of lists of Assets in compliance of letter dated 27th March, 2008. No continuing obligation to provide location existed. Thus, the claim was baseless and devoid of merits.

(b) The Plaintiff had unconditionally accepted the performance of Defendant No.1 by its letter dated 11th April, 2008. Thus the Plaintiff was estopped from belatedly contending to the contrary.

(c) The allegation of the Plaintiff that Defendant No.1 was negligent and thus liable for compensation was unsustainable as Plaintiff had purchased receivables after assessment and satisfaction.

(d) The Plaintiff had assumed entire risk of receivables from the Defendant No.2 under a 'No recourse' transaction. Thereafter, the Plaintiff had not proceeded against Defendant No.2 and the Goods despite defaults.

(e) The Plaintiff having accepted the details furnished by the Defendant No.1, vide its letter dated 11th April 2008, without any objection and demur coupled with the fact that the Plaintiff issued winding up notice to the Defendant No.2 resulted in waiver of the rights of the Plaintiff to proceed against the Defendant No.1.

25 This Court settled the issues on 18th March 2014. For the sake of convenience, issues are reproduced in the penultimate paragraph No.55.

26 Though the facts have been explained so much in detail, the point that comes for consideration are :

(a) w*hether Defendant No.1, as per the letter dated 27th March 2008, had an obligation to give location of the goods with details; and*

(b) If so, whether Defendant No.1 complied with the said obligation?

27 The counsel for the Plaintiff, Shri Narichania submitted that the rent schedule executed by Defendant No.1 and Defendant No.2 did not specify the locations of the goods rented. Therefore, after the Plaintiff disbursed the last tranche of money on 19th March 2008, the Plaintiff sought detailed locations of the goods from Defendant No.1 as could be seen from the email of Defendant No.1 dated 27th March 2008 (**Exh.'D-2**)'. Prior to that, the Plaintiff and Defendant No.1 had discussed the format in which the

information has to be furnished. It is the case of the Plaintiff that the Defendant No.1 by writing the letter dated 27th March 2008 (**Exh.D-2**) had agreed to provide the details by 15th April 2008 failing which Defendant No.1 would return the amount to the Plaintiff. Defendant No.1, by its letter dated 11th April 2008 (**Exh.P-83**) gave list of assets with details as per the format that the Plaintiff had approved. It was submitted that since the information was given by Defendant No.1 who was the owner of the goods, the Plaintiff had no occasion to disbelieve the same and the Plaintiff being merely a financial institution, was unable to supervise the location of the goods and verify the information provided by Defendant No.1 but the details given by Defendant No.1 only mentioned the names of the city where the goods were located. It was submitted that after default by Defendant No.2 in November/December 2008, the Plaintiff requested Defendant No.1 to verify the location of the goods but was unable to find. Therefore, according to the Plaintiff, Defendant No.1 has failed to comply with its undertaking dated 27th March 2008. The counsel for the Plaintiff stated that the stand of Defendant No.1 that it was not obligated to provide the location of the assets and also it was not agreed because the format which was agreed between the parties provided otherwise is not correct. The counsel submitted that the stand that Defendant No.1 took that they have no obligation under the agreement but merely to co-operate with the Plaintiff it agreed to provide location of the goods by its letter dated 27th March 2008 is also incorrect because the letter dated 27th March 2008 (**Exh.P-81**) specifically states as under:

> *"............We agree and undertake to provide the list with respect to each rental schedule as per the format enclosed on/or before April 15, 2008................*
>
> *We understand that inter alia, it is based on this undertaking that you have agreed to enter into the abovesaid assignment deeds."*

28 The counsel submitted that the stand taken by the Defendant No.1 in their Advocate's letter, dated 8th December 2009 (**Exh.P-98**) is not correct.

29 Shri Narichania also submitted that the Defendant No.1 was negligent and contented that Defendant No.1 had duty to keep track of the assets and relied on Clause 3.6.1 of Master Rental Agreement (MRA) which reads as under :

> *"3.6 Dealing with or affecting the Goods*
>
> *3.6.1 to keep the Goods in its own possession at the location ("Specified Location") stated in paragraph 1 of the Schedule…... The Renter agrees that if for any reason the location of the Goods is changed, the Renter shall immediately notify Defendant No.1 in writing of such change in the location of the Goods….."*

Thus, according to Shri Narichania, it was the obligation of Defendant No.2 to take permission of Defendant No.1 in case it wanted to relocate the goods. Correspondingly, it was duty of the Defendant No.1 to ensure that the goods were not shifted from the location without Defendant No.1's permission. It was for the Defendant No.1 to ensure that Defendant No.2 complies with Clause 3.6.1 of the MRA as Defendant No.1 had retained ownership of the goods and Defendant No.1 had right of regular inspection of goods. The counsel also submitted that Defendant No.1 is liable to indemnify the Plaintiff as per Clause 6.5.1(b) of the Deed of Assignment.

30 Shri Narichania also submitted that Defendant No.1 had rented the goods to Defendant No.2 under MRA. The goods were delivered to Defendant No.2 by Defendant No.1. Thereafter, Defendant No.1 assigned the rent receivables in respect of the goods from Defendant No.2 to the Plaintiff. Defendant No.1 has executed deeds of assignment in respect of each rental schedule. The Rent Schedule contained location of the assets rented. Defendant No.1 further gave location of the assets by letter dated 11th April 2008 and email dated 19th January 2009. However, from the search undertaken by Defendant No.1 in the month of February 2009, it was not able to locate goods. This has been reported to Defendant No.1 in its letter dated 3rd March 2009. Thus, it is clear that Defendant No.1 has been negligent in renting the goods without verifying the location where the goods were deployed. Defendant No.1 did not know the location of the

goods when it addressed its letter dated 11th April 2009 giving purported location of the goods. Similarly, when Defendant No.1, by its email dated 19th January 2009, forwarded the list of location even then it did not know the location. Shri Narichania submitted had Defendant No.1 been diligent in ascertaining the location of the goods when it rented the goods and carried out regular inspection as stated in letters of 6th and 12th February 2009, it could have easily come to know where the goods were kept by Defendant No.2. He also submitted that Clause 6 of Deed of Assignment gave right to the Plaintiff to proceed against the goods. Since, the location of the goods were not known, the Plaintiff could not take any action in this regard.

31 Shri Narichania also submitted that the stand of Defendant No.1 that it is not liable because the Plaintiff look to Defendant No.2 for payment is also not correct. The counsel submitted that Under the MRA (Exhibit P2), Defendant No.2 was required to pay rents towards the goods rented by Defendant No.1. The said rent receivables were assigned by Defendant No.1 to the Plaintiff. As per the Deed of Assignment, Defendant No.2 was liable to pay rents on due dates to the Plaintiff. Defendant No.2, after the rent receivable were assigned by Defendant No.1 to the Plaintiff, started paying rents to the Plaintiff. Thus, by accepting rentals from Defendant No.2 the Plaintiff was acting as per the Deeds of Assignment. Defendant No.2 till 15th

November 2008 did not commit any default in payment of rentals. When Defendant No.2 did not pay rentals due on 15th November 2008, the Plaintiff by its letter dated 26th November 2008 (**Exhibit P-76**) called upon Defendant No.2 to pay the due amount with 18% interest. Similarly, when Defendant No.2 did not pay rentals due on 1st December 2008, the Plaintiff by its letter dated 8th December 2008 **(Exhibit P-77**) called upon Defendant No.2 to pay the due amount with 18% interest. Both the letters were also forwarded to Defendant No.1. It is submitted that in case of default by Defendant No.2 in paying rentals, it was the most logical act to call upon Defendant No.2 to pay the defaulted amount. Defendant No.2 was liable to pay the rentals and therefore, the Plaintiff rightly called upon Defendant No.2 to pay the due amounts. By calling upon Defendant No.2 to pay the defaulted rental amounts, the Plaintiff was exercising its right under the Deeds of Assignment and merely because the Plaintiff called upon Defendant No.2 to pay the defaulted amount, Defendant No.1 is not absolved from its liability under the Deeds of Assignment and also its undertaking given by letter dated 27th March 2008.

32 Shri Narichania also submitted that it is not the case of the Defendant No.1 that the Plaintiff by calling upon Defendant No.2 acted to the detriment of Defendant No.1. If, the Plaintiff had not called upon Defendant

No.2 to pay the defaulted amounts, the Plaintiff would have been accused of not acting reasonably and prudently to mitigate its losses. He added by calling upon Defendant No.2 to pay the due amounts, the Plaintiff has not waived its right to proceed against Defendant No.1. Defendant No.1 has contended that by calling upon Defendant No.2 to make payment, the Plaintiff waived its right against Defendant No.1. The evidence on the record does not support the argument of Defendant No.1. The Plaintiff in the first instance proceeded against Defendant No.2 and thereafter, the Plaintiff called upon Defendant No.1 to trace the goods so as to proceed against them. Thus, there was no intentional or deliberate action by the Plaintiff which amounts to waiver. In this regard, reliance was placed by the counsel upon ***M/s. Motilal Padampat Sugar Mills Co. (P) Ltd. Vs. State of Uttar Pradesh & Ors.***[1].

33 Shri Narichania further submitted that under the Deeds of Assignment, the Plaintiff had various rights as per Clause 6 as under:

(i) To exercise all rights of Defendant No.1 to recover the receivables.

(ii) To require Defendant No.1 to exercise any of its powers to recover receivables from Defendant No.2.

(iii) To demand Defendant No.2 to hand over possession of the

1 AIR 1979 SC 621

equipments to the Plaintiff.

These remedies were not mutually exclusive and did not prohibit the Plaintiff from exercising the second remedy after it had exercised the first remedy. He submitted the Defendant No.1 became liable to the Plaintiff after it became clear from the exercise undertaken by Defendant No.1 at the instance of the Plaintiff that Defendant No.1 was negligent in renting the equipment's without verifying their location and as a result of which the Plaintiff's rights to proceed against the equipment was lost. Defendant No.1's liability also arose since it failed to comply with the undertaking of 27th March 2008.

34 Shri Narichania also submitted that the stand of Defendant No.1 that the Plaintiff had a right to proceed against the equipments but did not take any action against the equipments is not correct.

The counsel also submitted that in January 2009, the Plaintiff requested Defendant No.1 to give details of the goods with their physical location. Pursuant to this, Defendant No.1 by its email of 19th January 2009 (**Exh.P-84**) purported to give some information on the assets. Thereafter the Plaintiff requested Defendant No.1 to physically verify whether the assets were located at the location given by Defendant No.1. Defendant No.1 made attempts and by its letter dated 3rd March 2009 informed the Plaintiff about its inability to locate the current location of the goods despite follow up with the Defendant No.2.

The Plaintiff also asked Defendant No.2 to provide location of the assets. Defendant No.2 by its letter dated 2nd March 2008 (Exhibit P-99) informed the Plaintiff that it was not possible to give location of the assets.

Thus, Defendant No.1, i.e., owner of the goods and Defendant No.2, in whose custody the goods were, categorically informed the Plaintiff about non availability of the goods at any location. In such circumstances, Defendant No.1 itself having not been able to locate the goods cannot make a grievance that the Plaintiff did not proceed against the goods.

35 Shri Narichania also submitted that as per clause 6.3 (i) of the Deed of Assignment, Defendant No.1, in addition to its right to demand payment of unpaid rentals, had right to dismantle and remove the equipment from the location and sell by public auction. The relevant clause is as under:

> *"6.3 Other rights of RIF*
>
> *OPC has represented to RIF that as per terms the Rental Agreement:*
>
>> *(i) OPC may notwithstanding the right of the termination of the Rental Agreement and demand for payment of the unpaid rentals, OPC shall also, at their option and in addition to claiming the liquidated damages be entitled to dismantle and remove the equipment from the place where it shall have been kept and take away there from the sell the Equipment by public auction or*

> *private treaty and for that purpose, they shall have right to enter into premises/ property/ place where the Equipment is located; and"*

36 Therefore, Defendant No.1 could have exercised the aforesaid right. As Defendant No.1 did not exercise this right, shows that Defendant No.1 was also not aware about the location of the assets. Defendant No.1 having failed to exercise the aforesaid right of the goods is not justified in blaming the Plaintiff for allegedly having failed to proceed against the goods.

37 Shri Narichania concluded in these facts and circumstances Defendant No.1 is liable to repay the purchase consideration paid by the Plaintiff to Defendant No.1 under the Deeds of Assignment. The Plaintiff has paid Rs.5,28,28,618.48 on 25th February 2008, Rs.10,18,27,044.50 on 5th March 2008 and Rs.4,26,77,737.59 aggregating to Rs.19,73,33,400.57. Therefore, Defendant No.1 is liable to repay Rs.19,73,33,400.57 with interest at the rate of 18% p.a. from the date of actual disbursement of the amounts until the refund and/or realization aggregating to Rs.27,96,61,028.42 (Rupees Twenty Seven Crores Ninety Six Lakhs Sixty One Thousand Twenty Eight and Paise Forty Two only) as on 31st July 2010.

38 Having heard Shri Narichania and Shri Kapadia and after considering

the documents, I am unable to gather myself to accept Mr.Narichania's submissions.

39 Under the Deed of Assignment executed between the Plaintiff and Defendant No.1, it is stated in Clause 5.2 in clear, express and unequivocal terms that Defendant No.1 has assigned its right, title and interest under the MRA to the Plaintiff on a 'no recourse' basis. This is also admitted by the Plaintiff vide its notices dated 31st July 2009 and 26th July 2010 (**Exh. P-79 and Exh. P-82,** respectively) addressed to the Defendant No.2.

40 As per the format of the Rental Schedule annexed to the MRA signed on 31st October 2007, the details of the assets including details of goods, description, supplier and location of the goods as also the terms and conditions in respect thereof were to be included. The only detail which was not contained in the executed 18 Rental Schedules was the details and description of the goods. The schedules at **Exh. P-3 to Exh.P-20** set out a general description like "***furniture fit outs***", "**furniture fit outs**, IT Assets" or "**retail store assets**" The specified location, however, was included in each of the 18 Rent Schedules and, the same is reproduced herein for ease and reference:

"STSL – 1"

"*a) Subhiksha Trading Services Ltd. Survey No.159, Kompalli Village, Kudbullapur Mandal, R.R. District 500 014 Andhra Pradesh.*

b) Subhiksha Trading Services Ltd. Next to Navatha HO, Kanur Road, Kanur Village, Auto Nagar, Vijayawada, Andhra Pradesh.

"STSL – 2"

Subhiksha Trading Services Ltd. Room No.1, Block No.2528, Part 2529-2530 & 2498, B/H Umiya Way Bridg, Naz Pirana Road, Jetalpur, Ahmedabad, Gujarat.

"STSL – 3"

Subhiksha Trading Services Ltd. Katha No.45, Nimbekaipura Village, Mandur GP, Budigere Cross, Bangalore 560049, Karnataka.

"STSL – 4"

a) Subhiksha Trading Services Ltd. C/o Monty Warehousing, Opp. IBP Petrol Pump, Pune Nagar Road, Lankiand Village, Pune 412207, Maharashtra.

b) Subhiksha Trading Services Ltd., 48/51 Indian Corporation, Opp. Gajanan Petrol Pump, Mankoli Naka, Taluka Bhiwandi, Dist. Thane 421302, Maharashtra.

c) Subhiksha Trading Services Ltd. Plot No.158-162 B/H Jawaharlal Nehru Junior College, Near AFL Logistics, *Khadan Area, Wadi, Nagpur 440023, Maharashtra.*

“STSL – 5”

Subhiksha Trading Services Ltd. No.35, Nebsarai, New Delhi 110068.

“STSL –6”

Subhiksha Trading Services Ltd. A.P. Enclave, Village Jhansla Banur, Zirakpur Patiala Highway Rajpura, Patiala, Punjab

“STSL – 7”

Subhiksha Trading Services Ltd. 21, JDA Market, Gopalpura, Mansarover, Gopalpura Bypass, Jaipur, Rajasthan.

“STSL – 8”

Subhiksha Trading Services Ltd. 99/5 Dr. MGR Salai, Nagalkenni, Crompet Chennai 600044, Tamil Nadu.

“STSL – 17”

Subhiksha Trading Services Ltd., Survey No.159, Kompalli Village, Kudbullapur Mandal, R.R. District 500014 Andhra Pradesh.

“STSL – 18”

Subhiksha Trading Services Ltd. Room No.1, Block No.2528, Part 2529-2530 and 2498, B/H Umiya Way

Bridge, NAZ Pirana Road, Jetalpur, Ahmedabad.

“STSL – 19”

Subhiksha Trading Services Ltd. B-6, 1st floor, Sector-34, INFO City, Gurgaon 122001, Haryana.

“STSL – 20”

Subhiksha Trading Services Ltd. 42/1327(1), Power House Road, Ernakulam, Cochin 18.

“STSL – 21”

Subhiksha Trading Services Ltd. No.35, I.G.N.O.U. Road, Nebsarai, New Delhi 110068.

“STSL – 22”

Subhiksha Trading Services Ltd. A.P. Enclave, Vill Jhansia, Banur, Zirakpur, Patiala Highway, Rajpura, Patiala, Punjab.

“STSL – 23”

Subhiksha Trading Services Ltd. 99/5, Dr. MGR Road, Nagalkeni, Crompet.

“STSL – 24”

Subhiksha Trading Services Ltd. 43/1, Garden Reach Road, Kolkata 700044.

“STSL – 33”

Subhiksha Trading Services Ltd. Survey No.159, Kompalli Village, Kudbullapur Mandal, R.R. District 500014, Andhra Pradesh.

"STSL – 34"

Subhiksha Trading Services Ltd. No.35, I.G.N.O.U. Road, Nebsarai, New Delhi 110068.

Thus the Rental Schedules contained the specific location and only the details of the Assets were general.

41 In accordance with the letter dated 27th March 2008 (**Exh. P-81**) the details of list of assets were furnished by letter of 11th April 2008 (**Exh. P-83**), by Defendant No.1. which were accepted unconditionally and without any demur by the Plaintiff. The Plaintiff since the email of 11th April 2008, of Defendant No.1, did not raise any objections till more than one and half years thereafter in October 2009 in respect of the details furnished and/or made any allegation of absence of any particulars or information in the said details furnished on 11th April 2008.

42 There is no continuing obligation on the part of Defendant No.1 under the MRA or the Deed of Assignment to either keep tracking the assets

and/or trace the location thereof as alleged by the Plaintiff. The assignment in favour of the Plaintiff is on a no recourse basis and the Plaintiff admittedly continued to receive rents from Defendant No.2 till November 2008 in respect of the goods in question. The Plaintiff was aware that the Defendant No.2 was obliged to seek its permission before it could shift the location of the assets. The Plaintiff had the right to inspect the same which it failed to do.

43 It is only after the Defendant No.2 defaulted in making payment of the rent to the Plaintiff, the Plaintiff sought co-operation of Defendant No.1 to verify the assets physically. The Plaintiff addressed letters to the Defendant No.2 seeking payment of the amount due and payable by the Defendant No.2 to the Plaintiff, without seeking details of the exact location of the goods which have been delivered by Defendant No.2.

44 After default by Defendant No.2 of its payment obligations to the Plaintiff, the Plaintiff was in talks with Defendant No.2 for restructuring of payment dues. The Defendant No.1 addressed a letter to the Defendant No.2 on 26th November 2008 calling upon Defendant No.2 to pay to the Plaintiff amounts due and payable. Even during the period of exchange of financial

data between the Plaintiff and Defendant No.2 the grievance regarding location of goods is not raised at all. The Plaintiff also addressed email dated 16th December 2008 to the Defendant No.2 to consider the restructuring proposal but no request was made to give exact location of assets.

45 Despite the aforesaid process of restructuring having failed and no amount being received by the Plaintiff the Plaintiff, did not take any initiative regarding enforcement of rights under the MRA, calling upon the Defendant No.2 to return the goods, initiate legal proceedings and obtain suitable orders from the Court in respect of the goods.

46 The Defendant No.1 though not obliged, extended all its support in good faith and appointed a firm of chartered accountants to undertake physical inspection and diligently pursued the matter with Defendant No.2. The Defendant No.1, vide its email dated 11th February 2009 (**Exh. P-89**) informed the Plaintiff of the schedule for physical verification by the Chartered Accountant firm. The Chartered accountants report was also furnished by the Defendant No.1 to the Plaintiff vide letter dated 27th

February 2009 (**Exh. P-94**). Thereafter, the Defendant No.1, though having furnished information of assets as accepted by the Plaintiff, once again furnished information to the Plaintiff.

47 The Plaintiff took no steps (though having been assigned on a no recourse basis all right, title and interest under the MRA by Defendant No.1), against the Defendant No.2 to restore and/or recover the possession of the goods and/or even recover the amounts due and payable from the Defendant No.2.

48 The Plaintiff did not address any correspondence to the Defendant No.1 in respect of its alleged claim until by its Advocate's letter dated 31st October 2009 **(Exh. P-97**), more than 1 ½ years later. The Plaintiff had already taken action against Defendant No.2 including issuing of a winding up notice dated 31st July 2009 (**Exh.P-79**) and having realised that the same would not yield any result diverted its attack to Defendant No.1, by alleging breach by Defendant No.1 of obligation to provide location as per letter dated 27th March 2008 **(Exh.P-81**). Location was already detailed in the Rental Schedule. The Rental Schedule lacked details of assets. The letter dated 27th March 2008 only proferred to provide details of assets. Same was

done by letter dated 11th April 2008 (**Exh.P-83)**. In response to the Plaintiff's demand and allegations in its Advocate's letter dated 31st October 2009 (**Exh.P-97**), the Defendant No.1 replied by its Advocates' letter dated 8th December 2009 (**Exh. P-98**), denying the allegations and demand.

49 The Plaintiff has based its claims, *inter alia,* on alleged negligence of the Defendant No.1 and the indemnification clause in the deeds of assignment. These are, in my view, baseless and without substance. The Plaintiff has wrongfully alleged in the Plaint that the Defendant No.1 was negligent in renting the equipments without verifying store-wise data and as a result of this alleged negligence; the Plaintiff has claimed compensation from the Defendant No.1. These allegations and averments are completely baseless, unproved and contrary to contract.

50 The purchase by the Plaintiff of the receivables was on a no recourse basis arising under the rental schedules. The Plaintiff is a huge financial institution. I cannot believe and or accept an international financial organisation like the plaintiff would be so naive as projected by the counsel. The Plaintiff, I am sure, would have done due diligence before it entered into the agreement with Defendant No.1. In any event, the Plaintiff would

have done due diligence before it released the large amount in excess of Rs.19 crores to Defendant No.1 more so when it was on 'no recourse' basis. The amount also was released in three tranches. The Plaintiff knew exactly what it was getting into when it entered into the agreement and when it released the Rs.19 crores plus. That is why not once until the Advocates' letter dated 31st October 2009 (**Exh.P-97**) did the Plaintiff even ask Defendant No.1 to return the money. Therefore, I have no hesitation to observe that the Plaintiff entering into the agreement with Defendant No.1 was based entirely on the Plaintiff's own assessment and satisfaction of the merits of the renting transactions and the credit worthiness and financial wherewithal of Defendant No.2. The Defendant No.1 cannot be accused of being negligent or having committed any default. Defendant No.1 is being unnecessarily dragged in these proceedings that concern issues arising between the Defendant No.2 and the Plaintiff.

51 The Plaintiffs' case that the Defendant No.1 was not aware of the location of the assets and the Defendant No.1 as the owner of the goods was entitled to the return of the goods and thus duty bound to know the location are baseless and devoid of merits. The Plaintiff, in terms, admits that it acquired on a 'no recourse' basis the assignment of receivables and all the

right, title and interest under the MRA vide the Assignment. There is no continuing obligation on the Defendant No.1 to keep tracking the location of the assets and keep the Plaintiff informed as urged by Shri Narichania. This is not also the case of the Plaintiff in the Plaint. The Plaintiff as per the Rental Schedules was provided with the specified location of the Assets. **(Exh. P-3 and Exh. P-20)**. By letter of 11th April 2008 (**Exh.P-83**), the Defendant No.1 therefore provided the description of the assets which was as per the format of the Rental Schedule. The Plaintiff duly accepted and never objected to the said details furnished as per its format on 11th April 2008 by the Defendant No.1 till its notice dated 31st October 2009. **(Exh. P-97).**

52 The Plaintiff's case that it has a right to claim money from the Defendant No.1, since Defendant No.1 breached its obligation to provide location under the letter dated 27th March 2008 **(Exh.P-81)** cannot be sustained. By letter of 11th April 2008 (in response to 27th March 2008) the Defendant No.1 reiterated the information already in the knowledge of the Plaintiff with the only addition of the description of the assets which was as per the format of the Plaintiff. The Plaintiff never objected to the said details furnished as per its format on 11th April 2008 by the Defendant No.1 till its

notice dated 31st October 2009.

The Plaintiff was aware of its rights and remedies and thus only proceeded against the Defendant No.2 for recovery of its alleged dues as evident from its legal notices dated 31st July 2009 **(Exh.P-79)** and 26th July 2010 **(Exh.P-82)** addressed to the Defendant No.2.In absence of any obligation under the MRA to track the location of the assets and keep the Plaintiff informed and even after the MRA having been terminated (as admitted by the Plaintiff in the notices to the Defendant No.2), the question of any breach being alleged by the Plaintiff to the Defendant No..1 cannot and does not arise at all. Only in its legal notice dated 31st October 2009 **(Exh.P-97)** having already pursued against the Defendant No.2 and having failed to realise any amount, the Plaintiff diverted its attention to the Defendant No.1.

53 In my view, Shri Narichania's submissions that having accepted payment from Defendant No.2 till November 2008 in respect of the rent receivables did not amount to waiver of the rights of the Plaintiff to pursue the alleged claim against the Defendant No.1 cannot be sustained. This is because the Plaintiff having accepted the assignment on no recourse basis from the Defendant No.1 always understood, believed and acted in

furtherance thereof. The Plaintiff always looked towards the Defendant No.2 in respect of the location of the goods and also for recovery of its alleged claim. The Plaintiff always corresponded with the Defendant No.2 in respect of the goods and the rent receivables. The Plaintiff never called upon the Defendant No.1 when the Defendant No.2 defaulted in payment obligations of the rent receivables post November 2008 to take steps on their behalf. The Plaintiff never raised any objection and / or claim against the Defendant No.1 till its notice dated 31st October 2009.

54 Coming to case laws relied upon by the Plaintiffs, the same are not applicable to the facts and circumstances of this case. The judgment in the case of ***M/s Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh & Ors***.[2] on the principle of waiver is not applicable to the present case as the Plaintiff has accepted performance by the Defendant No.1 and thereby waived breach, if any.

The judgment in the case of ***Sarwan Singh Vs. State of Punjab*** [3] is also not applicable as the Defendant No.1 has availed the opportunity not only to cross examine the witness of the Plaintiff but also put their case in cross examination.

2 AIR 1979 SC 621
3 AIR 2002 SC 3652

55 In view of the above, the issues are answered as under :-

1	*Whether Defendant No.1 made any breach of the various deeds of assignments executed by and between the Plaintiff and Defendant No.1?*	:	No.
2	*Whether Defendant No.1 failed to furnish the list of assets given on rent to Defendant No.2?*	:	No.
3	*Whether the Plaintiff waived the stipulations in its letter dated 27th March, 2008?*	:	Does not arise
4	*Whether the right, title and interest of Defendant No.1 stood assigned to the Plaintiff under the deeds of assignment?*	:	Yes
5	*Whether the Plaintiff is entitled to receive any amount under the Master Rental Agreement?*	:	Yes. From Defendant No.2 and not from Defendant No.1
6	*What relief, if any, is the Plaintiff entitled to ?*		None against Defendant No.1. Ex-parte decree against Defendant No.2 already passed on 9th January 2014.

56 The suit accordingly stands dismissed as against Defendant No.1 with costs in the sum of Rs.2 lakhs, to be paid by the Plaintiff to Defendant No.1 by way of cheque drawn in favour of the Advocate for Defendant No.1 within 8 weeks.

(K.R. SHRIRAM, J.)