IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.12.2016

PRONOUNCED ON : 23 .11.2018

CORAM :

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

CS.No.964 of 1998

M/s.IOCEE Exports Ltd.,
4E, Century Plaza
560-562, Mount Road,
Chennai – 18.
Rep by its Director Mr.Mahesh Patwari .. plaintiff

v.

1.Mrs.Hansa Jain, Proprietress
Jyoti crafts
207, Dr.Natesan Raod,
Triplicane, Chennai-5.

2.Mr.G.Kamalnathan, Power of Attorney,
Agent of M/s.Jyoti Crafts
207, Dr.Natesan Raod,
Triplicane, Chennai-5.

3.M/s.Rock Copco Ltd.,
117, Dr.Radhakrishna Salai, Mylapore,
Chennai-14.

4.M/s.Yenpoyya Minerals & Granites Ltd.,
Modda Village, Bantwal, Mangalore,
P.O.Jodumarga-574 219. .. defendants

PRAYER : Civil suit is filed under Order IV Rule 1 of OS Rules and under Order VII Rule 1 of CPC :-

(a)directing the defendants jointly and severally to pay the plaintiffs Rs.41,46,450.30 together with interest at the rate of 24% from the date of institution of the suit till the date of decree;

(b)interest at 24%p.a. on Rs.41,46,450.30 from the date of the decree till the date of realisation and

(c)Costs of the suit.

For Plaintiff : Mr.M.Aravind Subramaniam.
For Respondents : Mr.Ranganathan Reddy
for M/s.King and Patridge – D4.

J U D G M E N T

The civil suit is filed by the plaintiff for recovery of sum of Rs.41,46,450.30 with interest at the rate of 24%p.a.

2. The gist of the plaint filed by the plaintiff is as follows :-

2.1.(i) The plaintiff state that they are reputed and registered exporter having the goodwill of the business commonly in India and abroad. They have been carrying on business for number of years and have extensive export business having an annual turnover of Rs.20crores.

(ii)The plaintiff state that on 16.08.1995, in the course of their business the second defendant representing the first defendant approached the plaintiff with a business proposal stating that the first defendant has two export orders for the Export of Granite, as specified below from a Foreign buyer (i.e,) M/s.Po

Kwong (China) Stone Ltd., of Kowloon, Hongkong, hereinafter referred to as the Foreign Buyer :

a)For the supply of 700 M2 (square meters), quantity of size 600 x 600 x 20MM thickness, New Imperial Red Granite Slabs (JC/PK-002) for a total value of USD 52,500/- under letter of Credit i.e, L/C.No.L-02-M 60266 dated 05.07.1995 advised by through Indian Overseas Bank, Triplicane Branch, Chennai; and

b) For the supply of 1400 M2 (Square meters), quantity of size 800 x 800 x 20 MM thickness slabs New Imperial Red Granite Slabs (JC/PK-002) for a total value of USD 1,14,800/- under letter of credit (L/C) i.e.,L/C No.L-02-M 60275 dated 13.07.1995 advised by Punjab National Bank, Mumbai 400 001 through Indian Overseas Bank, Triplicane Branch, Chennai; and

c)The date of delivery of the first Export order being before 10.08.1995 and of the second export order in 2 lots of 700 M2 each, the first lot before 15.08.1995 and the second lot of balance 700 M2 before 30.08.1995.

2.2. The first defendant approached the plaintiff and stated that due to financial constraints, they were unable to fulfill their export orders and sought the assistance of the plaintiff to provide finance and banking facilities to meet the said export commitments of the first defendant. The plaintiff agreed to assist the defendants 1 and 2 on the following terms and conditions :-

a)That the said two L/C's shall be transferred in favour of the plaintiff's.

b)That the period of delivery for both L/C's be extended accordingly.

c)That the terms of the said L/C's be suitably and accordingly amended.

d)That the profit on the said export orders would be shared between the plaintiff and the first defendant.

e)That the entire expenses to and on the said export orders would be exclusively bore by and be to the account of the defendants 1 and 2.

f)That any interest or damages shall also be exclusively borne by and be to the account of the defendants 1 and 2.

g)That supplies for the export goods should be in conformity with the L/C.

h)The inspection, forwarding and clearing of the said consignments including the final inspection thereof will be strictly as per the Foreign Buyers orders and approved samples. This was the responsibility of the defendants 1 and 2. Shipping arrangements also had to be arranged by the defendants 1 and 2.

i)That is what the responsibility and liability of all the defendants to assure and ensure that the quality and size of the said Granite to be exported was strictly in conformity with the specifications given in the said two export L/C's and the export orders and also, required to be in exact conformity with the Foreign buyers approved sample, which was in possession of Defendants 1 and 2.

j)That the export invoices and other attendant formalities would be in to enable the plaintiffs raised on the Foreign buyer directly, so as to enable the plaintiffs to realise their monies.

k)That an advance deposit of Rs.1,00,000/- had to be paid by the plaintiffs to the first defendant towards the fulfilment of the said export contracts, and which sum was to be thereafter refunded by the first defendant to the plaintiffs on or after the shipment of the goods.

2.3. The plaintiff states that the defendants 1 and 2 agreed with the terms and conditions as mentioned above, vide letter dated 23.08.1995 requested the first defendant to transfer the L/C.No. L-02-M60275 dated 13.07.1995 for $ 1,14,800 in favour of the plaintiffs, and which was complied with by the first defendant. The transferred L/C was sent to the plaintiffs along with the bank's covering letter dated 24.08.1995 issued by Indian Overseas Bank, Triplicane Branch, Chennai and inturn the bank reconfirmed the transfer as mentioned in their letter dated 24.08.1995. The plaintiff further states that L/C.No.L-02-M60266 dated 05.07.1995 for US $ 52,500 was also transferred in favour of the plaintiff. Subsequently, as per letter dated 02.08.1995 of Omniversal Export House, Villivakkam, Chennai who were the original transferees of this L/C from the first and second defendants. This L/C had the last shipment date 10.08.1995 which was extended to 30.08.1995 as contained in amendments dated 03.08.1995 and 21.08.1995 of Punjab National Bank, Mumbai. The plaintiff state that the first and second defendants had without the consent of the plaintiff placed orders on defendants 3 and 4 on 18.08.1995 and 02.09.1995 for the supply of Red Granite Slabs of different dimensions, different colors and of inferior quality and IInd grade, and this was quite contrary to the specifications, sizes, colors and quality required by the foreign buyers as per order placed by the foreign buyer on the first defendant as contained in the L/Cs. The above order placed by M/s.Omniversal Export House, Villivakkam, Chennai along with defendants 1 and 2 on the fourth defendant was quite contrary to the specifications mentioned in the order passed by the Foreign Buyers and covered by L/C.No.L-02-M 60266 dated 05.07.1995. The variations from approved colour and quality was deliberately done by the defendants 1 and 2 with an ulterior motive to cheat the plaintiff and the foreign buyer for wrongful gain. The defendants 3 and 4 are aware of the exact specifications and quality required by the importer at abroad and the orders placed by Foreign importers. This is quite evident from the fact that the Bill of Lading issued by them has the correct specifications of the foreign buyer's order.

2.4. The plaintiffs submits that they had placed orders on the defendants 3 and 4 on 24.08.1995, 02.09.1995 and 09.09.1995 confirming to the specifications given by the Foreign buyer and as mentioned in both the Letters of Credit. It is very pertinent to note at any point of time, the defendants 3 and 4 did not bring to the knowledge of the plaintiff. The earlier orders placed by defendants 1 and 2 and the discrepancies in their orders with the orders placed by the plaintiffs herein, even though all the orders pertained to the same L/Cs and they were also aware of the specifications in the L/Cs. The defendants had conspired to cheat the plaintiffs by exporting rejected and second quality material to the foreign buyer and thus shared the proceeds amongst themselves the wrongful gain received from the transaction. The defendants 3 and 4 deliberately concealed the fact to the plaintiffs that they were supplying the materials entirely different from the approved sample and the specifications as ordered by the Foreign buyer in conspiracy with the defendants 1 and 2 only for wrongful gain. These facts and circumstances would clearly go to show that the defendants had collided and conspired to cheat the plaintiff and cause wrongful loss and damage to them. The plaintiff had no opportunity to inspect the goods since all the goods were packed and sent for shipment directly from the factory of the defendants 3 and 4. The defendants 3 and 4 came forward and furnished the copies of the purchase orders, placed by the defendants 1 and 2 only after rejection of goods and after issuing the legal notices. The conduct of the defendants clearly reflect their malafide intentions to cheat the plaintiffs. The plaintiff also paid the freight charges under the bill of lading dated 30.08.1995 to M/s.RKB.Containers for a sum of Rs.47,155.30 and Rs.94,500/- by cheque dated 04.11.1995 and 08.11.1995 respectively drawn on Indian Overseas Bank. The plaintiff had paid a sum of Rs.2,25,000/- to the defendants 1 and 2 being the share of profit in the said transaction. The plaintiff was made to part with a total sum of Rs.36,33,316.98 to the defendants 1 and 2 towards the said two export orders. The plaintiff was informed by the refusal of the Foreign Buyers to honor the L/Cs. The plaintiff state that when the consignment reached Hongkong, and after due inspection of the said goods, the foreign buyer refused to take delivery of the entire consignment as the goods were not in conformity with the quality specification and sizes specified in the orders. The said two export orders were for the supply of 1st quality new imperial red granite slabs, but on inspection at Hongkong, it was found that the goods consigned were of various other kinds of stone of damaged and rejected lot and not at all marketable.

2.5. The plaintiff state that the goods consigned were not in conformity with the export orders and the acceptance of the goods had been rejected by the foreign buyers were duly confirmed and intimated to the defendants 1 and 2 and this was conveyed by the first defendant on 11.10.1985 to the plaintiff. The foreign buyers has again sent a fax addressed to the first defendant dated 13.10.1995, wherein the foreign buyer had claimed damages and also lodged a complaint with the Indian High Commission, Hongkong against the first defendant. The plaintiffs had also informed the defendants 3 and 4 about the refusal of the foreign buyers to take delivery of the goods and sought for their explanations. From the survey report dated 17.10.1995 by M/w.Heinch Public Marine & Cargo Survey (HK) Ltd., confirmed the fraud played by the defendants in procuring, forwarding and despatching goods contrary to and against the specification covenanted and contracted under the said two export orders. Further, the defendants acted under a common conspiracy and with an intentions to commit criminal breach of trust, cheating and fraud by supplying rejected goods of contrary sizes and wrong colours to the Foreign buyer, and making the plaintiff part with its monies and have thereby put the plaintiff to immense financial loss. The defendants have therefore conspired and jointly committed fraud suppressing the orders placed for the procurement of the granite which were of different sizes and colours and holding continuously out that the same were in conformity with the two L/C and cheating the plaintiffs and making it to part with its monies towards the fulfilment of the said two export orders. Apart from the amounts incurred by the plaintiffs in India, the plaintiffs had also spend huge money to go to Hongkong to inspect the goods, pay for the clearance and demurrage charges and also storage charges for the goods in Hongkong and besides all these the plaintiff paid a very heavy amount towards interest, warehousing and clearing expenses to a tune of Rs.13,67,017/-.

2.6. The plaintiffs issued legal notice dated 26.06.1996 to all the defendants and to which the third defendant sent an interim reply dated 22.07.1996 and thereafter a final reply through its counsel dated 23.08.1996, totally denying liability and putting the blame on the first defendant. The fourth defendant also sent a reply through its counsel dated 22.07.1996 also denying liability. The defendants 1 and 2 has not filed any reply. The plaintiffs state that they were induced by false representation by the defendants to part with huge amounts to them for the purpose of exporting granites contrary to the specifications in the purchase orders and specifications in the L/Cs. Therefore, the plaintiff is entitled to refund the entire amount paid for the export and also for the proposed profit on the entire exports. The plaintiff is entitled to refund all the amounts advanced by them and as they were induced to part with these payments by means of fraud and misrepresentation made by the defendants. The defendants are jointly and severally liable to reimburse the plaintiffs all the amounts advanced by them and also for the damages for breach of contract. The defendants have failed to honor their commitments and have acted in collusion with conspiracy and with malafide intentions. The plaintiff has no other alternative remedy except to file this suit against the defendants for recovery of the amounts. The suit is not barred by limitation since the foreign buyers informed the plaintiff about the rejection of the goods on 11.11.1995 and the amounts expended on the said contract was on 01.06.1996 and when the defendants refuted the rejection of the goods on 26.08.1996. Hence, the plaintiff filed the present suit for the relief as prayed for.

2.7. The fourth defendant filed the written statement submitting that the above suit is barred by limitation as per the Carriage of Goods by Sea Act, 1925 and the above suit should be dismissed in limine since the suit ought to have filed within one year from the date of rejection of the goods by the Foreign Buyers on 02.10.1995. The 4th defendant states letters of credit and bills of lading for the suit transaction is of the year 1995 viz., L/C.No.L-02-M60275 dated 13.07.1995 for USD 1,14,800/- and L/C.No.L-02-M60266 dated 05.07.1995 for USD 52,500/- in favour of the 1st defendant. The above two export orders were rejected by foreign buyer M/s.PO Kwong (China) Stone Limited which was confirmed by their letter dated 02.10.1995 . According to survey report dated 10.11.1995 of M/s.Hench Public Marine & Cargo Survey (Hong Kong) Limited, engaged by the foreign buyer has stated the goods supplied are not in conformity with specifications stated in their purchase order. Whereas, the plaintiff had issued legal notice dated 26.06.1996 to the defendants claiming loss and damages and the above suit was filed on 10.11.1998, which is clearly barred by limitation as per Carriage of Goods by Sea Act, 1925. Further, this defendant states that there is no privity of contract between the plaintiff and the suit is not maintainable either in law or on facts. The terms and conditions which were agreed between the plaintiffs and the defendants 1 and 2 for extending financial and other assistance to the 1st defendant for which the 4th defendant is not a party. With regard to transfer of L/C.No.L-02-M60275 dated

13.07.1995 $1,14,800 in favour of the plaintiff by the first defendant and the L/C.No.L-02-M60266 dated 05.07.1995 for US $ 52,500 was also transferred in favour of the plaintiff, subsequently, as per letter dated 02.08.1995 of Omniversal Exports House, Villivakkam who were the original transferees of this L/C from the defendants 1 and 2. The 4th defendant is not a party to the above two L/Cs and has got nothing to traverse.

2.8. The 4th defendant averred that the order passed by the defendants 1 and 2 on the 4th defendant was quite contrary to the specifications mentioned in the order placed by the foreign buyer. The variations, forms, approved colour and quality were deliberately done by the defendants 1 and 2 with an ulterior motive to cheat the plaintiff and foreign buyer for wrongful gain. The 4th defendant submits that the supply of granite slab was made to the first defendant who inspected the consignment item and accepted the same. As per purchase orders, the first defendant and the M/s.Omniversal Export house, Villivakkam, Chennai accepted the said order and the plaintiff cannot attribute loss, non-supply of materials as per their specifications against this defendant. The defendants 1 and 2 and M/s.Omniversal Export house, received and accepted the materials from the 4th defendant herein without any demur, thus the question of collusion by the 4th defendant with the other defendants does not arise herein. The 4th defendant reiterates that the defendants 1 and 2 had inspected the quality and size of the granite manufactured by the 4th defendant before export, inspected the packing thereof and forwarded to Madras for final loading the containers for onward shipment to Hongkong. This establish that the defendants 3 and 4 supplied the items and the quality, size as verified by the defendants 1 and 2. The 4th respondent is not liable for the alleged loss incurred by the plaintiff since the quality and size of the goods were inspected by the defendants 1 and 2 before packing and loading of the consignment. The total value of invoice Nos.100 and 101 comes to Rs.22,21,090/- whereas the suit claim amount also includes the value of invoice raised by third defendant amounting to an additional amount of Rs.11,38,380/-.

2.9. The 4th defendant herein reiterates that on survey of the goods received in Hong Kong the survey report dated 17.10.1995 M/s.Heinch Public Marine and Cargo Survey (HK) limited also confirms the fraud played by the defendants 1 and 2 in procuring, forwarding and dispatching goods contrary to and against the specifications covenanted and contracted under the said export orders. Further, the 4th defendant states that the defendants 1 and 2 who are the agents of the plaintiff have inspected the consignments before loading and shipment of the items to Hong Kong. Thus, the 4th defendant is not liable whatsoever for the losses incurred by the plaintiff. The plaintiff issued legal notices to all the defendants. The 3rd defendant sent an interim reply dated 22.07.1996 and thereafter a final reply through its counsel dated 23.08.1996, totally denying the liability and putting the blame on the 1st defendant. The 4th defendant sent his reply through its counsel dated 22.07.1997 by denying the liability. The non reply to the legal notice of the plaintiff by the defendants 1 and 2 will establish that they have colluded and acted in a fraudulent manner thereby causing loss to the plaintiffs. The suit against the 4th defendant is not at all maintainable either in law or on facts and further the suit is barred by limitation as per the Carriage of Goods by Sea Act, 1925 and hence, the 4th defendant prays for dismissal of the suit filed by the plaintiff.

3.Gist of the written statement filed by the 4th defendant is as follows:

3.1.The plaintiff filed reply statement for the written statement filed by the 4th defendant, wherein it is stated that the suit is filed against the defendants 1 to 4 for recovery of money, the defendants 1 to 4 together, by conniving, cheating, supplied damaged goods, which was different from the sample and the specifications, knowing very well that such goods are not to be exported. The foreign buyers placed orders for Imperial Red Granite, as per the samples approved by the buyers, against specific contract terms placed by the Plaintiff on 09.09.1995 and fax message dated 11.09.1995, addressed to Mr. Rizwan, who filed the written statement on behalf of the 4th defendant. The goods were inspected by the defendants 1 and 2, without filing any proof or acceptance of the rejected goods, when the defendants 1 and 2 were not authorized to do so by the plaintiff. Further, the plaintiff was not informed about the inspection and the plaintiff came to understand that the materials supplied conformed to the sample approved by the buyer.

3.2. The plaintiff states that the 4th defendant accepted the legal notice and sent a reply through their Counsel dated 22.07.1996. The 4th defendant who is the supplier ought to have supplied the goods as per the purchase order of the buyer and as per the terms of the Letter of Credit. Further, the defendants 1 & 2 were never authorized to inspect the goods or authorized to export the goods without the consent of the plaintiff.

3.3. It is further stated that there is no privity of contract between the plaintiff and the 4th defendant and that the suit is barred by limitation as per the Carriage of Goods Act, 1925.

4.The gist of the reply statement filed by the plaintiff is as follows:

4.1.The plaintiff further submits that the 4th defendant is trying to mislead the Court by relying on carriage of goods by Sea Act, when neither the plaintiff or either of the defendants do transport or carriage business.

4.2. The Plaintiff states that only rejected goods of wrong size and colors were packed and despatched by the defendants 3 and 4 and loaded in containers directly from their factory premises, 100% EOU factories approved by the Government of India and it is completely wrong and unethical for the defendants to state that the plaintiff "Inspected the packing thereof and forward to Madras for final loading in containers".

4.3. The Plaintiff paid full amount as contracted to the defendants 3 and 4 for supply of goods, as per purchase orders. But in complete disregard to the orders, the defendants have colludedly supplied rejected goods and shifted the entire responsibility on the defendants 1 and 2, whose whereabouts are not known either to the plaintiff or to the defendants 3 and 4. Hence, they are taking a plea that goods were inspected, packed and despatched in concurrence of defendants 1 and 2 and disregarding their contractual dealing with the Plaintiff, who has paid them for goods of Good Exportable quality as per buyers orders.

4.4. The Plaintiff submits that the allegations contained in the

Written Statement filed by the 4th defendant stating that they supplied granite slabs and tiles to M/s.Omniversal Export House, Villivakkam, Chennai as per their purchase orders and also that these supplies were accepted by 1st defendant and Omniversal Export House. The plaintiff submits that even as per the purchase order issued by the 1st defendant, the specifications of the Granite Tiles were explicitly mentioned viz. Granite Slabs of Red (Imperial Red). The plaintiff submits that it is noted from the copies of correspondence, given by the 4th defendant to the plaintiff, during the visit of plaintiff representative to their factory when complaints were made by the buyers. This correspondence with Omniversal Export House, Chennai, states that they contracted to purchase goods of various colors of Second Quality at USD 60 per sq.mtr against purchase rate of USD 72 per sq.mtr by the Plaintiff.

4.5. The Plaintiff denies the averments made in the Written Statement filed by the 4th defendant "that goods supplied by defendants 3 and 4 were in conformity of size, quality, color etc., as per orders placed by the Plaintiff on them", and that goods were inspected and accepted by the First and Second defendants prior to its despatch from the factory of the defendants 3 and 4. The defendants 1 and 2 and Omniversal Export House, Villivakkam, Chennai have received and accepted the materials supplied by the 4th defendant without any demur is misconceived and distortion of facts. Even if the defendants 1 & 2 and M/s. Omniversal Export House, Chennai had agreed, the same was not in accordance with the terms of the L/C which was opened by the buyer and duly transferred to the plaintiff. The plaintiff submits that they paid the defendants as per the agreements placed on the defendants 3 and 4, goods were cleared from their factories under Central Excise Department supervision, wherein the plaintiff was a party, packed and stuffed in containers at the factory of the defendants 3 and 4, which were directly loaded on shipping vessel from Madras. The Plaintiff submitted proof of export to the Central Excise Department by marking copies to defendants 3 and 4. M/s. Omniversal Export House who have no authority to receive goods on plaintiff's behalf, could not give their acceptance to the 4th defendant. This clearly shows the foul played and the fraudulent conduct of the defendants. The Plaintiff further submits that no supporting documents have been filed by the 4th defendant in support of their imaginary and far fetched averments. The Plaintiff had advised about the quality of goods to all the defendants vide fax messages dated 09.10.1995 and 13.09.1995. Similarly, the averments of written statement filed by the 4th defendant is denied as being false and misleading, as the goods were packed and loaded in containers at the factory premises of the 4th defendant and not at Chennai. The Plaintiff by its Letter dated 13.10.1995 informed the 4th defendant about the variance in the goods shipped by them and the goods as mentioned in the L/C and the 4th defendant has not replied to the above said letter.

4.6. The Plaintiff submits that to their knowledge, the 1st defendant, being a housewife, had never moved out of Chennai and hence she could not have inspected the goods and accepted the quality or color of the goods contrary to the goods ordered for supply of different quality as against the foreign buyers. The Plaintiff submit that the 4th defendant has miserably failed to confirm that goods were supplied as contracted except repeatedly stating that goods were inspected and accepted by the defendants 1 and 2 and M/s.Omniversal Export House, Villivakkam, Chennai. The Plaintiff states that the 4th defendant has maintained silence and not mentioned anything on the Survey Report filed in these proceedings which clearly indicates the difference between the goods contracted for and the goods supplied.

4.7. Further, the 4th defendant failed to submit as to how he was not part of the conspiracy, fraud, breach of contract in cheating the plaintiff except trying to shift the burden on the defendants 1 and 2. The plaintiff submits that the rejected, different size of goods and colors other than approved colour i.e. Imperial Red, were supplied by the defendants 3 and 4. In fact, the 4th defendant ought to have confirmed with the plaintiff on the correctness of the goods. The Plaintiff submit that all the defendants have gained out from this unjust, fraud, cheating, breach of contract and have conspired together in defrauding the plaintiff of their money and caused immense loss to their reputation in the international market as well as with their bankers. Further, vide Letter dated 07.10.1995, the 4th defendant had written to the plaintiff regarding the correctness of the shipping Bills. Hence, it is strange how the 4th defendant is now taking a completely different stand which is quite contrary to their own Letter.

4.8. The plaintiff denied the allegations that "the 4th defendant herein supplied the consignment items as per the export orders", then the same should have been received by the foreign buyers, and they would not have rejected the goods. The plaintiff submits that the foreign buyers' paid the first bill, received the goods and after checking the goods, immediately advised that the goods were different from their orders and that they will not accept any more goods and wanted refund of the amount paid by them, as per their fax messages dated 20.10.1995 and 13.10.1995. Further, there is no privity of contract between the plaintiff and M/s.Omniversal Export House. Hence, any reference by the 4th defendant to this concern would have no relevance as far as this suit is concerned and prays for decreeing the suit.

5. Based on the pleadings of both the parties documents filed by both parties and submission made by both the Counsel the following issues have been framed by this Court on 22.10.2013 :-

1.Whether there was any contract between the plaintiff and the fourth defendant on the subject suit?

2.Whether Carriage of Goods by Sea Act will apply to this case?

3.Whether the suit is barred by limitation as per the Carriage of Goods by Sea Act, 1925?

4.Whether the fourth defendant was responsible for loading the granites from their factory without giving an opportunity to plaintiff to inspect the goods?

5.Whether the plaintiff had paid the entire money under the Contract?

6.Whether the fourth defendant have supplied the goods as per the specification in the Purchase Order?

7.When the fourth defendant admittedly supplied Granite slabs, Granite Tiles to the first defendant as per their purchase orders which were accepted without any demur, can the plaintiff make a claim as against the fourth defendant?

8.Whether the defendants have colluded and conspired to cheat the plaintiff?

9.Whether the fourth defendant had deliberately concealed the discrepancies between the order placed by the first and second defendants and the orders placed by the plaintiff on them?

10.Whether the plaintiff is entitled for the suit claim of Rs.41,46,450.36 from the fourth defendant?

11.Whether the plaintiff is entitled for interest at the rate of 24% from the date of institution of the suit in the absence of a specific contract?

12.To what other reliefs, the parties are entitled to?

6. The defendants were set exparte and exparte decree was passed on 21.09.2007. Subsequently after filing execution petition, the 4th defendant alone filed application in OA.No.2732 of 2012 to set aside the exparte decree. The said application was allowed on 24.09.2012. The 4th defendant alone filed written statement and contesting the suit.

7. After completion of pleadings, during trial, on the side of the plaintiff PW1 was examined and marked Exs.P1 to P51. On the side of the defendants 4th defendant was examined as DW1 and marked Exs.D1 to D6.

8(i). The case of the plaintiff is that the Plaintiff Company is a registered Exporter carrying on business for several years with goodwill and reputation throughout India as well as abroad.

8(ii) The Second Defendant herein representing the First Defendant approached the Plaintiff on 16.08.1995 stating that they are having two Export Orders for the Export of Granite from a Foreign buyer (i.e.) M/s. PO Kwong (China) Stone Ltd., of Kowloon, Hongkong, hereinafter referred to as Foreign Buyer and had sought for a financial assistance and banking facilities from the Plaintiff in order to meet the commitments of Foreign Order. The First Defendant was in financial crisis and the same was accepted by the Plaintiff with certain terms and conditions, for which the First and Second Defendants had agreed. The Foreign Buyer had placed an order with specific quantity, size, type and quality of goods. Since the terms and conditions were agreed by the First and Second Defendants, the Plaintiff had requested the First Defendant to transfer of Letters of Credit dated 13.07.1995 for $ 1,14,800/- and

Letters of Credit dated 05.07.1995 for U.S. $ 52,500/- in favour of them vide their Letter dated 23.08.1995.

8(iii) Subsequently, the foreign buyer rejected two Containers and served copies of Orders placed on them by the First and Second defendants dated 18.08.1995 and 02.09.1995 with Defendants 3 and 4 for supply of Red Granite Slabs with inferior quality/second quality which was contrary to the specifications of goods ordered by the Foreign Buyer, without the consent and knowledge of the Plaintiff herein.

(iv) The Plaintiff had also placed orders with Third and Fourth Defendants on 24.08.1995, 02.09.1995 and 09.09.1995 conforming to the specification given by the Foreign Buyer and also mentioned in both the Letters of Credit and had paid a sum of Rs.14,21,92,50/- to the 3rd defendant with regard to the Orders dated 24.08.1995, 02.09.1995 and 09.09.1995 and paid a sum of Rs.22,21,089.98 towards Invoice No.100 and Rs.7,86,806/- towards Invoice No.101.

8(v) The defendants 3 and 4 colluded with the defendants 1 and 2 with an ulterior motive to cheat the Plaintiff and the Foreign Buyer for wrongful gain and the Plaintiff had no knowledge about the earlier Orders placed by defendants 1 and 2 about the discrepancies. Even though all the orders pertain to the same

Letters of Credits and they were fully aware of the specifications of goods required by the Foreign Buyer under the Letters of Credits. The defendants 3 and 4 had supplied the rejected and second quality goods for export to the Foreign Buyer without knowledge and consent of Plaintiff and the Plaintiff came to know about the same only when the Foreign Buyer rejected the goods.

8(vi) Apart from payment of total sum of Rs.33,59,469.98, the plaintiff had also paid directly to the Clearing and Forwarding agents of defendants 1 and 3 a sum of Rs.48,847/-. All the above payments were made by the Plaintiff only on the assurance that the Foreign Buyers would honour the Letters of Credits and the defendants would export the goods in conformity with the quality and specifications of Orders and Letters of Credits of Foreign Buyer. So far the Plaintiff had spent a total sum of Rs.36,33,316.98 to the First and Second Defendants towards the above two export orders. The Foreign buyer had rejected the first lot received by them and also asked to take back the goods supplied and advised that they will not take delivery of the balance goods and also lodged Complaint before Indian High Commission, Hongkong against the First Defendant and the Plaintiff.

8(vii) The Plaintiff had also informed the defendants 3 and 4 about the fax message received from the Foreign Buyer to take delivery of the goods and sought for their explanation. However, so far no explanation was offered by the defendants 3 & 4. Further the Survey Report dated 17.10.1995 issued by M/s.Heinch Public Marine and Cargo Survey (Hongkong) Ltd., had also confirmed the fraud played by the defendants.

8(viii) Further all the Defendants acting under a common conspiracy and with an intention to commit Criminal Breach of Trust, cheating and fraud by supplying rejected and second quality goods to the Foreign Buyers. The plaintiff had incurred loss to a huge sum of Rs.36,33,316.98 towards the business transaction based upon the assurance made by the defendants herein. Since the defendants had played fraud and had supplied rejected and second quality goods to the Foreign Buyer against the required goods of specifications mentioned in the Letters of Credit. Hence, the Plaintiff was put under great loss and hardship. The Plaintiff had also issued a Legal Notice dated 26.06.1996 to the all the defendants. The First and 2nd defendant had not replied and defendants 3 and 4 sent evasive replies dated 23.08.1996 and 22.07.1996 respectively.

8(ix) Aggrieved by the fraudulent act committed by the defendants herein the Plaintiff had now filed the present suit for recovery of money for Rs.41,46,450.36 along with interest at

24%p.a. against all the defendants jointly and severally.

9 (i). The case of the fourth defendant is that the 4th defendant in his Written Statement stated that the suit filed as against them is not maintainable either in law or on facts and further the suit is barred by limitation as per the Carriage of Goods by Sea Act, 1925. Since, the suit ought to have been filed within one year from the date of rejection of goods by the Foreign Buyer i.e. 02.10.1995 and hence the suit has to be dismissed with exemplary costs. Further the Letters of Credit pertains to the year of 1995 which is the subject matter of the suit. The Export Orders were rejected by the Foreign Buyer on 02.10.1995 and the Survey Report confirming the fraudulent act of First Defendant was given on 10.11.1995. The Plaintiff issued Legal Notice on 26.06.1996 claiming damages from the defendants. All the transaction were taken place between 1995 and 1996, but the Suit was filed in the year of 1998. Hence, the suit is barred by limitation.

9(ii) The 4th defendant in his written statement averred that there is no privity of contract between the plaintiff and 4th defendant. The goods were supplied as per orders placed by the 1st defendant and the 1st defendant had also inspected the consignment item before desptaching to Foreign Buyer and had accepted the goods without any demur hence the 4th defendant is not liable for the loss and for non-supply of materials specified in the Letters of Credit and also the question of collusions with the defendants 1 and 2 will not arise.

9(iii) Further the plaintiff had paid a sum of Rs.22,21,090/- towards the invoices No.100 & 101 and an additional amount of Rs.11,38,380/- was paid to the 3rd defendant. Hence, the 4th defendant is not liable to pay the Suit claim jointly and severally, since, the 4th defendant is no way connected with the other payments payable to the plaintiff. With regard to other expenses like loading, packing, shipment etc., this defendant is no way responsible or liable to pay. Hence, the 4th defendant prays for dismissal of the suit.

10.Heard the rival submissions made on both sides and perused the material records.

11.Issue No.1

11.(i). The learned counsel for the plaintiff would submit that there is a contract between the plaintiff and the 4th defendant, since, the plaintiff had placed an order dated 09.09.1995 and an amended order dated 22.09.1995 before the 4th defendant. The order dated

09.09.1995 and 22.09.1995/Ex.P9 and P16 respectively which shows the orders placed by the plaintiff with regard to the letters of credit No.L-02-M 60275 dated 15.07.1995 and the said was acknowledged by the 4th defendant to the plaintiff through fax dated 29.09.1995/Ex.P21. With reference to the above orders invoice No.100 dated 06.09.1995/Ex.D4 and invoice No.101 dated 11.09.1995/Ex.D5. The 4th defendant in his cross examination accepted the receipt of the amended order dated 22.09.1995 placed by the plaintiff. A total sum of Rs.22,21,089.98 has been settled towards full and final settlement to fourth defendant for the goods supplied by them. Form-H/Ex.P19 is the letter sent by the plaintiff to the 4th defendant, the goods are cleared under AR4 duly signed by the customs and payments were made in this regard to the 4th defendant.

11(ii)In this regard, the 4th defendant would submit that the 4th defendant did not have any contract with the plaintiff, but only with the defendants 1 and 2, who have placed orders with M/s.Omniversal Export house, Villivakkam, Chennai. Subsequently, by an another contract between the plaintiff and the 1st defendant, the letter of credit was changed in the name of the plaintiff, for which, the 4th defendant is not a party.

11 (iii). On a perusal of the averments made in the plaint and

also in the written statement filed by the 4th defendant, the evidence of PW1 and DW2 and the documents produced by the both the parties would go to show that there is a contract between the plaintiff and the 4th defendant, since, the plaintiff had placed an order dated 09.09.1995/Ex.P9 and an amended order dated 22.09.1995/Ex.P16 before the 4th defendant which clearly shows that the orders placed by the plaintiff with regard to the letter of credit No.L-02-M 60275 dated 15.07.1995, the same was acknowledged by the 4th defendant through fax dated 29.09.1995/Ex.P21. The above facts were admitted by the 4th defendant during cross examination. With regard to the above orders, the 4th defendant had raised invoice No.100 dated 06.09.1995/Ex.D3 and invoice No.101 dated 11.09.1995/Ex.D4 in the name of the plaintiff. The 4th defendant as DW1 in his cross examination has accepted that they had raised invoices Nos.100 and 101 as against the plaintiff. The plaintiff had also paid a total sum of Rs.22,21,089.98 in full and final settlement towards invoice No.100/Rs.14,334,283.20 and invoice No.101/Rs.7,86,806.78 for the goods supplied by the 4th defendant. Ex.D5 & Ex.P19 is the letter sent to the 4th defendant by the plaintiff stating that they had enclosed Form-H. From the above pleadings, oral and documentary evidences, it is clear that as stated by the learned counsel for the plaintiff that there is a contract between the plaintiff and the 4th defendant. Since, the orders has been placed by the plaintiff to the

4th defendant, the same has been accepted by the 4th defendant as DW1 in the cross examination. In this regard the plaintiff has made the payments in full and final settlement to the fourth defendant, the plaintiff had issued Form-H and the goods are cleared under AR4 duly signed by the Customs. From the above, oral and documentary evidences, it is proved that there is a privity of contract between the plaintiff and the 4th defendant, hence, the issue No.1 is answered accordingly.

12.Issue No.2

12.(i). The learned counsel for the plaintiff would submit that as per Rule 2 of the Carriage of Goods by Sea Act applies to the Carriage of Goods by sea under bill of lading or similar documents of title, from the port in India to any other Port or outside India. In the case on hand, the plaintiff had placed orders with regard to foreign buyers and informed the 4th defendant to deliver the goods on or before 13.09.1995 at Madras Port and not to foreign buyers directly. Ex.P9 is the copy of the order placed by the plaintiff, wherein it has been specifically stated in "*Sl.No.6 as Delivery – The Goods must reach Madras latest by 13.09.1995*". Ex.P16 is the another order placed by the plaintiff, wherein it has been specifically stated in "*Sl.No.6 as Delivery – The Goods must reach Madras latest by 07.10.1995*". The 4th defendant in his cross examination as DW1 admitted that the plaintiff asked them to deliver the goods locally and the same is also reflected in the written statement. The goods supplied against the orders were rejected and returned from Madras to 4th defendant as the plaintiff received rejection communication from the foreign buyers which was repudiated by the 4th defendant which clearly confirms the participation in the conspiracy against the plaintiff. The 4th defendant attempted to mislead the Court by relying on Carriage of Goods by Sea Act when neither the plaintiff nor the defendants do transport or sea carriage business. Hence, the Carriage of Goods by Sea Act will not be applicable to the facts of the present case on hand. Since, already stated the contract between the plaintiff and the 4th defendant agreed to deliver the goods in the port itself. Regarding this issue, the learned counsel for the 4th defendant would submit that the Carriage of Goods by Sea Act only will apply to this case. The plaintiff being an exporter of goods should have filed the suit within the period of limitation as specified in the Carriage of Goods by Sea Act, 1925 from the date of rejection of goods by the foreign buyer.

12(ii). On a reading of the entire plaint and written statement and also the oral and documentary evidences of both the parties. The 4th defendant during the cross examination clearly admitted that the plaintiff asked them to deliver the goods locally, the same was reiterated in the written statement filed by the 4th defendant. On a perusal of the Ex.P9 and Ex.P16, oral evidence and cross examination of DW1, it is evident that the plaintiff had informed the 4th defendant to deliver the goods to Madras port and not to the foreign buyers directly. Since, the plaintiff had made a request to deliver the goods to the Madras port and not to the foreign buyers, there is no carriage of goods through sea between the plaintiff and 4th defendant. Thus, the Carriage of Goods by Sea Act will not apply to the facts of the present case on hand. Hence, the issue is answered accordingly.

13.Issue No.3

13.(i). In this regard, the learned counsel for the plaintiff would submit that the carriage of goods by sea will not apply to the case on hand. Hence, there is no question of limitation will arise as per the Carriage of Goods by Sea Act. From the date of rejection of goods, the suit has been filed within a period of three years, therefore, the same is not barred by limitation.

13.(ii). The learned counsel for the 4th defendant would submit that the plaintiff being an exporter ought to have filed the suit within the period of limitation as specified under the Carriage of Goods by Sea Act, from the date of rejection of goods by the foreign buyer i.e., on 02.10.1995. the letter of credit and bills of lading in the subject suit transaction and the shipment is of the year 1995 viz., L/C.No.L-02-M60725 dated 13.07.1995 for US $ 1,14,800 and

L/C.No.L-02-M60266 dated 05.07.1995 for US $ 52,500/- in favour of the 1st defendant. The above two export orders were rejected by the foreign buyer M/s.PO Kwong (china) Stone Limited which was confirmed by their letter dated 02.10.1995. As per the survey report dated 10.11.1995 of M/s.Hench Public Marine & Cargo Survey (Hong Kong) Limited, engaged by the Foreign buyers had stated that the goods supplied were not in conformity with specifications stated in their purchase order. Whereas the plaintiff had issued legal notice dated 26.06.1996 to the defendants claiming loss and damages and filed the suit on 10.11.1998, which is clearly barred by limitation as per the Carriage of Goods by Sea Act, 1925. Even in the reply statement filed by the plaintiff, they have made a feeble attempt as to how the above suit is not barred by limitation but only putting the blame on the 4th defendant. It is the legal binding of the plaintiff to file the suit within the period of limitation as stipulated under the statute and cannot blame this defendant by circumventing their mistake. Article III Rule 6 is a part of the Carriage of Goods by Sea Act and this being a special Act, the period of limitation prescribed by it prevails over the period prescribed under the Limitation Act, 1963. In support of his contention, the learned counsel also placed reliance on the judgment reported in **(2004) 3 CTC 686** in the case of **Shipping Corporation Limited V. Union of India** as follows :

"..... it is clear form the above discussion and conclusion that once the liability is extinguished under the clause referred above, irrespective of acknowledgment of liability, the same cannot be enforced after the expiry of the prescribed period. They also observed that the said clause has to be interpreted specially in view of the international character of the legislation. We have already referred to the preamble of the (The Indian) Carriage of Goods by Sea Act, 1925, which shows that the Act was brought in pursuant to the decision taken by international authorities after deliberation and discussion; accordingly, as observed by the Hon'ble Supreme Court, the provision particularly relating to limitation has to be construed strictly".

13(iii). During cross examination, PW1 has admitted that during October 1995, the 1st defendant received the complaint from the foreign buyer and the 1st defendant informed the said complaint to the plaintiff through fax, the period of limitation starts from 1995, therefore, the suit is barred by limitation.

13(iv). As already held in the earlier issue No.2, the Carriage of Goods by Sea 1925 is not applicable to the present case on hand. Therefore, the period of limitation that the suit should have been filed within one year from the date of rejection of the goods by foreign buyers i.e, on 02.10.1995 is not applicable to the present case on hand. Since, it is a contract, from the date of knowledge of rejection of the foreign buyer the suit has been filed within the period of three years. Therefore, the suit is filed within the period of limitation. Hence, the issue is answered accordingly.

14.Issue No.4

14(i). In this regard, the learned counsel for the plaintiff would submit that the order has been placed by the plaintiff with regard to letter of Credit No.L-02-M-60275 dated 15.07.1995. Though, the letter of credit was originally in favour of the 1st defendant. Subsequently, it was transferred in favour of the plaintiff. The documents in Ex.P5 and Ex.P6 are letters sent by Indian Overseas Bank in favour of the plaintiff. Further, the amount with regard to the orders were received from the plaintiff by the 4th defendant, Form-H was issued by the plaintiff after making the shipments and further communication with regard to the orders were made with the plaintiff by the 4th defendant. Whileso, the 4th defendant is having responsibility to inform the plaintiff to inspect the goods before packing and exporting the goods to Madras Port. Instead, the 4th respondent packed and supplied the rejected, second quality goods without any murmur or information to the plaintiff, this shows the malafide intention of the 4th defendant and other defendants to cheat the plaintiff.

14(ii). In the written statement filed by the 4th defendant nowhere it is stated that they informed the plaintiff to inspect the goods before packing and exporting. The defendants 1 and 2 and one M/s.Omniversal Export House, Villivakkam, Chennai had inspected the goods on behalf of the plaintiff and they had accepted the same without any demur is not at all acceptable one. The plaintiff had not authorised the defendants 1 and 2 or M/s.Omniversal Export House, Villivakkam, Chennai to inspect the goods on behalf of the plaintiff, hence, the 4th defendant should have intimated the plaintiff to inspect the goods and not the defendants 1 and 2. The 4th defendant ought to have intimated to the plaintiff that the 1st defendant and M/s.Omniversal Export House has inspected the goods and confirmed the specifications of the foreign buyers. The plaintiff knew about the orders placed by defendants 1 and 2, it would not have placed direct orders dated 24.08.1995, 02.09.1995 and 09.09.1995 on defendants 3 and 4, they would have demanded the copies of the orders available before proceeding any further, this would go to show the complete contrast to their agreement with defendants 1 and 2. Defendants 3 and 4 had no knowledge about the terms and conditions of the agreement between the plaintiff, defendants 1 and 2. Therefore, the assumption without any documentary proof, that the plaintiff authorised the defendants 1 and 2 to inspect the goods or negotiate with defendants 3 and 4 is absurd and highly imaginary, except the introduction by defendants 1 and 2 as the defendants 3 and 4 are suppliers. The defendants 3 and 4 have not produced any copy of inspection certificate and the same was confirmed by DW1 in his evidence.

14(iii). Further, the 4th defendant as DW1 in his cross examination admitted that they have intimated the plaintiff regarding the inspection of goods before shipment and the plaintiff has not authorised any one on their behalf to inspect the goods. The 4th defendant has not produced any documentary evidence to this effect and no averments has been raised in this regard in the written statement filed by the 4th defendant.

14(iv). In this regard, the learned counsel for the 4th defendant would submit that the defendants 1 and 2 have inspected the goods before exporting and this was proved by the plaintiff and the plaintiff had exported the goods to the foreign buyers and the 4th defendant is no way liable or responsible for the loss incurred by the plaintiff. The plaintiff should have requested the 4th defendant for inspecting the goods before exporting to the foreign buyers. Originally, the defendants 1 and 2 had placed purchase orders to the 4th defendant, the 1st defendant inspected the quality and size of the granites manufactured by the defendants 3 and 4 before export and also inspected the packing thereof before forwarding to Madras and final loading in containers for the purpose of onward shipment to Hong Kong. This shows that the 4th defendant is not liable for the loss incurred by the plaintiff in any manner, with regard to the supply of the consignment at Hong Kong based upon the two export orders which were not of the quality and size specifications, the 4th defendant herein reiterates that on survey of the goods received in Hong Kong vide Survey Report dated 17.10.1995 by M/s.Hench Public Marine and Cargo Survey (HK) Ltd, also confirms the fraud played by the defendants 1 and 2 in procuring, forwarding and despatching the goods contrary to and against the specifications covenanted and contracted under the said two export orders. Thus the defendants 1 and 2 who inspected the consignment items before despatching and packing are responsible for the loss incurred by the plaintiff, the 4th defendant is no way liable or responsible for the loss incurred in the suit transaction and hence the 4th defendant is not liable for the suit claims. The 4th defendant as DW1 in his cross examination had clearly stated that Form-H issued by IOCEE Exports ltd, for the two invoices marked as documents D5 and D6 in which they have shown as third party exporters.

14(v). The learned counsel for the 4th defendant would denies the contentions of the plaintiff that all the defendants acted under a common conspiracy by supplying the goods contrary to the sizes, colours etc to the foreign buyers thereby causing immense loss to the plaintiff. The 4th defendant submits that the defendants 1 and 2 reiterates that the defendants 1 and 2 verified the consignment items before packing, loading and shipment of the items to Hongkong and hence, the 4th defendant herein is no way liable for the loss incurred by the plaintiff. Ex.P40 is a letter addressed by the plaintiff to the Foreign buyer, wherein it is clearly stated that the officials of the 1st defendant inspected the goods and only after their approval the goods were despatched to the buyers. Hence, the 4th defendant is not liable to pay any damages as prayed for in the plaint.

14(vi). On a perusal of the pleadings, and the oral and documentary evidences of both the parties, as stated by the learned counsel for the plaintiff the 4th defendant has not produced any documentary proof to show that they intimated the plaintiff for inspection before packing and despatching the goods and also not produced any document to show that the plaintiff had authorised the defendants 1 and 2 to inspect the goods on behalf of the plaintiff before packing and despatching the goods to foreign buyers. From the evidence of PW1 and also the documentary evidence to show that the plaintiff has not been given any opportunity to inspect the goods either before packing or despatching the goods. The oral and documentary evidences would clearly show that the goods were not upto the specifications mentioned in the orders. Hence, the foreign buyers rejected the goods. From the above discussion in Issue No.II, there is privity of contract between the plaintiff and the 4th defendant. The plaintiff placed the orders to the 4th defendant, therefore the 4th defendant should have given opportunity to the plaintiff to inspect the goods before packing and despatching the goods to the foreign buyers, as to whether the consignment are in the specifications mentioned in the letter of credit. Therefore, in the absence of any evidence that the 4th defendant neither produced any letter or communications sent to the plaintiff to inspect the goods before packing and despatching, in the absence of any proof filed by the defendants the persons who have inspected the goods were not authorised by the plaintiff. The contentions raised by the 4th defendant is not acceptable and hence, the 4th defendant was wholly responsible for loading the granite goods to the foreign buyers from the factory without giving any opportunity to the plaintiff to inspect the goods. Hence, the issue is answered accordingly in favour of the plaintiff.

15.Issue No.5

15(i). In this regard, The learned counsel for the plaintiff would submit that the plaintiff had paid a total sum of Rs.22,21,089.98 towards full and final settlement to the 4th defendant as per invoice No.100 dated 06.09.1995/Ex/D3 for

Rs.14,34,283.20 and as per invoice No.101 dated 11.09.1995 for Rs.7,86,806.78. The receipt of payments by the 4th defendant has been admitted in the written statement and not disputed the same anywhere either in the written statement or in the cross examination. In the cross examination also it has been admitted by the 4th defendant as DW1 that they received the full payment from the plaintiff for the goods supplied. The plaintiff also paid a sum of Rs.3,82,812.50 to the 3rd defendant through cheque dated 26.08.1995 bearing No.323646 drawn from Indian Overseas Bank, the balance and final payment of Rs.11,38,380 was also paid to the 3rd defendant towards invoice No.RCL/IEL/10 dated 07.09.1995. Ex.P7 is the letter addressed by the 3rd defendant to the plaintiff in which the 3rd defendant had accepted the receipt of payments from the plaintiff. Apart from the above payments a sum of Rs.33,59,469.98 has been paid by the plaintiff to the defendants 3 and 4 directly towards clearing, forwarding of agents of defendants 3 and 4 and for other charges towards the contract, totally to the tune of Rs.41,46,450.36. The plaintiff had also narrated the above payments in the plaint and thus it is evident that the plaintiff had paid the entire amount with regard to the contract.

15(ii). The learned counsel for the 4th defendant has admitted in the cross examination that the plaintiff had paid the entire amount under the contract, as per the orders placed by defendants

1 and 2 to 4th defendant and the plaintiff paid the money on behalf of 1st defendant and based on the invoice raised by the 4th defendant in Exs.D4 and D5.

15(iii). On a perusal of averments made in the plaint and in the written statement and also in the oral and documentary evidences, as per Ex.P3/purchase order and Ex.P7/letter of receipt from the 3rd defendant to the plaintiff for a sum of Rs.3,82,813/-. Apart from the above payment a sum of Rs.33,59,469.98 was made by the plaintiff to the defendants 3 and 4 and they are also paid towards clearing and forwarding of agents of defendants 3 and 4 and for other charges towards the contract, totally to the tune of Rs.41,46,450.36. Hence, the issue is answered accordingly.

16.Issue No.6

16(i). Regarding this issue, the learned counsel for the plaintiff would submit that the plaintiff placed an orders before the 4th respondent dated 22.09.1995 for supply of Granite Slabs of Red approved colour in the size of 800x800x20mm for the quantity of 345.6sq.mtrs for US $ 72.00per sq.mtr. In turn the 4th defendant supplied the rejected second quality goods and not to the specifications mentioned in the order dated 22.09.2016/Ex.P16. The plaintiff had previously advised vide Fax messages dated 13.09.1995 and 09.10.1995 about the quality of goods to all the defendants. Despite receiving the fax message and having knowledge about the specifications of materials required by the foreign buyer they deliberately supplied the rejected second quality goods. Ex.P22 is the Survey Report dated 07.10.1995 of M/s.Hench Public Marine and Cargo Survey (Hongkong) Ltd., who carried out the survey of goods supplied by the defendants 3 and 4 and reported that the supplied goods were rejected and second quality goods of various colours, different sizes, broken and chipped. In the written statement filed by the 4th defendant there are contradiction statements that in one place the goods are supplied as per the order of the plaintiff and in other place it is stated that the goods are supplied as per the orders placed by the 1st defendant. In the cross examination of DW1 it is categorically admitted that they have not supplied the goods as per the order of the plaintiff dated 02.09.1995. Hence, it is crystal clear that the 4th defendant has supplied the rejected and second quality inferior goods as against the specifications made in the order dated 02.09.1995.

16(ii). The learned counsel for the fourth defendant would submit that the 4th defendant supplied the goods as per the specifications of the order placed by the 1st defendant and M/s.Omniversal Export House, Villivakkam, Chennai-49 as per their Orders dated 02.09.1995/Ex.D2 and 04.09.1995/Ex.D3.

16(iii). From the reading of the plaint and written statement, the plaintiff has clearly stated that the 4th defendant has not supplied the goods as per the specifications to the foreign buyers. Ex.P16/order placed by the plaintiff to the 4th defendant and Ex.P22/Survey report which clearly shows that the 4th defendant has not supplied the goods as per the specifications. The plaintiff as PW1 in his cross examination as clearly stated that before packing and despatching, the 4th defendant has not given any opportunity to the plaintiff to inspect the goods. Though, the 4th defendant has stated that they supplied the goods as per the specifications of the 1st defendant and M/s.Omniversal Export House, Villivakkam, Chennai as per the Orders dated 02.09.1995/Ex.D2 and 04.09.1995/Ex.D3. Further, all the defendants have been set exparte and they have not filed any written statement nor come to the witness box, particularly for subjecting themselves for cross examination with regard to the inspection. Ex.P22/Survey report dated 07.10.1995 clearly shows that the supplied goods were rejected and second quality goods of various colours, different sizes, broken and chipped.

16(iv). On a perusal of the orders placed by the plaintiff to the 4th defendant and also the original letter of credit and the survey report/Ex.P22 would go to show that the goods supplied by the 4th defendant is not as per the specifications. Admittedly, the 4th defendant has not informed the plaintiff for inspecting the goods at the time of packing or desptaching, the plaintiff was not in a position to inspect the goods before packing and despatching to the foreign buyers. As per the oral and documentary evidences, this Court comes to the conclusion that the 4th defendant has not supplied the goods as per the specifications, hence, the issue is answered in favour of the plaintiff and negatived against the 4th defendant.

17.Issue No.7:-

17(i). Regarding this issue, the learned counsel for the plaintiff would submit that the letter of credit dated 15.07.1995 is in favour of the plaintiff, though originally it was in the name of the first defendant. Subsequently, the 1st defendant had transferred the L/C in favour of the plaintiff. The fact is very well known to the 4th defendant. In the cross examination also the 4th defendant as DW1 deposed that they raised invoices in the name of the plaintiff and the letter of credit was transferred in favour of the plaintiff and they had also collected money from the plaintiff and not from the first defendant. The plaintiff is entitled to claim against the 4th defendant since they had not informed about the prior orders placed on them by the defendants 1 and 2 to the plaintiff for supply of inferior, different sizes, colours, rejected goods against the foreign buyers specified requirements of size, imperial red granite of good quality. If the 4th defendant informed the plaintiff about the earlier order placed by the 1st defendant they may have a chance to rectify the defects, the foreign buyer would not have returned the goods and the plaintiff would not have suffered the loss. The 4th defendant was fully aware of the requirements of the foreign buyers and the discrepancies regarding the orders placed by the 1st defendant and plaintiff, with regard to one and the same letters of credit. The defendants 1 and 2 and M/s.Omniversal Exports House have received and accepted the materials supplied by the 4th defendant without demur is misconceived and distortion of facts. The defendants 1 and 2 and M/s.Omniversal Export House had agreed the same in accordance with the terms of letter of credits which were opened by the foreign buyers and duly transferred to the plaintiff and paid the defendants as per the contracts placed by the defendants 3 and 4 for genuine and correct goods conforming to exact specifications of the foreign buyers.

17(ii). The learned counsel for the 4th defendant would submit that the plaintiff cannot claim as against the 4th defendant when the goods were supplied to the 1st defendant as per their purchase orders which were accepted by the 1st defendant without any demur as the plaintiff have paid the defendants 1 and 2. It is categorically admitted by the plaintiff, that the plaintiff is estopped from holding the 4th defendant for any loss incurred by the plaintiff. Hence, the 4th defendant herein is no way responsible or liable for the suit transaction. Further, the plaintiff paid a sum of Rs.2,25,000/- to the defendants 1 and 2 being the share of profit in the said transaction for which, the 4th defendant is not party to it.

17(iii). As already stated and discussed in the earlier issue, the 4th defendant has not given opportunity to the plaintiff to inspect the goods either at the time of packing or despatching to the foreign buyer. The other defendants were set exparte. Since, the Ex.P22/Survey Report had clearly shows that the goods are not in conformity with the orders placed by the foreign buyers and reported that the supplied goods were rejected and second quality goods of various colours, different sizes, broken and chipped. Therefore, the goods supplied are not in conformity with specification as mentioned in the letter of credit, the foreign buyers rejected the goods and the same was intimated to the 4th defendant, since the other defendants remained exparte, the adverse inference can be drawn by the Court. The survey report shows that the goods were not marketable, the 4th defendant has not proved that the goods were sent as per the specifications mentioned in the letter of credit. Therefore, the 4th defendant is liable to pay the entire decree amount as prayed for and the issue is answered accordingly.

<u>18.Issue Nos.8 and 9</u>

18(i). The learned counsel for the plaintiff would submit that the 4th defendant is well aware of the discrepancies with regard to the orders placed by the 1st defendant and plaintiff. Ex.P32 is the order placed by the 1st defendant with 4th defendant. Ex.P16 is the amended order placed by the plaintiff with 4th defendant. Both the orders pertains to the same letter of credit and the copies of the orders were also communicated to the 4th defendant by the plaintiff. If the 4th defendant is genuine they ought to have informed the mischief played by the defendants 1 and 2 to the plaintiff, before making supplies, and hiding the fact about grave information, on the other hand the 4th defendant having undoubtedly supplied the goods as per the orders placed by the defendants 1 and 2 by over riding the orders placed by the plaintiff and by making supply of inferior, rejected, second quality slabs of different sizes, colours and deceived the plaintiff. In the written statement filed by the 4th defendant they denied the allegation and they have not colluded with the defendants 1 and 2 and there is no whisper about the position of order placed by the plaintiff and not stated anything as to why they have not given prior intimation about the orders and discrepancies of the goods to the plaintiff. Further, the 4th defendant in the written statement has not stated anything about as to why they have not allowed or informed the plaintiff for inspection of goods before despatching the goods packed by them with Central Excise Sealed containers which could only be opened by customs in the Madras Port.

18(ii). The plaintiff had paid the entire amount to the defendants 3 and 4 in good faith for supply of specified goods, but in complete disregard of orders the defendants have collectively supplied, rejected, broken, chipped, different color and sizes of second quality goods which are not marketable and now shifting the entire responsibility on the defendants 2 and 3 is not tenable or acceptable. M/s.Omniversal Export House have no authority to receive the goods on behalf of the plaintiff and is neither a party to the entire transaction could not give their acceptance to the 4th defendant. This clearly shows the foul played, cheating and the fraudulent conduct of the defendants. The plaintiff had advised about the quality of the goods to all the defendants vide fax message received by the foreign buyer dated 09.10.1995. The plaintiff by its Letter dated 13.10.1995 have informed the 4th defendant about the variance in the goods shipped by them and the specifications mentioned in the letter of credit, the 4th defendant has not replied to the above letter.

18(iii). The 4th defendant had miserably failed to confirm that the goods were supplied as contracted except repeatedly stating that the goods were inspected and accepted by the defendants 1 and 2 and M/s.Omniversal Export House. The 4th defendant in the reply notice, written statement and in the cross examination stated that they supplied the goods as per the orders made by the defendants 1 and 2 and not as per the plaintiff's order and received full payment for the goods supplied by them. The 4th defendant ought to have confirmed with the plaintiff on the correctness of the goods. The 4th defendant has not stated anything about the survey report and the discrepancies between the goods contracted for and the goods supplied. The 4th defendant by a letter dated 07.10.1995 had written a letter to the plaintiff regarding the correctness of the shipping bills and consignment. The plaintiff submits that all the defendants have gained from this unjust, fraud, cheating, breach of contract and conspired together in defrauding the plaintiff of their money and caused immense loss to plaintiffs reputation in the international market as well as to their bankers.

18(iv). Regarding these issues the learned counsel for the 4th defendant would submit that it is the plaintiff who involved in every part of the transaction and the plaintiff have also paid the amount to all the defendants and now the plaintiff cannot allege any collusion or conspiracy, when the 4th defendant involved in one part of the transaction based on the orders placed by the defendants 1 and 2. It is for the 4th defendant who paid the purchase orders of defendants 1 and 2 to which their invoices were raised and the 4th defendant cannot be held liable by any stretch of imagination when the other defendants 1 and 2 along with the plaintiff is involved in the transaction. PW1 in the cross examination admitted that the goods exported were not returned and admittedly sold in Hong Kong itself, and no credit was given in the suit nor any explanation given in the plaint. The 4th defendant had not deliberately concealed the discrepancies between the order placed the defendants 1 and 2 and the order placed by the plaintiff, as in the invoices raised in Ex.D4 and Ex.D5 would clearly shows that the goods packed and supplied for which the plaintiff have paid. If at all any discrepancies in the order placed by the plaintiff, the plaintiff could have raised when their invoices were sent for payment and refused for any payment. The plaintiff alleged the discrepancies only after the foreign buyers specifies the defects through the 1st defendant.

18(v). On a perusal of the plaint, written statement, oral and documentary evidences, Ex.P32 is the copy of the order placed by the 4th defendant, Ex.P16 is the amended order placed by the plaintiff with the 4th defendant. Both the orders pertaining to the same letter of credit, the plaintiff has also enclosed the letter of credit alongwith the orders placed to the 4th defendant. Therefore, it is clear that there is discrepancies in the goods, the 4th defendant collectively supplied the various colours, different sizes, damaged, second quality, broken and chipped goods and now shifted the entire responsibility on the defendants 1 and 2 is not tenable and acceptable, without the help of the defendants 3 and 4 it was not possible for the defendants 1 and 2 to supply the rejected goods. The defendants has not filed any supportive documents regarding these averments made in the written statement. Therefore, in the absence of any such documentary proof and without the knowledge of the 4th defendant, the defendants 1 and 2 supplied the rejected, second quality goods. Once the foreign buyer rejected the goods stating that the goods were not as per the specifications, the surveyor report also clearly stated the goods supplied are not in conformity with specifications stated in their purchase order. It is for the 4th defendant to prove that the goods were supplied to the foreign buyer as per the orders placed by the plaintiff to the defendants 1 and 2, without the knowledge of the defendants 1 and 2 they supplied the rejected second quality goods, after coming to the knowledge that the 4th defendant has taken action against the defendants 1 and 2 with regard to supply of rejected goods. Therefore, all the defendants are jointly and severally liable for the supply of the rejected second quality goods which is not as per the specifications mentioned in the orders placed by the plaintiff. Hence, the issues are answered accordingly.

19.Issue No.10 and 11

19(i). From the pleadings, oral and documentary evidences it is the case of the plaintiff that the defendants have not supplied the goods as per the specifications either in original or as per the order placed by the plaintiff to the 4th defendant. It is already stated that the copy of the order was enclosed with the order placed by the defendants and there is no privity of contract between the plaintiff and the 4th defendant. Ex.P9 is the contract between the plaintiff and the 4th defendant, since the plaintiff placed an order dated 09.09.1995 and Ex.P16 is the amended order dated 22.09.1995. This Court also held in issue No.1 that there is a contract between the plaintiff and the 4th defendant. Though, the plaintiff stated that the goods were not as per the specifications mentioned in the order. The 4th defendant stated that as per the specifications the goods were despatched to foreign buyer. The defendants 1 and 2 and M/s.Omniversal Export House inspected the goods before packing and despatching the same to the foreign buyer. It is admitted by the 4th defendant that opportunity was not given to the plaintiff to inspect the goods before packing and despatching. Under these circumstances, Ex.P9 and Ex.P16 are the order placed by the plaintiff and also Fax Message receipt/Ex.P21 acknowledgment given by the 4th defendant and the other documents viz., Ex.D3, Ex.D4, Ex.D5, Ex.P19 and also the cross examination of the defendants would show that the plaintiff has proved that there is a privity of contract between the plaintiff and the 4th defendant. The survey report/Ex.P22 would clearly show the goods supplied are not in conformity with specifications stated in their purchase order. The plaintiff has proved that there is a contract and the order placed by them to the 4th defendant and also proved the payments made by the plaintiff to the defendants 3 and 4. It is for the 4th defendant to prove that they had supplied the goods as per the specifications. From the averments made in the plaint and also from the oral and documentary evidences, the plaintiff has proved the case with cogent evidences. The defendants has not supplied the goods as per the specifications. Since, other defendants were remained exparte. The 4th defendant alone filed written statement and examined himself as DW1 and marked the documents as Ex.D1 to Ex.D6. Once it is proved, the placement of orders and payments and receipt of payments, it is for the 4th defendant to prove that they supplied the goods as per the specifications, the 4th defendant failed to shift the burden that they have supplied the goods as per the specifications jointly and severally and hence, liable to pay the claim made in the suit. Hence, the issues are answered accordingly.

20. In view of the discussions held above, the suit is decreed as prayed for. The suit is filed for recovery of money, the defendants are liable to pay a sum of Rs.41,46,450.30 to the plaintiff. Since, the transaction being a commercial transaction between the parties to the suit, the plaintiff is entitled to claim interest at 24%p.a. from the date of filing of the suit till the date of realisation.

23.11.2018.

Index : Yes/No

Internet : Yes/No

tsh

List of Witness examined on the side of the plaintiff

Ganesh Patwari - PW1

List of documents marked on the side of the plaintiff

SL. No	Exhibits	DESCRIPTION OF DOCUMENTS	DATED
1.	P1	Board Resolution	28.06.2013
2.	P2	Photo copy of Letter of Credit	07.07.1995
3.	P3	Photo copy of Letter of Credit	15.07.1995
4.	P4	Photo copy of Letter of Plaintiff to the first defendant	23.08.1995
5.	P5	Photo copy of Letter of first defendant to the plaintiff	24.08.1995
6.	P6	Photo copy of the letter of the first defendant to the plaintiff	11.09.1995
7.	P7	Photo copy of Letter by the third defendant to the plaintiff	28.08.1995
8.	P8	Photo copy of Fax Letter of plaintiff to the third defendant	06.09.1995
9.	P9	Photo copy of Letter of Plaintiff to the fourth defendant	09.09.1995
10.	P10	Photo copy of Letter of third defendant to the plaintiff	11.09.1995
11.	P11	Photo copy of Fax Letter of plaintiff to the fourth defendant	11.09.1995
12.	P12	Photo copy of Letter of plaintiff to the Foreign buyer	13.09.1995
13.	P13	Photo copy of Letter of Plaintiff to the third defendant	20.09.1995
14.	P14	Photo copy of Letter from the fourth defendant to the plaintiff	21.09.1995
15.	P15	Photo copy of Letter from the plaintiff to the fourth defendant	21.09.1995
16.	P16	Photo copy of Letter from the plaintiff to the fourth defendant	22.09.1995
17.	P17	Photo copy of Fax Letter from the fourth defendant to the plaintiff	22.09.1995

18.	P18	Photo copy of Letter from the plaintiff to the third defendant	27.09.1995
19.	P19	Photo copy of Letter from the plaintiff to the fourth defendant	27.09.1995
20.	P20	Photo copy of Letter of G.K. Shipping Services to the plaintiff	27.09.1995
21.	P21	Photo copy of Fax Letter from the fourth defendant to the plaintiff	29.09.1995
22.	P22	Photo copy of Survey Report of the Plaintiff	17.10.1995
23.	P23	Photo copy of Letter of first defendant to the plaintiff	11.10.1995
24.	P24	Photo copy of Letter of Purchaser to the plaintiff	11.11.1995
25.	P25	Photo copy of plaintiffs legal notice to the defendants	26.06.1996
26.	P26	Photo copy of reply notice of the fourth defendant to the plaintiffs counsel	22.07.1996
27.	P27	Photo copy of reply notice of the third defendant to the plaintiffs counsel	23.08.1996
28.	P28	Photo copy of Survey Report of the Plaintiff	10.11.1995
29	P29	Photo copy of the Sales contract from the first defendant to the foreign buyer	23.06.1995
30	P30	Photo copy of the Sales contract from the first defendant to the foreign buyer	10.07.1995
31	P31	Letter written by the first defendant signed by the second defendant received by the third defendant	18.08.1995
32	P32	Photo copy of the Fax addressed by D1 to D4	25.10.1995
33	P33	Photo copy of the Fax given by the purchaser to the first defendant	02.10.1995
34	P34	Photographs	---
35	P35	Original Letter from plaintiff to R.K.B. Container Services	03.11.1995
36	P36	Original Letter from plaintiff	28.10.1995
37	P37	Xerox Copy of Fax Transmission from plaintiff to fourth defendant	24.10.1995
38	P38	Xerox copy of Letter given to the plaintiff from freighters Limited	20.10.1995
39	P39	Xerox copy of Letter from foreign buyer	19.10.1995

40	P40	Original Letter from plaintiff to foreign buyer	17.10.1995
41	P41	Xerox copy of Letter from plaintiff to fourth defendant	13.10.1995
42	P42	Xerox copy of Letter from foreign buyer to plaintiff	13.10.1995
43	P43	Xerox copy of Letter from foreign buyer to first defendant	02.10.1995
44	P44	Xerox Copy of Letter from first defendant to foreign buyer	05.10.1995
45	P45	Original Letter to plaintiff from third defendant	28.08.1995
46	P46	Original Invoice	23.08.1995
47	P47	Original Packing List	23.08.1995
48	P48	Original Packing List	23.08.1995
49	P49	Original Bill of Lading	---
50	P50	Original Shipping Bill	23.08.1995
51	P51	Xerox copy of Godown Warrants	10.11.1995

List of Witness examined on the side of the defendant

Mahammad Bava - DW1

List of documents marked on the side of the defendant

SL. No	Exhibits	DESCRIPTION OF DOCUMENTS	DATED
1.	D1	Letter of Authorisation	21.04.2015
2.	D2	Xerox copy of purchase order	02.09.1995
3.	D3	Xerox copy of purchase order	04.09.1995
4.	D4	Original invoice	06.09.1995
5.	D5	Original Invoice	11.09.1995
6.	D6	Xerox copy of Form-H	26.09.1995

23.11.2018.

(P.V.J.)

P. VELMURUGAN, J.

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Pre Delivery Judgment in

CS.No.964 of 1998

23.11.2018.