

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 03.12.2018

Date of Decision : 12.12.2018

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

C.S.No.553 of 2012

M/s.Tamun Impex Company Private Limited,
rep by its Managing Director,
No.153, Eldams Road,
Teynampet,
Chennai-600 018.

.. Plaintiff

Vs.

Ozone Projects Private Limited,
rep by its Managing Director,
having office at New No.63,
G.N.Chetty Road,
T.Nagar,
Chennai-600 017.

.. Defendant

This Civil Suit is preferred under Order IV Rule 1 of the Original Side Rules read with Order VII Rule 1 of the Civil Procedure Code seeking for a decree and judgment (a) for a mandatory injunction directing the defendant to purchase materials as per purchase order No.OZ/MZ/PO1/PO/11-12/049 dated 8.2.2012 and as amended by purchase order No.OZ/MZ/PO1/PO/11-12/049 dated 27.4.2012 or alternatively to direct the defendant to pay a sum of Rs.2,50,00,000/- as liquidated damages for breach of contract under purchase order No.OZ/MZ/PO1/PO/11-12/049 dated 8.2.2012 and as amended by purchase order No.OZ/MZ/PO1/PO/11-12/049 dated 27.4.2012, (b)for permanent injunction restraining the defendant their men, agent or servant from purchasing the materials covered under purchase order

order No.OZ/MZ/PO1/PO/11-12/049 dated 27.4.2012 from any third person, (c)for costs of the suit and (d)for such further or other orders as this Hon'ble Court may deem fit and proper on the facts and circumstances of the case and render justice.

For Plaintiff : Mr.Raja Kalifulla, SC
for Mr.N.Ishtiaq Ahmed

For Defendant : Mr.P.V.Balasubramaniam
for M/s.BFS Legal

JUDGMENT

There is a sole plaintiff and a sole defendant in the instant suit.

2 Factual matrix of the suit can be set out in a nutshell as facts are simple and not voluminous. In very simple terms, this suit pertains to supply of Unplasticized Polyvinyl Chloride (UPVC) windows and doors by plaintiff to defendant. The UPVC windows and doors shall hereinafter be referred to as 'suit products' for the sake of convenience and clarity.

3 Defendant is in the industry of property development and real estate. Defendant embarked upon a project of developing a mixed use Township in the name and style 'The Metrozone' in Chennai, which shall hereinafter be referred to as 'suit project' for the sake of brevity. The suit project involved construction of 29 towers consisting of residential apartments. At the time of inception of the suit, 24 towers were approved and five towers were in the proposal stage. Defendant issued a notice inviting tenders dated 04.01.2012 for supply of suit products for three basements and

29 residential towers. It is submitted that each tower consists of ground + 16 appurtenant structures. It is not in dispute that plaintiff responded to the aforesaid notice inviting tenders, plaintiff was initially given the work order for suit products for three towers and subsequently, it was reduced to one tower.

4 Plaintiff commenced supply which continued till first week of June, 2012. While it is plaintiff's complaint that defendant suddenly stopped receiving and refused to receive suit products sent by plaintiff for the suit project, it is defendant's case that there was quality issues qua materials and installation / workmanship was poor resulting in termination of the work order.

5 In the aforesaid backdrop, this suit was presented on 24.07.2012 with a prayer for mandatory injunction to direct the defendant to purchase suit products according to the purchase order dated 08.02.2012 and amended purchase order dated 27.04.2012 with an alternative prayer to direct the defendant to pay a sum of Rs.2,50,00,000/- as liquidated damages for breach of contract qua aforesaid purchase order and amended purchase order. Besides this prayer for mandatory injunction and alternative prayer for damages, there was also a prayer for permanent injunction to restrain the defendant from purchasing materials covered under the aforesaid purchase order and amended purchase order from any third parties. There was a prayer for costs and the usual residuary limb in the prayer paragraph.

6 The prayer paragraph in the plaint is paragraph No.18 and the same reads as follows :

“18.The plaintiff prays for a decree and judgment

(a)For a mandatory injunction directing the defendant to purchase materials as per purchase order No.OZ/MZ/PO1/PO/11-12/049 dated 8.2.2012 and as amended by purchase order No.OZ/MZ/PO1/PO/11-12/049 dated 27.4.2012

or

alternatively to direct the defendant to pay a sum of Rs.2,50,00,000/- as liquidated damages for breach of contract under purchase order No.OZ/MZ/PO1/PO/11-12/049 dated 8.2.2012 and as amended by purchase order No.OZ/MZ/PO1/PO/11-12/049 dated 27.4.2012

(b)for permanent injunction restraining the defendant their men, agent or servant from purchasing the materials covered under purchase order No.OZ/MZ/PO1/PO/11-12/049 dated 8.2.2012 and as amended by purchase order No.OZ/MZ/PO1/PO/11-12/049 dated 27.4.2012 from any third person

(c)for costs of the suit and

(d)for such further or other orders as this Hon'ble Court may deem fit and proper on the facts and circumstances of the case and render justice.”

7 When this suit was taken up for arguments, Mr.Raja Kalifulla, learned Senior Counsel on behalf of counsel on record for plaintiff and Mr.P.V.Balasubramaniam of M/s.BFS Legal (Law Firm) on behalf of sole defendant were before this Commercial Division.

8 It was submitted by learned Senior counsel for plaintiff on instructions that the prayer for mandatory and permanent injunctions have become infructuous and therefore, the suit prayer now is only for damages of Rs.2,50,00,000/-. Though obvious, the prayer for costs and residuary limb of

the prayer do survive. Therefore, this is a now suit for damages. To be precise, this is a suit for damages claiming liquidated damages of Rs.2.50 Crores for breach of contract by defendant qua suit products intended to be supplied for suit project.

9 This Commercial Division has set out the factual matrix of the suit in a nutshell, prayer in the suit as well as the prayer that survives today. Having done this, it is necessary to have a birds eye view of the trajectory of this suit. As mentioned supra, plaint was presented in this Court on 24.07.2012, suit summons were served on defendant, defendant entered appearance and completed pleadings by filing a written statement dated 23.03.2015. After completion of pleadings, trial commenced. One witness each was examined on the side of plaintiff and defendant. Mr.Syed Muneer Ahmed, Managing Director of plaintiff company, who has also verified the plaint, deposed as P.W.1. 19 exhibits, namely, Ex.P.1 to Ex.P.19 were marked through him. On the side of defendant, one Mr.K.Krishnan, Associate Vice President – Legal of defendant company deposed as D.W.1 and seven exhibits were marked on the side of defendant, i.e., Exs.D.1 to D.7.

10 With regard to exhibits, it is to be noticed that of the 19 exhibits marked on behalf of plaintiff, 10 exhibits, namely Exs.P.3 to P.7, Exs.P.9 to P.12 and Ex.P.14 are exhibits series. Likewise, it is also necessary to notice that out of the seven documents marked on the side of defendant, one document, i.e., Ex.D.1 was marked through plaintiff (obviously in cross examination of P.W.1).

11 After completion of recording of oral and documentary

evidence in the aforesaid manner, plaintiff and defendant filed written arguments dated 05.09.2018 and 01.10.2018 respectively as mandated under the amended Order XVIII of 'The Code of Civil Procedure, 1908' ('CPC' for brevity) as amended by 'The Commercial Courts Act, 2015' ('said Act' for brevity). To be noted, under amended CPC, as amended by said Act, written arguments precedes oral arguments. Post filing of written arguments in the aforesaid manner, suit was taken up for oral arguments.

12 Before this Commercial Division proceeds to capture the broad rival submissions, it is necessary to notice the issues on which the instant suit now turns.

13 Originally, 12 issues were framed on 18.06.2015 before constitution of Commercial Division. When the suit was taken up for oral arguments, learned Senior Counsel for plaintiff and learned counsel for defendant by consent agreed that the issues need to be recast and they also agreed on four issues which will replace the 12 issues already framed and become issues now. The four recast issues framed on 26.11.2018 are as follows :

“1. Whether revised purchase order dated 27.04.2012 (Ex.P14) and original work order as revised dated 08.02.2012 (Ex.D1) are distinct and separate documents or do they constitute a composite contract between the plaintiff and the defendant?

2. Whether there was valid termination of aforesaid revised purchase order dated 27.04.2012 (Ex.P.14) and original work order as revised dated 08.02.2012 (Ex.D1)?

3. Whether the plaintiff is entitled to damages qua Exs.P.14 and D1?

4.What other reliefs parties are entitled to?”

14 Having set out the four recast issues on which the instant suit now turns, it is necessary to capture the rival submissions.

15 Submissions made by learned Senior Counsel for plaintiff can be broadly summarised as follows :

(a) The Purchase order (Ex.P.14) and the Work Order (ExD.1) are distinct agreements between plaintiff and defendant. There is termination clause only in the work order and there is no termination clause in the purchase order. As there is no termination clause in the purchase order, the alleged termination itself is illegal.

(b) Defendant, vide Exs.D.5 and D.6 dated 28.05.2012 and 02.06.2012 respectively handed over the work of supply of suit products for the suit project to third parties on 28.05.2012 and 02.06.2012, when the agreement between plaintiff and defendant was subsisting and it is illegal.

(c) Defendant had not given any schedule of work and therefore, there is no scope for complaint regarding the work done by plaintiff.

(d) The bunch of email communications between 8.5.2012 and 21.5.2012 marked as Ex.D.3 are concocted stories created for the purpose of justifying

defendant giving work to third parties.

(e) Plaintiff is entitled to damages under four different heads, namely (a)import of machineries from China, (b)additional space taken on lease, (c)additional bank loan availed by plaintiff and (d)additional manpower.

16 Per contra, submissions made by learned counsel for defendant can be broadly summarised as follows :

(a) Purchase order (Ex.P.1) and work order (Ex.D.1) have to be read together, they are not distinct and the two together constitute a composite contract between plaintiff and defendant;

(b) There is a termination clause in the work order which is clause 18, the purchase order and the work order constitute a composite contract, there was termination in accordance with clause 18 and therefore, it is incorrect to say that there was no valid termination;

(c) The theory of schedule of work not being given is clearly an afterthought ;

(d) A perusal of Ex.D.3 would reveal that emails are not invented stories, however plaintiff has not even chosen to reply to these emails, which itself will show

that the contents being concocted stories is an afterthought.

(e) There is no provision of liquidated damages and damages if any can only be under Section 73 of the Indian Contract Act, 1872 and therefore, the plaintiff has to prove actual damages and should also prove the entire quantum to be entitled to damages, but plaintiff has miserably failed in this regard.

17 Having captured the factual matrix, trajectory of the suit, issues, broad sketch of oral / documentary evidence and broad rival submissions, this Commercial Division now embarks upon the exercise of discussion / deliberation of the same under the caption 'Dispositive reasoning' infra.

18 **Dispositive reasoning :**

(a) Before I commence this discussion on rival submissions, for the purpose of finding answers to the four (recast) issues, it is to be noted that the prayer in the plaint has already been extracted supra. It has also been set out supra that the plaintiff is now only on the alternate prayer of damages of Rs.2.50 Crores besides costs, as mandatory and permanent injunctive reliefs have become infructuous. To be noted, this is the stated position of the plaintiff.

(b) In the backdrop stated supra, it is to be seen that prayer in the plaint talks about liquidated damages of Rs.2.50 Crores. Mr.Raja

Kalifulla, learned Senior counsel very fairly submitted on instructions that this is an error and 'liquidated damages' should read as 'damages'. Learned Senior counsel also fairly set out the obtaining position that there is no clause or covenant for liquidated damages either in Ex.P.1 Purchase order or in Ex.D.1 Work Order. Therefore, the position is very clear that we are concerned with a claim for damages of Rs.2.50 Crores essentially under Section 73 of 'The Indian Contract Act, 1872 (9 of 1872)' {'Contract Act' for brevity}. This is of tremendous significance because damages under Section 73 of Contract Act and liquidated damages under Section 74 of Contract Act are based on determinants and parameters which are not identical.

(c) One more aspect of the matter which is of relevance and which surfaced without any dispute in the hearing is that learned Senior counsel for plaintiff and learned counsel for defendant admitted that all the exhibits on both sides, i.e., Exs.P.1 to P.19 and Exs.D.1 to D.7 (26 exhibits in all) were marked without any objection. Therefore, the question of objection to any exhibit/s or dealing with the same does not arise as part of this discussion / deliberation.

(d) This Commercial Division now proceeds to first examine the issue as to whether the Purchase order dated 27.04.2012 (Ex.P.14) and revised Work order dated 8.2.2012 (Ex.D.1) are distinct and separate documents or whether they constitute a composite contract. As would be evidence from the rival submissions, while the plaintiff asserted that they are

distinct and separate documents, the defendant contended to the contrary and submitted that the two documents together constitute a composite contract between plaintiff and defendant.

(e) From the submissions made before this Commercial Division, it comes to light that this issue is no conundrum as the answer is straight, simple, clean and clear. Mr.P.V.Balasubramaniam, learned counsel referring to Ex.D.1 pointed out that there is a clear and categoric reference in Ex.D.1, work order, to purchase order No.PO no.OZ/MZ/PO1/PO/11-12/049. This purchase order is Ex.P.1. Therefore, there is a clear cross reference in Ex.D.1 about Ex.P.1, which is a prior document. The two documents read in conjunction makes it clear that Ex.P.1 and Ex.D.1 are clearly dovetailed. This takes us to the revised purchase order Ex.P.14. Ex.P.14 does not in any manner alter the obtaining position that Ex.P.1 and Ex.D.1 are dovetailed. Only certain specifications and technical details contained in Ex.P.1 have been revised in Ex.P.14. Therefore, it follows as a sequitur that Ex.D.1 and Ex.P.14 certainly go together. It also has to be viewed in the light of admitted / stated position of the plaintiff that they did not merely supply materials, but also embarked upon the exercise of executing the work by installing the materials at the site for the suit project though through a contractor. Therefore, the cross reference in the two exhibits or for that matter, three exhibits, namely Ex.P.1, Ex.D.1 and Ex.P.14 read in conjunction with the admitted position of the plaintiff that they did carry out the work of installing the materials supplied under the purchase order in the site for the suit project

makes it clear that Ex.D.1 and Ex.P.14 constitute one composite document.

(f) This Commercial Division has no hesitation whatsoever in answering issue No.1 in favour of the defendant and against the plaintiff by holding that the purchase order and work order are dovetailed and they constitute one composite contract between plaintiff and defendant.

(g) This takes us to the second issue as to whether there was a valid termination of the composite contract between plaintiff and defendant. As already alluded to supra, clause 18 in the work order, namely Ex.D.1 is a termination clause and the same reads as follows :

“18.If any sub standard of service or materials observed by our project in charge we are entitled to terminate your contract without any prior notice.”

(h) A perusal of termination clause in the work order reveals that there are two grounds on which the defendant can terminate the contract without prior notice to plaintiff. One ground is, service being substandard and the other ground is, materials supplied being substandard. In either one of the cases, it is open to the defendant to terminate the contract. Most importantly, it is to be noted that termination can be without prior notice.

(i) Learned counsel for defendant submitted that no prior notice is required for termination of contract by the defendant.

Notwithstanding this position, reply legal notice dated 20.7.2012 which has been marked as Ex.D.7 very clearly articulates that there is termination under clause 18 of Ex.D.1. Relevant portion of the reply notice reads as follows :

“.....Our client states that in any event, on account of quality issues, our client has the right to terminate the contract, as per Clause 18 of the Work Order, without any Notice to you. Our client states that it has invoked the said clause and the material already supplied by you shall be installed by other vendors at your cost and the remaining work also taken up by other vendors, who have already commenced such work. An email of May 31st states “you are leaving us with no choice but to go to alternate vendors who are capable of delivering to our requirements in terms of time, quality and cost”

(j) Learned counsel for defendant submitted that though the covenant in the contract, i.e., clause 18 provides for termination without prior notice, defendant had put the plaintiff on adequate prior notice. Learned counsel for defendant drew the attention of this Commercial Division to the series of electronic mail communications between 8.5.2012 and 21.5.2012 which have been marked as Ex.D.3. Ideally, this should have been marked as 'Ex.D.3 series' as it is a bunch of several mails. However, as learned Additional Master has marked these as 'Ex.D.3', I continue to refer the same as 'Ex.D.3'. To be noted, these electronic mail communications (Ex.D.3) are not disputed by plaintiff. The receipt of the same also is not disputed by plaintiff. All that the plaintiff is projecting before this Commercial Division is that the contents of the emails are incorrect and it is a make believe affair. To be precise, it is plaintiff's specific submission that these electronic mails have

been sent after defendant had decided to allot the contract to third parties, for the purpose of creating some ground for termination.

(k) Therefore, it emerges clearly that neither Ex.D.3 nor its receipt by plaintiff are disputed. It is only submitted that the contents are false and that these mails have been sent in a predetermined manner after taking a decision to allot / give the contract to third parties for the purpose of laying a platform / foundation to do so. Plaintiff went as far as saying that defendant used plaintiff's high quality material in a model flat to lure customers and thereafter switched over to low quality materials through third party contractors. This submission of plaintiff does not stand a moment's scrutiny and flies in the air on the face of it for one simple and straight reason. That simple and straight reason is, plaintiff admittedly has not replied or responded to any one of the electronic mails marked as Ex.D.3. To be noted, there are as many as four electronic mails including photographs which have been marked as Ex.D.4. This Commercial Division deems it appropriate to scan and reproduce Ex.D.4 considering the importance of the same and the same is as follows :

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(l) Plaintiff not having chosen to even refute or respond to these Ex.D.3 communications / photographs without even sending a holding or interim reply, cannot now be heard to contend that the contents of Ex.D.3 are false and that it is a make believe affair on the part of the defendant as the defendant has sent the same in a predetermined manner after taking a decision to award the contract to third parties.

(m) In this regard, it is also to be noticed that Ex.D.7, reply notice dated 20.07.2012 has been marked along with postal acknowledgement card and the postal acknowledgement card shows that the reply notice has been received by the plaintiff's counsel on 21.07.2012. Plaint was presented only on 24.07.2012. Therefore, there is termination for sure.

In any event, in the considered view of this Commercial Division, the

reckoning date in this regard will not be the date of presentation of the plaint as suggested by plaintiff, but it will be the date of receipt of suit summons by defendant, for testing whether this reply notice and termination therein referring to clause 18 of Ex.D.1 is an after thought. Only if Ex.D.7 reply notice had been sent or served on the plaintiff after receipt of suit summons by defendant, it can be contended that it is an after thought. Therefore, there is no difficulty in answering issue No.2 in favour of defendant and against plaintiff by holding that there was valid termination of the revised purchase order dated 27.04.2012 (ExP.14) and original work order (as revised) dated 8.2.2012 (Ex.D.1) which constitute a composite contract between parties to the lis in the instant suit.

(n) This takes us to the third and penultimate issue as to whether the plaintiff is entitled to damages. As already mentioned, it is damages under Section 73 of the Contract Act. There is no dispute or disagreement between the parties that damages have been claimed under four heads, namely, (a)import of machineries from China, (b)taking additional space on lease, (c)taking additional bank loan and (d) deploying additional manpower. Though it was submitted in the hearing that damages have been arrived at by taking 10% of the value of the contract as thumb rule, there is nothing to substantiate this.

(o) Be that as it may, if one examines the four heads, it is very fairly submitted by learned Senior counsel for plaintiff that no documents whatsoever have been marked and no evidence has been let in with regard to one of the four heads, namely, additional bank loan. This leaves us with three

heads. With regard to purchase of machineries, documents relied on are series of bills of entry dated 23.02.2012 and two invoices dated 4.5.2012 and 22.5.2012 which have been marked as Ex.P.3. Ideally, they should have been marked as Ex.P.3 series. Since the same has been marked as Ex.P.3, I continue to refer to the same as Ex.P.3. A perusal of these bills of entry shows that there is nothing to co-relate these bills of entry with the plaintiff. These bills of entry and invoices have been raised on one M/s.TMN International and another entity which goes by the name 'Home Life Furniture Company'. There is nothing to show any co-relation between these two entities and plaintiff. What nails this aspect of the matter is the deposition of P.W.1. P.W.1 who is none other than the Managing Director of plaintiff company, in the cross examination on 13.7.2017, has categorically stated that both these entities are not in any way connected with the business activities of plaintiff company. Relevant portion of the deposition (cross examination of P.W.1) reads as follows :

“... Both TMN International and Home Life Furniture company are not in any way connected with the business activities of the plaintiff's company.....”

(p) Further more, the theory of importing machineries after the composite contract also does not hold water, as P.W.1 in cross examination has categorically admitted that they had approached the defendant by stating that they have a large manufacturing facility and that they have a state of the art manufacturing facility. This portion of admission in the cross examination of P.W.1 has been recorded in question and answer

form. Relevant questions and answers read as follows :

“Q:Where is the manufacturing facility of the plaintiff situated?

A: In mogappair West, Chennai.

Q: Is it not true that you have stated in your plaint and proof affidavit that you have set up a large manufacturing facility based on the order placed by the defendant?

A:We have stated that we have state of the art manufacturing facility.”

(q) Therefore, this head of claiming for damages does not stand substantiated.

(r) Next head on which damages is claimed as mentioned supra is additional space taken on lease and the document filed in an attempt to buttress this claim is a lease agreement dated 29.2.2012 which has been marked as Ex.P.2. Again, an examination of Ex.P.2 reveals that there is a covenant in Ex.P.2 to the effect that the demised property is to be used as office-cum-factory and godowns for the business of aforesaid TMN International and Home Life Furniture Company. Relevant clause is Clause 2 captioned 'PURPOSE OF THE AGREEMENT' and the same reads as follows:

“2 PURPOSE OF THE AGREEMENT:

That the LESSEE shall use and occupy the premises only for office cum factory and godowns of his business and other sister companies of theirs, M/s.'TMN International' & 'Home life Furniture Company' and any additional company to be started and shall not sublet the scheduled premises to other outside persons. The LESSEE shall not sublet or transfer or assign the tenancy of the premises or any portion to any other party other than their family group.”

(s) To be noted, in this lease agreement, these two entities have been referred to as sister companies. However, the deposition of P.W.1 that these two entities have nothing to do with plaintiff's business activities which has been extracted supra, clearly brings into sharp focus that this unregistered lease deed is apparently an after thought and in any event, it has no co-relation with the plaintiff and the composite contract.

(t) This takes us to the third and last head, namely, additional manpower. While there is no exhibit or document for additional manpower, it now turns only on deposition. Relevant portion of deposition of P.W.1 is as follows :

“Q: Is the out source work force in terms of a enagement with a contractor or individual work man?

A: With the contractor.

Q:Have you registered the plaintiff under the Contract Labour Regulation Act, as a principal employer?

A: The contractor is separate and we have not registered.”

(u) Therefore, all the heads under which damages have been claimed have not been established.

(v) This takes us to the proof required and the extent to which the plaintiff has to prove damages to be entitled for a decree of damages. As already alluded to supra, this is a case of damages under Section 73 of Contract Act and not liquidated damages under Section 74 of Contract Act. The essential distinction in terms of claim for damages between Sections 73 and 74 of the Contract Act (besides the fact that liquidated

damages is quantified and damages is not) is, for liquidated damages under Section 74 of the Contract Act, it will suffice if the claimant / plaintiff establishes breach. The plaintiff may or may not have actually suffered the exact quantified amount, it might be lesser or it might be more, but the moment the plaintiff establishes breach, the plaintiff will be entitled to sum quantified as liquidated damages. In contradistinction, for damages under Section 73 of Contract Act, in the considered view / opinion of this Commercial Division, plaintiff has to prove damages to the hilt.

(w) On this aspect of the matter, very interestingly, both sides pressed into service the same three case laws. To be noted, the number of case laws pressed into service are four in all. They are, **(1) Fateh Chand Vs. Balkishan Dass [AIR 1963 SC 1405]**, **(2) Maula Bux Vs. Union of India [1969 (2) SCC 554]**, **(3) Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. [(2003) 5 SCC 705]** pressed into service by both sides and **(4) Kailash Nath Associates Vs. Delhi Development Authority and another [(2015) 4 SCC 136]** pressed into service by plaintiff. To be noted, these four case laws have been set out by me in chronological order based on the date of judgments.

(x) Defendant has referred to **Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and others [(1991) 1 SCC 533]** and **Indian Oil Corporation Ltd. Vs. Bhagawan Balasai Enterprises [2018-1-LW-610 = (2018) 2 MLJ 275]**. These two case laws, learned counsel for defendant very

fairly submitted that, are for the principle that a contract which is determinable are those in which specific performance cannot be sought. As the suit scope is now narrowed down only to damages and as the mandatory injunction prayer has become infructuous, it was fairly submitted that **Amritsar Gas Service** and **Bhagawan Balasai Enterprises** cases are not of any relevance and are not pressed into service though made part of written arguments.

(y) Likewise, **Kanchan Udyog Limited Vs. United Spirits Limited [(2017) 8 SCC 237]** and **Construction and Design Services Vs. Delhi Development Authority [(2015) 14 SCC 263]** made part of written arguments compilation of plaintiff also pertain to principles of breach being for sufficient cause and part of damages being treated as penalty respectively.

(z) Therefore, effectively, the case laws that come into play are the aforesaid four in number. Two judgments, namely, **Fateh Chand** and **Maula Bux** mainly pertain to the working of section 74 of Contract Act. **ONGC** and **Kailash Nath** turns on the interpolation of sections 73 and 74 of Contract Act. However, all three case laws are for the principle that in case of breach, the party aggrieved by breach is not required to prove actual loss or damage suffered by him before he can claim a decree from court. Hon'ble Supreme Court also held that courts are competent to award a reasonable compensation in case of breach, as many a times it is difficult to prove loss of damage. This does not arise in the instant case as Ex.D.3 series (electronic mail communications including photographs scanned and reproduced supra

and the plaintiff not even refuting the same) puts an end to termination and termination being unfair. As rightly pointed out by learned counsel for defendant, termination by itself cannot become breach.

(aa) In other aspects, as alluded to supra, these case laws are generally for principles touching upon interplay between Sections 73 and 74 of Contract Act, but in the instant case, the matter turns on Section 73.

(ab) In this case, it may not even be necessary to go into question as to whether the plaintiff / claimant has to prove every penny claimed to the hilt, to be entitled to damages under section 73 of Contract Act as all the heads have become non-starters for reasons which have been alluded to supra. In other words, plaintiff has not even been able to show that they have suffered damages on account of anything relatable to this composite contract touching upon suit products / suit project, which is the fulcrum of the case, under any one of the heads under which damages have been claimed.

19

Conclusion :

Owing to all that have been set out supra, plaintiff has not proved its claim for damages and the suit deserves to be dismissed.

20 Decision :

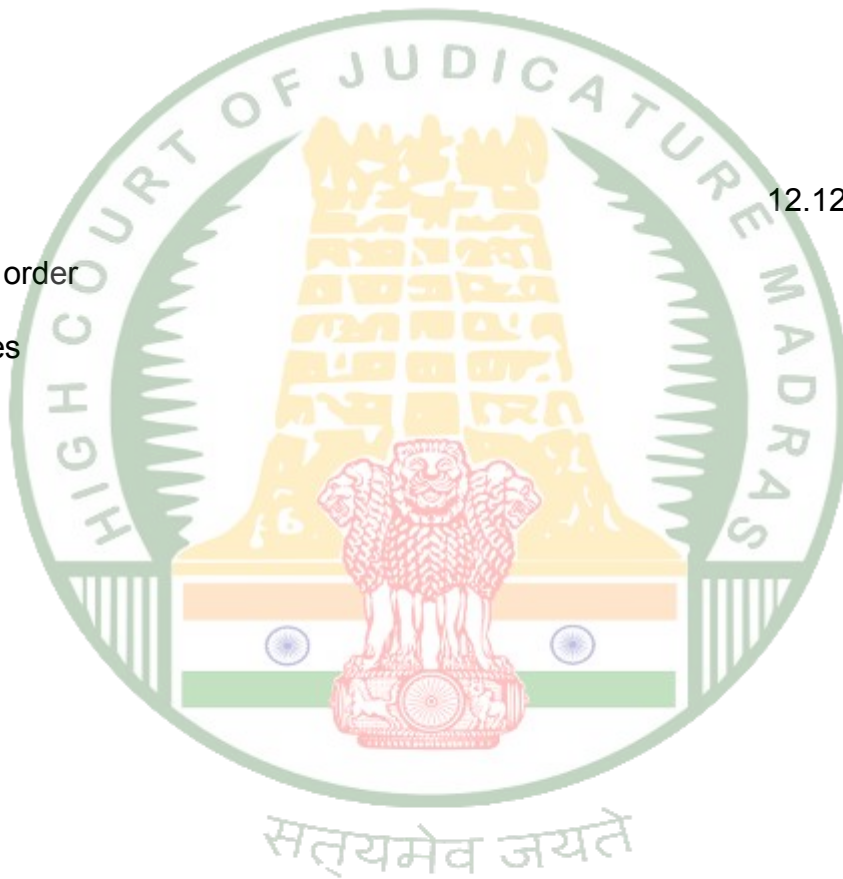
C.S.No.553 of 2012 is dismissed. Considering the nature of the suit and the trajectory this litigation has taken, parties are left to bear their respective costs.

12.12.2018

Speaking order

Index : Yes

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M.SUNDAR, J.

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order in
C.S.No.553 of 2012

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