

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 23.09.2019

JUDGMENT PRONOUNCED ON : 16.10.2019

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

C.S.No.712 of 2011

M/s.Bava Engineers Private Limited,
Rep.by its Director,
N.V.Abdul Akbar
Having office at
Old No.3/153, New No.3/290,
Maps Main Road, Sadras,
Kalpakkam – 603 102.
Kanchipuram District.
Tamilnadu.

... Plaintiff

Vs.

M/s.BGR Energy System Limited,
Represented by its Managing Director,
443, Anna Salai, Teynampet,
Chennai – 600 018.
Tamilnadu (India)

... Defendant

Plaint filed under Order VII Rule 1 C.P.C. read with Order IV
Rule 1 of the High Court Original Side Rules praying for:

(a) For a sum of Rs.51,74,785/- from the
defendant being the value of the tools, machinery and
equipment as detailed in the schedule I to the plaint
belonging to the plaintiff and illegally detained by the
defendant, together with interest at 24% p.a from the

date of plaint till realization.

(b) For the recovery of a sum of Rs.32,79,800/- from the defendant by way of damages and loss suffered by the plaintiff on account of the illegal retention of the plaintiff's machinery and tools required by the plaintiff for their other projects, from the date of termination of contract on 25.05.2010 till the date of the plaint and to pay future damages at Rs.2,11,600/- per month till the plaint claim is settled.

(c) For the recovery of a sum of Rs.8,00,000/- by way of damages for mental agony and harassment meted out to the plaintiff's officials caused by the defendant's officials and towards the delay in settlement of the bills due to the plaintiff's.

(d) For recovery of a sum of Rs.4,56,000/- by way of Bank interest charges towards loan interests due to termination of contract, and future damages by way of interest at Rs.30,400/- per month from the date of plaint till the realization.

(e) For recovery of a sum of Rs.1,00,675/- by way of taxes for the machineries.

(f) For the recovery of a sum of Rs.1,25,237/- together with interest at 24% p.a from the date of plaint till realization due to the illegal invocation of bank guarantee by the defendant.

(g) For a sum of Rs.97,907/- with interest at 24% per annum from the date of plaint till realization for holding the payment by defendant for the completed

works at Kakatheys Site (AP).

(h) For a sum of Rs.73,600/- towards the balance amount due to the plaintiff for the KTPS project together with interest at 24% p.a from the date of plaint till realization.

(i) For costs and other reliefs.

For Plaintiff : M/s.Chitra Sampath (Senior counsel)
for Mr.T.S.Bhaskaran

For Respondent : M/s.D.Ravichander

J U D G M E N T

The suit has been filed for recovery for a sum of Rs.51,74,785/- being the value of the tools, machinery and equipment as detailed in the Schedule I to the plaint belonging to the plaintiff and illegally detained by the defendant, together with interest at 24% p.a from the date of plaint till realization.

2. The brief facts are as follows:-

(i) The plaintiff is a mechanical fabrication and erection contractor specialized in Power Plant projects, refinery projects and other mechanical works. The defendant had invited offers for the Fabrication and Erection of Bunker shells, Ring beams, hopper etc at its Kothagudem site (hereinafter referred to as KTPS site) in Andhra

Pradesh in the month of March 2009. Finally the order was issued in favour of the plaintiff for the value of Rs.1,30,37,460/-. The order was signed by the defendant on 25.03.2009. The work was commenced by the plaintiff on 20.04.2009. The progress of the work suffered even from the very inception due to the lack of coordination and cooperation of the defendant's officials at the site and also due to labour unrest. Further, due to labour unrest and failure to provide required drawings on time, the plaintiff was forced to buy a Hydra crane by availing Bank loan and hire rolling machine to roll the CS plates at 25mm thickness at a cost of Rs.45,000/- per month as hire charges. Further, for want of the CS plates of 20mm & 25mm thickness with the defendant, the higher capacity rolling machine was kept idle for several days resulting in substantial loss to the plaintiff.

(ii) In the August 2009, works were affected due to the unrest of the labourers. Despite the reasons for such delay, the defendant has reduced the plaintiff work from seven bunkers to two bunkers by letter dated 14.08.2009. However, by this time, the plaintiff had already mobilized men and machinery to equip themselves for the fabrication and erection of seven bunkers at the site. When the

plaintiff objected to this reduction in scope of work by letter dated 28.08.2009, meeting was conveyed on 21.08.2009. Thereafter, the defendant released the work order for two more bunker shells on 21.08.2009. It was agreed to complete the 4th bunker on 31.12.2009. However, the work was affected by floods and also for want of clearance at the work site. Accordingly, parties agreed and extended the time up to 15.03.2010.

(iii) By the end of January 2010, the requirement for the 25mm rolling machine (higher capacity) at this site was not required. Despite the plaintiff's request to issue a gate pass, the plaintiff would not demobilize the said machinery from the site. It was being kept idle at a cost of Rs.45,000/- per month as hire charges. Thereafter, despite the persistent request, the machines was released by the defendant only on 08.03.2010. This had resulted in a loss of Rs.1,00,000/- to the plaintiff towards idling charges. Despite the plaintiff submit the running bills periodically to the official of the defendant, the site engineer. The defendant's site engineer purposely delayed the certification of the running bills and forced the plaintiff to accept for the release of 50% of the bills submitted. This also resulted in further delay. After joint meeting,

the reschedule for third and fourth bunkers also available. Accordingly, fourth bunker to be completed by 17.05.2010. The defendant while making payments under the running account bills had not payable by them.

(iv) In the month of April and May, the plaintiff faced severe labour crisis. The plaintiff has never delayed the settlement of labour wages. The defendant being aware of the situations in the site and the fact that the same situation prevailed for other contractors at site, the defendant proceeded to issue a letter dated 25.05.2010 terminating the contract. On that date the plaintiff had completed the third bunker and the fourth bunker was almost completed and few of the segments were ready for erection work. Immediately after termination on 25.05.2010, the plaintiff's men were denied entry into the KTPS site. The plaintiff's machineries worth several lakhs were lying at the site. The material received by the plaintiff from the defendant was also remaining at site without being inventoried and reconciled. Without material reconciliation being done in the presence of the plaintiff, the defendant allowed a new contractor to continue the work partially completed by the plaintiff. The new contractor utilized the materials and the

machinery tools left at the site by the plaintiff to proceed with his work. The plaintiff was finally allowed to enter the site only after 6 months from the date of termination of contract, that too after much follow-up. By then the materials at site were already utilized by the new contractor appointed by the defendant. The site engineer of the defendant after taking stock of the work done by the plaintiff and the new contractor and with the available materials at site prepared a material reconciliation statement on 19.11.2010. Whereas, the defendant claimed the huge amount of Rs.11,95,957/- without any basis. Hence the suit.

3. Denying the entire allegation, it is the contention of the defendant that the defendant always coordinated and cooperated with the plaintiff. However, the plaintiff did not take steps as required under the terms of the contract to complete the work in the given time. The plaintiff always found excuses to delay the work. He has showed stand with regard to the statutory complaints with regard to the payment of wages to the workman employee, as he failed to pay monthly payment to the employees which resulted in labour unrest at the site. Right from the beginning, the plaintiff was found wanting in the performance of the contract. The contract

completion date was 26.11.2008, but till August 2009, the plaintiff did not meet progress in performing the contract. The defendant provided letter dated 14.08.2009, clearly brought out the non performance to the attention of the plaintiff. Several instances had brought to the notice of the plaintiff. Despite such specific non performance, the plaintiff instead of trying to address the issue gave some excuses to justify him in action. When the defendant trying to offer help to resolve the issues, the plaintiff evaded meeting the defendant officials and did not show any interest in examining the issues. As on 25.05.2010, the plaintiff was able to complete only 46% of the overall work, he never took any steps to complete the work nor to resolve the workmen related issues. As efforts of the defendant to get the plaintiff to perform his part of the contract failed to yield results, the defendant was constrained to terminate the contract vide its letter dated 25.05.2010. In pursuant to the termination, a material reconciliation was carried out and it was found that 15.095 MT of steel worth Rs.8,23,378/- was not accounted by the plaintiff. He could not convincingly explain the loss of the materials. Due to the default on the part of the plaintiff the defendant had to suffer LD imposed by the employer. The plaintiff is liable to pay the defendant a sum of Rs.3,83,862/- as

liquidated damages consequent to termination of the contract. The plaintiff is liable to pay a total sum of Rs.12,93,864/- to the defendant with interest of 18%. The counter claim raised by the defendant is also denied by the plaintiff. It is also the contention of the defendant that all the machineries of the plaintiff continues in Schedule 1. The allegation that all the machineries of the plaintiff and account shown in Schedule 1 were denied by the defendant and their liability and claim in the prayer were denied. It is the contention that plaintiff is not entitled to any of the reliefs. Hence, prays for dismissal of the suit.

4. This Court, vide order, dated 16.04.2013, framed the following issues:-

1. Whether the termination of the suit contract by the defendant on 25.05.2010 is valid or not?

2. Whether the plaintiff is entitled to decree for a sum of Rs.51,74,785/- together with interest towards the detention materials detailed in Schedule I of the plaint detained by the defendant?

3. Whether the plaintiff is entitled for a decree for a sum of Rs.32,79,800/- towards the loss and damages suffered by the

detention of machinery and tools by the defendant?

4. Whether the plaintiff is entitled to recover future damages at Rs.2,11,600/- per month due to the illegal detention of machinery and tools by the defendant?

5. Whether the plaintiff is entitled for a decree for a sum of Rs.8,00,000/- towards the mental agony and harassment caused to the plaintiff by the defendant?

6. Whether the plaintiff is entitled for a decree for a sum of Rs.4,56,000/- towards the bank interest charges due to the termination of contract by the defendant?

7. Whether the defendant is entitled for decree for sum of Rs.1,29,32,864/- together with interest at 18% p.a against the plaintiff?

8. To what relief the plaintiff is entitled to?

5. The learned Senior counsel for the plaintiff submitted that the contract was already terminated on 25.05.2010 at that stage all the materials of the plaintiff were kept at the site. After termination, the plaintiff was never allowed inside, though the permission gate pass was given whereas, the materials to reconciliation was done only in the month of November. Ex.P24,

defendant has clearly admitted that materials were available within the site. Exs.P34, P.35 and P.36 clearly vouch the same. What are the nature of the materials available at the site has been identified by the site engineer and he has signed the same.

6. Therefore, it is the contention that once the materials available in the site of the defendant is established and the plaintiff was not allowed inside premises after the termination of the contract. When there is no evidence to show that all the materials were removed from the site, the defendant has to compensate the materials left by the plaintiff of the site. It is further contended that within six months from the date of termination of the contract, the contract was completed by engaging another new contractor. Such being the position, the plaintiff has to be compensated.

7. The learned counsel appearing for the defendant in his submission submits that the suit itself is not maintainable. No documents filed to prove the authorization to file the suit. It is further contended that the contract was admittedly terminated on 25.05.2010 and without challenging the termination, the suit for recovery of money is not maintainable and all the documents are

only xerox copies and they cannot be relied upon. It is the contention of the learned counsel that the suit has been filed for various reliefs. The plaintiff restricted only in respect of Sub Clause A of the prayer column. The plaintiff submitted that claim in the prayer F and G are already not pressed.

8. Issue No.1 - Since the plaintiff is not questioning the termination of contract and liquidating damages invoked by the defendant is also not questioned, this issue is not relevant for decision, though the various amounts have been paid.

9. The learned Senior counsel fairly contended that the main issue would be issue no.2. As far as other issues and other recoveries, there is no evidence available on record. For relief B and C, the learned Senior counsel fairly contended that there is no evidence available on record. In view of the same though there are many issues framed for recovery of the specific amount claimed in the plaint, this Court did not dwell upon those issues, since the plaintiff itself has given up those reliefs during the submission.

Issue No.2

10. It is not disputed by both side that the plaintiff was awarded contract, it is KTPS site Andra Pradesh. It is not in dispute that the contract qua the plaintiff was terminated on 25.05.2010. It is also not disputed that the plaintiff has placed the machinery tools and tackles at KTPS site prior to termination of the contract. Though the various documents have been filed by the plaintiff, Ex.P34 in the letter, the defendant has clearly informed the plaintiff unless the above amounts are settled, the tools, plants, machineries and equipments will be kept under the custody and shall not be removed from 1x500 thermal power station, KTPS site.

11. The above admission on the side of the defendant is seen in the document Ex.P34. The defendant categorically admitted that they kept the machineries of the plaintiff in the site itself. In Ex.P.35 dated 7th June 2010, the plaintiff has requested the defendant to release the machineries, tools and tackles from their site. Exs.P.36 and P.37, the materials reconstruction statement and also signed by the engineer incharge of the defendant, the legal notice dated 29.01.2011 is also sent by the plaintiff, wherein the

plaintiff has clearly stated that before access site entrusted another contractor, the machineries have been illegally held by the defendant and materials have not been allowed to be removed and the contractor was never allowed inside the premises. The above letters and legal notice are not denied. Ex.P47 dated 26.06.2012, the defendant has acknowledged the machineries are available in the site and informed the plaintiff to collect tools, plants and machineries, 1x5 Kuthangudam immediately. As per Ex.P.51 signed by the site engineer of the defendant, totally 63 materials were available of the site on 08.06.2010. This is much after termination of the contract. This document is also signed by the site engineer of the defendant. This document has been signed after verification by the store officer, Manager-store, site engineer at the site. Whereas Ex.P47, clearly indicates that on 26.06.2010, they issued a letter calling upon for the plaintiff to remove the materials from the site. This was on 26.06.2012 whereas, reconciliation under Ex.P51 where the materials as on 08.06.2010, store officers, Manager store of the site engineer of the defendant has noted down 63 materials available at the site. Further, there is no evidence on record to show that the plaintiff was ever allowed to remove the materials from the site or any gate passes have been issued, defendant has

also in his evidence, clearly admitted the site is totally protected that no one can enter into the vehicle area and the material can be removed only with the permission and recommendation of the security agency. Similarly, the defendant also admitted a sum of Rs.2,77,842/-, the amount has been verified by issuing Ex.P.34. Similarly, the defendant has also admitted Ex.D1 material reconciliation has not been signed by the site engineer. The plaintiff has also not signed and it is also admitted in Ex.P.34 communicated site copies and immediately, the plaintiff was prevented from doing any work and were allowed only to do material reconciliation, he also admitted that they had not verified with the security agents whether the plaintiff has removed materials from the site.

12. From the above documents, particularly the plaintiff case has been probalised that he was never allowed to take back the material. Schedule 1 materials were available in the site at that particular point in time. It is also not in dispute that immediately after termination of the contract, the new contractor was appointed and entire work was completed and only in the year 2012, the plaintiff was informed to remove the goods under Ex.P.47. When the work was completed in the year 2010, the plaintiff was informed

to remove the materials only in the year 2012, certainly, the work machineries would not have been worth as contended by the plaintiff. In fact the plaintiff's case is more probabalized.

13. Though on the above aspects, the documents clearly indicate that the materials were with the defendant, the evidence of the defendant clearly indicate that they had not checked whether, the machineries were taken back or not. Though the above documents probabalize the plaintiff's version at the first instance, the evidence of P.W.1 is carefully seen, P.W.1 in his evidence admitted that the materials shown in the schedule 2 were used by the plaintiff's company in Madhya Pradesh site.

14. It is relevant to note that schedule 2 machines are part of the schedule 1. 23 items contained in schedule 2 is also contained in schedule 1. When the evidence of P.W.1 itself clearly indicates that the major portion of the machineries were already used by the plaintiff at a different site. Though the above referred documents indicate and probabalized the version of the plaintiff, the admission of the plaintiff clearly indicates that a part of the machineries which had already been removed from the site had

been put in use at a different site by the plaintiff itself. Such being the position, merely on the basis of documents and materials on the side of the plaintiff to show that materials were retained at the defendant site even contract was terminated as such is not a ground to award the damages approximately claimed for the machinery. Admittedly, the plaintiff himself admitted that 23 machineries shown in the schedule 2 were already put in use and used by them in Madhya Pradesh site. Therefore, the approximate damages claimed by the plaintiff cannot be awarded. In fact he had incurred such expenses. However, there is no evidence available on record.

Counter Claim:

15. Though the defendant has relied upon Ex.D1, it cannot be said that the plaintiff has removed the materials from site. Therefore, it is to be noted that the material reconciliation were done after the work was taken out by the new contractor. Further, Ex.D1, the so called material reconciliation is not being signed by the site engineer or plaintiff. Further, the evidence of the defendant themselves clearly indicates that the plaintiff has no access to the site after 25.05.2010. Such being the position, the plaintiff

removing the even scrap of paper out of the site without permission of the defendant security agency is highly improbable. Further, in Ex.D1, the signature of the plaintiff or site engineer is missing. Such being the position, Ex.D1 is not acceptable. In view of the same, accordingly, counter claim is also not established. Hence, the issues are answered. Counter claim is dismissed.

16. Though it is admitted that 2nd schedule of the machineries were used in a different site, in respect of other items, there is no evidence to show that other machineries were removed by the plaintiff. In view of the above, since the defendant has admitted the availability of the machineries and hiring charges, this Court is of the view that the plaintiff is entitled to nominal damages of a sum of Rs.10,00,000/- with interest at the rate of 6% from the date of suit till the date of realization. Accordingly, suit is decreed for a sum of Rs.10,00,000/- with interest at the rate of 6% from the date of suit till the date of realization. With costs.

.10.2019

AT

List of the witnesses examined on the side of the plaintiff:

PW.1 – N.V.Bava

PW.2 – Abdul Akbar

List of Exhibits marked on the side of the plaintiff:

Sl. No.	Exhibits	Description	Dated
1	Ex.P1	Original order No.3300002219 issued to the plaintiff by the defendant.	19.03.2009
2	Ex.P2	Xerox copy of the letter issued by the defendant to the plaintiff.	04.06.2009
3	Ex.P3	Printout without signature reply issued by the plaintiff addressed to the defendant.	09.06.2009
4	Ex.P4	Unsigned printed copy of the rejoinder by the defendant to the plaintiff.	11.06.2009
5	Ex.P5	Original letter issued by the defendant to the plaintiff.	30.07.2009
6	Ex.P6	Xerox copy of the reply issued by the plaintiff to the defendant.	31.07.2009
7	Ex.P7	Original letter of defendant to the plaintiff.	01.08.2009
8	Ex.P8	Original letter of defendant to the plaintiff.	14.08.2009
9	Ex.P9	Xerox copy of the reply issued by the plaintiff to the defendant.	20.08.2009
10	Ex.P10	Xerox copy of the Mail sent by the defendant to the plaintiff.	20.08.2009
11	Ex.P11	Xerox copy of the minutes of meeting between the defendant and plaintiff.	21.08.2009
12	Ex.P12	Xerox copy of the minutes of meeting between the defendant and plaintiff.	09.10.2009
13	Ex.P13	Xerox copy of the mail from defendant to plaintiff.	22.10.2009
14	Ex.P14	Xerox copy of the mail from defendant to plaintiff.	23.10.2009
15	Ex.P15	Original mail from defendant to plaintiff.	01.12.2009
16	Ex.P16	Xerox copy of the mail from the plaintiff to defendant.	28.12.2009
17	Ex.P17	Xerox copy of the mail from the plaintiff to defendant.	28.12.2009
18	Ex.P18	Xerox copy of the record notes of	12.01.2010

Sl. No.	Exhibits	Description	Dated
		meeting between the plaintiff and defendant.	
19	Ex.P19	Original letter of defendant to the plaintiff.	18.01.2010
20	Ex.P20	Xerox copy of the mail from the plaintiff to defendant.	28.01.2010
21	Ex.P21	Xerox copy of the mail from the plaintiff to defendant.	18.02.2010
22	Ex.P22	Xerox copy of the letter by the plaintiff to the defendant.	24.02.2010
23	Ex.P23	Xerox copy of the mail from the plaintiff to defendant.	25.02.2010
24	Ex.P24	Xerox copy of the mail from the defendant to plaintiff.	25.02.2010
25	Ex.P25	Xerox copy of the mail from the plaintiff to the defendant.	05.03.2010
26	Ex.P26	Xerox copy of the mail from the plaintiff to the defendant.	09.03.2010
27	Ex.P27	Xerox copy of the letter from the plaintiff to defendant.	11.03.2010
28	Ex.P28	Xerox copy of the minutes of meeting between the plaintiff and defendant.	21.04.2010
29	Ex.P29	Xerox copy of the letter of plaintiff to defendant.	22.04.2010
30	Ex.P30	Xerox copy of the letter of plaintiff to defendant.	24.04.2010
31	Ex.P31	Xerox copy of the mail from the defendant to plaintiff.	06.05.2010
32	Ex.P32	Xerox copy of the reply by the plaintiff to defendant.	07.02.2010
33	Ex.P33	Xerox copy of the mail from the defendant to plaintiff.	08.05.2010
34	Ex.P34	Xerox copy of the letters from the defendant to plaintiff.	25.05.2010
35	Ex.P35	Xerox copy of the reply by the plaintiff to defendant.	07.06.2010
36	Ex.P36	Xerox copy of the letter from the plaintiff to defendant.	06.09.2010
37	Ex.P37	Xerox copy of the letter from the	22.11.2010

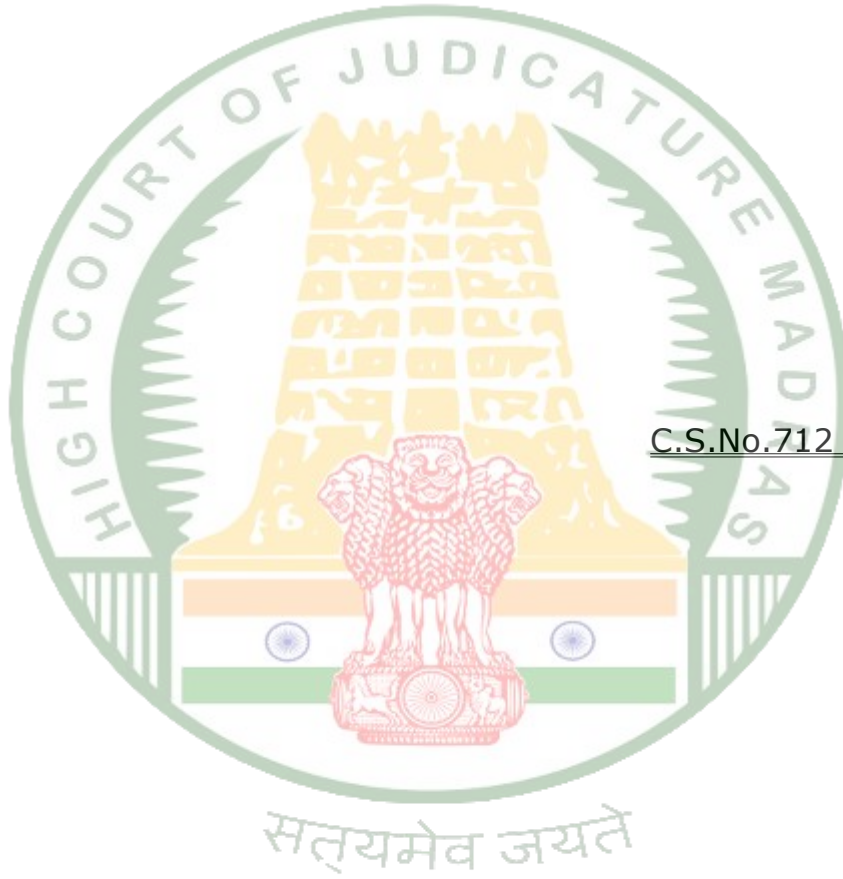
Sl. No.	Exhibits	Description	Dated
		plaintiff with enclosures.	
38	Ex.P38	Xerox copy of the letter of plaintiff to defendant with enclosures.	22.11.2010
39	Ex.P39	Xerox copy of the letter of defendant to plaintiff.	10.01.2011
40	Ex.P40	Office copy of Legal notice issued by the plaintiff.	29.01.2011
41	Ex.P41	Xerox copy of the mail from plaintiff to defendant.	27.02.2011
42	Ex.P42	Xerox copy of the mail from plaintiff to defendant.	27.03.2011
43	Ex.P43	Xerox copy of the mail from plaintiff to defendant.	13.04.2011
44	Ex.P44	Xerox copy of the letter of Canara Bank to plaintiff with enclosure.	29.07.2011
45	Ex.P45	Original Board of Resolution passed by the plaintiff.	15.09.2011
46	Ex.P46	Letter (Printout of E-mail) sent by the defendant to the plaintiff.	22.06.2010
47	Ex.P47	Letter written by the defendant to the plaintiff.	26.06.2012
48	Ex.P48	Office copy of the letter issued by the counsel for the plaintiff to the counsel for the defendant.	13.07.2012
49	Ex.P49	Reply issued by the counsel for the defendant to the plaintiff counsel on 23.08.2012.	---
50	Ex.P50	Outward gate pass issued by the defendant company to the plaintiff.	08.03.2010
51	Ex.P51 Series	(Three pages) Inventory of the used materials.	---
52	Ex.P52 Series Page No.4 to 30.	Inward gate pass for the various tools, plants and machineries.	---

16.10.2019

C.S.No.712 of 2011

N.SATHISH KUMAR,J.

AT



C.S.No.712 of 2011

WEB COPY

16.10.2019