

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 16.12.2020

Pronounced on : 19.02.2021

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

C.S.No.692 of 2012

M/s.R.P.Rajarajan Enterprises
Represented by its Managing Partner
R.Parthiban
S/o.K.A.Rishikesavan
Having its office at
No.39, Habibullah Road,
T.Nagar, Chennai – 600 017.

... Plaintiff

Vs.

Accudyne Industries India Private Limited,
Represented by its Managing Director,
No.4, Rajarajan Street,
Visalakshi Nagar,
Ekkaduthangal,
Chennai – 600 097.

... Defendant

(Amended as per order dated
05.07.2018 in A.No.3550 of 2018 and
time extended as per order dated
28.07.2018 and 10.08.2018).

Prayer:- This suit filed under Order IV Rule 1 of O.S Rules R/w. Order VII Rule 1 of C.P.C., prayed for a Judgment and Decree against the defendant:

a.Declare that the termination of the lease by the defendant by letter dated 29.10.2008 is illegal;

b.That the defendant do pay the plaintiff a sum of Rs.3,85,89,216/- with interest from the date of termination of lease on 29.10.2008 till the date of realisation; and

c.Costs of this suit.

For Plaintiff : Mr.V.Anand

For Defendant : Mr.Thirambak J. Kannan

JUDGMENT

The suit had been filed by the plaintiff M/s.R.P.Rajarajan Enterprises, a partnership firm, represented by its Managing Partner R.Parthiban against Accudyne Industries India Private Limited, a Company incorporated under the Companies Act, 1956 seeking a Judgment and Decree against the defendant for a declaration that the termination of the lease by the defendant by letter dated 29.10.2008 is illegal and for a direction against the defendant to pay to the plaintiff a sum of Rs.3,85,89,216/- together with interest from the date of termination of lease on 29.10.2008 till the date of realisation and for costs of the suit.

2.In the plaint it had been stated that the plaintiff owned lands ad measuring 1.67 acres in S.Nos.60/11C, 60/12, 61/18, 61/19 and 61/20B at Old No.101, New No.55, Thandalam Village, Sriperumpudur Taluk. It is the claim of the Plaintiff that the property was located in a fast developing industrial belt and the value was appreciating on account of the utility value of the lands in and around that area. It had been further stated that the Defendant had approached the plaintiff with a proposal of built-to-suit lease arrangement. There were many deliberations and discussions and finally a registered Lease Deed was executed on 29.11.2007 between the plaintiff and the defendant. It had been agreed between them that a constructed industrial area measuring approximately 30,000 sq.ft of factory space and 7,000 sq.ft of office space would be constructed by the plaintiff as lessor and would be handed over to the defendant as lessee within a period of six months from the date of execution of the lease deed.

3.By a subsequent meeting, it had been claimed in the plaint that the period had been altered and the date of commencement was changed to 01.04.2008. It is the contention of the plaintiff that the terms and

conditions of the lease had undergone novation. The plaintiff had also stated that necessary permissions had to be obtained by the plaintiff and other permissions relating to running of the industry had to be obtained by the defendant. It is the claim of the plaintiff that it was only owing to the delay on the part of the defendant, the construction was agreed to commence on 01.04.2008.

4. Further on account of rainfall there was also a likelihood of delay. There were also various specifications which were constantly changed by the defendant. It was stated that however the construction commenced and proceeded till the roof level. The flooring could be laid only after raising the inner flooring level of the constructed industrial shed. It had been further stated in the plaint that the representative of the defendant regularly visited the construction site and also gave suggestions for changes to be carried out. The plaintiff also carried out the desired changes.

5. The issue of construction of toilet for the office space generated a dispute between the plaintiff and the defendant and this was resolved in a meeting held on 26.08.2008. It was claimed that it was resolved that the

construction of the toilets for the office space would be carried out and would not be charged extra on the defendant by the plaintiff. The other specifications regarding roof height and flooring level were agreed to be uniform. It was further agreed that the plans from the municipality should be obtained by the plaintiff and only after the defendant approves the drawings and plan the construction should be commenced by the plaintiff. It was agreed that the revised drawings approved by the municipality should be handed over to the defendant by 30.10.2018. It was also agreed that the entire construction should be completed on or before 30.12.2008. The minutes of the meeting was signed by the Managing Director of the defendant.

6.The plaintiff however claimed that the agreement arrived at brought about substantial variation in the terms and conditions of the registered Lease Deed dated 29.11.2007. The changes in the construction was on account of additional open space of 6698 sq.ft required in addition to the originally agreed 6400 sq.ft of open space mentioned in the Lease Deed. It had been stated in the plaint that the officials of the defendant who visited the construction site kept changing the requirements and this was also communicated to the Managing Director of the Defendant over telephone.

7. It had been stated that in view of these additional instructions, the plaintiff also incurred additional expenses. It had also been stated that the Defendant was dependent on another Multi National French company for its business. The industrial shed had to be constructed according to the needs of the foreign company and therefore, the contracts and specifications kept changing. It had been further stated that owing to the drop of export potential of the defendant in July 2008 and other difficulties faced by the defendant, the plaintiff was blamed by the defendant about deviation in the agreed plan and approved drawing by letter dated 02.08.2008. The plaintiff by letter dated 07.08.2008 set out the details of the requirement of the defendant and sought clarification regarding location of the toilets for resuming construction. It had been also stated that the period fixed for completing construction namely 30.12.2008 should be extended further.

8. The defendant had also taken up the issue of additional rent for the additional space which was refuted by the plaintiff by letter dated 07.08.2008. The plaintiff had made clear that many modifications have been sought by the defendant and there were also many deviation in the approved plan. The plaintiff claimed they had spent more than Rs.1.5

Crores towards construction. The ground level was raised for the entire lease area.

9. It had been further stated that the defendant by letter dated 29.10.2008 terminated the lease exercising the option for doing so under Clause No.5.2 and Clause No.8.5 of the registered Lease Deed dated 29.11.2007. The defendant alleged that the construction had not been done in accordance with the specifications and the drawings. The plaintiff had issued a reply on 02.11.2008 stating that huge amount of money had been spent for construction work. The plaintiff also pointed out that there was no delay on their part in the construction.

10. The defendant then issued a legal notice date 08.12.2008, and for the first time allegations were raised against the plaintiff. The plaintiff issued a reply through their advocate on 18.12.2008. The plaintiff claimed that the amounts alleged to have been incurred by the defendant to a sum of Rs.1,43,54,324/- was not sustainable. The plaintiff claimed that they had spent a sum of Rs.3.75 Crores on construction. They also estimated that they would have realized rent of upto Rs.8,31,69,504/-.

11.The defendant issued a re-joinder to the notice of the plaintiff. The plaintiff replied through their counsel on 05.01.2009. The plaintiff alleged that the defendant sought changes in the plan at every stage. The plaintiff denied the contents of the letters of the defendant dated 29.10.2008, 08.12.2008 and 31.12.2008. The plaintiff claimed that it was the defendant which was at fault. They restated their contents in the notices dated 15.12.2008 and 05.01.2009. The plaintiff claimed that the rent agreed was Rs.9,73,200/-. The building was left idle in half constructed manner. The plaintiff claimed that they had incurred construction costs of Rs.3.75 Crores. They also claimed that they had lost Rs.8,31,69,504/- toward rents payable for the six years of the lock-in period. The plaintiff therefore claimed that they they were entitled for a total amount of Rs.12,06,69,504/-.

12.However, the plaintiff claimed the rents payable by the defendant only for three years namely, from 30.12.2008 to 29.12.2011. The plaintiff reserved the right to claim rent for the rest of the lock-in period. The plaintiff had therefore filed the suit for recovery of a sum of Rs.3,85,89,216/- together with a declaration that the termination of the Lease Deed by the Defendant is illegal and also claiming costs.

13.The defendant filed their written statement, in which they claimed that the suit is barred by law of limitation. It was claimed that the termination was on 29.10.2008 and the cause of action arose on that particular date and the period of limitation expired on 29.10.2011. The defendant also stated that they had filed Consumer Case No.294 of 2011 seeking compensation before the National Consumer Disputes Redressal Commission and the same was dismissed on 20.04.2012 and they had filed an appeal before the Hon'ble Supreme Court which was pending. They also questioned the authority of the person who verified the plaint. They also stated that the plaintiff was not a registered partnership firm and the suit was not maintainable.

14.The defendant stated that they had entered into a Letter of Intent on 25.07.2007 with the plaintiff, with respect to lands at No.55, Thandalam Village, Sri Perumbudur Taluk, Kancheepuram District, Tamil Nadu. The defendant claimed that they had requested the plaintiff on 08.01.2008 to give a schedule for the construction. The plaintiff was to start construction on 20.03.2008 and to complete the same within a period of six months. The plaintiff was required to develop, construct and lease to the defendant, the office and factory building at the said

place. The defendant had paid to the plaintiff a total sum of Rs.1,17,02,840/-. However, the plaintiff deviated in the construction and did not carry out the construction on the terms agreed between the parties. The plaintiff also failed to complete the construction and to handover the possession within six months from 29.11.2007.

15.The constructed area of the shop floor and office was not as per the agreed specifications and the elevation was also not in accordance with the agreement. The defendant had addressed the plaintiff by letter dated 29.10.2008 bringing to its notice the deficiencies in services. The defendant issued a legal notice on 08.12.2008 pointing out the details of deficiencies in services by the plaintiff. The defendant issued another legal notice on 31.12.2008 informing that the construction was not in conformity with the drawings and that there were deficiencies in the services of the plaintiff. It was claimed that the plaintiff did not cure the deficiencies. They did not complete the construction in the six months as agreed. The defendant therefore filed a Consumer Case No.294 of 2011 before the National Consumer Disputes Redressal Commission. This was dismissed *in limini* on 20.04.2012 holding that the complaint was not maintainable, because the defendant was not a

consumer. The defendant had filed an appeal before the Hon'ble Supreme Court. The defendant also denied each and every averment in each and every paragraph in the plaint.

16.The defendant denied that the construction of the industrial shed was agreed to commence from 01.04.2008. The defendant denied that there was likelihood of delay in the construction on account of rainfall. The defendant denied that they consistently changed the specifications. The defendant denied that the shed was to be completed at a mutually agreed time after taking into consideration the delays pertaining to the reasons stated in the plaint. The defendant denied that the construction proceeded at a fast pace and had reached upto the roof level. The defendant denied that the flooring could be laid only after raising the inner floor level of the constructed inner area.

17.The defendant stated that a meeting was held on 26.08.2008. The defendant denied that additional open space of 6698 sq.fts was requested. The defendant claimed that the plaintiff was never in a position to complete the construction before 30.12.2008. The defendant again reiterated that they did not change the specifications or the

drawings or their requirements. They denied that as on 07.08.2008 the plaintiff had spent more than Rs.1.5 Crores towards construction. The defendant terminated the lease and sought return of Rs.1,43,54,324/-. There were exchanges of notices. The defendant however denied that the plaintiff had spent Rs.3.75 Crores towards construction. The defendant denied that there was a lock-in period of six years and further denied that a total rent amount of Rs.8,31,69,504/- would have been realized by the plaintiff. The defendant denied that there were faults on them at every point of time.

18.The defendant had also filed a counter claim for a sum of Rs.1,17,02,840/- which had been paid by the defendant to the plaintiff as advance in terms of the registered Lease Deed dated 29.11.2007 together with interest at 24% per annum till date of realisation. The defendant therefore sought that the suit should be dismissed and a decree should be passed with respect to the counter claim together with costs.

19.A reply statement was filed by the plaintiff claiming that the suit was maintainable and had been filed within the period of limitation.

It had been stated that the plaint was presented on 28.10.2011 within the

period of limitation of three years from 29.10.2008 the date on which the lease was terminated by the defendant. It had also been stated that there was no bar in maintaining the suit, even though an appeal was pending in the Hon'ble Supreme Court as against the dismissal of the case filed by the defendant before the National Consumer Dispute Redressal Commission. It had also been stated that the plaintiff was a registered partnership firm. The plaintiff reiterated the averments made in the plaint. The entitlement of the defendant for refund of Rs.1,43,54,324/- was specifically denied. It had been reiterated that the facts and figures mentioned in the plaint are proper calculations. It had been stated that the counter claim is imaginary. It had been stated that the denials of the defendant were puerile and the defendant was liable for the claim of the plaintiff. It had once again been reiterated that the plaintiff was entitled for a Judgment and Decree as claimed in the plaint against the defendant.

20. On the basis of the above pleadings, the following issues were framed:-

“1. Whether the plaint has been validly signed and verified?

2. Whether the present suit is maintainable on

account of the plaintiff being an unregistered partnership?

3.Is the suit barred by limitation?

4.Is the Shed subject matter of the lease was delayed in construction due to the variations required by the defendant?

5.Whether the termination of the lease by the defendant through letter dated 29.10.2008 is valid?

6.Is the plaintiff entitled to recover money from the defendant for the entire term of the lease under the lease deed dated 29.11.2007, including the lock-in period?

7.To what relief the plaintiff is entitled?"

21.On 28.08.2019, the following additional issues were framed for

trial:-

"1.Whether the plaintiff is in breach of its obligations as contained in the agreement dated 29.11.2007 entered into with the defendant?

2.Whether the construction was completed, and

possession was delivered to the defendant by the plaintiff within the period mutually agreed on by the parties?

3. Whether the defendant is entitled to received from the plaintiff a sum of Rs.1,18,43,274/- including an interest of Rs.1,40,434/- on the principal amount of Rs.1,17,02,840/- paid as advance in terms of the lease deed dated 29.11.2007?"

22.A perusal of the records reveal that as a matter of fact, the issues were also framed on 23.10.2017 itself. But the parties had gone to trial on the basis of the issues framed on 02.08.2019 and the additional issues framed on 28.08.2019.

23.The parties were then invited to adduce evidence. Accordingly, the plaintiff examined R.Parthiban, Managing Partner of the Plaintiff as PW-1 and marked Exs.P1 to P12. During cross-examination of PW-1, the defendant marked Ex.D1. The defendant examined J.Shridhar, Finance Controller of the defendant as DW-1 and marked Exs.D2 to D11. The documents market by the plaintiff included the Original Lease Deed

dated 29.11.2007 as Ex.P2, exchanges of correspondences between the plaintiff and the defendant and also the notices issued. Ex.D1 was the letter written to the plaintiff by the defendant on 08.01.2008. The defendant marked the Letter of Intent dated 25.07.2007 and also the letter sent by the defendant to the plaintiff and the legal notice issued by the defendant to the plaintiff. The documents with relation to the Consumer Court case were also marked.

24. Heard arguments advanced by Mr.V.Anand, learned counsel for the plaintiff and Mr.Thirambak J.Kannan learned counsel for the defendant.

Issue No.1:-

25. This issue related to whether the plaint has been validly signed and verified. The said issue had been framed in view of the fact that in the written statement the defendant claimed that the plaint had been verified by the learned counsel for the plaintiff who could not aver of the events which had taken place between the plaintiff and the defendant. However, the Court had the benefit of examining the plaint as filed in the Court and it is seen that it is the partner of the plaintiff who had verified

the plaint. The issue therefore no longer survives and it is held that the plaint had been properly verified.

Issue No.2:-

26.This issue is whether the present suit is maintainable on account of the plaintiff being an unregistered partnership firm. This issue had again been framed owing to the statement in the written statement that the plaintiff is not a registered partnership firm and therefore cannot maintain the suit. However, the plaintiff had produced the Registration Certificate of the Partnership Firm, Ex.P1 which is dated 02.03.2005. That the plaintiff is a registered partnership firm cannot therefore be denied or disputed and the issue no longer survives. It is therefore held that the suit is maintainable and that the plaintiff is a registered partnership firm.

Issue No.3:-

27.This issue is whether the suit barred by limitation. It had been the contention of the learned counsel for the defendant that a perusal of the case status as seen in the website of the High Court revealed that the suit had been filed on 12.10.2012. The learned counsel stated that the suit

is therefore barred by limitation. However, a perusal of the plaint as filed shows that the plaint had been presented on 28.10.2011. The cause of action for the institution of the suit last occurred on 29.10.2008 when the defendant terminated the Lease Deed. Thereafter, there had been exchanges of legal notices. However, the plaint had been presented within the period of limitation on 28.10.2011. I hold that the suit is not barred by the law of limitation. This issue is answered accordingly.

Issue No.4 and Additional Issue No.1:-

28.The plaintiff, a partnership firm owned lands measuring 1.67 acres in S.Nos.60/11C, 60/12, 61/18, 61/19 and 61/20B at Old No.101, New No.55, Thandalam Village, Sriperumpudur Taluk. It is the stand of the plaintiff that the property was located in a fast developing industrial belt. The defendant had approached the plaintiff with the proposal of built-to-suit lease agreement. There were several discussions between the plaintiff and the defendant. Finally, a registered Lease Deed was executed on 29.11.2007. This was produced as Ex.P2. This Lease Deed / Ex.P2 had been registered as Document No.5426/2008 in the office of the Sub-Registrar, Sriperumpudur on 29.11.2007. It had been entered into between the plaintiff R.P.Rajarajan Enterprises represented by its

Managing Partner, R.Parthiban and the predecessor of the defendant Milton Roy India (P) Ltd., a Company incorporated under the Companies Act, 1956 and represented by its Authorized Signatory, Chetan Desai.

29. Even before proceeding further with analysing the terms of the Lease Deed, the averment that prior to execution of the Lease Deed there had been deliberations and discussions between the parties had to be verified. The plaintiff had examined R.Parthiban, their Managing Partner as PW-1. But however, the defendant had examined as their witness J.Shridhar, who was working as Finance Controller and who had actually joined the defendant only in November 2012, as a matter of fact, after the institution of the suit. This is pointed out since there are specific terms in Ex.P2 which require explanation and apart from the plaintiff, the defendant had not thought it fit to examine a witness who had knowledge not only about the terms of Ex.P2 which is now to be interpreted, but also about the deliberations which took place prior to its registration and the grievance of both the parties subsequent to its registration and during the course of its execution. DW-1 had stated that he is deposing only based on records.

“Q2.As mentioned by you in your proof affidavit you can depose only based on the records, is it true?”

A.Yes.

30.It is also to be mentioned that the competency of PW-1 had not been questioned by the defendant. On the other hand they asked him about the reason for instituting the suit as follows:

“Q5.Are you aware as to the reason why you have instituted the present suit against the defendant?”

A:I know. Witness adds:- The defendant prior to the completion date as per the lease agreement terminated the lease agreement. The agreement contemplated that by 30.12.2008 the building had to be constructed. However the defendant terminated the agreement 4 months prior to completion.”

31.Ex.P2 / Lease Deed was an agreement between the plaintiff and the defendant to provide a built-to-suit lease arrangement. What is to be built was to be in accordance with the defendant's specifications. The

amenities and the plans, drawings, specifications and elevation should be as provided by the Architect. It is also to be pointed that though disputes had arisen between the parties with respect to construction and the amenities particularly toilets to be provided, the Architect of the Defendant had not been examined as a witness. By the said agreement, the plaintiff had “agreed to obtain all the necessary permits, approvals, consents and licenses to be issued by the relevant agencies / authorities / department of the Government of the State of Tamil Nadu allowing the construction of the Lease Deed Industrial building totally 37,000/- square feet (of which 30,000 square feet will be constructed as factory space and 7,000 will be constructed as office space) on the 51,200 square feet of the Lease Deed Land.”

32.The details of the approvals to be obtained by the plaintiff were given in Annexure – 4 to Ex.P2. Annexure – 4 is as follows:

“ANNEXURE 4

List of approval (s) as obtained by the LESSOR in respect of undertaking the construction of the industrial building:

- *Plan approval from the Village of Panchayat*

(Thundalum Village).”

33.It had been further provided under Clause D of the Original Lease Deed as follows:-

“D.The LESSOR understands that the payment of rent and other outgoings by the LESSEE shall be subject to the LESSOR putting the LESSEE into exclusive possession of the factory building, within a period of six (6) months from the date of execution of this Lease Deed (except as may otherwise be provided for herein);”

34.According to this clause, the plaintiff should put the defendant into exclusive possession of the factory building within a period of six months from the date of execution of Ex.P2. Payment of rent was subject to that condition.

35.Clause 4 of the Lease Deed related to lease deed rent and security deposit. The defendant had paid an advance of Rs.9,73,200/- pursuant to a Letter of Intent entered on 25.07.2007. The Rent

Commencement Date had been given as follows in Ex.P2:-

“4.LEASE DEED RENT & SECURITY

DEPOSIT:

4.1.

4.2. The “Rent Commencement Date” shall be the date when:

(a)the LESSOR satisfactorily completes construction of the Premises as per the specifications set out in Annexures 2 and 3 (within all time periods set out in this Lease Deed),

(b)the LESSOR obtains plan approvals from the Village of Panchayat (Thundalum Village), and

(c)the LESSEE receives all consents, permissions, authorizations, clearances or licenses as shall be relevant and necessary for the LESSEE to commence and carry on its business and industrial activity at the Premises; provided, however, if LESSOR has completed construction of the Premises as per (a) above, has obtained the plan approval as per (b) above and has taken all action necessary and

required under the laws of India for the construction of the Lease Deed Industrial Building, LESSEE shall promptly make application for a Consent to Establish and any other such consents, permissions, authorizations, clearances or licenses that may be required of the LESSEE. If LESSEE does not promptly make such application or if LESSEE does not receive such consents, permissions, authorizations, clearances or licenses due to the action or inaction of the LESSEE and items (a) and (b) are satisfied, then the Rent Commencement Date shall commence on the day that items (a) and (b) were satisfied by the LESSOR;”

36.Tenure and Termination of Lease Deed had been provided in

Clause 5:-

“5.TENURE & TERMINATION OF LEASE DEED:

5.1.*The Term of the Lease Deed shall be six (6) years commencing on the Rent Commencement Date (the “Lock In Period The LESSEE shall have the option to*

renew the Lease Deed for one (1) additional three (3) years period upon the terms and conditions set forth herein and upon mutual agreement of the rental payments for such additional three (3) years period (the "Renewal Period").

5.2. The LESSOR agrees to complete construction of the Premises and satisfy the conditions of item 4.2(a) and (b) hereof within six (6) months from the date of execution of this Lease Deed (the Outside Completion Date). Notwithstanding anything to the contrary contained herein, if the LESSOR does not deliver the Lease Deed Industrial Building in accordance with the specification set forth herein (as may be modified upon mutual agreement between the LESSOR and the LESSEE) and the LESSOR has not obtained the unconditional and unqualified plan sanction approval permitting the occupation and use of the Premises for undertaking the industrial activity by the LESSEE, with twelve (12) months from the date of execution of the Lease Deed, the LESSEE shall have the option to

terminate the Lease Deed and the Token Advance and any Security Deposits (together with any interest accrued thereon) shall be immediately returned to the LESSEE together with all interest accrued thereon. Additionally, the LESSOR shall reimburse the LESSEE for all amounts paid by the LESSEE with respect to (i) Stamp Duty paid by LESSEE in connection with this Lease Deed. (ii) all fees incurred by LESSEE in connection with LESSEE'S environmental due diligence conducted at the Lease Deed Premises and (iii) all fees incurred by LESSEE in connection with LESSEE'S title search conducted for the Lease Deed Premises.”

37.A careful examination of these clauses would indicate that the Rent Commencement Date shall be the date when the plaintiff completes construction in accordance with the specifications given in Annexures 2 and 3 of the Lease Deed.

38. Annexure 2 of the Lease Deed related to general specifications and it had been stated that the specifications were subject to change in order to comply with the defendant's Standard and Environmental Health and also Safety requirements. There was also specifications given with respect to the Main Factory Finishes. Point No.13 was that toilets / lockers are to be provided as per requirements with respect to the office spaces. Point No.4 was that the toilets of the office spaces should be given separately.

39. Annexure 3 was as follows:-

“ANNEXURE 3

Plans, drawings, specifications and elevations as prepared by the architect in connection with the construction of the industrial building.”

40. The specifications should be satisfactorily adhered to by the plaintiff and the plaintiff should also obtain plan, approval from the Village of Panchayat, Thundalum Village. It is seen that it had also been provided that if the plaintiff had completed construction and had obtained the plan and approval and had taken all necessary action for the

construction of the Lease Deed industrial building, then the defendant shall promptly make an application for the consent to establish the business and any other consent and permission and clearance or license which may be required. It had been further provided, that if the plaintiff had completed construction and if they had also obtained the plan, approval from the Village Panchayat and if the defendant had not promptly made applications for permission and authorization and license or had not received such permission or authorization or licence, then the Rent Commencement Date shall commence on the date that the plaintiff had discharged their obligations.

41. The actual Lease Deed Rent payable by the defendant had also been stated in Ex.P2. With respect to the Tenure and Termination of the Lease Deed, it had been provided, as seen in Clause 5 that the term of the Lease Deed shall be six years commencing from the Rent Commencement Date. That period had been termed as the “Lock-in period”. Further the defendant was given an option to renew the Lease Deed for an additional three years upon the terms and conditions set forth in the Lease Deed and on mutual agreement of the rental payments. This period was called the Renewal Period.

42. Under Clause 5.2 which is the crucial clause insofar as the present issues between the parties are concerned, the plaintiff had agreed to complete construction and comply with constructing the premises in accordance with the specifications as set out in Annexure 2 and Annexure 3 of the Lease Deed, which as stated above related to general specifications, main factory finishes and office space and site development and the plans, drawings, specifications and elevations as prepared by Architect in connection with the construction of the industrial building with six months from the date of the Lease Deed namely 29.11.2007. This would indicate that the plaintiff should have put up the construction in accordance with the specifications of the defendant and should have also obtained plan approval from the Village Panchayat on or before 29.05.2008. This date, though not specifically mentioned in Ex.P2 was called “outside completion date”.

43. It had been further provided that if the plaintiff does not deliver the industrial building in accordance with the specifications which might have been modified by mutual agreement and if the defendant had not obtained the approval permitting occupation and use of the premises in undertaking industrial activity within a period of 12

months from the date of the Lease Deed namely on or before 28.11.2008, then the defendant can have the option to terminate the Lease Deed and the advance of any security deposit together with interest should be returned by the plaintiff. Further, the plaintiff was to reimburse to the defendant all amounts paid by the defendant towards stamp duty with respect to registration of Ex.P2 and all fees paid by the defendant with respect to environmental due diligence conducted at the premises and all fees incurred by the defendant in connection with the defendant's title towards the Lease Deed premises.

44.A careful reading of the above clauses would indicate that both the parties had agreed that the building would be completed by the plaintiff after obtaining permissions from the local Village Panchayat within a period of six months and then there was further provisions relating to termination owing to both non-completion of the construction and non-obtaining of the approval by the defendant for undertaking industrial activity in the premises within a period of 12 months, on or before 28.11.2008.

45. There was a further clause given under 5.3 with respect to the defendant's right to terminate. Clauses a, b and c are relevant. They are as follows:

“5.3.LESSEE's Right to terminate:

The LESSEE's has the right to terminate this Lease Deed, without being imposed with any penalty, for any of the following grounds:

a.The Rent Commencement Date not becoming effective;

b.The LESSOR not delivering the Premises to the LESSEE free, clear, unencumbered with for its use and occupation by the LESSEE within twelve (12) months of the date the Lease Deed is executed by the Parties;

c.The LESSOR not delivering the Premise to the LESSEE arising out of non-receipt of approval of the plan sanction papers or rejection of the plan sanction papers within twelve (12) months o the date the Lease Deed is executed by the Parties;

46. According to these clauses, the defendant had a right to terminate the Lease Deed on any of the following grounds.

i). The Rent Commencement Date not becoming effective which would mean the outside completion date which was fixed at six months from the date of the execution of Ex.P2 by which time the plaintiff should have put up the construction in accordance with the specifications of the office site, factory site and the site itself and also should have obtained a permission from the Village Panchayat.

ii). The Plaintiff not delivering the premises free, clear and unencumbered for use and occupation within a period of 12 months. This would arise if the plaintiff had not delivered the industrial building in accordance with the specifications and the defendant had not obtained unconditional and unqualified plan sanction approval permitting occupation.

iii). The plaintiff not delivering the premises to the defendant owing to non-receipt of approval of the plan sanction papers or rejection of the plan sanction papers within 12 months from the date of the Lease Deed.

47.A further analysis of the above would indicate that the plaintiff initially had to get permission from the Village Panchayat. They will then have to put up the building in accordance with the specifications required including specific stipulations for the office space, factory space and the site itself within a period of six months. If they had not completed the building within a period of 12 months and if the defendant was not able to get unconditional and unqualified plan sanction approval for utilizing the building for industrial purpose, then the defendant can terminate the Lease Deed.

48.Any analysis of Ex.P2 would be worthwhile only if the terms of Ex.P2 had remained unchanged for the entire period of 12 months and giving an opportunity to the plaintiff to fulfil their obligations arising under the agreement. It is the case of the defendant also that the lock-in period was for six years. As a matter of fact, they had clarified that during the cross-examination of the PW-1.

49.PW-1 was confronted with his proof affidavit, wherein he had mentioned that the lock-in period was three years. But during cross-examination he clarified that it was only six years.

“Q.7.Witness is shown para-5 of his proof affidavit and also Ex.P2 (clause – 5.1). In terms of the lease agreement how long is the lock-in period?

A.6 years.

Q.8.If so, can you please explain to this Hon'ble Court as to why in your proof affidavit you have stated that the lock-in period is for 3 years?

A.It is a typographical error.”

50.It is the specific case of the plaintiff that they were asked to wait to start construction since the defendant needed to get licences. This point was confronted with PW-1 during his cross-examination.

“Q12.When did you start construction of the building as per the specification of the defendant?

A.After the registration of Ex.P2 we were told to wait to start the construction of the building since the defendant needed to get license. Thereafter they intimated us by a letter in April 2008 (apporximately) to commence the construction.

Q.13.Have you filed any proof to substantiate your

answer to the previous question that the defendant told you to wait to start the construction of the building immediately after registration of Ex.P2?

A.I have not filed.

Q.14.Have you filed any document after the registration of Ex.P2 indicating that you were waiting for the go ahead from the defendant to start the constructed of the building?

A.I do not know.

Q.15.I therefore, put it to you that in terms of Ex.P2 you were required to commence the construction upon registration of Ex.P2 and consequently complete the construction within six months from then.

A.I deny.

Q.16.Witness is shown para-6 of his proof affidavit. You have in this paragraph indicated that the work was getting delayed due to the defendant. Have you filed any proof to show any such delay?

A.As mentioned earlier the work started only after

April 2008 when the defendant got all their licenses. This delay in getting the license after the registration of Ex.P2 is because of the defendant only, which was also mentioned in the aforesaid letter written in April 2008.”

51.The witness for the defendant DW-1 was also confronted with the delay in commencement of construction.

“Q36.Is it correct to state that you are conversant with the documents filed in this case?

A.Yes.

Q37.The witness is shown the original document dated 20.03.2008. This document has already been marked as Ex.D4 by you, is it not?

A.Yes. The above said original document dated 20.03.2008 is marked as Ex.P12.

Q38.In Ex.P12 in the 2nd page both parties agreed that construction would commence on and from 01.04.2008, is it not?

A.Yes.

Q39.What is the period provided to the plaintiff to complete construction and deliver possession of the lease hold in Ex.P2?

A.6 months.

Q40.The period mentioned in Ex.P12 is thus an extension, is it not?

A.Yes.

Q41.Immediately after Ex.P12 did the defendant request the plaintiff to have the amendment in the time frame to be incorporated by way of amendment to Ex.P2.?

A.The records show that the amendment in Ex.P12 is not carried out in Ex.P2. As agreed by both.”

52.Ex.P12 / D4 shown to DW-1 is a letter dated 20.03.2008 sent by the defendant to the plaintiff. In the said letter the defendant had agreed to take up an additional open space of 6698 sq.ft.s in addition to the 6400 sq.ft.s of open space indicated in the lease deed. There was a proportionate increase in the rent payable. More importantly the plaintiff had been thrust with the duty and obligation to put up construction over

the additional open space of 6698 sq.fts. When this construction on additional space was thrust on the plaintiff naturally, the time period for completion of construction would extend. The plaintiff had put up a plan keeping in mind 6400 sq.fts of open space. That plan would have to be altered to include an additional open space of 6698 sq.fts.

53.This is one factor which was not contemplated in Ex.P2 namely that quite apart from the land offered by the plaintiff, the defendant would also taken up an additional open space of 6698 sq.fts. of land.

54.There was a further stipulation regarding the flooring in the factory space. It was mentioned that the flooring should contain Epoxy coating. At this juncture, a further glance at Ex.P2 is required. Annexure 2 contains the specifications. It contains general specifications, main factory finishes and office space. Among the general specifications, item No.4 was “1mm thick Epoxy flooring” item No.7 was “Floor-Minimum 4.5 ft above land”. These two specifications will also have to be extended to the additional open space of 6698 sq.fts.

55. In the 2nd portion of paragraph 3 of the letter dated 20.03.2008, the defendant had also stated as follows:

“You have also confirmed that there will be no more additional changes which will be required and had agreed to take the date of this letter as the date of commencement for the construction. These changes being mentioned here will be converted into an amendment of the lease at the time MRI takes possession of the building and MRI and the Lessor shall sign the amendment for the same at that time. This is subject of HS Legal approval.”

56. A reading of the above namely, *“that there will be no more additional changes”* would indicate that there had been earlier changes, or additional changes and by this letter there were further changes and that there would be no further additional changes. In effect, I hold the parties had moved away from the specifications given from the agreement which they had entered into under Ex.P2.

57. Further the words “to take the date of this letter as the date of commencement of construction” would further indicate that the defendant themselves have stated that the date of the letter namely 20.03.2008 would be the date of commencement of construction. Naturally, one wonders as to whether the six months and the 12 months period mentioned in Ex.P2 would also be suitably shifted. There was no mention about that.

58. It is also to be mentioned that the changes mentioned would be converted as an amendment of the lease and this was the statement which was confronted with DW-1 in Q41 extracted above, wherein, he admitted that the amendments mentioned in Ex.P12 was not carried out in Ex.P2. The explanation given by him that it was not carried out as agreed by both is rejected by me since he was not directly present at the time of execution of both Ex.P2 and Ex.P12. In his own words, he joined the defendant only November 2012.

59. As a matter of fact in Ex.P12 itself the following words are found at the bottom.

*“Date of commencement of construction will
be 1st April 2008.”*

60. Thus the date of commencement had been further shifted from the date of the letter to 1st April 2008. This would effectively also imply that there were still on going discussions between the parties regarding the nature of construction, the nature of the plan and the amendment of the plan. I hold that Ex.P2 had shifted from its nucleus and the time line given therein had become redundant and unworkable.

61. PW-1 was also cross-examined with respect to the changes in the requirements of the structure by the defendant. It was as follows:

“Q17. Witness is shown para-6 of his proof affidavit. You have indicated that there were constant changes in the requirements of the structure by the defendant. Have you filed any proof to substantiate the same?”

A. No documents have been filed. These were only oral instructions which were given at the time of meeting each other.

Q18. Were you personally present or personally informed of each of the changes as mentioned in your aforesaid answer?

A. To me. I had regular meetings with Mr. Desai every

week.

Q19.How many changes according to you were made in the construction of the building?

A.I do not remember as so many changes were made.

Q20.Witness is shown para-6 of his proof affidavit. In terms of Ex.P2 was there an obligation on the part of the plaintiff to construct toilets in the building that was being constructed?

A.It was part of the scope of my work.

Q21.On whose instructions was the entire construction halted?

A.The entire construction was not halted. Only the construction of the toilet and the septic tank was halted.”

62.Further questions were also put to PW-1 during cross-examination, it was as follows:

“Q25.Witness is shown para-7 of his proof affidavit.

You have stated that the defendant had informed you that they would confirm the location of the toilet. Was this done?

A.It was never confirmed to the end. Witness adds:-We were ready to build. But every time the location was changed and construction of the maid building was on going.

Q26.Have you filed any proof whereby you called upon the defendant to confirm the location of the toilet and the defendant failed to confirm the same?

A.Since there were weekly meetings at the site, there was no necessity to send any letter.

Q27.I put it to you that there was no issue on the toilet location except your unwillingness to construct the same. What do you say?

A.I deny.

Q28.Witness is shown para-8 of his proof affidavit. In para-8 you had made reference to a number of deviations and that the defendant did not follow the registered lease deed. Was there an amendment to the lease deed?

A.No, there was no amendment. There is only one registered lease deed.”

63.What emanates from the above is that there have been deviation, there have been amendments, there have been further directions given, there have been changes in locations and finally there has been a change in the date of commencement of the construction also.

64.By letter dated 02.08.2008 which had been marked as Ex.P4/D5, the defendant, drawing attention to the Lease Deed Ex.P2, stated that the commencement of the construction was on 01.04.2008 and had complained about the information received that the plaintiff intended to demand an increased hiring charge on account of the toilets that are to be provided within the factory and office premises. It was stated that the entire building should be handed over before 30.09.2008 as per the terms of Ex.P2. This letter is self contradictory in itself. It was very specifically mentioned in paragraph 1 as follows:

“We understand that the construction has already commenced effective 1st April 2008”

65.This date is not the date mentioned in Ex.P2. The commencement of construction date in Ex.P2 is the date of Lease Deed / P2 namely 29.11.2007. This date was shifted to 01.04.2008 by Ex.P12 /

D4 dated 20.03.2008. Even if the shift had been mutually agreed, from 01.04.2008, the plaintiff had six months time to complete the construction, which would indicate that the plaintiff had time till 30.09.2008. This letter namely, Ex.P4 / D5 was issued on 02.08.2008 just prior to the period given to the plaintiff to complete construction.

66. This was replied by the plaintiff by Ex.P3 dated 07.08.2008. By that letter after the initial statement about the date of commencement of construction, in paragraph 3 of the letter, the plaintiff also stated as follows:

“(3) Please confirm the location of toilets at office space and factory to enable us to resume the construction work. Only after confirmation through your officials in person at our site will we be able to resume with civil work. We are not responsible for this delay caused by you. This has already been intimated to you through letter and mail dated July 28th 2008.

There was no intimation about this in your letter dated 2nd August 2008. There were no response for our letter and mail dated July 28th 2008 in your letter dated

August 2nd 2008. We don't understand the reason for this. Please send a confirmation through letter for our letter dated July 28th 2008.”

67.It is thus seen that the plaintiff was still searching for clarifications over the details and specifications mentioned by the defendant. There was a meeting on 26.08.2008 between the plaintiff and the officials of the defendant. The agenda of the meeting was the following:

“Agenda of the meeting:

To discuss & resolve the difference of opinion regarding rent of toilets as superstructure cost and detailed drawings of the plant.”

68.It is thus seen that even as late as end of August 2008, the plaintiff and the defendant had not resolved their differences of opinion regarding toilets, regarding superstructure costs and regarding the detailed drawings and the plan. The agenda stated above will have to be contrasted with the tone and tenor of the defendant in their letter dated 02.08.2008 Ex.P4 / D5. By that letter, the defendant had called upon the

plaintiff to furnish drawings and specifications. When such drawings and such specifications had not been decided between the parties, I hold that as between the plaintiff and the defendant, the defendant was always in a dominating position and certainly was also in a position to exercise undue influence over the plaintiff. The agreement was not between equal parties.

69. Even in Ex.P5 where the meeting between the plaintiff and the defendant at the residence of the plaintiff was mentioned, the plaintiff was represented by their Managing Partner alone. The defendant was however represented by as many as five individuals namely Chetan.R.Desai, C.Ramesh (Project Manager), S.Sundararaman (EH&S), Satish (JLL), Sridhar (JLL) and Parthiban (Land Owner). Thus there was always the possibility of the defendant forcing themselves with their changes and modifications and requirements about the constructions plan over the plaintiff. The minutes reduced after that meeting was signed by Chetan.R.Desai, but it was not signed by the plaintiff.

70. In his proof affidavit PW-1 had stated as follows:-

“9.Thereafter the defendant sent its officers

including Director Mr.Desai met me in my residence.

At that time, the defendant insisted on various things and they were there interested only to extract something in writing from me, with secret objective.

The letter of the defendant dated 02.08.2008 and the minutes sent to me dated 26.08.2008 are merely an eyewash and they do not reflect the true picture.

10.I submit that the defendant's director Mr.Desai and its officer met me at my residence on 26.08.2008. The drawings, the deviations and other things were studied in perspective of situation of the toilets and in that meeting the defendant proposed various changes regarding drawings to be delivered to them within a stipulated date. The roof design, its calculation, the elevation of the building, fire hydrant, drainage and plumbing layouts were all discussed and the defendant agreed that we can complete the building by 30.12.2008. The defendant wanted me to sign a stamped paper in which they had formulated something like a minutes and signed by Mr.C.R.Desai

*without his seal and sent it across to me. Though we discussed several things and agreed upon the delivery of possession to the defendant by 30.08.2008, as the issue pertaining to the drawings remained a fluctuating issue due to the defendant, we did not sign the said minutes. We rely upon the said minutes sent to me by the defendant only for the purpose of showing that the defendant had repeatedly asked for various changes, that they never complained about any delay earlier, only because of the fact of delay due to the defendant. The minutes of the meeting dated 26.08.2008 sent by the defendant to us may be marked as **Ex.P5**. I have only a copy of the same and the same is also admitted by the defendant in the legal notice for which I had instructed my counsel to send the reply notice wherein we have mentioned that we had not agreed to the terms and conditions of Ex.P5.”*

71.It is significant to point out that the plaintiff did not sign

Ex.P5. However, Chetan.R.Desai who had actually verified the written

statement and was also present in the meeting had signed Ex.P5. It is the complaint of the plaintiff there were stipulations given in Ex.P5 which went far beyond what was agreed during the meeting.

72.However, Clause 11 of Ex.P5 has a direct bearing on the further actions initiated by the defendant. Clause 11 is as follows:

“11.The extension of time for completion of construction of the facility agreed by MRI shall expire on 30-Dec-2008. The landlord agrees to provide the facility to MRI for fit outs by 15-Nov-2008 itself. The deadline of 30-Dec-2008 was arrived by calculating by adding approximately just above 2 months of construction having been stalled at the site and around 13 days of construction affected due to rain.”

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73.A reading of the particular clause shows that the construction had been stalled at the site and as a fact progress of construction had been affected due to rain. This fact had also been mentioned in the plaint.

The specific averment in paragraph 7 of the plaint was as follows:

“7.The plaintiff firm by its letter dated 07.08.2008 clearly set out the details of the requirement of the defendant and sought for clarification for the location of the toilets for resuming construction and the period fixed for completing construction viz.30.12.2008 should also undergo a further extension on account of the obstruction in civil work because of rains and the further modifications sought for by the defendant.”

74.In the written statement while giving their reply paragraph wise, the defendant had not thought it necessary to deny this particular fact, namely, that the construction had been obstructed owing to rains.

75.During cross examination of DW-1, the following question was put on him and his answer was as follows:

“Q64.I suggest to you that the letter of termination is only with reference to situation of toilets for citing as a reason for the delay without taking into account the rainy days that were agreed to be deducted in the time

frame for completion of work?

A.I deny.”

76.The witness blindly denied all suggestions without even understanding that the delay on account of rainy days actually had been agreed to be deducted in Ex.P5 which had been signed by Chetan Desai who had verified the written statement. Thus the defendant's case itself had turned out to be a bundle of contradictions with a witness being examined who had no direct knowledge of the negotiations which took place prior to and during the relevant period and who took upon himself the avowed burden of denying every statement of the plaintiff with scarce regard to the documents available on record and the facts as had agreed between the plaintiff and the defendant during the relevant period.

77.As had been pointed out, there had been disputes regarding the location of the toilets during the course of construction. Much reliance had been placed on Ex.D6 which is an internal communication within the defendant and copy marked to the Civil Engineer of the plaintiff. DW-1 was exclusively cross-examined on Ex.D6. However, the defendant for unknown reasons had not produced an affidavit under Section 65B of the Indian Evidence Act, 1872.

78. DW-1 who produced Ex.D6 was not a witness who claimed that he either owned the laptop, computer or computer tablet from which Ex.D6 had been downloaded. Therefore, Ex.D6 can be admissible only when it is produced along with a certificate under Section 65 B(4) of the Indian Evidence Act, 1872.

79. In *Arjun Panditrao Gorantyal Vs. Kailash Kushanrao Gorantyal and Others* reported in (2020) 7 SCC 1, the Hon'ble Supreme Court had stated that the certificate required under Section 65 B(4) is a condition precedent to the admissibility of secondary evidence by way of electronic evidence. It had been further stated that oral evidence in such certificate cannot suffice, as Section 65 B(4) is a mandatory requirement of the law and it had been clearly held that secondary evidence is admissible only if led in the manner stated and not otherwise.

80. In view of the above, whatever may be the contents of Ex.D6 and whatever was the interpretation placed by either the witnesses or by the learned counsels, I am afraid I will have to hold that the said document is inadmissible as evidence. But the fact remains that there had been deviations made in the original plan.

81.Further shifts were made by the defendant. The date of commencement of construction had been shifted from the date of the Lease Deed to 01.04.2008. It is also a fact that the plaintiff had actually commenced construction and had put up a substantial part of the construction. In Ex.P5, the defendant had stated that the completion date for construction was 30.12.2008. Ex.P5 had been signed on behalf of the defendant. Therefore it is binding on that. There cannot be a charge against the plaintiff that they were not ready and willing to construct the premises as required by the defendant.

82.It is to be noted that the plaintiff had commenced construction. Whatever had been constructed could not be put to any other use. They had been constructed in accordance with the specifications of the defendant.

83.The contention of the defendant that the construction was not in accordance with the specifications has not been established by the defendant through admissible and reliable evidence. It is the contention of the defendant that the plaintiff had failed to put up construction as stipulated by them. If that be the case, the defendant should have

examined a witness to determine what had been stipulated and what had actually been constructed. Such evidence had not been adduced by the defendant. The burden on the plaintiff was only to show that the land had actually been handed over and that the construction had commenced and that the defendant had shifted the date of commencement of the construction to 01.04.2008 and thereafter, that the construction had been on going and that there were changes demanded in the construction. If such construction had totally deviated from the specifications, then the burden shifts to the defendant to prove the same. The defendant had failed to discharge such burden.

84. Section 62 of the Indian Contract Act, 1872 is as follows:-

“62. Effect of novation, rescission, and alteration of contract.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed. ”

85. I hold that by the very fact that the date of commencement had shifted, the parties had agreed to a new contract. It is in evidence that the

changes with respect to the nature of construction as projected in Ex.P12 / D4 dated 20.03.2008 had not been incorporated in Ex.P2, the Lease Deed dated 29.11.2007. However, changes had been agreed between the parties. This would in effect bring about necessity to draw an entirely new agreement incorporating the changes agreed upon between the parties. That had not been done. The defendant cannot waver between Ex.P2 and the changes stipulated by them over and above the requirements mentioned in Ex.P2 and overlook the changes sought by them and seek execution of the contract as agreed between the parties in Ex.P2.

86.It is seen that the defendant has been oscillating in their stand. Once changes have been effected, then Ex.P2 pales into irrelevance. It could be the basis of an agreement between the parties namely, the plaintiff to handover land and to put up construction. Once the defendant had insisted upon changes in the construction, then naturally, the clauses in Ex.P2 should have been revisited by the parties by drawing an appropriate agreement. Failure to do so shifts the blame away from the plaintiff. So far as plaintiff was concerned their primary burden to handover land and to commence construction. This had been discharged by them. If there had been deviations in the said construction, the burden

to establish proof of such deviations lay entirely on the defendant.

87. The learned counsel for the defendant had relied on **Mehboob-Ur-Rehman** reported in **2019 SCC OnLine 203**, more particularly paragraphs 14 and 15. The said paragraphs are extracted below.

14. Though, with the amendment of the Specific Relief Act, 1963 by Act No. 18 of 2018, the expression “who fails to aver and prove” is substituted by the expression “who fails to prove” and the expression “must aver” stands substituted by the expression “must prove” but then, the position on all the material aspects remains the same that, specific performance of a contract cannot be enforced in favour to the person who fails to prove that he has already performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than the terms of which, the performance has been prevented or waived by the other party. As per the law applicable at the relevant time, it was incumbent for the plaintiff to take the specific averment to that effect in the plaint. Of course, it was made clear by this Court in several decisions [Vide Syed Dastagir v. T.R. Gopalakrishna Setty, (1999) 6 SCC 337

and Aniglase Yohannan v. Ramlatha, (2005) 7 SCC 534] , that such requirement of taking the necessary averment was not a matter of form and no specific phraseology or language was required to take such a plea. However, and even when mechanical reproduction of the words of statute was not insisted upon, the requirement of such pleading being available in the plaint was neither waived nor even whittled down. In A. Kanthamani v. Nasreen Ahmed [A. Kanthamani v. Nasreen Ahmed, (2017) 4 SCC 654 : (2017) 2 SCC (Civ) 596] , even while approving the decree for specific performance of the agreement on facts, this Court pointed out that the requirement analogous to that contained in Section 16(c) of the Specific Relief Act, 1963 was read in its forerunner i.e. the Specific Relief Act, 1877 even without specific provision to that effect. Having examined the scheme of the Act and the requirements of CPC, this Court said : (SCC p. 660, para 22)

“22. Therefore, the plaint which seeks the relief of specific performance of the agreement/contract must contain all requirements of Section 16(c) read with

requirements contained in Forms 47 and 48 of Appendix A CPC.”

15. Such a requirement, of necessary averment in the plaint, that he has already performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him being on the plaintiff, mere want of objection by the defendant in the written statement is hardly of any effect or consequence. The essential question to be addressed to by the Court in such a matter has always been as to whether, by taking the pleading and the evidence on record as a whole, the plaintiff has established that he has performed his part of the contract or has always been ready and willing to do so. In this regard, suffice it would be to refer to the principles enunciated by this Court in Umabai [Umabai v. Nilkanth Dhondiba Chavan, (2005) 6 SCC 243] as under : (SCC pp. 256 & 260, paras 30 & 45)

“30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether

the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the plaintiff-respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records.

45. It was for the plaintiff to prove his readiness and willingness to pay the stipulated amount and it was not for the appellants to raise such question.”

88. In the instant case, the plaintiff has averred that they were always willing to perform their part of Ex.P2. But it must be kept in mind that Ex.P2 vanished into oblivion owing to the terms being changed and shifted. In the absence of any fresh contract entered between the parties, the defendant cannot rely on Ex.P2 to impute allegations against the

plaintiff. There had been novation of the original contract. Therefore, the said judgment referred supra is not applicable to the facts of the present case.

89. The learned counsel for the defendant also relied on ***C.S.Venkatesh Vs. A.S.C.Murthy and others*** reported in (2020) 3 SCC 280. Paragraph 16 is as follows:

“16. The words “ready and willing” imply that the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they depend upon his performance. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of performance. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of contract, the court must take into consideration the conduct of the plaintiff prior, and subsequent to the filing of the suit along with other attending circumstances. The amount which he has to pay the defendant must be of necessity to be proved to be available. Right from the

date of the execution of the contract till the date of decree, he must prove that he is ready and willing to perform his part of the contract. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready to perform his contract.”

90. In the instant case, it is indiscernible whether the defendant expects the plaintiff to adhere to the terms of Ex.P2 or to the terms of the new specifications laid down by them. Insofar as the plaintiff is concerned, the very fact that they handed over the land and had commenced construction itself shows their readiness and willingness to comply with the conditions as stipulated under Ex.P2. Once changes had been effected by the defendant, then it is only reasonable for the plaintiff to expect that such changes should be formally entered into by way of a separate agreement, which would alone would be binding on the parties. In the absence of such a fresh agreement the defendant will have to suffer their consequences of bringing about unilateral changes in the construction of the building.

91.In the instant case, there has been no shift in the conduct of the plaintiff, but substantial shift in the conduct of the defendant. The dictum laid in the judgment extracted above will be applicable against the defendant if the parties are interchangeably described.

92.In view of all these reasons, with respect to issue No.4, I hold that the construction was delayed only due to variations brought in by the defendant. With respect to the additional issue No.1, I hold that, the plaintiff was not in breach of their obligations under the agreement dated 29.11.2007, owing to the fact that the defendant themselves have deviated from the said agreement and brought in changes right from the date of commencement of construction to the nature of construction. Therefore, Ex.P2 dated 29.11.2007 can never be the basis for the defendant to initiate any action as against the plaintiff and claim that the plaintiff had been in breach of their obligations. This issue is answered that the plaintiff has not been in breach of their obligations as contained in the agreement dated 29.11.2007.

Issue No.5 and Additional Issue No.2:-

93.The defendant had terminated the lease deed through letter dated 29.10.2008, which had been marked as Ex.P6. In the said letter in

paragraph 5, the defendant has stated as follows:

*“5.During the progress of the construction our representatives met with you from time to time including as recently as on 2nd August 2008 and 26th August 2008 in connection with addressing issues relating to deviations in construction as against the specifications and drawings submitted to you. Based on the discussions we had hoped that the construction would be carried out based on the understandings mutually arrived at during these discussions. Inspite of clear understandings between us, the specifications and elevations of the constructed area of Shop Floor and Office are not as per the agreed specifications and elevations under the Lease Deed. We are therefore invoking the provisions of **clause 5.2** under the Lease Deed and in terms thereof are issuing to you this notice as per **Clause 8.5** to notify you that we hereby exercise the option granted to us and terminate the Lease Deed with immediate effect.”*

94. In the above extracted paragraph, attention had been drawn to Ex.P4 / D5 which letter was addressed by the defendant to the plaintiff and also to Ex.P5 the copy of the minutes of the meeting dated 26.08.2008 which had been signed only by the defendant. Even at the outset, it must be immediately pointed out that in Clause 11 of the minutes of the meeting dated 26.08.2008 which has been filed as Ex.P5 and which had been extracted supra, the defendant themselves had very categorically stated that the time for completion of the construction of facilities shall expire on 30.12.2008. The termination letter Ex.P6 had been issued on 29.10.2008 much much prior to the date within which the plaintiff was accepted to complete and handover construction.

95. It must also be kept in mind that owing to the changes made in the specifications for the construction, Ex.P2 had become otiose and the parties had been working on oral instructions stated over by the representatives of the defendant and the date of construction had actually commenced only on 01.04.2008. In the letter dated 02.08.2008, Ex.P4 / D5, it had been mentioned that the construction should be completed and possession handed over on or before 30.09.2008. By meeting dated 26.08.2008 Ex.P5, the said completion date for construction had been re-

shifted to 30.12.2008. The defendant therefore cannot place much reliance on Ex.P4 / D5. That letter had been issued primarily addressing the additional rent claimed by the plaintiff and the justifications by the defendant for not being liable for any additional rent. It was not focused on the nature of the constructions. It was more focused on the drawings to be submitted by the plaintiff. It had been very specifically stated that *“These drawings as you are aware, require us to review and approve so as for you to carry out the required works. We would very much appreciate a line in confirmation”*.

96.It is seen that the drawings were required not to verify the construction which the plaintiff had made, but to review and approve the drawings to enable the plaintiff to carry out required work. This naturally means that the defendant had not finalized the instructions they would want to give to the plaintiff with respect to the nature of construction required by the them. Again there has been a strong indication that the parties had moved away from Ex.P2, the Lease Agreement. In Ex.P5, as stated which had been signed only by the defendant, once again there had been a shift in the date of completion of construction.

97.It is seen that the defendant had generated letters and documents which are self-contradictory to each other and which contains a bundle of instructions totally different from what had been agreed upon in Ex.P2. In this context, the letter of termination issued by the defendant in Ex.P6 will have to be examined. It is stated that the defendant had invoked the provisions of Clause 5.2 of the Lease Deed. Clause 5.2 had been extracted above. Even in Clause 5.2, a further period of six months, that is an outer period of 12 months had been given for final completion of the building. If that is also taken into account and if the construction had commenced only on 01.04.2008, then the 12 months period would expire only on 31.03.2009. Even if it is to be taken at six months' outer period, the date of completion of construction was only on 30.12.2008. The termination letter had been issued on 29.10.2008, even when the construction was in progress. If this is the stand of the defendant, then the circumstances surrounding issuance of the termination letter should have been explained to the Court by means of reliable and admissible evidence.

98.DW-1 is neither reliable nor privy to any of the agreements between the parties. His evidence, though based on records can never speak on what transpired between the parties and what factor led to the

termination of the contract. If it is based on records, the records reveal that the terms of Ex.P2 had been drastically changed at the instance of the defendant and the defendant alone. The plaintiff had no role in the change of specifications for the construction. Their role was only to handover land and to construct in accordance with the specifications of the defendant. If the defendant kept changing the nature of constructions, the plaintiff cannot be blamed for the same. Whether the plaintiff would have constructed the entire building by 30.12.2008 or not is an issue which nobody can comprehend since the agreement between them and the defendant had been terminated even on 29.10.2008, nearly two months prior to the date of completion of the construction.

99.The learned counsel for the defendant had relied on *Air India Ltd., Vs. Gati Ltd.*, reported in *2015 SCC OnLine Del 10220*. More particularly to paragraphs 29 and 30.

“29. The Court finds that the AT has discussed Clause 5.8 of the agreement threadbare. It has also made note of Clause 4.1 when setting out the various clauses in the agreement. It must be noticed here that Clause 4.1 makes a reference to Clause 5.6 and states

that “in case of any delays in the induction of the Aircrafts, Lessor shall not be liable for such delay”.

This is virtually repeated in Clause 5.8, which says that the delay in induction/operation of the aircraft shall not be held against the lessor and that the lessor “shall not be liable in any manner whatsoever towards the lessee.”

30. The AT has in detail explained how it came to the conclusion that “the protection against delay provided by Clause 5.6 of the agreement can at best be extended to ‘reasonable delay’ and not to an unreasonable one.” It is not possible to find any error having been committed by the AT, much less any patent illegality, when it says that the delay of “14 months for the delivery of fourth freighter from the date of commencement of the Agreement as against the originally scheduled period of six months cannot in any circumstances be held to be reasonable”.

100. That judgment was with respect to a petition under Section 34 of the Arbitration and Conciliation Act, 1996. It is to be stated that the

grounds under which an award can be questioned under Section 34 are very narrow.

101. In the instant case, the Court is examining as a Court of first instance, the evidence on record. Termination, if it is to be justified will have to be examined on the basis of the evidence with respect to each and every particular case and there cannot be a general statement of law on this aspect. With due respects, the facts in the judgment under reference are not applicable to the facts of the present case.

102. In the instant case, as pointed out, the defendant had terminated the Lease Deed, even though they had, by their acts moved away from the original terms of the Lease Deed as agreed under Ex.P2.

103. Question 42 during cross-examination of DW-1 is as follows:

“Q42. The witness is shown the original plaint. The initial lines in para-7 of the plaint mentions about order from French Company and the defendant has terminated the lease in Ex.P2 on account of failure of that French order, which fact has not been denied by

you in your proof affidavit?

A.No.”

104.The plaintiff had put in a probable reason for termination. The defendant had not answered it. Quite apart from the fact that they moved away from Ex.P2, the above suggestion is also significant. I hold that the termination of the Lease Deed by the defendant through their letter dated 29.10.2008 is not valid.

105.Issue No.5 is answered against the defendant. As a corollary additional issue No.2 pales into insignificance since the termination had been effected even before the date on which the construction should have been constructed namely, 30.12.2008. This issue is answered accordingly, that though the construction had not been completed, possession had not been delivered to the defendant. The period mutually agreed upon by the parties had not yet arrived on the date of termination of the Lease Deed by the defendant. I therefore hold that since the period mutually agreed namely 30.12.2008 by the parties had not yet arrived, and the plaintiff had put up construction, I hold that the issue will have to be answered by stating that the period mutually agreed

had not yet arrived and therefore, possession could not be delivered to the defendant and whether construction had been completed or not could not be determined by the Court. The issue is answered accordingly.

Issue No.6 and Additional Issue No.3:-

106.Both the issues arise as a corollary to issue No.5 which had been answered against the defendant. It had been held that the termination was not valid. Then a further issue arises whether the plaintiff is entitled for recovery of money for the lock-in period.

107.To determine this aspect, the Court will have to go back to Ex.P2 Lease Deed dated 29.11.2007. It is true that it had been observed that the parties moved away from the terms and conditions of Ex.P2 with respect to the date of commencement of construction and the date within which the factory premises should be handed over to the defendant. The parties had also moved away from Ex.P2 with respect to the amenities to be provided and the nature of constructions to be carried out.

108.The lease rent as agreed in Ex.P2 is taken into consideration to determine the rent that can be granted to the plaintiff. The suit had

been filed seeking a Judgment and Decree for a sum of Rs.3,85,89,216/- together with interest from the date of termination of lease deed on 29.10.2008 till the date of realisation. The plaintiff had claimed that they would have realized a total rent of Rs.8,31,69,504/-. They have also stated that they have spent a sum of Rs.3,75,00,000/- towards construction, but no documents have been filed to substantiate that aspect. In the plaint they have also claimed rent for a period of three years from 30.12.2008 to 29.12.2011.

109.A perusal of Ex.P2 indicate that the Lease Deed had been agreed for a sum of Rs.9,73,200/- per month and this had been further divided into two portions namely Rs.3,89,280/- as the base rent payable every month for the premises and Rs.5,83,920/- towards hiring charges payable towards amenities. It is a fact that the building had not been constructed completely and the defendant have not made commercial use of it. Therefore they have also not used the amenities that had been provided. In such an event, they are liable to pay only the base rent payable every month. When examined from that angle the rent payable is Rs.3,89,280/- per month. For one year the rent payable comes to Rs.46,71,360/-. The plaintiff has claim rent for a period of three years

alone and therefore the total rent payable on the above calculation for a period of three years would come to Rs.1,40,14,080/-.

110.I hold that this is the amount which the plaintiff can be granted. Naturally interest follows and interest is determined at 12% per annum from the date of termination of the Lease Deed which led to the institution of the suit namely, 29.10.2008 till the date of realisation.

111.Insofar as the counter claim is concerned, the defendant have brought about termination of the Lease Deed owing to their own hastiness. It had been mutually agreed that the date of commencement of construction would be on 01.04.2008 and the date of completion of construction and handing over possession to the defendant would be on 30.12.2008. However, the defendant had terminated the lease on 29.10.2008. I have already held that this termination is not valid. Therefore, the defendant will have to suffer the loss of the advance paid to the plaintiff.

112.In view of these facts, I hold that the counter claim sought by the defendant would necessarily have to be rejected and the claim is dismissed.

113.In effect, issue No.6 is answered that the plaintiff is entitled only for the base rent for a period of three years at Rs.3,89,280/- which comes to Rs.46,71,360/- per year and which comes to Rs.1,40,14,080/- for three years. Naturally the plaintiff is also entitled for the interest for the said amount at 12% per annum from the date of termination namely 29.10.2008 till the date of realisation. The issue is answered in favour of the plaintiff to that extent.

114.With respect to additional issue No.3, since the termination had been held to be not valid in the eyes of law, I hold that the defendant is not entitled for the counter claim raised. Accordingly it is answered against the defendant.

Issue No.7:-

115.The suit is partly decreed.

(a).The termination of the lease deed by the defendant by letter dated 29.10.2008 is declared as illegal.

(b).The defendant is directed to pay a sum of Rs.1,40,14,080/- together with interest at 12% per annum from 29.10.2008 till date of realisation.

(c).The counter claim of the defendant is dismissed.

(d).The plaintiff is entitled for costs of the suit.

116. In the result, the suit is partly decreed as follows:

1. The plaintiff is entitled for a declaration that the termination of the lease by the defendant by letter dated 29.10.2008 is illegal.

2. The plaintiff is entitled for a sum of Rs.1,40,14,080/- together with interest at 12% per annum from 29.10.2008 till date of realisation.

3. The plaintiff is entitled for costs of the suit.

4. The counter claim of the defendant is dismissed. No costs.

117. Insofar the cost of the plaintiff is concerned, the Registry is delegated by the Court to determine the costs as per the Bill/Memo of Costs submitted by the plaintiff in accordance with Section 35 of C.P.C., as amended by the Commercial Courts Act, 2015. The plaintiff is specifically entitled to the fees and expenses of the witness, the legal fees and expenses incurred and for any other expenses incurred in connection with the judicial proceedings and also for recovery of the actual Court fees paid into Court.

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smv

Index : Yes / No

Internet : Yes / No

Speaking order : Yes / No

List of Witnesses in C.S.No.692 of 2012

P.W.1 – R.Parthiban

List of Exhibits:

1. Ex.P1 : Original Registration of Firm dated 02.03.2005.
2. Ex.P2 : Original Registered Lease Deed dated 29.11.2007.
3. Ex.P3 : Office copy of the letter of the defendant dated 07.08.2008.
4. Ex.P4 : Office copy of the letter of the defendant dated 02.08.2008.
5. Ex.P5 : Copy of the minutes of meeting dated 26.08.2008.
6. Ex.P6 : Office copy of the letter by the defendant dated 29.10.2008.
7. Ex.P7 : Office copy of the letter by the plaintiff dated 02.11.2008.
8. Ex.P8 : Original of the Legal Notice issued by the defendant dated 08.12.2008.
9. Ex.P9 : Office copy of the reply to the above said legal notice dated 18.12.2008.
10. Ex.P10 : Original of the rejoinder issued by the defendant dated 13.12.2008.
11. Ex.P11 : Office copy of the reply rejoinder dated 05.01.2009.
12. Ex.P12 : Letter dated 20.03.2008 written by the defendant to the plaintiff.

D.W.1 – J.Shridhar.

List of Exhibits:

1. Ex.D1 : Letter dated 08.01.2008 written by the defendant to the plaintiff.
2. Ex.D2 : Original Circular Resolution No.9/2019-20 dated 02.01.2020 passed by the Board of Directors authorizing J.Shridhar to represent the defendant company.
3. Ex.D3 : Photocopy of the Letter of Intent dated 25.07.2017.
4. Ex.D4 : Photocopy of the letter dated 20.03.2008 sent by the defendant to the plaintiff.
5. Ex.D5 : Photocopy of the letter dated 02.08.2008 sent by the defendant to the plaintiff.
6. Ex.D6 : Printout of the e-mail dated 30.09.2008 sent by the defendant company copying the civil engineer of the plaintiff.
7. Ex.D7 : Photocopy of the letter dated 29.10.2008 sent by the defendant to the plaintiff.
8. Ex.D8 : Photocopy of the legal notice dated 08.12.2008 caused to be issued by the defendant to the plaintiff.
9. Ex.D9 : Photocopy of the order passed by the National Consumer Forum in Consumer Case No.294 of 2011 on 20.04.2012.
10. Ex.D10 : Photocopy of the civil appeal filed in the Hon'ble Supreme Court of India by the defendant.
11. Ex.D11 : Photocopy of the counter affidavit filed by the plaintiff in the civil appeal filed in the Hon'ble Supreme Court of India.

19.02.2021

C.V.KARTHIKEYAN, J.,

smv



Pre-Delivery Judgment made in

C.S.No.692 of 2012

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