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C.S.No.366 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 16.12.2021

PRONOUNCING ORDERS ON : 23.12.2021

Coram:

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

Civil Suit No.366 of 2016
(Comm. Suit)

M/s.R.K.M.Powergen Private Ltd.,
Represented by J.Mohan (GM Planning)
Old No.45, New No.14
Dr.Giriappa Road, T.Nagar
Chennai 600 017.

.. Plaintiff

/versus/

Jai Balaji Industries Limited
Rep.by its Managing Director
No.5, 1st Floor, Bentinck Street
Kolkatta 700001.

..Defendant

Prayer: Civil Suit has been filed under Order IV Rule 1 of the Madras High Court O.S. Rules r/w Order VII Rule 1 of C.P.C., praying to pass a judgment and decree in favour of plaintiff.



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a) to pay the sum of Rs.6,66,10,734/- to the plaintiff.

b) to pay interest at the rate of 18% p per annum on Rs.3.22 crores from the date of plaint till the date of recovery of all amounts.

c) to pay the cost of the suit; and

d) pass such further or other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case.

For Plaintiff : Mr.B.Kumar
Senior Counsel
for Mr.S.Ramachandran

For Defendant : Mr.K.V.Shanmuganathan

J U D G M E N T

The instant suit has been filed seeking for a judgement and decree directing the defendant to pay a sum of Rs. 6,66,10,734/- to the plaintiff and directing the defendant to pay interest at the rate of 18% per annum from the date of the plaint till the date of recovery of all the amounts. The plaintiff further seeks for a direction to the defendant to pay the costs of the suit.



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CASE OF THE PLAINTIFF:

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2.The plaintiff is a company engaged in power sector. The plaintiff states that between 2013 and 2016 their Company was constructing a power plant to generate electricity on a commercial scale in the state of Chhattisgarh. For the purposes of civil construction the plaintiff required iron rods of particular diameters and length. The defendant is a Company manufacturing and selling such Iron rods.

3.The further case of the plaintiff is that the plaintiff placed a purchase order for a total requirement of 4900 Mts of iron rods for various dimensions vide Purchase order dated 25-3-2013. The plaintiff's claim that the total price for the entire supply of 4900 Mts of rods was fixed at rupees 29,94,50,000. The purchase order provided for 50 percent of the quantity to be delivered within April 2013 and the balance 50 percent by May 2013. The plaintiff claims that as per the agreed terms, the materials were progressively lifted till June, 2013 and subsequently, on account of monsoon and labour strikes, the supplies were kept in abeyance. The supplies resumed in September 2013 and continued till January 2014. The plaintiff claims that the defendant had totally supplied



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only 1490 Mts and that the said quantity is valued at Rs.6.39 crores as per the invoice of the defendant.

4.The plaintiff specifically relies upon certain clauses in the purchase order. Clause B of the purchase order enabled the plaintiff to reserve their right to amend the purchase order in respect of quantity/delivery schedule. Clause 8 of the purchase order provides that, “invoice shall be quadruplicate along with the delivery challan, lorry receipt, test certificate, inspection report and other necessary documents”. *Clause 2 of the purchase order states that ‘payment terms 100 percent advance payment against submission of proforma invoice’.*

5.The plaintiff states that the plaintiff had given an advance of Rs.9.61 crores. The further claim of the plaintiff is that for the quantity of iron rods supplied, the price for the same was deducted out of the above said advance. On such adjustments, the defendant has to supply 753 Mts to adjust Rs.3.22 crores advance still lying with the defendant.



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6. The grievance of the plaintiff is that the defendants demanded the payment of the entire 20.94 crores i.e., total consideration of the contract, even before the supply of the goods, failing which, the defendants will not dispatch the goods to the plaintiff. The plaintiff states that the defendant stopped all supplies from January 2014 onwards. According to the plaintiff, the purchase order along with the Clauses in the annexure clearly shows that as and when the defendant supplies the goods and sends the invoice, the plaintiff has to pay the amount in advance to the extent of the supply. The plaintiff therefore claims that the contract cannot be read as requiring the payment of the entire 20.94 crores even before any supply. The further grievance of the plaintiff is that the defendant received Rs.9.61 crores in advance and after deducting the quantity of iron rods supplied, the defendant still has the money of the plaintiff to the tune of Rs.3.22 crores. The plaintiff claims that all the invoices raised by the defendant are in conformation with Clause 8 and contain different quantities of iron rods dispatched by the defendant to the plaintiff. The plaintiff after adjusting the supply has sought for recovery of money and liquidated damages from the defendant.



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CASE OF THE DEFENDANT:

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7.The defendant is a manufacturing Company involved in the manufacture of iron and steel rods. The defendant states that the plaintiff placed a purchase order with the defendant Company for the supply of 4900 Mts of rods vide order dated 25-3-2013. The defendant also states that the total value of the purchase order is Rs.29,94,50,000/-. The defendant claims that as per the purchase order, there would be a proforma invoice upfront or advance towards the supply of materials. The defendant states that an advance of Rs. 9.61 crores was paid by the plaintiff to the defendant through various payments till 06-06-2013. The defendant claims that the materials were progressively lifted till June, 2013. The defendant further states that the supplies were kept in abeyance due to monsoons and resumed again in September 2013 to January 2014. The defendant states that 1490 Mts of rods were supplied by the defendant and the total value of the supplied rods is Rs.6.39 crores. The defendant further states that the supply of materials was stopped from January 2014 and the defendant insisted the plaintiff to pay Rs. 11.32 crores in order to supply balance quantity of materials.



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8.The defendant states that to resolve the dispute amicably a meeting was arranged between the plaintiff and the defendant. The defendant claims that in the said meeting, the plaintiff agreed to remit Rs.11.32 crores in five instalments and the defendant agreed to supply 700 Mts of rods worth Rs.3.22 crores corresponding to the balance advance amount lying with the defendant. Subsequently, the defendant demanded the plaintiff to give a written confirmation for the release of Rs.11.32 crores, on the failure of which, the defendant refused to supply 700 Mts of rods. The defendant states that the defendant later sent a mail on 30-7-2014 requesting 15 days time to effect delivery. However, nothing happened.

9.The further case of the defendant is that this Hon'ble Court lacks jurisdiction to try this case as according to the defendant, the contract came into existence at the registered office of the defendant which is in West Bengal. Further the defendant claims that the defendant sent proforma invoice for making 100 percent advance. However, the defendant states that the plaintiff failed to pay 100 percent advance as



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agreed between the parties. The defendant claims that as per the terms and condition No.2 of the purchase order dated 25-3-2013, the plaintiff was under a contractual obligation to pay 100 percent advance upon submission of proforma invoice. *The defendant further states that by way of covering email dated 25-3-2013 whereby the purchase order was sent to the defendant, the plaintiff had interalia asked the defendant to send proforma invoice for making 100 percent advance as agreed between the parties.*

10. The defendant further states that only for the purpose of maintaining a cordial business relationship with the plaintiff and in good faith, had manufactured and kept the required quantity of TMT Bars ready for despatch. The defendant states that it did not waive its right to receive 100 percent payment of advance as per the terms and condition No. 2 of the agreement. The defendant further claims that the plaintiff on several occasions from a number of contemporaneous e-mails dated 3rd, 10th and 19th June had directed the defendant to withhold the supply of rods on the ground that they were reviewing the requirement of TMTS



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with reference to work progress vs stock position. However, the defendant states that by an email dated 19-6-2013 the defendant had requested the plaintiff to give permission to them to start the dispatch immediately. The defendant thus states that the emails dated 18-9-2013, 07-02-2014 and 17-2-2014 would go on to show that, the defendant was always ready and willing to perform its part of the obligation.

11. The defendants claim that they have suffered a loss to the tune of rupees 6,89,20,000 due to the breach of agreement committed by the plaintiff. Further the defendant states that with respect to Rs.3.22 crores of advance amount still lying with the defendant, the defendant informed the plaintiff that, the balance advance amount will be held up for adequate funding in case any further material will be required by the plaintiff and the defendant claims that the plaintiff did not give any reply message after receiving the email on 23-12-2013. The defendant has therefore denied the entire liability and prayed for the dismissal of the suit.

12. Based on the above pleadings, the following issues were



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framed by this Court:

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- i) Whether the transaction between the parties took place outside the territorial jurisdiction of this court and whether this court has no jurisdiction to entertain the suit?
- ii) Whether the advance payment for the supply of goods is a pre-condition in the contract and whether the plaintiff is entitled to recovery of 3.22 crores from the defendant?
- iii) Whether the plaintiff is entitled for any interest on the money advanced?
- iv) Whether the plaintiff is entitled to liquidated damages at the rate of 5 percent for the undelivered portion of the total supplies?
- v) Whether the plaintiff entitled for the interest at the rate of 18 percent per annum on the suit claim from the date of plaint till the date of recovery?
- vi) Whether the suit has been properly valued and court fees paid?
- vii) Whether the plaintiff is entitled for the refund of money advanced when there is no provision in the contract?



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viii. What other relief the plaintiff is entitled to?

13. The suit was pending before the regular Court and was transferred to the Commercial Division. The Commercial Division determined jurisdiction on 06.12.2019. Pursuant to the same, the suit was tried before the Commercial Division.

14. The plaintiff examined PW1 and Ex.P-1 to Ex. P-11 were marked. The defendant examined DW1 and Ex.D-1 to Ex.D-8 were marked.

15. Heard Mr.B.Kumar, learned Senior Counsel for the Plaintiff and Mr.K.V.Shanmuganathan, learned counsel for the Defendant.

DISCUSSION AND FINDINGS ON THE ISSUES:

16. This Court will now take up the first issue for consideration since it touches upon the jurisdiction of this Court. The Defendant has taken a plea to the effect that no cause of action has arisen within the jurisdiction of this Court and that the defendant is also having



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their registered office outside the jurisdiction of this Court and hence, this court does not have the territorial jurisdiction to deal with this suit.

The averments made in the plaint is to the effect that the entire negotiation had taken place only through exchange of e-mails and that even the purchase order was sent through e-mail to the defendant and the defendant has accepted the same and communicated through e-mail and all the pro forma invoices were sent through email. That apart, the amount payable for the goods supplied was paid only from Chennai. Therefore, according to the plaintiff a substantial cause of action had arisen within the territorial jurisdiction of this Court. Even when the suit was moved by the plaintiff, an application was filed in Application No. 969 of 2016, seeking for the leave of this Court under Clause 12 of the Letters Patent. Leave was granted by this Court by an order dated 20.04.2016. Only thereafter, the suit was numbered and taken on file. Even while passing the order, the defendant was put on notice and the learned counsel for the defendant submitted that the cause of action arose within the jurisdiction of this Court and that they have no objection for the grant of the leave. This submission was recorded by this Court while allowing the application.



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17. In the present case, the communication had taken place through an electronic medium i.e., through e-mail communication. In cases of this nature where the parties are communicating through an electronic medium, which is in the nature of an instantaneous communication between the parties, it would be reasonable to hold that the parties, in a sense, were in the presence of each other and negotiations were concluded. Under such circumstances, a part of the cause of action has arisen within the jurisdiction of this Court. This is apart from the fact that the defendant had conceded to the territorial jurisdiction of this Court when the leave was granted by this court in Application No. 969 of 2016 ordered on 20.04.2016. In view of the same, this Court has territorial jurisdiction to deal with the present suit and the first issue is answered accordingly.

18. This Court will now take up issue numbers 2, 3 and 5 for consideration.

19. The Plaintiff placed the purchase order through Ex.P2



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dated 25.03.2013. The plaintiff had placed orders for supply of 4900 Mts for various dimensions of TMT bars and the total price that was fixed for the entire quantity of goods was Rs.20,94,50,000/- As per the terms and conditions of the purchase order, invoice must be raised in triplicate and 100% advance payment must be made against the **submission of pro forma invoice**. Clause 8 of the terms and conditions governing the purchase order provided as follows:

Invoice shall be in quadruplicate along with delivery challan, lorry receipt copy, test certificate, inspection report and other necessary documents.

20. A plain reading of the above clauses seen along with Ex. P4 series shows that all the invoices that are found in this exhibit are in line with Clause 8 of the terms and conditions. In other words, the invoice is raised by mentioning the quantity of the product that is required by the plaintiff and the amount payable towards the concerned invoice is paid 100 % in advance and thereafter the material is delivered to the plaintiff.



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21. The stand taken by the defendant as if the entire amount of Rs.20,94,50,000/- has to be paid by the plaintiff upfront for the supply of materials is not sustainable. That is not the purport of the terms and conditions of the purchase order. In fact, even the defendant did not understand the purchase order in this manner when the supply of materials was made to the plaintiff to the tune of Rs.6.39 Crores.

22. It is an admitted position that the defendant had received a sum of Rs.9.61 crores from the plaintiff and it is also admitted that the defendant had supplied materials to the tune of 1490 MTS which carries a value of Rs.6.39 Crores. There is also no serious dispute with regard to the fact that the defendant had retained the excess amount of Rs.3.22 Crores for which there is no corresponding supply of materials to the Plaintiff.

23. The plaintiff has taken a specific stand at Paragraph 8 of the Plaint to the effect that the defendant had sent an email on 30.07.2014 to the effect that they required 15 days' time to effect the delivery of 200 Mts and thereafter the supply did not go through. Even when the legal



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notice was issued on 23.09.2014 which was marked as Ex.P8, a specific reference was made to the email dated 30.07.2014. The defendant in their written statement while meeting this averment had stated that they reserved their right to make appropriate submission thereon at the time of hearing if necessary. The defendant did not choose to give any reply for the legal notice issued by the Plaintiff. Even in the proof affidavit of PW1, there is a specific mention about the e-mail sent by the defendant on 30.07.2014 asking for 15 days' time to effect the delivery. There was no cross-examination on this aspect to PW1 from the side of the defendant. Even in the proof affidavit of DW1, there is not even a stand taken contradicting the e-mail communication dated 30.07.2014. In fact, even in the written submissions filed by the defendant, the e-mail dated 30.07.2014 sent by the defendant has been admitted. When DW1 was asked questions in this regard during the cross-examination, he had answered those questions in the following manner.

Q.5: Is it correct to state that cost of 1490 metric tons is only Rs.6.39 crores as per the rate agreed between the plaintiff and defendant?

A: Yes.



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Q.6: Is it correct to state that there is a short supply of 753 metric tons, for the money the plaintiff has so far paid?

A: As per Purchase Order the payment terms were agreed on 100% advance but we have received only a part payment of R\$.2.6 1crores and. only on good business relationship we start to dispatch materials of above 1420 metric tons but in due course we have not received further balance advance payment from plaintiff.

Q.7: I put it to you that you do not have 753 metric tons ready for dispatch that is why you have stopped delivery.

A: No.

Q.8: I put it to you that the conciliatory efforts made by the plaintiff side failed because you do not have the materials ready for dispatch.

A: I deny.

Q.9: I put it to you that as you have failed to deliver the materials representing Rs.3.22crores in the advance paid, you are bound to return the said amount.



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A: The entire quantity of materials is lying ready at our plant. But the plaintiff requested to hold the dispatches with immediate effect.

24. The factual stand that was taken by the plaintiff with regard to the e-mail dated 30.07.2014 was not refuted or denied or challenged at any point of time. Even PW1 was not cross-examined on this issue and no reply was given for the legal notice which also contained a specific reference to the e-mail dated 30.07.2014. It must therefore be taken that the defendant had in-fact sought for time to effect delivery for excess amount of Rs.3.22 Crores that was lying in their hands and did not make the supplies. Later, the defendant had turned around and taken a stand as if the plaintiff must pay a sum of Rs.11.32 Crores in order to supply the balance quantity of materials. Such a stand taken by the defendants is totally unsustainable. In view of this finding, the plaintiff is entitled for the recovery of a sum of Rs.3.22 Crores from the defendant with interest. These issues are thus, answered accordingly.



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25. This Court will now take up issue no.6 for consideration.

This issue pertains to the Court fees paid by the Plaintiff. It is seen that the plaintiff had paid court fees of a sum of Rs.6,75,107.34 after valuing the suit at Rs. 6,66,10,734/-. The defendant in the written statement has made a bare denial without explaining as to how the valuation done by the Plaintiff and the Court fees paid is not proper. Order VIII Rule 3-A (5) as amended under the Commercial Courts Act, 2015 specifically provides that if the defendant disputes the plaintiff's valuation of the suit, he must state his reasons for doing so, and if he is able, give his own statement of the value of the suit. This requirement has not been satisfied by the defendant and hence, it must be taken that the defendant has admitted the valuation of the suit and the Court fees paid by the Plaintiff to be valid and proper. The 6th issue is answered accordingly.

26. This Court will now take up the 4th issue for consideration. This issue deals with the liquidated damages that has been sought for by the plaintiff for the undelivered portion of the total supplies. In order to deal with this issue, the purchase order namely



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Ex. P2 has to be taken note of. Clause 3 of the terms and conditions of the purchase order stipulates that the liquidated damages for delay in supply will be 0.5% of total order value per week subject to maximum of 5% of the total order value for the undelivered portion. The plaintiff has claimed a sum of Rs. 2,18,28,737/- under this head. The plaintiff has not produced any materials or let in any evidence to substantiate this claim. The learned senior counsel appearing on behalf of the Plaintiff submitted that liquidated damages could be ordered by this court even without any proof of damage being established. This submission was made on the premise that where there is a breach of contract, Section 74 of the Contract Act, 1872 provides for awarding a reasonable compensation. To substantiate this submission, the learned senior counsel relied upon the Division Bench judgement of this Court in *M/s Macbrite Engineers by Prop. Mr. P.N. Sharma vs Tamil Nadu Sugar Corporation Ltd. by its Managing Director* reported in (2003) 1 LW 420.

27. Section 74 of the Contract Act, 1872 provides for awarding reasonable compensation in every case of breach of contract.



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While awarding such reasonable compensation, the person aggrieved is not required to prove actual loss or damage. The Court is competent to award reasonable compensation and while awarding such compensation, the Court must ensure that the damages are not exorbitant, unconscionable or inequitable.

28. Keeping the above principle in mind, this Court considering the facts and circumstances of this case and the breach of contract committed by the defendant, deems it fit to order 1% of the value of the remaining materials that were not supplied by the defendant in spite of undertaking through their e-mail 30.07.2014. Accordingly, a sum of Rs.3,22,000/- (1% on Rs. 3,22,00,000/- which was the excess amount available with the defendant and for which no material was supplied). This amount will be a reasonable compensation that can be awarded in favour of the plaintiff under the head liquidated damages. This issue is answered accordingly.



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29. This Court will now take up the 7th and the last issue for consideration. This court has already found that defendant was retaining an excess amount of Rs.3.22 Crores for which no materials were supplied by the defendant. The defendant has taken a stand as if the plaintiff gave an assurance that the balance amount of Rs.11.32 Crores will be paid to the defendant and believing the same, the defendant had supplied 1490 metric tons of TMT bars. Since the plaintiff went back on their promise, the sum of Rs.3.22 Crores was forfeited by the defendant. That apart it is also stated by the defendant that there is no scope for refunding the advance payment in case of breach of contract by the plaintiff. The defendant has also taken an alternate plea to the effect that even if such a forfeiture of amount is not resorted to, the excess amount of Rs.3.22 Crores will be adjusted from the loss and damage sustained by the defendant.

30. In the present case, the terms and conditions of the purchase order does not contemplate forfeiture of the advance amount. Therefore, the defendant cannot unilaterally forfeit the amount and



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unjustly enrich themselves. Insofar as the loss and damages claimed by the defendant, the same has not been substantiated and proved before this Court. If really the defendant had sustained loss and damage as claimed in para 23 of the written statement, they would have certainly come up with a counter claim against the plaintiff. Therefore, the stand taken by the defendant regarding the forfeiture of the excess amount lying with them and the alternate stand taken by the defendant that they can adjust the excess amount from the loss and damages suffered by them, is totally unsustainable. The consequence of this finding is that the plaintiff is entitled for the refund of the excess amount of Rs 3.22 Crores that was lying with the defendant. This issue is answered accordingly.

CONCLUSION

31. In the result, the following judgement and decree is passed in favour of the Plaintiff.

a) The defendant is directed to repay back the sum of Rs. 3.22 Crores to the Plaintiff along with interest at the rate of 9% per annum from the date of filing of the suit till the date of realization.



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b) The defendant is directed to pay liquidated damages of Rs.3,22,000/- [Rupees Three Lakh Twenty-Two Thousand Only] to the plaintiff along with interest at the rate of 9% per annum from the date of filing of the suit till the date of realization and;

c) the defendant is further directed to pay a sum of Rupees Nine Lakhs (Rs. 6,75,000/- for the Court fee paid and Rs 2,25,000/- under the head cost) towards cost to the Plaintiff.

32. The suit is allowed in favour of the Plaintiff in the above terms.

23.12.2021

Internet: Yes

Index : Yes/No

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List of Witness examined on the side of the Plaintiff:-

Mr.J.Mohan ----- PW.1

List of Witness examined on the side of the Defendant:-

Sunilkumar Das - DW -1

List of the Exhibits marked on the side of the Plaintiff:-

<u>S.No.</u>	<u>Exhibits</u>	<u>Description of Documents</u>
1	Ex.P-1	Certificate of Incorporation dated 15.12.2004.
2.	Ex.P-2	Purchase Order (xerox copy)
3.	Ex.P-3	General Ledger (xerox copy)
4.	Ex.P-4	Sales Invoice (xerox copy)
5.	Ex.P-5	Profit and Loss Account with Balance Sheet (xerox copy)
6.	Ex.P-6	Email Print out with Statement (xerox copy)
7.	Ex.P-7	Profit and Loss Account with Balance Sheet (xerox copy)
8.	Ex.P-8	Copy of Legal Notice with RPAD Receipt.
9.	Ex.P-9	Original RPAD Acknowledgement Card.
10.	Ex.P-10	Profit and Loss Account with Balance Sheet (xerox copy)
11.	Ex.P-11	Copy of Board resolution authorizing Mr.Mohan to represent the Company.



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List of the Exhibits marked on the side of the Defendants:-

S.No.	Exhibits	Description of Documents
1	Ex.D-1	Certified Copy of the resolution passed at the meeting of the Board of Directors of Jai Balaji Industries Limited for the financial year 2021-22, held at its registered office at 5, Bentinck Street, Kolkata-700001 on Saturday, 14 th August, 2021 at 11.00 a.m., through video conferencing.
2	Ex.D-2	Purchase Order
3	Ex.D-3	Attachment PO No.RKMPPL/Civil/316/2012-13, dated 25.03.2013 for the supply of TMT Bar to our site.
4	Ex.D-4	Proforma Invoice
5	Ex.P-5	TMT Supply Withheld – Reg
6	Ex.P-6	Request for Permission of TMT Bar Dispatch to your plaint as your P/O no-RKMPPL/Civil/316/2012-2013
7	Ex.P-7	Jai Balaji – despatch details of pending PO
8	Ex.P-8	Details regarding despatching of materials and with regard to the payments.



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N.ANAND VENKATESH, J.

KP

Pre-Delivery Judgment in
Civil Suit No.366 of 2016
(Comm. Suit)

23.12.2021