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C.S.No.292 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	01.09.2022
Judgment pronounced on	28.10.2022

CORAM

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

Civil Suit No.292 of 2017

M/s.Textainer Equipment Management Limited,
Having its office at P.O.Box No.1806,
Century House,
16 Par-la-Ville Road,
Hamilton HM HZ Bermuda,
Represented by its Power of Attorney holder,
Mr.S.Jayachandran,
Santi Colony Adayar,
Chennai-600 020.

... Plaintiff

vs.

1. M/s.Caravel Logistics Pvt. Ltd.
(Earlier known as M/s.Caravel Shipping Services Pvt. Ltd.)
Rep. By its Managing Director, Mr.Saju Chacko
No.484, 3rd Floor,
Pantheon Plaza, Pantheon Road,
Egmore, Chennai-600 008.
2. Mr.Saju Chacko,
Managing Director of M/s.Caravel Logistics Pvt. Ltd.
(Earlier known as M/s.Caravel Shipping Services Pvt. Ltd.)
No.484, 3rd Floor,
Pantheon Plaza, Pantheon Road,



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Egmore, Chennai-600 008.

... Defendants

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Civil Suit is filed under Order IV Rule 1 of O.S.Rules r/w. Order VII Rule 1 of Civil Procedure Code 1908 praying to pass a judgment and decree in favour of the Plaintiff: (a) Directing the defendants to pay jointly and severally the Plaintiff a sum of Rs.16,23,41,582/- being the amount due to the Plaintiff together with interest at the rate of 24% per annum for Rs.16,23,41,582/- from the date of the plaint and the till the date of realization; (b) Direct the defendants to pay the costs of the suit; and (c) Pass any other or other order or directions as this Hon'ble Court may deem fit and proper under the circumstances of the case and thus render justice.

For Plaintiff : Mr.Ravikumar Paul, Senior Advocate
for M/s.AAV Partners, Advocates

For Defendants : Mr.P.S.Raman, Senior Advocate
for Ms.Abitha Banu, Advocate

J U D G M E N T

The plaintiff and the first defendant entered into a Master Lease Agreement dated 01.09.2005. As an integral part thereof, Lease Schedule Number AFRM5054 was executed. On 01.08.2010, another Lease Agreement and Lease Schedule Number AFRS0601 were executed. Lease Schedule Number AFRS0601 expressly provided that the containers subject to the said lease shall be manufactured in the year



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2000 or earlier and further provided for the transfer of all containers leased under Lease Schedule Number AFRM5054 to the subsequent lease schedule if manufactured in the year 2000 or earlier. Containers manufactured in the year 2000 or earlier are referred to in this judgment as old containers. Thereafter, Lease Schedule Number AFRP5076, which corresponds to Lease Agreement dated 01.10.2011, was entered into between the plaintiff and the first defendant on 01.08.2010 for supply of containers manufactured in the year 2011. Such containers are referred to in this judgment as new containers. A dispute arose between the parties in relation to the alleged non-payment of invoices relating to both old and new containers under the above mentioned agreements. The present suit was instituted in respect thereof and the plaintiff claimed a sum of Indian rupees (INR) 16,23,41,582/- with interest thereon at the rate of 24% p.a. from the date of plaint until realization.

2. In the plaint, the plaintiff asserted that 201 old containers were not returned by the defendants to the plaintiff. A list of such containers was annexed as a plaint document. With regard to the lease agreement in respect of new containers, the plaintiff asserted that the



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defendants paid for one 20 ft container but retained the remaining 999 containers. According to the plaintiff, a running account was maintained between the plaintiff and the defendants. In paragraph 8 of the plaint, the plaintiff has set out in tabular form the amounts due and payable towards lease rentals for the old and new containers. The aggregate claim of INR16,23,41,582/- is arrived at by converting the amounts due and payable in US dollar (USD) to INR.

3. The plaintiff stated that the defendants were irregular in payment of lease rentals and defaulted on their obligations. Therefore, the plaintiff called upon the defendants to discharge their liability under several communications which are referred to in paragraph 13. As a result, the plaintiff stated that its containers were stuck in various locations around the world and lease rentals were not paid in respect thereof. Eventually, the plaintiff issued a termination letter dated 22nd March, 2017 and was constrained to institute the suit because the defendants failed to return the containers or pay the amounts outstanding.

4. By filing a written statement-cum-counter claim, the



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defendants refuted the averments in the plaint. According to the defendants, the containers supplied by the plaintiff under the Master Lease Agreement dated 1st September, 2005 and Lease Schedule Numbers AFRM 5054 and AFRS0601 were very old containers - more than 15 years old. Consequently, the said containers could not be put to use. By adverting to e-mail correspondence from the defendants to the plaintiff, the defendants stated that they repeatedly called upon the plaintiff to take back the old containers. In spite of such requests, the defendants asserted that the plaintiff failed to take back the containers and continued to charge rent for the same. The defendants expressly stated that they were ready and willing to return the old containers from 15th August 2015 but the plaintiff failed to take back the containers. Therefore, the defendants contended that the plaintiff has no right to charge rent after 15th August 2015. The defendants further stated that 98 old containers were returned pursuant to directions issued by this Court while the matter was pending adjudication. As regards the remaining 100 containers, it was stated that only the depreciated replacement value (DRV) can be claimed by the plaintiff. The defendants referred to the Damage Protection Plan (DPP) under the Lease Agreement dated 1st



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August, 2010 and contended that the plaintiff is liable to bear DPP for the old containers supplied under AFRM 5054 and AFRS 0601. Apart from the DRV of USD 1,05,000 for 100 containers, the defendants stated that the plaintiff is not entitled to claim rentals in respect thereof.

5. As regards the supply of new containers under AFRP 5076, the defendants stated that the Lease Schedule was for the purchase of 1000 containers. The base term for these 1000 containers is 5 years running from 1st October, 2011 to 30th September, 2016. Therefore, on expiry of this 5 year period, the defendants become the owners of the containers subject to payment of a nominal sum of USD 1 per container.

6. The defendants also stated that the plaintiff had seized 310 containers on 18th April, 2017 after the suit was instituted. Therefore, the plaintiff is liable to pay rent on the seized containers at the rate of USD 0.85 per day per container. If calculated from 18th April, 2017, the plaintiff is liable to pay USD 263.5 per day for the 310 seized containers. This amounts to USD 96177.5 for the period of 365 days from 18th April, 2017 until the date of filing of the counter claim. On the said basis, a



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counter claim was made for a sum of INR 62,51,537, which is the rupee equivalent of USD 96177.5. Thus, the defendants prayed for a money decree for the above sum and for a mandatory injunction to direct the plaintiff to return the 310 containers that were seized by the plaintiff.

7. Upon completion of pleadings, the following issues were framed by the Court:

(i) Whether the defendants is liable to pay the lease rental due to the plaintiff towards the containers supplied under the Master Lease Agreement AFRM5054 and AFRS0601 dated 01.09.2005?

(ii) Whether the defendants are in possession and using the containers supplied by the plaintiff under the lease agreement AFRM5054 and AFRS0601, after the termination of agreement?

(iii) Whether the defendants is liable to return the containers leased under AFRM5054 and AFRS0601 to the plaintiff, after default in payment of the lease rents?

(iv) Whether the agreement AFRM5076 dated 20.01.2010 as amended on 01.10.2011 is a purchase agreement or a lease agreement in respect of the containers?

(v) Whether the plaintiff is entitled/empowered to



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repossess the containers supplied under the agreement (AFRP5076) without resort to judicial process, in the event of default in payment by the defendants?

(vi) Whether the termination of the agreement (AFRP5076) by the plaintiff for default in payment is valid?

(vii) Whether the plaintiff is entitled for the suit claim as prayed for?

(viii) Whether the defendants are entitled for the counter claim as prayed for?

(ix) What other relief the parties are entitled for?

8. The plaintiff adduced evidence by examining Mr.S.Jayachandran as PW1. In course of examination-in-chief of PW1, 18 documents were exhibited as Exs.1 to P18. PW1 was cross-examined by learned counsel for the defendants. The defendants examined Mr.Saju Chacko, the second defendant, as DW1. In course of examination-in-chief of DW1, 9 documents were exhibited as Exs.D1 to D9. DW1 was cross-examined by the learned counsel for the plaintiff. Both parties submitted written arguments. Oral arguments on behalf of the plaintiff were made by Mr.Ravikumar Paul, senior counsel, assisted by AAV Partners, learned counsel; and on behalf of the defendants by



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Mr.P.S.Raman, senior counsel, assisted by Ms.Abitha Banu, learned counsel.

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9. Mr.Ravikumar Paul submitted that the suit claim pertained to the lease rentals for the containers supplied by the plaintiff to the first defendant under two master lease agreements and the corresponding lease schedules. He pointed out that separate agreements were entered into in respect of old containers and new containers. As against the supply of a total of 201 old containers, he submitted that the DRV was paid in respect of 167 containers. Therefore, apart from lease rentals and repair charges, the DRV is liable to be paid in respect of about 37 old containers by the first defendant. With regard to the new containers, he stated that 1000 containers were originally supplied. One container was paid for before the suit was filed. After the institution of the suit, possession of 310 containers were taken by the plaintiff through an Advocate Commissioner appointed by this Court.

10. Learned senior counsel contended that the delivery of the old containers was in terms of the Master Lease Agreement and the schedules thereto. By referring to Lease Schedule Number AFRS0601



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dated 1st August, 2010, he pointed out that the standard term set out in the schedule specifies expressly that “Containers subject to this Lease shall be manufactured in the year 2000 and older”. Therefore, he submitted that the defendants are not entitled to contend that the containers are old and unusable. By referring to Ex.D9, which is an e-mail of 15th August, 2015, he pointed out that the defendants cited a downturn in the industry but did not assert that the containers were not seaworthy. With regard to the alleged willingness of the defendants to return the old containers, he pointed out that the Master Lease Agreement specifies the return locations in a return annex. Learned senior counsel submitted that the defendants did not take steps to return the old containers in accordance with the return annex. He also referred to Exs.P9 and 10 and contended that the defendants admitted liability by the said e-mail and letter, respectively.

11. As regards the new containers, learned senior counsel submitted that clause (C) of Lease Schedule Number AFRP5076 would apply only if the requisite lease rentals are paid by the first defendant for the entire base term. In the case at hand, the first defendant failed to pay the requisite lease rentals during the base term. Consequently, he



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contended that the plaintiff retained ownership of the containers and that the first defendant is not entitled to claim ownership thereof.

12. In support of the above contentions, learned senior counsel for the plaintiff relied on the judgment of the Hon'ble Supreme Court in *Magma Fincorp Limited v. Rajesh Kumar Tiwari*, (2020) 10 SCC 399, (*Magma Fincorp Ltd.*) for the proposition that a hire-purchase agreement is an executory contract of sale and that it does not confer title on the hirer who remains a bailee of the goods covered by the hire-purchase agreement. Similarly, he submitted that the first defendant is no more than the bailee of the containers and is liable to discharge obligations arising out of the lease agreement.

13. Mr.P.S.Raman, learned senior counsel for the defendants, submitted that the old containers and new containers were leased on different terms. As regards the old containers, the DRV was paid by the defendants in respect of 63 containers. By referring to the efforts taken by the defendants to return the containers, he relied on the e-mail of 15th August, 2015 and the e-mail of 8th June, 2016 (Ex.P9 series). In view of the defendants offer to return the containers [off-hire], he contended that the plaintiff is not entitled to lease rentals after August 2015. Thus, as



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regards old containers, he submitted that the defendants are liable only in respect of DRV for 34 old containers.

14. Turning to the new containers, he submitted that lease rentals were paid for a period of almost 4 years running from 1st October, 2011 to 31st August, 2015. Pursuant to an interim order, 310 new containers were seized. By referring to and relying upon clause (C) of Lease Schedule Number AFRP5076, he contended that the plaintiff is only entitled to lease rentals for the base term and on expiry thereof, title in the goods passes to the first defendant on payment of a nominal sum of USD 1 per container. With regard to the termination, he contended that the suit was filed in April 2017 even before expiry of the notice period of 60 days under the termination letter dated 22nd March, 2017 (Ex.P13).

15. By way of rejoinder, Mr.Ravi Kumar Paul submitted that the pre-suit notice referred to clause 15(c) but the plaintiff did not agree to wait for 60 days before instituting the suit. He reiterated that the contract provided for the supply of containers of the year 2000 and older and that the defendants failed to adduce evidence that the said containers are not being used or are not seaworthy. As regards the efforts allegedly



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made by the defendants to return the containers, he stated that no notice to return a specific number of containers was issued by the defendants. He also pointed out that the plaintiff agreed to take back 1263 containers on 7th June, 2016.

16. At the outset, it should be noticed that the lease agreements for both the old and new containers were executed by and between the plaintiff and the first defendant and all invoices were raised on the first defendant. In the absence of a guarantee by the second defendant, the claims are maintainable only against the first defendant and not jointly and severally against both defendants.

17. Both parties submitted calculation memoranda in respect of the old and new containers. Before examining the implications thereof, it is pertinent to recognise that Lease Schedule Number AFRM5054 defines Replacement Value as “the amount specified in Schedule 1 to this Lease, which Lessor and Lessee agree will equal the cost to the Lessee to replace a Container which has been lost, stolen or damaged beyond repair”. In effect, this is the DRV. The method of computation of



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DRV is as under:

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“(G) REPLACEMENT VALUE

The Replacement Value of each Container shall be equal to the Original Replacement Value, as shown in Section (A) above, depreciated at a rate of five percent (5%) per annum from date of manufacture.”

The Original Replacement Value, as specified in Section (A), varies depending on the size and type of container. The plaintiff exhibited, as part of Ex.P7 series, Invoice No.170174208 dated 31.01.2017 for a consolidated sum of USD 161,820 towards DRV under Lease Schedule Number AFRS0601 and Invoice No.170174207 dated 31.01.2017 for a consolidated sum of USD 183,385 towards DRV under Lease Schedule Number AFRM5054. In the proof affidavit of P.W.1 dated 16.08.2021, P.W.1 stated that DRV was payable in respect of 22 containers and that 17 containers are still in the possession of the defendants. In response, the defendants stated that 101 containers, out of the total of 201, were returned. As regards the remaining 100 containers, the defendants stated that DRV was paid in respect of 63 retained containers and three containers that were returned to the plaintiff. As such, it was stated that



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DRV is payable only in respect of 34 containers after making adjustments in respect of the DRV paid for three containers which were returned to the plaintiff. As regards the computation of DRV, the defendants stated that the DRV for the 20 ft containers is 900 USD per container and the DRV for the 40 ft containers is 1500 USD per container. This rate was adopted after taking into account the additional affidavit dated 6th December 2017 of the plaintiff and the discount agreed to therein. Out of the 100 containers, 75 containers were 20 ft and 25 containers were 40 ft. By applying the above mentioned rates, the total DRV for 100 containers was arrived at. Since 5000 USD was paid prior to the institution of the suit and 59400 USD was paid while the suit was pending (pursuant to common order dated 21st August, 2018 in O.A.No.400 of 2017 and related applications), the defendants stated that they are liable to pay net DRV of 40600 USD, i.e. 105,000-64,400. This calculation was accepted by the plaintiff in its memorandum of 1st September, 2022. As such, with regard to the old containers, the contesting parties agreed that the first defendant is liable to pay USD 40600 as DRV. Whether the first defendant is also liable to pay lease rentals and repair bills in respect of the old containers, as claimed,



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remains to be considered.

18. The above mentioned memoranda also dealt with the new containers. As regards the new containers, the plaintiff stated that 689 containers are still in the possession of the defendants, and that the defendants are using the said containers. Therefore, the plaintiff claims a sum of USD 11,25,523.35. On the contrary, in the memorandum submitted by the defendants, the defendants' counter claim is for the lease rentals in respect of 310 seized containers at USD 1,046,637.15. Thus, the defendants claimed that an excess amount of USD 200,184.80 is lying with the plaintiff as against the amount outstanding of USD 846,452 as on 30.09.2016.

19. Issues (i) to (iii) should be determined after taking into account the above development. The said issues relate to the old containers and are dealt with jointly. As regards these old containers, the suit claim includes: a consolidated claim of USD 578,078.03 under Lease Schedule Number AFRM5054, which includes a claim of USD 183,385 towards DRV; a consolidated claim of USD 485,696.44 under Lease



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Schedule Number AFRS0601, which includes a claim of USD 161,820 towards DRV; and claims for repairs and service charges for late payment. These consolidated claims were made after giving credit to amounts received from the first defendant, as is evident from the statement of account. The relevant invoices were issued monthly from 31st July, 2015 to 28th February, 2017. Each invoice is for rent calculated at USD 0.85 per 20 foot container and USD 1.68 per 40 foot container, and is payable after a credit period of thirty days, as regards lease rentals, and 60 days, as regards repairs and service charges. The repair-related invoices are for a consolidated sum of USD 56,048.79. The service charge invoices are for a consolidated sum of USD 252,216.19. Clause 6 of both the Lease Agreement dated 1st September, 2005 and 1st August, 2010 enables the plaintiff/lessor to claim service charge at 18% per annum on delayed payment of rental charges. While the repair-related invoices pertain to the old containers, on the basis of the documents on record, it is not possible to correlate the service charge invoices and the containers or even to ascertain the rate at which service charge is claimed. For present purposes, it is assumed that the service charge invoices relate to both the old and new containers.



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20. The statement of account is exhibited as Ex.P8. Ex.P8 covers both old containers and new containers. Since the said statement specifies the lease schedule number, it is possible to identify and segregate claims relating to lease rentals for old and new containers. If this exercise is undertaken, a total of USD 1,127,671.50 (amount claimed in respect of new containers) should be excluded from the amount due (USD 2,441,514.01), as per the consolidated statement of claim, to arrive at the claim in respect of old containers. Thus, if USD 1,127,671.50 is deducted from USD 2,441,514.01, the net claim for old containers plus repair charges and consolidated service charges would be USD 1,313,842.51. This sum includes sums of USD 183,385 and USD 161,820 towards DRV. Since this aspect has been settled between the parties, the consolidated DRV claim of USD 345,205 should also be excluded. If the sum of USD 345,205 plus the sum of USD 252,216.19 (consolidated service charges) are excluded, the net lease rental claim plus repair charges for the old containers would be USD 716,421.32. What remains to be considered is whether the plaintiff is entitled to this



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amount in addition to the DRV. This, in turn, depends on the terms of the Lease Agreements and Lease Schedule Numbers. Before delving into the terms thereof, it is pertinent to recall that the key defences of the defendants were that the defendants endeavoured to return the containers and that there was no liability to pay lease rentals for the old containers because of the age and condition thereof. On those issues, the responses of D.W.1, in cross-examination, to key questions on the old containers should be reckoned:

“Q.143: Was there a condition in the master lease agreement Ex.P4 requiring you to return the containers after expiry of the lease?

A. The term 5 of Ex.P4 provides for return of containers.

Q.148: Have you stipulated in Exs.P2 and P4 and schedule executed under them that the containers should be below 12 years of age?

A. No

Q.149: Is Ex.P3 the schedule you have executed under Ex.P4?

A. Yes

Q.150: On the date of signing Ex.P3 which is 19.10.2015 you had agreed to take containers more than 15 years as on that date?



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A. Yes"

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21. Lease Schedule Number AFRM5054 stipulates the term thereof, in clause (C) thereof, as running from 1st September, 2006 until 30th November, 2007 or until satisfactory re-delivery of all containers, whichever is later. The expression “Build-down Period” is also defined therein as running from 1st December, 2007 to 28th February, 2008. It is further specified that containers remaining on-hire in the post build-down period shall be charged post build-down rental charges which are at higher rates. Lease Schedule Number AFRS0601 was executed on 19th October, 2015 and specifies a term running from 1st August, 2014 to 1st July, 2015. Unlike the earlier lease schedule, AFRS0601 does not prescribe the build-down period. Clause 10(a) thereof provides for the transfer of all containers delivered under Lease Schedule Number AFRM5054 to the later Lease Schedule, if such containers were manufactured in the year 2000 or earlier, subject to the terms and conditions thereunder with effect from 1st August, 2014. The above Lease Schedule is subject to the terms and conditions in the corresponding Lease Agreement dated 1st August, 2010. This Lease



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Agreement defines “build-down period” as the period designated in the schedule and also provides for the levy of post-down rental charges for the period subsequent thereto. It also defines “Lease Term” and “Off-hire Date” as under:

“Lease Term” for any Container means the period between and including the On-hire Date and the Off-hire Date for each Container”

...

“Off-hire Date” means the same date as the Return Date, but:

(a) ...

(b) In the case of an Container which is not returned by Lessee due to such Container having been lost, stolen or damaged beyond repair while in the possession of Lessee, the “Off-hire Date” shall be the date upon which Lessee has paid the Replacement Value of the Container to Lessor”

22. The above clauses lead to the inference that rental charges may be levied and would be payable during the Lease Term. Therefore, as regards Lease Schedule Number AFRS0601, rental charges but not post build-down rental charges would be payable until the containers are returned to the plaintiff/lessor or retained by the first defendant subject to



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payment of DRV. The email correspondence between the parties (Ex.P9 series) indicates that parties discussed off-hiring of containers. In fact, the email of 7th June, 2016 from the plaintiff to the second defendant discloses the intention to re-deliver 1263 units by 31st August, 2016. Eventually, the Lease Agreement dated 1st August, 2010 and the corresponding lease schedules were terminated by notice dated 22nd March, 2017(Ex.P13) and the first defendant was put on notice that all containers not returned within 60 days thereof would be reckoned as lost as per clause 15(c). Clause 2(b) of the Lease Agreement provides that the first defendant's obligation to pay the rental and other charges shall survive or continue after termination.

23. As discussed earlier, DRV was claimed by the plaintiff under invoices dated 31st January, 2017 by computing the same as on 31st December, 2016. This is, in effect, the price at which the first defendant was called upon to purchase the old containers. This price was reduced subsequently and adjustments were made towards amounts received subsequently and returned containers. After effecting such adjustments, net DRV of USD 40,600 is said to be payable by the first defendant and



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the plaintiff accepts this calculation. Since there is no agreed rate of interest in respect thereof and clause 6 of the Lease Agreement applies only to rental charges, handling charges, location charges and repair charges, this amount shall be paid with interest thereon at 9% per annum from the date the amount is payable under the DRV invoices. Consequently, the question that remains is whether lease rentals may be claimed and, if so, up to what date. Since net DRV was calculated and claimed, as on 31st December, 2016, and part-paid thereafter, subject to payment of interest on delayed payment of DRV, lease rentals certainly cannot be claimed for the period subsequent thereto. By taking into account the fact that invoicing was done in arrears, the invoices issued in January and February 2017 should be excluded. This results in the exclusion of the claim of USD 1019.80, 673.41, 1635.65 and 863.28. If this aggregate sum of USD 4192.14 is excluded from USD 716,421.32, the net amount payable towards lease rentals and repair charges would be USD 712,229.17. The plaintiff is entitled to this sum in addition to the DRV and service charges at 18% per annum on delayed payment.

24. Issues (iv) to (vi) and (viii) pertain to the supply of new



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containers under the Lease Schedule Number AFRM5076. Therefore, the said issues are interrelated and are dealt with and disposed of jointly. Issue No.(iv) pertains to whether the agreement is a purchase agreement or a lease agreement in respect of the containers. The answer to this question depends on the interpretation of the relevant agreement. The said agreement, including the schedule, is exhibited as Ex.P5. Clause (C) to the Lease Schedule Number AFRP5076 deals with the term of 'Lease'. The “Base Term”, as defined therein, is a period of five years from 1st October, 2011, which would run from 1st October, 2011 to 30th September, 2016. Significantly, the definition of Lease Term, as contained in the Lease Agreement, is modified in Lease Schedule Number AFRP5076 as follows:

“Lease Term” for any Container means the period between and including the On-hire Date and the last day of the Base Term for such Container”

The second paragraph of clause (C) of Lease Schedule Number AFRP5076 provides as under:

“On the last day of Base Term for each Container, Lessee shall pay to Lessor the amount of USD 1.00 for such Container, after which



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(notwithstanding Section 11 (a) of the T & Cs) such Container shall become the property of the Lessee. Section 11(a) of the T and Cs shall not apply to the Lease.”

Clause 11(a) of the Lease Agreement is set out below:

“Notwithstanding any other provisions in these T & Cs, including without limitation, the definition and nomenclature used herein, the Lease shall not be deemed a sale or anything other than a lease for any purpose. Lessee shall not acquire any ownership rights in the Containers through or by virtue of the Lease.”

25. The clause dealing with “Base Term” and “Lease Term” in the Lease Schedule and clause 11(a) of the Lease Agreement should be read carefully to understand the meaning and purport thereof. While Clause 11 (a) expressly stipulates that the lease shall not be deemed a sale or anything other than a lease and that the lessee shall not acquire ownership rights in the containers by virtue of the lease, the said stipulation is inapplicable to this Lease by virtue of the clause dealing with term in Lease Schedule Number AFRP5076. In terms thereof, the first defendant is required to pay the stipulated lease rentals for the entire



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Base Term of five years. Subject to fulfillment of this condition by the

lessee, the contract provides for transfer of title to the lessee subject to payment of USD 1 per container by the lessee. Until then, the property remains that of the lessor. In effect, this lease is on lease-cum-conditional sale basis. A few significant responses of D.W.1, in course of cross-examination, throw further light on this issue and are, therefore, set out below:

Q.181: *As per Ex.P5 were you required to pay lease amount to the plaintiff during the Base Term?*

A. *Yes, But we have the clause 'H' which allows us for late payment.*

Q.182: *According to Ex.P5 is there penalty with interest or service charges in case of delayed payment?*

A. *Yes, Clause 'H' says about interest etc."*

Q.251: *According to the terms of Ex.P5 without paying the balance of the lease amount together with one dollar on completion of the lease term do you become the owner of the containers?*

A. *We become the owner after payment of USD 1 as per the term 'C' of Ex.P5 and we had sought time for the balance payment which was allowed as per clause 'H' of Ex.P5."*



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26. Consequently, the first defendant/lessee was required to pay lease rentals until expiry of the Base Term on 30th September, 2016. In this case, the plaintiff claims lease rentals in a consolidated sum of USD 1,125,523.35 until 28th February, 2017. The claims under invoices dated 31st July, 2015 to 30th September, 2016 pertain to the Base Term and are valid as per the contract, whereas the claims under invoices issued between 31st October, 2016 and 28th February, 2017 pertain to the period beyond the Base Term and are not payable. Thus, the value of five invoices for an aggregate sum of USD 279,370.65 should be excluded from the consolidated claim of USD 1,125,523.35. If excluded, the valid and sustainable claim would be for USD 846,452.70 for 999 containers. In addition to the principal sum, service charges at 18% per annum would be payable on each invoice issued between between 31.07.2015 and 30.09.2016 from the due date until realisation. In *Magma Fincorp*, the Supreme Court followed the law on a hire-purchase agreement, as laid down in *K.L.Johar and Co. v. Deputy Commercial Tax Officer*, (1965) 2 SCR 112 where, in relevant part, it was held as follows:



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“12....On the other hand, a hire-purchase agreement, as its very name implies, has two aspects. There is first, an aspect of bailment of the goods subjected to the hire-purchase agreement, and there is next an element of sale which fructifies when the option to purchase, which is usually a term of hire-purchase agreements, is exercised by the intending purchaser. Thus, the intending purchaser is known as the hirer so long as the option to purchase is not exercised, and the essence of a hire-purchase agreement properly so called is that the property in the goods does not pass at the time of the agreement but remains in the intending seller, and only passes later when the option is exercised by the intending purchaser. The distinguishing feature of a typical hire-purchase agreement, therefore, is that the property does not pass when the agreement is made but only passes when the option is finally exercised after complying with all the terms of the agreement.”

The same principle applies in the context of a lease-cum-conditional sale, which is the nature of contract in this case. As regards transfer of title on making payment as stipulated in the lease, the said right subsisted only while the lease-cum-conditional sale agreement subsisted. In this case, upon default, the contract was terminated with effect from 22nd March, 2017 prior to fulfillment of the condition by the first defendant. Therefore, title in the containers did not pass to the first defendant.



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Whether the seizure is valid is dealt with next.

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27. The Lease Agreement provides for various remedies in the event of default by the lessee. These events of default and remedies are set out in clause 15 which provides, *inter alia*, for the following:

“15. DEFAULT AND REMEDIES

(a) Defaults: The occurrence of any of the following events shall constitute an event of default hereunder (“Event of Default”):

(i) Lessee shall fail to pay any Rental Charge, Repair Charge, Location Charge or other charges, and such failure shall continue for ten (10) days or more from the date such payment first came due:

(ii) Within ten (10) days after notice from Lessor thereof, Lessee shall fail (A) to pay any other sum becoming due under this Lease, or (B) to cure any other breach of the Lease, or any condition which may jeopardize or adversely affect Lessor's rights in any Containers;

....

(b) Remedies: Upon the occurrence of any Event of Default, and at any time thereafter as long as the same shall be continuing, Lessor may forthwith (but without prejudice to any rights under the Lease) exercise any permitted remedy at law or equity, including, without limitation, one or more of the following:

(i) Elect to accelerate all Rental Charges



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(including amounts previously invoiced but not yet otherwise due) for the full Lease Term to and including the expected Return Dates set forth in the Schedule, causing these Rental Charges to become due and payable immediately for all Containers or, if, in Lessor's sole discretion, it shall specify that acceleration shall apply only to certain Containers, then only for such Containers thereof as may be specified in such notice; and/or

(ii) Terminate the Lease of all, or any, of the Containers, whereupon the Lease shall, except, as otherwise provided in Section 2, terminate and Lessee shall be bound to return any Container in its possession as soon as possible after termination, in a state of repair satisfactory to Lessor in Lessor's absolute discretion, and to pay within the same time all Rental Charges and other charges due under the Lease; and/or

(iii) Utilize such legal remedies as may be available to it, including, without limitation, replevin, injunction or any other provisional remedy designed to obtain possession of or protect the Containers or any items thereof, Lessee hereby specifically waives any hearing with respect to any such provisional remedy; and/or

(iv) Retake possession of the Containers or any items thereof without resort to judicial process and for such purpose may enter upon any premises belonging to or in the occupation or control of Lessee. In that event, Lessor shall use reasonable efforts to lease such Containers to others, and Lessee shall be liable for the difference between the Rental Charges due and payable for such Containers under this



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Lease and the rental charges collected by Lessor upon the leasing of such Containers to to others; and/or

(v) Elect, with effect from the date of such Event of Default, to charge Lessee as the Rental Charge the Post Build-down Rental Charge.

(c) If Lessee fails to return a Container within sixty (60) days after termination of the Lease, the loss of such Container shall be irrebuttably presumed and Lessee shall pay the Replacement Value therefor, plus U.S. \$400 per Container for relocation/positioning charges.

(d) Lessee irrevocably appoints Lessor as the agent and attorney-in-fact of Lessee, with full power and authority, whenever Lessee is obligated to return the Containers to Lessor, to demand and take possession of the Containers in the name and on behalf of Lessee from whoever controls it. If Lessor retakes possession of any Containers, Lessee authorizes Lessor to take possession of any property in or attached to the Containers which is not Lessor's property, and without liability for its care or safekeeping, to place it in storage at the risk and expense of Lessee.

(e) The remedies and other rights set forth in this Section 15, elsewhere in the Lease or otherwise available to Lessor, are cumulative and not alternative. Such remedies and rights may be exercised separately or in any combination or sequence, and the use of any remedy or right individually or in any combination or sequence shall be without prejudice to and shall not waive any others. The exercise of any such remedy or right, including, without limitation, termination, shall not



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relieve Lessee of any liability or obligation under the Lease incurred prior to the exercise thereof.

(f) The Termination of the Lease with respect to all, or any, of the Containers shall not relieve Lessee of its obligation to pay to Lessor the Excess Return Charge.”

28. Lease Schedule Number AFRP5076 has not made the above clause 15 inapplicable and sub-clause (e) provides that the specified remedies are cumulative and not alternative. On examining the above clause, it is beyond doubt that the plaintiff is entitled to repossession of the containers and to terminate the lease. In the light of these clauses and the evidence on failure to pay lease rentals for the Base Term in spite of reminders, the termination of the lease agreement and the repossession of 310 containers on account of default are clearly valid. Consequently, the counter claim in respect of the seized containers is rejected.

29. Issue Nos.7, 8 and 9 relate to the reliefs that the parties are entitled to. These issues are dealt with jointly. The amounts payable for the old containers were determined and set out in paragraph 23 *supra*.



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Since it was earlier concluded that the Lease Agreement pertaining to the new containers, read with Lease Schedule Number AFRP5076, provides for payment of lease rentals only until the end of the Base Term, as regards the new containers, the plaintiff is entitled to USD 846,841.70 plus 18% per annum as service charge from the due date under the respective invoices until payment. As per the law laid down in *Forasol v. Oil and Natural Gas Corporation, 1984 Supp. SCC 263*, the relevant date for conversion of USD claims into INR would be the date of judgment or a date proximate thereto. As on 27th October, 2022, the conversion rate is 1 USD = INR 82.33. The amounts due and payable are arrived at on that basis. As the successful party, the plaintiff is entitled to court fees (about INR16,27,000/-), reasonable lawyer's fees and expenses. A sum of INR 20,00,000/- is awarded as consolidated costs. Since it is possible that open issues may remain in respect of the transactions between the parties, it is clarified that it is open to the parties to institute a fresh suit, provided it arises out of a distinct cause of action.

30. In the result, the suit is decreed as under:

(i) the first defendant is directed to pay the plaintiff a sum of



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INR 3,342,598, which is equivalent to USD 40,600, towards
DRV for the old containers;

(ii) the first defendant is directed to pay the plaintiff a sum of
INR 58,637,827.56, which is equivalent to USD 712,229.17,
towards lease rentals and repair charges on the old containers
until 31st December, 2016;

(iii) the first defendant is directed to pay the plaintiff a sum of
INR 69,688,450.79, which is equivalent to USD 846,452.70,
towards lease rentals for the 999 new containers during the
Base Term;

(iv) the first defendant is directed to pay service charges on all
invoices issued in respect of lease rentals and repair charges
for the old containers until 31st December, 2016 at 18% per
annum from the due dates under the respective invoice until
realization;

(v) the first defendant is directed to pay interest on the amounts
paid or payable as DRV at 9% per annum from 1st April 2017
(the due date under the DRV invoices) until realization;

(vi) the first defendant is directed to pay service charges on all



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invoices issued in respect of the new containers until 30th September, 2016 at 18% per annum from the due date under the respective invoice until realization;

(vii) The counter claims of the first defendant are rejected; and

(viii) The first defendant is directed to pay a sum of INR 20,00,000/- as costs to cover court fees, lawyer's fees and other expenses.

28.10.2022

Index : Yes
Internet: Yes/No
kal/rrg

Plaintiff's witness:

Mr. S.Jayachandran : P.W.1

Defendants' witness:

Mr. Saju Chacko : D.W.1

Documents exhibited by the Plaintiff:

<i>Sl.No.</i>	<i>Exhibits</i>	<i>Date</i>	<i>Particulars of Documents</i>
1.	Ex.P1	31.01.2017	Original Power of Attorney



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Sl.No.	Exhibits	Date	Particulars of Documents
2.	Ex.P2	01.08.2010	Original Master Lease Agreement . Schedule AFRM5054 and term and conditions
3.	Ex.P3	01.08.2010	Original Lease Agreement and schedule AFRS0601
4.	Ex.P4	01.08.2010	The original Modified Terms & Conditions
5.	Ex.P5	01.10.2011	The original Lease Agreement schedule AFRP5076
6.	Ex.P6	01.10.2011	The printed copy of details of the containers supplied under the lease agreement (Schedule number AFRP5076 as on the date of filing of this suit. (65(B) Certified filed)
7.	Ex.P7		(Series) are the printed copy of invoices in total Nos.126 raised by the plaintiff. (65 (B) Certified filed)
8.	Ex.P8		The printed copy Statement of Accounts as on the date of filing of the suit (65 (B) Certified filed.)
9.	Ex.P9		(Series) are the printout Email Correspondence between the plaintiff and the defendants.(65 (B) Certified filed)
10.	Ex.P10	27.07.2016	The printed copy sent by the defendants regarding outstanding dues payable to the plaintiff (65 (B) Certified filed)
11.	Ex.P11	30.11.2016	(Series) Email along with the attached letter by IT Department (65(B) Certified filed)
12.	Ex.P12	30.11.2016	The printed copy Email along with the attached letter by IT Department (65(B) Certified filed)



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Sl.No.	Exhibits	Date	Particulars of Documents
13.	Ex.P13	22.03.2017	The office copy of Termination Notice of Lease Agreements issued by the plaintiff.
14.	Ex.P14	04.04.2017	The print out copy Email Termination Notice (65(B) Certified filed.)
15.	Ex.P15	30.03.2017	The print out Delivery Report (65(B) Certified filed)
16.	Ex.P16	31.03.2017	The printout copy email sent by the 2 nd defendant stating their proposal for installment payment. (65(B) Certified filed)
17.	Ex.P17		The print out copy Location details of to containers supplied under the Master Lease Agreement (Schedule AFRM5054 & AFRS0601)
18.	Ex.P18		The printout copy of Location details of the containers supplied under the Lease Agreement (Schedule AFRP5076). (65(B) Certified filed)

Documents exhibited by the Defendant :

Sl.No.	Exhibits	Date	Particulars of Documents
1.	Ex.D1	01.12.2017	Print out of Email sent by the Plaintiff regarding use of seized containers.
2.	Ex.D2		Print out of Repair invoices for seized containers.
3.	Ex.D3		The original Schedule Agreement No.AFRM 5054.
4.	Ex.D4		The original Schedule Agreement No.AFRM 5076.
5.	Ex.D5	24.02.2017	The print out copy of email from the



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Sl.No.	Exhibits	Date	Particulars of Documents
			plaintiff to the defendants granting discount.
6.	Ex.D6		The print out copy of email correspondence between the plaintiff and the defendants.
7.	Ex.D7	07.06.2016	The print out copy of email sent by the plaintiff.
8.	Ex.D8	01.12.2017	The print out copy of email sent by the plaintiff regarding use of seized containers.
9.	Ex.D9		The print out copy of Repair Invoices for seized containers. (Ex.sD5 to Ex.D9) along with 65 B certificate is enclosed.

SKRJ



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SENTHILKUMAR RAMAMOORTHY, J

kal/rrg

Pre-Delivery Judgment

C.S.No.297 of 2017



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28.10.2022