IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
COMMERCIAL DIVISION

Present:

The Hon'ble Justice Krishna Rao

CS 12 of 2014

Sundeep Bhutoria & Ors.
Versus
Wigan & Leigh College (India) Ltd.

Mr. Sarvapriya Mukherjee
Mr. Ayan Dutta
Mr. Dwip Raj Basu
… for the plaintiffs.

Hearing Concluded On : 12.09.2023

Judgment on : 05.10.2023

Krishna Rao, J.:

1. The plaintiffs have filed the instant suit against the defendant, praying for a decree of sum of Rs. 51,82,700/- along with an interest upon judgment at the rate of 24% per annum.

2. The plaintiffs nos. 1 and 2 are both Trustees of Prabha Khaitan Foundation, a Trust under the Indian Trust Act, 1882, and they are also the owners of the 2^{nd} and 3^{rd} Floors of premises No. 10C, Hungerford Street, Kolkata – 700017.

3. The plaintiffs nos. 3 and 4, are, engaged in the business of rendering maintenance service on the 3^{rd} and 2^{nd} Floors respectively of the premises No. 10C, Hungerford Street, Kolkata – 700017.

4. The defendant is a company incorporated under the Companies Act, 1956 and carries on business, inter-alia, of running an educational institution.

CASE OF THE PLAINTFF :

5. The defendant was in need of around 6,000 sq. ft. of vacant space, for running a college. Accordingly, the defendant had approached the plaintiffs for letting out the vacant space and after negotiation between the parties, the plaintiff nos. 3 and 4 had entered into an agreement with the defendant on 17^{th} June, 2004 with respect of the 2^{nd} and 3^{rd} Floors of No. 10C, Hungerford Street, Kolkata – 700017.

6. On 17^{th} June, 2004, the plaintiffs nos. 3 and 4 entered into a separate agreement with the defendant, to render service to the defendant in respect of the 3^{rd} and 2^{nd} Floors of the said premises. On the same day of 17^{th} June, 2004, separate tripartite agreements were entered into between the plaintiffs nos. 1 and 2, plaintiffs nos. 3 and 4 and the defendant.

7. In terms of the said two agreements, both dated 17th June, 2004, the defendant was granted lease in respect of the 2nd and 3rd Floors of the premises No. 10C, Hungerford Street, Kolkata – 700017 by the plaintiff trust for a term of 9 years commencing from 1st August, 2004. The monthly rent for the first three years (01.08.2004 to 31.07.2007) was fixed at Rs. 31,800/- and then 15% increase after three years i.e. (01.08.2007 to 31.07.2010) i.e. Rs. 36,570/- and for the last three years i.e. (01.08.2010 to 31.07.2013) i.e. Rs. 42055/-.

8. During the period of June' 2004 to August' 2012, the defendant had made payment of rent and maintenance charges as stated in the Agreements.

9. The defendant had defaulted in making payment of rent and maintenance charges to the plaintiffs on and from September, 2013 till August, 2013, total amounting to Rs. 20,18,640. The defendant has also defaulted in making payment of electricity bill due on and from November, 2012 amounting to Rs. 54,540/- and accordingly the plaintiff has paid the said amount to CESC on behalf of the defendant. The defendant also failed to make payment of service tax amounting to Rs. 16,75,644/, as applicable under the Finance Act, 1994 and the said amount was also paid by the plaintiffs on 1st July, 2013.

10. In the month of August' 2013, the defendant had left the premises unlocked by removing all its belongings. On 5th August, 2013, the plaintiffs have intimated to the concern Police Authorities and the police has submitted report on 20th August, 2013.

11. Thereafter, upon taking possession of the said premises by the plaintiffs, the plaintiffs discovered that the said premises had been ruined by the defendant. The plaintiffs have incurred expenditure to the extent of Rs. 9,78,000/- for repair of the said premises.

CASE OF THE DEFENDANT:

12. The defendant had entered appearance in the suit and had filed their Written Statement along with counter claim. The defendant has admitted with regard to the agreements entered between the parties and made out the following case in the written statement:

a. The defendant had deposited with the Trust/Lessor a sum of Rs. 1,90,800/- interest free security deposit for each of the said two lease agreements in respect of the said tenanted premises comprising of 2nd and 3rd floors of the said premises, totalling to a sum of Rs. 3,81,600/-, which was refundable by the Trust on account of security deposit to the defendant/Lessee on the expiry or soon at the determination of the said lease and immediately on vacating and handing over the peaceful and Khas possession of the said demised premises to the said lessor after deduction therefrom (i) all cost of repair in the demised premises of damaged by the Lessee except normal wear and tear; (ii) any unpaid amounts payable in respect of demised office block.

b. As per clause 4(ii) of the said agreements the Lessor/Trust shall provide the Lessee with 15 KVA Power prior to commencement of the Lease and to bear costs for wiring from the ground floor to the demised premises.

c. In Clause 4 (iii) of the said Agreement, the said Lessor/Trust fail to provide the lessee i.e. the defendant herein with regular and adequate power i.e. 15 KVA within stipulated period. Under clause 4 (iv) of the agreements it is provided that the said Trust/Lessor is unable to provide either the regular connection specified in clause 4 (ii) or to provide generator as mentioned in clause 4 (iii) as stated in the said agreements, that the defendant shall suspend the payment of monthly rent without any notice and shall resume the same only after required power supply is satisfactorily installed at the Cost/charges or expenses of the Lessor.

d. In clause 2.2 of the service provider agreement, it is mentioned that the liability of the Defendant/Lessee for payment of municipal taxes in respect of the said demised portion (office block) allotted to the defendant has taken over by the service provider in accordance to the agreement and the defendant shall not be liable to pay such taxes.

e. The plaintiffs by a letter dated 11th January, 2008, purportedly demanded service taxes leviable on lease rent as proposed in the Financial Bill, 2007 and called upon the defendant by the said notice to pay the same as applicable from 1st November, 2007, to which the defendant had made it clear to the Trust that the service tax leviable as provided in the Finance Bill, 2007 was a 'new tax' and the imposition of new tax was to be borne by the plaintiffs under the service provider agreement.

f. The plaintiffs continued to raise bills on account of service tax from November, 2007 onwards and wrongly issued a demand letter for service tax. The defendant by their letter dated 21st June, 2009 refused to pay such sum as purportedly demanded by the plaintiffs.

g. As per agreements 15 KVA load was to be provided by the plaintiff on each demised floor of the said premises but actually only a total of 17.6 KVA was being provided by the plaintiffs for the said two floors and therefore such activity of the plaintiffs was in violation of clause 4 of the lease agreements. The defendant had also vide letters dated 30th May, 2009 and 04th June, 2009, requested the plaintiffs to increase the electric supply, as otherwise in pursuance of clause 4 the defendant is entitled to suspend payment of monthly rent.

h. The plaintiffs failed and/or neglected to comply with their obligation to provide necessary essential services and by reasons of their fault and/or laches there accrued power disconnection intermittently and on various occasions which was affecting the Defendant's business for running a college.

i. Since no attempt was made by the plaintiffs to ensure uninterrupted supply of power in violation of the terms of the agreements, the defendant did not make any payment of rent and service charges from September, 2012, in pursuance to the terms of the Rent and Service provider agreements which provides the defendant to deduct rent and service provider agreements which provides the defendant to deduct rent and service charges on prorate basis if uninterrupted supply of power is not resumed after 48 hours from interruption in power supply.

ISSUES:

13. Both the parties had filed their suggested issues. On consideration of pleadings of both parties and the suggested issues filed by the parties, following issues are framed:

"(i) Is the suit maintainable in its present form and in law?

(ii) Is the suit bad for non-joinder of parties or mis-joinder of causes of action?

(iii) Has the defendant defaulted in paying rent and maintenance charges from September 2012 to August 2013 and thereby liable to pay Rs. 20,18,640/- to the plaintiff?

(iv) Has the defendant defaulted in paying the electricity charges and thereby the plaintiff is entitled to claim Rs.54,540/- on account of reimbursement of the electricity charges from the defendant?

(v) Is the defendant bound to pay service tax to the plaintiff and thereby the plaintiff is entitled to claim reimbursement of Rs.16,75,644/- from the defendant towards unpaid service tax?

(vi) Is the defendant bound to pay for causing damage to the suit premises and thereby the plaintiff in entitled to claim Rs.9,78,000/- from the defendant as compensation?

(vii) Is the defendant entitled to claim Rs.2,25,33,480/- from the plaintiff for alleged violation of the terms of the agreement?

(viii) Is the plaintiff entitled to get the decree as prayed for?

(ix) Is the plaintiff entitled to get any other relief?

EVIDENCE OF PLAINTIFF:

14. The plaintiffs has examined one witness namely Mr. Sachindra Nath Jha. The plaintiffs had adduced a total number of 42 Exhibits, from Exhibit 'A' to Exhibit 'PP'.

I. **'Exhibit-A'**: Lease Agreement, executed by and between Prabha Khaitan Foundation and Wigan and Leigh College (India) Limited, on 17th June, 2004, for the 2nd Floor of 10C, Hungerford Street, Kolkata-700017.

II. **'Exhibit-B'**: Lease Agreement, executed by and between Prabha Khaitan Foundation and Wigan and Leigh College (India) Limited, on 17th June, 2004, for the 3rd Floor of 10C, Hungerford Street, Kolkata-700017.

III. **'Exhibit-C'**: Documents under serial no. 5 and 6 are both a tripartite agreement, executed by and between Prabha Khaitan Foundation and Wigan and Leigh College (India) Limited.

IV. **‘Exhibit-D’**: An agreement made on 17.06.2004 between Ess Bee Network Pvt. Ltd. and Wigan and Leigh College (India) Ltd, for providing services, for the premises No.10C, Hungerford Street, Kolkata-700017, of 2nd and 3rd Floor.

V. **‘Exhibit-E’ and ‘Exhibit-E/1’**: Letter dated 17th March, 2005, issued by Prabha Khaitan Foundation, wherein it was informed to the Wigan and Leigh College (India) Ltd., that new electric meter was installed in our property for their service and CESC had directly sent a bill to the Wigan and Leigh College (India) Ltd. for their payment. and the letter was stamped by the Wigan and Leigh College (India) Ltd., as they have duly received the document.

VI. **‘Exhibit-F’ and ‘Exhibit-F/1’**: Letter dated 6th April, 2005, to the administrator of Wigan and Leigh College (India) Ltd. informing the administrator that the plaintiffs had paid the electricity bill for the month of March,2005, and the same was duly stamped and received by the Wigan and Leigh College (India) Ltd.

VII. **‘Exhibit-G’**: Letter issued by Wigan and Leigh College (India) Ltd. to the trustees of the Prabha Khaitan Foundation, on 3rd March, 2006 and informed us that electricity bill is coming late and they have crossed the due date. Also it was informed by the defendant that all payment is directly processed from the headquarter.

VIII. **'Exhibit-H' and 'Exhibit-H/1'**: Letter dated 4th March, 2006, issued by Kalidas Chatterjee, trustee of Prabha Khaitan Foundation, to the Subhasis Chakraborty of Wigan and Leigh College (India) Ltd, stating that the electricity bill is directly going to the defendant's premises and the plaintiffs are not in position to help. This letter was duly received and stamped by the Wigan and Leigh College (India) Ltd.

IX. **'Exhibit-I' and 'Exhibit-I/1'**: Letter dated 11th January, 2008, issued by Ess Bee Network Pvt. Ltd., to Wigan and Leigh College (India) Ltd., informing them that a new finance bill has been introduced by the Government of Indin in the year 2007 and service tax imposed @12.36% payable was payable by them, and it was duly received and stamped by the defendant.

X. **'Exhibit-J'**: A copy of a letter dated 1st January, 2009, which was issued by Prabha Khaitan Foundation to the Wigan and Leigh College (India) Ltd., asking them to pay service taxes dues on and from 1st February, 2008 to 1st December, 2008, amounting to Rs. 1,26,560/-

XI. **'Exhibit-K' and 'Exhibit-K/1'**: Reply to a letter dated 30th May, 2009, sent by Wigan and Leigh College (India) Ltd., on 3rd June, 2009, by the plaintiffs.

XII. **'Exhibit-L'**: Letter dated 14th February, 2012, sent by the plaintiffs to the defendant along with its postal receipts.

XIII. **‘Exhibit-M’**: Letter dated 21st August, 2012, sent by the plaintiffs to the defendant.

XIV. **‘Exhibit-N’ and ‘Exhibit-N/1’**: Letter dated 8th June, 2013, sent by the plaintiffs to the administrator of Wigan and Leigh College (India) Ltd., along with its acknowledgment due card and postal receipts wherein it shows that the defendant had refused to receive the same.

XV. **‘Exhibit-O’**: Letter dated 8th June, 2013, issued by the Plaintiffs to the administrator of Wigan and Leigh College (India) Ltd.

XVI. **‘Exhibit-P’ and ‘Exhibit-P/1’**: Letter dated 18th June, 2013, issued by the plaintiff to the administrator of the Wigan and Leigh College (India) Ltd., along with its postal endorsement, wherein it is mentioned that the letter was refused by the defendant.

XVII. **‘Exhibit-Q’**: Letter dated 8th June, 2013, issued by the Plaintiffs to the administrator of Wigan and Leigh College (India) Ltd.

XVIII. **‘Exhibit-R’ and ‘Exhibit-R/1’**: : Letter dated 18th June, 2013, issued by the plaintiff to the administrator of the Wigan and Leigh College (India) Ltd., along with its postal endorsement, wherein it is mentioned that the letter was refused by the defendant.

XIX. **‘Exhibit-S’ and ‘Exhibit-S/1’**: a copy of Letter dated 8th June, 2013, issued by the Plaintiffs to the administrator of

Wigan and Leigh College (India) Ltd., along with its postal endorsement, wherein it is mentioned that the letter was refused by the defendant.

XX. **'Exhibit-T' and 'Exhibit-T/1'**: a copy of Letter dated 8th June, 2013, issued by the Ess Bee Networks Private Limited to the administrator of Wigan and Leigh College (India) Ltd., along with its postal endorsement, wherein it is mentioned that the letter was refused by the defendant.

XXI. **'Exhibit-U'**: A calculation of maintenance charge, rent charges, electricity payment receivable form the Wigan and Leigh College (India) Ltd, prepared by the plaintiffs and plaintiff's accountant.

XXII. **'Exhibit-V'**: Service Tax Receipts, paid by the Prabha Khaitan Foundation and Ess Bee Networks and Prabha Associates Private Limited, on 4th July, 2013.

XXIII. **'Exhibit-W'**: Calculation of Service Tax receivable from the Wigan and Leigh College (India) Ltd.

XXIV. **'Exhibit-X'**: copies of electricity bill issued by the Calcutta Electricity Supply Corporation to Prabha Khaitan Foundation for the month of January, 2013 showing net amount of Rs. 36,730/- and also showing the dues of December, 2012 of Rs. 13,580/- and for the month of November, 2012 of Rs. 20,297.51 paise.

XXV. **'Exhibit-Y'**: calculation of electricity bill dues from Novemebr, 2012 to March, 2013 and, which were paid by the plaintiff by bank draft of Federal Bank Limited.

XXVI. **'Exhibit-Z'**: Copies of letters issued by Prabha Khaitan Foundation, to the Officer-In-Charge, Shakespeare Sarani Police Station, dated 08.04.2013; 03.01.203; and 09.05.2013.

XXVII. **'Exhibit-AA'**: Copies of Letters dated 11.06.2013, issued by the Prabha Khaitan Foundation to the Administrator of Wigan and Leigh College (India) Limited, regarding non-payment of electricity bills.

XXVIII. **'Exhibit-BB'**: Letter dated 08.02.2013, prepared and sent by Radhika Singh & Co., advocate to Sourabh Chowdhury, Advocate, upon instructions of the plaintiffs.

XXIX. **'Exhibit-CC' and 'Exhibit-CC/1'**: Letter dated 5th August, 2013, to the Officer-in-charge, Shakespeare Sarani Police Station, issued by the Prabha Khaitan Foundation, and they have duly stamped and received the letter.

XXX. **'Exhibit-DD'**: Letter dated 20th August, 2013, issued by the Prabha Khaitan Foundation to the Wigan and Leigh College (India) Ltd.

XXXI. **'Exhibit-EE' and 'Exhibit-EE/1'**: Letter dated 12th December, 2013, issued by the Plaintiffs to the administrator of Wigan and Leigh College (India) Ltd., along with its postal endorsement, wherein it is mentioned that the letter was refused by the defendant.

XXXII. **'Exhibit-FF'**: Photographs of the premises No.10C, Hungerford Street, Kolkata-700017, which shows that the defendant had left it in ruined condition and the electricity and walls were destroyed.

XXXIII. **'Exhibit-GG'**: copy of an email dated 31st December, 2012, sent by Colonel Pushkar Prasad, COO, of Wigan and Leigh College (India) Limited, which was sent to Sandip Mitra, who was the Campus Director of Wigan and Leigh College (India) Limited and then it was forwarded to the Plaintiffs.

XXXIV. **'Exhibit-HH'**: copy of an email dated 07th August, 2013, sent by Sumanta Kumar, the accountant of Wigan and Leigh College (India) Ltd.

XXXV. **'Exhibit-II'**: A letter issued by the Wigan and Leigh College (India) Limited to the Prabha Khaitan Foundation, purportedly, the letter was issued on 15th October, 2013 but the premises was abandoned by the Wigan and Leigh College (India) Limited on 3rd August, 2013.

XXXVI. **'Exhibit-JJ'**: a copy of a letter dated 30th August, 2013, issued by the defendant, whereas the defendant had left the premises on 3rd August, 2013.

XXXVII. **'Exhibit-KK'**: Bill for the security deposit issued by CESC to the Prabha Khaitan Foundation, premises no. 10C, Hungerford Street, Kolkata-700017, for the new load of 15 KW of Rs. 67,150/-.

XXXVIII. **'Exhibit-LL'**: It is a letter issued by CESC informing the plaintiffs that they have adjusted the security deposit against the dues paid by defendant college.

XXXIX. **'Exhibit-MM' and 'Exhibit-MM/1'**: It is a consolidated bill issued by CESC to Prabha Khaitan Foundation for further security deposit of Rs.66,530/-, that the plaintiffs had paid.

XL. **'Exhibit-NN'**: Demand draft issued by Federal Bank Limited in favour of CESC of Rs.66,530/-.

XLI. **'Exhibit-OO'**: General Power of Attorney dated 16th December,2013.

XLII. **'Exhibit-PP'**: Extract minutes of proceedings of the meeting of the trustees of Prabha Khaitan Foundation held on 12th September, 2013 at 1.00PM.

EVIDENCE OF DEFENDANT:

15. The defendant had also examined one witness, namely Mrs. Malabika Sengupta, Chief Executive Officer of the Company but the cross examination of the defendant witness No. 1 was deferred on 17th December 2019 since thereafter, the defendant has not produced the defendant witness no.1 for further cross examination in spite of several notices issued by the counsel for the plaintiff to the defendant and accordingly by an order dated 3rd May 2023 the evidence of the defendant was closed. It is found from record that since 6th April 2022 none appears on behalf of the defendant. During the argument of the matter, this Court found that the matter is connected with commercial dispute and by an order dated 11th August 2023 this Court had transferred the matter to this Court (Commercial Division). After transfer of the case, the plaintiff had also issued notice to the Advocate on record of the defendant but inspite of receipt of notice none appears on behalf of the defendant. The defendant had adduced total number of 24 documents being 'Exhibit-1 to Exhibit-24', which are as follows :

a. **'Exhibit-1':** One agreement between the defendant and the service provider for the 5th Floor of 10C, Hungerford Street, Kolkata – 700017, and the other agreement is a tripartite agreement for the same 5th Floor of 10C, Hungerford Street.

b. **'Exhibit-2':** Signatures of signatories of the agreements, the signatories are Mrs. Indu Saraf, Mr, Vijay Pasricha and Mr. Ashok Kumar Saraf.

c. **'Exhibit-3':** A copy of police complaint, which was lodged by the defendant, in order to put on record that there was a lease agreement of the 5th Floor and all the third agreement of the 4th Floor, the original of the three agreements of the 4th Floor has been misplaced during shifting of office of the defendant.

d. **'Exhibit-4' and 'Exhibit-4/1' and 'Exhibit-4/2':** Ledger Account of CESC, bearing Consumer No. 22009026012.

e. **'Exhibit-5':** A copy of a Bank Statement of Kotak Mahindra Bank for the period of September 2012 to November 2012, it shows all the bank transactions made during the period by the college at the Kolkata campus including the electricity payment made for the month of October, 2012.

f. **'Exhibit-5/1':** Encircled portion of the bank statement which shows payment for October 2012 towards CESC.

g. **'Exhibits-6' :** a copy of the complaint that the college lodged at the local police station as the trust took no action against the electricity disruption and CESC officials were also unable to help as the meter box was under lock and key and the trust authorities were not helping to sort out the matter.

h. **'Exhibit-7':** A letter given by the Defendant's advocate named Mr. Sourav Chowdhuri to the trust for the sudden disconnection of the electricity at the second and the third floor of the building.

i. **'Exhibit-8':** A forwarding letter of WLCI dated 20th November, 2012 along with four cheques being Nos. 001278, 001277, 001276, 001279, dated 17th November, 2012.

j. **'Exhibit-9':** Downloaded copy of a letter of WLCI, dated 14th December, 2012.

k. **'Exhibit-10':** A forwarding letter of WLCI dated 28th December, 2012 along with four cheques bearing Nos. 000851, 000852, 000850 and 000853 dated 22nd December, 2012 respectively.

l. **'Exhibit-11':** Downloaded copy of a letter dated of Pushkar Prasad dated 31st December, 2012.

m. **'Exhibit-12':** Downloaded copy of a letter dated of WLCI, dated 02nd January, 2013.

n. **'Exhibit-13':** Downloaded copy of a letter dated 03rd January, 2013, of Pushkar Prasad.

o. **'Exhibit-14':** Bills of hiring generator sets from January to July, 2013.

p. **'Exhibit-15':** Cash Memos issued by Bharat Petrolium retail outlet and the are for the month of January till July' 2013.

q. **'Exhibit-16':** Monthly bills of security solutions and manpower services Security agency of Noida for supplying security guards to the defendant college's Kolkata and Noida branch and the bills are for the month of January till July' 2013.

r. **'Exhibit-17':** Ledge account for the expenses incurred towards hiring of generator because of disruption of main power at the campus in Calcutta. Ledger account for purchase of diesel to the tune of Rs.1,90,982/- for running the generator sets at the campus.

s. **'Exhibit-17/1':** details of ex-students who dropped out and discontinued their courses. The fee that was received by the college till date i.e. January, 2013 and the balance that was to be received by the college from the students, which amounted to Rs.36,26,126/- and that is the incurred loss by the defendant.

t. **'Exhibit-18':** A copy of a Fees Payment Schedule of one student which mentioned the total fees.

u. **'Exhibit-19':** Copies of some registration forms.

v. **'Exhibit-20':** A letter account of the expenses incurred towards cable and networking due to disruption of electricity, mentioned to payment made to Sukanya Electrical.

w. **'Exhibit-21':** Certificate issued by the defendant's auditor K.S. Bawa & Associates which mentions the year wise application forms i.e. 2011,2012,2013 and till May, 2014, sold and also mentions admission of students. Thereafter it also mentions revenue received by the college. Continuation of the previous details wherein it mentions the percentage of conversion from application form to admission. [Annexed collectively].

x. **'Exhibit-22':** A letter written by the defendant's director of the campus to the Prabha Khaitan Foundation mentioning the problems that the defendant was facing because of electricity disruption on the 2nd and 3rd Floor of the premises.

y. **‘Exhibit-23’:** A letter written by Mr. Sandip Mitra to Prabha Khaitan Foundation mentioning about the financial loss due to disconnection of electricity on the 2nd and 3rd Floor.

z. **‘Exhibit-24’:** copy of an email sent by the defendant’s accountant to the office of the foundation along with a copy of the hand over certificate, dated 7th August, 2013.

aa. **‘Exhibit-25’:** Board resolution of the directors of the company M/s. WLC College India Limited which authorises the witness to represent the company for this case.

DECISION WITH REASONS:

Issues no.1 and 2 taken up together:

“(i) Is the suit maintainable in its present form and in law?

(ii) Is the suit bad for non-joinder of parties or mis-joinder of causes of action?

The plaintiff has filed the suit for recovery of rent and other charges against the defendant. On 24.12.2013, this Court granted leave to accept the Court fees and after acceptance of Court fees by an order dated 13.01.2014 leave was granted under Clause 12 of Letters Patent and subsequently the plaintiff has taken appropriate steps. At the time of hearing of the suit, it was found that the suit is of commercial in nature and the suit was filed prior to promulgation of the Commercial Courts Act, 2015, accordingly, the suit was transferred to this Court and even after transfer, a notice was issued to the Advocate-on-record of the defendant but even after receipt of notice none appeared on behalf of the defendant, thus the suit is maintainable in its present form and law. Accordingly issue no. (i) is decided in favour of plaintiff and against the defrendant.

The suit was filed in the year' 2014 claiming rent, maintenamce charges, electric charges, service charges, repair charges and interest with respect of the suit premises. The plaintiffs have let out the premises to the defendant for the purpose of running college. For letting out the premises, two agreements were entered between the plaintiff no. 3 and defendant. A tripartite agreement was executed between the plaintiffs and the defendant. Another agreement between the plaintiff no. 4 and the defendant was entered on the same day and all the parties to the agreements are parties to the suit and thus issue no (ii) is decided in favour of the plaintiffs and against the defendant.

<u>ISSUES NO. (iii) to (ix) are taken up together:</u>

(iii) Has the defendant defaulted in paying rent and maintenance charges from September 2012 to August 2013 and thereby liable to pay Rs. 20,18,640/- to the plaintiff?

(iv) Has the defendant defaulted in paying the electricity charges and thereby the plaintiff is entitled to claim Rs.54,540/- on account of reimbursement of the electricity charges from the defendant?

(v) Is the defendant bound to pay service tax to the plaintiff and thereby the plaintiff is entitled to claim reimbursement of Rs.16,75,644/- from the defendant towards unpaid service tax?

(vi) Is the defendant bound to pay for causing damage to the suit premises and thereby the plaintiff in entitled to claim Rs.9,78,000/- from the defendant as compensation?

(vii) Is the defendant entitled to claim Rs.2,25,33,480/- from the plaintiff for alleged violation of the terms of the agreement?

(viii) Is the plaintiff entitled to get the decree as prayed for?

(ix) Is the plaintiff entitled to get any other relief?

16. On 17th June, 2004, two agreement were entered between the plaintiff no. 3 and the defendant with respect of 2nd floor and 3rd floor of the eight storied building at premises No. 10C, Picasso Bithi (Formely No. 10C, Hungerford Street), Kolkata. Both agreements were marked as Exhibits A and B. On the same day tripartite agreement was executed between plaintiff no. 3, the defendant and the plaintiff no. 4 and the said tripartite agreement is marked as Exhibit 'C'. On the same day, another agreement was entered between plaintiff no. 4, defendant and the said agreement is marked as Exhibit 'D'. As per Exhibits A and B, the lease period of both the floors is for 9 (Nine) years with effect from 1st August, 2004 and the monthly rent for the first three years (01.08.2004 to 31.07.2007) was fixed at Rs. 31,800/- and then 15% increase after three years i.e. (01.08.2007 to 31.07.2010) i.e. Rs. 36,570/- and for the last three years i.e. (01.08.2010 to 31.07.2013) i.e. Rs. 42055/. The defendant has deposited an amount of Rs. 1,90,800/- each of the premises with the plaintiffs as interest free security deposit.

17. As per the agreement, the defendant has occupied the premises and started paying the maintenance charges and monthly rent to the plaintiff. The defendant has paid monthly rent and maintenance charges till the month of August' 2012 and since thereafter i.e from the month of September' 2012 till the month of August' 2013, the defendant defaulted in paying the same total amounting to Rs. 20,18,640/-. In the tenanted premises, CESC Limited has also provided Electricity Meter No. 4272908 being Consumer No. 22009026012 and as per the agreement entered between the parties, the defendant is liable to pay the electrical consumption charges of the tenanted premises. The defendant has paid the electricity charges uptill October' 2012 and since the month of November' 2012, the defendant failed to pay the said charges and accordingly the plaintiff has paid an amount of Rs. 54,540/- to the CESC on behalf of the defendant. Exhibits E, F, G, H, X, Y, LL, MM and NN are proved that the plaintiff has provided electric connection in the suit premises by depositing security deposit and non-payment of the consumption charges, the CESC has adjusted the dues from security deposit. The defense recorded by the defendant that the plaintiff has not provided 15 KVA load on said premises and only provided 17.6 KVA has not proved by the defendant by any cogent evidence.

18. On introduction of new finance bill by the Government of India in the year' 2007 and imposition of service tax at the rate of 12.36%, the plaintiff has informed the defendant by a letter dated 1st January, 2009, for payment of service tax total amounting to Rs. 1,26,560/- with effect from 1st January, 2008 which is marked as Exhibit 'J'. Thereafter also, the plaintiff had sent several reminders to the defendant for payment of service tax but the defendant has not paid the said tax. The tax paid by the plaintiff is marked as Exhibit 'V' collectively. The plaintiff has proved the payment of service tax being Exhibits I, J, K, M, V and GG. Clause 2.2 (i) of the agreement dated 17th June, 2004, entered between plaintiff no. 3 and defendant being Exhibit 'C' reads as follows :

> *"2.2 The Service Provider has also agreed to take over the liability of the Lessee for payment of the following outgoings in respect of the said Office Block:*
>
> *(i) Liability for payment of only the municipal rates and taxes in respect of the said Office Block during the term reserved under the said Lease Agreement and the Lessee shall not be made liable therefor in any manner whatsoever, notwithstanding anything to the contrary agreed by and between the said Lessor and the Lessee under the said Lease. It is made clear that any increase in rate of taxes in respect of owner's and occupier's share and commercial surcharge and all other impositions, levies, charges and fees or imposition if new taxes shall be borne by the Lessor and the Lessee shall only be liable to make payment as stated in clause (3) provided hereunder."*

As per said Clause, the defendant is liable to pay the service tax from November' 2007 to August' 2013 amounting to Rs. 16,75,644/- which the plaintiff has paid being Exhibit V colletivelly.

19. The defendant has not paid the maintenance amount of the suit premises from September' 2012 to August' 2013. As per agreement dated 17th June, 2004, being Exhibit 'C' and Exhibit 'D', the defendant is required to pay Rs. 42055/- per month of each premises total amounting to Rs. 20,18,640/-. The plaintiff has requested the defendant to clear the due but inspite of receipt of the said request, the defendant has not paid the dues of maintenance charges. Exhibits 'T' and 'U' proved that the plaintiff has made request to the defendant but the defendant has not paid the same and on 3rd August, 2013, the defendant has left the premises unlocked by removing all its belonging and without any intimation to the plaintiff and without clearing the dues of the plaintiff.

20. The defendant has claimed that the plaintiff failed and/or neglected to comply with their obligation to provide necessary essential services and by reasons of their fault and/or laches there accrued power disconnection intermittently and on various occasions which was affecting the Defendant's business for running a college. Since no attempt was made by the plaintiff to ensure uninterrupted supply of power in violation of the terms of the agreements, the defendant did not make any payment of rent and service charges from September' 2012, in pursuance to the terms of the Rent and Service provider agreements which provides the defendant to deduct rent and service provider agreements which provides the defendant to deduct rent and service charges on prorate basis if uninterrupted supply of power is not resumed after 48 hours from interruption in power supply.

21. The defendant has also made their counter claim but the defendant has not proved the counter claim and the defence set out by the defendant in the written statement. The defendant has cross-examined the plaintiff's witness but the defendant failed to bring his witness i.e. D.W.1 to complete the cross examination. The Counsel for the plaintiff has partly cross-examined the D.W.1 but subsequently, the defendant has not produced the said witness to complete the cross-examination of the D.W.1. None on behalf of the defendant has argued the matter also.

22. In the case reported in ***1998 SCC OnLine AP 305 (The A.P. Tobacco Growers Co-op. Union Ltd. -vs- Shri Anjaneya Tobacco Co., Tangutur & Ors.),*** it is held that :

> ***"8.*** *So, it is clear that D.W. 1 did not turn up on 16-3-1995 for cross-examination, although the matter was adjourned after chief-examination on 10-3-1995, to that date by an order of the Court. There was also no request made on behalf of defendants to re-call him for cross-examination, though the matter was posted for arguments as a next step by an order dated 16-3-1995. Therefore, the evidence of D.W. 1 in chief-examination without affording an opportunity to the plaintiff to cross-examine him cannot be used as evidence in this case. We are therefore left with the evidence of P.W. 1 and Exs. A-1 to A-18."*

In the case reported in ***2002 Supp (1) ALD 600 (Somagutta Sivasankara Reddy and Ors. –vs- Palapandla Chinna Gangappa and Ors.),*** it is held that evidence would be inadmissible, if cross examination was avoided or deliberately prevented.

In the case reported in ***1949 SCC OnLine Cal 11 (Phani Bhusan Ghosh and Another –vs- Sibakali Basu),*** the Hon'ble Court held that :

> *"Unless examination of a witness is complete, that is to say, unless he has been cross-examined and re-examined or unless his cross examination or re-examination has been declined, his evidence cannot be considered except in the circumstances mentioned in Section 33 of the Indian Evidence Act. There is nothing to show that these persons are dead or incapable of giving evidence or that they cannot be found or that they have been kept out of the way by the complainant; nor is there any evidence that their presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable. In the absence of these circumstances such incomplete evidence cannot be accepted."*

In the case reported in ***2010 SCC OnLine Del 3660 (Pearey Lal Bhawan Association –vs- M/s. Satya Developers Pvt. Limited),*** the Hon'ble Court held that:

> ***"12.*** *The controversy requiring decision by the Court is narrow and limited. It is whether the burden of service tax, levied on the service or facility of leasing (of the suit premises) should be borne by the lessor (i.e. the service provider) or the lessee (i.e. the defendant, user). There is no dispute that the parties did not visualize that this kind of a levy would be made in respect of lease, or rental of commercial*

properties; it is also undisputed that the levy was made effective in 2007, after the parties had entered into the agreement. The defendant denies liability to pay, submitting that the conditions in the contract clearly stipulate that all taxes, etc. are to be borne by the plaintiff landlord. It relies on principles of interpretation of contract, to submit that when parties visualize situations and provision for them, it is not open to either of them to ??? outside the express terms, and try to discover obligations when none exist.

14. *It is true, that the contracts entered into between the parties in this case, spoke of the plaintiff lessor's liability to pay municipal, local and other taxes, in at least two places. The Court, however, is not unmindful of the circumstance that service tax is a species of levy which the parties clearly did not envision while entering into their arrangement. It is not denied that leasing, and renting premises was included as a "service" and made exigible to service tax, by an amendment; the rate of tax to be collected, is not denied, if the overall objective of the levy - as explained by the Supreme Court, were to be taken into consideration, it is the service which is taxed, and the levy is an indirect one, which necessarily means that the user has to bear it. The rationale why this logic has to be accepted is that the ultimate consumer has contact with the user; it is from them that the levy would eventually be ??? by including the amount of tax in the cost of the service (or goods)."*

"15. *It would be noteworthy to recollect Section 64-A of the Sale of Goods Act, 1930, which visualizes and provides for situations where levies of tax are imposed after the contract (for sale of goods) is entered into. The provision prescribes that:*

> ***"64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted.-*** *(1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax*

where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time,

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or ??? of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) The provisions of sub-section (1) apply to the following taxes, namely:

(a) any duty of customs or excise on goods;
(b) any tax on the sale or purchase of goods."

The above provision also clearly says that unless a different intention appears from the terms of the contract, in case of the imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such tax or such increase. Although there is no explicit provision to that effect, enabling lessors such as the plaintiff, to the service tax component, this Court is of the view that there is sufficient internal indication in the Act, through Section 83 read with Section 12-A and Section 12-B suggesting that the levy is an indirect tax, which can be collected from the user (in this case, the lessee). This issue, is therefore, answered in the plaintiff's favour, and against the defendant."

23. The plaintiff has claimed damages of Rs. 9,78,000/- being the cost of repair of the suit premises. The defendant has left the suit premises unlocked and on inspection it was found that the defendant has caused damage in the suit premises and has taken photographs Exhibit "FF". The plaintiff has reported the matter to the concerned police station and the police has also submitted report being Exhibit 'DD' which is proved that electrical wiring, doors, furniture, ACs, interior fittings etc., were removed. In clause 2(ii) of the Exhibit A and B is recorded that:

> *"ii) The Lessee shall deposit with the Lessor during the term of this agreement Rs. 190800/- as interest free security deposit. The said sum to remain deposited with the Lessor during the period of this agreement shall be deposited by the Lessee with the Lessor simultaneously with the execution hereof (the receipt whereof the Lessor both hereby as also by the receipt and memo hereunder written admit and acknowledge), notwithstanding the fact that the lease shall commence on and from 1st August, 2004).*
>
> *The said security deposit shall always be maintained during the term of this agreement and in case there be any shortfall due to reason of any amount being deducted by the Lessor therefrom in terms hereof or otherwise then the lessee shall replenish the same to the quantum hereinabove sated. The said security deposit shall be refunded to the Lessee on the expiry of the lease or sooner determination thereof and the Lessee vacating and handing over the complete peaceful vacant and khas possession of the said Office Block to the Lessor after deduction therefrom of (i) any unpaid rent or other charges payable by the Lessee to the Lessor and/or any other unpaid amounts payable in respect of the said Office Block to any other person or persons claiming through under or in trust for the Lessor and (ii) all costs of repairs to the said Office Block, if damage by the Lessee except normal wear and tear."*

Considering the report being Exhibit 'DD' and as per Clause 2(ii) of Exhibits A and B, the security deposit of the defendant should be treated as forfeited being the cost of repair charges.

24. Issues Nos. (iii) to (ix) except Issue No. (vi) are decided in favour of the plaintiffs and against the defendants. Issue No. (vi) decided in favour of the plaintiff in part and against the defendant.

25. In view of the above, the plaintiff is entitled to get decree of Rs. 3,748,824/- being the monthly rent and maintenance from the month of September' 2012 to August' 2013, electric charges of Rs. 54,540/- and service charge of Rs. 16,75,644/. The plaintiff is also entitled to get interest on Rs. 3,748,824/- at the rate of 15% per annum from the date of filing of the suit till realisation of the said amount. The counter claim filed by the defendant is dismissed.

26. **C.S No. 12 of 2014** is **disposed of**. Decree be drawn accordingly.

(Krishna Rao, J.)