



C.S.No.1163 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Reserved on : 08.02.2024

Pronounced on :16.02.2024

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

C.S.No.1163 of 2008

M/s.Kapoor Imaging Private Limited,
Rep. By its Managing Director,
No.6, III Street,
Balaji Nagar,
Royapettah,
Chennai – 14.

... Plaintiff

Vs.

M/s.Kodak (India) Private Limited,
(formerly known as M/s.Kodak Graphic
Communication (India) Private Limited)
Rep. By its Director,
Mumbai.

(amended as per order dt.2.8.21 in
A.No.2612 of 21 in C.S.No.1163 of 08)

... Defendant

Prayer: Civil Suit is filed under Order IV Rule 1 of O.S. Rules read with Order VII Rule 1 CPC, praying for a direction to the defendant to pay a sum of Rs.1,81,62,728/- being the principal amount of Rs.1,50,30,923/-



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payable by the defendant as per para 10 of the plaint and interest thereon at the rate of 15% per annum from 01.07.2007 till 18.11.2008, along with future interest at the rate of 15% per annum from the date of filing of the suit till the date of actual payment.

For Plaintiff : Mr.R.Parthasarathy, Sr.Counsel
assisted by Ms.Madhu Preeta Elango

For Defendant : Mr.S.Arjun Suresh
for Dua Associates

JUDGMENT

The suit has been filed against the defendant for recovery of a sum of Rs.1,26,40,648/- towards damages. According to the plaintiff, the goods supplied by the defendant was defective and due to the same, they had suffered damages. The damage claim made by the plaintiff against the defendant comprises of the following:-

(i) Payments withheld by the customers of the plaintiff -
Rs.96,33,360/-

(ii) Defective stocks that were unsold by the plaintiff -
Rs.12,50,000/-



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(iii) Goods returned by the customers back to the plaintiff -

Rs.17,57,288/-.

(iv) Towards wasted expenditure, namely, storage charges of defective and unsold goods supplied by the defendant - Rs.4,20,000/-

(v) Towards non-issuance of E1 forms - Rs.21,24,545/-

(vi) Towards interest @ 15% per annum.

2. The plaintiff is engaged in the business of trading in graphic art film, printing plates, plate chemicals, flexo plates and other types of proofing products, which are used in the printing industry. The defendant is in the business of manufacturing the aforesaid products in Plants situated in Europe and United States of America. The defendant had engaged the plaintiff as a reseller/distributor of its products on a principal-to-principal basis ever since 1995, where the plaintiff's scope of work was to establish a market base and identify potential customers for trading the defendant's products. The plaintiff and the defendant entered into a formal Reseller Agreement dated 01.04.2006 and as per the terms and conditions of the said agreement, the plaintiff was required to take best efforts to promote and thereafter to sell and trade the products



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manufactured by the defendant, as a reseller for Southern India (except Kerala). As per the Reseller Agreement dated 01.04.2006, the defendant was supplying the products to the plaintiff. According to the plaintiff, the products supplied by the defendant to the plaintiff had suffered from two types of defects, namely, “base fog” and “finger prints”. According to them, the loss suffered by them is owing to direct and proximate consequences of the defective goods supplied by the defendant and therefore, the defendant is liable to pay the suit claim, on account of breach of contract committed by the defendant under the Reseller Agreement dated 01.04.2006.

3. According the plaintiff, the defendant had provided a guarantee under the Reseller Agreement dated 01.04.2006 to supply the products in good and merchantable quality and condition. According to the plaintiff, it was the defendant's responsibility to replace the goods or supply equivalent goods or repair the goods or pay the cost of replacing the goods or acquire equivalent goods or pay the cost of having the goods repaired, in case the goods supplied by them are defective. According to the plaintiff, they were permitted by the defendant to sell the defendant's



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products in the defendant's original packages. According to them, the packages were received from the defendant in a sealed condition and they were supplied to the plaintiff's customers in the same condition. Therefore, according to the plaintiff, the two types of defects, namely, base fog and finger prints, cannot be due to the plaintiff's mishandling of the goods, and therefore, the defendant is liable to compensate the plaintiff for the losses suffered by them owing to the supply of defective goods.

4. According to the plaintiff, the defendant has acknowledged that some of the goods supplied by them to the plaintiff were defective, as seen from the correspondences, which have been filed along with the plaint. According to the plaintiff, the payments were withheld by their customers on account of direct and foreseeable consequence of supplying defective goods by the defendant. It is also their case that the goods supplied by the defendant remained unsold on account of its quality. It is also their case that the goods were returned by their customers due to its defective quality. The plaintiff also contends that the defendant failed to issue necessary E1 forms. According to them, if the necessary E1 forms



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were issued by the defendant, the rate of C.S.T payable was only 3%.

According to them, as a result of non-issuance of E1 forms by the defendant, the difference in sales tax, interest and penalty paid by the plaintiff, was to the tune of Rs.21,24,545/-, which the defendant is liable to reimburse the plaintiff.

5. The plaintiff also claims that they had to lose storage space in its godown and warehouse by storing the defective goods supplied by the defendant. According to them, on account of the loss of storage space, the defendant is liable to pay Rs.15,000/- per month towards damages starting from August, 2006, till the date of filing the suit, amounting to Rs.4,20,000/-.

6. On the other hand, as per the written statement filed by the defendant, it is the case of the defendant that as on 08.06.2007, the plaintiff had admitted the liability of Rs.3,17,70,116/- to the defendant. According to them, the same is evident from the balance confirmation forms signed by the plaintiff. According to them, they supplied the goods to the plaintiff to the tune of Rs.3,43,01,254/- during the financial



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year 2007-2008. Therefore, the total admitted outstanding as on 31.3.2007 and the quantum of goods supplied for the period 2007-2008, amount to Rs.6,60,71,370/-. According to the defendant, the plaintiff made payments amounting to Rs.5,34,01,243/- during the financial year 2007-2008 and the defendant issued credit notes amounting to Rs.68,69,441/-. According to them, after giving due consideration to the certain sums paid by the plaintiff and the credit notes issued by the defendant in favour of the plaintiff, the total outstanding payable by the plaintiff to the defendant amounts to Rs.58,00,686/-.

7. According to the defendant, they issued several reminders to the plaintiff to pay the outstanding dues. Since the plaintiff failed to pay the outstanding dues even after repeated reminders, the defendant claims that they were constrained to issue the statutory notice under Sections 433 and 434 of the Companies Act, 1956 on 27.03.2008 for winding up of the plaintiff's company for non payment of the alleged admitted debt. According to the defendant, merely as an afterthought and counter-blast to the statutory notice dated 27.03.2008, the plaintiff, in its reply dated 22.04.2008, had raised several frivolous and unsustainable claims for the



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first time and demanded a sum of Rs.6,79,89,761/- from the defendant.

The defendant, as seen from the rejoinder dated 10.06.2008 to the plaintiff, once again called upon the plaintiff to make the payment to the tune of Rs.58,00,686/- with interest. According to the defendant, only as a counter-blast to the said notice, the plaintiff has filed the present suit making untenable, unsubstantiated and unsustainable claims. The defendant has also made a counter-claim for a sum of Rs.82,32,040.33/- comprising of Rs.58,00,686/- towards principal amount for the value of the goods supplied and the balance amount towards interest at 18% per annum calculated from the due dates of the respective invoices.

8. A reply statement has also been filed by the plaintiff to the counter-claim made by the defendant, reiterating the plaint averments and denying their liability to pay the counter-claim.

9. Based on the pleadings of the respective parties, this Court framed the following issues on 17.09.2019:-

(1) Whether the goods supplied by the defendant were defective in nature?



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(2) Whether the plaintiff is entitled to the amounts withheld by the customers of the plaintiff?

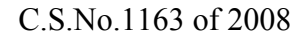
(3) Whether the plaintiff is entitled to the whole of the monetary claims sought by it or any part thereof, and if so, to what extent?

(4) Whether the defendant is entitled to the whole of the counter-claim sought by it or part thereof, and if so, to what extent?

(5) To what other reliefs are the parties entitled to?

10. Before the learned Additional Master-I, Mr.Sunil Kapoor, Managing Director of the plaintiff company, was examined as a witness (PW1) on the side of the plaintiff. He has also filed a proof affidavit reiterating the contents of the plaint as well as the reply statement filed by the plaintiff. Through PW1, the following documents were marked as exhibits:-

Date	Particulars	Exhibit
27.09.2004	Photocopy of the certificate of incorporation of the plaintiff's company	Ex.P1
	Details of the value of films purchased from the defendant	Ex.P2



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Date	Particulars	Exhibit
	the defendant along with the postal receipt and postal acknowledgment card dated 22.04.2008	
10.06.2008	Original rejoinder notice from the defendant's counsel to the plaintiff	Ex.P18
31.10.2008	Photocopy of the letter from the plaintiff to the defendant at Mumbai	Ex.P19
31.10.2008	Photocopy of the letter written by the plaintiff to the defendant with regard to taking return of defective goods	Ex.P20
31.03.2012	Original debit note bearing reference No.KIPL/KODD.Note/HOF/001, issued by the plaintiff to the defendant for Rs.40,03,457.20/-, dated 31.03.2012	Ex.P21
31.03.2012	Original debit note bearing reference No.KIPL/KODD.Note/HOF/002, issued by the plaintiff to the defendant for Rs.17,87,137.67/-, dated 31.03.2012	Ex.P22
	Relevant extracts of ledger statement of the plaintiff's company showing the debit of Rs.40,03,457.20/- covered under Ex.P21 series	Ex.P23
	Relevant extracts of ledger statement of the plaintiff's company showing the debit of Rs.17,87,137.67/- covered under Ex.P22 series	Ex.P24
31.03.2007	Balance sheet of the plaintiff company as on 31.03.2007 dated 31.03.2007 certified by the plaintiff Chartered Accountant	Ex.P25
31.03.2008	Balance sheet of the plaintiff company as on 31.03.2008 dated 31.03.2008 certified by the plaintiff Chartered Accountant	Ex.P26
31.03.2009	Balance sheet of the plaintiff company as on 31.03.2009 dated 31.03.2009 certified by the plaintiff Chartered Accountant	Ex.P27
	Certificate under Section 65B of the Indian Evidence Act for the printouts of invoices, emails, credit notes and debit notes	Ex.P28
	65B certificate pertaining to Exs.P9 to P12, P25, P26 & P27	Ex.P29

11. Another witness by name Mr.A.Maheswara Reddy was also examined on the side of the plaintiff as PW2. He is a Chartered



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Accountant and he claims to have audited the accounts of the plaintiff company since 1994. He has also filed a proof affidavit and through his deposition, he confirms that there was no manipulation of the records/accounts in the plaintiff company to the best of his knowledge. Through PW2, the Section 65 B certificate pertaining to Exs.P9 to P12, Ex.P25, Ex.P26 & Ex.P27 was marked as Ex.P29. Both PW1 as well as PW2 were also cross-examined by the defendant's counsel.

12. On the side of the defendant, Mr.Maxy Francis Assis Fernandes, Whole-time Director and General Manager-Indian Controller and Tax of the defendant company, was examined as a witness on behalf of the defendant (DW1). He has also filed his proof affidavit reiterating the contents of the written statement as well as counter-claim filed by the defendant and denying the defendant's liability to pay the suit claim. Through DW1, the following documents were marked as exhibits on the side of the defendant.

Date	Particulars	Exhibit
02.05.2022	Copy of Board resolution dated 02.05.2022	Ex.D1
	Original lorry receipts (series) (20 nos.)	Ex.D2
	Original credit notes (series) (11 Nos.)	Ex.D3
	Original credit notes (series) (59 Nos.)	Ex.D4



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Date	Particulars	Exhibit
08.06.2007	Photocopy of balance confirmation form (series)(5nos.) signed on 08.06.2007	Ex.D5
	Original invoices (series) (41 Nos.) and photocopies of the lorry receipts (series) (7 Nos.)	Ex.D6
16.04.2007	Originals of cheque deposit slip and statement (series) (7 pages) dated 16.04.2007	Ex.D7
28.04.2007	Originals of cheque deposit slip and statement (series) (7pages) dated 28.04.2007	Ex.D8
30.04.2007	Originals of cheque deposit slip and statement (series) (6pages) dated 30.04.2007	Ex.D9
31.05.2007	Originals of cheque deposit slip and statement (series) (6pages) dated 31.05.2007	Ex.D10
31.05.2007	Originals of cheque deposit slip and statement (series) (3pages) dated 31.05.2007	Ex.D11
20.06.2007	Originals of cheque deposit slip and statement (series) (6pages) dated 20.06.2007	Ex.D12
	Original statement of the plaintiff (series)(8pages)	Ex.D13
	Original statement of the plaintiff (series)(5pages)	Ex.D14
	Original statement of the plaintiff (series)(7pages)	Ex.D15
	Original statement of the plaintiff (series)(2pages)	Ex.D16
	Copy of the bank statement (series) (6pages)	Ex.D17
	Copy of the ledger extract (9 pages)	Ex.D18
	Original of the Auditor's report for the year ending 2007 (21pages)	Ex.D19
	Photocopy of the Auditor's report (18pages)	Ex.D20
27.12.2007	Printout copy of the email dated 27.12.2007	Ex.D21
16.01.2008	Printout copy of the email dated 16.01.2008	Ex.D22
27.03.2008	Photocopy of the notice dated 27.03.2008	Ex.D23
10.06.2008	Photocopy of the notice dated 10.06.2008	Ex.D24
04.06.2007	Photocopy of the Invoice No.8000030325 dated 04.06.2007	Ex.D25

The plaintiff's counsel has also cross-examined DW1.



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13. Heard Mr.R.Parthasarathy, learned Senior Counsel, assisted by Ms.Madhu Preeta Elango, learned counsel, appearing for the plaintiff; and Mr.S.Arjun Suresh, learned counsel, appearing for the defendant.

14. The learned Senior counsel for the plaintiff drew the attention of this Court to the pleadings in the plaint as well as to the oral and documentary evidence available on record, and after referring to the same, he would submit that since the goods supplied to the plaintiff are defective, the plaintiff is entitled to the following claims:-

(a) Payments withheld by the customers of the plaintiff amounting to Rs.96,33,360/-, which, according to him, is a direct and foreseeable consequence due to the supply of defective goods by the defendant.

(b) The claim towards unsold defective stocks amounting to Rs.12,50,000/-, which, according to him, is also due to the supply of defective goods by the defendant.

(c) The claim towards goods returned by the plaintiff's customers amounting to Rs.17,57,288/-, which, according to him, is also due to the supply of defective goods by the defendant.



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(d) The claim towards difference in sales tax and penalty amounting to Rs.21,24,545/- on account of failure to issue E1 forms by the defendant.

(e) The claim towards wasted expenditure amounting to Rs.42,000/- on account of loss of storage space in the plaintiff's godown and warehouse for storing the defective materials supplied by the defendant.

15. On the other hand, the learned counsel for the defendant, after drawing the attention of this Court to the pleadings, and oral and documentary evidence available on record, would submit as follows:-

(a) The plaintiff has filed this suit only as a pre-emptive action to prevent the defendant from filing a winding up petition to wind up the plaintiff in respect of an admitted debt due and payable by the plaintiff to the defendant.

(b) The suit filed by the plaintiff is a vexatious suit and is an abuse of process of law and Court.

(c) No evidence has been placed on record by the plaintiff to substantiate that the goods supplied by the defendant had suffered base



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fog or fingerprints.

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(d) The plaintiff has not substantiated that it has suffered damages in the form of loss on account of alleged non-payment by the plaintiff's customers. The plaintiff has not substantiated whether the damage or loss is to the extent quantified in the plaint.

(d) Even assuming that the plaintiff has suffered the loss as claimed in the plaint, the mandatory requirement of mitigation of loss as per the Explanation to Section 73 of the Indian Contract Act has not been complied with.

DISCUSSION:-

16. As per Section 101 of the Indian Evidence Act, whoever desires any Court to give judgment as to any legal right or liability is dependent on the existence of facts, which he asserts, must prove that those facts exist. As a plaintiff, the burden of proof lies on the plaintiff to prove the following:-

(a) The goods supplied by the defendant were defective.

(b) The payments were withheld by the plaintiff's customers on account of defective goods supplied by the defendant.



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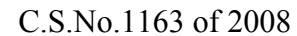
(c) The defective goods stocks remained unsold by the plaintiff.

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(d) The goods were returned by the customers of the plaintiff on account of its defective condition.

17. According to the plaintiff, the products supplied by the defendant had suffered from two types of defects, namely, (i) base fog; and (ii) finger prints. However, it is the contention of the defendant that the goods supplied to the plaintiff are not defective, for which, payments are due and only as an afterthought by way of counter-blast, to avoid a winding up petition being filed pursuant to the statutory notice issued by the defendant to the plaintiff on 27.03.2008, the present suit has been filed to avoid payment of the admitted debt to the defendant.

18. This Court will have to now examine based on the pleadings, oral and documentary evidence available on record, as to whether the plaintiff is entitled for the suit claim or whether the defendant is entitled for the counter-claim made by them in the suit for the alleged non-payment of the value of the goods supplied by them to the plaintiff.



(d) As per Section 40 of the Sale of Goods Act, where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to



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the course of transit.

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(e) Under section 42 of the Sale of Goods Act, the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

(f) Under section 41 of the Sale of Goods Act, where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. As per Section 41(2), unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(g) Section 43 of the Sale of Goods Act also makes it clear that unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to



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return them to the seller, but, at the same time, the buyer will have to intimate the same to the seller that he refuses to accept the goods from the seller.

20. Before deciding, who has committed the breach, it has to be first taken note of that admittedly, both the plaintiff and the defendant are having business relationship ever since 1995, though they had made a formal written contract only in the year 2006 through the Reseller Agreement dated 01.04.2006 (Ex.P3). The relevant clauses in the Reseller Agreement dated 01.04.2006 for determining as to who is at fault, are extracted hereunder:-

4. TERMINATION:-

a) This agreement may be terminated immediately by either party for “Cause” which shall include, but not limited to, the following:

(i) default by either party under this or any other agreement or dissatisfaction of either party at any time with the other party's financial responsibility;

(ii) failure of Reseller to meet sales targets;

(iii) any sale, transfer or relinquishment,



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voluntary or involuntary, of any substantial interest in the ownership or management of either party;

(iv) any assignment for benefit of creditors by either party, the appointment of an assignee, referee, receiver or trustee for either party or the adjudication in bankruptcy, voluntary or involuntary, or the liquidation of either party;

(v) failure of either party to conduct his business in accordance with any of the provisions of this agreement; and

(vi) commercial incompatibility.

b) Termination shall also result in immediate cancellation of unfilled orders.

5. OBLIGATIONS OF RESELLER:-

Reseller agrees that its minimum sales volume for products shall be those as agreed in Appendix B (Refer Appendix (B) for the product pricing and volume).

Reseller shall ensure that the products are not knowingly sold directly or via sub resellers outside the area without prior permission of seller.

(a) Reseller will sell all the products in Seller's original packages without removing or



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defacing or concealing or altering marks or numbers prior to sale and not misuse or cause others to misuse any trademark, service mark, trade name, or trade dress of seller without written consent of seller.

(b)

(c)

(d)

(e) During Reseller's review meetings, the following key subjects will be discussed and it is expected that the Reseller will have updated information for this review:-

- Reseller Report with resale data (including general market situation) – see point 12.

- Sales performance vs target.

- Market share update

- Average end user pricing update.

- Top 10 customer review / status.

- Technical competency review and future technical requirements.

- Product templates and forecasting review.

- Marcom update

- Month end inventory

7. PRICING:-



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PAYMENT AND DELIVERY TERMS:

(a) Unless otherwise determined, payment terms will be 30 days from the date of invoice. The delivery will be made at Seller's warehouse for FOB terms.

(b) Trading terms will be 30 days from the date of invoice. This term will continue unless advised in writing with 30 days notice. Prices of products are FOB Kodak facility for export shipments.

(c) Legal title will transfer from seller to reseller at the time of delivery to reseller's carrier as agreed between the parties. Unless otherwise specified in these agreements, title & risk of loss to the products shall pass to the reseller upon delivery of the products to the carrier. All products are shipped FOB point of shipment.

9. WARRANTY:-

(a) Products sold by the Reseller pursuant to this agreement are sold with seller's guarantee that they are of good merchantable quality and condition. The reseller shall convey to seller all complaints and observations received from its customers in respect of defects in products delivered by resellers without any liability on his part. Reseller shall immediately inform seller of



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any such case via the appropriate Complaint Handling Procedure and shall act in seller's best interest. Seller shall have no warranty liability with respect to any products sold to reseller by any person, firm or corporation other than seller, and reseller shall make no statements or representations to the contrary.

(b) Seller will not be responsible for any consequential or incidental damages resulting from the sale, use or improper functioning of the goods.

10. LIMITATION OF LIABILITY:-

To the maximum extent permitted by law, any conditions or warranties imposed by law are hereby excluded. Where any legislation implies into this agreement any condition or warranty and that legislation prohibits exclusion or limitation of the condition or warranty, to the maximum extent permitted by that legislation, the liability of Kodak is limited at the option of Kodak to any one or more of the following in the case of goods:

(i) the replacement of the goods or the supply of equivalent goods;

(ii) the repair of the goods;

(iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or

(iv) the payment of the cost of having the goods



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repaired.

18. Return of Defective product:-

Subject to clause 13, Distributor may return to Kodak any products purchased directly from Kodak which are defective in materials or credit, at Kodak's option, in the full amount of the price paid by Distributor. Kodak reserves the right to inspect and require proof of the defect prior to accepting returns under this provision. For getting the credit of return of defective goods the standard KPIR procedure need to be followed.

21. The plaintiff, in order to be entitled for compensation as claimed in the suit, will have to make a case of breach on the part of the defendant resulting in any loss or damage to the plaintiff. Such compensation cannot be granted by this Court for any remote or indirect loss or damage sustained by reason of such breach. Further, while estimating such loss or damage, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account. In other words, the circumstances available to the plaintiff in mitigating the losses must also be taken into account while



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estimating the loss. Therefore, the plaintiff will have to prove the following to sustain its claim for damages:-

(a) Supply of films were made by the defendant to the plaintiff, for which, invoices were raised by the defendant and payments were made by the plaintiff to the defendant;

(b) The aforesaid supplies were defective on account of base fog or finger prints;

(c) The aforesaid defective supplies were in turn supplied to the plaintiff's customers listed under Ex.P4 (defective films which were not returned by the plaintiff's customers), and Ex.P8 (defective films which the customers had returned and remained with the plaintiff), and there remained unsold stock amounting to Rs.12.50 lakhs, which were also defective and remained with the plaintiff;

(d) The plaintiff suffered damages in the form of losses on account of non-payment by the plaintiff's customers referred to in Ex.P4 & Ex.P8.



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(e) The damages or loss is to the extent

quantified in the plaint; and

(f) Mitigation of such loss, if any.

22. We shall consider one by one the various claims made in the suit. Firstly, we shall consider the claim of Rs.96,33,360/- towards the amount allegedly withheld by the customers of the plaintiff on account of the alleged defective films which were not returned. The plaintiff has not provided the details of supplies made or any invoices which were purportedly raised by the defendant or films delivered with regard to the supplies said to have been made to those specified in Ex.P4 list. Unless and until the plaintiff establishes with details that defective films supplied to them were in turn supplied to their customers, the question of breach of contract by the defendant does not arise. Infact, as seen from the cross-examination of the plaintiff's witness (PW1), the witness has deposed that he was not aware of the quantity of films, batch nos., invoice details or the break-up of the alleged defects, claimed by the plaintiff in the suit. Since the plaintiff has not provided the details of the defective supplies made with supporting invoices which were



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purportedly raised by the defendant or films delivered with regard to supplies said to have been made to those specified in Ex.P4 list, the plaintiff's claim of Rs.17,57,288/- towards goods allegedly returned by the customers (Ex.P8) on account of alleged defects and other claims cannot be granted by this Court.

23. As seen from the oral and documentary evidence available on record, the plaintiff has also not provided any proof of payment made by them to the defendant towards disputed invoices, in respect of which, the plaintiff claims that the goods supplied covering those invoices are of defective quality. Unless the plaintiff establishes that payments were made by them towards the alleged defective films, which, in turn, were supplied by the plaintiff to its customers, the question of awarding damages by this Court also does not arise. The credit period under the Reseller Agreement dated 01.04.2006 (Ex.P3) also makes it clear that payments will have to be made by the plaintiff to the defendant within 30 days from the date of respective invoices. It is also made clear that once the goods are delivered to the carrier by the defendant, the goods are deemed to be sold by the defendant to the plaintiff.



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24. The plaintiff has provided the list of customers in Ex.P4 and has stated that the customers mentioned therein withheld the payment to the plaintiff on account of supply of defective films made to them. However, no invoices, purportedly raised by the plaintiff to its customers, have been produced by the plaintiff towards the purported supplies of films made by it to those customers mentioned in Ex.P4. There is no evidence available on record to show that the films were delivered by the plaintiff to its purported customers mentioned in Ex.P4, such as, delivery note, despatch proof, etc. Therefore, there is no evidence of any sales or supplies having been made by the plaintiff to its purported customers listed in Ex.P4. It is also seen from the cross-examination of PW1 from question Nos.44 and 45 that neither purchase orders were raised by the plaintiff's customers referred to in Ex.P4 nor were raised by the plaintiff on those customers. Despite specific questions having been raised by the defendant during the cross-examination of PW1 about the non-supply of goods to their customers, for which, a claim has been made, it is noted that even thereafter, the



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plaintiff has not come forward to produce invoices raised against their customers, who allegedly had complained about the defective quality of the goods. The initial burden of proof is on the plaintiff to prove the suit claim. They have failed to discharge their initial burden in accordance with Section 101 of the Evidence Act. The plaintiff has also not filed any correspondences from any of its purported customers listed in Ex.P4 stating that goods supplied were defective. The plaintiff has, therefore, not discharged their initial burden of proving their claim that goods supplied by them to their customers were defective in quality.

25. Infact, during the cross-examination of PW1 in question Nos.160, 162 and 163, specific questions were raised with regard to when these alleged defective films were put to use by those customers mentioned in Ex.P4, identification of documents by which complaints were made by those customers, date of supply of films to those customers, however, PW1 either stated that he is unable to identify them or that he does not know.

26. It is also seen from Clause 9(a) of the Reseller Agreement



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dated 01.04.2006 (Ex.P3) that the plaintiff will have to convey to the defendant about all complaints and observations received from its customers in respect of defects in the products delivered by the plaintiff. The plaintiff shall immediately inform the defendant of any such complaint via the appropriate Complaint Handling Procedure and shall act in the defendant's best interest. As seen from the evidence available on record, the plaintiff has not adhered to Clause 9(a) of the Reseller Agreement dated 01.04.2006 (Ex.P3). Infact, as seen from the cross-examination of PW1, i.e., question Nos.132 and 134, PW1 has deposed that he is unable to identify any documents, by which, such complaints were made by the plaintiff's customers. Therefore, the plaintiff has failed to establish that their customers had returned the goods on account of defective quality and the same was also notified to the defendant by following the procedure as contemplated under Clause 9(a) of the Reseller Agreement dated 01.04.2006 (Ex.P3).

27. The alleged defective films or the exposed images have also not been filed by the plaintiff and marked as exhibits to substantiate their claim that goods supplied by the defendant were defective in the form of



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base fog or finger prints. The only document which the plaintiff has filed before this Court is from a purported customer by name M/s.K&M Graphics (Ex.P5), which name does not figure in Ex.P4 or in Ex.P8. Further, it appears from the evidence available on record that M/s.K&M Graphics is a reseller of films and not an end user. This is also confirmed by PW1 in his answer to question No.184 and 185 during the course of his cross-examination. Therefore, the only document filed by the plaintiff from a purported customer by name M/s.K&M Graphics is of no avail.

28. PW1, during his cross-examination, as seen from question Nos.50 to 53, has deposed that he heard from his technician that films were defective on account of base fog and fingerprints. However, the technician referred to by PW1 has not been examined as a witness on the side of the plaintiff to prove the plaintiff's claim. Therefore, the alleged defects are only hearsay, not meeting the standards of reliable evidence and not satisfying the requirements of Sections 59 and 60 of the Evidence Act, 1872. PW1 has also deposed that certain reports must have been prepared and provided to the defendant, but, however, such



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reports have also not been filed. Therefore, the veracity of the deposition of PW1 cannot be believed. The statement made by PW1 that the defendant is aware of the defective quality of the goods is not substantiated by any documentary evidence. PW1 in his answer to question Nos.116 and 117 during the course of his cross-examination, has also confirmed that he has not prepared Ex.P4 list and that it was prepared by his accounts personnel and he is also not sure as to the date when it was prepared. Therefore, Ex.P4-list has to be treated as unreliable.

29. The plaintiff has also not produced any evidence to show that their customers (Ex.P4) have not paid the value of the goods supplied by them on account of its defective quality. No communication is produced between the plaintiff and its customers calling upon them to make the payment. The plaintiff has also admitted that credit notes to the extent of Rs.12,49,873/- were issued by them to its customers and that credit notes amounting to Rs.20,62,132/- from July, 2006 to March, 2007 were issued by the defendant to the plaintiff, whereas, according to the defendant, credit notes amounting to Rs.93,04,942/- between June, 2006 and



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October, 2007, were issued to the plaintiff. Admittedly, credit notes issued by the defendant to the plaintiff were in excess of what was allegedly issued by the plaintiff to its customers. Therefore, the question of the plaintiff suffering losses does not arise. The plaintiff has also not produced any evidence for having issued the unsigned credit notes to its customers during the course of cross-examination of PW1. As seen from question Nos.121 to 124, the witness was attempting to evade these questions. Therefore, the credibility of the credit notes (Ex.P15) issued by the plaintiff are questionable. The only evidence from the plaintiff to the defendant is Ex.P13 (email correspondence between January, 2007 and January, 2008), which quantifies that the alleged return of the films or the alleged defects in the films are only for a sum of Rs.28,42,345/-. Even as per these emails, the quantum towards the alleged defects or batch problems is restricted to Rs.28,42,345/-, i.e, Rs.20,72,219/- towards batch problems and Rs.7,71,126/- towards defective rolls. However, as seen from some of other emails contained in this exhibit series, which refers to some of the credit notes issued by the defendant to the plaintiff, it confirms to atleast Rs.21,88,129/- worth of credit notes that were issued by the defendant to the plaintiff. It is also seen that



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credit notes in excess of Rs.68 lakhs were issued by the defendant to the plaintiff for the period 2007-2008 and therefore, no loss or damage is caused to the plaintiff.

30. The plaintiff, apart from their obligations to establish breach and loss, they have an obligation to mitigate such a loss, which is sine qua non to sustain a claim for damages. Explanation to Section 73 of the Contract Act in this regard makes it mandatory for any person claiming damages to mitigate the loss and only for the balance sum after mitigating the loss, they are entitled to file a suit for damages. In the instant case, the plaintiff has not taken any steps to mitigate the losses, if any, though they may contend that goods supplied by the defendant have now become worthless.

31. The plaintiff has also not produced any document to show that goods to the tune of Rs.12,50,000/- were left unsold with the plaintiff. Having filed the suit, the initial burden is upon the plaintiff to prove that goods supplied to them were unsold on account of its defective quality. The stock summaries filed by the plaintiff as on 31.03.2007 (Ex.P13) and



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31.03.2008(Ex.P14) merely indicate that the plaintiff had a stock of films worth Rs.31,94,181/- as on 31.08.2008 as against a stock of Rs.1,01,13,812/- as on 31.03.2007. The plaintiff has chosen not to file the stock summary as on 31.03.2009. PW2, auditor of the plaintiff, in his cross-examination, has also deposed that only the stock summaries requested by the plaintiff were prepared by him in November, 2019.

32. PW1, during his cross-examination, had admitted, as seen from the answer to question No.91, that none of the films, which were packed, were opened. The plaintiff has presumed that films were defective as seen from the answer to Question No.93 during the course of his cross-examination. As seen from the cross-examination, PW1 is not even aware as to the number of film rolls that form part of the alleged defects. There is no material to substantiate that the films amounting to a value of Rs.12.50 lakhs were defective or that the plaintiff informed the same to the defendant prior to the filing of the present suit.

33. It is also to be noted that as per the Reseller Agreement dated 01.04.2006 (Ex.P3), the title of the goods supplied by the defendant



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would transfer to the plaintiff at the time of the films/goods leaving the defendant's premises, and the risk and loss would shift to the plaintiff at that point. Therefore, the plaintiff, having not established that the goods supplied by the defendant were defective in quality, the claim for compensation against the defendant does not arise merely on the basis of presumption. The emails marked by the plaintiff as Ex.P13 are unreliable as a piece of evidence. The defendant has also denied most of the said emails. The said emails are incomplete and are not accompanied by a valid certificate filed under Section 65B of the Evidence Act. The details of the computer and printer where the emails have been printed have not been provided. This lacuna has not been rectified by the plaintiff despite the defendant having raised objections during the marking of these emails. Infact, the plaintiff had objected to the marking of the emails by the defendant during trial, and the same was brought before this Court for clarification. This Court, by its earlier order in the present suit, had clarified that emails were to comply with Section 65B of the Evidence Act, and that a defect, if any, is a curable defect, and that it was open to the defendant to cure the defects before conclusion of trial. Subsequently, the defendant filed another certificate under Section 65B



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of the Evidence Act for the documents filed by it. Despite the same, the plaintiff has chosen not to cure the defects by filing a certificate complying with the requirements of Section 65B of the Evidence Act.

34. PW1, during his cross-examination, has also admitted that several of the emails filed by the plaintiff were internal emails allegedly exchanged amongst the employees of the defendant. However, when asked about how the plaintiff gained access to the internal emails of the defendant, PW1 deposed that the same were from his source, but, he was unable to recall the name of the source. According to the PW1, the plaintiff had access to the internal emails of the defendant in between 2006-2008. Hence, it is evident that not only that these emails are unreliable, but also are hearsay in nature without revealing the source and hence, not admissible.

35. PW1 was also unable to identify the names of the customers who allegedly withheld payments to the plaintiff in Ex.P4 or returned goods to the plaintiff in Ex.P8, which formed a part of the rolls that were allegedly notified as defective in the said emails. The plaintiff has been



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unable to correlate the same with the present claims. The evidence of PW2, auditor of the plaintiff, is also unreliable. The ledger extracts allegedly prepared and certified by the PW2 have no evidentiary value as per Section 34 of the Evidence Act. The Hon'ble Supreme Court in the case of *State Bank of Travancore Vs. Kingston Computers (I) Pvt. Ltd. [(2011) 11 SCC 524]* has made it clear that the evidence is unreliable for lack of proper authorization.

36. For the forgoing reasons, the suit claim, as stated supra, has to be rejected by this Court, since the plaintiff has not produced any evidence substantiating the said suit claim. The plaintiff has filed the present suit as a pre-emptive action to avoid payment of the legitimate dues of the defendant as per the invoices raised by the defendant, which still remain unpaid. The defendant has rightly made a counter-claim in the suit for a sum of Rs.58,00,686/- towards the outstanding dues arising out of unpaid invoices. The plaintiff has not provided any evidence to prove that films supplied under 42 invoices raised by the defendant were defective and no evidence has also been placed on record by the plaintiff to prove that the goods, which are subject matter of the invoices raised



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by the defendant, for which, a counter-claim has also been made by them, are defective. The invoices raised by the defendant on the plaintiff are marked as Ex.D6 and the plaintiff has admitted the receipt of the said invoices. Having failed in its attempt to prove that the invoices covered under Ex.D6 are of defective quality, necessarily the plaintiff is liable to pay the value of the invoices (Ex.D6) to the defendant.

37. The defendant had also sent an email dated 27.12.2007 and a follow up email dated 16.01.2008 (Ex.D21 & Ex.D22) calling upon the plaintiff to pay the value of the unpaid invoices. Despite the same, the plaintiff has chosen not to come forward to pay the value of the unpaid invoices. The defendant had also issued a statutory notice dated 27.03.2008 to the plaintiff under Sections 433 and 434 of the Companies Act, 1956, for winding up. On receipt of the said notice and only to avoid payment of the legitimate dues of the defendant, the plaintiff has filed this suit.

38. It is also to be noted that as per the balance sheet of the plaintiff for the year ending 31.03.2008(Ex.P26) and



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31.03.2009(Ex.P27), sums of Rs.40,03,457/- and Rs.17,87,137/- totalling

Rs.57,90,594/- were shown as due to the defendant in the list of Sundry

Creditors in the books of the plaintiff. It is also to be noted that entries

in the balance sheets of the plaintiff are in the name of Kodak

Polychrome Graphics India Private Limited and Kodak Graphic

Communications India Private Limited. It is further to be noted that

Kodak Polychrome Graphics India Private Limited changed its name to

Kodak Graphic Communications India Private Limited on 30.03.2007

and thereafter amalgamated with the defendant on 01.04.2008. To

unlawfully overcome the aforesaid admission of dues in the balance

sheets of the plaintiff, the plaintiff has belatedly, much after the

institution of this suit, issued debit notes for Rs.40,03,457/- and

Rs.17,87,137/- (Ex.P21 and P22), both dated 31.03.2012, totalling

Rs.57,90,594/- claiming that debit notes were issued to the defendant.

There is no document on record to establish when these debit notes were

issued or when the defendant had received the same. PW1, during the

course of his cross-examination, while answering to question No.48

regarding the documents evidencing despatch of the debit notes, deposed

that he does not remember the same. Further, while answering question



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No.124 with regard to mode of despatch of these debit notes, PW1 deposed that he does not remember. As seen from the evidence available on record, the plaintiff's witness has given evasive answer in an attempt to unlawfully deprive payment of the legitimate dues to the defendant.

39. PW2, auditor of the plaintiff, while answering to a question as to when debit notes were issued, deposed that a debit note is issued immediately after identifying problems with the quality of the product, if any. The mere fact that debit notes were purportedly issued almost 5 years after the supplies were made is sufficient to establish that debit notes were merely issued as an afterthought, after 5 years of considering the defendant as a Sundry Creditor. As on 31.03.2007, the plaintiff owes the defendant a sum of Rs.3,17,70,116/- (Ex.D5) and thereafter, during the year 2007-08, the defendant made supplies to the tune of Rs.3,43,01,254/-. Payments were admittedly made by the plaintiff to the tune of Rs.5,34,01,243/-. The total credit notes issued by the defendant during this period amounts to Rs.68,69,441/-. The defendant has filed the original office copies of 59 credit notes (Ex.D4) issued in the year 2007-08 amounting to Rs.53,07,786/-. However, as the remaining



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originals were untraceable for the reasons mentioned in the application as well as in the proof affidavit of DW1, the ledger statement of the defendant has been filed, which reflects the details of the credit notes. After adjusting the credit notes, the total outstanding due and payable to the defendant as on 31.03.2008 admittedly amounts to Rs.58,00,686/-. Even assuming that the ledger extracts in lieu of the credit notes are not considered, it would only amount to the plaintiff owing in excess of Rs.58,00,686/- plus interest. However, the defendant relies on the ledger extracts for those credit notes not filed and limits its counter-claim to Rs.58,00,686/- plus interest. The fact that the credit notes were received by the plaintiff and adjusted against the amount due and payable to the defendant, is borne out from the admission of PW1 that an amount of Rs.58,00,686/- was withheld to the defendant albeit due to the alleged defects. The allegation regarding defects is not only contrary to the pleadings and the plaintiff's own admission, but is also contrary to the documents on record. No evidence has been adduced to substantiate that the films pertaining to 42 invoices were defective in nature. The Reseller Agreement dated 01.04.2006 between the parties also provides that the invoices are to be paid by the plaintiff within 30 days of receipt of the



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goods and the defendant has claimed interest from the 60th day of delivery of the goods under each invoice as per the terms contained in the invoices. The agreed interest on delayed payment of invoices was fixed at 30%, whereas the claim has been restricted to 18% per annum.

40. For the forgoing reasons, it is clear that the suit filed by the plaintiff is an abuse of process of law and Court, as the suit has been filed as an afterthought only to avoid payment of the legitimate dues of the defendant. On the other hand, the defendant has proved through its oral and documentary evidence that the plaintiff has failed to pay the value of the goods to the tune of Rs.58,00,686/- to the defendant, which is the counter-claim amount. The defendant has also proved through their invoices that the plaintiff is liable to pay interest at the rate of 18% per annum for the belated payment as claimed in the written statement and counter-claim.

41. In the result, issues (1) to (3) are answered against the plaintiff and issue (4) is answered in favour of the defendant. Accordingly, this suit is dismissed and the counter-claim is decreed in favour of the



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defendant by directing the plaintiff to pay the defendant a sum of Rs.58,00,686/- together with interest at the rate of 18% per annum from the date of the last invoice raised by the defendant, i.e., from 04.07.2007, till the date of realization. The plaintiff is also directed to pay the costs of the suit to the defendant.

16.02.2024

Index: Yes/no
Speaking order/non-speaking
Neutral citation : Yes/no
rkm

Plaintiff's witness:

Mr.Sunil Kapoor - PW1

Mr.A.Maheswara Reddy – PW2

Documents exhibited by the Plaintiff:

Date	Particulars	Exhibit
27.09.2004	Photocopy of the certificate of incorporation of the plaintiff's company	Ex.P1
	Details of the value of films purchased from the defendant between August, 2006 and June, 2007 along with 19 sample purchase order (collectively)	Ex.P2
01.04.2006	Reseller Agreement between the plaintiff and the defendant	Ex.P3
	Photocopy of the details of amounts withheld by the plaintiff's customers due to defects in the films	Ex.P4



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Date	Particulars	Exhibit
05.01.2008	A copy of the letter of M/s.L&M Graphics to the plaintiff	Ex.P5
23.11.2019	Original of the auditor's certificate dated 23.11.2019 regarding amounts of Rs.96,35,360/- withheld by the customers of the applicant dated 23.11.2019	Ex.P6
23.11.2019	Original of the auditor's certificate dated 23.11.2019 showing various amounts written off as bad debts, rebates and discounts, including the amount of Rs.2,65,49,991.70/- dated 23.11.2019	Ex.P7
	Original details of the customers who had returned back the goods resold by the plaintiff	Ex.P8
23.11.2019	Original of the Auditor's Certificate dated 23.11.2019 regarding defective goods worth Rs.17,57,288/- returned by the customers along with a list and relevant ledger extracts dated 23.11.2019	Ex.P9
23.11.2019	Original of the Auditor's Certificate dated 23.11.2019 showing the stock summary of the plaintiff company for the period 01.04.2006-31.03.2007 dated 23.11.2019	Ex.P10
23.11.2019	Original of the Auditor's Certificate dated 23.11.2019 showing the stock summary of the plaintiff company for the period 01.04.2007-31.03.2008 dated 23.11.2019	Ex.P11
	Photocopy of the ledger extracts for the claim of Rs.96,35,360/- withheld by the customers of the plaintiff and is relatable to para 9(i) of the proof affidavit dated 09.12.2019	Ex.P12
	Series of emails between January, 2007 and January, 2008 between the parties showing the defects in the goods	Ex.P13
	Series of 35 credit notes issued by the defendant to the plaintiff to compensate the plaintiff for defective goods	Ex.P14
	Series of 53 credit notes issued by the plaintiff to its customers to compensate its customers for their losses	Ex.P15
	Original legal notice from the defendant's counsel to the plaintiff dated 27.03.2008	Ex.P16
	Office copy of the reply notice from the plaintiff's counsel to the defendant along with the postal receipt and postal acknowledgment card dated 22.04.2008	Ex.P17
10.06.2008	Original rejoinder notice from the defendant's counsel to the plaintiff	Ex.P18
31.10.2008	Photocopy of the letter from the plaintiff to the defendant at Mumbai	Ex.P19



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Date	Particulars	Exhibit
31.10.2008	Photocopy of the letter written by the plaintiff to the defendant with regard to taking return of defective goods	Ex.P20
31.03.2012	Original debit note bearing reference No.KIPL/KODD.Note/HOF/001, issued by the plaintiff to the defendant for Rs.40,03,457.20/-, dated 31.03.2012	Ex.P21
31.03.2012	Original debit note bearing reference No.KIPL/KODD.Note/HOF/002, issued by the plaintiff to the defendant for Rs.17,87,137.67/-, dated 31.03.2012	Ex.P22
	Relevant extracts of ledger statement of the plaintiff's company showing the debit of Rs.40,03,457.20/- covered under Ex.P21 series	Ex.P23
	Relevant extracts of ledger statement of the plaintiff's company showing the debit of Rs.17,87,137.67/- covered under Ex.P22 series	Ex.P24
31.03.2007	Balance sheet of the plaintiff company as on 31.03.2007 dated 31.03.2007 certified by the plaintiff Chartered Accountant	Ex.P25
31.03.2008	Balance sheet of the plaintiff company as on 31.03.2008 dated 31.03.2008 certified by the plaintiff Chartered Accountant	Ex.P26
31.03.2009	Balance sheet of the plaintiff company as on 31.03.2009 dated 31.03.2009 certified by the plaintiff Chartered Accountant	Ex.P27
	Certificate under Section 65B of the Indian Evidence Act for the printouts of invoices, emails, credit notes and debit notes	Ex.P28
	65B certificate pertaining to Exs.P9 to P12, P25, P26 & P27	Ex.P29

Defendant's witness:-

Mr.Maxy Francis Asis Fernandes - DW1



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Documents exhibited by the defendant:-

Date	Particulars	Exhibit
02.05.2022	Copy of Board resolution dated 02.05.2022	Ex.D1
	Original lorry receipts (series) (20 nos.)	Ex.D2
	Original credit notes (series) (11 Nos.)	Ex.D3
	Original credit notes (series) (59 Nos.)	Ex.D4
08.06.2007	Photocopy of balance confirmation form (series)(5nos.) signed on 08.06.2007	Ex.D5
	Original invoices (series) (41 Nos.) and photocopies of the lorry receipts (series) (7 Nos.)	Ex.D6
16.04.2007	Originals of cheque deposit slip and statement (series) (7 pages) dated 16.04.2007	Ex.D7
28.04.2007	Originals of cheque deposit slip and statement (series) (7pages) dated 28.04.2007	Ex.D8
30.04.2007	Originals of cheque deposit slip and statement (series) (6pages) dated 30.04.2007	Ex.D9
31.05.2007	Originals of cheque deposit slip and statement (series) (6pages) dated 31.05.2007	Ex.D10
31.05.2007	Originals of cheque deposit slip and statement (series) (3pages) dated 31.05.2007	Ex.D11
20.06.2007	Originals of cheque deposit slip and statement (series) (6pages) dated 20.06.2007	Ex.D12
	Original statement of the plaintiff (series)(8pages)	Ex.D13
	Original statement of the plaintiff (series)(5pages)	Ex.D14
	Original statement of the plaintiff (series)(7pages)	Ex.D15
	Original statement of the plaintiff (series)(2pages)	Ex.D16
	Copy of the bank statement (series) (6pages)	Ex.D17
	Copy of the ledger extract (9 pages)	Ex.D18
	Original of the Auditor's report for the year ending 2007	Ex.D19



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Date	Particulars	Exhibit
	(21pages)	
	Photocopy of the Auditor's report (18pages)	Ex.D20
27.12.2007	Printout copy of the email dated 27.12.2007	Ex.D21
16.01.2008	Printout copy of the email dated 16.01.2008	Ex.D22
27.03.2008	Photocopy of the notice dated 27.03.2008	Ex.D23
10.06.2008	Photocopy of the notice dated 10.06.2008	Ex.D24
04.06.2007	Photocopy of the Invoice No.8000030325 dated 04.06.2007	Ex.D25

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ABDUL QUDDHOSE, J.

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