IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.03.2024

CORAM

THE HONOURABLE **MR.JUSTICE ABDUL QUDDHOSE**

C.S.No.339 of 2018

M/s.Prasad Productions Private Ltd.,
NO.28, Arunachalam Road,
Saligramam,
Chennai – 93. .. Plaintiff

-vs-

1.M/s.3D Camera Company

2.M/s.Bill White INC,
No.7, Ridout Street,
Ontario,
Canada M6R-1Z1. .. Defendants

PRAYER: Civil Suit is filed under Order IV Rule 1 of High Court O.S. Rules and Order VII Rule 1 of CPC, praying;

(a) for a direction to the defendants to pay the plaintiff a sum of USD 7,22,601/- together with interest at the rate of 18% per annum on USD 5,56,339/- from the date of filing of the suit till the date of recovery; and

(b) to direct the defendants to pay costs of the suit to the plaintiff.

For Plaintiff : Ms.R.Sahana

Defendants are set exparte

JUDGMENT

The suit has been filed for recovery of a sum of USD 7,22,601/- against the defendants together with interest at the rate of 18% per annum on USD 5,56,339/- jointly and severally from the date of filing of the suit till the date of recovery. The suit has been filed on the ground that the defendants have committed breach of contract under two Memorandum of Understandings (MoU) dated 25.05.2010 and 09.11.2012 entered into between the plaintiff and first defendant.

2. Under the first MoU dated 25.05.2010, the plaintiff had paid the security deposit amount of USD 5,87,737/- to the first defendant, who had exported the subject equipments from Canada to India for its use by the plaintiff. Under the first MoU dated 25.05.2010, the plaintiff and the first defendant had agreed to share the profit and expenditure as detailed below:-

(a) The first defendant will supply 3D camera and related equipments and accessories to the plaintiff on a 50/50 rental split for a period of 6 calendar months, i.e., from 01.06.2010 to 01.12.2010.

(b) All costs associated with shipping/duties will be split in the ratio of 50:50.

(c) The plaintiff will take 75% of the rental split until their portion of costs incurred in clause (2) of the MoU dated 25.05.2010 is fully recouped.

(d) After these costs for importing the equipments are paid back from 75/25 rental split, the rental sharing will revert to the intended ratio of 50:50 of the net revenue.

3. According to the plaintiff, under the MoU dated 25.05.2010, which was for an initial period of 6 months, it was made clear that the plaintiff had an option to terminate the contract, after the initial period of 6 months in case it is not viable for the plaintiff to continue with the business further. According to the plaintiff, it became unviable for them to continue with the contract dated 25.05.2010 due to the non-profitability of the business. Under those circumstances, they entered into a Supplemental MoU dated 09.11.2012 with the first defendant, under which, the first defendant had acknowledged that the plaintiff has deposited a refundable rental deposit of

USD 5,87,737 with the first defendant. Under the Supplemental MoU dated 09.11.2012, the first defendant has also agreed that the plaintiff will take 100% of the rental proceeds until their portion of the costs are fully recouped. The plaintiff also claims that they have made additional payment of USD 66,602/-, which is to be reimbursed by the defendants.

4. According to the plaintiff, till date, despite several reminders and issuing notice of termination of both the contracts, the first defendant has not paid the outstanding dues of the plaintiff.

5. The second defendant has been arrayed as a party defendant in the suit on the ground that at the time of signing the MoU dated 25.05.2010, the first defendant had submitted the articles of association along with PAN details pertaining to the second defendant. According to the plaintiff, the second defendant is a subsidiary company of the first defendant and only under those circumstances, they have arrayed the second defendant as a party defendant in the suit.

6. The defendants have been set exparte by this Court on 26.08.2021. Till date, the defendants have not filed any application seeking to set aside the exparte order. The plaintiff has also recorded the exparte evidence before the learned Additional Master-II. The plaintiff's authorized representative Mr.V.M.Rajeev Kumar was examined as a witness (PW1) on behalf of the plaintiff. He has also filed a proof affidavit reiterating the contents of the plaint. Through PW1, the following documents were marked as exhibits on the side of the plaintiff:-

Sl. No	*Exhibits*	*Description*
1	Ex.P1	Ex.P1, which is S.No.1 in the list of documents, is the copy of Board Resolution dated 15.11.2022, issued by the Plaintiff in my favour, authorizing me tender evidence on behalf of the Plaintiff.
2	Ex.P2	Ex.P2, which is S.No.2 in the list of documents, is the copy of the MoU dated 25.05.2010.
3	Ex.P3	Ex.P3 series, which is S.Nos.3-7 in the list of documents, is the copies of the invoices dated 21st May, 2010, 15th August 2011, 22nd August, 2011, 26th August 2011, 26th September, 2011, 3rd November, 2011 raised by the 1st Defendant.
4	Ex.P4	Ex.P4 series, which is S.Nos.8-10 in the list of documents, is the Copies of the supplementary invoices dated 23.06.2010, 25.06.2010, and 11.11.2011, raised by the 1st Defendant on the Plaintiff at the time of shipping the said ancillary equipment, as per the terms of the MoU.

Sl. No	Exhibits	Description
5	Ex.P5	Ex.P5 series, which is S.Nos.11-19 in the list of documents, is the Air Way Bill No. LAX 83436 dated 04.06.2010, Air Way Bill No. AE10009102 dated 05.06.2010, Air Way Bill No. 023 6922-8331 dated 24.06.2010, House Air Way Bill No. CAV – 1050451 dated 30.6.2010, Air Way Bill No. HAWB EA3075 dated 27.08.2011, Airway Bill No. HAWB EA3080 dated 06.09.2011, Air Way Bill No. 341 D- 65451 dated 19.10.2011, Air Way Bill No. /10012822/AE10012822 dated 11.11.2012 and Air Way Bill dated 09.03.2012.
6	Ex.P6	Ex.P6 series, which is S.Nos.20-66 in the list of documents, is the copies of the TR-6 Challan dated 10.06.2010, 10.06.2010, 21.06.2010, 03.07.2010, 09.07.2010, 09.12.2010, 20.12.2010, 29.12.2010, 29.12.2010, 03.03.2011, 18.03.2011, 31.03.2011, 07.04.2011, 07.06.2011, 07.06.2011, 30.06.2011, 30.06.2011, 06.09.2011, 08.09.2011, 08.09.2011, 16.09.2011, 01.10.2011, 01.10.2011, 15.10.2011, 24.10.2011, 25.11.2011, 07.12.2011, 15.12.2011, 17.12.2011, 17.12.2011, 23.01.2012, 23.02.2012, 14.03.2012, 24.05.2012, 07.06.2012, 07.06.2012, 23.07.2012, 22.08.2012, 06.09.2012, 06.09.2012, 22.10.2012, 22.11.2012, 22.01.2013, 23.02.2013, 08.03.2013, 08.03.2013, 23.04.2013, 23.05.2013, issued by the Customs Authorities upon receipt of the payments made by the Plaintiff.
7	Ex.P7	Ex.P7 series, which is S.Nos.67-80 in the list of documents, is the **c**opies of the invoices and receipts towards freight clearing charges, insurance transit premium and bank charges, etc., dated 09.06.2010, 21.06.2010, 01.07.2010, 07.07.2010, 10.07.2010, 12.07.2010, 12.09.2011, 29.10.2011, 21.11.2011, 22.11.2011, 25.11.2011, 14.12.2011, 20.12.2011, 15.03.2012, 19.09.2011.
8	Ex.P8	Ex.P8 series, which is S.Nos.81-127 in the list of documents, is the copies of the invoices dated 30.11.2010. 17.10.2011, 17.10.2011, 17.10.2011, 21.10.2011, 21.10.2011, 21.10.2011, 26.11.2011, 13.12.2011, 27.12.2011, 14.01.2012, 30.01.2012, 08.02.2012, 23.02.2012, 15.03.2012, 26.03.2012, 31.03.2012, 11.04.2012, 21.04.2012, 25.04.2012, 07.05.2012, 07.05.2012,

Sl. No	Exhibits	Description
		04.07.2013, 04.07.2013, 04.07.2013, 04.07.2013, 04.07.2013, 25.07.2013, 30.07.2013, 30.07.2013, 30.07.2013, 30.07.2013, 14.08.2013, 20.08.2013, 28.08.2013, 18.09.2013, 18.09.2013, 18.09.2013, 21.09.2013, 24.09.2013, 24.09.2013, 24.09.2013, 24.09.2013, 16.11.2013, 16.11.2013, 16.11.2013, and 16.11.2013 raised by the Plaintiff for leasing the said equipments.
9	Ex.P9	Ex.P9 series, which is S.Nos.128-131 in the list of documents, is the invoices dated 25.10.2010, 19.09.2011, 08.12.2011 and 09.03.2012 raised by the 1st Defendant towards its share from the revenue generated from leasing/hiring the Said Equipments.
10	Ex.P10	Ex.P10, which is S.No.132 in the list of documents, is the copy of the said FORM No. 49A dated 19.08.2011 along with the copy of the invoice of the 1st Defendant and incorporation certificate and articles of association of the 2nd Defendant.
11	Ex.P11	Ex.P11, which is S.No.133 in the list of documents, is the Supplemental MoU dated 09.11.2012.
12	Ex.P12	Ex.P12 series, which is S.Nos.134 - 142 in the list of documents, is the true copies of the aforementioned said proposals and counter-proposals that were exchanged between the Parties vide e-mails dated 25.10.2013, 02.11.2013, 15.03.2014, 18.03.2014, 18.03.2014, 16.04.2014, 16.04.2014, 19.04.2014, and 19.04.2014.
13	Ex.P13	Ex.P13 series, which is S.Nos.143-144 in the list of documents, is the true copy of the said notice addressed to the First Defendant vide email dated 22.07.2016 and the original of the returned notice which was sent through Speed Post with Acknowledgment Card.
14	Ex.P14	Ex.P14 series, which is S.Nos.145-146 in the list of documents, is the true copy of the payment challan dated 06.06.2015 made by the Plaintiff towards the TDS payable for the said adjusted amount and office copy of the Journal Voucher dated 07.05.2015 bearing No. 29 of the Plaintiff Company.

Sl. No	Exhibits	Description
15	Ex.P15	Ex.P15, which is S.Nos.147 in the list of documents, is the copy of the Invoice No. 71014 dated 07.10.2014 raised by the 1st Defendant towards its share in renting the equipment.
16	Ex.P16	Ex.P16, which is S.Nos.148 in the list of documents, is the office copy of the Statement of Account filed along with the Plaint.
17	Ex.P17	Ex.P17, which is S.Nos.149 in the list of documents, is the true copy of extract from the website www.opstart.ca.

7. Heard Ms.R.Sahana, learned counsel for the plaintiff, and she has reiterated the contents of the plaint during her submissions.

DISCUSSION

8. As seen from the MoU dated 25.05.2010, which has been marked as Ex.P2, it is clear that 3D camera and related equipments were sent by the first defendant to the plaintiff, and both the plaintiff and the first defendant agreed to do business together by utilizing the said equipments. Clause (1) of the MoU dated 25.05.2010 (Ex.P2) also confirms that the plaintiff and the first defendant agreed to share profits arising out of the utilization of equipments sent by the first defendant in the ratio of 50:50. Clause (2) of the MoU dated 25.05.2010 (Ex.P2) also makes it clear that all costs

associated with shipping/duties, and taxes to transport and import equipments to India will be split in the ratio of 50:50. It has also been made clear in Clause (3) of the MoU dated 25.05.2010 (Ex.P2) that the plaintiff will take 75% of the rentals until the portion of the costs payable by the first defendant as per Clause (2) is fully recouped by the plaintiff. It has also been made clear from Clause (9) of the MoU dated 25.05.2010 (Ex.P2) that after the first six months, if the business is not viable to proceed further, any of the parties can opt out by terminating the contract.

9. The plaintiff claims that since the business venture was not viable, they have terminated the MoU dated 25.05.2010 with the first defendant, and also sought for refund of the advance security deposit amount, which was paid by them under the MoU dated 25.05.2010 (Ex.P2) as seen from Clause (13) of the MoU dated 25.05.2010.

10. Subsequent to the MoU dated 25.05.2010 (Ex.P2), the plaintiff has also made additional security deposit to the tune of USD 5,87,737/-, which is confirmed in the Supplemental MoU dated 09.11.2012 (Ex.P11).

Clause (3) of Ex.P11 also confirms that a total sum of USD 5,87,737/- was paid by the plaintiff to the first defendant by way of security deposit.

11. The plaintiff has terminated both the contracts, namely, MoU dated 25.05.2010 (Ex.P2) and the Supplemental MoU dated 09.11.2012 (Ex.P11) through their letter dated 22.07.2016, which has been marked as Ex.P13. Even prior to the termination of MoUs, there has been exchange of email communications between the plaintiff and the first defendant, which have been marked as Ex.P12 series. As seen from those communications, repeatedly, the plaintiff has informed the first defendant that it is not viable to proceed further with the business venture and they have also not agreed to the settlement proposal given by the first defendant, which is not as per the terms of Ex.P2. The plaintiff has adjusted the rental amount received by them from the production houses on hire to the tune of USD 98,000/- towards their outstanding dues.

12. The plaintiff has also filed documents, which have been marked as exhibits, to prove the amount of expenses incurred by them towards

shipping, which is admittedly agreed to be adjusted under the MoU dated 25.05.2010 (Ex.P2) from and out of the rentals received by the plaintiff by usage of the equipments.

13. The plaintiff claims that even after terminating both the contracts, the first defendant has not paid the security deposit to the plaintiff as agreed in the Supplemental MoU dated 09.11.2012 (Ex.P11). It is to be noted that the plaintiff has attempted to mitigate the loss by filing an application seeking for appointment of an Advocate Commissioner to sell the subject equipments. This Court, by order dated 21.02.2024, had appointed the Advocate Commissioner, who was directed to sell the subject equipments, which are lying idle in the premise of the plaintiff. However, the Advocate Commissioner has submitted a report stating that despite effecting paper publication, there were no takers for the subject equipments.

14. The learned counsel for the plaintiff submits that the subject equipments have now become outdated and that is the reason why there are no takers. This Court accepts the said submission. In view of advent of

new technology and being cinematographic equipments, necessarily, it would have become obsolete by now. Therefore, it is established that the plaintiff has taken best efforts to mitigate the loss and they cannot be found fault with for not mitigating the loss.

15. The learned counsel for the plaintiff drew the attention of this Court to Ex.P16 (Statement of accounts) and would submit that apart from making rental security deposit to the tune of USD 5,87,737/-, the plaintiff had made excess payment to the tune of USD 66,602/- to the first defendant. A perusal of Ex.P16 would reveal that the plaintiff had made excess payment of USD 66,602/- over and above the rental security deposit of USD 5,87,737/-. Therefore, this Court is of the considered view that the plaintiff is entitled to claim the said sum as well.

16. Though the plaintiff may contend that certain documents belonging to the second defendant were submitted to them by the first defendant at the time of entering into the MoU dated 25.05.2010 (Ex.P2), that cannot be a ground for making the second defendant liable to pay the

suit claim to the plaintiff. Unless and until, there is any contractual relationship between the plaintiff and the second defendant, the second defendant cannot be made liable for the dues payable to the plaintiff by the first defendant, who alone has entered into contracts with the plaintiff.

17. For the foregoing reasons, the following amounts are due and payable by the first defendant to the plaintiff:-

(a) USD 4,89,737/-, after adjusting a sum of USD 98,000/- from and out of the rental security deposit of USD 5,87,737/-; and

(b) USD 66,602/- towards the excess sum paid by the plaintiff.

In total, the plaintiff is entitled for recovery of USD 5,56,339/- from the first defendant.

18. Eventhough the plaintiff has claimed interest at 18% per annum on the outstanding amount, this Court is of the considered view that interest at 18% per annum will be excessive, as the contract also does not provide

for the same. However, being a commercial transaction, after giving due consideration to the banking interest prevalent as on date, this Court awards interest at the rate of 8% per annum.

19. In the result, a judgment and decree is passed in favour of the plaintiff against the first defendant by issuing the following directions:-

(i) The first defendant is directed to pay the plaintiff a sum of USD 5,56,339/- (USD 4,89,737 + USD 66,602) together with interest at 8% per annum from the date of termination of the contract, i.e., from 22.07.2016, till the date of realization.

(ii) The first defendant is also directed to pay the costs of the suit to the plaintiff.

(iii) The suit is dismissed as against the second defendant.

26.03.2024

Index:yes/no
Neutral citation: yes/no
Speaking/non-speaking
rkm

Plaintiff's witnesses:

Mr.V.M.Rajeev Kumar - PW1

Documents exhibits on the side of the plaintiff:-

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13	Ex.P13	Ex.P13 series, which is S.Nos.143-144 in the list of documents, is the true copy of the said notice addressed to the First Defendant vide email dated 22.07.2016 (**along with the Affidavit under Section 65 B of the Indian Evidence Act)** and the original of the returned notice which was sent through Speed Post with Acknowledgment Card.
14	Ex.P14	Ex.P14 series, which is S.Nos.145-146 in the list of documents, is the true copy of the payment challan dated 06.06.2015 made by the Plaintiff towards the TDS payable for the said adjusted amount and office copy of the Journal Voucher dated 07.05.2015 bearing No. 29 of the Plaintiff Company. (**along with the Affidavit under Section 65 B of the Indian Evidence Act)**
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16	Ex.P16	Ex.P16, which is S.Nos.148 in the list of documents, is the office copy of the Statement of Account filed along with the Plaint.
17	Ex.P17	Ex.P17, which is S.Nos.149 in the list of documents, is the true copy of extract from the website www.opstart.ca.

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ABDUL QUDDHOSE, J.

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C.S.(Comm.Div.)No.339 of 2018

26.03.2024