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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) 1152/1999

12th October, 2012

AHAAR INTERNATIONAL (INDIA) LTD.

...Plaintiff

Through: Mr. Peeyush Kalra and Mr. Omar Siddiqui
Advocates.

VERSUS

SIFTER PROJECT SERVICES & ANR.

..... Defendants

Through:

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. The subject suit for recovery of ₹ 44,62,827.00 has been filed by the plaintiff/buyer against the defendant which is the seller/supplier of various machineries and equipments and whose job also included their erection and commissioning. Machinery was towards the Roller Flour Mill having capacity of 120 MT per day. Recovery is claimed on the ground that entire machinery was not supplied, entire contract was not performed, and hence, the machinery already supplied are of no use to the plaintiff and hence the price paid towards machineries supplied be refunded.

2. The facts as pleaded in the plaint are that the defendant no.1 sent its quotations dated 19.2.1996 (Ex.PW1/C) to the plaintiff, and which was accepted by the plaintiff vide its letter dated 21.2.1996 (Ex.PW1/D). Plaintiff claims that the defendants represented that by installation of the Flour Mill supplied by the defendant no.1, plaintiff could save over 20 lacs per year, and on installations there will be a saving of 40-50 lacs. It is also averred in the plaint that it was represented that the area occupied by this Flour Mill will be 26 ft. in breadth and 60 ft. in length and 38 ft. in height. It is also pleaded that the defendants had issued a similar advertisement in a Hindi Newspaper-Vyapar Bharti on 12.9.1996. Plaintiff pleaded a further representation by the defendants that 100 H.P. electricity consumption will be saved and as against four to six persons ordinarily required in older technology to operate the Flour Mill, in new only two persons would be required. It was further pleaded that the Flour Mill supplied was to be fitted on a steel structure as per the representation made by the defendants and there shall be a saving time of six months with respect to the installation of the plant. It is further pleaded in the plaint that the defendants represented that maintenance on the machines will be reduced to ₹ 24,00,000/- per annum. Plaintiff claims that it is on all these abovestated representations that the plaintiff accepted the quotation of the defendants dated 19.2.1996. Plaintiff further pleads that it accepted the offer of the defendants vide its letter dated 21.2.1996 and sent a sum of ₹ 5,00,000/- alongwith

this letter to the defendants as advance payment. It is pleaded in the plaint that the defendants failed to perform the contract as agreed, and failed to erect and install the Roller Flour Mill by the promised date of 30.4.1996. In the meanwhile, the defendant no.1 had received a sum of ₹ 23,00,000/- from the plaintiff. Plaintiff pleads that the machinery supplied by the defendants are lying with the plaintiff without the same being erected or commissioned and which have not been taken by the defendants in spite of various communications made to them. There are further averments in the plaint with respect to the other alleged breaches by the defendants, and also of a fraud being perpetrated on the plaintiff inasmuch as the defendants are stated to have misrepresented the facts. The plaintiff, therefore, has claimed the suit amount of ₹ 44,62,827/- which is broken up as per para 28 of the plaint as under:-

“i)	Refund of total amount paid	Rs.23,00,000-00
ii)	Interest @ 18% per annum from 16.7.96 to 28.2.99	Rs.10,86,750-00
iii)	Storing charges	Rs. 78,750-00
iv)	Damages/Compensation	Rs. 5,00,000-00
v)	Paid to Mukul Bros. on the recommendation of the defendants.	Rs. 1,44,000-00
vi)	Paid to M/s Punjab Engineering Co. on account of electric motors on the recommendation of the defendants.	Rs. 3,55,327-00
	Total	Rs.44,62,827-00
		”

3. The defendants contested the suit and pleaded that the contract between the parties was encompassed not in the letter of the plaintiff dated 21.2.1996 (Ex.PW1/D) but in the defendants' letter dated 19.2.1996 (Ex.PW1/C). It is pleaded that the terms as stated in the letter dated 21.2.1996 were never agreed between the parties inasmuch as this plaintiff's letter dated 21.2.1996 was never received by the defendants. It was further pleaded that the letter dated 21.2.1996 refers to the duplicate being signed but the same was never signed showing that the contract is not contained in the letter dated 21.2.1996 of the plaintiff to the defendant no.1. The defendants further pleaded that the letter of the plaintiff dated 14.12.1996 (Ex.PW1/D1) making false allegations was sent to the defendants, and the same was replied to by the defendants in terms of their letter dated 31.12.1996 (Ex.DW1/P1). The defendants further pleaded that it is the plaintiff who is guilty of breach of contract, and it failed to make payments due. It is further pleaded that there were no representations as alleged by the plaintiff in para 5 of the plaint. The defendants further pleaded that the defendants had already supplied goods worth ₹24,00,180/- and against which, they have received only a sum of ₹23,00,000/- from the plaintiff. Accordingly, it is prayed that the suit be dismissed.

4. The following issues were framed in this suit on 10.9.2001.

1. Whether the suit as framed, is maintainable in its present form as alleged in P.O.No.1?OPD

2. Whether there exists a valid and binding contract between the parties?OPP
 3. Whether this Court has territorial jurisdiction to try and entertain the present suit?OPD
 4. Whether the suit is bad for non-joinder of parties? OPD
 5. Whether the suit is independent of the alleged contract dated 21.2.1996?OPD
 6. Whether Shri S.K.Mittal is the authorized signatory to file the present suit? OPP
 7. Whether the defendants have supplied machinery worth Rs.24,00180/- against the payment of Rs.23 lakhs as alleged? OPD
 8. Whether the consent of the plaintiff for the contract of installation, erection and commissioning of Roller Flour Mill was obtained by the defendants by fraud and mis-representation?
 9. Whether the defendant failed to perform the contract as agreed?
 10. Whether the plaintiff is entitled to Rs. 44,62,827/- on account of refund of the amount, storing charges, damages/compensation?
 11. Whether plaintiff is entitled to interest, if so, at what rate?
 12. Relief.”
5. Though, the defendants contested the suit and led evidence, at the stage of final arguments, the defendants were not represented before me inasmuch as, one proxy counsel Ms. Sunita Tiwari, Advocate appeared on behalf of the main counsel Sh. Vimal Goel, Advocate and stated that the defendants had taken back the file from the counsel and therefore counsel could not assist the Court.

Issue No.6

6. This issue pertains to the due filing of the suit, and since the plaintiff has proved and exhibited the resolution Ex.PW1/A authorizing Sh. S.K.Mittal to file the suit, it is held that the suit is validly instituted and Sh. S.K.Mittal was the due authorized signatory of the plaintiff.

Issue No.4.

7. Counsel for the plaintiff states that this issue has been framed qua the liability of defendant no.2. However, no evidence has been pointed out to me during the course of arguments by the counsel for the plaintiff as to how the defendant no.2 is liable for the liability of the defendant no.1. Accordingly, it is held that there would be no liability of the defendant no.2 and the liability, if any, can only be of the defendant no.1 with whom the plaintiff alleges that the contract was entered into.

Issue no.3.

8. This issue pertains to the territorial jurisdiction. Since the defendant no.1 had agreed to erect and commission the machinery and equipment on the plaintiff's promises, performance of the contract would be at Delhi and therefore,

this Court has territorial jurisdiction. This issue is decided in favour of the plaintiff and against the defendants.

Issue Nos. 1,2,5,7,8 and 9

9. All these issues which are now being taken up together can be broken up effectively into the following broad heads:-

(i) Whether the contract between the parties is contained in the defendants' letter dated 19.2.1996(Ex.PW1/C) or the plaintiff's letter dated 21.2.1996 (Ex.PW1/D), or partly in both and partly in oral representations and also oral agreements entered into during the performance of the contract?

(ii) Who was guilty of breach of contract i.e the plaintiff or the defendants?

(iii) Even if, the defendants are guilty of breach of contract, what is the relief which the plaintiff will be entitled to?

10. It is trite that for any contract there has to be consensus ad idem i.e meeting of minds of both the parties on all the necessary terms and conditions. If there is no meeting of minds on the relevant terms, there would be no contract between the parties. In the present case, admittedly, there is no specific written contract signed by both the parties containing the terms and conditions of the

agreement. Therefore, decision on the issue of consensus ad idem is not easy to answer.

11. The letter dated 19.2.1996 of the defendant no.1 to the plaintiff was an offer is not disputed on behalf of the plaintiff. This letter states that it is a quotation for the various items of machinery and the works as specified in the letter plus cost of erection. It is also argued on behalf of the plaintiff before me that offer contained in the letter of the defendants dated 19.2.1996 is accepted by the plaintiff by the plaintiff's letter dated 21.2.1996, and which letter dated 21.2.1996 is therefore the contract binding the parties. The letter dated 21.2.1996 is however not an acceptance as is the meaning of the term under the Contract Act. Acceptance to be an acceptance in law has to be absolute and unqualified. When we look at the letter dated 21.2.1996 by the plaintiff to the defendant no.1, the same does not make absolute and unqualified acceptance of the terms as stated by the defendant no.1 in its letter dated 19.2.1996. The letter dated 21.2.1996 thus in fact amounts to a counter offer. As per this counter offer, besides the price being reduced to ₹45,00,000/-, the quotation contained in the letter dated 19.2.1996 of the defendant no.1 has been changed on other aspects including with respect to the amount of ₹45,00,000/- being inclusive of all taxes, the job to be performed under the contract will also be of supply, erection, installation and commissioning of the

Roller Flour Mill, and, that the date for completion of the job would be 30.4.1996. The aforesaid changed terms are different than as contained in the quotation of the defendant no.1 dated 19.2.1996. This counter offer of the plaintiff contained in the letter dated 21.2.1996 specifically in the second last para of page 2 thereof required the defendants to sign the letter in duplicate as token of acceptance of the terms of the letter. Admittedly, the defendant no.1 at no point of time ever signed a duplicate copy of this letter dated 21.2.1996 and sent the same to the plaintiff. In fact, the witness of the plaintiff Sh. Suresh Kr. Mittal, PW-1 in his cross-examination dated 1.5.2006, not only categorically admitted that this letter dated 21.2.1996 has not been signed by the defendants, but also the plaintiff never raised any protest to the defendant no.1-company of not receiving back of duplicate of the letter dated 21.2.1996 after signing by the defendant no.1 on the said letter. It is further admitted by Sh. S.K. Mittal PW-1, in his cross-examination that he did not lodge any protest with the defendant no.1 of not receiving the duplicate of the letter dated 21.2.1996 signed by the defendant no.1. The defendant no.1 denies the receiving of the letter dated 21.2.1996 and it is not proved by the plaintiff as to how the defendant no.1 had received this letter. Therefore, it is clear that it cannot be said that the contract was complete as per the terms contained either in the letter dated 19.2.1996 or the letter dated 21.2.1996.

12. In fact, that neither of the aforesaid two letters dated 19.2.1996 and 21.2.1996 are embodiment of all the terms of the parties, it becomes clear from the two subsequent letters, one dated 14.12.1996 (Ex.PW1/D1) of the plaintiff to the defendant no.1, and the other being the defendants' reply dated 31.12.1996 (Ex.DW-1/P1). When we look at the letter of the plaintiff dated 14.12.1996, the following salient points come out:-

(i) Though the plaintiff in its earlier letter dated 21.2.1996 wrote the date of completion as 30.4.1996, however, in this letter dated 14.12.1996 the plaintiff has written the date of completion to be of a much later date being 15.8.1996.

(ii) The plaintiff has written that the defendants were grabbing monies however, while reducing the price from ₹ 53,31,000/- as stated by the defendant no.1 in its letter dated 19.2.1996 to a sum of ₹ 45,00,000/- in the letter of the plaintiff dated 21.2.1996, however, the term that 35% will be paid in advance thereunder was not changed i.e the plaintiff had to pay 35% of the price of ₹45,00,000/- i.e ₹12,25,000/- alongwith letter dated 21.2.1996, however, only a sum of ₹5,00,000/- was given.

(iii) Though there is no mention in the letter dated 21.2.1996 of the plaintiff to the defendant no.1 of whether civil work of the foundation was to be done by whom, the letter dated 14.12.1996 indicates that there was an alteration of the term

of the foundation from a steel structure as contained in the defendant no.1's letter dated 19.2.1996 to a cemented/concrete foundation.

(iv) The letter of the defendant no.1 to the plaintiff stated the price at ₹53,31,000/- exclusive of all other taxes and which was reduced to ₹45,00,000/- inclusive of all taxes by the plaintiff in its letter dated 21.2.1996, however, the plaintiff, in its letter dated 14.12.1996 admits that the sales tax is to be paid by the plaintiff and not by the defendant no.1.

(v) The plant and machinery in terms of defendant no.1's letter dated 19.2.1996 was to be of the capacity of 120 MT in one day i.e 24 hours, however, the plaintiff in its letter dated 14.2.1996 argued that the 120 MT was to be produced not in one day but in 20 hours and that too with respect to output being 60% Maida, 10% Suji, 20% Choaker and 10% Atta.

(vi) The plaintiff in its letter dated 14.12.1996 talks of making payment of 10% of the price only after the machineries are found to be in good working condition at the plaintiff's premises, and which is not a term which is found in the plaintiff's letter dated 21.2.1996 to the defendants.

There are other minor changes also as stated in the plaintiff's letter dated 14.12.1996 than as contained in the two earlier letters dated 19.2.1996 and 21.2.1996.

13. In the reply to the letter dated 14.12.1996 of the plaintiff, the defendant no.1 vide its letter dated 31.12.1996 did not dispute that the contract was reduced to ₹ 45,00,000/- and that too for supply, erection and commissioning, however, the defendant no.1 stated that it was the plaintiff who was guilty of not performing the obligations as agreed upon including of delaying and failing in making of the due payment. In this letter, the defendant no.1 again reiterates that the capacity of Roller Flour Mill was to be of 120 MT in one day and not in 20 hours as stated by the plaintiff in the letter dated 14.12.1996. Defendant no.1 in this letter reiterates the fact that the plaintiff has breached the term and condition of payment of 35% of price as advance.

14. Therefore, we have, in order to understand so called agreed terms between both the parties i.e plaintiff and defendant no.1, referred to in detail to four documents being the defendant no.1's letter dated 19.2.1996 (Ex.PW1/C), plaintiff's reply dated 21.2.1996 (Ex.PW1/D), plaintiff's notice dated 14.12.1996 (Ex.PW1/D1) and defendant no.1's reply dated 31.12.1996 (Ex.DW1/P1). The total of all the four letters only leads to confusion worse confounded on very crucial aspects i.e (i) whether the term of advance price of 35% stood between the parties, and if that be so, the plaintiff has clearly breached its part of the contract; (ii) whether the sales tax was or was not payable by the plaintiff inasmuch as, though the plaintiff did say in the letter dated 21.2.1996 that the amount of ₹ 45,00,000/-

was inclusive of all taxes, in the subsequent letter dated 14.12.1996, it is admitted that plaintiff will bear the sales tax; (iii) whether the plant had to have capacity of 120 MT in one day or 24 hours as the letter dated 19.2.1996 of the defendant no.1 to the plaintiff states that this capacity agreed was of 120 MT per day or the production capacity had to be 120 MT in 20 hours as was the contention of the plaintiff in the letter dated 14.12.1996; (iv) what was the final date for completion of the contract i.e. was it 30.4.1996 as written by the plaintiff in its letter dated 21.2.1996 or it was 15.8.1996 as written by the plaintiff in its subsequent letter dated 14.12.1996 or that the time of performance whether by the plaintiff or by the defendants or by both was or was not the essence of the contract. Admittedly, in law, once time is not found to be the essence of the contract, unless a specific notice is given specifying a time for performance of the obligation, there does not arise the issue of breach and it cannot be determined as per the existing evidence on record that it is the plaintiff or the defendants who clearly is/will be guilty of breach of contract, however, the plaintiff is at least guilty of breach of contract qua the non-payment of the initial price of 35% as also qua the payment of the sales tax component.

15. In view of the above discussion, I find that the plaintiff has failed to discharge its onus of proof that it were the defendants who failed to perform their part of the obligations by failing to perform the various terms and conditions of the CS(OS) 1152/1999

contract including for the reason that the terms themselves are obscure in many crucial aspects. Further, the plaintiff has also failed to discharge onus that the defendants gave wide and varied promises as stated in para 5 of the plaint and which have been detailed in the para 2 of the present judgment. It may be noted at this stage that the plaintiff relies upon a newspaper advertisement dated 12.9.1996 which is inserted by the defendant no.1 with respect to its plants whereas, the contract in this case is much earlier of February, 1996 and therefore, one fails to understand as to how any insertion by the defendants of advertisement much later of September 1996 can in any manner be taken as encompassing agreed terms and conditions of a contract which was said to have been entered into in February, 1996. So far as the existence of a valid and binding contract between the parties is concerned, it cannot be said with total certainty that there was a binding contract in the sense that there is the requisite clarity with respect to each and every crucial term. Unless there is a clarity on each and every crucial term and which crucial terms are detailed above, I am of the opinion that the plaintiff has failed to discharge onus of proof that there existed a specific binding contract between the parties and it appears that the parties kept on agreeing, disagreeing, then again agreeing or changing various crucial terms of the contract. In the present state of facts, it cannot be said that the defendant no.1 is guilty of alleged fraud or misrepresentation as is the case of the plaintiff. It cannot be said that the defendant

no.1 failed to perform its part of the contract, inasmuch as, not only there is lack of clarity on the issue of what are the specific terms agreed between the parties, there is even lack of clarity as to in which manner the reciprocal promises have to be performed including when payments had to be made by the plaintiff, in what installments, in what manner/stage and how was the same to be corresponded by the performance of the obligations by the defendants. I may finally state that though the plaintiff had claimed damages of ₹ 5 lacs, even assuming that there was a contract and complete clarity with regard to all the terms of the contract, and also that the defendant no.1 breached the contract, the plaintiff has not led credible evidence as to how the claimed figure of damages is proved or established. Damages also therefore cannot be awarded as prayed for by the plaintiff. Issue nos. 1,2,5,7,8 and 9 are decided in favour of the defendants and against the plaintiff.

Issue No. 11

16. Once it is held that the plaintiff is not entitled to the principal amount, the plaintiff will also not be entitled to interest. This issue is decided in favour of the defendants and against the plaintiff.

Relief:-

17. Before I pronounce finally on the suit, I must state that though the case of the plaintiff was that that defendants can take away the machinery whenever it so chooses, however, at the stage of final arguments, if the suit was to be decreed, there had to be simultaneous and corresponding obligation for the plaintiff to return back the machinery of ₹ 23,00,000/- which admittedly was lying with the plaintiff, but, to a query put by the Court, counsel for the plaintiff states that at least as of today, the plaintiff cannot return this machinery inasmuch as, this machinery alongwith the complete premises was taken over by the Bank from whom the plaintiff had taken a loan. Counsel for the plaintiff, however, states that the plaintiff has already moved an application before the Debt Recovery Tribunal where a suit by the Bank has been filed so that machinery which was the subject matter of the contract with the defendants, can be taken back. To this aspect, I cannot pronounce upon inasmuch as, there is no application filed by the plaintiff in this Court alongwith requisite documents, however, one thing is clear that the plaintiff is not in a position to return the machinery of ₹ 23,00,000/- and even if, decree had to be passed in favour of the plaintiff and against the defendants for recovery, the same had to be necessarily conditional upon the plaintiff returning

the machinery, and which cannot take place as the plaintiff cannot return the machinery purchased from the defendants.

18. In view of the above, the suit of the plaintiff is accordingly dismissed, leaving the parties to bear their own costs. Decree sheet be prepared.

OCTOBER 12, 2012
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VALMIKI J. MEHTA, J.