

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : **15.02.2018**

JUDGMENT PRONOUNCED ON : **06.04.2018**

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.S.No.686 of 2011

Shango Technologies Private Limited
D-2 Kothari Vatika,
No.10 East Mada Street, Chennai 600 041
Rep by its Director,
Dr.H.S.Gopala Krishna Murthy

... Plaintiff

Vs

Chemplast Sanmar Ltd.,
No.9, Cathedral Road,
Gopalapuram, Chennai 86.
Rep by its Secretary

... Defendant

Prayer : Complaint filed under Order IV Rule 1 of the Madras High Court Original Side Rules read with Order VII Rule 1 Code of Civil Procedure, 1908, praying for the following judgment and decree:-

- (a) directing the defendant to pay the plaintiff a sum of Rs.31,81,185/-;
- (b) directing the defendant to pay the plaintiff interest on the sum of Rs.26,95,920/- at the rate of 18% p.a. from the date of filing of the suit till the date of realization;
- (c) for costs of the suit.

For Plaintiff : Mr. P.Giridharan

For Defendant : Mr.B.Giridhara Rao

J U D G M E N T

The Suit for recovery of a sum of Rs.31,00,000/- due under the consultancy agreement dated 22.04.2006.

2. The brief summary of the plaintiff's case is as follows:

The Managing Director of the plaintiff was an employee of the defendant, which is a Public Limited Company, engaged in various manufacturing activities. The plaintiff provides engineering solutions, consultancy and management services related to silicon/poly silicon based materials and production facilities. The defendant, which was interested in establishing a 30 TPA Solar Grade Polysilicon production facility had engaged the services of the plaintiff, as a consultant for providing consultancy services for the said project. It is claimed by the plaintiff that it's Director has proven expertise in the field of silicon manufacture and he was formerly a Vice President of the defendant Company and has 27 years experience in the field of silicon manufacture. The defendant had issued a letter of intent on 27.03.2006 to the plaintiff for consultancy work for

establishing a 30 TPA Solar Grade Poly Silicon Production Facility at Mettur Dam. The scope of the work, according to the plaintiff, included:

1. *“Providing a basic engineering package.*
2. *Helping the defendant in developing a detailed engineering package for the project.*
3. *Advising the defendant in identifying existing in house buildings and structures and plant and machinery for use in the project and modifications to the same.*
4. *Assisting the engineering team of the defendant in making engineering drawings and specifications for various bought out equipments.*
5. *Helping the process team of the defendant in commissioning, operating and optimizing the process upto a period of 3 months from date of commissioning of the project.*
6. *Advising the technical team of the defendant in safety and environmental aspects of the silicon plant operations.*
7. *Helping the defendant achieve sustained production and agreed efficiency norms.”*

3. The defendant had agreed and under took to pay a sum of Rs.60,00,000/- plus Service Tax and expenses incurred by the plaintiff for

conveyance etc. Pursuant to the said letter of intent dated 27.03.2006, the defendant had also sent work order dated 04.04.2006, setting out in detail, the scope of the work, schedule of the work and the schedule of payment of fees and a confidentiality agreement was also signed between the parties. Since, the plaintiff required certain changes in the terms of the work order, particularly the payment terms a matter was discussed again and the payment terms were altered, which resulted in another work order dated 12.04.2006, amending and superseding the work order dated 04.04.2006 being issued. The plaintiff had returned the signed copy of the work order as a mark of acceptance with certain corrections.

4. The plaintiff would allege that the amendments sought for by the plaintiff were accepted by the defendant and the defendant issued a letter dated 17.04.2006, amending the work order dated 12.04.2006, as per the requirements of the plaintiff. As per the terms of the work order, the basic engineering package had to be submitted on 25.07.2006 and the outer date for commissioning of the plant was fixed as 30.04.2007. The schedule of payments agreed as per the work order are as follows:

“ 8. As per the terms of the work order, the Basic Engineering package had to be submitted by 27.05.2006 and the commissioning of the plant had to be done before 03.04.2007. It is submitted that as per the terms of the work

order, the schedule of payment of fees was as follows:

- a. 20% of advance after signing confidentiality agreement.*
- b. 20% on submission of Basic Engineering package.*
- c. 10% on completion of detailed engineering.*
- d. 10% on commissioning of plant.*
- e. 30% after guarantee run-guarantee run would mean one successful batch per reactor for each of the reactors.*
- f. 10%, after 3 months of commissioning subject to successful running of the plant as per design parameters.”*

5. After the initial agreement and the work orders, the plaintiff had issued a purchase order bearing No.3600003234 dated 22.04.2006 for Rs.60,00,000/- plus taxes and ECS, in all amounting to Rs.67,34,400/-. The purchase order, according to the plaintiff, also states that the defendant shall pay the plaintiff immediately for the works done in terms of the work order dated 12.04.2006. It is not in dispute that the work was commenced and the defendant had paid the amounts payable under Clauses (a) to (d) of the schedule of payment set out in the purchase order dated 22.04.2006. The plaintiff would claim that it is extending all its cooperation and support to the defendant in designing, erection and commissioning of the plant.

6. According to the plaintiff, two reactors were commenced

during January- February 2008 and the plaintiff was visiting the premises of the defendant and the factory premises as per the defendant's needs to ensure/check whether the reactors were running as per the design parameters set out in the purchase order. The plaintiff would claim that on 12.05.2008, the Managing Director of the plaintiff personally visited the site and found that the reactors were performing as per the design parameters. On 15.05.2008, the plaintiff had sent an email to the defendant claiming that payment of 10% of the project cost on commissioning of the reactors was due to be paid, the plaintiff would also claim that it has stated that it would raise an invoice for 30% payment that is due at completion of successful trial. The plaintiff had raised an invoice on 09.06.2008 for payment of 30% of the project cost, which is payable after guarantee-run of the reactors.

7. The defendant had admitted the fact that the reactors are commissioned and made the payment of 10% of the project cost on 30.09.2008 representing the 10% payable on commissioning of the plant. On 01.11.2008, the plaintiff had sent an email pointing out that the reactors are running as per the required production level and therefore, sought for payment of the 30% of the project cost payable after the guarantee-run. The plaintiff would also state that its claim that the reactors were running as

required under the design parameters in its email dated 01.11.2008 was never disputed by the defendant. The plaintiff raised the last invoice for the 10% of the project cost payable after three months of commissioning, subject to successful running of the plant as per the design parameters on 20.07.2009.

8. According to the plaintiff, though the invoices were received by the defendant, the defendant did not come forward to pay the balance amount, viz. the 30% payable after the successful completion of the guarantee-run and the 10% payable 3 months after commissioning of the plant. According to the plaintiff, to its surprise the defendant called for a project closure meeting on 29.06.2009, during which the defendant required the plaintiff, to reduce the amount due, considering the plant was not in operation and the defendant was facing financial difficulties. The plaintiff did not accept the said request. On 25.11.2009, the plaintiff sent an email demanding payment of 40% being the balance amount due. Several remainder emails were sent by the plaintiff on 11.12.2009, 01.01.2010, 26.03.2010, 07.04.2010 and 11.06.2010. To the surprise of the plaintiff, the defendant by its letter dated 22.04.2010 claimed, for the 1st time, that the plant was not running as per the specifications and stated that the plaintiff was not entitled to the balance amount. The plaintiff sent a

reply on 17.05.2010, stating the scope of the project and pointed out why the reasons attributed by the defendant for non-payment of the balance amount would not hold water. A remainder was also sent by the plaintiff on 11.06.2010 seeking immediate payment of dues. The defendant sent a reply dated 29.06.2010 reiterating the contents of the earlier order dated 22.04.2010 and refused to make the balance payment. This according to the plaintiff had led to the filing of the suit claiming in all a sum of Rs.31,81,185/- being the amount due with interest on the sum of Rs.26,95,920/- at 18% per annum from 09.06.2008 till date of the suit.

9. The defendant filed the written statement along with the counter claim.

The sum and substance of the defence is as follows:

The execution of the agreement as well as the entrustment of the consultancy work with the plaintiff are not denied. The fact that 60% of the amount payable towards consultancy charges was paid by the defendant and the balance is only 40% of the value of the contract is also admitted. According to the defendant, the claim under the invoice dated 09.06.2008, for a sum of Rs.20,22,480/- is barred by limitation in as much as the suit came to be filed only on 19.09.2011, that is after the expiry of 3 years from the date of invoice i.e. 09.06.2008.

10. Without prejudice to the above contention on limitation, the defendant would further contend that the contract being one for a consultancy service, the plaintiff would be entitled to payment of consultancy charges only upon its fulfilling its obligations under the contract. According to the defendant, the performance of the plaintiff was below par and despite the assurances given by the plaintiff, the plaintiff was unable to make the plant achieve the desired results. In other words, the defendant would contend that the plaintiff could not achieve the design parameters, as per the purchase order dated 22.04.2006 and hence it is not entitled to claim the balance amount payable under the contract. Pointing out the relevant clauses in the purchase order, the defendant would contend that there was a total failure on the part of the plaintiff in complying with the design parameters set out in the purchase order, which had resulted in the failure of optimum utilization of the resources in the facility. The defendant would further contend that it had incurred a loss of more than Rs.20 Crores as the entire unit became non functional, due to the inept handling by the plaintiff, which was engaged as a consultant for the entire project.

11. The defendant would also contend that the efficiency norms

set out in the purchase order are the integral part of the project and the parties had understood the contract as one that requires the plaintiff to achieve the efficiency as well as the consumption norms set out in the purchase order. Referring to its email dated 17.05.2006, wherein the defendant had categorically stated that while the efficiency norms are the integral part of the project, the consumption norms are a part of the basic engineering package. The defendant would further contend that the very fact that the purchase order provides for payment of the consultancy charges upon completion of each stage of work would show that the payment was always dependent on the completion of the work up to that stage. Therefore, unless the plaintiff had demonstrated a successful guarantee-run of the project, it was not entitled to the 30% of the project cost payable upon successful completion of the guarantee-run as well as a 10% of the project cost payable after expiry of 3 months from the date of the commissioning of the project, subject to successful running of the plant as per the design parameters.

12. According to the defendant, the plant never met the design parameters and the consumption parameters were also not achieved. Therefore, according to the defendant, it is not liable to pay the balance 40% payable under Clauses (e) and (f) of the schedule of payments. The

defendant would further claim that since the milestones were not achieved by the plaintiff, the plaintiff cannot make a claim for the amounts payable. In short its defence is that the plaintiff had singularly failed to perform its part of the contract and in as much as the unit was not functioning as per the design parameters, the plaintiff is not entitled to the suit claim.

13. The defendant would further contend that it is because of the inefficiency of the plaintiff in handling the project, the project did not show desired results and the actual performance of the plant was far below the parameters agreed upon at the time of the project approval. According to the defendant, it was forced to close down the unit because of the very low performance level, which resulted in a loss, which would be nearly Rs.20 Crores, to the defendant. However, the defendant would restrict its counter claim to Rs.50 lakh. Therefore, the defendant would apart from seeking a dismissal of the suit, on the above pleadings also seek a decree on the basis of the counter claim for Rs.50 lakhs.

14. The plaintiff had filed a reply statement to the counter claim, wherein it would contend that the contract is one, as such the claim of the defendant that each invoice gave raise to a cause of action and hence the claim in respect of a sum of Rs.20,22,480/- is barred by limitation cannot

be accepted. The plaintiff would also claim that, it was only a consultant and the defendant had stopped the operation of the plant abruptly without even informing the plaintiff and it is claimed that the defendant did not give an opportunity to the plaintiff to demonstrate the working of the plant. It is also claimed that the contention on the part of the defendant that the plaintiff failed to achieve necessary design parameters is not correct. As regards the counter claim, the plaintiff would submit that it was not responsible for the closure of the business and it was a decision of the defendant itself and therefore, the plaintiff cannot be made liable for any loss on account of the closure of the unit. It is also claimed by the plaintiff that it was not responsible for the erection work and the delay in erection work was on the part of the defendant and the plaintiff was not responsible for the same.

15. The plaintiff would also point out that the absence of any denial on the part of the defendant, with reference to the performance of the reactors, between the Invoice dated 09.06.2008 and the email sent by the defendant raising the issues of non-compliance with the design parameters on 22.04.2010. This silence on the part of the defendant for over a period of 2 years is pointed out by the plaintiff to contend that the entire boogie of non-performance has been raised by the defendant only to

wriggle out of its liability. The plaintiff would also point out that non-performance of certain directions of the plaintiff by the defendant which related to installation of the Transformer and Power Control for the reactor and commissioning of only two reactors instead of three, as originally planned, as factors for the plant not running to its full capacity. The plaintiff would also contend that being a consultancy contract, it cannot be made liable for the defects in erection and other aspects of the contract with which it was not involved. The plaintiff would also contend that the conditions in the purchase order relating to design parameters were incorporated by the plaintiff on its own and they were never agreed upon.

16. On the above pleadings, the following issues were framed by this Court on 13.02.2013:

1. Whether the suit claim to the extent of Rs.22,22,480/- payable as consultancy fee is barred by limitation?
2. Whether the part payment made by the defendant on 30.09.2008 amounts to admission of liability for the suit claim?
3. Whether the plaintiff had failed to perform its obligations as stipulated in the Purchase Order dated 22.04.2006?
4. Whether the plant erected by the plaintiff failed to meet the output and consumption norms on its commissioning as

stipulated in the purchase order dated 22.04.2006?

5. Whether the Purchase orders dated 22.04.2006 supersedes the Work Orders dated 12.04.2006?
6. Whether the defendant is entitled to a decree for Rs.50,00,000/- by way of counter claim on account of the failure of the plaintiff to adhere to the terms and conditions of the purchase order?
7. Whether the defendant has established a prima facie casual link between the actions of the plaintiff and the alleged losses suffered by them, in order to entitle them to claim for damages as a counter claim?
8. To what reliefs are the parties entitled?

17. Thereafter, the following additional issues were framed by this Court on 26.10.2016:

1. Whether each invoice would constitute a separate cause of action?
2. Whether the Confidentiality Agreement dated 10.04.2006 was executed to protect the plaintiff's confidentiality/proprietary information as alleged?
3. Whether the plaintiff having once accepted and acted upon the

terms contained in the defendant's purchase order of 22.04.2006, thereafter unilaterally seek to alter the same, and if so, whether the same would be binding on the defendant?

4. Whether the delay in implementing the project is solely attributable to the plaintiff?

18. At trial, the Director of the plaintiff Company, viz. Dr.H.S.Gopala Krishna Murthy was examined as P.W.1 and Exhibits P1 to P24 were marked. On the side of the defendant one Mr.G.Sankar Subramanian was examined as D.W.1 and Exhibits D1 to D14 were marked.

19. I have heard Mr.P.Giridharan, learned counsel appearing for the plaintiff and Mr.B.Giridhara Rao, learned counsel appearing for the defendant.

20. Issue Nos. 1 & 2 and Additional Issue No.1:

20.1. These issues relate to the question of limitation. The defendant would contend that the claim of the plaintiff for a sum of Rs.20,22,480/- under the Invoice dated 09.06.2008 is barred by limitation. Mr.P.Poornam, learned counsel appearing for the defendant would point

out that the invoice dated 09.06.2008, marked as Ex.P14, would show that the payment due date as “immediately”. Therefore, according to him, the cause of action for the said demand of Rs.20,22,480/- arose on 09.06.2008 and the limitation for recovery of a said sum started running on and from 09.06.2008. Hence, according to him, the suit that is filed on 19.09.2011, beyond the period of 3 years from 09.06.2008 is barred by limitation.

20.2. Per Contra Mr.P.Giridharan, learned counsel appearing for the plaintiff would contend that the contract is one and the consultancy fee fixed is payable in stages. Therefore, according to him, the actual cause of action for the plaintiff to sue for recovery would arise only after completion of the contract and its commissioning of the unit. The two reactors of the unit were eventually commissioned only during January - February 2008 and the 3rd reactor was not commissioned at all. Pointing out that the last payment, i.e. 10% payable as per the Clause (d) of the payment schedule in the purchase order dated 22.04.2006, viz., 10% on commissioning of the plant was made only on 30.09.2008, Mr.P.Giridharan would contend that the period of limitation, if it all, would commence from the said date and the suit filed within 3 years from the said date is in time.

20.3. Mr. Mr.P.Giridharan, learned counsel would also contend

that the last of the invoices, viz. the Invoice for 10% of the amount to be paid after 3 months of the commissioning subject to successful running of the plant as per the design parameters was raised only on 20.07.2009. Therefore, the suit could have been filed within 3 years from that date. Hence, according to Mr.P.Giridharan, the suit is not barred by limitation. He would also invite my attention to the judgment of the Division Bench of the Kerala High Court in **Food Corporation of India v. T.M.Abdul Saleem** reported in **Manu/KE/0952/2012**, wherein the Division Bench had relying upon the judgment of the Hon'ble Supreme Court in **Rukhmabai v. Lala Laxmi Narayan** reported in **AIR (1960) SC 335**, held that

“13. ...when there are successive invasions or denials of right, the right to sue under Article 120 accrues when the defendant had clearly and unequivocally threatened to Infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right however ineffective or innocuous, cannot be considered to be clear and unequivocal so as to compel him to file a suit.”

20.4. It is also pointed out by the Division Bench that when the contract is a continuous contract and it is open for the party, who is not in breach to complete the work and then claim the amount in dispute after the

period of contract also. It is pointed out by the plaintiff that the plaintiff even though had issued the bill had not taken any further proceedings, to make a claim until the contract had been completed, once the contract had been completed, its right to sue had accrued. Therefore, relying heavily upon the above said Division Bench Judgment of the Kerala High Court, Mr.P.Giridharan, learned counsel appearing for the plaintiff would contend that it was open to the plaintiff to await the completion of the contract and after having raised the last invoice on 20.07.2009, it was well open to the plaintiff to have instituted that suit for recovery, when the payments were not forthcoming. Therefore, according to Mr.P.Giridharan, the limitation for the suit would start at the best on 20.07.2009, when the last invoice was raised by the plaintiff.

20.5. Mr.P.Giridharan, learned counsel would also make an alternative submission to the effect that though the plaintiff has raised the invoice on 09.06.2008, the first refusal on the part of the defendant to pay the sum claimed under the Invoice dated 09.06.2008 was only on 22.04.2010. Therefore, according to him, the period of 3 years would commence from that date only. As could be seen from the correspondence, the defendant had in fact raised the issue of non-compliance with the parameters specifically only on 22.04.2010 and had

denied payment only on that date. It is also in evidence that the third reactor was commissioned only during February – March 2009. The amount payable under Clause (e) of the schedule of payments referred to in the purchase order is payable only on completion of the guarantee-run of all the three reactors. The third reactor having been commissioned only during February – March 2009, the cause of action for the plaintiff to demand payment of the 30% would arise only after that date. No doubt true that the plaintiff had raised an invoice much earlier than the commissioning of the third reactor. The mere raising of an invoice as pointed out by the Division Bench of the Kerala High Court, in the decisions, cited supra, would not give cause of action to the plaintiff to have instituted the suit.

20.6. Looking at another angle also, as rightly pointed out by Mr.P.Giridharan, the denial on the part of the defendant came only on 22.04.2010 when, for the first time, the defendant denied its liability pointing out non-compliance with the requirements of the design parameters. I am therefore of the considered opinion that the cause of action for the plaintiff to sue for recovery of the monies covered by the invoice dated 09.06.2008 arose only on 22.04.2010, when the defendant made a categorical denial of the plaintiff's entitlement, citing non-

compliance of the design parameters. Hence, the suit filed on 19.09.2012 is, in my considered opinion, not barred by limitation.

20.7. In view of the foregoing discussion, Issue No.1 is answered against the defendant and in favour of the plaintiff holding that the suit paid to the extent of Rs.20,22,480/- is not barred by limitation. Insofar as the Issue No.2 is concerned *de hors* the part payment on 30.09.2008, the suit would be in time in as much as I have concluded that the limitation for filing the suit commenced only on 22.04.2010. In view of the above findings, Additional Issue No.1 is answered against the defendant holding that each invoice does not give a separate cause of action to the plaintiff for instituting the suit. It is well open to the plaintiff to wait for the completion of the contract and thereafter make a demand for the amounts due under the contract, even in a contract, where payments are sought to be made on stage wise completion.

21. Issue Nos.3, 4, 5 and Additional No.3:

21.1. These issues relate to the terms of the contract. The terms of the contract can be culled out from atleast five documents, viz. the letter of intent dated 27.03.2006 marked as Ex.P1, the work order dated 04.04.2006, marked as Ex.P2, the work order dated 12.04.2006, marked

as Ex.P3, the work order dated 17.04.2006 marked as Ex.P4 and the purchase order dated 22.04.2006, marked as Ex.P5. From the letter of intent dated 27.03.2006, it is seen that the scope of the work is providing consultancy service to the defendant in restarting/establishing the 30 TPA Solar Grade Poly Silicon production facility, it also states that the scope would include

- (a) *Basic Engineering Package consisting of Schematic flow chart, material flow, equipment heat and mass loading at various stages and operating parameters;*
- (b) *Helping us in developing detailed engineering package for the project;*
- (c) *Advising us in identifying available in-house buildings and Civil Structures utilities and plant and machinery useful for the project and any modifications required from the same;*
- (d) *Assisting our project team in making engineering drawings and specifications for various bought out equipment;*
- (e) *Helping our process team in commissioning, operating and optimizing the process up to a period of three months from the date of commissioning;*
- (f) *Advising our technical team in safety and environmental aspects of the silicon plant operations;*

(g) *Helping us in achieving sustained production and agreed efficiency norms;*

21.2. A reading of the above scope of the contract would show that the plaintiff was not fully incharge of the erection and commissioning of the plant. The plaintiff was to provide consultancy services to restart/establish the production facility. The plaintiff was also required to prepare a basic engineering package, help the defendant in developing a detailed engineering package and also in establishing or utilising the available resources of the defendant. The first work order was dated 04.04.2006, which is marked as Ex.P2. The schedule of work as per the work order is that basic engineering package has to be done within two months from the date of letter of intent i.e. on or before 27.05.2006 and the commissioning is to be done on or before 03.04.2007. The schedule of payment is also set out therein and there is no dispute regarding the same. A Confidentiality Agreement was also been entered into between the parties. The second work order is dated 12.04.2006, there is not much of a difference between the first work order dated 04.04.2006 and the second work order dated 12.04.2006. It appears that the confidentiality agreement was entered into between the parties, after the second work order dated 12.04.2006.

21.3. The work order dated 12.04.2006 has been accepted by the plaintiff subject to certain corrections made therein. The corrections are with reference to the period with in which the basic engineering work is to be completed, the inclusion of taxes and other expenditure in the fee payable and the schedule of payment of fees. Insofar as the schedule of payment of fees, Clause 5 of the tabular column annexed to the work order dated 12.04.2006, provides that 30% of the total project cost, i.e. Rs.60,00,000/- plus tax is to be paid after the guarantee-run and guarantee-run would mean one successful batch for each of the reactor. The success of the batch would be measured in terms of output and consumption norms both raw material and utilities against design parameters. The plaintiff had made an endorsement in the said work order, which reads as follows:

“Please connect our discussion with Mr.Raman, ED projects.

Please send typical term of guarantee-run as promised.”

To this, the defendant had sent a reply on 17.04.2006, wherein it is stated as follows:

“We are arranging to mail you a draft of typical terms of guarantee-run”.

21.4. A purchase order is issued by the defendant and under Ex.P5 on 22.04.2006. In the purchase order the agreed consumption/utility norms are set out. The said purchase order, with reference to the terms of payment after the guarantee-run, reads as follows:

“30% after guarantee-run - guarantee-run would mean one successful batch per reactor for each of the reactors. The success of the batch would be measured in terms of output and consumption norms (both raw material and utilities) against design parameters, typical terms of guarantee-run is being sent you.”

21.5. It is not in dispute that the plaintiff had raised, Invoices dated 18.04.2006, 30.06.2006, 17.06.2007 and 29.10.2007, with reference to the amounts payable under Clauses (a) to (d) of the schedule of payments. It is also not in dispute that the amounts claimed as per the said invoices have been paid by the defendant. The dispute is only with reference to the last of the two amounts shown in Clauses (e) and (f) to the schedule of payments. While, the plaintiff would contend that the reactors had been commissioned successfully and their performance is matching the desired levels, the defendant would contend that the performance of the reactors is not as per the design parameters and therefore, there is a

breach of contract on the part of the plaintiff and hence the defendant could not be made liable for the balance of the 40% payable under Clauses (e) and (f) of the payment schedule.

21.6. As could be seen from the documents, viz. Exs.P1 to P4 as well as the purchase order dated 22.04.2006 marked as Ex.P5, there is a reference to a particular document called "Typical Terms of Guarantee-run", this surprisingly has not been produced either by the plaintiff or by the defendant, to show what were the requirements that were to be fulfilled by the plaintiff during the guarantee-runs that are undertaken after the commissioning of the project. Though, the defendant in the purchase order dated 22.04.2006 had stated that typical terms of guarantee-run is being sent to the defendant, there is nothing on record to show that such typical terms of guarantee-run are actually sent and the reactor on being set up and commissioned did not meet the requirements of the typical terms of guarantee-run. All that has been produced before the Court is only certain emails and correspondence to show that there was something agreed upon and that something was not complied with. It will be pertinent to point out at this juncture, while accepting the work order dated 12.04.2006, the plaintiff had in fact raised an issue, relating to the typical terms of guarantee-run, despite the non production of the same, the plaintiff would

claim that they started the work in view of the fact that the representing Director of the plaintiff was an employee of the defendant for over 27 years and out of trust, faith and belief, they started the work.

21.7. Of course, the purchase order dated 22.04.2006, marked as Ex.P5 sets out agreed consumption/utility norms and according to the defendant, the said norms were not achieved by the plaintiff, after the commissioning of the reactor and it was found wanting in all aspects. It is because of the said deficiency, the defendant was forced to close the unit, which resulted in a huge loss of nearly Rs.20 Crores to the defendant. The plaintiff has raised an invoice for a sum of Rs.20,22,480/- as early as on 09.06.2008, even before that, the plaintiff had sent an email on 15.05.2008, which is marked as Ex.P13, wherein the plaintiff claims to have rectified certain teething problems in the reactor and assures that the output will go up drastically once the reactor is made to operate continuously. He would also point out that it will be possible for operating both the reactors to their capacity. In the said email the plaintiff would state as follows:

“While on this, you had mentioned about the norms that are a part of the purchase order. In this context, I wish to draw your attention to the emails I had exchanged with NK which are reproduced below for your reference. The basis for the norms are not known and NK himself was wondering whether they

can be achieved. I also had made a clear statement that norms of consumption of metallurgical silicon, hydrogen chloride, production of STC etc., would have to be arrived at the time of carrying out the detailed engineering based on the economics of capital and running costs of the plant.”

21.8. An email dated 26.05.2006 is also attached to Ex.P13, wherein it could be seen that the plaintiff had stated that the plaintiff has suggested that the basis on which the norms have been made is not known and he would also point out that the consumptions would depend on the efficiency of the recovery process. Finally, it is stated that the norms will have to be worked out, when a detailed Engineering package is being worked out, based on our recovery scheme and the extent to which justifiable recovery is desirable has to be arrived at by your organization. The plaintiff would also point out that it had mentioned only about the reactor energy, which is most important factor and others can be worked out at the detailed engineering stage.

21.9. From the above correspondence between the parties, it could be seen that the plaintiff has always maintained that it had not accepted the output norms as claimed by the defendant. Of course, the defendant would in Ex.P5 dated 22.04.2006 state that the typical terms of

guarantee-run are being sent to the plaintiff, there is no evidence of such typical terms of guarantee-run having been sent to the plaintiff by the defendant at any point of time. The defendant has also not chosen to produce the said terms, which have been allegedly agreed to between the plaintiff and the defendant. The defendant would however seek to establish the fact that the unit as such had not met the output and consumption norms as required by the defendant, in support of its version, the defendant would rely upon two documents, viz. Exs.D3 and D7.

21.10. Exhibit D3 is a statement which according to the defendant would show the details of the functioning of the plant during August 2008 to May 2009. It is seen from the data and the remarks that even the power consumption, the plant has not met the norms suggested by the defendant. Ex.D7 is the email dated 16.03.2009, addressed to the Managing Director of the plaintiff from one Mr.M.S.Srinivasan, officer of the defendant Company, the relevant portion of the said email dated 16.03.2009, reads as follows:

"I understand that you had given data for the project approval in April 2006. I request you to please clarify the battery limits for the above assumptions, I had remembered you saying that you were only asked to work on the Poly deposition stage and that the upstream was in CSL scope. In

fact VR and I discussed this matter with you when we talked about the guaranteed consumption norms in our order 3600003234 dated 22nd April 2006. The extract from this order with regard to guaranteed norms is reproduced below:

Agreed consumption/utility norms are as under (All figures in per kg of polysilicon)

1. MG Silicon – 2 kg
2. Anhydrous HCL – 5kg
3. Hydrogen – 0.28 kg
4. Tungsten Rod – 0.04 kg
5. Power – 225 kwh
6. Steam – 0.09 MT

If this were so, kindly clarify across which equipment the above norms in April 06 are applicable. Since the meeting with the Chairman is on 20th March, I request you to reply before that to help me.”

21.11. The contents of this email would only show that the defendant and its officers were not sure as to what were the responsibilities entrusted to the plaintiff, under the purchase order dated 22.04.2006 and what were the norms that were suggested by the plaintiff etc. The entire process appears to have been based on the acquaintance between the parties as a former employer and former employee than a very formal

commercial consultancy contract. I am unable to resist the conclusion that the parties have gone about the contract in a very casual manner without concentrating on the finer details just because there were known to each other for a very long time.

21.12. Mr.P.Giridharan, learned counsel appearing for the plaintiff would vehemently contend that though Ex.D3 and D7 were within the knowledge and power of the defendant even at the time the written statement was filed, these documents were not been produced along with the written statement. He would also further point out that even on 01.11.2008 under Ex.P15, the plaintiff had claimed that the plaintiff has indeed fulfilled all required terms and conditions and the norms that were achieved in the plant are what were specified. Pointing out that there was no response to this email dated 01.11.2008 from the defendant, for a long time and the claim was sought to be denied only 16.03.2009 under Ex.D7, he would contend that the claim of the defendant that the plaintiff was unable to achieve the suggested input and output norms is itself is an afterthought. Mr.P.Giridharan, would also point out that the comparative chart, viz. Ex.D3 was not put to the plaintiff and it was marked at the time of the defendant's evidence thus denying an opportunity to the plaintiff to respond to the same and explain the contents of it.

21.13. Mr.P.Giridharan, learned counsel would invite my attention to the cross-examination of D.W.1, wherein to a specific question regarding non-achievement of parameters, the witness had deposed that the engineers of the defendant had not questioned the plaintiff, about the non-achievement of parameters, it is also recorded that the plaintiff's representative was aware of the consumption norms and their non-achievement. Mr. P.Giridharan would also point out that P.W.1 has in cross-examination deposed that the defendant did not follow the advice of the plaintiff. He would also point out that P.W.1 has deposed that the consumption norms were never finalized.

21.14. Per Contra Mr.T.Poornam, learned counsel appearing for the defendant would submit that Exs.D3 and D7 would conclusively show that the plant has not achieved the desired parameters as per the purchase order dated 22.04.2006. He would also point out that the plaintiff had signed the purchase order in token of having accepted the same and hence it is not open to the plaintiff to contend that the parameters or the input and output norms were never agreed to between the parties. The learned counsel would also invite my attention to Ex.P20 the letter dated 22.04.2010, wherein the defendant and its officers have pointed out that

the plant has not achieved the agreed consumption norms or the output norms between September 2008 to April 2009. It is also claimed that material breach of terms of the purchase order on the part of the plaintiff had resulted in substantial loss and the entire investment of about Rs.25,00,00,000/- is now lying ideal.

21.15. As rightly pointed out by Mr.Giridharan, under Ex.P15 even on 01.11.2008, the plaintiff has asserted that the norms have been achieved. Surprisingly, there was no response to Ex.P15 from the defendant, Ex.D3 which was introduced at the time of the defendant's evidence would show that the same contains data for the period from August 2008 to May 2009. The defendant was possessed of data for atleast three months on the performance, when it received Ex.D15 on 01.11.2008, but the claim made under Ex.P15 dated 01.11.2008 was sought to be denied by the defendants only on 16.03.2009 under Ex.D7, prior to that there was no denial of the claim of the plaintiff made in Ex.P15 by the defendant.

21.16. Mr.Giridharan, would also point out that D.W.1 had in fact admitted that he had not informed the plaintiff that the plant was not running as per the specified parameters the question and answer, which is

relied upon by the learned counsel are as follows:

“Question: Ever since you were incharge of the plant from 2009 did you by any communication inform the plaintiff that the plant was not running as per the specified parameters?”

Answer: No”

21.17. To a pointed query by the learned counsel for the plaintiff regarding the contents of Ex.P15, the witness had given an very evasive answer, the said questions and answers, which read as follows:

“Question: Attention of the witness is drawn to Ex.P15. Could you please tell me whether anyone from the defendant company responded this e-mail?”

Answer: I have to check.

Question: Did you respond after taking over the production and operation of the plant in 2009?”

Answer: No.”

21.18. From the above evidence, it is clear that the defendant had not raised the question of deficiency in performance of the unit till 16.03.2009, even Ex.D7 dated 16.03.2009, does not very clearly spell out the so called deficiencies. It only requires the plaintiff to give more details and in fact a reading of Ex.D7 would show that the defendant and its

officers themselves were not clear about, what were the norms that were suggested and what was the area of work that was assigned to the plaintiff?. The contention of the learned counsel for the defendant that the very boogie of non-performance and non-compliance with the required parameters has been raised by the defendant belatedly, as an afterthought, only with a view to prevent a claim from the plaintiff for non-payment of the balance amount merits acceptance. Therefore, I am unable to accept the contention of the defendant that the plaintiff had failed to perform its obligations as stipulated in the purchase order dated 22.04.2006.

21.19. As already pointed out, even Ex.D7 does not present a conclusive picture as to the responsibilities of the plaintiff. The following sentence in Ex.D7 would show that the parties or atleast the plaintiff was under an impression that it was asked to work only up to the poly deposition stage and anything upstream was within the scope of Chemplast Sanmar Ltd. The exact words in the email are as follows:

“I had remembered you saying that you were only asked to work on the Poly deposition stage and that the upstream was in CSL scope.”

21.20. From Ex.D7, I am unable to find out a categorical denial of

the claim of the plaintiff made under Ex.P15, dated 01.11.2008. A categorical denial of the claim of the plaintiff appears to have been made by the defendant only under Ex.P20 dated 22.04.2010. This in my considered opinion is a very belated denial, which can be construed as an afterthought. Of course, it is contended by the learned counsel for the defendant that the entire plant was an unsuccessful venture and the defendant had closed down the plant. It is not known as to what promoted the defendant to shut down the plant. The fact that the plant was successfully commissioned is not in dispute. The fact that the guarantee-runs were completed is not in dispute. The claim of the plaintiff that the guarantee-runs were successful was sought to be denied by the defendant only after a very long un-justifiable delay. There was no immediate response from the defendant, though the defendant was possessed of the particulars relating to the performance of the unit, to the claim of the plaintiff that the unit has been functioning satisfactorily. All these factors, in my considered opinion will only lead to the inevitable conclusion that the claim of the defendant regarding non performance is an afterthought made only with a view to deny payment of charges due and payable to the plaintiff as per the purchase order dated 22.04.2006.

21.21. Therefore, in view of the above conclusions, Issue No.3 is

answered to the effect that the plaintiff had in fact performed its obligations, as stipulated in the purchase order dated 22.04.2006 and the defendant had failed to establish that the plant erected failed to meet the output and consumption norms, Issue Nos.3 and 4 are answered as above. The purchase order dated 22.04.2006, being the final contract, in fact supersedes the work order dated 12.04.2006. Additional Issue No.3 is answered to the effect that the plaintiff has in fact performed its obligations under the purchase order dated 22.04.2006 and it does not seek to unilaterally alter the same. Additional Issue No.3 is answered in favour of the plaintiff and against the defendant.

22. Issue Nos.6, 7 and Additional Issue No.4:

22.1. The defendant apart from denying the claim of the plaintiff has also made a counter claim contending that the entire investment of about Rs.25,00,00,000/- is lost to the defendant, but the defendant would however restrict its claim to a sum of Rs.50,00,000/-. The fact remains that the defendant had closed down the unit and the unit is not functioning as of to-day. The actual reason for closure of the unit is not borne out by evidence. Mr.P.Giridharan, learned counsel appearing for the plaintiff would contend that the claim for damages has to be necessarily construed to be one under Section 73 and 74 of the Contract Act, if that be so, there

should be actual proof of damages. In the absence of actual proof of damages the defendant cannot claim damages on assumptions.

22.2. Referring to the following evidence of D.W.1 in cross-examination:

“Question: In Exs.D4 and D5 the values of various assets were stated. Are these values subject to depreciation?”

Answer: Book values on the date of capitalization.

Question: When were these assets capitalized?

Answer: 01.08.2008

Question: The value stated in Ex.D4 and D5 are of 2009-2010. Aren't assets which are capitalized subject to depreciation every financial year?

Answer: Yes. We have given both the assets value and depreciated value in Exs.D4 and D5.

Question: Did you write of the impairment loss and bring the assets to nil value in your books the financial year 2009-2010?

Answer: Yes

Question: What did you do physically to the poly reactor and assets?

Answer: The entire plant is preserved.

Question: So the loss is notional?

Answer: No. I deny as these assets can be used only for the manufacture of poly silicon."

22.3. Mr.P.Giridharan would contend that the defendant and its officer have not established the loss and therefore it is not entitled to damages claimed by it. He would also rely upon the Judgment of the Hon'ble Supreme Court in ***Kailash Nath Associates v. Delhi Development Authority and Another***, reported in **2015 (4) SCC 136**, wherein the Hon'ble Supreme Court had pointed out that in order to claim the loss or compensation for damages, proof of loss or damage arising out of the contract is mandatory. The law relating to damages has been summarized by the Hon'ble Supreme Court in the said judgment as follows:

"43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the

amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4. The Section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before

agreement is reached, Section 74 would have no application.”

22.4. From the above principles laid down by the Hon'ble Supreme Court, it is clear that when damages are claimed by a party complaining of breach of contract, even when there is an agreement between parties to pay a liquidated sum as damages, it should be shown that it should be a genuine pre-estimate of the damages fixed by the parties and found to be such by the Court. Therefore, if the defendant is to be awarded damages, proof of actual damages is mandatory and in the absence of proof, the Court cannot award damages to the defendant. Of course, the defendant would contend that the entire plant was not successful and therefore, the plaintiff alone is liable for the entire loss. I am afraid such a contention cannot be accepted.

22.5. The plaintiff was only entrusted with the consultancy job, and the erection part of it was always handled by the defendant. The remuneration payable to the plaintiff was to be paid at stages on completion of certain works. Of course, there was a delay in commencement of the project and its completion also, the parties are at loggerhead as to who was responsible for a delay in commencement as well as the completion of the project. Considering the very nature of the

contract, which is evidenced by the purchase order, it will be too unfair to make the plaintiff responsible for the delay. It is in evidence by way of various emails that the defendant also delayed in making payments to the plaintiff and therefore, both the parties have equally contributed to the delay in the project. In such circumstances, in the absence of the clear, cogent and convincing evidence regarding the damages caused to the defendant, I do not think, a decree can be passed against the plaintiff for damages. Apart from the above, I had answered Issues Nos.3, 4, 5 and Additional Issue No.3 to the effect that the plaintiff had done whatever it was required to do under the purchase order dated 22.04.2006 and the claim of the defendant that the work done by the plaintiff did not meet with the consumption and output norms has been rejected by me. In such circumstances, I do not think, the defendant could be favoured with the decree for damages. Hence, Issue Nos.6 and 7 are answered against the defendant and in favour of the plaintiff.

22.6. Of course, an issue relating to the confidentiality agreement is framed by additional issue No.2, but, I do not find any evidence regarding the same and it is not the case of either of the parties that the plaintiff had breached the confidentiality agreement. The learned Counsels have also not addressed any arguments on that issue.

23. In the result, the suit is decreed as prayed for by the plaintiff. However, since I have concluded that the plaintiff was also responsible for the delay in execution of the project for the certain extent, the plaintiff would be entitled to the suit claim of Rs.26,95,920/- with interest at 9% per annum from the date of the suit till the date of the decree and 6% per annum thereafter, till date of payment. The counter claim of the defendant stands dismissed. Considering the facts and circumstances of the case, I direct the parties to bear their own costs.

06.04.2018

jv
Index: No
Internet: Yes
Speaking order

List of the Witnesses examined on the side of the Plaintiff:

P.W.1 Dr.H.S.Gopala Krishna Murthy

List of Exhibits marked on the side of the Plaintiff:

Sl.No.	Exhibits	Date	Description of documents
1	Ex.P1	27.03.2006	Letter of Intent
2	Ex.P2	.04.04.2006	The Work order sent by the defendant to the plaintiff

Sl.No.	Exhibits	Date	Description of documents
3	Ex.P3	.12.04.2006	The Amended Work order sent by the defendant to the plaintiff
4	Ex.P4	17.04.2006	The Amended Work order sent by the defendant to the plaintiff
5	Ex.P5	22.04.2006	The purchase order No.3600003234
6	Ex.P6	-	The Basic Engineering Package issued by the plaintiff
7	Ex.P7	18.04.2006	The Invoice raised by the plaintiff
8	Ex.P8	30.06.2006	The Invoice raised by the plaintiff
9	Ex.P9	.01.09.2006	The Invoice raised by the plaintiff
10	Ex.P10	.01.09.2006	The Invoice raised by the plaintiff
11	Ex.P11	17.06.2007	The Invoice raised by the plaintiff
12	Ex.P12	29.10.2007	The Invoice raised by the plaintiff
13	Ex.P13	15.05.2008	The plaintiff sent an email
14	Ex.P14	.09.06.2008	The Invoice raised by the plaintiff
15	Ex.P15	.01.11.2008	The Email
16	Ex.P16	20.07.2009	The covering letter invoice
17	Ex.P17	25.11.2009	The Email
18	Ex.P18	.11.12.2010	The copy of reminder
19	Ex.P19	.01.01.2010	The copy of reminder
20	Ex.P20	22.04.2010	The letter issued by plaintiff
21	Ex.P21	22.04.2010	Copy of the letter
22	Ex.P22	.11.06.2010	Copy of the letter
23	Ex.P23	29.06.2010	Letter of the defendant
24	Ex.P24	.02.03.2011	Copy of the plaintiff

List of the Witnesses examined on the side of the Defendant:

D.W.1 G.Sankar Subramanian

List of Exhibits marked on the side of the Defendant:

Sl.No.	Exhibits	Date	Description of documents
1	Ex.D1	17.05.2016	The original Authorizing letter

Sl.No.	Exhibits	Date	Description of documents
2	Ex.D2	-	The certified true copy of the Carrier progression of the plaintiff
3	Ex.D3	-	The ASP print out true copy of the statement furnishing details achieved during August 2008
4	Ex.D4	-	The certificate true copy of the list of assets and machineries equipments extracts Books of Accounts certificate
5	Ex.D5	-	The certified copy true copy of statement furnishing details write off on account of impairment of assets
6	Ex.D6	17.05.2006	The photocopy of the Emails (2 Nos.)
7	Ex.D7	16.03.2009	The photocopy of the email
8	Ex.D8	10.04.2006	The photocopy of the confidentiality agreement
9	Ex.D9	23.05.2007	The photocopy of the email
10	Ex.D10	24.05.2007	The photocopy of the email
11	Ex.D11	25.05.2007	The photocopy of the email
12	Ex.D12	28.05.2007	The photocopy of the email
13	Ex.D13	14.06.2007	The photocopy of the email
14	Ex.D14	12.09.2007	The photocopy of the email

06.04.2018

jv

सत्यमेव जयते

To

WEB COPY

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

R.SUBRAMANIAN,J.

Jv



Pre Delivery Judgment
C.S.No.686 of 2011

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06.04.2018