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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(COMM) 730/2016

GOLD PLUS GLASS INDUSTRY LTD ..... Plaintiff

Through: Mr. K.P. Gautam, Adv.

Versus

SANGHAVI ENGINEERING ..... Defendant

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

<u>O R D E R</u>

% **29.01.2019**

1. The plaintiff has instituted this suit for recovery of Rs.4 crores pleading, (i) that a contract dated 7th February, 2014 was entered into between the sole plaintiff and the sole defendant whereunder the defendant had to, within stipulated time, supply and install in the premises of the plaintiff, different machines and parts for manufacturing and processing float glass; (ii) that the burners supplied and installed by the defendant were found to be inadequate in performance and not fit for producing flame shape and devoid of air mixing adjustment; (iii) that the burners supplied and installed by the defendant affected the quality of float glass produced and also damaged the furnace; (iv) that the defendant also failed to complete the works within the specified time i.e. by mid of September, 2014 and on request of the defendant, the plaintiff agreed to extend the said time till 30th September, 2014; (v) that the defendant again failed to complete the works but the plaintiff again, on request of the defendant, extended the time till 30th October, 2014; (vi) that though the defendant tried to start the Pet Coke Firing System installed but failed in starting up the said System causing economic loss to the plaintiff; (vii) that the defendant failed to complete the

assigned work and also failed to address the various issues to which the attention of the defendant was drawn, inspite of numerous requests and reminders; (viii) that on the contrary, the defendant withdrew all its staff deployed at the premises of the plaintiff for completion of the said works; (ix) that the plant of the plaintiff stopped working through Pet Coke from 3rd November, 2014 to 14th November, 2014 i.e. for 12 days, compelling the plaintiff to run the plant through other means by incurring additional cost of Rs.2,10,94,943/-; (x) that due to non-supply of spare bearing for Mill by the defendant, the plant again stopped working through Pet Coke for 4.5 days from 10th January, 2015 to 14th January, 2015, again compelling the plaintiff to run the plant through other means by incurring additional cost of Rs.45,54,471/-; (xi) that the plaintiff also had to pay Rs.6,63,000/- for unlocking password for Pet Coke System and reinstallation of program; (xii) that the burners supplied by the defendant were of inferior quality and the plaintiff had to order new burners at the rate of Rs.11,18,000/-; (xiii) that the load cells were not properly calibrated for which the plaintiff had paid a sum of Rs.1,06,742/-; (xiv) that the plaintiff also had to incur an expense of Rs.6,16,162/- for hiring foreign experts and had to incur an expense of Rs.1,61,93,036/- towards purchase of machinery and parts; (xv) that a sum of Rs.6,23,785/- was also incurred by the plaintiff as labour charges for repairing the furnace; (xvi) hence, a loss of Rs.4.5 crores has been incurred by the plaintiff and out of which the plaintiff is likely to get Rs.0.5 crore from the Insurance Company and the net loss caused to the plaintiff by the defendant is of Rs.4 crores; and, (xvii) that the defendant, inspite of demand, has failed to pay the said amounts. Hence, the suit.

2. On 3rd June, 2016, summons of the suit were ordered to be issued to

the defendant. The order dated 21st September, 2016 records that the defendant had been served with the summons of the suit by speed post on 21st July, 2016, though none appeared for the defendant on that date. The counsel for the defendant appeared on 21st November, 2016 and sought time to file written statement. The orders dated 9th January, 2017 and 30th March, 2017 record that the written statement of the defendant was lying under objection. The order dated 14th July, 2017 records the contention of the counsel for the defendant that the objections had been removed and the written statement had been re-filed.

3. The written statement of the defendant was accompanied with an application for condonation of delay in filing thereof. Vide order dated 30th November, 2017, finding that the written statement filed by the defendant was beyond 120 days of service, the written statement of the defendant was taken off the record and the right of the defendant to file written statement forfeited and the defence of the defendant struck off.

4. Vide subsequent order dated 12th December, 2017, the plaintiff was directed to lead *ex-parte* evidence.

5. The plaintiff, in its *ex-parte* evidence has examined its Authorised Representative, its Plant Head, its Deputy General Manager in Float Glass Line-I and its Senior Manager (Electrical) Float Glass Line-I and has closed its evidence.

6. The counsel for the defendant appeared last till 25th May, 2018 but thereafter stopped appearing.

7. The counsel for the plaintiff has been heard.

8. I have considered the evidence of the plaintiff. The authorised representative of the plaintiff in his affidavit by way of examination-in-chief

has merely reiterated the contents of the plaint. The said witness has not proved only documents to show incurring of expenses, as have been pleaded to have been incurred. The same is the position with respect to the affidavits by way of examination-in-chief of other witnesses. Save for bare statement, there is no proof of incurring of expenses attributable to the defendant. There is no proof of the expense which would have been incurred by the plaintiff had the plant of the plaintiff operated through Pet Coke System and no proof of the amount incurred by running it through other means. Without the said two figures, it has not been proved that loss of Rs.2,10,94,943/- and Rs.45,54,471/-, as has been claimed to have been suffered by the plaintiff. Similarly, there is no proof of payment by the plaintiff of Rs.6,63,000/- for unlocking the password of the System and reinstallation of program or of purchase of burners worth Rs.11,18,000/- in lieu of defective burners or of payment of Rs.1,06,742/- for improperly calibrated load cells or of incurring of expenses of Rs.6,16,162/- on foreign experts or of Rs.1,61,93,036/- towards purchase of machinery and parts or of incurring of labour charges of Rs.6,23,785/- for repairing the furnace. So much so, the original books of accounts of the plaintiff containing the said expenses have also not been proved.

9. Though the plaintiff has proved invoice of some purchases but the same do not prove defect in the parts/machinery supplied by defendant. There is nothing to show that any defective parts/machines were returned to the defendant or any communication sent to defendant to take back the same.

10. The plaintiff has proved the contract with the defendant as Ex.PW1/2. A reading of the same shows, 10% of the purchase price to be paid by

plaintiff as advance against bank guarantee, 55% against submission of dispatch documents and which dispatch was to be after inspection of the goods at the premises of defendant/its vendors, 10% against erection of equipment, 10% against commissioning and start up of System, 10% within 30 days of commissioning and remaining 5% against submission of Performance Bank Guarantee valid for 12 months. The plaintiff has not explained, (a) why successive payments were released if the equipment was defective or if the desired results not achieved on commissioning; (b) why the defects were not noticed at time of commissioning; (c) what was the total value of the contract and how much payment has been made to defendant; and, (d) why claims were not made in guarantee/warranty period.

11. Though the defendant is *ex-parte* but the same, though may lessen the onus on the plaintiff, does not relieve the plaintiff altogether from the onus, to at least make a semblance of a case before this Court.

12. Considering the nature of the claim, the plaintiff was required to prove the defects, the communication to the defendant of each of the defects, failure of the defendant to rectify the same and incurring of expenses by the plaintiff on rectifying the said defects which the defendant was called upon to rectify. The plaintiff has utterly failed on each of the said aspects.

13. Resultantly, there is no option but to dismiss the suit.

14. The suit is dismissed.

15. However, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

JANUARY 29, 2019/'bs'..