IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
COMMERCIAL DIVISION

Present:

The Hon'ble Justice Krishna Rao

CS 279 of 2019

Orissa Metaliks Private Limited
Versus
Shenyang Casting and Forging Industries Company Limited.

Mr. Jishnu Chowdhury
Mr. Debdut Mukherjee
Ms. Priyanka Sharma

... for the plaintiff.

Hearing Concluded On : 24.07.2023

Judgment on : 18.08.2023

Krishna Rao, J.:

1. Plaintiff has filed the present suit against the defendant for recovery of an amount of Rs. 2,20,46,576.27/- with interest.

2. The plaintiff is engaged in the business of manufacturing of iron and steel and has a manufacturing unit at Kharagpur, Midnapore, West

Bengal. The defendant is engaged in the business of design, manufacturing and supply of major equipment for pellet plant.

3. After discussion and negotiation between the parties two agreements were entered on 19th February 2017 and 17th March, 2017 for design, manufacturing and supply of major equipments for a 6,00,000 TPA Grade Kiln Pellet Plant Line – 4 and 6,00,000 TPA Grade Kiln Pellet Plant Line -5. The total value of the contract is USD 3.00 Million of each contract. As per Clause 3.10 of the contract, the plaintiff is required to pay USD 50,000 as advance by way of Letter of Credit and 10% of the total value is to be paid by way of bank guarantee. As per clause 5.00 of the contract, the defendant is required to supply the parts and accessories within a maximum period of 180 days from the date of token advance.

4. The defendant raised two invoices of each agreement dated 12th March 2017 and 17th March 2017. The plaintiff has paid the token advance of USD 50,000 each to the defendant on 20th March, 2017 and 22nd March, 2017. The payment made by the plaintiff on 20th March, 2017 which was equivalent to Rs. 32,72,240.58/- and payment made on 22nd March, 2017 was equivalent to Rs. 32,74,740.95/- due to the foreign exchange fluctuation.

5. The plaintiff and the defendant have agreed that the zero date from which the 180 days within which delivery had to be effected would be counted from 30th March, 2017. By e-mails dated 31st March, 2017, 3rd

April, 2017 and 7th April 2017, the terms of payments were modified. In the meeting held on 10th April, 2017, it was mutually agreed between the parties that the second contract would be cancelled and the payment made thereunder shall be adjusted in the first contract. In the meeting held on 21st September, 2017 and 22nd September, 2017, the zero date was again modified to 10th July 2017.

6. The first Letter of Credit was opened on 10th July, 2017 with HDFC Bank for a value of USD 12,07,000 by incurring cost of Rs. 1,01,824.74/- in favour of the defendant. Due to the difficulties expressed by the defendant, the plaintiff has closed the Letter of Credit by a letter dated 23rd November, 2017 and a fresh Letter of Credit was issued by the plaintiff through the State Bank of India on 29th November, 2017. Various meetings between the parties were held and it transpired that defendant was not in a position to perform the contract.

7. On 22nd February, 2018, the plaintiff had sent a notice though the learned Advocate calling upon the defendant for immediate performance and also indicated that the plaintiff will also claim damages for non-performance of contract. The notice issued by the plaintiff was duly delivered to the defendant but inspite of receipt of the notice, the defendant failed to perform the contract.

8. It transpired from the records that after filing of the suit, writ of summons were served upon the defendant but inspite of receipt of writ of summons of this case, the defendant has not entered in the suit and accordingly on receipt of report from the department, by an order dated 25th November 2022 the present suit was placed in the list of "undefended suit".

9. The plaintiff has examined one witness in support of his case by filing examination-in-chief on affidavit along with all documents and the same was marked as Exhibit A collectively.

10. Clause 3.10 d of the agreement provides payments terms which reads as follows:

"3.10 PAYMENT TERMS

Payment will be released as per the terms specified herein, Billing schedule document No: OMPL-II/16-17/P7162-00019 (BS), attached to this contract is part of this contract.

1.	*Token advance along with order by TT.*	*USD 50,000.00*
2.	*90% (USD 2650000) of order value less token advance, Prorate basis against the dispatch, as per the billing schedule, LC to be enchased against the submission of documents,*	*LC to be opened for 100% of order value less token advance (USD 2950000)*
	Dually signed commercial invoice, Test Certificate (In triplicate) Bill of Lading, Inspection report dually signed and stamped by Buyer	*LC shall be opened within 30 days from date of receipt of first payment*

	Packing List (In Triplicate)	
3.	*USD 300000 Against submission the Performance bank Guarantee of 10% of order value which shall remain valid for the period of Guarantee at least for 18 months. Refer clause 10.00, must be submitted along with last supply of good equivalent to 10 of order value.”*	*10% of order value*

11. Clause 5.00 of the agreement provides delivery period which reads as follows:

“5.00 DELIVERY PERIOD

All the equipment shall be delivered at CIF-Haldia/Kolkata within 105-180 days from date of token advance of order without any failure, (latest by 20th October, 2017). Part shipment is allowed however all the goods must be delivered in three consignment as specified herein,

A.	*First consignment of steel parts of the equipment, stationary parts of the equipment*	*Material will be delivered within 105 days at Indian port*
B.	*Second consignment inclusive of Rotating parts of the equipment*	*Material will be delivered within 150 days at Indian Port*
C.	*Third consignment inclusive of drive Gear box, motor, electrical panel, control panel, etc.*	*Material will be delivered within 180 days at Indian Port*

However, Purchase requested seller to deliver the goods in 150 days from date of signing of contract.

You shall provide all the engineering drawings scoped in, within 30 days from date of contract, Equipment drawings must be submitted immediate on signing the contract so as OMPL can extend their approval immediate to commence the manufacturing of the equipments by seller.

Delivery is linked only to first payment, not to drawings approval, this please be noted, however any delay in opening the LC will have impact on delivery period correspondingly.

Kindly note that the maintenance of delivery schedule is of paramount importance and is a vital consideration for the placement of order with you. We shall tolerate no delay in the delivery of the items on any grounds whatsoever."

12. Clause 18.00 of the agreements provides for termination which reads as follows :

"18.00 TERMINATION

We reserve the right to terminate the contract in the event of :

1. *Non fulfilment of supply after a maximum delay of one month.*
2. *Non fulfilment of quality and workmanship standards as mentioned in this contract, inclusive of this contract."*

13. As per invoices raised by the defendant, the plaintiff in terms of the agreement has paid USD 50,000 each on 20th March, 2017 and 22nd March, 2017. As on 20th March, 2017, the value of USD 50,000 was equivalent to Indian Rupees 32,72,240.58/- and on 22nd March, 2017 the value of USD 50,000 was equivalent to Indian Rupees 32,74,740.95/-. The delivery period was 180 days from 30th March, 2017 and subsequent the date of delivery period was modified to 10th July, 2017.

14. Initially, the plaintiff has opened the Letter of Credit on 10th July, 2017 in the HDFC Bank for a value of USD 12,07,000 by incurring cost of Rs. 1,01,824.74/- but subsequently on the request of the defendant, the plaintiff has closed the said Letter of Credit and opened a new Letter of Credit through the State Bank of India on 29th November, 2017 for value of USD 12,07,000 by incurring cost of Rs. 50,936.00/-

15. Even after completion of all formalities and payment of token advance as per the contract, the defendant failed to perform its obligations by supplying the materials to the plaintiff as agreed by the defendant. The defendant even after receipt of the legal notice has not come forward to comply with the terms of the contract.

16. The Agreements dated 19th February, 2017, 17th March, 2017, two invoices date 12th March, 2017 and 17th March, 2017, the bank transaction of USD 50,000 each dated 20th March, 2017 and 22nd March, 2017, the emails dated 31st March, 2017, 3rd April, 2017 and 7th April, 2017, the letter dated 20th April, 2017 wherein the second contract was cancelled, Letter of Credit dated 10th July, 2017 with the HDFC Bank, Letter of Credit with the State Bank of India dated 29th November, 2017, Minutes of the Meetings dated 24th July, 2017 to 27th July, 2017, 21st September, 2017 to 22nd September, 2017, 12th November, 2017 and 10th May, 2018, Advocate notice dated 22nd

February, 2018 and the track reports are exhibited as Exhibit A collectively.

17. Considered the submissions made by the learned Counsel for the plaintiff, perused the plaint, examination in chief on affidavit of the plaintiff's witness and the documents exhibited during the evidence of the plaintiff's witness. This court finds that the plaintiff in compliance of the contracts entered between the parties and in terms of invoices raised by the defendant, the plaintiff has paid token advance of USD 50,000 each on 20th March, 2017 and 22nd March, 2017 and subsequently on the request of the defendant, first Letter of Credit was closed and a fresh Letter of Credit was opened with the State Bank of India by incurring expenditure of Rs. 1,01,824.74/-.

The defendant has received the total amount of Rs. 65,46,981.23/- from the plaintiff and the plaintiff has also incurred an amount of Rs. 1,01,824.74/- for opening of fresh Letter of Credit by closing earlier Letter of Credit. The defendant has neither supplied materials in terms of contract nor has refunded the amount, thus the plaintiff is entitled to get the amount incurred by the plaintiff along with interest as well as damages.

18. In view of the above, the plaintiff do get a decree for Rs. 2,20,46,576.27/- against the defendant with interest at the rate of 18% per annum from the date of filing of the suit till the realisation of the decretal amount.

19. C.S No. 279 of 2019 is thus **disposed of**. Decree be drawn accordingly.

(Krishna Rao, J.)