

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(COMMERCIAL DIVISION)

BEFORE:

The Hon'ble Justice Soumen Sen

and

The Hon'ble Justice Biswaroop Chowdhury

FMA 1477 of 2024

With

IA No. CAN 1 of 2024

Orissa Metaliks Private Limited

versus

Titagarh Rail Systems Ltd.

For the Appellant	:	Mr. S.N. Mookherjee, Sr. Adv Mr. Ranjan Bachawat, Sr. Adv Mr. Debrup Bhattacharjee, Adv. Ms. Akshita Bohra, Adv. Ms. Yamini Mookherjee, Adv.
For the respondent	:	Mr. Sabyasachi Chowdhury, Sr. Adv., Mr. Satadeep Bhattacharya, Adv. Mr. Dipayan Dan, Adv. Ms. Sriparna Mitra, Adv.
Hearing concluded on	:	21 st January, 2025
Judgment on	:	28 th January, 2025

Soumen Sen, J.:-

1. An order of injunction restraining the appellant from operating the bank account without leaving a sum of Rs.7,75,44,000/- crores realised by the appellant upon invocation of the bank guarantee is the subject matter of challenge in this appeal.

2. The impugned order was passed on 27th November 2024 read with an order dated 28th November 2024 in an application for being money

Suit (com) 160 of 2024 injunction and attachment before judgment being I.A. No.01 of 2024 in the suit filed by the respondent/plaintiff praying, *inter alia*, for a declaration that the bank guarantee dated 18th January 2023 is null and void and the appellant/defendant is entitled to a money decree of Rs.8,99,34,044/- crores realized by the appellant on invocation of the bank guarantee and a sum of Rs.115,57,28,449/- on account of the damages suffered by reason of termination of the contract.

3. Briefly stated, on March, 2022 the Railway Board, Ministry of Railways, Government of India issued an approval for procurement and operation of 05 rakes of BOXNHL wagons (with 01 brake van per rake) by the defendant under the General Purpose Wagon Investment Scheme (GPWIS).

4. The plaintiff represented that it is a leading rolling stock manufacturer in India and Europe and is capable of executing the contract if awarded. On August 8, 2022, the plaintiff submitted its techno-commercial proposal, for manufacturing and supplying 62 railway wagons comprising of 61BOXNHL wagons and one BVCM (brake van) wagon, before the defendant. The plaintiff represented that the delivery schedule would be within 6 months from date of receipt of advance payment. The techno-commercial offer contains payment terms which reads as follows:

“Clause 4. Mobilization Advance 40% of the Basic price to be released along with Techno-commercial clear purchase Order. Mobilization Advance for cost effective production and timely delivery of product.”

5. Pursuant to negotiations between the parties through emails dated August 26, 2022, September 7, 2022, October 10, 2022, November 5, 2022 and December 7, 2022, the appellant/defendant issued a Purchase Order No. OMPL/TTGWL/2022 dated December 30, 2022 upon the plaintiff for manufacture and supply of 62 numbers wagons (61 BOXNHL wagons and 1 BVCM brake van) (hereinafter referred to as 'purchase order') in a time bound manner and the delivery of the wagons are to be completed within May, 2023. The purchase order stipulates that time is the essence of the contract and supplier has to confirm the delivery schedule without fail and in any case delivery date cannot be extended beyond May, 2023.

6. On 15th December, 2022 Research Designs and Standards Organisation (RDSO), Government of India, Ministry of Railways issued an instruction whereby all wagon builders were advised to attend the scheduled meeting on 27th December, 2022 to discuss the cut-off date which should not be later than 1st February, 2022 and other related issues with regard to blocking of two doors in BOXNHL wagons. On 27th December, 2022, a meeting was held in which it was decided that wagon manufacturers can manufacture wagon with four doors only if specifically asked by the private party. Considering the inability of the private orders to change manufacturing process before February, 2023, it was decided that the cut-off date for manufacturing process in respect of private orders should be extended till 1st March, 2023. Hence, the cut-off date for implementation of change requested by the wagon manufacturers had been extended till 1st March, 2023.

7. The plaintiff on 30th December, 2022 requested the delivery period to be extended till June, 2023. The defendant accepted the said request and confirmed the said date through e-mail sent on even date. This extension was treated as an addendum to the purchase order. On January, 20, 2023 the plaintiff submitted Proforma Invoice and unconditional bank guarantee for Rs.7,75,44,000/- bearing reference number 68840IGL00001523 dated January 18, 2023 issued by Union Bank of India. The unconditional bank guarantee was submitted as security for the advance paid by the defendant. The unconditional bank guarantee was valid upto 30th June, 2023.

8. Consequent upon furnishing the bank guarantee in terms of the obligation under the purchase order, the appellant/defendant released the advance payment of Rs.7,75,44,000/- to the plaintiff on 31st January, 2023 through bank transfer/NEFT.

9. RDSO on 20th April, 2023 informed the wagon builders that all wagons dispatched after 15th January, 2023 shall have two doors of reduced height. Thereafter a meeting was held on 13th June, 2023 between RDSO and wagon builders in which it was clarified that in terms of the minutes of the meeting held on 27th December, 2022 issued on 3rd January, 2023, the wagon manufacturers were allowed to manufacture BOXNHL Wagon with four doors under WLS etc. scheme in private orders. BOXNHL wagon could be manufactured with four doors with reduced height only for private parties if specifically asked by private parties. The cut-off date from manufacture of BOXNHL wagons with modified side top coping was 31st August, 2023.

10. The defendant by an e-mail dated 23rd June, 2023 enquired about the status of the manufacture and delivery of wagons, as without such information the Defendant was not able to plan movement of its material. However, no response was forthcoming from the plaintiff. The defendant thereafter issued several follow up emails dated June 26, 2023, June 27, 2023, and June 30, 2023 enquiring about compliance of the delivery schedule by the plaintiff as agreed to between the parties. The defendant highlighted that the defendant was incurring huge losses due to disruption in movement of material in the absence of updates for supply of rakes from the plaintiff.

11. Subsequent to lapse of the delivery period as stipulated in the purchase order read with Addendum no.1, the plaintiff through letter dated July 10, 2023 requested an extension of time till September 30, 2023. The extension of time sought by the plaintiff was not acceptable to the defendant and the same was communicated to the plaintiff through email dated July 13, 2023.

12. The plaintiff, however, failed to respond or take accountability for the delay in spite of several follow up e-mails issued by the defendant/appellant on 25th July, 2023, 28th July, 2023, 29th July, 2023, 2nd August, 2023 and 5th August, 2023. In these e-mails the appellant/defendant emphasised that the delivery schedule for September, 2023 fixed unilaterally by the plaintiff is not acceptable. The defendant was incurring huge financial losses due to non-delivery of goods as the material movement planning was done by considering June, 2023 as date for completion of delivery. By reason of the failure of the plaintiff to confirm the

delivery date or extend the advance bank guarantee the appellant/defendant would be compelled to invoke the bank guarantee. The plaintiff ultimately on 8th August, 2023 submitted an extension to the unconditional bank guarantee whereby the validity of the bank guarantee was extended up to October, 2023. The plaintiff however, remained silent regarding delivery of the goods as was highlighted by the appellant/defendant in its e-mail dated 8th August, 2023. The defendant however, received an e-mail from the plaintiff dated 13th August, 2023 informing that the goods will be supplied by October, 2023. The said e-mail was issued without any prior discussion on the issue of extension of time for delivery of the wagons. The plaintiff on 11th September, 2023 again sought extension of time till 31st October, 2023 assuring that they are making serious efforts to adhere to the delivery schedule. In view of the fact that the appellant had invested considerable time and resources in procuring the supply from the plaintiff and owing to the fact that a new supplier/vendor would not be able to complete delivery by 31st October, 2023, the appellant was constrained to approve the extension of time till 31st October, 2023, subject to other terms including but not limited to LD and time being of the essence of the extension. Thereafter, on 9th October, 2023 and 29th October, 2023 the appellant enquired about the status of manufacturing and also the status of the unconditional bank guarantee as it was going to expire on 31st October, 2023. The defendant having not received any response, invoked the bank guarantee and realised the sum of Rs.7,75,44,000/- representing the interest free advance paid to the plaintiff on account of the mobilisation advance. This was followed by a termination

notice dated 13th November, 2023. The plaintiff replied to the said termination notice in which the plaintiff claimed Rs.115 crores for breach of contract. The appellant made a counter claim of Rs.221 crores on 8th December, 2023. The plaintiff filed a mediation claim from 10th June, 2024 but due to failure on the part of the appellant to participate in the mediation, a non-starter report was filed and thereafter on 30th September, 2024. The plaintiff thereafter, filed the money suit no.160 of 2024 against the appellant for the reliefs as mentioned above.

13. In the said proceeding the plaintiff filed an application for injunction being injunction application being I.A.No.1 of 2024 praying for ad-interim orders. The learned Judge, commercial court Alipore, on 1st October, 2024 passed an ex parte order directing the appellant to secure a sum of Rs.7,75,44,000/- in the bank account till 2nd December, 2024. An appeal was preferred on 12th November, 2024 and the said matter was disposed of on 19th November, 2024 with the following observation:

“The first two prayers in the interlocutory application appear to be in the nature of attachments before judgment. However, if the Court comes to a finding even prima facie that the invocation was wrongful, appropriate orders may be passed to secure the claim of the plaintiff in the suit depending upon the facts and circumstances of the case. It appears from the impugned order that the emails dated 6th October, 2023, 9th October, 2023 and 29th October, 2023 have not been referred to and considered by the learned Commercial Court. Having regard to nature of the controversy and that the Commercial Court was approached in September 2024 in respect of dispute that arose in 30th October, 2023 and having regard to the pleading made in paragraph 58 of the injunction petition where the

plaintiff had admitted that the cause of action arose first time on 31st October, 2023 upon the respondent wrongfully invoking the bank guarantee and thereafter on 13th November, 2023 upon the respondent wrongfully and illegally purporting to terminate the contract. We are of the view that a notice ought to have been given before an ex parte order of this nature is passed. However, it was open for the Trial Court to pass an order in terms of the prayer (a) and give an opportunity to the respondent to deliver their defence. There is also no finding of the learned Trial Court that the appellant is in an impecunious situation and in the event a decree is passed it would be rendered infructuous.

The learned Commercial Court shall re-visit the order of injunction granted earlier after taking into consideration the materials to be disclosed by the defendant and shall decide whether the learned Commercial Judge shall continue with the interim order or vacate the interim order uninfluenced by any observation made in this order.

The interim order passed by the learned Commercial Judge shall continue till 27th November, 2024 any exclusion beyond that period should be by a reasoned order.”

14. The learned Judge Commercial Court heard the matter on affidavits and refused to vacate the ad interim ex-parte order. The reasoning appears to be that after extending the bank guarantee the invocation of the bank guarantee is prima facie bad in law and if the said amount is not secured the “claim prayed for in the instant case will be futile”. The learned Judge has also taken into consideration the observation made by this Division Bench that if the court comes to a finding even prima facie that the invocation was wrongful appropriate orders will be passed to secure the

claim of the plaintiff in the suit depending upon the facts and circumstances of the case. This order is under appeal.

15. Mr. S.N. Mookherjee, the learned Senior Counsel appearing on behalf of the appellant has submitted that it would be clear from the terms of the purchase order read with the decisions of the Railway Board dated 15th December, 2022 and 27th December, 2022 that the respondent No.1 would be required to supply the wagons by 1st March, 2023.

16. Mr. Mookherjee has referred to the offer of the plaintiff during the negotiation dated 8th August, 2022 and has drawn our attention to the representation made by the plaintiff with regard to its capacity and capability “of producing an excess of 8400 wagons per year”. It is submitted that on the basis of such representation and believing it to be true the purchase order was issued on 30th December 2022 for supply of 62 railway wagons comprising of 61 BPXNHL wagons and one BVCM (brake van) wagon. The bank guarantee was furnished on January 18, 2023. Thereafter the entire mobilization advance was released on 31st January, 2023.

17. Mr. Mookherjee has referred to the communication exchanged between the parties by letters and emails between January and October, 2023 to show that the plaintiff has chosen to unilaterally extend the period of supply without any consent or approval from the plaintiff and in fact the documents disclosed would show that they did not make any effort to procure any equipment or component for the purpose of execution of the work prior to on 5th August, 2023. Moreover, it is interesting to note that the subsequent purchase order raised by the plaintiff of the same date would show the delivery date as on 20th October 2023 and 29th October 2023 in

spite of the fact that the plaintiff had made a clear representation that they would complete the supply by 30th October, 2023. Mr. Mookherjee has referred to the emails dated 6th October, 9th October and 29th October 2023 to show that the appellant was unhappy with the conduct of the respondent/plaintiff as the plaintiff was not responding to the various emails and had failed to adhere to the timeline within which the equipments were to be supplied.

18. Mr. Mookherjee has also referred to the terms of the bank guarantee to show that it is unconditional in nature and for the proposition that the court should be extremely circumspect in interfering with the unconditional bank guarantee as any order of injunction is likely to disrupt the commercial transaction and militate against the principle that an unconditional bank guarantee is the life blood of commerce as observed by Kerr J. in ***R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.***, 1977(3) WLR 752 and followed in ***Centax (India) Ltd. v. Vinmar Impex INC. & Ors.***, 1986 (4) SCC 136; ***State Bank of India v. Sun Pharmaceuticals Industries Ltd. & Anr.***, AIR 2019 Cal 385:2019 (4) Cal LT 249 and in absence of any special equity being established, the plaintiff, is not entitled to any relief in relation to the invocation of the bank guarantee. Mr. Mookherjee has referred to the pleadings of the plaint and the injunction application and has submitted that no case has been made out for restraining the defendant from invoking the bank guarantee.

19. Mr. Mookherjee has submitted that although the learned Judge Commercial Court has referred to the emails dated 6th October, 2023, 9th October, 2023 and 23rd October, 2023, it has failed to take into

consideration the contents and purport of the said three communications. In fact, the learned Judge has also failed to take into consideration the techno commercial offer, correspondence dated 23rd June, 2023, 26th June, 2023, 27th June, 2023, 30th June, 2023, 10th July, 2023 and 8th August, 2023 which clearly established that the ex-parte ad interim order was obtained without disclosing the full facts and that it was obtained by suppression of material facts. The learned Judge, Commercial Court however did not consider the aforesaid correspondences exchanged by and between the parties which are relevant for the purpose of forming an opinion as to whether the plaintiff was able to make out a prima facie case and fulfill the trinity tests for any protective order being passed in favour of the plaintiff. It is submitted that the learned Judge Commercial Court has not carried out the direction passed by this court and the said order is required to be set aside.

20. Mr. Sabyasachi Chowdhury, the learned Counsel appearing on behalf of the respondent has submitted that the plaintiff has not questioned the terms of the bank guarantee and has not disputed that the bank guarantee is unconditional, however, the realization and utilization of the money consequent upon the invocation has been challenged in the suit as the conduct between the parties would show that the time was never the essence of the contract and the appellant realizing the difficulties created by the change in policy by RDSO as would be evident from the minutes of the meeting held on 27th December 2022, 30th January 2023 and 13th June 2023 had extended the period of delivery initially up to June 2023 and thereafter till 31st October, 2023.

21. Mr. Chowdhury has referred to the decision of the Hon'ble Supreme Court in ***M/s. Hind Construction contractors by its sole proprietor Bhikam Chand Mulchand Jain (Dead) by LRs v. State of Maharashtra, 1979 (2) SCC 70***, to show that when there is an extension clause or that the contract has been extended it has to be presumed that the time was never considered to be the essence of the contract. Moreover, the reason for delay in delivery the wagons within the stipulated period was not attributable to the plaintiff as the issue with regard to two doors and four doors of the wagons was resolved only on 13th June, 2023 with the cut off date till 31st August, 2023. Thereafter, the plaintiff has taken reasonable steps for procuring the materials. In fact the claim period under the bank guarantee was still 31st October, 2024 and there could not have been any reason for the defendant/appellant to invoke the bank guarantee without giving an opportunity to the appellant to fulfil the contract.

22. Mr. Chowdhury submits that the initial period for completion of supply was till May, 2023 and extension should have been for a period of six months from the date when the uncertainty was resolved on 13th June, 2023 clarifying that the BOXNHL wagons can be manufactured with four doors with reduced heights only for private parties, if the same is asked for by the private parties. Minutes of the said meeting was received by the plaintiff by a covering letter dated 4th July, 2023 on that date. Immediately upon receipt of the minutes of the aforesaid meeting, the plaintiff, by a letter dated 10th July, 2023 informed the appellant that they are now permitted to manufacture and supply the required wagons as per the specifications given in the contract, i.e. with four doors but with reduced height. By way of

the said letter, the plaintiff also, *inter alia*, requested the appellant to extend the delivery time for the said wagons to 30th September, 2023. The appellant, appreciating the unprecedented situation which was being faced by the plaintiff, and unconditionally extended the delivery period by letter dated 11th September, 2023. The plaintiff, immediately thereafter, took steps for procuring RDSO controlled items for manufacture and supply of the said wagons to the tune of Rs.6,12,96,357/- from various vendors. All these purchase orders were issued from the plaintiff's aforesaid factory premises and the materials procured by the plaintiff have all been received there at. The applicant has already made payment of Rs.35,03,184.03/- to RDSO for consultancy charges and has procured materials worth Rs.6,12,96,357/-. Thus, the plaintiff has already incurred expenses, to the tune of at least Rs.6,47,99, 541/- as on date, for the purpose of performing the said contract. It is in view of the prevailing uncertainty, as to which design was to be followed by the plaintiff for manufacture of the wagons, that the performance of the contract was delayed. Such delay therefore cannot be attributed to the plaintiff in any manner whatsoever. Immediately upon the aforesaid clarification being received from the RDSO, the plaintiff had informed the same to the appellant, who, having agreed to unconditionally extend the time for the plaintiff to manufacture and supply the said wagons, the time period for causing delivery of the said wagons stood enlarged. Therefore, time can never be treated to be the essence of the said contract. The plaintiff, however, for reasons beyond its control which *inter alia*, include delay on the part of RDSO to carry out inspection thereof, was not in a position to supply the said wagons by the end of September,

2023 and accordingly, by email dated 11th September, 2023 requested the appellant to extend the delivery period till 31 October, 2023. The appellant, by way of a letter dated 11th September, 2023 had once again, unconditionally extended the delivery period to 31 October, 2023. At the request of the appellant on 30th June, 2023 the plaintiff also caused extension of the bank guarantee No. 688401GL0001523 dated 18th January, 2023 for an amount of Rs.7,75,44,000/- (Rupees Seven crores Seventy Five Lakhs Forty Four Thousand only) to be valid and/or subsisting till 31st October, 2023, with a claim period till 31 October, 2024, which was issued by the bank on behalf of the plaintiff. While the plaintiff was proceeding in terms of the contract post the aforesaid extensions, out of the blue, in the month of October, 2023, started receiving certain emails dated 6th October, 2023, 9th October, 2023 and 29th October, 2023 whereby the appellant had purported to question the progress in respect of the works which were being carried out by the plaintiff in terms of the contract. There was absolutely no need on the part of the appellant to raise any question in respect of the works which were being carried out in terms of the contract, as the plaintiff, on a regular basis have been keeping all the concerned officers of the appellant updated in this regard.

23. Mr. Chowdhury has referred to the letter dated 30th October, 2023 issued by the appellant to show that there is a claim of Rs.1.033 crores towards liquidated damages. The liquidated damages could have been imposed provided the appellant had accepted the breach and require the plaintiff to complete the work. It further shows that the appellant has never treated time as an essence of the contract.

24. In the reply Mr. S. N. Mukherjee has submitted that time is always an essence of the contract in respect of movable properties. The judgment cited was in respect of a building contract and it is a settled law that in respect of a construction of a building time is not considered to be an essence of the contract. In this regard, the learned Senior Counsel has referred to a Division Bench judgment of this court in ***British Paints (India) Ltd. v. Union of India*; 1970 SCC Online Cal 86; AIR 1971 Cal 393** (paragraph 8).

25. On the basis of the narration of the facts and the submission made on behalf of the parties we are required to decide whether the learned Judge Commercial Court was justified in extending the ad interim order till the disposal of the suit. We are in agreement with Mr. Mukherjee that the learned Judge has misconstrued our order and did not apply proper tests in deciding the matter. It was incumbent upon the learned Judge Commercial Court to take into consideration the correspondence exchanged by and between the parties in order to ascertain whether the time was of the essence of the contract. It has to be seen if any assurance has been given by the plaintiff to execute the contract within the original period or the extended period. It is quite clear from the conduct of the appellant that although it had received the mobilization advance on 31st January, 2023 and there is no material on record to show that any attempt was made to procure the equipment. There is a complete lack of preparedness on the part of the plaintiff till the first purchase order issued on 5th August, 2023 although the delivery was to be completed by 30th September, 2023. Significantly the wagons were to be delivered by 30th June, 2023 in view of

the letter dated 30th December, 2022 seeking extension upto that date for delivery. The RSDO minutes would make it clear that initially the plaintiff was required to supply within 1st March, 2023 and even if we take into consideration the clarification dated 13th June, 2023 being the latest on the issue which only reiterates the stand of RDSO on private orders, extension granted by the plaintiff till 30th September, 2023 and it should have been completed by that time. The appellant in fact has extended the time for delivery on 11th September, 2023 till 31st October, 2023. These correspondence as referred to by Mr. S.N. Mookerjee, Sr. Advocate have been suppressed in the application for interim relief. The purchase orders issued by the plaintiff were after 30th June, 2023. The first one was issued on 5th August, 2023 with the delivery period as 30th October, 2023, the second purchase order was issued on the same date i.e. 5th August, 2023 with the delivery date of 20th October, 2023 and the third was placed on 9th October with delivery dated 29th October, 2023. This is a clear breach of the understanding. Admittedly these purchase orders were issued subsequent to first extension granted by the plaintiff and it would be well nigh impossible for the plaintiff to effect supply within 31st October, 2023 having regard to the date of delivery mentioned in the purchase orders mentioned above.

26. It is also not clear from the purchase orders that the components that are required to be procured are in relation to this present contract. There is no assertion to this effect in the pleadings. These are all relevant considerations which the learned Judge Commercial Court has overlooked and failed to take into consideration. In fact the mobilization

advance is the money paid to the plaintiff on the basis of the requests made by the plaintiff in its Techno Commercial Offer and the fact remains that the plaintiff has failed to deliver the materials within the extended period. The plaintiff has not been able to explain satisfactorily for placing two purchase orders both dated 5th August, 2023 and subsequent purchase order dated 9th October, 2023 with delivery dates 20th October, 2023 and 29th October, 2023 respectively. It is further not clear that whether all these components are the final list of components required for the manufacture of the wagons under the purchase order. There is no pleading to that effect either.

27. In view of the fact that Mr. Chaudhury has clearly submitted that the plaintiff is not disputing the enforcement of the bank guarantee having regard to the terms of the guarantee we do not feel it necessary to distinguish the judgments cited by Mr. S.N Mukherjee with regard to the invocation of the bank guarantee. The plaintiff in our view has failed to make out a case that the bank guarantee in the fact and circumstances of the case was invoked illegal by and hence the realization of the amount by the plaintiff in the given facts and circumstances cannot be held to be illegal or arbitrary. In fact it is the return of the consideration amount paid by the appellant to the plaintiff by reason of failure of consideration.

28. Moreover, the submission made by Mr. Sabyasachi Chowdhury, Sr. Advocate that having regard to the conduct of the parties time cannot be an essence of the contract is not clearly acceptable as it is in respect of movable and there was an express stipulator in the purchase order that time would be of the essence of the contract. Even the subsequent extensions made it clear that there would be no further extension beyond

30th October, 2023. In ordinary commercial contracts for the sale of goods the rule clearly is that time is “prima facie of the essence with respect to delivery”; per Lord Cairns LC in **Bowes v. Shand**; 1877 (2) AC 455. McCardie J. in **Hartley v. Hymans**; 1920(3) KB 475, in affirming the said view concluded by quoting with approval at p 484 of the report, the passage in Blackburn on Sale:

“In mercantile contracts stipulations as to time (except as regards time of payment) are usually of the essence of the contract’. If, therefore, the seller fails to deliver the goods within the stipulated time, there is breach of condition entitling the buyer to reject the goods and treat the contract as repudiated.” (emphasis supplied)

29. Where time is of the essence, and is extended, the extended date is also of the essence. In a similar matter in **British Paints (India) Ltd.**(*supra*) the Hon’ble Division Bench in paragraph 8 has observed:

*“8. Mr. Mukherjee has very strenuously contended that time was not of the essence of the Contract and that the respondent was not entitled therefore to cancel the Contract on the 1st of May on the alleged default to make delivery of the goods by the 30th April. It would appear from the Contract itself that time was specifically made of the essence of the Contract. Mr. Mukherjee submits that inasmuch as the time had been extended from time to time, it would appear therefrom that the Union of India did not consider the fixed time to be a condition precedent in this case, and, at the most, it was a warranty and nothing more and the action of the Union of India in cancelling the Contract unilaterally was an anticipatory breach, and would entitle the plaintiff to damages. In *Gomathi Nayagam v. Palaniswami*, AIR 1967 SC 868 it has been laid down that “Intention to make time of the essence of the contract may be evidenced by either express stipulations or by circumstances which are sufficiently strong to displace the ordinary presumption that in a contract of sale of land stipulations as to the time are not of the*

essence.” In this particular case, as we have already pointed out, there was an express stipulation that time would be of the essence of the Contract. It is no doubt a fact that the original time for delivery in the Contract namely 15th of October, 1952 was extended from time to time or the application express or implied of the plaintiff upto the 30th of April, 1953. In its telegram as also letter dated the 3rd March, 1953 the defendant made it quite clear that there would be no further extension of time. In *Md. Habidullah v. Bird and Co.*, ILR 43 All 257 : (AIR 1922 PC 178) it has been held by the Privy Council that when after the seller of goods has failed to deliver them at the agreed time the buyer has agreed to an extension of time for delivery, the effect of Section 55 of the Indian Contract Act is that the buyer is entitled to damages computed in the ordinary way, if the seller fails to deliver within the extended time. In *Orissa Textile Mills Ltd. v. Ganesh*, AIR 1961 Pat 107 it has been held that generally speaking stipulations regarding time for delivery of the goods are deemed to be of the essence of the Contract in mercantile transactions and that where time is of the essence of the Contract and is extended, the extended date is also of the essence of the Contract. Mr. Mukherjee, with his usual fairness, has placed before us the aforesaid two decisions and has also relied on *Burn & Co. v. Morvi State*, 90 Ind Cas 52 : (AIR 1925 PC 188), and more particularly on *Hindusthan Construction Co. v. State of Bihar*, AIR 1963 Pat 254. In *Burn & Co.*'s case the Privy Council, on an interpretation of the terms of the Contract, came to the conclusion that the intention of the parties when the Contract was made, was that time should be of the essence of the Contract. In the *Hindusthan Construction Co.*'s case the court, on an analysis of the terms and specially in view of the facts, that there was a provision for daily damages after the default is made, and the State of Bihar which had the option of determining the Contract did not avail itself of the option, held that time was not of the essence of the Contract. The facts in that case are entirely different from the facts, of the present case wherein the plaintiff had asked for extension of time again and again and the defendant had reluctantly to agree thereto.

Even, in this decision it has also been laid down that an intention to make time of the essence of the Contract must be expressed in explicit and unmistakable language in the agreement itself and if by any means such an intention is not explicit, it may be inferred from the antecedent conduct of the parties and surrounding circumstances but not from the subsequent conduct of the parties after the Contract was made We are therefore, of opinion that in this particular case time was of the essence of the Contract and this time would also include the extended time as agreed upon by both the parties. This term in the agreement was a condition precedent and not a mere warranty.”
(emphasis supplied)

30. The sequence of events would lead to the conclusion that the plaintiff has failed to show that it has done all that it could to ensure timely supply even within the extended period.

31. Injunction is a discretionary and equitable relief. The plaintiff is required to approach the Court with clean hands and to disclose all material facts. The entire material facts in relation to the contract and its performance are required to be stated by the plaintiff and it is only upon consideration of such facts, the Court shall decide whether the plaintiff is entitled to any discretionary relief at the ad-interim stage. The consequence of non-disclosure of material facts has been succinctly stated in **R v Kensington Income Tax Commrs.**¹ famously known as Russian princess case as follows:

"[I]t has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts--facts, not law. He must not misstate the law if he can help it--the

¹(1917) 1 KB 486 : 86 LKKB 257 : 116 LT 136 (CA)

court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside, any action which it has taken on the faith of the imperfect statement." (emphasis supplied)

32. The plaintiff is also duty bound to bring it to the notice of the Court all correspondence even if some of such correspondence may have been against the plaintiff. The exchanges between the parties during the contract are relevant and the plaintiff cannot be heard to contend that although correspondence which may be in favour of the defendant have been disclosed, the Court has not considered such correspondence. Did the plaintiff has in fact referred to such correspondence and invited the court to take note of the contents of such correspondence? Lack of specific reference to such documents although disclosed in the petition on the part of the plaintiff at the ad interim stage would be a reason for recalling of the ex parte order as the said documents are relevant and could have a bearing on the discretion to be applied by the learned Trial Judge. Moreover, as mentioned earlier all the relevant documents have not been disclosed. Indubitably the court is required to find out if material facts have been stated and disclosed in the pleading and it is always open to the plaintiff to argue and contend that the facts which the defendant has disclosed now and claimed to be necessary are in fact not material for a decision on the issue. In the given facts and circumstances of the case the correspondence disclosed by the plaintiff before the learned

Judge, Commercial Court cannot be said to be irrelevant and inconsequential. Those correspondence as disclosed by the appellant completes the entire chain of events. The plaintiff has made selective reference to some correspondence which does not truly disclose the events that ultimately resulted in termination of the contract. The correspondence disclosed by the appellant are relevant and material. We could not find any plausible explanation from the plaintiff for not disclosing such correspondence.

33. If the Court comes to a finding that the application does not fairly state the facts, but is stated in such a manner as to mislead the Court as to the true facts, the Court would be entitled to refuse to proceed any further with the examination of the case on merits. This is a power inherent in the Court. Significantly, the injunction application apart from not disclosing all the correspondence exchanged by and between the parties, contains statements that were very far from being honest and candid. It seems that on the day the first impugned order was passed reference was not made to the three purchase orders which unmistakably would show that they were all issued after 30th June 2023 and it was impossible for the plaintiff to execute the contract even within the period extended thereafter upto 31st October 2023. However, when the learned Commercial judge was directed to hear the matter afresh on an affidavit to be filed by the defendant, it seems that the learned judge, Commercial Court has failed to lay emphasis on these facts and also the correspondence exchanged between the parties as disclosed in the affidavit filed by the

defendant before the learned judge, Commercial Court and did not even refer to those documents while deciding the issue and has failed to exercise jurisdiction under Order 39 Rule 4 of the Code of Civil Procedure.

34. In the first round of litigation the purchase orders placed by the plaintiff on 5th August, 2023 and 9th October, 2023 are not even referred to and when these documents were placed and argued on the date fixed before the Judge, Commercial Court pursuant to our order dated 19th November, 2024, the learned Judge Commercial Court has failed to take into consideration the contents and purport of the said two documents which on a bare reading read with other disclosures would clearly show the complete lack of readiness on the part of the plaintiff to execute the contract. The said three purchase orders would clearly show on the face of it that the plaintiff would be unable to execute the contract even within the extended period. Moreover, there is no material on record to establish a connection between the purchase orders and the materials to be procured by the plaintiff for the manufacture of wagons under the contract.

35. In view thereof, the appeal succeeds.

36. The impugned order is set aside.

37. However there shall be no order as to costs.

I agree

(Soumen Sen, J.)

(Biswaroop Chowdhury, J.)