

HEADING OF DECISION IN CIVIL SUITS
IN THE COURT OF 1st ADDL.SENIOR CIVIL JUDGE, BHUBANESWAR

*Present :- Pranab Kumar Routray, LL.,M,
1st Addl. Senior Civil Judge,
Bhubaneswar.*

C.S.47/15 of 2008/1998

M/s.Indian Metals & Ferro Alloys Ltd.
having its Regd. Office at Bomikhal,
P.O.:- Rasulgarh, Bhubaneswar,
Dist- Khurda, represented through
its Asst. Secretary Mr. S.R. Ray

... **Plaintiff**

-Versus-

M/s. National Aluminium Co. Ltd.
IDCO Tower, Janpath,
Bhubaneswar- 751007

... **Defendant**

COUNSEL APPEARED

For the Plaintiff : Sri R.N. Mohanty and associates

For the Defendant : Sri P.K. Das

DATE OF CONCLUSION OF ARGUMENT : **19-08-2014**

DATE OF JUDGMENT : **09-09-2014**

J U D G M E N T

This is a suit for realisation of money of Rs.2,37,170/- with interest and with cost and for declaration that the plaintiff is not liable to pay compensation of Rs.3.88 lakhs.

2. The case of the plaintiff in short is that the plaintiff company on behalf of their principal confirmed supply of 250 M.T. of Silicon metal to the defendant against the enquiry of the defendant by its tender dated 08-07-1994 after negotiation and discussion. Defendant placed its purchase order on the principal company of the plaintiff with certain terms. Prior to issuance of purchase order the plaintiff made it clear that they were offering to supply on behalf of the principal and also communicated that the principal company have agreed to execute Performance Bank Guarantee Bond and also agreed to pay liquidated damages in case of delay in execution of the contract. Due to unforeseen events like outbreak of plague in India the execution of contract was delayed and the Chinese supplier found it difficult to ship the material and increase the freight and proposed Chinese supplier to deal directly with the defendant and accordingly plaintiff issued a letter offering two alternative terms either to buy goods on F.O.B. Xingang Port, China without any price escalation or the order be placed directly on the plaintiff at the agreed price with exemption of execution of performance bank guarantee. But the defendant did not agree to that but however agreed to transfer the business to

the Chinese supplier subject to condition that the principal company of the plaintiff was to accept to assume all responsibilities for execution of the order. Accordingly, the bank guarantee offered by the plaintiff was extended with claim period upto 29-05-1995 and the supply was assigned to different supplier by the defendant. In spite of the change of seller, the principal company of the plaintiff assured the plaintiff to give 2 US Dollar per one metric tonne towards commission. The principal of the plaintiff-company being responsible for execution of contract, communicated to the defendant that the Chinese supplier was refusing to issue Performance Bank Guarantee according to the terms and conditions of the defendant. The defendant was aware that the supply was being delayed not due to the principal company but for the third party and even though a bank guarantee of the plaintiff was valid till May, 1995 but the defendant arbitrarily and unilaterally canceled the contract and forfeited the security deposit of Rs.1,00,000/- offered by the plaintiff without giving any opportunity and also made the plaintiff responsible to compensate for the extra financial burden in making alternative purchase and asked to pay a sum of Rs.3.88 lakhs for the same. Hence, the plaintiff filed the suit for realisation of the forfeited Bank guarantee amount with interest alongwith the loss sustained towards commission and damage for ill reputation and

also for a declaration that they are not liable to pay the compensation as claimed by the defendant.

3. Defendant filed a written statement challenging the suit on maintainability in law and facts, cause of action, non-joinder of necessary parties, on the point of limitation and misrepresentation. It is also challenged that the suit is not tenable in view of the arbitration Clause No.21 provided in General Purchase Conditions for imports (G.P.C. 1) and Clause No.25 provided in General Purchase Conditions for Indigenous Purchase and this Court is not competent to adjudicate the dispute. It is the case of the defendant that he was in urgent need of 250 MT. Silicon metal for which he floated tender enquiry from supplier of international repute. M/s. Oriental Wealth International Ltd., Hongkong (Principal of the plaintiff-company) offered to supply the same materials of Chinese origin and appointed the plaintiff as their local agent authorising to submit quotation on their behalf. Accordingly, the plaintiff submitted tender, bank guarantee of Rs.1,00,000/- towards EMD and also agreed to all the terms and conditions of tender including submission of Performance Bank Guarantee Bond (PBG) and accordingly furnished bank guarantee for Rs.1,00,000/- undertaking full responsibility to indemnify the defendant corporation in case of default of supply.

4. The defendant placed purchase order on the principal company on 29-09-1994 with a copy to the plaintiff

for supply of 250 MT of Silicon Metal with some conditions like (i) A PBG for US \$ 21,075/- has to be submitted by the seller within 15 days from the date of order (ii) the letter of credit will be opened after receipt of PBG and (iii) shipment shall be made within six weeks from receipt of letter of credit. On 17-10-1994 defendant reminded for submission of order of acceptance and PBG Bond. But on dtd.20-10-1994 the plaintiff asked the defendant for converting the order from C.F.R to F.O.B terms placing direct order on them with waival of PBG and with some other conditions but the defendant did not agree and again reminded for submission of PBG Bond. Since the original Bank guarantee of E.M.D. was expiring on 29-10-1994, the plaintiff had extended its validity by one month. On the request of plaintiff and its Principal, the defendant on 07-11-1994 confirmed acceptance of M/s. Shanxi Taiyan Import & Export Trading Corporation as supplier without changing the beneficiary of original order and the principal company of the plaintiff to continue to be the beneficiary of the order as there was no direct order from the aforesaid trading corporation but on the said date the defendant set dead line for submission of PBG as 16-11-1994 failing which the purchase order will be cancelled at the seller's risk and cost. PBG was not submitted on the ground that their Banker, Bank of China was reluctant to issue the same according to defendant's requirement and again requested to waive the PBG. In the event of such non-

performance of contract, the defendant was compelled to cancel the order and was compelled to purchase the materials incurring additional expenditure of Rs.3.88 lakhs. Hence, the defendant claim their action to be justified and also claim that the plaintiff and their Principal are liable to pay Rs.3.88 lakhs for the loss caused to them.

5. With the aforesaid pleadings of the parties the following issues have been framed :

ISSUES

1. Is the suit maintainable ?
2. Is there any cause of action for the suit ?
3. Whether the plaintiff is entitled to recover the suit amount from the defendant with interest @18% per annum ?
4. Whether the plaintiff had executed a bank guarantee in favour of the defendant for Rs.1,00,000/- on 30-07-1994 as per the terms of the purchase order ?
5. Whether the defendant cancelled the purchase order and encashed the bank guarantee on 01-12-1994 and forfeited the amount without giving any opportunity to the plaintiff as per terms of the purchase order ?
6. Whether the plaintiff is entitled to a damage of Rs.50,000/- towards its ill-reputation ?

7. Is the jurisdiction of this Court is ousted by virtue of the arbitration clause no.21 and 25 of the purchase order ?
8. Whether the suit is barred by limitation ?
9. Whether the suit is bad for non joinder of necessary party?
10. To what other relief the plaintiff is entitled ?

6. In order to prove the case, the plaintiff has examined only witness namely Sachindra Narayan Sarangi, Assistant Manager (Marketing) of the plaintiff-company and produced and proved 17 documents. On the other hand, the defendant has examined one witness namely Sanjeev Singh, Manager, Materials of the defendant-company and marked documents vide Ext.A to K. The list of the documents are appended at the foot of the judgment.

With the aforesaid evidence on record the issues as framed are to be answered.

FINDINGS

Issue no.4 :

7. This is the issue to decide as to whether the plaintiff has executed a bank guarantee in favour of the defendant for Rupees One lakh on dtd.30-07-1994 as per the terms of the purchase order. It is the evidence of P.W.1 that it was stipulated in the tender notice that the tender must be

accompanied with an earnest money deposit of Rupees One lakh by way of cross demand draft or bank guarantee drawn on any nationalised bank payable at Bhubaneswar in favour of defendant-company in the prescribed format without which the tender shall be liable for outright rejection. In his cross-examination in para 68, P.W.1 has admitted that as per condition of tender the principal supplier is to submit the bank guarantee of Rs.1 lakh and if the bank guarantee would not be submitted by the tender purchaser the tender would be liable to be rejected. He also admitted that the bank guarantee was furnished for & on behalf of principal supplier. It is admitted by the defendant in written statement that the plaintiff furnished bank guarantee executed by Indian Overseas Bank, Main Branch, Bhubaneswar, dated 30-07-1994 for Rupees One lakh under taking full responsibility to indemnify the defendant corporation in case of default of supply. Hence, the materials on record clearly speaks that the plaintiff has executed the bank guarantee in favour of the defendant of Rupees One lakh. This issue is answered accordingly.

Issue nos.3, 5 & 6 :

8. These issues are the vital issues and interlinked for which taken up together. It is already held under issue no.4, that the plaintiff has executed a bank guarantee for Rupees One lakh in favour of the defendant as per the terms of the purchase order. It is the claim of the plaintiff that the said

bank guarantee has been encashed and forfeited by the defendant by cancelling the purchase order without giving any opportunity to the plaintiff even though the bank guarantee was valid till May 1995. Further plea of the plaintiff is that there is no breach of contract rather frustration of contract due to supervening impossibility. On the other hand, it is the stand of the defendant that the plaintiff submitted the tender paper for and on behalf of their principal and although the plaintiff has provided the bank guarantee covering earnest money that it was on behalf of their principal on whose behalf they had submitted the tender and had agreed to execute Performance Bank Guarantee and to pay liquidated damages in case of delay in execution of the contract but after giving sufficient opportunity the plaintiff and their foreign supplier did not supply the material by violating terms and condition of contract for which the defendant was constrained to cancel the contract and to forfeit the Bank guarantee in view of stipulation in Clause 6 of the tender notice and the plaintiff is also aware about such cancellation of contract and forfeiture of bank guarantee. It is also claimed that the plaintiff being an agent cannot claim any damage.

9. There is no dispute that the plaintiff is agent of M/s. Oriental Wealth International Ltd. There is also no dispute that the defendant enquired by its tender dtd.08-07-94 for supply of 250 MT of Silicon Metal and the plaintiff vide

letter dtd.14-09-94 on behalf of their Principal confirmed supply of the said material. Plaintiff has exhibited the letter of defendant dtd.08-07-94 vide Ext.2 which contains notice inviting tender and in that notice it is specifically mentioned that the tender must be accompanied with earnest money deposit by way of cross demand draft or bank guarantee drawn on any Nationalised Bank in favour of defendant-company for Rupees One lakh with a further condition that the tender documents without being accompanied with requisite earnest money deposit will be liable for outright rejection. On further careful perusal of Ext.2, it reveals that it is also mentioned therein that if the tenderer after submitting the tender revokes his offer or modifies terms and conditions thereof in a manner not acceptable to the purchaser, the earnest money / bank guarantee shall liable to be forfeited and tender will be rejected. Hence, the bank guarantee of Rupees One lakh is a precondition to tender. The plaintiff has fulfilled that condition and ofcourse on behalf of their Principal. Ext.2 further reveals that a Performance Bank Gurantee for 10% of the total contract value shall have to be furnished in the prescribed format given under the tender document within 15 days of the order placement and to remain valid till complete execution of contract. This means that Performance Bank Guarantee (in short P.B.G) is to be furnished within 15 days of placement of order. Ext.3, letter of the plaintiff dtd.29-07-94 to defendant is a vital document in

this context which reveals that the plaintiff on behalf of their Principal offered to supply material of Chinese origin and intimated the defendant that their Principal had agreed to execute Performance Bank Guarantee and also intimated the defendant that they have provided Bank Guarantee covering earnest money and their Principal has agreed to furnish Performance Bank Guarantee as stipulated by the defendant and also agreed to pay liquidated damages in case of delay in execution of the contract. The said letter further reveals that the Principal would be responsible for execution of the order and shall also be liable for timely delivery. It is the claim of the defendant that the plaintiff could not furnish Performance Bank Guarantee and therefore letter of credit was not issued by them.

10. Ext.5, letter dtd.29-09-94 of defendant is the order for supply of the materials as per terms and conditions mentioned therein and it was requested for acceptance of the purchase order within seven days of issue failing which the order will be deemed to have been accepted. Further, Ext.5 reveals that it was issued after considering the tender vide Ext.2, offer of plaintiff dtd.29-07-94 (Ext.3) and letter of plaintiff dtd.23-09-94 (Ext.C). Ext.C reveals about confirmation of plaintiff about price of metal per Metric Tonne and also about the quality of material. On careful perusal of Ext.5 i.e. the purchase order it is found that it is prepared in confirmity with Ext.C. During cross examination of D.W.1 in para-15 of cross-

examination the plaintiff is taking the stand that Ext.C has not been referred to in the written statement. But on perusal of the written statement it is found that defendant has averred in para-8 of the written statement about placement of purchase order on the Principal Supplier with a copy to the plaintiff. So, when copy of the purchase order is with the plaintiff and the plaintiff is relying on the said document i.e. Ext.5 wherein there is reference of Ext.C, under such circumstances, bringing of Ext.C into evidence without particularly mentioning about the detail of the said document in written statement is certainly not beyond pleadings. This apart, Ext.C is the document of plaintiff and no objection was raised when it was marked as exhibit from the side of defendant.

11. Now it is to be seen that what was the action of plaintiff on receiving of Ext.5. On perusal of the documents and the oral evidence of the witnesses it is found that within seven days of issuance of Ext.5, plaintiff has not issued any letter acknowledging acceptance of the order. The next communication between the parties is Ext.D, letter of defendant dtd.17-10-94 to the plaintiff asking the plaintiff for submission of P.B.G alongwith order acceptance for opening of Letter of Credit immediately. In the said letter, defendant also expressed about the urgent requirement of the Silicon Metal. The plaintiff is also taking the plea while cross examining D.W.1 in para 15 that Ext.D has not been referred in the written statement. But on

a perusal of written statement it is found that the defendant has clearly averred in para 8 about sending of letter dtd.17-10-94 i.e. Ext.D. The plaintiff is also taking the plea in para-18 of cross examination of D.W.1 that Ext.D was not sent to them and is created later by the defendant. But it is found from Ext.6, letter of plaintiff dtd.20-10-94, that plaintiff has written the said letter to the defendant with reference to defendant's letter no.NBC/CMM/94 dtd.17-10-94 i.e. Ext.D. So, it is clearly found that plaintiff was well aware about Ext.D. Hence, the stand of the plaintiff that Ext.D was not issued and that the defendant has not asked for submission of P.B.G is not sustained.

12. The plaintiff has taken stand that due to recent outbreak of plague in India the contract could not be executed. In this regard the plaintiff has adduced evidence as well as produced and proved their letter dtd.20-10-1994 vide Ext.6. On perusal of the said letter it is found that the plaintiff has intimated the defendant-company that due to outbreak of plague in India there was some set backs and though the epidemic was under control but seriously affected international trade and they have been informed by the Chinese supplier that the shipping companies were demanding exorbitantly high ocean freight for which the Chinese supplier requested for increase of price to accommodate the enhanced freight cost. In the said letter it is also suggested that the Chinese supplier was

prepared to sell the material without any price escalation in case the defendant to buy on F.O.B Xingang port basis. The plaintiff also suggested two alternatives. The first alternative is that the defendant to buy the goods F.O.B. Xingang port China basis in which case the Chinese supplier was still willing to supply the goods without any price escalation but the seller required one month time to prepare and make the material load-ready. The other alternative is that the defendant to place the order to the plaintiff directly who would supply on the agreed price but the plaintiff should be exempted from executing Performance Bank Guarantee and also offered some other conditions. But another document filed by the plaintiff vide Ext.7 which is a letter of defendant dtd.22-10-94 speaks that the defendant did not agree to accept any of the alternative proposal of the plaintiff and expressed their concern about extreme urgency of their requirement of the material and also requested the plaintiff to supply the same as per the agreed contractual terms and conditions and also requested to arrange extension of bank guarantee upto end of November, 1994 pending receipt of Performance Bank Guarantee from the principal company of the plaintiff. The further materials on record as supplied by the plaintiff and the defendant particularly from Ext.10 and Ext.E reveal that the defendant agreed to accept M/s. Shanxi Taiyuan Import and Export Trading Corporation in place of the existing Principal M/s Oriental Wealth International Ltd. but the

defendant accepted only the name of new Principal but no terms and conditions and rates were changed. Ext.E, letter dtd.07-11-94 of defendant further reveals that unless the defendant received Performance Bank Guarantee for 10% of order value from the Principal through the plaintiff and their unqualified acceptance of the order within 16th November, 1994 they would cancel the order and would also forfeit the E.M.D. It is the claim of the plaintiff that they have not received Ext.E. But it is admitted by the plaintiff through Ext.11 which is a letter of dtd.19-11-94 that the banker of Chinese supplier was reluctant to issue Performance Bank Guarantee and accordingly the defendant was requested to waive the P.B.G and to issue letter of credit. On this context, it is said that it was clearly known to the plaintiff, that, as per the contract, letter of credit can only be issued after receiving of P.B.G.

13. Outbreak of plague in India was not disputed by the defendant which is one of the reasons shown by the plaintiff for frustration of contract and it is argued on behalf of the plaintiff that therefore onus is on defendant to prove that as to why the contract was not performed. But considering Ext.6, the letter of the plaintiff itself which reveals that the plaintiff has proposed two alternatives for supply of the material and out of those two alternatives, the plaintiff agreed to supply material of Chinese origin C.N.F Vizag Port (high sea sale) basis at already agreed price but sought for exemption of execution of

P.B.G and some other conditions and also agreed to sail from Xingang Port during November, 1994. The said letter itself reveals that the epidemic was under control by then. The said letter further reveals that it was requested to the defendant for increase of US \$ 35 per metric tonne in C.N.F price to accommodate the enhanced freight cost. Hence, from the letter of the plaintiff itself it is gathered that outbreak of plague in India was not supervening event which made performance of the contract impossible. Had it been so, then as to how the plaintiff had proposed to supply the material directly even in that situation.

14. The plaintiff has taken the other stand that they have not committed breach of contract rather it was frustrated as the banker of Chinese supplier did not agree to issue P.B.G. It is held in *Alopi Parshad and sons Ltd. -Vs.- Union of India* reported in AIR 1960 SC 588 at 593-94 that a contract is not frustrated because its performance has become more onerous or burdensome namely, because abnormal rise or fall in prices, a sudden depreciation of currency or an unexpected obstacle to the execution of the contract. Halsbury's laws of England, Volume 9 4th Edn. Para 455 says that a party's insolvency or inability to get finance will not discharge him, unless, ofcourse, the parties have agreed otherwise. Hence, considering such authorities of law, in the present case, the

reluctance of Banker of Chinese supplier to issue P.B.G is certainly not a ground for frustration of the contract.

15. Now it is to be finally found that whether the cancellation of the contract by the defendant and forfeiture of bank guarantee was arbitrary and unilateral. In this regard, defendant is relying on Ext.E and is claiming that it was intimated to the plaintiff on dtd.07-11-1994 about failure of the plaintiff in submission of P.B.G and also requested the plaintiff to submit P.B.G within 16th November or else they would cancel the order and would forfeit EMD. It is the stand of the plaintiff that Ext.E was not sent to them. It is found that Ext.12 is the letter dtd.01-12-1994 of the defendant wherein it was intimated to the plaintiff about cancellation of the order and forfeiture of earnest money. On perusal of the said document it is found that the defendant has referred their earlier letter no.NBC /GM(M) / 7765 /94 dtd.07-11-1994. But further careful perusal of all documents it is found that the said letter referred is not Ext.E rather it is Ext.10 i.e. letter no.NBC / GM(M)/ 7765 / 94 dtd. 07-11-1994. Ext.E is not letter no.7765 dtd.07-11-1994 but letter no.7764 dtd.07-11-1994. Hence, the stand of the plaintiff that he has not received Ext.E is found to be correct. However, Ext.11 is a very important piece of document which is letter of plaintiff of dtd.19-11-1994 to the defendant accompanied with the letter of their Principal dtd.18-11-1994. The letter of the Principal

M/s. Oriental Wealth International Ltd. to the plaintiff reveals that since the banker of Chinese supplier was reluctant to issue the P.B.G to NALCO's terms and conditions the only possibility is to waive the P.B.G and just issue Letter of Credit for December shipment and in case this condition was not agreed the business could not be effected. The plaintiff has sent such letter of their Principal alongwith Ext.11 to the defendant seeking kind advice in the matter so as to take it up with the Chinese supplier suitably. On this point, it is firmly said that there was earlier correspondence by the defendant that in no case the P.B.G can be waived out. It is already held that Letter of Credit can only be issued after getting P.B.G as per the contract and therefore considering Ext.11 it is safely held that the Principal of the plaintiff-company did not intend to execute the contract and hence, committed breach of contract. Hence, no notice is required to be issued for cancellation of contract and forfeiture of bank guarantee as per Clause 6 of Tender notice vide Ext.2 which is considered as part of contract as per Clause 16 of the purchase order vide Ext.5. Hence, it is concluded that the cancellation of the contract and forfeiture of bank guarantee by the defendant is not arbitrary and unilateral.

16. Now it is to be seen that whether the plaintiff is entitled to recover the suit amount from the defendant with interest @18% per annum. The plaintiff is agent of M/s. Oriental Wealth International Ltd. on whose behalf the

plaintiff has deposited the earnest money. So it is to be held that the earnest money was deposited by the Principal. It is argued on behalf of the defendant that the plaintiff may recover the forfeited amount and the loss of commission (if any) from their Principal and it was also argued that as per Clause 10 of the Contract vide Ext.5 the plaintiff is the authorised Indian representative / agent who will co-ordinate / liaise for all related activities in India with the buyer till final acceptance of the material at site, as per agreed terms but no Indian agency commission or any such charges are separately payable by the buyer. On perusal of Ext.5 it is found that there is much force in the submission of the learned counsel for the defendant and Clause 10 of Contract speaks no commission or any such charges as separately payable to the plaintiff by the defendant. Hence, the claim of the plaintiff that they are entitled for recovery of the commission which they were deprived is not maintainable. Accordingly, the plaintiff is not entitled to recover the forfeited amount and the commission from the defendant.

17. So far as plaintiff's claim for compensation of Rs.50,000/- towards its ill reputation is concerned, when it is already held that the termination of contract by the defendant was not unilateral rather the plaintiff has committed breach of contract, under such circumstances question of payment of damage towards ill reputation does not arise. Hence, the plaintiff is not entitled for the same.

18. So far as claim of the plaintiff that they are not liable to pay compensation of Rs.3.88 lakhs to the defendant is concerned, when it is claimed by the defendant that the plaintiff is not entitled for any amount from them being agent of another company-supplier, under this circumstance it can be safely said that the agent cannot be personally liable for alleged breach of contract. On this point learned counsel for the plaintiff relied on a decision reported in AIR 1999 Bombay 401 wherein it is held that a contract entered into by agent contracting on behalf of foreign principal who was named and disclosed and while contracting, agent has not undertaken any personal liability, then, agent cannot be sued personally nor made personally liable for alleged breach of contract. In the case at hand the plaintiff is agent of a foreign principal who was named and disclosed and has also not taken any personal liability and therefore the claim of the defendant through their letter dtd.05-04-95 vide Ext.J asking the plaintiff to pay a sum of Rs.3.88 lakhs towards extra expenditure incurred by them on purchase of material from alternative sources and towards loss suffered by them due to breach of contract is not maintainable as against the plaintiff. The plaintiff being an agent cannot be held personally liable to pay compensation to the defendant. These issues are answered accordingly.

Issue no.7:

19. This issue relates to the jurisdiction of this Court to adjudicate the matter. It is the claim of the defendant that the suit is not tenable in view of Arbitration Clause no.21 provided in General Purchase conditions for imports and Clause no.25 provided in General Purchase Order for indigenous purchase. Admittedly the aforesaid Clause 21 and 25 reveals that any dispute or difference between the seller and the purchaser of any kind arising at any time shall be referred to arbitration. Learned counsel for the plaintiff placed reliance on the decision reported in 76 (1993) CLT 688 between Janpath, Bhubaneswar vrs. Pratap Chandra Samal wherein it is held by Hon'ble High Court that filing of suit is not a bar in existence of arbitration agreement. In a decision reported in AIR 1973 SC 2071 between the State of Uttar Pradesh & another vrs. M/s. Janaki Saran Kailash Chandra & another in which their Lordships have expressed the view that when a suit is filed in respect of matters within the scope of arbitration agreement, the Court can exercise its discretion with regard to stay of the suit U/s.34 of the Arbitration Act, 1940 but the said discretion is to be exercised only when an application under that Section is otherwise competent. It is further stated that if the defendant has something in aid of the progress of the suit or has submitted to the jurisdiction of the Court for the purpose of

adjudication on merits of the controversy in the suit, such discretion U/s.34 of the Act is not available to be exercised.

20. Section 8 (1) of the Arbitration and Conciliation Act 1996 speaks that the judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall refer the party to arbitration but the party must apply before submitting his first statement. In the case at hand, the defendant has filed written statement, participated in the trial but has not filed any application before submitting his written statement. Hence, in view of the aforesaid authorities of law as cited and Section 8 (1) of the Arbitration and Conciliation Act 1996 this Court has jurisdiction to adjudicate the matter inspite of Clause 21 and 25 of the purchaser. This issue is answered accordingly.

Issue no.8 :

21. The defendant claims that the suit is barred by limitation on the ground that the defendant forfeited the security deposit of Rs.1,00,000/- of the plaintiff on 01-12-94 but the suit is filed for recovery of the forfeited amount on 12-01-98 which is beyond three years and therefore the suit being filed beyond three years is barred by limitation. The plaintiff is claiming that cause of action arose on 04-03-96 when the defendant-company called upon them through Ext.13 to pay Rs.3.88 lakhs by 15-03-96 towards extra expenditure incurred in purchasing the material from alternative source and for the

loss sustained by the breach of contract. Hence, cause of action arose on 04-03-94 because the letter dtd.01-12-94 of the defendant vide Ext.12 does not disclose about the extra financial burden taken by the defendant and forfeiture of Bank Guarantee. Considering Exts.12 and 13, it is held that the suit is well within the period of limitation.

Issue no.9 :

22. It is the claim of the defendant that the suit is bad for non joinder of necessary party as the plaintiff is agent and was only co-ordinating on behalf of Principal. It is the stand of the plaintiff that there was no contract between the Principal Supplier and the plaintiff that the Principal will be liable for forfeiture of Bank Guarantee and as the Bank Guarantee was given by the plaintiff to the defendant, the same is to be recovered from the defendant. In the facts and circumstances of the case and considering the pleadings of the defendant and prayers of the plaintiff the suit will not be defeated due to non-joinder of party.

This issue is answered accordingly.

Issue nos.1, 2 & 10 :

23. The defendant raised a very vital point that the plaintiff-company has not been properly represented. He invited attention of the Court to the original plaint and submitted that the plaintiff-company was first represented by its branch accountant and authorised agent Sri Tapan Kumar Parida whereas the consolidated plaint filed on 07-12-2010 reveals that

the plaintiff-company has been represented by P.W.1. It is forcefully argued that the cause title of both the plaints shows that the plaintiff-company has not been properly represented because Board of Directors has not appointed a person to represent the plaintiff-company by passing any Resolution rather one Director has executed Power of Attorney in favour of P.W.1 to represent the company which is not in consonance with relevant provisions of Companies Act and Order 29 Rule 1 of C.P. Code. On the other hand, the learned counsel for the plaintiff contended that by the time the original plaint was filed there was no law officer to pursue cases in Court of Law for which the Branch Accountant filed the plaint representing the plaintiff-company. The person namely Tapan Kumar Parida who presented the original plaint on behalf of the company had left the plaintiff's company in the meanwhile as evident from evidence of P.W.1. After appointment of Law Officer, he was empowered by Director of the Company through Registered Power of Attorney to file case on behalf of the company.

24. The language of Order 29 Rule 1 needs to be quoted here to solve this problem :

“Order29 Rule1- Subscription and Verification of Pleading-In suits by or against a Corporation, any pleading may be signed and verified on behalf of the Corporation by the Secretary or by any Director or other principal officer of the Corporation who is able to depose to the facts of the case.”

25. A bare reading of Order 29 Rule 1 speaks that a Principal Officer of the Corporation can sign and verify the pleading on behalf of the Corporation if he is able to depose to the facts of the case. In the present case P.W.1 is a Principal Officer of the plaintiff-company and has deposed ably on the facts of the case. This apart, a case law reported in AIR 1997 SC 3 (at para 4) speaks that *“It cannot be disputed that a company like the bank can sue and be sued in its own name. Under O. 6 R. 14 of C.P.C a pleading is required to be signed by the party and its pleader, if any. As a company is a juristic entity, it is obvious that some person has to sign the pleadings on behalf of the company. Order 29, Rule 1 of C.P.C., therefore, provides that in a suit by or against a corporation the Secretary or any Director or other Principal Officer of the corporation who is able to depose to the facts of the case might sign and verify on behalf of the company. Reading Order 6, Rule 14 together with O. 29, R. 1 of Code of Civil Procedure it would appear that even in the absence of any formal Procedure it would appear that even in the absence of any formal letter of authority or power of attorney having been executed a person referred to in R.1 of O. 29 can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. In addition thereto and de hors O. 29 R.1, as a company is a juristic entity, it can duly authorize any person to sign the plaint or the written statement on its behalf and this*

would be regarded as sufficient compliance with the provisions of O. 6, R.14. A person may be expressly authorized to sign the pleadings on behalf of the company, for example by the Board of Directors passing a resolution to that effect or by a power of attorney being executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers a Corporation can ratify the said action of its officer in signing the pleadings. Such ratification can be express or implied. The Court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by its officer.”

26. In the present case, Power of Attorney has been executed in favour of P.W.1 to present the plaint and to pursue the case. On the basis of evidence on record and considering the circumstances of the case with regard to conduct of trial it is found that the plaintiff- company has ratified the act of signing of the pleading by its officer. The material on record reveals that there is cause of action to file the suit and the suit so filed is maintainable. So far as issue no.10 is concerned, the plaintiff is not entitled for any other relief. These issues are answered accordingly.

Hence, it is ordered.

ORDER

The suit be and the same is partly decreed on contest against the defendant but under the circumstances without cost. It is hereby declared that the plaintiff is not liable to pay compensation amount of Rs.3.88 lakhs to the defendant as claimed towards extra expenditure incurred by the defendant.

*Ist. Addl. Senior Civil Judge,
Bhubaneswar*

The judgment is typed to my dictation by the typist attached to this Court directly on the computer provided under E-Court Project, corrected and pronounced by me in the open Court today i.e. on the 9th day of September, 2014 under my seal and signature.

*Ist. Addl. Senior Civil Judge,
Bhubaneswar*

List of Witnesses examined for the Plaintiff:

P.W.1 : Sri Sachindra Narayan Sarangi

List of Witnesses examined for the Defendant :

D.W.1: Sri Sanjeev Singh

List of Documents marked as Exhibits for the Plaintiff:

- Ext.1: Authorisation letter ;
- Ext.2: Letter dtd.08-07-1994 from the plaintiff ;
- Ext.3: Letter dtd.29-07-1994 ;
- Ext.4: Letter dtd.14-09-1994 ;

- Ext.5: Purchase order dtd.29-09-1994 ;
- Ext.6: Letter dtd.20-10-1994 from the plaintiff to the defendant ;
- Ext.7: Fax letter dtd.22-10-1994 to the plaintiff by the defendant ;
- Ext.8: Fax letter dtd.24-10-1994 from M/s.Oriental to the plaintiff ;
- Ext.9: Letter dtd.29-10-1994 from Indian Overseas Bank, Bhubaneswar ;
- Ext.10: Purchase order of the defendant amendment dtd.07-11-1994 ;
- Ext.11: Letter dtd.19-11-1994 with enclosure of plaintiff to the defendant ;
- Ext.12: Letter dtd.01-12-1994 of defendant ;
- Ext.13: Letter of the defendant dtd.04-03-1996 to M/s. Oriental Wealth International Ltd. ;
- Ext.14: Letter dtd.05-04-1996 to the defendant ;

Ext.15: Legal notice of the plaintiff dtd.08-07-1997 to the defendant with AD ;

Ext.16: Letter of defendant dtd.26-08-1997 to the plaintiff ;

Ext.17: Letter dtd.31-10-1994 ;

List of Documents marked as Exhibits for the Defendant:

Ext.A: Authorisation letter ;

Ext.B: Bidding ;

Ext.C: Final Price Bid submitted by plaintiff ;

Ext.D: Letter of plaintiff furnishing bank guarantee ;

Ext.D/1: Fax receipt ;

Ext.E: Letter dtd.07-11-1994 ;

Ext.F: Letter dtd.04-11-1994 of plaintiff to the defendant ;

Ext.G: Letter dtd.02-11-1994 of the plaintiff to the defendant ;

Ext.H: Letter dtd.16-11-1994 plaintiff to defendant ;

Ext.J: Letter dtd.05-04-1995 of defendant to plaintiff ;

Ext.K: Letter dtd.16-06-1997 of defendant to the plaintiff & supplier ;

Ext.K/1: Fax receipt ;

***1st. Addl. Senior Civil Judge,
Bhubaneswar***

