(2015) 03 DEL CK 0180

Delhi High Court

Case No: CS (OS) 1480/2009 and I.A. No. 11029/3013

Chemical Systems Technologies (India) Pvt. Ltd.	APPELLANT
Vs	
Simbhaoli Sugar Mills Ltd.	RESPONDENT

Date of Decision: March 2, 2015

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, Order 12 Rule 6, Order 6 Rule 17
- Sales of Goods Act, 1930 - Section 41, 42

Citation: (2015) 3 AD 153 : (2015) 148 DRJ 650

Hon'ble Judges: Indermeet Kaur, J.

Bench: Single Bench

Advocate: Sanjiv Bahl, Udit Gupta and Eklavya Bahl, for the Appellant; M.A. Niyazi, P. Kumar, Advs. and Navin Kumar, A.R., Advocates for the Respondent

Final Decision: Disposed off

Judgement

Indermeet Kaur, J.

The plaintiff (Chemical Systems Technologies (India) Pvt. Ltd. has filed the present suit against the defendant (Simbhaoli Sugar Mills Ltd.) for recovery of a sum of Rs. 1,80,81,564/-. In terms of a purchase order dated 11.02.2006, the plaintiff had supplied a cane juice purification plant to the defendant which was erected, installed and commissioned at the premises of the defendant. The defendant had agreed to pay a sum of Rs. 1,97,50,000/- in terms of the aforenoted purchase order. An advance of Rs. 1 crore has been received by the plaintiff. Balance sum of Rs. 97,50,000/- along with interest is due and payable from the defendant.

2. Contention in the plaint is that the plaintiff had erected, installed and commissioned the plant at the site of the defendant. A water trial had taken place on 20.01.2007. The minutes of the meeting were recorded. The satisfaction of the working of the plant was recorded in that meeting. Plaintiff raised invoices between

25.01.2006 to 17.01.2007. The defendant has however failed to make the payment. It was contended that C-Forms dated 17.03.2007 and 05.06.2007 had also been issued by the defendant and even up to that time, no complaint was made by the defendant about the plant not having worked satisfactorily. The hypothecation deed entered into between the defendant and TIFAC on 20.03.2007 has also been relied upon in the plaint. The defendant had taken financial assistance from TIFAC and an inter-se agreement had been entered into between the parties. On 26.03.2007, the defendant had asked for a second installment of cheque Rs. 50 lacs from TIFAC to make payment to the plaintiff. Even up to that time, there was no complaint that the plant of the plaintiff was not working satisfactorily. Submission of the plaintiff being that the plant of the plaintiff was giving the requisite results. Further submission being that on 21.09.2008, a letter had been written by the defendant to the plaintiff wherein a sum of Rs. 1,21,37,542/- payable to the plaintiff stood confirmed.

3. On 17.05.2008 for the first time, a communication had been addressed by the defendant to the plaintiff claiming to have rejected the plant of the plaintiff. The defence of the defendant was that the plant supplied was not working satisfactorily and as such the plaintiff is not entitled to any amount. The defendant had filed a counter claim.

4. FIR No. 467/2011 had also been lodged by the defendant against the plaintiff which was to the effect that the plant which was commissioned at the site of the defendant by the plaintiff was not giving the result of 50 cm per hour on the cane juice which was a fraud in terms of the purchase order and was not as per requisite requirement.

5. Defendant filed a written statement-cum-counter claim. He also filed an application under Order 6 Rule 17 of the Code of Civil Procedure, 1908 (hereinafter referred to as the ''Code'') seeking an amendment in his written statement-cum-counter claim which had been permitted vide order dated 11.07.2011. The primary contention was that TIFAC was a necessary party and it should have been impleaded in the present proceedings. Further submission being that a false representation has been made by the plaintiff that he had expertise and experience in supplying, erecting and commissioning of the plaint for production of refined crystallized sugar through cane juice clarification using the membrane separation technology. It was submitted that TIFAC had agreed to finance the project in terms of an agreement which had been entered into between TIFAC and the defendant on 10.02.2006 and accordingly, the purchase order had been placed upon the plaintiff on 11.02.2006 based on the assurances of the plaintiff. An advance sum of Rs. 1 crore has been paid by the defendant to the plaintiff. Balance amount was payable only on the satisfactory commissioning of the aforenoted plant. Submission being that the plaintiff has played a fraud on the defendant as he did not have the required expertise to commission the said plant; the project had failed. The plaintiff in collusion with TIFAC has played a fraud upon the defendant by

making false representations about the membrane technology which was yet undeveloped by the plaintiff. The minutes of the meeting dated 26.09.2006 between the plaintiff, TIFAC and the defendant to discuss this program of the membrane filtration project pursuant to which the purchase order was placed upon TIFAC makes TIFAC a necessary party. Further submission being that a water trial was conducted on 20.01.2007 and although that was satisfactory but the performance trial conducted on 30.01.2007 was dissatisfactory. There was a clogging of the membrane in the trial. The membrane system failed to give the mandatory flow of 20 cubic meter per hour output when run with the raw cane juice. The clogging of the membrane during the trial caused rapid reduction in the flow from the membrane. The output was insufficient. It was very low. After several failed attempts on the part of the plaintiff, one Steve has been called from US to re-commission this plant. Even attempts made by him failed. The defendant was constrained to issue letter dated 17.05.2008 to the plaintiff asking him to take back the aforenoted plant. However, since there was a hypothecation agreement between the defendant and the plaintiff, the plant could not be removed as no objection was not obtained by the plaintiff malafidely. The sum of Rs. 1 crore which has been paid to the plaintiff as an advance is liable to be returned back to the defendant as the project of the plaintiff has failed completely. The membrane technology could never be commissioned satisfactorily. Suit is liable to be dismissed. The defendant in terms of his counter claim is entitled to the refund of Rs. 1 crore along with interest.

6. On an application of the plaintiff under Order XII Rule 6 of the CPC, this Court on 01.02.2013 decreed the suit of the plaintiff for the principal amount i.e. Rs. 1,28,16,407/- in his favour along with interest. Counter-claim of the defendant was rejected.

7. An appeal had been filed against this judgment. On 10.05.2013, the Division Bench allowed the appeal. This was on a consent of the parties. Order on merits was not reviewed. On the agreement of the parties, issues were framed and a Local Commissioner was appointed to record the evidence of the parties.

8. The following issues were framed by the Division Bench on 10.05.2013. They read as follows:-

"(i) Whether the suit is bad for non-joinder of necessary parties. OPD;

(ii) Whether the goods supplied by the plaintiff were to ordered specification and accepted by the defendant? OPP;

(iii) Whether the goods supplied by the plaintiff were defective entitling the defendant to reject them. OPD;

(iv) Whether the plaintiff is entitled for suit amount/relief or any other amount/relief? If so, at what rate of interest? OPP;

(v) Whether the defendant/counter-claimant is entitled for counterclaim or any other claim; if so, at what rate of interest? OPD;

(vi) Relief."

9. The plaintiff in support of his case has examined two witnesses. The defendant has examined one witness.

10. A further development which took place was that on 23.09.2013, was that the application filed by the defendant (under Order 1 Rule 10 of the CPC seeking impleadment of TIFAC as a necessary and proper party) was dismissed. It was held that TIFAC is neither a necessary and nor a proper party.

11. Arguments have been heard. Record has been perused.

Issue No. (I)

12. The onus to discharge this issue was upon the defendant. He had admittedly filed an application under Order 1 Rule 10 of the CPC. His submission was that TIFAC is a necessary and a proper party for the adjudication of the present suit. The purchase order dated 11.02.2006 entered into between the plaintiff and the defendant was pursuant to the meetings which had taken place between the plaintiff, the defendant and TIFAC one day prior thereto i.e. on 10.02.2006 and it was in the presence of TIFAC that the plaintiff had assured the defendant that he had a special membrane technology to set up the cane juice purification plant which was thereafter agreed to be supplied to the defendant. TIFAC had agreed to fund this project only because of the assurances of the plaintiff.

13. This application was dismissed on 23.09.2013. This order was passed after the issues had been framed which was by the Division Bench on 10.05.2013. This order has become final. It has not been challenged in appeal.

14. While dismissing this application, the learned Joint Registrar had noted that although there is some role and there appears to an involvement of TIFAC but the question whether its role and involvement is as such that it warrants its impleadment was answered in the negative. This order was passed on merits noting the submissions and counter submissions of the parties. It was categorically concluded that TIFAC is neither a necessary and nor a proper party. The defendant was however given liberty to examine TIFAC as a witness.

15. In view of the aforenoted order which has now become final, there is little scope left with the defendant to argue any further on this issue. It already stands decided. TIFAC was neither a necessary and nor a proper party.

16. Issue No. 1 is decided in favour of the plaintiff and against the defendant.

Issues No. (II) and (III)

17. Issues No. 2 and 3 would be decided by a common discussion. The onus to discharge issue No. 2 was upon the plaintiff and the onus to discharge issue No. 3 was upon the defendant. The question which has to be answered is as to whether the goods which were admittedly supplied by the plaintiff to the defendant were as per the specification as contended by the plaintiff or were defective as is the version of the defendant.

18. The documentary evidence relied upon by the respective parties is relevant. Ex. P-1 is an admitted document. This is a purchase order dated 11.02.2006 pursuant to which the order for the supply of the new technology for cane juice purification was placed upon the plaintiff. The obligation of the plaintiff included water trials as also the performance trials. Vis-a-vis the obligation of the defendant included the supply of equipments as detailed at serial No. 1 of Ex. P-1 which were evaporator bodies with condenser, pan supplying tanks for syrup with epoxy coating, centrifugal machine, sugar handling station etc. The total price of the purchase order was Rs. 1,97,50,000/- and sale tax at the rate of 4% was exclusive and so also the freight. An advance sum of Rs. 1 crore was admittedly paid by the defendant to the plaintiff. The balance payment of Rs. 97,50,000/- was divided into the following three stages:-

Time was the essence of the contract and this was also specifically noted.

19. The case as set up by the plaintiff is that the cane juice purification plant was erected, installed and commissioned at the site of the defendant. Water trials of the project had been conducted on 20.01.2007. The minutes of the meeting dated 20.01.2007 is Ex. P-2. This is an admitted document. The fact that the water trials were satisfactory is also admitted. All the 19 parameters contained in Ex. P-2 dealing with "Erection and Trials" were "Ok". Further case of the plaintiff is that on 30.01.2007, the performance trials had been conducted. No minutes of the performance trials were detailed. The plaintiff raised bills upon the defendant from 25.10.2006 up to 17.01.2007. These are 15 invoices all of which stand admitted by the plaintiff and have been proved as Ex. P-3 to Ex. P-17. Two bills (Ex. PW-1/3 dated 15.01.2007) and a second bill dated 27.01.2007 (Ex. PW-1/4) were also raised by the plaintiff upon the defendant but were disputed. In his cross-examination, PW-1 stated that Ex. PW-1/3 was the invoice pertaining to erection and Ex. PW-1/4 was the invoice pertaining to commissioning. This was in answer to a specific question put to the witness meaning thereby that the defendant had accepted that Ex. PW-1/3 and Ex. PW-1/4 had been raised by the plaintiff upon the defendant. The query which the defendant apparently wanted to elicit in this cross-examination was that there was no specific invoice for the third stage i.e. installation. To this query, PW-1 had replied that the invoice raised towards erection and commission included installation as well. PW-1 denied the suggestion that the endorsement made in the column of receipt by an authorized signatory on behalf of the defendant was not in fact the authorized signatory of the defendant. The plaintiff has also relied upon C-Forms which had been issued by the defendant. These are admitted documents. These are

two C-forms (Ex. P-18 and Ex. P-19) dated 17.03.2007 and 05.06.2007. These documents evidence that sale tax was being deducted from the account of the defendant qua the supplies which had been made by the plaintiff; this was a statutory compliance. Relevant would it be to note that the last C-Form is dated 05.06.2007.

20. Ex-PW-1/6 is a letter sent by the plaintiff to the defendant; this was plaintiff''s reply to the debit note which had been received by the plaintiff on 16.07.2007 from the defendant in which Rs. 16,02,967/- had been debited from the account of the plaintiff. No cross-examination has been effected on this document.

21. Ex. P-20 dated 17.05.2008 is an admitted document. This document has been heavily relied upon by the defendant to base his argument that by this communication, the defendant had rejected the plant of the plaintiff and had asked him to remove it. This letter reads herein as under:-

"Mr. Sunil Singhal

Managing Director,

Chemical System Technology India Pvt. Ltd.

M-58, Second Floor,

Market Greater Kailash-II,

New Delhi-110048

Sub:- Shifting of membrane filtration system from our site

Dear Sir

This has reference to our earlier communication for the above, in which we had ruled out the possibility for making crystal sugar separately from filtered juice received out of membrane filtration with existing equipment and machinery in our factory and had requested you to take the system back, but till date no one has approached us for taking the system bank. You are once again requested to give instructions to the concerned persons to take the above system back

Thanking you,

Yours faithfully,

SIMBHAOLI SUGARS LIMITED

GENERAL MANAGER,"

22. The plaintiff had sent his reply on 21.05.2008. This document has been proved as Ex. PW-1/D5. It reads herein as under:-

"GENERAL MANAGER

THE SIMBHAOLI SUGAR MILLS LTD.

SIMBHAOLI

DISTT. GHAZIABAD

UP.

Ref:- MEMBRANE FILTRATION SYSTEM

Dear Sir,

Reference to your letter No. SC/GM dated 17.05.2008.

We will arrange to depute our person and transport to your factory in two to three days for taking the system back.

Please provide us the services of some filters, etc. to dismantle the same and load onto trucks.

Thanks.

FOR CHEMICAL SYSTEMS TECHNOLOGIES (I0 P. LTD."

23. The submission of the learned counsel for the defendant is that on 17.05.2008 when the plaintiff had been informed to remove his plant, the plaintiff without any demur or protest had agreed to depute a person to take back the system. Submission being that had it been a case where the plaintiff had satisfactorily commissioned the plant, he would have raised a protest upon the defendant and would not have placidly agreed to take back the plant.

24. This submission of the learned counsel for the defendant will be dealt with the after the other documentary evidence relied upon by the parties has been discussed.

25. Ex. P-21 is a letter dated 22.05.2008 sent by the defendant to the plaintiff asking him to arrange for the refund of Rs. 1 crore which had been paid by him to the plaintiff. This communication of 22.05.2008 was answered by the plaintiff on 25.05.2008 vide Ex. P-22 (admitted document). In this document, the details of the case which have now been set up in the plaint were averred. It was stated that the purification plant had been supplied by the plaintiff to the defendant as per the terms contained in the purchase order and after its installation and commissioning, the plant was functioning properly. Invoices had been raised upon the defendant and balance due was Rs. 1,28,16,407/-. It was further stated that C-Forms had been furnished to the Central Sale Tax Authority after these dates; the request of the defendant to take back the plant was agreed upon by the plaintiff but the defendant thereafter backtracked and at that point sent the communication dated 22.05.2008 seeking a refund of Rs. 1 crore.

26. Ex. PW-1/7 dated 21.09.2008 is another relevant document. This is a letter sent by the defendant to the plaintiff wherein the defendant informed the plaintiff to confirm the balance of Rs. 1,21,37,542/- to their Chartered Accountant M/s. A.F. Ferguson and Co. located at Scindia House, K.G. Marg, New Delhi directly which details find mention in this letter. This document has been denied by the defendant. His submission is that this document is forged and has been created by the plaintiff to succeed in the present case. The extract of this letter is relevant. It reads herein as under:-

"Dear Sirs

In connection with the audit of our accounts, we request you to confirm our auditors M/s. A.F. Ferguson and Co. Chartered Accountants, 9 Scindia House, K.G. Marg, New Delhi-110001 that the balance of Rs. 1,21,37,542/- due to you/due from you as at 31st August, 2008 accordingly to your books is connect.

If the amount shows above is in agreement with your books, please sign at the place provided below and return this letter directly to our Auditors in the enclosed envelope. The second copy may be retained by you for your record purposes.

If the amount shows is not in agreement with your books, please inform our auditors the amount shown in your records giving the details of the balance. Your prompt compliance with this request will be appreciated. Kindly return this form in its entirely.

Yours faithfully,

FOR SIMBHAOLI SUGARS LIMITED

AUTHORISED SIGNATORY.

M/s. A.F. Ferguson and Co.

Chartered Accountants,

9 Scindia House,

K.G. Marg,

New Delhi-110001

Dear Sir,

We confirm that the above stated amount is correct as at 31st August, 2008 and we are/we are not a small scale Industrial undertaking as define under clause (J) of Section 8 of the Industrial (Development and Regulation) Act, 1951 having Registration No.....

Signature"

27. This letter is on the letter head of the defendant. This is an admitted fact. It has been signed by the authorized signatory of the defendant. This letter states that the plaintiff will confirm the balance and sign below and return this letter directly to the auditor i.e. M/s. A.F. Ferguson. The plaintiff had signed in the column below. Letter was then returned to the Chartered Accountant directly by the plaintiff. PW-1 has been subjected to a cross-examination on this score. He affirmed the position and reiterated that the request of the defendant recorded in Ex. PW-1/7 at point A to A and at point B to B had been acceded to. A perusal of Ex. PW-1/7 and point A to A and point B to B shows that the defendant had requested the plaintiff to confirm the balance of Rs. 1,21,37,542/- directly to their auditor i.e. M/s. A.F. Ferguson. The defendant did not cross-examine PW-1 on the point that this document is forged or fabricated or that M/s. A.F. Ferguson is not their Chartered Accountant or that this document was not delivered by the plaintiff directly to M/s. A.F. Ferguson. The only suggestion given to this witness was that PW-1 was not sent by the plaintiff to the defendant.

28. Per contra, the documents relied upon by the defendant although largely the same but in addition relate to the financial arrangements between the defendant and TIFAC who was admittedly funding this project for the defendant. The Agreement for Technology Development between the defendant and TIFAC was proved as Ex. DW-1. The plaintiff was not a signatory to this document. In terms of Ex. DW-1, the defendant company had acknowledged and accepted the capability of entrepreneur (the plaintiff) and the defendant company "had agreed to use, exploit and practice the know-how of membrane separation process for purifying sugarcane juice and manufacture of refined grade chemical free sugar in the company in the factory at Simbhaoli, Distt. Ghaziabad, UP……. After discussion with the entrepreneur and TIFAC, the defendant was convinced about the usefulness of the project…….. The company has approached TIFAC for financial assistance for acquiring and experimenting the technology".

29. This document supports the submission of the plaintiff that the defendant had agreed to set up this plant for purification of sugar cane juice to exploit and practice the know-how of the membrane separation process of the plaintiff and had agreed to experiment with it. Thus the submission of the plaintiff that the defendant knew that the plaintiff was for the first time experimenting with this technology although it had developed its know-how and was working upon it since the last several years but the fact that this was a first time project of the plaintiff and the defendant had agreed to ''use'', ''exploit'' and ''practice'' this know-how of the plaintiff and experiment with its stands established.

30. The second document relied upon by the defendant is Ex. DW-1/D which is the Hypothecation Deed dated 20.03.2007 between the defendant and TIFAC to which again the plaintiff is not a party. By virtue of this agreement, the plant supplied by the plaintiff to the defendant had been hypothecated with TIFAC as a security for the

finance which was being funded by the TIFAC to the defendant.

31. The oral evidence adduced by the plaintiff was through PW-1 and PW-2.

32. PW-1 was the Director of the plaintiff company. His evidence has been discussed supra.

33. PW-2 was also a Director of the plaintiff company working in his capacity as Technical Advisor and was a qualified Sugar Technologist having done a post graduation course of 2-1/4 years from the National Sugar Institute, Kanpur. He stated that technology of the plaintiff i.e. "membrane separation technology" was developed by the plaintiff in the year 2006. He admitted that the water trials were conducted on 17.01.2007. The feature of the membrane was distinctive and had been imported from Graver Technology, USA. He proved the cost of membrane (Ex. PW-2/D) as Rs. 1,08,80,300.75 upon which an import duty of Rs. 39,97,019/- had been levied. He admitted that there were three different words ''installation'', ''erection'' and ''commissioning'' each having a different meaning. Erection was the first stage indicating all the equipments together to make it ready for water trials and installation and commissioning was to run the total system installed with the actual product. He admitted that Ex. P-2 were the minutes of the meeting dated 21.01.2007 which referred the erection and installation of the project. Commissioning took place within 15 days thereafter. He admitted that two persons of the plaintiff company namely Arvind Srivastava and Shailendra Semwal were involved in the supervision of erection, installation and commissioning of the project. Both these persons were sugar technologists. The project was monitored by PW-1. An engineer of the US company, Mr. Steve also visited the project and he was involved in running the system. He stayed at the defendant''s guest house for 3-4 days. In his cross-examination, he admitted that Mr. Steve had come to the project in April, 2007 for re-commissioning of the plant. This statement was recorded on 02.09.2013. In his subsequent statement recorded on 04.09.2013, PW-2 made a clarification and stated that on receiving an e-mail response from the US company it was clarified that Mr. Steve had last visited India with respect to commissioning of this project only in January, 2007 and not in April. PW-2 produced a CD Ex. PW-2/1 which had been prepared from his laptop and contained three video clips relating to this project. PW-2 stated that this was a personal video recording which he had done in January, 2007. This document was disputed by the learned counsel for the defendant. Submission being that even if this CD had been prepared by PW-2 which as per PW-2 shows the different stages i.e. erection, installation and commissioning of the plant, it should have been mentioned in the plaint and not having done so, this document cannot be looked into. This is an admitted position. This Court is thus not inclined to rely on this document. It is ignored.

34. Further deposition of PW-2 is that performance trials were carried out after commissioning of the plant i.e. after the water trials. He deposed that to convert the juice in the sugar, the defendant company had to provide them with equipments

which fell within the scope of the defendant company but these were not provided. He stated that the commissioning was completed as per the capacity of the project and the defendant was requested to send the other parts of the system but he did not do so.

35. DW-1 was the Deputy General Manager of the defendant company. In his cross-examination, he admitted that water trial was conducted on 21.01.2007 and was successful. All necessary equipments for performance trials had been given to the defendant. There was clogging of the membrane and inspite of all best efforts made by the plaintiff to remove this clogging, the membrane continued to remain clogged and output become insufficient and low; positive conclusions could not be arrived at. All attempts failed. It was reiterated that the plant was erected and installed by the plaintiff but the commissioning had not taken place and inspite of re-commissioning efforts made by Mr. Steve in April, 2007 even those did not culminate in success. He heavily relied upon his letter dated 17.05.008 (Ex. P-20) wherein he informed the plaintiff to take back the plant and the plaintiff vide his letter dated 21.05.2008 (Ex. PW-1/D5) without any demur agreed to take back the goods. Vehement submission of the defendant is that had a satisfactory performance been given to the defendant by the plaintiff, he would have objected to the return of this plant but he did not raise any objection.

36. The sum total of this oral and documentary evidence persuades this Court to hold that the plaintiff had not only erected, installed but also commissioned the plant at the site of the defendant. Even as per the defendant, erection and installation were done but commissioning was not done. Water trials of the plant had taken place on 20.01.2007 and Ex. P-2 had recorded the minutes of that meeting show satisfaction on all counts i.e. on erection and installation. Commissioning was in fact the last stage. This is also clear from the purchase order (Ex. P-1). The last amount of Rs. 7.50 lacs was to be paid on the commissioning of the plant.

37. The case of the plaintiff is that the performance trials were conducted with cane juice on 30.01.2007. The documentary evidence establishes the satisfaction of these performance trials. C-Forms issued by the defendant on 17.03.2007 and 05.06.2007 (Ex. P-18 and Ex. P-19) were followed up by the hypothecated deed dated 20.03.2007 (Ex. DW-1/D) executed between the defendant and TIFAC. Had it been a case where the defendant was dissatisfied with the commissioning of the plant, he would not have, six months later, still issued C-Forms which admittedly is a sale tax statutory liability which the defendant had agreed to pay for the project which had been supplied by the plaintiff to the defendant or have hypothecated the plant to TIFAC. The letter dated 26.03.2007 sent by the defendant to TIFAC is relevant. Vide this letter, the defendant had requested TIFAC to release the second installment of Rs. 50 lacs. If the project was dissatisfactory and the plant of the plaintiff was not giving the desired result, the defendant would not have requested TIFAC for further

payments. This document also shows that the defendant appears to be satisfied with the working of the project and that is why he had requested for the second installment of Rs. 50 lacs.

38. It was only on 17.05.2008 that for the first time that defendant appears to have told the plaintiff that the plaintiff should take back his plant as the membrane technology could not be worked at the defendant site at Simbhaoli, Distt. Ghaziabad, UP. As is evident, this is not a letter of rejection. The purchase order had imposed obligations and counter obligations on the parties. There were certain obligations on the part of the defendant which included supply of equipments. A perusal of the letter dated 17.05.2008 (Ex. P-20) in fact shows the possibility of making crystal sugar separately from filtered juice un the membrane filtration with existing equipment and machinery in our factory is not available and therefore the plaintiff was requested to take back the system. The terminology of this letter suggests that the existing equipment and machinery available in the factory of the defendant did not make it possible for the defendant to run this project. The plaintiff vide his short letter (dated 21.05.2008) (Ex. PW-1/D5) agreed to take back the plant; submission being that since the plant was still in a saleable condition and he would have probably utilized it for some other purpose.

39. Ex. PW-1/7 dated 21.09.2009 seals the fate of the defendant. Vide this letter, the defendant had sought a confirmation from the plaintiff to their Chartered Accountant of the balance of Rs. 1,21,37,542/-. A submission had been made before this Court that this document was forged and fabricated and was created by the plaintiff. No such suggestion had been given to PW-1. It was not suggested to him that this letter was not on the letter head of the defendant or that it had been procured. It was not suggested that M/s. A.F. Ferguson was not their Chartered Accountant and this letter had not been delivered by the plaintiff to M/s. A.F. Ferguson directly as was contended in that letter. The defendant in fact had an ample opportunity to disprove this letter by producing M/s. A.F. Ferguson as a witness to substantiate the argument now made before this Court that this letter was neither sent by the defendant to the plaintiff and nor was it delivered by the plaintiff directly to M/s. A.F. Ferguson.

40. Sections 41 and 42 of the Sale of Goods Act have been relied upon by the learned counsel for the plaintiff. The said provisions read as under:-

41. Buyer''s right of examining the goods.--

(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining

the goods for the purpose of ascertaining whether they are in conformity with the contract.

42. Acceptance.--The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

41. As per the mandate of Section 41, the defendant not having inspected the goods in question before the delivery has a right to inspect the goods and return them within a reasonable time. If they are not rejected within a reasonable time, the mandate of Section 42 stipulates that the defendant would be deemed to have accepted the goods.

42. The plaintiff has been able to establish that the plant was successfully commissioned. Ex. PW-1/4 was an invoice (dated 27.01.2007) raised on the defendant for commissioning of the plant. Admittedly between January, 2007 up to May, 2008 not a single communication was written by the defendant to the plaintiff. He has candidly admitted that the first letter sent by him to the plaintiff was only on 17.05.2008.

43. On this point, learned counsel for the defendant submits that performance trials could not be conducted between May, 2007 up to October, 2007 as cane juice is not available in the market; up to April, 2007 PW-1 has admitted that Mr. Steve was re-commissioning the plant. From October, 2008 up to May, 2008, the trials re-continued but being dissatisfactory, the defendant was constrained to send this letter on 17.05.2008 asking the plaintiff to remove his plant.

44. There is no documentary evidence to this oral submission which had been made in the Court. This has also not been pleaded in the written statement-cum-counter claim. This is nothing but an afterthought; even presuming that there was no cane juice available in the market between May to October and the trials restarted only in October, 2007 why did the defendant wait up to May, 2008 to finally pen a letter to the plaintiff asking to take back the plant.

45. That apart, this letter (dated 17.05.2008) can by no means be read as a letter of rejection. Had it been a case of clear rejection, the defendant would have pointed out the defects to the plaintiff; he would have stated that the performance trials are dissatisfactory. Nothing like this was averred.

46. The purchase order (Ex. P-1) had detailed the stages in which payments were to be made. Admittedly Rs. 1 crore already stood received by the plaintiff. Rs. 80 lacs were to be paid against delivery at site. This stage was over. Rs. 10 lacs were to be paid on the completion of erection at site. This stage also stands admitted by the defendant. At the time of commissioning, the balance sum of Rs. 7.50 lacs was to be

paid. Ex. PW-1/4 was raised on this count.

47. The plaintiff has been able to establish that the plant was erected, installed and commissioned at site of the defendant by the end of January, 2007. It worked satisfactorily. It was only in May, 2008 that a communication was sent to the plaintiff asking him to take back the plant. Even at this stage, there was no objection taken on the working of the plant. DW-1 had also admitted that on trials being conducted on a daily basis in March-April, 2007 clear juice results of 40-50 cubic meter per hour (as per requirement) had been obtained. Reasonable time for having rejected the goods if they were found to be defective had elapsed. More than 1-1/2 years had passed. This long gap remains unexplained. The plaintiff is entitled to the benefit of Sections 41 and 42 of the Sale of Goods Act.

48. The goods supplied by the plaintiff was thus as per specifications and were accepted by the defendant. The letter of 17.05.2008 was not a letter of rejection. That apart even if the goods were rejected it was not within a "reasonable time" as is the mandate of Sections 41 and 42 of the said Act. Defendant is thus not entitled to reject them.

49. Both these issues are decided accordingly.

Issues No. (IV) and (V)

50. The plaintiff is entitled to the suit amount as claimed by him. This amount of Rs. 1,80,81,564/- is inclusive of the sale tax and freight charges and is in accordance with the purchase order Ex. P-1. The suit of the plaintiff is decreed in the sum of Rs. 1,80,81,564/-. No rate of interest has been stipulated. This amount will carry interest at the rate of 9% per annum. The counter claim of the defendant is rejected.

51. Both these issues are decided in favour of the plaintiff and against the defendant.

Issue No. (VI) (Relief).

52. The suit of the plaintiff is decreed in the sum of Rs. 1,80,81,564/- along with interest at 9% per annum which is to be paid from the date of the decree till realization. Decree-sheet be drawn. File be consigned to the record room.

53. Suit disposed of in the above terms.