

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.831 of 2020

Date	Order with Signature of Judge
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Allied Engineering and Services (Pvt) Ltd.....Plaintiff

Versus

Berger Paints Pakistan Limited and another.....Defendants

Date of hearing : 14.02.2025

Date of announcement of judgment : 17.02.2025

Chaudhry Atif Rafique, advocate for the plaintiff.

JUDGMENT

MUHAMMAD JAFFER RAZA, J; - The plaintiff is a private limited company and provides turn-key solutions to alternative energy generation and more particularly solar energy in Pakistan. The defendant No.1 is a public limited company and the said defendant according to learned counsel for the plaintiff, desired to setup a solar power energy facility and therefore, entered into an agreement with the plaintiff on 01.04.2019 for 'Supply, Installation and Commissioning of 383.23 KWP Photovoltaic (PV) System on Turn-key Basis' ("**Agreement**"). Learned counsel for the plaintiff further contended that on 02.04.2019, the defendant issued a purchase order to the plaintiff and the total consideration for the said installation was mutually agreed at Rs.42,807,150/- plus taxes. The said amount was payable in five unequal installments. The payment schedule decided between the parties was based on specific tasks being achieved by the plaintiff.

2. The contractual obligation of the plaintiff can be summarized as follows:-

- (i) Import and installation of the system as per bill of quantity in the agreement.
- (ii) Commissioning of the said installation on or before October, 2019.
- (iii) Execution of mobilization of advance bank guarantee to secure 50% advance payment required to pay by the defendant No.1.

The contractual obligation of the defendant No.1 can be summarized as follows: -

- 1) Make timely payments to the plaintiff within ten (10) days of the completion of each assigned task.
- 2) To permit the workers of the plaintiff to work at the factory without any impediment.
- 3) Release the bank guarantee upon the completion of the project.

It is contended by the learned counsel for the plaintiff during the course of arguments and more specifically in para-5 of the plaint, that the plaintiff completed the above-mentioned contractual obligation and all the works under the contract were fulfilled by the plaintiff. However, learned counsel for the plaintiff has most vehemently argued that the defendant has not fulfilled its contractual obligation and the disbursement of the payment of the plaintiff has been delayed, hence this suit.

3. Learned counsel for the plaintiff has referred to various correspondence between the parties, which according to him, unequivocally show that the defendant is not denying the execution of the work by the plaintiff and is citing frivolous reasons for not making the payment and releasing the requisite bank guarantee. It is further contended that despite the defendant creating impediments in the task assigned to the plaintiff, the plaintiff irrespective of the

same completed the task at hand, albeit with minor delays. It has also been argued by the learned counsel for plaintiff that in February 2020, the defendant No.1 had given project completion and satisfactory letters to the plaintiff mechanical, civil and electrical sub-contractor and therefore, this can only be seen as an acknowledgement for the completion of the project. In the light of above, learned counsel for the plaintiff prays as follows:-

- A. Declare that the plaintiff has completed all works under the contract dated 01.04.2019 and purchase order dated 02.04.2019 and has fulfilled and performed all the obligations and responsibilities under the Agreement dated 01.04.2019;
- B. Direct the defendant No.1 to release Rs.6,598,960/- in favour of the plaintiff as balance-consideration under the agreement dated 01.04.2019 along with 14% interest/mark-up till the date of realization;
- C. Direct the defendant No.1 to release the Mobilization Advance Bank Guarantee dated 09.04.2019 bearing No.IGT07860091319PK to the plaintiff having achieved its purpose;
- D. Direct the defendant No.2 to cancel the Bank Guarantee dated 09.04.2019 bearing No. IGT07860091319PK;
- E. Permanently restrain the defendant No.1 and 2 from encashing or release any amounts by encashment of the Bank Guarantee dated 09.04.2019 bearing No.IGT07860091319PK;
- F. Grant General Damages of Rs.20 Million for causing financial loss to the plaintiff;
- G. Grant costs of the Suit; and
- H. Grant any other further and better relief that may be appropriate in the facts and circumstances of the case.

4. Instant suit was filed on 22.07.2020 and notices and summons were issued to the defendants. The diary of the Additional Registrar reveals that summons through different modes were repeatedly served upon the defendants. It is also pertinent to note that Mr. Muhammad Farooq, Advocate, undertook to file vakalatnama on behalf of defendant No.1 and sought time to

file Counter Affidavit and Written Statement. The said undertaking is recorded in order dated 24.07.2020. Subsequently, on 07.09.2020, Mr. Fida Hussain, Senior Manager, Law Deptt. of defendant No.2 affected appearance and filed statement to the affect that the defendant No.2 is maintaining status quo in relation to the encashment of the bank guarantees. It was also observed in order dated 07.09.2020 that despite undertaking given by the counsel on 24.07.2020, no written statement or counter affidavit was filed and notice was repeated to defendant No.1 through all modes except publication. Thereafter, on 19.10.2020, Mr. Khalil Ahmed Siddiqui, Advocate, undertook to file vakalatnama and counter affidavit on behalf of defendant No.1 and time was granted to do the needful. It is evident that despite repeated undertakings given by various counsels on behalf of defendant No.1, the defendant No.1 failed to file written statement in the case and this Court on 21.02.2024 declared the defendant No.1 ex-parte.

5. On 10.02.2025, learned counsel for the plaintiff was directed to file Affidavit-in-Ex-parte proof and the matter came up for examination and final disposal on 14.02.2025. The witness of the plaintiff, namely, Farooq Ijaz, entered the witness box and recorded his statement (recorded separately) and reiterated the contents of the Affidavit-in-Ex-parte proof.

6. The instant case is proceeding ex-parte, however, under order IX Rule 6(a) it is a well settled principle of law that the Court cannot pass an ex-parte judgment in a mechanical manner, shutting its eye to the record, which is before the Court. The Court even in ex-parte cases has the power to dismiss the suit if the plaintiff fails to discharge his burden as enumerated under Article 117 and 118 of the Qanoon-e-Shahadat Order, 1984, after striking the defence of the defendant. The plaintiff in this regard has to stand on his own feet to satisfy the Court as to the existence of any right. In other words, mere absence

of the defendant does not justify the presumption that the whole of the plaintiff's case is true. The defendant's absence does not in any way lower the plaintiff's burden to prove his case. I would go as far as to say that in ex-parte cases the court is saddled with the additional burden of ensuring that the plaintiff's version of events is at least prima-facie true and fathomable.

7. I have examined the documents exhibited by the witness of the plaintiff, more particularly, I have perused through various emails and correspondences between the parties. It is evident from perusal of the said correspondences, that at no stage the execution of the work was denied by the defendant. The only issue raised by the defendant was the power generation of the installed system. The correspondence also reveals that various reminders regarding payment were sent to the defendant, however, the same were only met with replies which can only be classified as evasive. Without referring to the details of the correspondence/emails mentioned above, I find it particularly useful to reproduce the emails dated 21.02.2020 sent by the defendant No.1 to the plaintiff as follows: -

“Please check the quotation (image attached herewith) and the Purchase Order (image attached herewith). You’ve only written 383 KW solar system and the Purchase Order was issued likewise. Therefore, this is what I’ve already written in my first mail that your pending payment and bank guarantee will only be released if the project produces the agreed quantity of power as per quotation, purchase order and month wise solar access (as mentioned in the quotation – image attached).”

“383 KW is the agreed quantity of solar power generation. Once the solar project (383 KW) produces 383 KW even for five minutes, we’ll release all your pending payment as well as the bank guarantee. I think this is very easy to understand and it is useless just to write emails until the system produces the agreed quantity of solar power.”

383 KW is the installed capacity of the project, in page # 3 the contract you have accepted and signed as it's clearly mentioned" AESL will issue project completion certificate that the project is complete in all aspect and is producing yield as per system simulation reports".

In the above emails, it is evident that the defendant has raised an issue about the production of 383 KW and has inferred that the power generation from the system is not as per the installed capacity.

7. Learned counsel for the plaintiff was specifically asked regarding the same and he has quite categorically and clearly stated that 383 KW is the "installed" capacity and by no stretch of the imagination that can be construed as the power or electricity generated. Learned counsel upon specific query has also correctly stated that the production of alternate energy is largely dependent upon factors, which are beyond the control of the plaintiff, more particularly, sunlight in the instant case. It is also stated that the installed capacity is only a reflection of the maximum power output the system is capable of producing. The production as stated above is largely dependent on weather condition and given the condition of the solar panels the production will inevitably always be less than the installed capacity.

8. I have examined the documents relied upon by the counsel for the Plaintiff as elaborated upon in paragraph No.6 above and in light of the same the suit of the plaintiff is decreed as prayed only in respect of prayer clause A, B, C, D and E, whereas, the plaintiff does not press prayer clause F, G and H.

Office is directed to prepare the decree in favour of the plaintiff in the above terms.

Judge

Nadeem