

Tuf Metallurgical Private Limited vs Nortech Ferro Alloys Private Limited ... on 24 September, 2024

BEFORE THE COURT OF SH. SURINDER S. RATHI, DISTRICT JUDGE
(COMM.)-03 SHAHDARA, KKD, DELHI

CS Comm. No.172/2021

TUF Metallurgical Pvt. Ltd.
Through its AR
Having registered office at:
TUF House, LSC No. 3, Shreshtha Vihar,
Post Box No. 9237, Delhi-110092

Vs.

Nortech Ferro Alloys Private Ltd.
Registered address
113/20-A, Swaroop Nagar,
Kanpur, Uttar Pradesh-208002
Head Office:
214, Antriksh Bhawan 22,
Kasturba Gandhi Marg, Delhi-110001

Date of Institution	:	24.03.2021
Date of Final Arguments	:	24.09.2024
Date of Judgment	:	24.09.2024
Decision	:	Dismissed

Judgment

1.

This suit is filed by plaintiff a duly incorporated private Ltd. Company for recovery of Rs.29,36,056/- alongwith interest @18% as damages for non- lifting of goods imported by plaintiff on defendant's request under a sale contract with the defendant.

Case of the Plaintiff

2. Case of the plaintiff as per plaint and the documents filed is that it is a duly incorporated company at Shahdara, Delhi and is involved in business of trade, import-export of raw materials including ferro alloys, iron and other related materials used in steel and metal industry. Defendant which is also said to be a duly incorporated private ltd. Company at Kanpur, UP is said to be engaged in CS Comm No.172/2021 Digitally page 1 signed by TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. SURINDER S SURINDER RATHI S RATHI Date:

2024.10.14 15:29:31 +0530 manufacturing of noble ferro alloys. In the course of business on 05.02.2020 defendant approached the plaintiff for procurement of 100 metric tons of ferro silicon. Negotiations were carried out which led to execution of

sale contract on 05.02.2020 valued Rs.59,34,500/- at the rate of Rs.59,345/- per metric ton. Although the plaint is silent but as per contract dated 05.02.2020 plaintiff was supposed to deliver 100 metric tons of ferro silicon to the defendant at ICD Kanpur.

3. As per the sales contract plaintiff was supposed to procure the material from plaintiff's own subsidiary company located in Dubai, UAE. The consignment was supposed to land at Nava Sheva Port, Maharashtra within four weeks of payment of advance of 10% amount. As per plaint the Defendant made an advance payment of Rs.5.94 lakhs by way of bank transfer on 14.02.2020 (Correct date is 06.02.2020) to the plaintiff. Upon receipt of the advance payment plaintiff initiated the process for procurement of goods as per established procedure. However, there is no reference as to what the procedure is.

4. In the meantime, defendant communicated the plaintiff to change the landing port from Nava Sheva, Maharashtra to Mundra Port, Gujarat. However, neither in the pleadings nor by way of any document it is shown as to on what date defendant shared its intention to change the port from Maharashtra to Gujarat and by what mode the claimed request was made. This submission in para 7 has been contradicted by the plaintiff company itself when it said that it is not a defendant who requested for the change of port but rather it is the plaintiff who requested the defendant and an addendum to the contract dated 05.02.2020 was signed between the parties on 17.03.2020 upon mutual agreement. On account of change of port plaintiff expressed its inability to conclude the contract within four weeks of advance payment as renewed arrangements were supposed to be made at the changed port. Plaintiff carried out necessary Digitally CS Comm No.172/2021 signed by page 2 TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. SURINDER S SURINDER RATHI S RATHI Date:

2024.10.14 15:29:43 +0530 arrangements as per which the consignment dispatched from Dubai for Mundra Port, Gujarat on 24.03.2020. This information was shared with the defendant which was duly acknowledged and as per fresh understanding the contract was to be complied in March 2020.

5. Since the consignment had already left the origin port, as per established business practice in overseas trading industry both the sides entered into a High Seas Sale (HSS) Agreement on 25.03.2020 whereunder the title/risk and ownership of the goods were transferred by the plaintiff in favour of the defendant but, as per plaint, this was subject to payment of the remaining agreed amount as per commercial invoice (dated 26.03.2020). Till this point no objection was raised by the defendant qua the consequent delay in dispatch of the consignment.

6. It is further pleaded that as per terms and conditions of the HSS Agreement it supersedes the sale contract initially executed on 05.02.2020 and its addendum dated 17.03.2020. As per the HSS once the corpus of the consignment stood transferred to the defendant, in terms of the Clause 19 of the same, it was the defendant who was supposed to receive the delivery at the port. Any failure in doing the same could result into defendant compensating the plaintiff for damages on account of non-acceptance of consignment.

7. On 27.03.2020 plaintiff shared the copy of invoice and the post-shipment advice which enables the receiver of the goods to track the same and receive it upon its arrival. Even till this stage no objection was raised by the defendant. Since the consignment was scheduled to reach the port on 31.03.2020, plaintiff issued another email to the defendant on 30.03.2020 providing it copy of "all the necessary documents" so that defendant's Clearing and Handling Agent (CHA) can get the consignment released after making the balance payment as per invoice dated 28.03.2020 for Rs.62,35,790/-. Upon adjusting the advance payment of Rs.5.94 lakhs the balance payment was Rs.56,41,790/-.

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8. The shipment arrived at Port Mundra on 31.03.2020 and this information was duly brought to the attention of the defendant. But still neither the defendant cleared the balance payment nor lifted the consignment from the port. Scanned copy of all the shipping documents were resent by the plaintiff to the defendant vide email on 28.04.2020. It was followed by another email dated 07.05.2020 whereby request to pay the balance amount and lift the goods was made to the defendant apart from apprising that the free detention time for the consignment by the shipper is only till 10.05.2020. When no action was taken plaintiff issued another email on 13.05.2020 reiterating its request followed by another email on 14.05.2020 whereby it was informed that the free detention period had been extended to 17.05.2020. Again on 18.05.2020 communication received from the shipline qua extension of redention time. Attempts were made to reach out the defendant telephonically as well. Another reminder email was issued on 20.05.2020.

9. After all these communications it is on 22.05.2020 that for the first time defendant responded and unjustifiably declined to take the delivery of the goods and rather rescinded the agreement by citing delay in importing the material. Since the free detention period had expired on 17.05.2020 the cargo lying on the port was imposed detention charges by the authority. The above email of the defendant was responded to by the plaintiff on 25.05.2020 whereby contentions of the defendant were denied being frivolous. Defendant issued another email on 26.05.2020 reiterating that it will not take the delivery and alleged that plaintiff has breached HSS and has failed to conclude the contract within the stipulated time.

10. The plaint further mentions that plaintiff issued notice under Section 21 of Arbitration and Conciliation Act, as per clause contained in sale contract, on 26.09.2020 which was served upon the defendant by courier and email dated 29.06.2020 and 03.07.2020. Defendant is said to have denied the plaintiff's CS Comm No.172/2021 Digitally page 4 signed by TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. SURINDER S SURINDER RATHI S RATHI Date:

2024.10.14 15:30:02 +0530 request for reference of dispute for disposal before Delhi International Arbitration Centre. It is further pleaded that plaintiff withdrew the Section 21 A & C Act notice as plaintiff felt that the dispute is non-arbitrable and can be decided as per terms of HSS which does not contain any arbitration clause.

11. Upon unjustified refusal by the defendant to receive the goods plaintiff had to run around from pillar to post to find a new buyer. The goods were sold by the plaintiff Jindal Stainless (Hisar) Ltd. at the rate of Rs.66,000/- per metric ton.

The total sale amount covering two invoices dated 29.10.2020 and 31.10.2020 was of Rs.66 lakhs. This development was shared by plaintiff with defendant vide email dated 14.07.2020. Defendant responded vide email dated 16.07.2020 distancing itself from the above transaction. As per plaintiff it suffered several overhead expenses namely CFS Cost, Stamp Duty, Custom Duty Amendment EDI, OOC Cancellation Charges, Detention and other charges, Bonded Warehouse Charges, Cargo Storage, Duty Penalty etc. Plaintiff has quantified the financial loss in 15 heads quantifying the expenditure to Rs.28,50,557/- + Rs.83,505/-. In so far as material was supposed to be sold by plaintiff to the defendant for around Rs.62.35 lakhs but when the defendant did not take the delivery the material was sold for Rs.66 lakhs i.e. at a profit of Rs.3.65 lakhs upon adjusting the additional expenses and the above money.

12. As per plaintiff he is entitled to Rs.32,98,272/-. It is pertinent to mention here that the above calculation is ex-facie erroneous and it also does not take into account the advance payment of Rs.5.94 lakhs. Although plaint is silent but Court is apprised that Plaintiff approached Shahdara DLSA for Pre-Institution Mediation under Section 12A of Commercial Courts Act, 2015 where defendant did not participate and Non-Starter Report was issued on 06.02.2021. In this backdrop suit in hand was filed for following reliefs:

Prayer:

i. Issue summons of the suit to the defendant; and CS Comm No.172/2021 Digitally page 5 TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. signed by SURINDER S SURINDER RATHI S RATHI Date:

2024.10.14 15:30:11 +0530 ii. Pass a money decree for a sum of Rs.29,36,056/- (which includes the principal amount of Rs.25,69,852.32/- and pre-suit interest of Rs.3,66,204/- in favour of the plaintiff against the defendants alongwith interest @ 18% payable from date of refusal till the date of actual payment i.e. both pendente lite and future interest;

iii. Grant any further relief or reliefs, as the case may be, as this Hon'ble Court may deem fit and proper in the circumstances of the case.

13. During the course of trial at the stage of final arguments it was found that plaintiff has not paid court fees on the pre-suit interest. Plaintiff quantified the same at

Rs.3,66,204/- . This took the suit amount to Rs.36,64,476/- . At that juncture plaintiff moved an Order 6 Rule 17 CPC application but therein by citing mathematical error in arriving at the suit amount of Rs.32,98,272/- an amendment was sought so as to reduce the principal suit amount to Rs.25,69,852/- . After adding the pre-suit interest the revised final suit amount comes to Rs.29,36,056/- .

Service of Defendant

14. Summons of the suit was served upon the defendant company on 30.03.2021.

Defendant entered appearance through Ld. Counsel Sh. Rajesh Khaware. Detailed written statement was filed alongwith counter-claim of Rs.60.94 lakhs however Court is apprised that the counter-claim was dismissed by Ld. Predecessor some time in the year 2023 as certain costs imposed on the defendant/counter-claimant was not deposited. The order of dismissal of counter-claim was not challenged by the defendant/counter-claimant. Defendant's Case

15. In its WS defendant company has sought dismissal of the suit on the ground that plaintiff has not approached this Court with clean hands and has suppressed material facts. Objection qua lack of territorial jurisdiction is also taken. It is pleaded that the suit is filed with an aim to extract undue money from the defendant. On merits, defendant company has not denied that plaintiff is the company dealing with import-export or raw materials related to steel industry. It is admitted that on 05.02.2020 it entered into a contract with the CS Comm No.172/2021 page 6 TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. Digitally signed by SURINDER S RATHI SURINDER Date:

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plaintiff company for procurement and purchase of 100 metric tons of ferro silicon and a written contract was executed.

16. It is also accepted that out of the total sale value of Rs.59,34,500/- , defendant paid Rs.5.94 lakhs as advance on 14.02.2020. It is also accepted that the initial port for delivery of the material was Nava Sheva. It is accepted that the port was changed from Nava Sheva to Mundra but as per defendant it was not changed on their request but it was done by the plaintiff unilaterally. It is case of the defendant that the goods were supposed to reach the final destination i.e. ICD, Kanpur, UP by 6th of March 2020 but when the same did not arrive plaintiff assured that the delivery would be made by 10.03.2020. When no delivery happened even by 10.03.2020 plaintiff made the defendant sign defendant company an addendum dated 17.03.2020 by assuring delivery at Kanpur by 20.03.2020. When no delivery was received even up to 20.03.2020, as per WS defendant stopped communicating with the plaintiff and rescinded the contract. Orally, however no date of the same is mentioned in the WS. Admittedly, neither any document is filed in this regard by the defendant on record nor any mode of alleged rescinding of contract telephonically is specifically pleaded. Defendant has not denied that the goods were dispatched from the origin on 24.03.2020. As far as execution of HSS Agreement dated 25.03.2020 it is stated that defendant was made to sign this

agreement in the name of paper formality by the plaintiff.

17. Defendant has reiterated that it was supposed to receive the consignment within four weeks of making advance payment. It is denied that the HSS Agreement superseded the sales contract entered earlier or that the agreed four weeks period for delivery stood extended. As per defendant instead of ensuring timely delivery of material to the defendant at Kanpur after taking its possession at the port plaintiff continued to send repeated emails.

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18. Defendant has not denied receipt of repeated emails sent by the plaintiff to it. Defendant maintained that it stopped communicating with the plaintiff when goods were not delivered at Kanpur as agreed on 06.03.2020 or on extended dates i.e. 10.03.2020 then 15.03.2020 and finally 20.03.2020. Defendant had unequivocally intimated its intention to not to accept delivery of the goods beyond the agreed scheduled time. The WS is silent qua plaintiff's assertion that the updated final sale consideration was Rs.62,35,790/- and that after adjusting the advance payment defendant was to deposit Rs.56,41,790/-. Defendant accepted that they issued emails dated 22.05.2020 and 26.05.2020 whereby the plaintiff was informed that the contract already stood rescinded for the reason that the fixed timelines were not adhered to by the plaintiff.

19. It is stated that the only binding contract between them was initial sale agreement of 05.02.2020 and its addendum dated 17.03.2020. It is pleaded that HSS was signed by the defendant on the asking of the plaintiff under good faith. With these pleas defendant has pleaded that since it was the plaintiff company which did not perform the contract within the agreed time schedule, defendant is not liable to pay the demurrage and other charges sought under 15 heads mentioned in the plaint. Defendant is shown to have issued a no objection certificate dated 01.06.2020 allowing the plaintiff to amend the goods cleared and obtain delivery.

20. In its affidavit of admission and denial of plaintiff's documents defendant has admitted the initial sale contract dated 05.02.2020. Surprisingly, despite admitting the fact that defendant company signed addendum dated 17.03.2020 and HSS agreement dated 25.03.2020. Defendant has denied the documents filed by the plaintiff qua clearance of consignment and other charges paid at the port while receiving the goods.

21. In additional affidavit of admission and denial of documents filed by defendant on 01.07.2023 which contains the reasons for denial it is found that despite Digitally CS Comm No.172/2021 signed by page 8 TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. SURINDER SURINDER S RATHI S RATHI Date:

2024.10.14 15:30:43 +0530 admitting the execution of Addenda and HSS agreement, defendant denies both of them by claiming that they are forged and illegible documents.

22.No replication has been filed by plaintiff.

23.During the course of trial when the defendant did not deposit certain cost its defence was struck off by Ld. Predecessor. However, the order was set aside by Hon'ble High Court. Plaintiff's application under Order 13A CPC for Summary Judgment was dismissed by this Court on 15.10.2022 on account of the fact that all the documents filed with the suit were photocopies and were also not legible.

24. Out of the pleadings following issues were identified by this Court on 15.10.2022 and amended on 24.09.2024:

Issues:

i. Whether the plaintiff is entitled to recovery of Rs.29,36,056/- alongwith pendente lite and future interest @18% p.a.? OPP ii. Relief

25. Evidence in this case was ordered to be recorded before Ld. LC Sh. Nitin Bansal, Advocate as per protocol created by this Court under Order 18 Rule 4 CPC read with Order 15A Rule 6(l) and (o) CPC as applicable to Commercial suits.

Evidence

26. To prove its case plaintiff examined PW1 Ms. Shraddha Sahay, its AR and HR/Legal and Admin Head. Vide her affidavits Ex.PW1/A and Ex.PW1/B she deposed on the lines of plaint and exhibited following documents:

i. Board resolution dated 26.09.2022 is Ex.PW1/1; ii. Printout of company master data of plaintiff company retrieved from MCA online portal is Ex.PW1/2;

iii. Printout of company master data of defendant company retrieved from MCA online portal is Ex.PW1/3;

iv. True copy of Sales Contract dated 05.02.2020 as received from email dated 06.02.2020 as entered between the parties is Ex.PW1/4;

v. True copy of High Seas Sales Agreement dated 25.03.2020 is Ex.PW1/6; vi. True copy of letter dated 25.03.2020 issued by plaintiff to Deputy Commissioner of Cus-

toms is Ex.PW1/7;

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vii. True copy of email dated 27.03.2020 and email dated 30.03.2020 sent by plaintiff to the defendant alongwith the post shipment advice dated 26.03.2020 and the commercial in-voice dated 28.03.2020 are Ex.PW1/8(colly.); viii. Copy of email dated 28.04.2020 whereby the plaintiff share all the necessary documents for the purchase of goods by the defendant company is Ex.PW1/9; ix. Copy of email dated 02.04.2020 and subsequent email dated 07.05.2020, 13.05.2020, 14.05.2020, 18.05.2020, 20.05.2020 and 21.05.2020 send by the plaintiff seeking an up-

date on the balance payment from the defendant are Ex.PW1/10 (colly.); x. Copy of email dated 22.05.2020, 25.05.2020 and 26.05.2020 send by the defendant denying to except the delivery of goods purchased by the defendant are Ex.PW1/11 (colly.);

xi. Copy of bill of entry dated 18.05.2020 for ex-bond clearance for home consumption is Ex.PW1/12;

xii. Copy of No Objection letter dated 01.06.2020 issued by defendant is Ex.PW1/13; xiii. Copy of Notice of dispute dated 29.06.2020 along with email dated 29.06.2020 send by the counsel for the plaintiff to the defendant is Ex.PW1/14 (colly.) xiv. Copy of email dated 10.07.2020 along with reply to notice of dispute dated 10.07.2020 issued on behalf of the defendant are Ex.PW1/15 (colly.) xv. Copy of email dated 01.02.2021 and withdrawal notice dated 01.02.2021 issued by plaintiff are Ex.PW1/16 (colly.);

xvi. Copy of email dated 14.07.2020 issued by the plaintiff intimating the defendant about a new and potential buyer of the goods rejected by the defendant is Ex.PW1/17; xvii. Copy of email dated 16.07.2020 issued by the defendant stating complete and utter dis-

association from the goods earlier purchased from the plaintiff is Ex.PW1/18; xviii. Copy of invoice dated 29.10.2020 and 31.10.2020 issued by the plaintiff on Jinder Stain- less (Hisar) Ltd. are Ex.PW1/19 (colly.) xix. Copy of invoice dated 30.06.2020 raised by Suraj Forwarders Pvt. Ltd. in the name of plaintiff for CFS and Insurance Charges are Ex.PW1/20 (Colly.) running into 4 pages; xx. Copy of delivery order dated 12.06.2020 issued by able shipping agencies (India) Pvt.

Ltd. to arrange the delivery of the Cargo of the plaintiff mentioning that the goods arrived on 30.03.2020 are Ex.PW1/21 (Colly.) running in 3 pages; xxi. Copy of invoice dated 30.06.2020 raised by Suraj Forwarders Pvt. Ltd. in the name of plaintiff for Stamp Duty and Custom Duty charges is

Ex.PW1/22; xxii. Copy of invoice dated 16.09.2020 raised by Suraj Forwarders Pvt. Ltd. in the name of plaintiff for miscellaneous charges is Ex.PW1/23;

xxiii. Copy of invoice dated 09.06.2020 raised by Aaryam Cargoways Pvt. Ltd. in the name of plaintiff for container cleaning charges, maintenance and terminal handling and usage charges is Ex.PW1/24;

xxiv. Copy of invoice dated 11.06.2020, 14.07.2020, 14.08.2020, 14.09.2020 and 15.10.2020 raised by SSS SAI LOGISTICS on account of composite container charges and insurance charges and fuel charges by the plaintiff are Ex.PW1/25 (colly.) running in 5 pages; xxv. Copy of payment receipts of duty penalty paid by the plaintiff are Ex.PW1/26 (colly.) xxvi. Copy of receipt of duty amount alongwith proof of payment are Ex.PW1/27 (colly.) running in 4 pages;

xxvii. Copy of invoice dated 06.11.2020 raised by Prakash Transport Corporation against plaintiff company is Ex.PW1/28;

xxviii. Copy of lodging travelling and other miscellaneous expenses from 24.09.2020 till 28.10.2020 incurred by the plaintiff for travel to Mundra Port on account of default caused by the defendant in as much as refusing to accept the goods purchased from the plaintiff are Ex.PW1/29 (Colly.) running in 47 pages; xxix. Original Board Resolution dated 26.09.2022 issued by the plaintiff whereby I was ap-

pointed as authorised representative is Ex.PW1/29A; xxx. Copy of email dated 06.02.2020 alongwith the attached agreement to sale dated 05.02.2020 is Ex.PW1/30 (Colly.) running in 4 pages;

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xxxi. Copy of email dated 18.03.2020 alongwith the attached addendum dated 17.03.2020 is Ex.PW1/31 (Colly.) running in 11 pages;

xxxii. Copy of High Seas Sale agreement dated 28.03.2020 stamped and signed by both parties is Ex.PW1/32 running in 4 pages;

xxxiii. Copy of email dated 20.04.2020 alongwith its attachment is Ex.PW1/33 (colly.) running in 5 pages;

xxxiv. Copy of email dated 02.06.2020 alongwith attached letter of No Objection dated 01.06.2020 issued by the defendant is now Ex.PW1/34 (Colly.) running in 3 pages; xxxv. Copy of email dated

04.07.2020 alongwith the attached bill/invoice dated 30.06.2020 raised by Suraj Forwarders Pvt. Ltd. alongwith proof of payment are Ex.PW1/35 (colly.) xxxvi. Copy of e-receipts of duty amount (BCD + surcharge) alongwith proof of payment are Ex.PW1/36 (Colly.) running in 6 pages;

xxxvii. Copy of declaration of oath by way of affidavit under Order 11 Rule 6 CPC read with Section 65B of Indian Evidence Act,1872 dated 06.06.2023 is Ex.PW1/37.

27.She stated that the contract dated 05.02.2020 was not executed in her presence. She accepted the suggestion that according to the contract the goods were to be imported from UAE and were to be delivered at ICD, Kanpur within 4 weeks of receiving the advance amount i.e. on or by 06.03.2020. She added that the first contract was not the main one. She did not admit the suggestion that the date of delivery was 10.03.2020 or 20.03.2020. She denied the suggestion that plaintiff failed to deliver the goods as promised at ICD, Kanpur. As per her the destination was changed to Mundra Port and the delivery date was end of March 2020. This plea appears to be factually incorrect because only the landing port was changed from Nava Sheva Maharashtra to Mundra, Gujarat while destination remained the same i.e. ICD, Kanpur. She denied the suggestion that defendant never signed the Addendum Agreement. She denied that the change of port happened due to request of the plaintiff. She denied that plaintiff company failed to deliver the goods even by 30.03.2020.

28.She accepted the suggestion that time was essence of the contract. She accepted that the bill included charges for bringing the goods from UAE to Mundra Port and other transportation charges. She accepted that the High Seas Sales Agreement Ex.PW1/DC1 is not signed on behalf of the defendant company but the one available as Ex.PW1/32 is signed by both the parties. She denied that both the Addendum and HSS Agreement were filed by plaintiff by forging signatures of the defendant company and using a forge seal. She denied CS Comm No.172/2021 Digitally signed page 11 TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. by SURINDER S RATHI
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that the material was not delivered to the defendant as it was sold at a higher profit by the plaintiff company in India. She denied that plaintiff company suffered a damage of Rs.55 lakhs on account of delivery of material within time.

29.The second witness examined is PW2 Pravin C. Popat, Group-IV Officer from Mundra, Gujarat. He deposed as per letter of authority Ex.PW2/A and brought records from e-SANCHIT electronic repository of documents. He accepted High Seas Sales Agreement as Ex.PW2/2. A letter issued by plaintiff on two Deputy Commissioners, Customs dated 25.03.2020 are Ex.PW2/3. Bills of Entry dated 18.05.2020 are Ex.PW2/4 and Ex.PW2/5, Ex-bond Bill is Ex.PW2/6. Witness accepted that all the documents brought by him are photocopies which were downloaded from the official portal of Customs Department.

Defendant's Evidence

30. On the contrary defendant examined DW1 Manish Gupta who happens to be its Director and AR. Vide affidavit Ex.DW1/A he deposed on the lines of WS and marked board resolution/authorization letter dated 01.06.2021 as Mark D.

31. The defendant company is in existence since last 34 years and his family is in the business for the last 50 years. He is looking after the business for the last around 20 years. According to him his understanding of High Seas Sales Agreement is when the importer decides to sell the goods while the goods are in transit in order to avoid double taxation. This happens in such a case the custom duty is levied only once and is applicable to final buyer and no GST is applicable. He accepted that as per final contract dated 05.02.2020 the custom duty was to be paid by the defendant company. He accepted that name of the buyer company was changed from plaintiff to that of defendant during the transit as per HSS Terms. As per him advance payment was made on 06.02.2020. He accepted the suggestion that as per final contract changes were Digitally CS Comm No.172/2021 signed by page 12 TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. SURINDER SURINDER S RATHI S RATHI Date:

2024.10.14 15:31:21 +0530 supposed to be made only by way of writing from both the sides. The addenda document and HSS were signed by Puneet Gupta on behalf of defendant. He accepted that in case goods which was not imported are not got released by the final buyer such goods invite detention, demurrage and other charges. He also accepted that on account of Covid-19 related lockdown people were finding it difficult to get the goods released and period up to 10.05.2020 was declared to be detention free period.

32. The defendant company has been using the email address inquiry.nortech@gmail.com. He accepted that execution of HSS Agreement has lots of benefits as it does not invite GST. He added that the goods were sold by plaintiff at a higher price than what was agreed with defendant. He also accepted that plaintiff must have incurred transportation charges from the port to the new buying company apart from other incidental charges but added that defendant is not liable to compensate the plaintiff for the same. He accepted that emails Ex.PW1/8 to Ex.PW1/18 were sent/received through their official email ID. He could not disclose the date when the defendant company communicated to the plaintiff their intention to not to pick up the goods.

33. He denied the suggestion that damages detailed in para 24 was supplied by plaintiff due to default of defendant. He admitted due execution of HSS Agreement. Although he claimed that Addendum Agreement dated 17.03.2020 was not executed by them but they admitted the same. He also accepted that post execution of HSS Agreement the plaintiff company could not have got released the goods and it was only the defendant company who could have got the goods released. He accepted issuance of NOC to the plaintiff for release of the goods. He maintained that the original Bill of Lading was never supplied by the plaintiff to them. No GST was applicable to invoice as per HSS. He admitted receipt of legal notice from plaintiff

Ex.PW1/14. He denied the suggestion that his company deliberately did not get the Ferro Silicon released Digitally CS Comm No.172/2021 signed by SURINDER S page 13 TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. SURINDER RATHI S RATHI Date:

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34.The second witness examined by defendant company is DW2 Puneet Gupta, one of its directors. Vide affidavit Ex.DW2/A he deposed on the lines of WS and exhibited documents Ex.DW2/1 i.e. defendant's bank statement showing payment of advance money of Rs.5.94 lakhs on 06.02.2020 itself as against what is mentioned in the plaint as 14.02.2020. The second document exhibited is Ex.DW2/2 dated 03.04.2020 sent by defendant to plaintiff, Ex.DW2/3 is reply email of plaintiff and Ex.DW2/4 the email dated 18.05.2020 through which the plaintiff sent bill of lading to the defendant for the first time. During his cross-examination he stated that he is post-graduate in education and is personally involved in the business for the last 15 years. His company has been carrying out imports regularly in the course of business and as such he is well conversant with the High Seas Sale Agreement and related issues.

35.He accepted that he is aware that in case a company is importing goods via sea and while the goods are in transit in High Sea and they are sold to another company it is the buyer who is authorised to get the goods released from the Court and such sales are called HSS Sales. He, however, maintained that there are no benefits of HSS Sales. He stated that taxes on such imports depend upon the items imported. As per him the ferro silicon attracted 5% surcharge on basic custom duty apart from 18% IGST of the material value and custom duty with surcharge. He accepted that the material value of the import as per initial sale contract was Rs.59,34,500/- as can be seen from proforma invoice dated 05.02.2020 Ex.PW1/4 but it does not include insurance cost. He explained that the terms of delivery contain CFR which means cost of material and freight i.e. ocean freight. It is submitted by Ld. Counsel for defendant that the freight from port to final destination i.e. ICD, Kanpur was to be borne by the defendant.

36.He stated that any sale carried out after release of the goods from the Court by the final buyer to any further buyer is called local sale and the same attracts Digitally CS Comm No.172/2021 signed by page 14 SURINDER TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. SURINDER S RATHI S RATHI Date:

2024.10.14 15:31:42 +0530 GST on the local sale price. He accepted that in the initial proforma invoice Ex.PW1/4 there is no reference of any GST. He accepted that his company appointed M/s Airship Forwarding Agency of Kanpur as CHA who in turn might have engaged services of a local CHA at Mundra Port, Gujarat. He could not admit or deny if services at Mundra were provided by M/s Shri Nath Shipping and

Logistics.

37. He accepted that the name of the buyer of the consignment was changed from plaintiff company to the defendant company but he added that he is not sure whether this happened during the transit. He accepted that this name was changed on 26.03.2020 on account of HSS Ex.PW1/6. He accepted that he had written a letter Ex.PW1/13 to Deputy Commissioner, Customs whereby defendant company issued a NOC in favour of plaintiff company. He also accepted that in this letter name of M/s Shri Nath Shipping and Logistics is shown as defendant's CHA and it has no mention of the Kanpur based CHA.

He also accepted that in this letter there is no reference of any reason as to why defendant company did not get the goods released.

38. DW2 admitted that for all their official communications they use email id inquiry.nortech@gmail.com. He also accepted that on 22.05.2020 email Ex.PW1/11 was issued by the defendant to the plaintiff that they are not interested in the consignment and plaintiff is free to sell it to any customer. He also admitted that prior to 19.05.2020 defendant never informed the plaintiff for their disinterest to continue to be final buyer. He, however, added that a telephonic information was given on 20.03.2020 that in case plaintiff is unable to deliver the goods they should cancel the contract and return the advance. He denied the suggestion that no communication as claimed was issued.

39. He accepted that email Ex.DW2/2, Ex.DW2/3 and Ex.DW2/4 have not been pleaded in the WS filed by defendant. He categorically admitted that after execution of initial sale contract Ex.PW1/4 the addendum dated 17.03.2020 CS Comm No.172/2021 Digitally signed by page 15 TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. SURINDER S SURINDER RATHI S RATHI Date:

2024.10.14 15:31:51 +0530 Mark A and the HSS Agreement Ex.PW1/6, also exhibited as Ex.PW1/32 (also exhibited on record as Ex.PW2/2) were also executed. He, however, added that addendum was not signed by any director of the company. He accepted that HSS agreement was signed by him for the defendant company. As per him on account of shortage of raw material their factory also remained closed between 19.03.2020 to 17.04.2020.

40. He added that the ferro silicon which was agreed to be purchased from the plaintiff was to be used for preparing final products namely ferro molybdenum and ferro silicon magnesium. He stated that their AR Manish Gupta filed the pleadings without consulting him. He stated that the addendum Ex.PW1/31 was signed by one Sunil Kumar Srivastava on behalf of defendant company. He accepted that bill of entry Ex.PW2/4 dated 18.05.2020 was filed with the Custom Authorities by the defendant company through its authorised CHA Shri Nath Shipping and Logistics Solution prior to issuance of NOC in favour of plaintiff Ex.PW1/13 dated 01.06.2020.

41. He admitted that apart from paying 10% advance defendant did not pay any amount to the plaintiff. He accepted that vide email dated 20.05.2020 plaintiff company demanded balance 90% from them. He claimed that his company did not make the payment because plaintiff did not provide original shipping documents until 18.05.2020. He accepted that all the emails Ex.PW1/10 (colly.) were sent by the plaintiff company to the defendant between 28.04.2020 to 20.05.2020. He however denied that plaintiff supplied all the necessary documents to this company. He admitted that plaintiff issued frequent reminders about the pre-detention period and subsequent dates. He denied that this company did not buy the ferro silicon apprehending declining its demand due to covid related lockdown. He did not deny that defendant demanded a discount of Rs.5000 per metric ton from the plaintiff but this portion can't be relied by the plaintiff as it is beyond pleadings in the plaint. He CS Comm No.172/2021 Digitally signed by page 16 TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. SURINDER S SURINDER RATHI S RATHI Date:

2024.10.14 15:31:58 +0530 stated that he does not remember if legal notice sent by plaintiff's lawyer Ex.PW1/17 dated 14.07.2020. he also did not identify reply to this legal notice sent on behalf of defendant Ex.PW1/18.

42. I have heard arguments of Sh. Ravi Dev Sharma, Ld. Counsel for plaintiff and Sh. Rajesh Khaware, Ld. Counsel for defendant and have perused the case file carefully.

43. Now I shall dispose of individual issues framed in this case.

Issue no. 1:

i. Whether the plaintiff is entitled to recovery of damages of Rs.29,36,056/- alongwith pendente lite and future interest @18% p.a.? OPP

44. Before appreciating the submissions made by Ld. Counsel for both the sides it would be appropriate to cull out the facts admitted by both the plaintiff and the defendant. It is admitted case of the parties that plaintiff is a duly incorporated company and is engaged in import and export of raw material for steel and metal industries. It is also admitted that defendant, also a duly incorporated company is engaged in manufacturing of noble ferro alloys. It is admitted that defendant approached the plaintiff company for purchase of 100 metric tons (MT) of Ferro Silicon on 05.02.2020 and upon negotiations initial contract Ex.PW1/4 was executed whereunder the total sale value of the consignment was agreed to Rs.59,34,500/- available at running page no. 90 list of document dated 17.12.2022. This document bears signatures and rubber stamp of both the companies. Admittedly, according to this Port of loading was Jabel Ali, UAE and port of discharge was Nava Sheva, Mumbai, India and final destination was ICD Kanpur with a rider that inland transportation of material from Nava Sheva to ICD Kanpur was to be borne by the defendant buyer. It is also mentioned that the shipment was to be carried out within four weeks of receipt of advance.

45. Admittedly, defendant paid 10% of the above contract Ex.PW1/4's value i.e. Rs.5.94 lakhs on 06.02.2020 as against the wrongly mentioned date in plaint on CS Comm No.172/2021 Digitally signed page 17 by SURINDER TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. S RATHI SURINDER Date:

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46. It is further admitted case of both the sides that the port of discharge i.e. arrival of consignment in India was changed from Nava Sheva, Maharashtra to Mundra, Gujarat on the request of plaintiff which was acceded to by the defendant and which led to creation of an addendum document dated 17.03.2020 Ex.PW1/31 or Mark A which bears signatures and rubber stamp of both the plaintiff and the defendant. Perusal of this addendum shows that port of discharge and final destination was changed to Mundra Port, Gujarat, India and against the word 'shipment' it is written as 'March 2020' with a mention that rest of the terms shall continue as per initial contract.

47. Likewise it is admitted case of both the sides that even before the material could reach Mundra Port, a third agreement was executed between them mutually i.e. High Sea Sales (HSS) Agreement Ex.PW1/6 dated 25.03.2020, which was initially signed only by the plaintiff company. The same document was re-exhibited as Ex.PW2/2 dated 28.03.2020 which bears signatures of both the sides. It is admitted case of both the sides that as per HSS Agreement port of discharge is mentioned as Mundra Port and the price escalated to Rs.62,35,790/-. Admittedly, there is no reference or mention of time or duration of delivery in the HSS agreement. Admittedly, as per initial understanding between plaintiff and defendant, plaintiff was supposed to import the material and then carry out a local sale to the defendant but upon execution of HSS the circumstances changed to the effect that now plaintiff has agreed to sell the consignment to the defendant in High Seas only i.e. the sale had been carried out at High Seas itself. Another change which has admittedly been brought by HSS is that the earlier consignment was to be received and got released by the plaintiff from the port authorities but after execution of HSS it was duty of the defendant to receive and get the consignment released on the basis of document supplied by the plaintiff, only upon receipt of the payment CS Comm No.172/2021 Digitally signed page 18 TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. by SURINDER S RATHI SURINDER Date:

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by the plaintiff from the defendant.

48. Admittedly, the consignment reached Mundra Port on 31.03.2020 as this fact has not been specifically denied by the defendant in the WS as per Order 8 Rule 3A of CPC. It is also admitted that this shipment was not received or got released by the defendant as per HSS and the material had to be stocked at the port itself till it was finally got released by the plaintiff on 29.10.2020 on the

basis of NOC issued by defendant company dated 01.06.2020 and exhibited as Ex.PW1/13.

49. In order to show its entitlement to seek recovery of Rs.29,36,056/- alongwith interest @18% per annum, plaintiff is required to show that the initial agreement Ex.PW1/4 which was modified by the Addenda Ex.PW1/31 followed by third High Sea Sales Agreement Ex.PW1/6 which was breached by the defendant and fully complied by the plaintiff. Plaintiff is also required to prove that despite due compliance of all the clauses by the plaintiff and failure of the defendant to comply the terms of the HSS contract plaintiff suffered loss of Rs.29,36,056/-

50. As discussed supra the consignment of 100 metric tons of ferro silicon was supposed to be delivered to the defendant by the plaintiff within 4 weeks of payment of advance. The advance was paid on 06.02.2020 and as such the consignment was supposed to be delivered at ICD, Kanpur on or by 06.03.2020. Since the port of landing was changed from Nava Sheva, Mumbai to Mundra, Gujarat and addenda Ex.PW1/31 was executed it carried the terms "Shipment March 2020". As per Ld. Counsel for plaintiff this date signifies the date on which the consignment was to embark on journey from Jabel Ali, UAE but as per Ld. Counsel for defendant this phrase signifies the last date of delivery i.e. end of March 2020. Be that as it may, the consignment arrived at Mundra Port, Gujarat on 30.03.2020 but nothing has been placed by plaintiff on record to show that this intimation was sent by the plaintiff company to the CS Comm No.172/2021 Digitally page 19 signed by TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. SURINDER S SURINDER RATHI S RATHI Date:

2024.10.14 15:32:24 +0530 defendant company. Although para 14 of the plaint carries a reference that the shipment was due to arrive on 31.03.2020 and hence plaintiff wrote an email to the defendant on 30.03.2020 but even the body of this email Ex.PW1/8 does not carry any reference of actual arrival or estimated time of arrival (ETA) on 30.03.2020 or 31.03.2020.

51. Although initially the defendant was not forthcoming in admitting the execution of HSS as one of the copy of the same Ex.PW1/6 did not carry the signatures from the defendant's side but another copy of HSS dated 28.03.2020 was exhibited as Ex.PW2/2 which bears the signatures of both the sides.

Execution of HSS was also admitted by DW2 Puneet Gupta. Consequently, the fate of this case rests solely on the interpretation and compliance of terms contained in the same by both the sides. Clause 15 of the HSS is relevant and is reproduced hereunder:

Clause 15 of HSS:

15. PAYMENT: TOTAL AMOUNT OF INR 62,35,790.00 (SIXTY TWO LAKH THIRTY FIVE THOUSAND SEVEN HUNDRED NINETY ONLY) WOULD BE PAID BY THE BUYER TO THE SELLER AS UNDER:

TOTAL INVOICE VALUE INR 62,35,790.00 LESS: ADVANCE PAID INR 594,000.00 BALANCE INR 56,41,790.00 BALANCE ABOVE TO BE PAID AGAINST PRESENTATION OF COPIES OF BELOW DOCUMENTS:

a. ORIGINAL COMMERCIAL INVOICE 3+3 b. ORIGINAL BILL OF LADING c. IMPORT COMMERCIAL INVOICE 1+1 d. IMPORT PACKING LIST 1+1 e. SELLER TEST CERTIFICATE 1+1 f. CERTIFICATE OF ORIGIN 1+1

52.Plain reading of this binding clause shows that in addition to the advance paid by the defendant i.e. Rs.5.94 lakhs defendant was supposed to pay balance of enhanced sale amount i.e. Rs.56,41,790. The clause categorically provides that as a pre-requisite of demanding this payment from the defendant plaintiff was supposed to share copies of six documents inventorised from a to f. In para 14 of the plaint the plaintiff has categorically stated that all the documents required by the defendant to get the consignment released from Mundra Port CS Comm No.172/2021 Digitally page 20 signed by TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. SURINDER S SURINDER RATHI S RATHI Date:

2024.10.14 15:32:34 +0530 Authorities were supplied to it by the plaintiff company vide email dated 20.03.2020 Ex.PW1/8. For ready reference para 14 is reproduced hereunder:

14. "That since the shipment/goods was due for arrival at the port on 31.03.2020 the Plaintiff vide email dated 30.03.2020 provided all the documents to the Defendant, to enable the CHA of the Defendant to get the consignment released, subject to payment of the outstanding."

53.When para 14 is read simultaneously with email Ex.PW1/8, it is found that the only attachment available with the email is copy of HSS Agreement. Although the manner in which the document was exhibited during the course of evidence and contents claim that copy of draft invoice and packing list was also attached but no thumbnail of any such attachment is visible in the email. It is rightly pointed out by Ld. Counsel for defendant that the body of the email says that "draft invoice" is enclosed but the printout placed on record carry an unsigned commercial invoice of Rs.56,41,790/- apart from a purported invoice of Rs.62,35,790/- which bears two rubber stamps and hand made signature on behalf of plaintiff company. Since neither there is any reference of attachment of a copy of a final commercial invoice nor there is any thumbnail of the same visible in the email the same is found to be wholly unbelievable. Even if it is believed that the copy of draft invoice and packing list was attached alongwith HSS agreement it does not qualify the requirement of Clause 15 of HSS Agreement i.e. documents inventorized as 'a' to 'f' supra. It is seen that the necessary documents were actually not supplied by the plaintiff company to the defendant. This leads to an inevitable conclusion that the contents of para 14 of the plaint where plaintiff claims to have supplied all the necessary documents for release

of shipment by the defendant is a false plea and averment. It is strikingly observed that that most important document i.e. copy of original "Bill of Lading" necessary for release of consignment from the port authorities was supplied by the plaintiff to the defendant only on 18.05.2020 i.e. after 48 days after arrival of the consignment but para 14 of the plaint claims that even this document was supplied as on 30.03.2020 which is nothing CS Comm No.172/2021 Digitally page 21 signed by TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. SURINDER S SURINDER RATHI S RATHI Date:

2024.10.14 15:32:42 +0530 but a bald lie. Plaintiff deserves to be dealt with under Section 379 BNSS (Section 340 Cr.PC) for pleading false fact under affidavit.

54.During the course of arguments, Ld. Counsel for plaintiff could not dispute the fact that submission of copy of bill of lading is a necessary pre-requisite for release of consignment from the port. Upon being asked nothing has been shown on record from the side of the plaintiff that copy of 'Bill of Lading' was shared by the plaintiff company to the defendant on any date between 28.03.2020 when the HSS was executed between the parties and 18.05.2020 when the copy of the same was supplied by the plaintiff to the defendant for the first time. Evidently, in the absence of copy of the Bill of Lading, defendant could not have obtained the delivery of the consignment of 100 metric tons of ferro silicon and as such there is no question of faulting the defendant for non- supply of lading bill to it by the plaintiff company.

55.During the course of hearing per se frivolous arguments has been raised on behalf of the plaintiff that bill of lading was not supplied by the plaintiff to the defendant any time prior to 18.05.2020 because defendant company did not pay up the balance of Rs.56,41,790/-. This plea is in total contradistinction to Clause 15 of HSS Ex.PW1/6/Ex.PW2/2 which clearly shows that handing over of 6 documents by the plaintiff to the defendant shall precede before defendant was supposed to make any payment to the plaintiff. A supplementary submission was also made that the plaintiff company had a apprehension that in case the documents are released to the defendant the defendant would get the consignment released without paying the dues to the plaintiff. It is pointed out to Ld. Counsel for plaintiff that these pleas are legally untenable as they are in violation of Section 95 of Bhartiya Sakshya Adhiniyam, 2023 (Section 92 Indian Evidence Act) and Section 96 of Bhartiya Sakshya Adhiniyam, 2023 (Section 93 of Evidence Act).

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Section 95 of Bhartiya Sakshya Adhiniyam, 2023 : Exclusion of evidence of oral agreement "When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1). -- Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. Proviso (2). --The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3). --The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4). --The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5). -- Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6). -- Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Section 96 of Bhartiya Sakshya Adhiniyam, 2023 : Exclusion of evidence to explain or amend ambiguous document.-

"When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects."

56.Once a contract was entered between the parties with mutual understanding, there is no reason as to why the parties can be allowed to alter, modify or twist the

purpose and purport of the contents of the document. It is further submitted by Ld. Counsel for plaintiff that the act of defendant of accepting the bill of lading on 18.05.2020 should be treated as defendant's waiver of delay in supplying of the same by the plaintiff. I do not find any substance in this plea in so far as Ld. Counsel for defendant has categorically submitted that the same was received by the defendant only under the impression that no penalty or CS Comm No.172/2021 page 23 TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. Digitally signed by SURINDER S RATHI SURINDER Date:

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demurrage would be imposed on it for the period 31.03.2020 to 18.05.2020 when the consignment was lying at the Port. However, as rightly pointed out when the defendant contacted the Customs Authority, the port authorities demanded a penalty of Rs.4.95 lakhs. It is argued on behalf of the defendant that since the defendant company was not at fault, it cannot be expected to pay this huge penalty.

57.A submission is made by Ld. Counsel for plaintiff in this regard that plaintiff had ensured that no penalty or demurrage would be levied against the defendant for the period 30.03.2020 to 18.05.2020. This plea is, however, contradicted by the table of conclusions filed by PW1 in her affidavit in chief wherein it is shown that several charges would be calculated right from June 2020 itself.

58.Another plea raised on behalf of the plaintiff is that in the initial contract between the parties dated 05.02.2020 there was a provision that the consignment would be delivered within 4 weeks of advance payment and since the advance of Rs.5.94 lakhs was admittedly paid on 06.02.2020, the consignment was supposed to be delivered on or by 06.03.2020 but it is argued that in the addendum executed on 17.03.2020, there was no fix date provided except when the consignment/addendum dated 17.03.2020 only provided for "Shipment March 2020".

59.It is argued that even in the HSS agreement there is no period mentioned for delivery and as such a defendant is not within its right to claim that the plaintiff delayed the consignment. In this regard it has to be borne in mind that the initial contract, supplemented with Addenda and followed by execution of High Seas Sale Agreement dated 28.03.2020 are not standalone transactions in the stricter sense but are series of documentation carried out between two contracting parties for the same purpose i.e. for import and sale of 100 metric tons of ferro silicon. As discussed supra, the initial delivery date was Digitally CS Comm No.172/2021 signed by page 24 SURINDER S TUF Metallurgical Pvt. Ltd. Vs. Nortech Ferro Alloys Pvt. Ltd. SURINDER RATHI S RATHI Date:

2024.10.14 15:33:08 +0530 06.03.2020 and the addenda was executed on 17.03.2020 and the consignment reached the port Mundra, Gujarat on 31.03.2020, failure on the part of the plaintiff to provide all the necessary documents for release of the consignment for more than one and a half month shows that it was the plaintiff company which miserably faltered in carrying out its part of the contract. Evidently, the time was always of essence as far as the transaction of sale of 100 metric tons by the plaintiff to the defendant is concerned. Just because the time was extended initially in the name of Addendum and thereafter in the name of HSS does not mean that timely delivery of the consignment, which was of essence at the beginning, lost its essence in the subsequent modifications in the terms of contract. Just because there is no specific period mentioned in the HSS of delivery, does not mean that the plaintiff had unlimited time at its disposal for supply of the consignment.

60. Furthermore, once the consignment reached Mundra Port Gujarat from UAE, the delay which ensued on account of non-delivery of documents is squarely attributable to the lethargy of the plaintiff and its employees.

61. The action of the plaintiff company, of filing of the suit in hand seeking damages, is evidently act to shield its own failure. Even conjoint reading of Section 46 and Section 47 of Indian Contract Act shows when time and place of performance is agreed between the parties, the same shall be performed by the promiser within time or within reasonable time as the case may be.

Section 46 of Indian Contract Act, 1872: Time for performance of promise, where no application is to be made and no time is specified.-

Where, by the contract, a promisor is to perform his promise, without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.- The question "what is a reasonable time" is, in each particular case, a question of fact.

Section 47 of Indian Contract Act, 1872: Time and place for performance of promise, where time is specified and no application to be made.-

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When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hour of business on such day and at the place at which the promise ought to be performed.

62.The endeavour on the part of the plaintiff Ld. Counsel for plaintiff to project that all the necessary documents including the bill of lading was duly supplied to the defendant well within the time has already been found to be a false statement and stand. Moreover, a contradictory plea was raised during the course of final hearing that the plaintiff bank did not supply the necessary documents to the defendant because defendant did not pay up the balance value of the consignment as per HSS i.e. Rs.56,41,790/- as discussed supra this is nothing but a farce in so far as it was never agreed between the parties that payment of balance amount precede the handing over of necessary documents by the plaintiff to the defendant.

63.The last submission made by Ld. Counsel for plaintiff is that the defendants were actually not desirous of getting the consignment released and the same is evident from the fact that they were not responding to plaintiff's repeated emails sent w.e.f. 27.03.2020 onwards to 14.05.2020. I do not find any strength in this submission as well since the execution of HSS was actually carried out on 25.03.2020 but as per stamp paper on Ex.PW1/8 it was executed on 28.03.2020. Ld. Counsel for plaintiff failed to show anything on record that the plaintiff involved the defendant of arrival of consignment on 31.03.2020 at Mundra Port, Gujarat no email has been cited. The tone and tenure of emails sent during the month of April and May simply demand the balance payment and falsely claim that all the shipment documents have been supplied despite the admitted fact that the most important document required for release of the consignment i.e. copy of original bill of lading was supplied only on 18.05.2020. As such, I find no merits in the case of the plaintiff and plaintiff has miserably failed to discharge the onus of proving its entitlement to receive damages from the defendant to the tune of Rs.29,36,056/- @ 18% per annum.

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In view of the above, this issue is answered against the plaintiff and in favour of defendant.

Relief

64.In view of the above discussion, this Court has no hesitation in concluding that plaintiff company has miserably failed to discharge the onus of proving this case and suit of the plaintiff is accordingly dismissed with cost. An additional cost of Rs.75,000/- is imposed on the plaintiff which shall be paid to defendant. Defendant's lawyer's fees is assessed as Rs.50,000/-.

65.Decree Sheet be prepared accordingly. File be consigned to Record Room after due compliance.

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(SURINDER S. RATHI)
District Judge
Commercial Court -03
Shahdara District, KKD
Delhi/24.09.2024.

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