

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.
Suit No.1891 of 1980

The Cotton Corporation of India Ltd. ... Plaintiffs
Versus
TCI Industries Ltd. .. Defendants

Mr.Rajesh Shah with Ms.Smita Karnik with Mr.A. Joshi i/by
M/s.Divekar & Co. for Plaintiffs.

Mr.O.S. Kutty with Ms. Sabiha Mukadam for Defendants.

CORAM : SMT.ROSHAN DALVI, J.

Dated : 15th December 2008

JUDGMENT :

1. The Plaintiffs are the canalizing agents of the Government of India for import and supply of foreign cotton to several Indian Textile Mills. The Defendants carry on business of the textile Mills.
2. The Plaintiffs issued a circular dated 12.3.1977 upon all the Mills informing the Mills that limited quantities of certain varieties of imported cotton were available for allocation at the rates mentioned therein. The Plaintiffs called upon the Mills to perform certain acts and informed the Mills that any of the Mills desirous of importing cotton were requested to approach the Plaintiffs for registering their demand. The

Defendants registered their demand on 15.3.1977. The parties entered into a written contract on 28.3.1977.

3. Pursuant to the contract, the goods were shipped to India. The Plaintiffs issued their shipment advice on 1.6.1977 to the Defendants. The Defendants have denied receipt of the said advice. The Plaintiffs sent their telegram to the Defendants to clear the goods upon collecting the duplicate documents and informed the Plaintiffs the mode of payment. The Defendants have denied receipt of that telegram.
4. The Defendants did not clear the goods. Instead the Plaintiffs cleared the Defendants' consignment. The Plaintiffs have relied upon various Dock documents to show the expenses incurred by them for clearance of the goods. The Plaintiffs also paid fees of their clearing agents. The Plaintiffs have sought to prove the expenses incurred by them for clearing the goods through a representative of the clearing agents' Firm.
5. The Plaintiffs have raised their invoice upon the Defendants dated 27.9.1977 under the covering letter dated 30.9.1977. The Defendants have refuted their liability thereunder.
6. Upon having cleared the goods, the Plaintiffs had stored the

goods of the Defendants. The Plaintiffs have informed the Defendants of such storage by their letter dated 27.10.1977, mentioning the date of arrival, lot number and the quantity of the Defendants' goods stored by the Plaintiffs. The Defendants were requested to obtain their cotton bales under the said letter also. The Defendants failed to take delivery. The Plaintiffs have issued their legal Notice to the Defendants on 18.4.1978. The Plaintiffs claim their rights under the provisions of the Sale of Goods Act with regard to the non-delivery and have sued for damages for the loss suffered by the Plaintiffs upon the shipment being made for which the Plaintiffs had to incur expenses due to the breach committed by the Defendants by non-acceptance of the goods which arrived in India on their account. The Plaintiffs claim their rights under the written contract with regard to the Dock expenses incurred by them as reflected in the Dock documents, the clearing charges incurred by them as per the invoice of their clearing agents along with interest at 18% per annum which is less than the contractual rate. The Plaintiffs also claim carrying charges for the storage of the goods upon clearance.

7. Further the Plaintiffs have sought to resell the goods initially by public auction as per the tender issued by them on 24th June 1978 and they not having obtained the proper price

upon such auction, by private treaty. The Plaintiffs claim to have sold the Defendants' goods to 5 parties under 5 separate invoices between 26.10.1979 to 22.12.1980. The Plaintiffs have hence shown how they have mitigated their damages. They claimed the balance amount incurred by them upon the import of the goods as per the invoice raised upon the Defendants as the net loss suffered by the Plaintiffs.

8. It has been the Defendants' case that they have repudiated the contract even before they entered into the written contract by not performing the conditions which they were called upon to perform in the Plaintiffs' circular itself. The Defendants contend that, therefore, the written contract is of no consequence and they have not incurred any liability thereunder to take delivery of the goods by clearance of the goods or to honour the contract by payment. The Defendants further contend that mitigation of the loss by the Plaintiffs is improper and the resale sought to be made by the Plaintiffs is after an inordinate delay after the goods deteriorated with age and could not fetch a reasonable price. The Defendants, therefore, contend that the Plaintiffs are not entitled to rely upon any such mitigation of their damages by resale.

9. Based upon the pleadings upon the parties, Justice D.K. Deshmukh drafted the following issues which are answered as follows :-

ISSUES

- (a) Whether the Suit is barred by Law of Limitation as stated in paragraph 1 of the Written Statement. .. **Not pressed**
- (b) Whether the Suit is misconceived for want of details and particulars as stated in paragraph 2 of the Written Statement. **Not pressed**
- (c) Whether the Plaintiffs prove that there is valid, binding and concluded contract between the Plaintiffs and Defendants to import and supply to Defendants 500 bales of cotton as stated in paragraph 2 of the Plaint. **Yes**
- (d) Whether the Plaintiffs prove that the Defendants committed breach of the contract by failing to take delivery of the cotton. **Yes**
- (e) Whether the Defendants prove that the Plaintiffs have not acted in furtherance of the suit contract as stated in paragraphs 5 and 7 of the Written Statement. .. **No**
- (f) Whether the Defendants prove that the contract was given a go-by or cancelled as stated in para 6 of the Written Statement. **No**
- (g) Whether the Plaintiffs prove that they suffered the loss of Rs.22,78,578.45 as stated in para 6 of the Plaint to the extent of the claim for damages upon resale of the Defendants' consignment. .. **No**

- (h) Do the Plaintiffs prove that the Plaintiffs imported 480 bales of Sudan cotton pursuant to the contract for sale thereof with the Defendants as alleged in paragraph (4) of the Plaint ? .. **.. Yes**
- (i) Do the Plaintiffs prove that the Plaintiffs paid an aggregate sum of Rs.29,83,756.70 towards invoice value, clearance charges, demurrage, carrying charges, clearing and forwarding charges, brokerage and gain in weight for 480 bales of Sudan cotton as alleged in paragraph (6) of the Plaint ?
.. Yes to the extent shown in their documents Ex.P-7 to Ex.P-14 and for carrying charges and interest at the contractual rate.
- (j) Do the Plaintiffs prove that the Plaintiffs offered delivery of 480 bales of Sudan cotton to Defendants as alleged in paragraph (4) of the Plaint ? .. **Yes**
- (k) Is the contract dated 28.3.1977/22.4.1977 not properly and sufficiently stamped as alleged in paragraph (4) of the Written Statement ? If so, what is its effect ?
- (l) What reliefs/order ? .. **As per final order**

10. The Plaintiffs have examined their 2 officers and have tendered documents relating to the execution of the contract, the shipment and the clearance of the goods, the storage of the goods and the resale for mitigation of damages. The Plaintiffs have also examined a representative of their

clearing agents to prove the invoice raised upon the Plaintiffs for the clearing agents' charges paid by the Plaintiffs. The Defendants have led evidence of their officers.

11. It can be seen that the issue of the circular and the consequent execution of the contract are admitted. The several documents relied upon by the Plaintiffs pursuant to the shipment being effected which were sent to the Defendants were denied. Several of the documents of the Plaintiffs are Dock documents under Item-3, Part-II of the Schedule to the Commercial Documents Evidence Act, 1939 carrying a presumption as to their correctness. No documents are relied upon and need be produced or proved in respect of storage of the consignments cleared by the Plaintiffs as the carrying charges are claimed at the rate mentioned in the written contract between the parties itself. Similarly, the telegram reflects the statutory presumption of transmission of the message from the Defendants. The documents sent to the Defendants being the shipment advice, the invoice and the forwarding letter thereto which are denied by the Defendants would only have to be proved by the Plaintiffs by direct oral evidence. Similarly only the invoice of the clearing agents would have to be proved by the Plaintiffs by direct oral evidence.

12. The documents relating to resale would require to be considered essentially upon the period which has passed from the date of the clearance of the goods until the date of resale when the goods were stored with the Defendants to initially see whether the resale would be of any consequence in mitigation of the damages and claiming the loss suffered by the Plaintiffs. Accordingly, a large chunk of the oral evidence becomes totally redundant and irrelevant. The rights and liabilities of the parties would have to be considered essentially based upon the aforesaid admitted documents, the Dock documents and the documents proved by direct evidence.

13. The Defendants have not relied upon any documentary evidence. The Defendants concede to the documents of the Plaintiffs being referred to and marked in the evidence of the Plaintiffs under the Affidavit of examination-in-chief of the Plaintiffs' witnesses.

14. Issues (a) & (b) are not pressed.

15. **Issues (c) & (f)** : The Plaintiffs initially issued a Circular dated 12th March 1977, Exhibit P-1, upon all the Mills. The circular sets out that all the Mills are informed that limited quantities of certain varieties of imported cotton were

available for allocation at the rates indicated against the varieties specified in the circular, excluding the bank and the Plaintiffs' service charges. The Mills were called upon to arrange for clearance on arrival of the steamer. The Mills desirous of importing the cotton were requested to approach the Plaintiffs before 24.3.1977 for registering their demand. The allocation would be communicated to the Mills on the basis of supplies available. The Mills were informed that the Bank Guarantee in a prescribed format which was overleaf was required. The Mills were required to send their application for subsidiary import licence along with the Bank Guarantee within 10 days of the confirmation of the booking to the Plaintiffs along with the licence fees as usual.

16. It can be seen that the Circular dated 12.3.1977 was an invitation to the Mills to make their offer. The Mills have to make an offer within the specified time. The Plaintiffs would thereafter communicate the allocation on the basis of supplies. Such allocation would constitute acceptance of the Mills' offer. There was a specific requirement in the tender for clearance of the goods on arrival of the steamer. The Bank Guarantee and the subsidiary import licence were required to be given only if the Mills' offer was accepted by the Plaintiffs and a written contract came to be executed between the parties. These conditions were to be complied

within 10 days after confirmation of booking.

17. It is the contention on behalf of the Defendants that these conditions were condition precedent to the execution of the contract and if these conditions were not complied, the contract would be *non-est* even if executed and entered into. Hence, the Defendants contend that they are not bound and liable under any of the clauses of the contract which was later executed without performing those conditions. It can be easily seen that the contention is wholly erroneous. The rights and liabilities of the parties commence only from and after a contract is executed and communicated to the proposer. A circular, which is addressed to all the Mills, cannot even form an offer of a contract. It is only an invitation to make offers. The Plaintiffs called upon the Mills to make their proposal for import of goods. Only the Mills would decide whether or not to import cotton bales. If the Defendants decided to import cotton, they would register their demand with the Plaintiffs to the extent of their requirement. In other words, they would make an offer to purchase cotton to the extent required by them. The Plaintiffs would confirm the offer, partly or fully, as per the availability of goods. When the confirmation is made the parties would sign the contract. The Plaintiffs, as the canalizing agents, who are required to allocate certain

limited quantities of imported cotton to various Mills, would perform that contract by having the goods shipped by the exporters and making the contracted material available for delivery upon arrival at the Indian Ports. It can be seen that the Bank Guarantee, the format which was given on the reverse of the circular itself, was to be calculated at the rate of Rs.600/- per bale. That rate could never be calculated until the Defendants make an offer of the number of bales they required, the Plaintiffs allocated the bales, and the bales are actually shipped and arrived in the Ports. The contention on behalf of the Defendants that the Bank Guarantee should have been given within 10 days of the circular/letter or even the Defendants' own application for registration of their demands can never be accepted because at that point of time the extent of the Bank Guarantee, which is required to be filled in in the proforma of the Bank Guarantee, could never be made out. The liquidated amount payable at the rate required by the Plaintiffs per bale could never be ascertained. Hence no Bank Guarantee could have been issued at that time. Further the contention that the Mills had to send their subsidiary import licence also within 10 days of the said circular or the Defendants' own application for registration of their demand is erroneous. Clause relating to the requirement of the import licence specially states that it should be within 10 days of the

confirmation of the booking. Only the Plaintiffs would confirm the booking which could not have been done until the parties enter into the contract.

18. It is, therefore, clear that the Circular dated 12.3.1977 could not have been complied by the Defendants by doing anything before or upon registering their demand. The circular was, therefore, an invitation to make an offer. It was not an offer to enter into a contract. The registration of the demand would constitute the offer of the Defendants.

19. The Defendants made their offer by registering their demand by their letter dated 15.3.1977, Exhibit P-2. The letter refers to the Circular dated 12.3.1977. It runs thus:-

“We hereby register our offer to buy 500 bales of Sudan cotton at Rs.5150/- per candy CIF Bombay due in April/May 1977 as per above circular. Further formalities will be completed after confirmation of the booking.”

[Underlining supplied]

These formalities would be issuing of the Bank Guarantee and sending the application for subsidiary import licence as specified in the circular of the Plaintiffs. The confirmation of the booking would be made by the Plaintiffs upon allocation of

the cotton on the basis of the supplies available as stated in the circular.

20. Hence the Defendants' letter dated 15.3.1977 constitutes the offer of the Defendants to import and purchase 500 bales of Sudan cotton at the price specified therein. It was for the Plaintiffs to accept or refuse the said offer fully or partly.

21. The Plaintiffs sent Contract No.G-472 dated 28.3.1977 to the Defendants allocating to the Defendants 500 bales of cotton offered to be purchased. The contract is cyclostyled with the relevant blanks being filled in. The contract is duly executed and returned by the Defendants to the Plaintiffs on 23.4.1977 under their letter dated 23.4.1977 received by the Plaintiffs under Certificate of Posting. The Defendants' letter runs thus :

“We are enclosing herewith Contract No.G 472 for 500 bales of foreign cotton duly signed by us.

Thanking you.

Sd/-

P.S. : Bank Guarantee will follow.

Encl. : Original Contract No.G 472.”

[Underlining supplied]

Hence the contract between the parties was completed. The contract was in writing. The Defendants agreed and understood and expressly stated that Bank Guarantee will follow.

22. It need hardly be stated that the parties to an admittedly executed written commercial contract are bound by its terms and must perform the contract as per its terms as per Section 31 of the Sale of the Goods Act. The contract specifies the requirements, inter alia, of the Bank Guarantee as well as subsidiary import licence required to be given. The terms of the contract are required to be considered. Under Clause-20 of the Contract, in case of the deposit of 25%, which has been paid by the Mills in cash by way of Bank Guarantee, was liable to forfeiture. Hence the Defendants were to make payment of 25% of the price of the goods by such Bank Guarantee. The circular of the Plaintiffs stated that this Bank Guarantee was required to be calculated at the rate of 600 per day. For the import of 500 bales, the Defendants would be required to give a Bank Guarantee of Rs.3 Lakhs. This had to be given upon the contract being signed. Hence the Defendants' own letter stated that the Bank Guarantee will follow. The precise 25% of the value of the consignment shipped and imported would be required to

be ascertained upon the actual value at the relevant time for which the Plaintiffs would be raising their invoice upon the Defendants. It is impossible to conclude that the Bank Guarantee could have been given earlier than the contract or that not giving the Bank Guarantee was a condition precedent which was not performed vitiating the contract entered into by the parties afterwards.

23. Under Clause-34, the Agreement was specifically subject to the condition that the Mills produced the necessary Bank Guarantee within 10 days from the date of the execution of the Agreement, failing which the Agreement was liable to be cancelled. It is contended on behalf of the Defendants that because the Defendants have not given Bank Guarantee as required, the contract has become inexecutable. That argument is misconceived. It was the Defendants' liability to give the Bank Guarantee as required under the said clause. If the Defendants did not give the Bank Guarantee, they would make a breach of the said clause in the Agreement. They would be the defaulters to that extent. The contract, which was liable to be cancelled, would then be cancelled by the Plaintiffs. Hence the right of cancellation remained with the Plaintiffs and not with the Defendants who would be the defaulting party. A defaulting party making a breach of the contract cannot itself terminate the contract.

24. Clause- 14 of the Contract shows that the Defendants would pursue to get the import licence well in advance before the commencement of the shipment as per the quota letter, failing which the liability for sales tax, if any, would have to be borne by the Defendants. The clause further specifies that if the goods under the Agreement were imported without the Defendants having obtained the necessary subsidiary import licence and if sales tax is required to be paid on the goods, the same would be paid by the Mills and the Mills would indemnify the Plaintiffs to that extent. Consequently it is seen that the clause shows not only the enjoinder of the Defendants to obtain the licence, but sets out the consequences of not obtaining the licence. Such licence was to be sent to the Plaintiffs along with the Bank Guarantee within 10 days after the confirmation of the booking as per the circular of the Plaintiffs. If such licence was not sent to the Plaintiffs, as per the contractual terms, the Defendants would incur liability of sales tax. Consequently it is seen that this is not a condition precedent to the contract. It is not even a condition in the contract. It is an enabling provision. It requires the licence to be obtained in view of other rules by which the parties were governed. It would result in additional mandatory liability if the licence was not obtained. Non-obtaining such licence would only enhance

the Defendants' liability and cannot vitiate the contract. The provision relating to liability itself shows that it is not a condition.

25. In the case of **D.W. Roberts vs. Shaikh Hyder, AIR 1923 Nagpur 140**, it was held that where the goods were to be delivered within a given time-frame and the consequences of non-delivery was shown, the time was not of the essence of the contract as per the intention of the parties. On the same analogy, it can be seen that obtaining the import licence is not a condition under the contract itself. It was required to be obtained if the Defendants desired not to incur the liability of further sales tax.

26. The Defendants' first contention must be rejected on both these scores. The contract between the parties, therefore, governs rights and liabilities as per its terms. The Plaintiffs have to have the goods shipped within the time-frame. The Defendants have to accept the delivery of the goods by clearing the goods upon arrival in the Port of India as stated in the Contract.

Hence Issue-(c) is answered in the affirmative and Issue (d) is answered in the negative.

27. Issues (d), (e), (h) & (j) : The Plaintiffs were to supply and deliver the goods contracted to be purchased by the Defendants. The goods were to be supplied by the foreign supplier and to arrive in the Indian Port.

28. It is not denied that the goods were shipped and allowed in the Indian Port as per the terms of the contract. The Defendants have indeed not taken delivery. They would be taken to have made a breach of the contract by non-acceptance of the goods under Section 56 of the Sale of Goods Act. The Defendants however contend that though they have not taken delivery, they have not breached the contract because the contract, though executed by the Defendants, was not performed by the Defendants with regard to two of its essential conditions prior to the arrival of the goods and hence stood cancelled upon their default and at their instance. The Plaintiffs contend that the contract was in force. The Plaintiffs performed their reciprocal promises under the contract by having the goods mentioned in the contract delivered as per the terms of the contract with regard to the quantity, quality as well as the price and the time of delivery specifically set out in the contract. The Plaintiffs had no further reciprocal promise to perform. Once the Plaintiffs did that, it was for the Defendants to accept the goods, take the delivery and clear the goods from the Port.

29. The goods were admittedly shipped on 26.5.1977 as shown in the Bill of Entry itself. The Plaintiffs sent their shipment advice to the Defendants under their letter dated 1.6.1977, Exhibit P-5. The shipment advice mentions the particulars of the consignment. It is the Plaintiffs' evidence that this shipping advice was handed over to the Defendants' representative at their office on 3.6.1977. It has been initialled by the Defendants' representative. The oral evidence led by the Plaintiffs in this behalf for proving the receipt of the shipping advice by the Defendants upon their denial of receipt of the shipping advice is reflected in the cross-examination of the Plaintiffs' witness Mr.V. Munikrishnan. The witness has identified the signature on the shipment advice as that of one Mr.C.S. Thaker, who signed on behalf of the witness and who was himself the Deputy Manager (Int) at the relevant time. He has specified about the acknowledgment of the receipt by the representative of the Defendants at the left hand bottom of the office copy of the Plaintiffs' letter, though he cannot identify who was that representative. He has however explained that it was the practice at the relevant time for the Mills located in Bombay to be in daily touch for the import division of the Plaintiffs to collect any documents, clarify any doubts or furnish any information required with regard to

their contracts. It was the practice of the receiver of the original documents to acknowledge the documents at the left hand bottom and take the original documents. The shipping advice was collected from the Plaintiffs' office. It did not require any entry in the Outward Register to be made. The Plaintiffs have thus proved the receipt of the shipment advice by the Defendants in the ordinary course of business and conduct of the parties. However even if that is not taken to be proved, the Plaintiffs have produced the telegram sent to the Defendants on 18.6.1977 to collect the duplicate documents and inform the Plaintiffs of the mode of payment and the name of the Defendants' clearing agent. The Plaintiffs sent the aforesaid telegram to the Defendants on 18.6.1977 at 12.20 hours. It is sent to the Defendants' telegraphic address BESTFEB. The Defendants admit that that is their telegraphic address. There is a presumption as to the correctness of telegraphic message sent to the addressee under Section 88 of the Indian Evidence Act. The oral evidence of the Plaintiffs is with regard to the correctness of the message in the telegram. Hence despite the Defendants' denial, the transmission of the telegram must be taken to have been made as reflected in the telegram, Exhibit P-6.

30. The Defendants had notice and knowledge of the import of

the goods specified in their written contract as per the terms of the contract. These facts show that the Plaintiffs got the Defendants' consignment shipped to the Indian Port as per the terms of the contract between the parties. The Plaintiffs informed the Defendants about the arrival of the goods and offered delivery of the goods that arrived. Hence the Plaintiffs acted as the contract and the Defendants breached the contract by non-acceptance of the goods and admitted non-performance of the other terms of the contract. Hence Issues (d), (h) and (j) are answered in the affirmative and Issue (e) is answered in the negative.

31. **Issues (g) & (i)** : The Defendants are bound to perform their part as per the terms of that contract. They would incur the liabilities also as per the terms of the contract. These liabilities would be incurred under Clauses 6, 13 and 17 of the written contract admittedly executed by the parties. They would be governed by its terms including Clauses 28 and 29 therein. The aforesaid clauses run thus :

32. Under Clause-6 of the Contract, if the Defendants fail to take delivery of the goods, the Plaintiffs were entitled to sell the goods to any other party by private sale or public auction and the Defendants were liable to pay the loss suffered by the Plaintiffs thereupon.

33. Under Clause-13 of the Contract, the Defendants were required to pay carrying charges at the rate of 2½ % per 30 days from the date of the arrival of the steamer, if they failed to make payment and to take delivery of the imported consignment.
34. Under Clause-17 of the Contract, if the Defendants fail to take delivery of the shipping documents and the Plaintiffs incur any expenses or charges for insurance, demurrage, taxes, such charges as well as interest thereon at 20% per annum on monthly rest basis would be borne by the Defendants.
35. Under Clauses 28 and 29, the Defendants were not entitled to cancel or revoke the Agreement or reject the shipment.
36. The initial liability of the Defendants was to clear the goods at the Port. For non-clearance of the goods, the Defendants would incur insurance, demurrage charges and taxes. The Plaintiffs cleared the goods instead. The Plaintiffs incurred the charges and expenses. The Plaintiffs would, therefore, be entitled to recover those charges as per the terms of the contract. Under Clause-17 that would be with interest at 20% per annum on monthly rest basis.

37. The Plaintiffs have to prove the charges incurred by them.

Most of the charges are incurred by the Plaintiffs under what are called "Dock documents". These are the charges specified in the Bill of Entry, Exhibit P-7, Import Applications, Exhibits P-8 and P-9, Port Trust Receipts, Exhibits P-10 to P-13. The Plaintiffs would be entitled to the total of these charges along with interest at the contractual rate thereon.

38. The Plaintiffs further incurred charges of their own clearing agents for clearing the goods. The clearing agents would have to be paid their fees for clearing the goods by the Plaintiffs as reflected in the bill/invoice raised upon the Plaintiffs which is to be proved by direct evidence. The Plaintiffs have led evidence of partner of the clearing agent as PW3 one Mr. Girish Kamath. He has deposed about the services rendered by the clearing agents which are reflected in the aforesaid documents, Exhibits P-7 to P-13 and which need not be repeated. Upon such evidence, he has raised his bill/invoice No.430/CCI/77 dated 20.9.1977 upon the Plaintiffs. He has identified the signature of Mr. V.G. Kamath on behalf of the Firm of the clearing agents M/s. Kamath & Company on the said invoice. He has specified the receipt of the advance of Rs.38,600/- from the Plaintiffs and the final bill of Rs.6122.28 payable by the Plaintiffs subsequently. The

Plaintiffs have thus proved the invoice through the maker of the invoice being the partner of the Firm identifying the signature of the signatory of the bill. The clearing agents' invoice dated 29.7.1977, Exhibit P-14, is accordingly proved by the Plaintiffs for the total expenses of Rs.44,722.28 incurred by the Plaintiffs. These expenses are also recoverable by the Plaintiffs under Clause-17 of the Contract with interest at the contractual rate.

39. The Plaintiffs raised their invoice dated 27.9.1977 upon the Defendants for the goods shipped based upon the Defendants' offer accepted by the Plaintiffs and specified in the written contract. The liability to pay as per the written contract is implicit in the written contract itself. The Defendants have strangely denied the receipt of the invoice sent under the Plaintiffs' forwarding letter dated 30.9.1977, both of which are marked Exhibits P-15 and P-15A.

40. The Plaintiffs would be entitled to recovery of the entire amount as on the date of the contract and upon clearance of the goods at Port. This would constitute the damages incurred by the Plaintiffs which the Plaintiffs under Clause-6 would have to mitigate by selling goods to any other party by private sale or public auction. The loss suffered by the Plaintiffs on that count would have to be borne by the

Defendants under the said clause.

41. The Plaintiffs would have to resell the goods within a reasonable time.

42. In the case of **Harichand and Co., Vs. Gosho Kabushiki Kaisha Ltd., A.I.R. 1925 Bombay 28**, which was also a case of sale of bales (presumably cotton) for computation of damages for the breach of contract. A period of 3 months taken by the Plaintiffs for resale of the goods between 5th February, 1921 when the goods arrived and 29th May, 1921 when the goods were sold was taken to be unreasonable delay. It was observed that since it was the Plaintiffs' duty to take all reasonable steps to mitigate the damages the Plaintiffs' Solicitor's notice of 26th April to resell the goods unless the Defendants took the bales within 2 days was itself held to be delayed without sufficient justification. It was seen that the market prices were falling and hence there should not have been such delay.

43. In the case of **M/s Hirji Bharmal Vs. Bombay Cotton Ltd., A.I.R. 1958 Bombay 411** Justice Chagla, as he then was, held that even 5 days that elapsed for resale of the goods was unreasonable. That was a case of resale of cotton which was observed to be an extremely marketable commodity for

which there would not be slightest difficulty in resale. In that case the notice of sale was given on 22nd May, 1953. Pursuant to the notice, the right to resale arose 5 days after 7th July, 1953 viz. 12th July, 1953. It was held that the goods should have been sold on 15th July, 1953 and that having not been done, there was an unreasonable delay in the sale. Hence, though the claim for damages was rejected carrying charges claimed by the Plaintiffs were granted up to 15th July, 1953 (paragraph 21) which was stated to be the proper date for considering the damages to which the Plaintiffs were entitled.

44. In the case of **Nikku Mal-Sardari Mal Vs. Gur Parshad & Brothers, A.I.R. 1931 Lahor 714** delay of more than a year was held unreasonable and in the case of **Mysore Sugar Co. Ltd. Vs. Manohar Metal Industries, A.I.R. 1982 Karnataka 283** delay of 3 months was considered to be long delay though the goods to be resold were copper scraps and ingots which are not perishable.

45. The goods were shipped on 26.5.1977. The Defendants were informed by the shipping advice on 1.6.1977 and by the Plaintiffs' telegram on 18.6.1977. The goods arrived in Bombay Port on 16.7.1977. The Plaintiffs cleared the goods by 20.9.1977. The Plaintiffs paid the clearing charges under

their agents' invoice also raised on 27.9.1977. The Plaintiffs raised invoice upon the Defendants on 27.9.1977 itself and informed the Defendants by their covering letter on 30.9.1977. The Plaintiffs stored the goods in their godown Nos.C-35 and C-36 upon clearance in September 1977. The Plaintiffs informed the Defendants about the storage of the goods under the specific Lot No.799/803 on 27.10.1977.

46.The Plaintiffs sent their legal Notice on 18.4.1978. The Defendants did not heed any of these. The Plaintiffs were entitled to carrying charges for the storage of the goods at the contractual rate specified in Clause- 13 of the Contract.

47.The Plaintiffs have tried to resell the goods thereafter by the initial Tender dated 24.6.1978 and the actual sale by private treaty much later between 26.10.1979 and 22.12.1980. It is clearly seen that resale by the Plaintiffs is after an inordinate delay 2 years and more from the time of storage of the goods and not within the reasonable time specified in the aforesaid judgments.

48.The Plaintiffs are, therefore, entitled to the expenses incurred by them under Dock documents as well as the clearing agents' bills with the contractual rate of interest thereon until the filing of the Suit. The Plaintiffs are also

entitled to the carrying charges upon invoice price of the goods at the rate of 2½% per 30 days which is the contractual rate for the carrying charges for a reasonable period of storage of the goods. A period of 1 month can be taken to be a reasonable period of storage given the fact that the Plaintiffs are a Government Agency required to follow due procedure of public auction before sale by private treaty. The Plaintiffs are however not entitled to the amount of loss incurred by them upon resale as the resale has been done after an inordinate delay.

Hence Issue (g) is answered in the negative and Issue (i) is answered in the affirmative to the extent of the shipping and carrying charges paid by the Plaintiffs with interest as aforesaid.

49. **Issue (l) :**

ORDER

The Suit is decreed in the sum of Rs.2,35,690.89 being made up off Rs.37710.88 as carrying charges at the rate of 2.5% per month for 30 days, shipping, fumigation and clearing agent's charges of Rs.44722.28 with interest at the rate of 20% per annum with monthly rest from the dates of the documents showing the aforesaid charges paid until 29.10.1980 being the date of the filing of the Suit, aggregating

to **Rs.31340.15** and further interest at the rate of 12% per annum from the date of the Suit until the date of judgment i.e. 15.12.2008 being **Rs.121917.58** .

The Defendants shall pay further interest at the rate of 12% per annum from the date of the judgment until payment/realization.

50.No order as to costs.

51.The original documents shall be returned to the respective parties who produced them.

[SMT.ROSHAN DALVI, J.]