

(2011) 12 MAD CK 0182

In the Madras High Court

Case No : Writ Petition (MD) No. 8856 of 2010 and M.P. (MD) No's. 1, 3 and 5 of 2010

A.M.K. and Co.

APPELLANT

Vs

Deputy Chief Materials Manager, Southern Railway and Others

RESPONDENT

Date of Decision : 08-12-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2(1), 7(3), 7(4)
Constitution of India, 1950 — Article 14, 226
Contract Act, 1872 — Section 74
Sales of Goods Act, 1930 — Section 19, 20, 24, 25(1), 26

Citation : (2012) 1 BC 438 : (2012) 4 CTC 271

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : C.K. Rajan, for the Appellant; V. Radhakrishnan S.C. for Mr. S. Munohar, for the Respondent

Final Decision : Dismissed

Judgement

V. Ramasubramanian, J.—The petitioner has come up with the above writ petition challenging a demand made by the first respondent herein for payment of ground rent, for allowing extension of time to them to take delivery of the material purchased by them in an auction held by the respondents. I have heard Mr. C.K. Rajan, learned Counsel for the petitioner and Mr. V. Radhakrishnan, learned Senior Counsel for the respondents.

2. The first respondent herein published an auction catalogue in their website for a public auction to be held on 19.1.2010 at the Combined Scrap Stores Depot, Golden Rock. The catalogue contained 72 items proposed to be auctioned. Each of those items was described in seriatim, such as GAJ1, GAJ2, etc., upto GAJ-72.

3. Lot No. 64 indicated by code word "GAJ 64"; was described in the catalogue as follows:

Auction No.

Lot No,

PL No.

Lot Qty.

SaleUnit Description

GAJ 64

058300909

98032252

4.000

Number Loc at Bridge No. 633 @ KM 237/6-7 in MV-VM Section

Desc. Reld. Girder through Type 45.720 Mtrs with Bed Plate 16 Nos. Span -4 Nos./448.080 Mts. Lot Basis. NFS

(1) Phosper Bronze Strip 2". 10" x 4" x 1/2, -- 32 Nos.

(2) GI Cable Boxes with Holding Brackets,

(3) Telephone Posts with C.I. Base.

Cus : SE/BR/E/TPJ @ GOC DS-8 No. 792138 Dated 4.10.2007. Cutting Permitted to Loadable Sizes.

4. The catalogue was also available to be downloaded from the website of the first respondent and the catalogue was accompanied by "Terms and Conditions for R.M. Auction Sale". The acronym "R.M." stood for "Released Materials". Condition No. 1 of the "Terms and Conditions" stipulated that the inspection of the material was permitted prior to auction sale. Condition No. 2 stipulated that the lots are sold on "as is where is basis" and that there was no guarantee for size, measurement, quantity, etc. Condition No. 2 may be of relevance for the case on hand. Therefore, it is extracted as follows:

2. Conditions of lots: Lots are sold on "as is where is" basis and no guarantee is for size, measurement, quantity, etc. The sale is strictly on the assumption that bidders have inspected the item. No complaint/ claim by the purchaser will be entertained in this regard. Railway reserves rights to reduce/increase the quantity.

5. Condition No. 9 of the "Terms and Conditions" contained the prescription relating to payment of balance sale value and delivery of lots. The relevant portion of condition No. 9 presented in a tabular form, reads as follows:

Sl. No.

Sale Value of Lots Auction Dt. 11.1.10 GAM Lots

Free time allowed for payment of balance sale reckoned from the date of auction

Other than Rolling Stock free time allowed for delivery reckoned from the date of auction including free time for payment of BSV

For Rolling Stock free time allowed for delivery reckoned from the date of auction including free time for payment of BSV

Number of instalments permissible for payment

1.

Upto and including Rs. 1,00,000/-

10 days 28.1.10

25 days 12.2.10

40 days 27.2.10

1

2.

Exceeding Rs. 1,00,000/- and uptoRs. 2,00,000/-

20 days 7.2.10

35 days 22.2.10

50 days 9.3.10

1

3,

Exceeding Rs. 2,00,000

20 days 7.2.10

50 days 9.3.10

65 days 24.3.10

2

4.

Maximum permissible period for taking delivery of sold lots

90 days 18.4.10

105 days 3.5.10

Ground rent 0.5% per day

6. Condition No. 12 prescribed the maximum period of delivery as 90 days from the date of auction and it also stipulated that upon failure, the EMD will be

forfeited. The other clauses may not be of relevance for our present purpose. Therefore, I am not dealing with the same. But, one aspect needs to be taken note of, namely, that all the 72 items put up for auction on 19.1.2010 were described under the category of "GAJ". However, condition No. 9 extracted above gave an impression as though it applied only to GAH Lots.

7. The petitioner herein participated in the auction held on 19.1.2010 and he became the successful bidder. Hence, he was issued with what is known as "Bid Sheet". The total amount for which the petitioner bagged the contract for the purchase of material described under lot No. GAJ-64 was Rs. 60,50,000/-.

8. Simultaneously with the issue of Bid Sheet, the first respondent also issued a sale advice dated 19.1.2010 calling upon the petitioner to remit the balance amount of Rs. 57,53,427.79 on or before 7.2.2010, failing which, interest was to become payable at the rate of 14.75%. The balance amount indicated in the sale advice was arrived at, after giving credit to the Earnest Money Deposit of Rs. 6,05,000/- made by the petitioner towards part of the sale consideration and after taking into account VAT at 4%, IT at 1 %, SC on IT at 2.5% and Cess on IT at 3%.

9. The sale advice also contained a printed stipulation at the bottom to the effect that any ground rent that is likely to accrue as a result of the delay in taking delivery will be entirely at the responsibility of the petitioner.

10. The first respondent issued a delivery order on 4.2.2010. But, the said delivery order made it very clear that it was issued only for cutting purposes and that actual delivery will be made after remittance of final payment. The delivery order also called upon the petitioner to make payment of a sum of Rs. 31,80,000/-, out of which Rs. 30,25,000/- represented the sale value and the balance represented VAT, IT, Cess, etc. This delivery order further stated that the maximum delivery period of 90 days would expire on 18.4.2010.

11. The site appears to have been handed over to the petitioner on 12.2.2010 and the cutting work appears to have commenced from 13.2.2010 and proceeded till 20.2.2010. But, in the meantime, the first respondent sent an internal communication to the Deputy Financial Advisor to send a Stock Verifier to the location to witness the cutting and delivery of the sold Lot. This internal communication is dated 5.2.2010.

12. The next delivery order was issued on 8.3.2010. This called upon the petitioner to pay the balance amount of Rs. 25,97,880/-, which included Rs. 24,19,214/- towards part of the sale value and the remaining represented VAT, etc. The site was handed over on 13.3.2010 under the second delivery order and the cutting commenced on 6.4.2010 and proceeded till 16.4.2010. Simultaneously with the issue of the second delivery order dated 8.3.2010, an internal note was sent, as in the first instance, directing the Deputy Financial Advisor to depute a Stock Verifier to the location.

13. But, due to a lack of clarity in the Terms and Conditions, the petitioner gave a letter dated 8.3.2010, stating that since the site was handed over only on 12.2.2010 and since there was flow of water under the bridge, he would not be able to complete the work by 9.3.2010 and that he required time till 10.4.2010 to take delivery without payment of ground rent. Since the auction itself took place on 19.1.2010, the sale advice was issued on 19.1.2010, the first delivery order was issued on 4.2.2010 and the actual handing over of part of the site was made on 12.2.2010 and the handing over of the rest of the site was made on 8.3.2010, there was no sanctity in the original stipulation of 50 days expiring on 9.3.2010, for the petitioner to take delivery. The original stipulation of 50 days expiring on 9.3.2010, is found in the tabular column given in condition No. 9 of the Terms and Conditions which I have extracted above. The starting point for the commencement of this period of 50 days, is indicated in the tabular column as the date of auction. But, when the date of handing over the site, actually happened after a gap of 24 days, from the date of the auction, namely, 19.1.2010 (the actual handing over under the first delivery order dated 4.2.2010 took place on 12.2.2010), then, the stipulation of 50 days loses its sanctity.

14. But, be that as it may, the first respondent issued a reply dated 8.3.2010, conceding the request of the petitioner made in his letter dated 8.3.2010, extending the time for removal of the Lots without ground rent, up to 10.4.2010. But, on 7.4.2010, the petitioner made a fresh request for extension of the period till 10.5.2010 without ground rent, on the ground that the second handing over that took place on 13.3.2010, was also delayed due to a line inspection by the Railways. But, the first respondent sanctioned this request only partly, by granting time for removal without ground rent up to 18.4.2010.

15. Again, on 15.4.2010, the petitioner made a request pointing out the following facts, namely--

(i) that though the payment for the first Lot was made on 2.2.2010, the handing overtook place on 12.2.2010. after a delay of ten days on the part of the respondents;

(ii) that though the payment for the second Lot was made on 4.3.2010, the handing overtook place on 14.3.2010, after a delay of ten days on the part of the respondents;

(iii) that from 14.3.2010, no work could be performed for four days due to the line work undertaken by the Railways in the new bridge;

(iv) that due to the work carried out by the respondents on the new bridge, the petitioner could not take his lorry for about 20 days to the location;

(v) that the second girder fell into water and one of the employees of the petitioner also fell into water; and

(vi) that therefore, the time for taking delivery without ground rent may be extended till 19.6.2010.

16. In response to the above request made by the petitioner, the first respondent issued the impugned communication dated 6.5.2010, granting extension of time from 19.4.2010 to 4.6.2010, subject to payment of ground rent at the rate of Rs. 20,798.48 per day. It must be noted that the total weightage of the material that the petitioner was entitled to take delivery under the contract, was approximately about 448.080 MT. By the time the impugned communication was issued, he had already taken possession of about 140 MT, leaving a balance of 308.080 MT. Since condition No. 9 of the Terms and Conditions fixed the ground rent payable at 0.5% per day of the total value of the material, the respondents demanded Rs. 20,798.48 per day as ground rent, which was arrived at 0.5% of the value of the balance material measuring 308.080 MT.

17. Objecting to the demand made in the impugned communication, the petitioner made representations dated 10.5.2010, 20.5.2010 and 3.6.2010. But, by a letter dated 12.6.2010, the first respondent stuck to his demand and permitted extension up to 31.7.2010, subject to payment of ground rent. Therefore, left with no alternative, the petitioner has come up with the above writ petition.

18. The basis on which the petitioner challenges the demand for payment of ground rent is (i) that the material auctioned and sold to the petitioner was not stored in any depot or godown of the Railways, enabling them to charge ground rent; (ii) that the stipulation for ground rent was relatable only to released materials denoted by the acronym "R.M." and not to unreleased materials, such as the girders in a bridge; (iii) that prescription for payment of ground rent contained in the catalogue and the Terms and Conditions, related to GAH and not GAJ materials; and (iv) that In any case, the demand for ground rent is arbitrary, unfair and unreasonable.

19. The respondents have filed a counter and an additional counter affidavit. The sum and substance of the defence taken by the respondents in the counter affidavit is;

- (i) that the auction held on 19.1.2010 was in respect of GAJ series;
- (ii) that the petitioner is a regular customer of purchase of scrap from Railways;
- (iii) that the petitioner defaulted in payment on a few occasions in the past;
- (iv) that the petitioner was granted extension of time for delivery without ground rent on a few occasions in the past;
- (v) that the auction catalogue is prepared on the basis of the reports of Senior Supervisors and it is published well in advance, to enable the prospective buyers to inspect the lot and satisfy themselves before participating in the auction;
- (vi) that the expression "released girder" indicates the material released for sale and not necessarily the material dismantled and removed from the location;
- (vii) that the very description of Lot GAJ64 showed that it was lying in the

location at bridge No. 633;

(viii) that the Terms and Conditions applicable for GAH Lots are also applicable to GAJ Lots and the petitioner knows about this with his 40 years of association with Railways;

(ix) that GAJ64 Lot, purchased by the petitioner in the auction held on 19.1.2010, had earlier been put up for auction at least 26 times during the period September 2008 to April 2009;

(x) that the petitioner, who is a participant in many of the auctions, ought to have inspected the Lot before bidding;

(xi) that the catalogue made it clear that the Lots were sold in as is where is condition, with no guarantee as to size, measurement and quantity;

(xii) that as per Condition No. 9 of the Terms and Conditions, the Lots whose value is more than Rs. 2.00 lakh are permitted to be taken in two instalments;

(xiii) that the petitioner paid the first instalment of Rs. 31,80,000/- on 2.2.2010, after a delay of 13 days from the date of the auction and hence, the first delivery order was issued only on 4.2.2010;

(xiv) that though the free time for payment of balance sale value expired on 7.2.2010, the petitioner was given time till 7.3.2010;

(xv) that the second and final instalment of balance sale value was paid by the petitioner on 4.3.2010 and hence, delivery was ordered on 8.3.2010;

(xvi) that the free delivery period of 50 days expired on 9.3.2010, but was extended first up to 10.4.2010 and later, up to 18.4.2010, without any ground rent; and

(xvii) that if unlimited free time is allowed for auction purchasers to remove the materials sold, the purchasers would use Railway premises as their godown, to speculate on the fluctuations in the price.

20. The contentions raised in the additional counter affidavit are as follows:-

(i) that Railways had prescribed General Conditions for auction sale of scrap materials, which are applicable to all auctions conducted by them;

(ii) that in the catalogue for the auction held on 19.1.2010 for 72 Lots contained in GAJ series, the Terms and Conditions wrongly referred to GAH Lots, instead of GAJ Lots;

(iii) that this bona fide mistake was understood by all participants;

(iv) that sale advice issued on 19.1.2010 also contained a stipulation at the bottom that any ground rent likely to accrue as a result of the delay in taking delivery, will be the responsibility of the purchaser;

(v) that though free time given for taking delivery was only 50 days, the petitioner was granted 90 days free time;

(vi) that for the grant of free time beyond 90 days, the competent authority is only the Railway Board and hence, the matter was referred to them;

(vii) that the impugned communications were issued as per the advice of the competent authority;

(viii) that having understood the Terms and Conditions and having participated in the auction with eyes wide open, it is not open to the petitioner to challenge the Terms and Conditions;

(ix) that as per Clause X of the General Conditions relating to auction sale of Railway materials, the petitioner has an effective alternative remedy to seek arbitration of the dispute now raised; and

(x) that due to the availability of such an alternative remedy and due to the existence of disputed questions of fact, the writ petition is not maintainable.

21. From the rival pleadings, I think the following issues arise for consideration:

(i) Whether in terms of Clause X of the General Conditions, providing an alternative remedy of referring the dispute to arbitration, the writ petition is barred?

(ii) Whether the writ jurisdiction of this Court is barred in view of the fact that the dispute between the parties lies in the realm of contract?

(iii) Whether the stipulation for payment of ground rent for the delay in taking delivery, is enforceable, in view of the distinction between GAH and GAJ series and the distinction between the released and unreleased materials? and

(iv) Assuming that ground rent is payable, do the Railways have the right to proceed against the material or against the petitioner?

Issues (i) and (ii):

22. It is not difficult to resolve these two issues. It is common knowledge that in every Government contract, there are always two sets of conditions, namely, (i) General Conditions and (ii) Special Conditions. The General Conditions contain several stipulations applicable to all types of contracts. It is in the General Conditions that clauses relating to interpretation, disputes, resolution of disputes, etc. are incorporated. These General Conditions are applicable to all contracts, except to the extent that they are excluded by the stipulations contained in the Special Conditions.

23. The Special Conditions are always contract specific. They contain the description of material proposed to be sold or purchased, the qualifications for participation in the tender, the Special Conditions for participation as well as payment and conditions relating to delivery. Therefore, the General Conditions

and Special Conditions are always read together as complementary to each other insofar as Government contracts are concerned.

24. But, the Special Conditions would always contain a reference to the General Conditions, by prescribing that in respect of matters not covered by the Special Conditions, the covenants contained in the General Conditions would, apply. Normally, in all tenders floated by the Government and Government departments, the foot-note will make a reference to the General Conditions. Alternatively, at least the contract awarded to the successful tenderer, would contain a clause, referring to the General Conditions. Therefore, a person participating in a tender would become bound by the terms stipulated in the General Conditions, if a reference is made to the General Conditions (i) either in the tender schedule, (ii) or in the contract.

25. Unfortunately, neither the catalogue, nor the Terms and Conditions accompanying the catalogue, contained a reference to the General Conditions, insofar as the case on hand is concerned. After the auction was over and the petitioner became the successful tenderer, he was issued with a Bid Sheet, followed by a sale advice. Even in the Bid Sheet and the sale advice, there was no reference to the General Conditions.

26. Once it is seen that in none of the pre-contract or post-contract documents, there is any reference to the General Conditions, an auction purchaser cannot be bound by the arbitration clause contained in the General Conditions. It is the fundamental principle of the law of arbitration that a person who is not a party to an arbitration agreement, cannot be referred to arbitration. Section 7(3) of the Arbitration and Conciliation Act, 1996, requires an arbitration agreement to be in writing. u/s 7(4), an arbitration agreement will be construed to be in writing, if it is contained (i) in a document signed by the parties, (ii) in an exchange of letters or other means of communication which provide a record of the agreement, or (iii) in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. None of the three alternatives provided in Section 7(4) is present in this case. The General Conditions which contain an arbitration clause, is neither made part of, nor even referred to, either in the tender catalogue or in the Terms and Conditions accompanying the tender catalogue, or in the Bid Sheet or sale advice. Therefore, there is no arbitration agreement in existence between the parties. If there is no arbitration agreement between the parties, there cannot be a reference of the dispute to arbitration. Section 2(1)(h) of the Act defines the expression "party" to mean a party to an arbitration agreement. The petitioner herein is not a party to an arbitration agreement, contained as part of the General Conditions, since no reference is made to the General Conditions in any of the documents either pretender or post-tender. Therefore, the objection of the respondents that the petitioner has an alternative remedy of raising a dispute and having it referred to arbitration, is not sustainable.

27. Insofar as the jurisdiction of this Court under Article 226, in respect of

contractual matters is concerned, the issue is no longer *res Integra*. The Courts have consistently held that (i) where the contract is statutory in character, or (ii) where a public law element is involved, or (iii) where the action of the Government or Government department is unfair or unreasonable or arbitrary, the jurisdiction of this Court is not ousted. In a recent decision in *Zonal Manager, Central Bank of India Vs. Devi Ispat Ltd. and Others*, the Apex Court summarised the position as follows:

From the case law it is clear that (a) in the Contract if there is a clause for arbitration, normally a writ Court should not invoke its jurisdiction; (b) the existence of effective alternative remedy provided in the contract itself is a good ground to decline to exercise its extraordinary jurisdiction under Article 226; and (c) if the instrumentality of the State acts contrary to the public good, public interest, unfairly, unjustly, unreasonably discriminatory and violative of Article 14 of the Constitution in its contractual or statutory obligation, writ petition would be maintainable. However, a legal right must exist and corresponding legal duty on the part of the state and if any action on the part of the State is wholly unfair or arbitrary, writ Courts can exercise their power.

In the light of the legal position, writ petition is maintainable even in contractual matters, in the circumstances mentioned in various judgments of the Supreme Court.

28. Therefore, the present writ petition is maintainable, If the petitioner is able to demonstrate that the respondents have acted unfairly, unjustly and unreasonably. To see if they have done so, we may have to go to the other issues arising for consideration. Therefore, let me now move on to the other Issues.

Issues (iii) and (iv):

29. In simple terms, the issues arising on the merits of the case are--(i) whether the liability to pay ground rent formed part of the contract, (ii) if the stipulation for payment of ground rent was part of the contract, whether it is enforceable In law, and (iii) whether the non payment of ground rent by the petitioner, would have anything to do with the delivery of the material now lying at the location.

30. It is an admitted fact that all the Lots put up for auction formed part of GAJ series. The Terms and Conditions accompanying the catalogue contained a stipulation for payment of ground rent, in respect of GAH series. According to the respondents, this has happened by a small mistake. The respondents contend that despite the Terms and Conditions referring only to GAH series, the petitioner understood the stipulation as relating to GAJ series also.

31. The stand of the respondents that the petitioner understood the stipulation for payment of ground rent as relatable to GAJ series, is fortified by the fact that the petitioner went on pleading for extension of time for taking delivery without ground rent. If the petitioner had not understood it to be so, he would not have, nay, he need not have begged the respondents for extension of time without

ground rent.

32. A tender document, under the law of contracts, is an invitation to offer. The bids made by the participants constitute the offer. On the hammer striking the table in an auction, the offer is accepted. Acceptance is to offer, like a lighted match stick to a train of gun powder. Therefore, the moment the offer made by the highest offeror or any one else is accepted, the contract is born.

33. An agreement enforceable by law, is always founded upon the consensus ad idem between the parties. Therefore, it is always open to a party to a contract to show that his consent was vitiated by fraud, coercion, undue influence, misrepresentation or mistake. It is also open to a party to show that the parties were not ad idem on a particular fact, at the time of entering into the contract.

34. Today, the stand of the petitioner is that on 19.1.2010, the date of the auction, there was no stipulation for payment of ground rent, in respect of GAJ series, though there was a stipulation in respect of GAH series. This is established by the catalogue and the Terms and Conditions. But, none of the 72 Lots put up for auction on 19.1.2010 related to GAH series. All of them related only to GAJ series. Therefore, it was open to the petitioner to contend that on 19.1.2010, the consent of the parties were not ad idem, insofar as this aspect is concerned. But, this contention will hold good only till a contra evidence is shown. By his own letters of request dated 8.3.2010, 7.4.2010, 15.4.2010, 10.5.2010, 20.5.2010 and 3.6.2010, the petitioner himself had shown that he understood the stipulation for payment of ground rent as relatable to GAJ series. It was only in the letter dated 3.6.2010 addressed to the General Manager that the petitioner raised the question of legitimacy of the demand for the first time. Therefore, it is clear that the petitioner and the first respondent had identity of mind even on 19.1.2010 with regard to the stipulation. Hence, he cannot today put the catalogue to legal scrutiny and contend post facto that his understanding as on 19.1.2010 was different.

35. Once it is clear that the liability to pay ground rent formed part of the contract, the next question that would arise for consideration is as to the nature of the stipulation. This question arises in view of certain special circumstances, namely, that the material was not lying either in a godown or depot or Railway yard, occupying a storage space belonging to the Railways. Moreover, the rate at which ground rent is made chargeable, is stipulated not on the basis of the space occupied by the material, but on the basis of the value of the material. Normally, rent is something that co-relates to the space occupied, irrespective of the value of the material that occupies the space. In view of these special circumstances, it is necessary to examine the nature of this stipulation.

36. As seen from Condition No. 9 of the Terms and Conditions, ground rent is payable beyond a period of 50 days from the date of the auction, at the rate of 0.5% of the value of the material. Therefore, if a person bags the contract for the purchase of some material from the respondents and he fails to take delivery

of the product for a period of 200 days, beyond the free time allowed, he would have to pay twice the value of the contract (200 times 0.5% is equivalent to 100%). Therefore, such a stipulation can at the most be understood only as a clause in terrorem. Some times, it is also called as a "no contest clause", that is designed to threaten a contracting party, so that the party honours his obligations duly and promptly.

37. The enforceability of such a clause in a contract is to be traced to Section 74 of the Contract Act, 1872. Section 74 speaks of two types of cases, namely, (i) where the contract fixes an amount to be paid in case of its breach, and (ii) where the contract provides for any other stipulation by way of penalty. The explanation to Section 74 makes it clear that even a stipulation for increased interest from the date of default, may be a stipulation by way of penalty. If the stipulation is by way of penalty, what is recoverable from the defaulting party, is only a reasonable compensation not exceeding the stipulated penalty. The only exception to the application of Section 74 is Government contracts under which the performance of a public duty is imposed. But, the second explanation to Section 74 makes it clear that a person who enters into a contract with Government, does not necessarily undertake thereby any public duty or promise to do an act in which the public is interested.

38. In *Fateh Chand Vs. Balkishan Das*, , it was held by the Supreme Court that the Court has the jurisdiction to award such compensation, as it deems reasonable, having regard to all the circumstances of the case, but not exceeding the penalty stipulated. This jurisdiction of the Court was held to be unqualified except as to the maximum stipulated. The Court also pointed out that though the aggrieved party is entitled to receive compensation irrespective of the proof of actual damage or loss, Section 74 does not justify the award of compensation when in consequence of the breach, no legal injury at all has resulted. The relevant portion of the judgment reads as follows:

The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of actual loss or damage; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things or which the parties knew when they made the contract, to be likely to result from the breach.

39. In *Naresh Chandra Sanyal Vs. Calcutta Stock Exchange Association Ltd.*, the Court pointed out in para 19 of the report, while following *Fateh Chand*, that "duty not to enforce the penalty clause, but only to award reasonable compensation is statutorily imposed upon Courts by Section 74 of the Indian Contract Act".

40. The stipulation for payment of ground rent, as pointed out earlier, is only a stipulation in the nature of penalty, falling under the second category of cases covered by Section 74 of the Contract Act. This is for two reasons, namely, (a) that the quantum is unconscionably huge that in a period of 200 days, the ground rent will exceed the value of the material, and (b) that the ground rent is fixed not on the basis of the storage space occupied by the material, but on the basis of the value of the material occupying the space.

41. There is also one more reason as to why this stipulation can be taken only to be a stipulation in the nature of penalty. The material in question is actually a bridge. Irrespective of the semantics involved in the expressions "released material" and "unreleased material", the fact remains that the contract awarded to the petitioner was for cutting the girders from the bridge and removing them. The bridge was not stored in any godown or depot belonging to the Railways. It may be true that the land on which the bridge was constructed belongs to the Railways. But, it was not occupying a storage space as in the case of other materials lying in the godown or depot. Therefore, the Railway was not rendering nor was expected to render any service to the petitioner, by keeping the material in safe custody. Since the sale transaction had been completed and the petitioner had paid the value of the material in full, it was the look out of the petitioner to safeguard the material sold to him. If, for instance, any theft had taken place or the bridge had been washed away in a huge flood, the Railways would have washed its hands off, on the ground that the sold material was lying there at the risk of the petitioner. On the contrary, if the material was lying at the godown or depot of the Railways, they may not be in a position to wriggle out of their obligation for the safety of the material.

42. To say that they would not accept responsibility for the safety of the material after 50 days of the completion of the transaction and also to say at the same breath that they would charge ground rent beyond 50 days without any corresponding obligation, would strike at the root of the fundamental principles governing the law of contracts. As pointed out by the Supreme Court in *Fateh Chand*, the respondents must show the sufferance of a legal injury, by the breach of the contract on the part of the petitioner, to enable them to enforce the stipulation for ground rent. Alternatively, they must at least show the rendering of any service, such as the provision of a storage space. In the absence of both, the claim for ground rent, especially when the material sold is a bridge, cannot be sustained. At the most, the stipulation for payment of ground rent can be taken only to be a clause intended to make the petitioner cut and remove the material within a reasonable time.

43. We may analyse this question even from the point of view of Condition No. 12 of the Terms and Conditions, which prescribes the consequences of failure to take delivery. While the tabular column under Condition No. 9 stipulates one consequence, Condition No. 12 of the Terms and Conditions stipulates another consequence. Under Condition No. 9, every day's delay beyond 50 days, in

taking delivery, would lead to a ground rent at the rate of 0.5% per day being charged. Under Condition No. 12, the failure to take delivery beyond 90 days would result in forfeiture of EMD. The EMD paid in this case is only Rs. 6,05,000/-. But, the ground rent now demanded has gone beyond more than Rs. 1.00 crore, far in excess of the value of the material itself. Therefore, the stipulation is actually absurd. Hence, it is unenforceable.

44. Even assuming without admitting that the stipulation is enforceable, I do not know how the respondents can enforce it without going to a normal civil Court. Today, the respondents cannot prevent the petitioner from cutting and removing the girders, since the property in those goods, had actually passed on to the petitioner.

45. u/s 19 of the Sale of Goods Act, 1930, the property in specific or ascertained goods, is transferred to the buyer at the time intended by the parties. The intention of the parties is to be gathered (i) from the terms of the contract, (ii) the conduct of the parties, and (iii) the circumstances of the case. The rules for ascertaining the intention of the parties is to be gathered from Sections 20 to 24, unless a different intention appears. The rules to be found in Sections 20 to 24 can be summarised as follows:

(i) If the contract is for sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, if the contract is an unconditional contract. This is irrespective of whether the time for payment of price or time for delivery or both, is postponed or not;

(ii) If the contract is for sale of specific goods which are not in a deliverable state and the seller is bound by the terms, to put the goods into a deliverable state, the property passes on only after the seller does such a thing and the buyer has notice thereof;

(iii) If the contract is for sale of specific goods in a deliverable state, but the seller is bound to do something to weigh, measure, test or ascertain the price, then the property passes on after such an act is done by the seller and the buyer has notice thereof;

(iv) If the contract is for the sale of unascertained or future goods by description and goods of that description in a deliverable state are unconditionally appropriated to the contract by either of the parties with the assent of the other, the property in the goods passes on;

(v) Where in pursuance of a contract, the seller delivers the goods to the buyer or to a carrier or other bailee for transmission to the buyer, without reserving the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract; and

(vi) When goods are delivered to the buyer, either "on approval" basis, or "on sale or return" basis, or on other similar terms, the property passes the moment the buyer signifies his approval or acceptance.

46. Keeping in mind the principles enunciated in Sections 19 to 24 of the Sale of Goods Act, if we look at the case on hand, the following undisputed facts emerge:

(i) that the offer of the petitioner was accepted on 19.1.2010 and a sale advice was issued;

(ii) that the Lots were divided into two parts and the respondents have already issued two delivery orders, one on 12.2.2010 and another on 8.3.2010, directing the petitioner to cut the girders from the bridge and remove them;

(iii) that the petitioner has already paid the full sale price of the material;

(iv) that about 140 MT out of 448.080 MT of material had already been cut and removed by the petitioner; and

(v) that nothing remains to be done on the part of the respondents, to complete the sale.

47. Therefore, the property in the goods had already passed on to the petitioner. In other words, what is lying at the location is a property belonging to the petitioner, over which, the respondents do not even have a lien. The respondents have not reserved unto themselves, the right of disposal, in terms of Section 25(1) of the Sale of Goods Act. u/s 25(1), it was open to the Railways to reserve the right of disposal of the goods, until certain conditions are fulfilled. But, they must have done so by the terms of the contract. This is clear by the language used in Section 25(1). Neither the catalogue, nor the Terms and Conditions of auction, nor even the impugned order or the counter affidavit shows that the respondents reserved, by the terms of the contract, the right of disposal, for non fulfillment of certain conditions. Therefore, the title in the goods had already passed on to the petitioner.

48. As a result, the property is today lying there at the location, at the risk of the buyer. If the respondents claim that the property in the goods had not passed to the buyer, then, the respondents have to suffer the consequences of Section 26, which states that the goods remain at the seller's risk, until the property therein is transferred to the buyer. The first proviso to Section 26 makes it clear that where delivery is delayed through the fault of either the buyer or the seller, the goods are at the risk of the party in default, as regards any loss which might not have occurred but for such fault.

49. In other words, if the respondents take a stand that the property in the goods had not passed, then, they must accept that the goods remain at their risk. But, the respondents have been prudent enough not to take such a stand. Therefore, there is no denial of the fact that the property in the goods had passed on to the petitioner.

50. Once it is concluded that the property in the goods had passed, then it follows as a necessary corollary that the petitioner is entitled to cut and remove the material, irrespective of any claim for ground rent made by the respondents,

assuming without admitting that such a claim is valid. Therefore, the respondents cannot today prevent the petitioner or deny access to the petitioner, to cut and remove the balance material lying at the location, on the ground that they have a claim for ground rent. Since the property in the goods had passed, since the respondents have not retained a right of disposal and also since the respondents have no lien over the property, they have no legal basis to prevent the petitioner from cutting and removing the material.

51. At the most, the only thing that could be done by the respondents is to sue the petitioner for recovery of the actual value of the loss or damage suffered by them on account of the delay on the part of the petitioner in cutting and removing the material. This could be done by them in terms of Section 74 of the Contract Act. But, when they do so, they must prove the sufferance of actual legal injury. If and when they file a suit, the prescription of 0.5% per day would act as a cap on the claim.

52. But, the above right is only a right to sue for the actual loss or damage. This right to sue will not enable the respondents to stop the petitioner from cutting and removing the material. The respondents have not shown even prima facie, that they have suffered any loss or injury on account of the delay on the part of the petitioner in cutting and removing the girders on the bridge. But on the contrary, the petitioner has actually suffered loss. Apart from the fact that the petitioner has already paid the full purchase price of the material along with VAT, IT, CESS, etc., way back in March 2010, but taken delivery of only about 30% of the material, part of the material has also fallen into the sea-bed. In the course of hearing of the writ petition, I appointed an Advocate Commissioner to inspect the location and find out (i) the availability of the remaining material and (ii) the possibility and feasibility of retrieving the material. The Advocate Commissioner has filed a report along with the report of a qualified Engineer-cum-Valuer. In Section E of his detailed report, the Engineer has found that out of the remaining quantity of 308.080 MT, which the petitioner is entitled, the actual quantity of material available on spot is as follows:

(i) Material available above water level -- 259.849 MT

(ii) Material immersed in water, but exposed and assessable -- 26.342 MT

(iii) Material suspected to be under water, but not exposed and not assessable -- 22.890 MT

The Engineer has also opined that since the water is brackish and saline, the recovery rate of material immersed in water depends upon the corrosion quotient at 0.25. Therefore, it appears that 75% of the material alone could be recovered from out of what is immersed. The Engineer has also found out that the petitioner may have to incur additional expenditure, not contemplated under the terms of the contract, even to retrieve these materials.

53. Therefore, it is clear that while the respondents do not appear to have

suffered any actual loss or damage, due to the delay on the part of the petitioner in taking delivery, the petitioner has obviously suffered substantial loss on three counts viz., (i) the opportunity cost of the investment on a material, 70% of which he could not take delivery for the past 20 months, (ii) the additional cost to be incurred for recovering the material, due to the subsequent developments, and (iii) the reduction in the quantity and quality of material that could be recovered, due to the subsequent developments. Hence, the refusal of the respondents to permit the petitioner to cut and remove the material, the property in which had already passed on to the petitioner, is highly unfair and unreasonable. Therefore, to the extent of permitting the petitioner to take his material, the writ petition is maintainable, despite the dispute lying in the realm of a contract.

54. But without taking evidence, it is not possible to award any damages to the petitioner, for the loss that he has actually sustained. Moreover, it is also not possible in a writ petition to quantify the loss that has arisen on account of his own contribution. Therefore, the only thing that could be done in this writ petition, having regard to my findings on the question of the passing of title to the petitioner, is to allow the petitioner to take his material, with liberty to the parties to work out the question of damages for loss and injury before a Civil Court. In view of the above, the writ petition is allowed and a direction is issued to the respondents to permit the petitioner to cut and remove the girders and other material that they have purchased in the auction held on 19.1.2010 under Lot No. GAJ 64, without any obstruction. The petitioner shall carry out the work without detriment or injury to the Railway bridge or line adjoining the bridge in question. The respondents are directed to render all co-operation to the petitioner and the petitioner shall complete the job on or before 31.3.2012, so as to avoid any hardship to the Railway traffic. Though I have recorded a prima facie finding that the claim for ground rent is not enforceable and that the respondents have not proved any actual loss or injury, I leave it open to the Railways, if they so choose to do, to file a suit before an appropriate Civil Court, for recovery of the value of the actual loss or injury, if any, suffered by them, on account of the delay on the part of the petitioner in cutting and removing the material. Similarly, it is also open to the petitioner, after taking away his material, to sue the respondents for recovery of the value of the actual loss or damage suffered by him, due to any act of omission and commission that could be attributed to the respondents. But, the same shall not stand in the way of the petitioner cutting and removing the material. The respondents shall permit the petitioner to commence the operations of cutting and removing the material, within a week of receipt of a copy of this order. The petitioner shall endeavour to complete the whole process on or before 31.3.2012. There will be no order as to costs. Consequently connected miscellaneous petitions are closed.