

(1983) 08 DEL CK 0025
In the Delhi High Court
Case No : Civil Suit No. 213 of 1976

Andard Mount (London) Ltd.	Vs	APPELLANT
Curewel (India) Ltd.		RESPONDENT

Date of Decision : 12-08-1983

Acts Referred:

Citation : AIR 1985 Delhi 45

Hon'ble Judges : J.D. Jain, J

Bench : Single Bench

Advocate : L.M. Singhvi, S.K. Dholakia, R.C. Bhatia and Lakshami Kant, for the Appellant; R.K.P. Shankardas, M.G. Ramachandran and Meena Kapur, for the Respondent

Judgement

J.D. Jain, J.—This suit was disposed of by me vide judgment dated 4th Sept., 1981. Subsequently the defendant made an application being I.A. 2951/81 for rehearing of arguments on issues other than issues 1 & 2. The said application was allowed vide order dated 6th October, 1981 on the concession made by counsel for the plaintiff and as such the aforesaid judgment and the decree were recalled except as regards findings on issues 1 & 2.

2. I have heard the counsel for both the parties at great length. Since all the material facts and pleadings of the parties have been set out in considerable details in my aforesaid judgment dated 4th Sept., 1981, I need not recapitulate the same in this judgment and it shall be read in continuation of the same.

Issues 3, 4 & 5:

3. All these issues being closely interlinked, can be conveniently dealt with together.

4. Ex. OW1/2 is the original contract dated 1st of March 1973. It is in the form of a letter addressed by the plaintiff to the defendant who was required to supply 200 Kgs. of Human Albumin Powder (Lyophilised, Pyrogen Free) to the plaintiff.

This contract was confirmed by the defendant vide letter dated 8th March 1973 (Ex. D7). Apparently Ex. PW1/2 contains all the terms and conditions of the contract. The case of the plaintiff is that the defendant was to supply 200 Kgs. of Human Albumin in the form of powder only within a period of one year commencing from April 1973. The contention of the defendant, however, is that:

(1) they were to supply Human Albumin not only in powder form but also in solution form; and

(2) there was no commitment on their part to adhere to any specific delivery schedule in respect of the goods to be supplied and as such the condition-of delivery was not to be rigidly enforced either as regards the quantum to be supplied periodically or with regard to the period within which the total quantity had to be supplied.

5. Shri Amar Nath Vidyalankar, Joint Managing Director of the defendant-company stepped into the witness box as DW2 and deposed that Mr. Gould of the plaintiff-company contacted them and told them that they wanted to purchase Human Serum Albumin in both powder as well as solution form. At that time they told him that theirs being a new concern they could not guarantee the supply of the material according to any particular schedule. Adverting to the contract Ex. PW1/2, he specifically asserted that the delivery schedule embodied therein was not to be rigidly enforced either with regard to the quantum to be supplied periodically or with regard to the period over which the same was to be supplied. He explained that because of their inability to adhere to any schedule the word preferably was used in the contract. He further asserted that 10% of the total quantity of Human Albumin was to be supplied to the plaintiff in the form of solution.

6. On the other hand Mr. I.S. Gould, Managing Director of the plaintiff-company asserted as PW1 that the contract was for supply of 200 Kgs., Human Albumin Powder at U.S. \$765 per kg to be delivered within one year. He explained that he had carried of the negotiations on behalf of the plaintiff-company solely with Dr. Kumar, he was then Managing Director of the defendant-company but had since died for the sale of the product in question.

7. It would, no doubt, appear from a perusal of the correspondence which exchanged between the parties subsequent to the contract Ex. PW1/2 that some kind of controversy with regard to the supply of Human Albumin in the form of solution was raised by the defendant who insisted that the plaintiff purchased a part of the commodity in solution form. (See (i) letter dated 8th March 1973 Ex. D7, written by the defendant to the plaintiff, (ii) letter dated 30th March 1973, Ex. D1 written by the plaintiff to the defendant, (iii) letter dated 15th May 1973, (copy Ex. D10), written by the defendant to the plaintiff, (iv) letter dated 19th June 1973, (Ex. D3), written by the plaintiff to the defendant, (v) letter dated 2nd July 1973, (Copy Ex. D11), written by the defendant to the plaintiff, and (vi) letter dated 10th July 1973, Ex. PW1/D1, written by the plaintiff to the

defendant.). However, the controversy was resolved by mutual agreement as would be manifest from letter dated 10th August 1973, Ex. PW1/3, of the plaintiff to the defendant and a reply dated 14th August 1973, Ex. P1, thereto by the defendant. By mutual agreement the plaintiff increased the price of Human Albumin Powder from Section 785 to Section 950 per kg and it is clearly stipulated that the whole quantity would be supplied in the form of powder. Mr. Gould, inter alia, wrote in his letter Ex. PW1/3 that:

I am glad that we have managed between us to clarify the situation and simplify it so that all our purchases from you are on the basis of powder and the co-operation of both yourself and your colleagues in this respect is greatly appreciated.

8. This was confirmed in unequivocal terms by Shri Vidyalankar in his letter dated 14th Aug 1973, Ex. P1, addressed to Mr. Gould and he was candid and fair enough to concede this position in the course of his deposition when he said:

It was agreed between us that we would supply only powder and not solution of Human Serum Albumin but the price of powder was, increased from U.S. \$785 per kg to U.S. \$950 per kg.

9. In view of this positive evidence, there was hardly any justification on the part of the defendant to raise this controversy which was dead and gone as a consequence Of negotiations culminating in mutual agreement as reflected in letters Exs. PW1/3 and P.1. Hence, the only question which survives for consideration is whether the time of delivery as stated in the contract was of the essence of the contract or not.

10. The term of delivery as incorporated in the contract Ex. PW1/2, reads as under:

At the rate of D-20 kilos per month over one year with initial delivery commencing preferably by April 1973.

11. On its plain language this clause manifestly stipulates that the total supplies were to be made over a period of one year. However, the quantity had to be supplied in monthly instalments of 10-20 kgs. This while there could be some laxity/variation in the matter of quantity to be supplied every month as contemplated in this clause the overall period within which the whole supply was to be made had been clearly specified as one year. There is nothing in the language of the contract to warrant an inference that the overall period for the supply of total quantity could be extended or the condition relaxed at the option of the seller.

12. Section 11 of the Sale of Goods Act (for short the Act) which corresponds to Section 10 of the English Sale of Goods Act, 1979, provides that:

Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale.

Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

13. As a general rule, in ordinary commercial contracts for the sale of goods, stipulations as to time of delivery are considered to be of the essence of the contract even though they are not expressly stated in the words of the contract. If, therefore, the seller fails to deliver the goods within the time limited for delivery there is a breach of condition and the buyer is entitled to reject the goods and treat the contract as repudiated. (See Benjamin's Sale of Goods, Second Edition, Para 603). As was observed by Lord Cairns L.C. in *Bowes v. Shand* (1877) 2 A.C. 455 that:

Merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance.

14. The reason for the general rule is obvious. A mercantile contract is not always an isolated transaction but a link in a chain of transactions. In the instant case too, it would appear from the evidence of Mr. Goule that they had entered into contracts with other parties for supply of the commodity in question and there appears to be no reason to disbelieve him in this respect. Moreover, there can always be a risk of sudden and unexpected fluctuation in the price of a commodity. Therefore, a prudent and a wary purchaser would like that the goods are supplied to him by the vendor within the time which he considers to be safe. Prima facie, therefore, the parties must be deemed to have intended that the time should be of the essence of the contract in the instant case. See also *Mahabir Prashad Rungta Vs. Durga Datt*, .

15. The learned Counsel for the defendant has, however, vigorously urged that having regard to all the circumstances of the case, especially the fact that the defendant was a new enterprise and it was still passing through gestation period and as such it was not in a position to guarantee the supplies of the commodity within any specified time, the parties could not possibly intend or contemplate that the time mentioned in the contract would be of essence. This, according to him, was the precise reason that the contract did not expressly mention that the time stated therein was of essence. Further the expression "preferably" appearing in the delivery clause was used advisedly. Similarly flexibility was introduced in the quantity to be supplied every month and it could vary from 10-20 kgs per month. Not only that the cumbersome procedure envisaged in the contract before the supplies could be made, viz., sending of the samples by the defendant, their clearance by the plaintiff after laboratory test and opening of Letter of Credit by them, was so time consuming that, the parties could not have intended the time stated in the contract to be of essence. That is why, argues the learned Counsel for the defendant, that the plaintiff did not raise any objection to the default in making further supplies after the initial supply of 27 kgs and they kept the contract alive by insisting on further supplies being made. Consequently they went on accepting supplies up to June 1974 when last supply was made even though the same were made irregularly and not in conformity with the term

of delivery. Significantly even in letter dated 10th August 1973, Ex. PW1/3, no reference was made to short supply although only 27 kgs of Albumin powder had been supplied and that too in April 1973, there being no supplies subsequent thereto. In other words, the breach on the part of the defendant was not taken notice of because both the parties knew full well that the defendant was an infant industry and was passing through teething troubles and they did not contemplate the time to be of the essence of the contract.

16. In my view, the argument advanced by the learned Counsel for the defendant although very specious and attractive on its face does not bear scrutiny. The word "preferably" follows the words "with initial delivery commencing" and precedes the words "by April 1973". Obviously it qualifies the initial supply and was intended to emphasise that the first supply should start preferably by April 1973. Certainly this word does not govern and has no bearing on the subsequent supplies or on the period within which the stated instalments of the commodity were to be tendered. Normally the total quantity of goods to be supplied by a vendor in instalments is rateably distributed over the period appointed for the delivery of goods. That is not so in the instant case and the contract contemplates that the monthly instalments may vary from 10 to 20 kgs. Obviously this latitude was given to the defendant having regard to the problems of manufacture and supply of the goods in uniform quantities. It was meant to enable them to make good the deficiency, if any, in any particular instalment in the subsequent instalments provided that there was no shortfall at the end of the overall period within which the total quantity of the goods was to be supplied. That would perhaps explain why the plaintiff did not take serious notice of failure on the part of the defendant to supply the goods regularly in stipulated monthly instalments and waived the breach. Evidently the plaintiff hoped that any shortfall/deficiency in the supplies would be eventually made up within the stipulated period. Anyhow, the law is well settled that the intention of the parties to make time essence of the contract may be inferred from what passed between the parties before but not after contract is made. Subsequent conduct of the parties is not at all relevant. (See *Jamshed Kodaram Irani v. Burjorji Dhunjibhai* AIR 1915 PC 83. As for the assertion made by Shri Vidyalankar that they had told the plaintiff that theirs was a new concern and as such they could not guarantee the supply of the material according to any particular schedule suffice it to say that such parole evidence is inadmissible in view of the embargo placed by Sections 91 and 92 of the Evidence Act which embody the twin rules of best evidence and exclusion of parole evidence with regard to terms and conditions embodied in a written contract Section 92 in terms excludes all oral evidence of what was spoken to by the parties before, after or contemporaneously with the final transaction, for apart from the unreliability of such oral evidence it will afford an opportunity to the parties to resile from the contract or to set up a new one. Moreover the concluded written contract must be presumed to contain every thing that the parties agreed upon after due deliberation. Hence, as between the parties to an instrument, oral testimony cannot be received to contradict, vary,

add to or subtract from the terms of a duly written contract. Indeed, it is presumed that the contract reflects and incorporates the final result of whatever negotiations and discussions had taken place between the parties before it was reduced to writing. Even the stipulation in the contract that the defendant was to send samples of the commodity for test and approval by the plaintiff who was, then to open a Letter of Credit in favour of the defendant whereupon the goods were to be despatched to the plaintiff does not in any way militate against the time being of essence of the contract. It is for the simple reason that all these formalities are but a normal business routine and do not constitute any hurdle or obstacle in the way of regular supply of goods in monthly instalments. Of course, prompt action on the part of the vendor is called for in sending samples well in time for test and approval etc.. It may be pertinent to note in this context that the defendant handed over to the plaintiff three samples of Albumin Powder pertaining to a total consignment of 27 kgs even before they wrote the letter of confirmation dated 8th March 1973 (Ex. D7) to the plaintiff. Certainly they could have acted with the same promptitude and alacrity in mending samples for subsequent consignments to the plaintiff but unfortunately, for reasons best known to them, they failed to do so and it was only after the plaintiff enhanced the price of the commodity from US \$785 to US \$950 per kg vide letter dated 10th of Aug 1973 that the defendant resumed supplies of the commodity and they despatched a meagre 9 Kgs of Albumin Powder in August 1973. Hence, the so-called cumbersome procedure which was to precede the despatch of every monthly consignment does not in any manner detract from the intention of the parties in making time of the essence of the contract. I am, therefore, persuaded to hold that the stipulation that the total quantity of the goods contracted was to be supplied within a year was intended to be of the essence of the contract.

17. Even assuming for the sake of argument that the time was not of the essence of the contract, the same had to be performed by the defendant within a reasonable time in view of Section 46 of the Contract Act which provides that where no time is stipulated performance of a contract is to be completed within a time reasonable under the circumstances of the case. Having regard to the fact that period of one year is specified in the contract itself, it can be safely assumed that the parties considered it to be reasonable time for due performance of the contract. At best, the defendant could claim allowance of a month or so and the performance of the contract could spill over the prescribed time by a month or so.

18. That a part there is yet another well established principle of law. It is that where time is not originally of the essence of the contract or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay by a notice from the party who is not in default fixing a reasonable time for the performance and stating that in the event of non-performance within the time so fixed he intends to keep the contract as broken. The time so fixed must be reasonable having regard to the state of things at the time when the notice is given and to all the circumstances of the case. Such a notice is binding on the party giving it as on the party receiving it.

(See Halsbury's Laws of England, 4th Ed., Vol. 9, Para 485).

19. This statement of law is based on numerous English decisions, viz., *Stickney v. Keeble* 1915 AC 386; *Hartley v. Hymans* (1920) 3 KB 475 and *Charles Rickards Ltd. v. Oppenheim* (1950) 1 KB 616 etc. It would appear that this principle will squarely apply even in this country to a case like the present. In *Muhammad Habid Ullah v. Bird & Co.* 48 Ind App 175 : AIR 1922 PC 178, the appellant had entered into a contract for sale of certain quantity of railway sleepers to be delivered by May 31, 1913. They failed to deliver the entire goods at the stipulated time and the buyer agreed to an extension of time for delivery of the balance quantity to them until Nov. 30, 1913. However, delivery of the balance was not made by the appellant on Nov. 30, and they were consequently in default. The respondents then threatened to exact the penalties. The appellant refused to make any further deliveries and instituted a suit for refund of security money and damages. Their Lordships of the Judicial Committee, *inter alia*, observed that:

Where, as here, a specific time is stated, then that substituted date must hold. If there were simple waiver of the right to extension of the original time, then a reasonable time would be the proper time for delivery.

20. This statement of law was based on the decision in *Tyers v. Rosedale and Ferry hill Iron Co.* (1875) LR 10 Exch 195, which purported to lay down the rule that if the breach in performance of (the contract within the time fixed by the contract of sale is waived and no period of postponement is stipulated, the party at fault will be liable to deliver the goods within some reasonable time. Thus the original time fixed by the parties ceases to be of the essence of the contract and the promisor is liable to perform the contract or remaining part of the contract as the case may be within a reasonable time.

21. In *Stickney v. Keeble* 1915 AC 386 (*supra*) which was a decision by the House of Lords, it was observed that:

Where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end....

22. This dictum was approved by the Supreme Court in *Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar*, . That case too pertained to an agreement to sell land and it was found that there was no express stipulation and the circumstances were not such as to indicate that it was intention of the parties to make time of the essence of the contract. It was in this background that Shah, J., as his Lordship then was, observed that:

it is true that even if time was not originally of the essence, the appellants could by notice served upon the respondent call upon him to take the conveyance within the time fixed and intimate that in default of compliance with the

requisition the contract will be treated as cancelled.

(Reference may also be made with advantage to *Jamshed Kodaram Irani v. Burjorji Dhunjibhai* AIR 1915 PC 83 (supra), *Sat Parkash L. Tara Chand and Another Vs. Dr. Bodh Raj L. Bhagwan Das Khatri and Others*, and *Dominion of India Vs. Raj Bahadur Seth Bhikhraj Jaipuria*, , in this context.)

23. In the last mentioned case after adverting to paragraph 282, Vol. 80 of the *Halsbury's Laws of England* (3rd Edition) which corresponds to paragraph 485 of 4th Edition, Vol. 9 of the said treaties (supra), their Lordships observed that the position is the same so far as the law in this country is concerned.

24. The legal proposition which would emerge from these authorities manifestly is that where in a contract of sale of goods the time was not originally of the essence of the contract or it being so ceased to be of essence on account of waiver on the part of the innocent party and the period of postponement is not specified, the contract has to be performed within a reasonable time. In such a situation the buyer can give a reasonable notice to the seller requiring that the goods be delivered within a certain time and if he so specifies a new time limit delivery at the time thus specified becomes the essence of the contract, Pertinently reliance has been placed on *Hartley v. Hymans* 1920 (3) KB 475 (supra) by counsel for both the parties and the only contention raised by the defendant's counsel is that notice dated 25th Nov. 1974 (Ex. P8) which was given by the plaintiffs solicitors to the defendant is not valid and legally binding on the defendant I shall, however, deal with this aspect of the matter a little later under issue No. 8.

25. To sum up, therefore, I hold that time was of the essence of the contract, that at any rate the contract had to be performed within reasonable time and that it was open to the plaintiff to make the time of the essence of the contract on account of unnecessary delay on the part of the defendant and fix a time limit for performance of the contract and make it of the essence of the contract.

Issue No. 8:

26. As stated above, the defendant supplied 27 Kgs of Human Albumin Powder immediately after the contract was confirmed. However, they did not send any further consignment of the commodity even though vide letter dated 9th June 1973 (Ex. D3) the plaintiff asked them to send samples of the next batch as soon as possible. In reply dated 2nd July 1973 (copy Ex. D11) the defendant told the plaintiff in plain language that they could despatch further samples of the fresh batches of Albumin Powder manufactured by them only after receiving orders for despatching solution lying earmarked for them, i.e., the plaintiff. This, as seen above led to upward revision of the price of the commodity vide letter dated 10th Aug., 1973 of the plaintiff. Thereafter the defendant sent one batch of Albumin Powder weighing 9 Kgs only towards the end of August 1973. Subsequently they sent two more batches of Albumin Powder but the same were not approved by the plaintiff because of the defects revealed in the test report. Thereupon, vide

their letter dated 14th February 1974 (Ex. D5), the plaintiff impressed upon the defendant to send to them immediately (latest within 10 days) fresh samples from new batches in order to avoid any further unpleasantness. However, it was only on 15th April 1974 that the defendant despatched one sample of Albumin Powder out of batch No. 38 weighing 9 Kgs only. (See Ex. D13). Shri Vidyalankar then wrote letter dated 16th April 1974 (copy Ex. D14) to Mr. Gould. While expressing his regret for not having; been able to write to him for so long due to his pre-occupation with other work he explained that their management had been facing considerable internal technical difficulties, frequent power shut downs and shortages accompanied by a few mechanical troubles due to low voltage etc. and the same had to be surmounted. He promised that he would be sending more samples of Albumin Powder within that week. It would appear that two samples of fresh batch of Albumin Powder were then sent to the plaintiff. (See letter dated 26th April 1974 (copy Ex. D15) of the defendant addressed to the plaintiff). On the said samples being approved by the plaintiff, a total of 27 Kgs of Albumin Powder was despatched by the defendant to the plaintiff in June 1974. This is the admitted case of the parties that there was no further supply of the commodity in question thereafter.

27. Understandably the plaintiff must, have conveyed their displeasure with the sad state of affairs, then obtaining, to the defendant. On 9th Sept. 1974 Shri Vidyalankar wrote a letter (Ex.P2) to Mr. Gould expressing regret for not replying to the communications of the plaintiff promptly. He explained that the work of production had been seriously affected due to shortages of electricity, furnace oil and irregular supply of raw material on account of transport interruptions. He further stated that in the beginning of the year they had entered into an agreement with their Bulgarian Collaborators for supply of certain quantity of Albumin because the latter had bought the entire quantity of Gamma Globulin Ampoules produced by them in the previous year on the condition that they should sell them (i.e. Bulgarian Collaborators) certain quantity of Albumin Powder. Therefore, they had to accord first priority to the combined order, which was big one, of their Bulgarian Collaborators and they could supply Albumin to other customers only after meeting the agreed target. He plainly told the plaintiff that they could treat them too as their priority customer if the plaintiff could make any offer to buy Gamma Globulin Ampoules too along with Albumin Powder. Shri Vidyalankar, inter alia, adverted to the original negotiations between the parties in order to justify his stand. It makes an interesting reading:

You will recollect, at the very early stage when late Dr. Kumar had negotiated with you it was stipulated that you will buy certain percentage of Albumin solution, and subsequently Gamma Globulin Ampoules too. As the demand for Albumin powder has now grown high and at much higher price than we had been accepting so far, the company's Board had recently decided to give priority to such customers who offered to purchase certain quantity of Gamma Globulin Ampoules too, along with Albumin powder.

28. This was naturally very much resented by the plaintiff. In his reply dated 18th September 1974 (Ex.P.W. 1/4) Mr. Gould, inter alia, wrote:

We have been asking you about further supplies on our contract for two months now and not one single line has come out from you, with the exception of this new communication.... a).... b) The contract was made for 200 Kilos ALBUMIN Purely on that basis and nothing else. c)....

Frankly, we are not at all interested about the Bulgarians or anybody else. You re-affirmed a contract with due knowledge of all the factors involved. We on our part have similarly been committed here in Europe, and we think that one of the factors behind your communication relates to the current cost ratio between ALBUMIN and FLOBULIN.

29. He then concluded with a warning to the defendant that unless supplies of Albumin were forthcoming he would find it necessary to take appropriate steps in law and they could not be held to ransom by the defendant.

30. Notwithstanding the admonition contained in letter Ex.P.W. 1/4, the defendant made no further supplies of the commodity in question to the plaintiff. Faced with this situation the plaintiff served the defendant notice dated 25th November 1974 (Ex.P8) through their solicitors M/s. Mulla & Mulla Craigie Blunt & Career .After narrating the whole Background of the transaction and the correspondence which has exchanged between the parties the solicitors called upon the defendant to resume supplies of the commodity and make good the shortfall at the rate of at least 18 Kgs each month commencing from 15th December 1974. Defendants were further warned that in the event of failure on their part to comply with the notice the plaintiff would be left with no alternative but to take appropriate proceedings against them in a Court of law.

31. Even this notice evoked no response from the defendant. Hence, on 20th Dec., 1974 the plaintiff's solicitors sent a reminder to the defendant (copy Ex. P9). It had the desired effect in the sense that the defendant sent a reply to the plaintiffs solicitors on 24th December, 1974 (Ex. P3). While regretting that they could not produce the requisite quantity because of the various troubles caused by power cuts etc. they assured the plaintiff's solicitors that they would examine the supply position in the light of their programme of production for the ensuing year. So they requested the plaintiff's solicitors to bear with them till they i.e. defendant, finalise their programme.

32. From the foregoing conspectus of events it is crystal clear that the defendant was very irregular in supplying the goods. At the time of first default soon after the initial supply of 27 Kgs the defendant took shelter behind the plea that the plaintiff was committed to purchase Human Albumin not only in powder form but in solution also. Needless to say it yielded rich dividends in the form of enhancement in price but even then the defendant persisted in default. Some samples were even found to be defective. Reluctant though the defendant was to admit this fact the sent fresh samples rather grudgingly on 15th April 1974.

However, they again defaulted in making further supplies and no explanation for the same is forthcoming. It would thus appear that the explanation given in their letter dated 16th April 1974 was a thinly disguised attempt to beguile the plaintiff and make them believe that their intention was good but they were helpless in the matter of supplies; Eventually, however, the cat was out of the bag when Sri Vidyalankar in his letter dated 9th September 1974 bluntly told Mr. Gould that they could treat the plaintiff too as their priority customer provided they could make any offer to buy Gamma Globulin Ampoules too along with the Albumin Powder. Further he minced no words in telling Mr. Gould in a forth-right manner that the demand for Albumin Powder had since gone high and at much higher price than they had been accepting hitherto. The plaintiff protested against the discriminatory treatment being meted out to them as against the Bulgarian Collaborators of the defendant even though the contract for supply of Human Albumin Powder to them came into being much later than that of the plaintiff. However, it failed to yield the desired result and the defendant persisted in the default. This manifestly amounted to repudiation of the contract by the defendant. Repudiation may be either explicit or implicit. Repudiation is implicit where the reasonable inference from the defendant's conduct is that he no longer intends to perform his side of the contract. Vide letter dated 9th September 1974, the defendant expressly evinced his intention not to be bound by the contract unless it was modified as desired by them. Further the conduct of the defendant in not performing the contract speaks eloquently for their intention. Needless to say that the breach on their part was of sufficient gravity so as to entitle the plaintiff to treat the contract as repudiated and rescind the same. However, they still chose to forebear and it was only in November 1974 i.e. about three months after their letter dated 18th September 1974 that the plaintiff served a legal notice on the defendant. Thus, the conclusion is irresistible that the defendant was guilty of flagrant breach of the contract which amounted to repudiation not only by nonperformance but also by renunciation of their contractual obligations.

33. The learned Counsel for the defendant has strenuously urged that the instant being an instalment contract, each instalment to be paid for separately, it could not be deemed to be an entire contract and it could only be regarded as a combination of several independent contracts and failure on the part of the defendant to fulfil his part in any one or more of the successive deliveries to be made did not absolve the defendant from tendering subsequent deliveries nor did it absolve the plaintiff from accepting the same. It is for the reason that such a breach by a party constitutes a breach of only a part of the consideration moving from him and the same: can be compensated in damages without any necessity for annulling the whole contract. He has invoked in this contract provisions of Section 38(2) of the Act which read as under:

Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the sellers makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects

or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not a right to treat the whole contract as repudiated.

34. The upshot of the argument of the defendant's counsel is that the default in respect of any instalment in the instant case constituted a separate breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

35. On a careful consideration of the contract as a whole, I am not persuaded to accept this proposition. There is abundant authority for the proposition that a divisible contract for the delivery of goods by instalments is not the same as a series of separate contracts. It is a single contract and not a complex of as many contracts as there are instalments under it. It was so held in *Maple Flock Co. Ltd v. Universal Furniture Products (Wembley) Ltd.* (1934) 1 KB 148. In that case the contract was for supply of 100 tonnes of rag flock to be delivered in three loads of 1 $\frac{1}{3}$ tonnes per week as required and the weekly deliveries were to be separately paid for. Similarly in *Ross T. Smyth & Co. Ltd. v. T.D. Bailey Son & Co.* (1940) 3 ALL ER 60, where the contract was for sale of 15,000 units of yellow American corn and separate documents for each 1,000 units were to be submitted and each 1,000 units were to be considered a separate contract. It was held by the House of Lords:

Such clauses are subsidiary clauses, which generally have effect upon questions of performance. There is still only one contract and one contract quantity, though, for certain purpose, in the, way of performance, particular instalments or shipments and parcels may be treated in separation from the others.

36. The learned Law Lords cited with approval the dictum laid down in *Maple Flock Company Limited* (supra). Reference in this context be also usefully made to *Robert A. Munro and Co. Ltd. v. Meyer* (1930) 2 KB 312, wherein too there was a provision in the contract that "each delivery or shipment shall be treated as a separate contract, and the failure to give or to take any delivery or shipment shall not cancel the contract as to future deliveries or shipments" but Wright, J. said that:

In my opinion this clause could not separate so as to prevent the buyer in Such circumstances from bringing his action, if he were so minded, so soon as the complete and positive refusal to fulfil the contract was expressed; but the rule u/s 31, Sub-section (2) of the Sale of Goods Act is only a method of giving effect to the same principle as would arise in the case of a definite and express refusal; because the acts of the seller in such a case are treated as being equivalent to declaring that he will not fulfil the contract.....

37. In the instant case the contract was for a single quantity although for the sake of convenience of its performance the deliveries were spread over a span of

one year. The very fact that the instalments were not of a definite quantity and much leeway had been left for the defendant in the matter of quantities to be supplied per instalment obviously implying that deficiency in one instalment would be made upon the delivery of subsequent instalments negatives the contention of the defendant that the contract in question was but a conglomeration of a number of contracts.

38. The ambit and scope of Section 31(2) of the English Sale of Goods Act on which Section 38(2) of the Act is modelled except to the extent that the words "no delivery or" have been added after the words "the seller makes" was also considered in all these authorities. I have already alluded to some of the observations made by Wright, J. in *Robert A. Munro & Co. Ltd.* (1930 (2) KB 312 (supra)) but it may be Useful to allude to something more said by him:

My conclusion is that in such, circumstances the intention of the seller must be judged from his acts and front the deliveries which he in fact makes, and that being so, where the breach is substantial and so serious as the breach in this case and has continued so persistently, the Buyer is entitled to say that he has the right, to treat the whole contract as repudiated.

39. However, a somewhat different test was laid by the Court of Appeal in *Maple Flock Co. Ltd.* 1934 (1) KB 148 (supra). Said Lord Hewart, C.J., who spoke for the Court, that:

With the help of these authorities we deduce that the main tests to be considered in applying the sub-section to the present case are, first, the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that such a breach will be repeated.

40. As for *Ross T. Smyth & Co. Ltd.* 1940 (3) All ER 60 (supra), the learned Law Lords observed that:

It must always be a question in such cases whether a refusal by word or conduct or failure to deliver more than certain instalments or quantities, and not the whole contract quantity, goes to the root of the contract so as to constitute a total repudiation.

41. Thus, the crucial question for consideration is whether the buyer in the instant case was entitled to treat himself as discharged by reason of the serious and persistent nature of the breach, it being essentially a question of fact rather than of law. Evidently the breach on the part of the defendant was of sufficient gravity and the conduct of the defendant was such as reasonably to lead to the inference that similar breaches would be committed in relation to subsequent deliveries. So the plaintiff was justified in regarding the whole" contract as repudiated and giving a notice to the defendant calling upon them to make good the contract within a time which they (i.e. the plaintiff) considered reasonable, hence, this contention of the defendant's counsel is devoid of any substance.

43. The next contention of the learned Counsel for the defendant is that the

plaintiff not having elected to rescind the contract on its becoming voidable at their option due to non-performance by the defendant within the stipulated period, the only course open was to extend time for its performance by mutual consent of the parties. The line of argument is that while it was open to a promisee not to exercise the option to avoid the contract he cannot thereby alter the date of performance fixed by the contract and u/s 63 of the Contract Act time for performance can only be extended by an agreement arrived at by both the parties. It is urged that the fact that the contract is not put an end to does not entail the further consequence that the time for performance is automatically extended. Reliance in this behalf has been placed on *Keshavlal Lallubhai Patel and Others Vs. Lalbhai Trikumlal Mills Ltd.*, where it was held that:

The true legal position in regard to the extension of time for the performance of a contract is quite clear u/s 63 of the Indian Contract Act. Every promisee, as the section provides, may extend time for the performance of the contract." The question as to how extension of time may be agreed upon by the parties has been the subject-matter of some argument at the Bar in the present appeal. There can be, no doubt, we think, that both the buyer and the seller must agree to extend time for the delivery of goods. It would not be open to the promisee by his unilateral act to extend the time for performance of his own accord for his own benefit. It is true that the agreement to extend time need not necessarily be reduced to writing. It may be proved by oral evidence. In some cases it may be proved by evidence of conduct.

43. However, a perusal of the said authority would reveal that the facts in that case were totally different. No question of the waiver of breach of any term of the contract or failure to exercise the option to avoid the contract under paragraph 1 of Section 55 of the Contract Act was involved in that case. The question of extending time for performance of the contract does not arise in a case of simple waiver by the promisee who elects not to rescind the contract on commission of the breach of a condition of the contract by the other party because the defaulting party is then under a legal obligation to execute the contract within a reasonable period. Extension of time and waiver are two distinct concepts. Although the line of demarcation between the two may be very thin but it is real. In the law of contract, waiver is most commonly used to describe the process whereby one party voluntarily grants a concession to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of the term waived. (See Halsbury's Laws of England, 4th Edition, Vol.9, Para. 571). In the words of Goddard, J.:

...if what happens is a mere voluntary forbearance to insist on delivery or acceptance according to the strict terms of the written contract, the original contract remains unaffected, and the obligation to deliver and to accept the full contract quantity still continues.

(See *Bessler Waechter Glover and Co. v. South Derwent Coal Co. Ltd.* (1938) 1 KB 408)

44. In *Banning v. Wright (Inspector of Taxes)* (1972) 2 ALL ER 987, Lord Hailsham of St. Marylebone LC, explained the legal position with regard to waiver of a term as under:

Waiver is the abandonment of a right. Viewed from one aspect of the matter the right abandoned is conferred by the conduct of the appellant in breach. Viewed from another aspect the same right is conferred by the term of the contract which has been broken by the appellant. When a contract is broken the injured party in condoning the fault may be said either to waive the breach, or to waive the term in relation to the breach. What in each case he waives is the right to rely on the term for the purpose of enforcing his remedy to the breach.

45. This, where the buyer, as in the instant case, voluntarily accedes to a request by the seller that the delivery of the goods may be postponed, he may be held to have waived his right to insist that the goods be delivered within the time fixed by the contract of sale. It is significant to note that in the instant case letters dated 16th April 1974 (Ex. D14) and dated 26th April 1974 (Ex. D15) were written at a time when the period for the performance of, the contract was about to expire. In the former letter Shri Vidyalankar clearly stated that another batch of the same quality and in the same quantity would be available within a week and they would send more samples to the plaintiff. In the other letter he informed the plaintiff that three batches consisting of about 27 Kgs of powder were ready to be despatched after approval of the samples by them. (i.e. the plaintiff). It is thus quite patent that the despatches of Albumin Powder made by the defendant to the plaintiff in June 1974 were accepted by the latter by way of concession and they did not insist on adhering to the terms of the contract regarding the time of delivery. As a necessary corollary the condition regarding time being of the essence of the contract stood waived and ceased to be operative as if it had never existed and the only liability of the defendant was to perform the contract within a reasonable time. (See the observation of Tindal, C.J. to this effect in *Alexander v. Gardner* (1835) 131 ER 1276). It is only thereafter that in the event of there being unnecessary delay on the part of the promisee to fulfil his contractual obligation that the promisee is entitled to make the time of the essence of the contract by serving a notice requiring the premises to perform the contract within the, time limit fixed by him. Of course, it is for the Court to determine whether the time limit fixed in such a notice was reasonable or not, having regard to all the facts and attendant circumstances of the case. As said by Lord Denning in *Charles Rickards Ltd.* 1950 (1) KB 616 (supra):

It would be most unreasonable if the defendant, having been lenient and waived the initial expressed time, should, by so doing, have prevented himself from ever thereafter insisting on reasonably quick delivery. In my judgment he was entitled to give a reasonable notice making time of the essence of the matter. Adequate protection to the suppliers is given by the requirement that the notice should be "reasonable."

46. I am, therefore, of the view that such a notice does not amount to extension

of time for performance of the contract as contemplated in Section 63 of the Contract Act. Hence, this argument too is without any merit.

47. The learned Counsel for the defendant has then questioned the validity of the notice dated 25th of November 1974 on the ground that it did not give reasonable time to the defendant to perform the balance contract. As stated above, by the aforesaid notice the defendant was called upon to immediately resume supplies of the remaining goods to the plaintiff at the rate of at least 18 Kgs each month commencing from 15th December 1974, The contention raised by the defendant's counsel is that having regard to the previous course of dealings between the parties, the terms of the original contract itself and low rate of production of the commodity in the factory of the defendant, the requirement of supplying 18 Kgs of Albumin Powder per month was very much on the high side and it was not at all practicable if not impossible for the defendant to comply with the same. Hence, the notice suffers from the vice of being unreasonable.

48. Section 46 does not define "what is a reasonable time". It simply says that the question "what is a reasonable time" is in each particular case a question of fact. Thus, there is no such thing as a reasonable time in the abstract. It must always depend upon circumstances of each case. In the well-known words of Lord Watson in *Hick v. Raymond and Reid*, 1893 AC 22:

...Where the law implies that a contract shall be performed within a reasonable time, it had invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control and he has neither acted negligently nor unreasonably.

49. As would be seen from the resume of the circumstances narrated above, the inordinate delay in the performance of the contract could not be attributed purely to causes beyond the control of the defendant. It may not be possible to say whether they acted negligently or not in the absence of any evidence to that effect but it is abundantly clear that they acted in an unreasonable manner. The defendant evinced even an intention to abandon the contract unless the plaintiff came to some terms as indicated in letter dated 9th September 1974. However, at present the question before us is whether the notice Ex. P8 is reasonable one. Said Lord Parker of Waddington in *Stickney v. Keeble* 1915 AC 386 (supra):

In considering whether the time so limited is a reasonable time the Court will consider all the circumstances of the case. No doubt what remains to be done at the date of the notice is of importance, but it is by no means the only relevant fact. The fact that the purchaser has continually been pressing for completion, or has before given similar notices which he has waived, or that it is specially important to him to obtain early completion, are equally relevant facts.

50. These observations, to my mind, are very apposite to the case on hand. Having regard to the long time which elapsed between the commencement of the

contract and the date of notice Ex. P8, the stipulation in the contract to supply 10-20 Kgs per month of the commodity and the balance quantity which still remained to be supplied on the date Of the notice, I do not think that the demand of the plaintiff requiring the defendant to resume supplies at the rate of 18 Kgs per month can be said to be unreasonable by any stretch of reasoning. For obvious reasons the patience of the plaintiff was already under considerable strain if not totally exhausted and they could ill-afford to wait for the deliveries of the remaining goods to be made over an indefinite period. Hence, having regard to all the facts and circumstances of the case, I find that the notice Ex.P8 is reasonable. This argument, therefore, too falls to the ground.

51. Lastly, the learned Counsel for the defendant has canvassed rather ingeniously that notice Ex. P8 even if otherwise valid ceased to be so and lost its efficacy on account of protracted negotiations for a settlement which proceeded between the parties after the said notice and as such it was incumbent upon the plaintiff to have served a fresh notice allowing reasonable time to the defendant to fulfil their commitment as regards the balance supplies. In substance the argument advanced is that after the negotiations had gone on for a considerable time notice Ex. P8 stood waived and it was necessary for the purchaser to give a reasonable time for putting an end to his contract. Reliance in this behalf is placed on Webb v. Hughes (1870) LR 10 281. In that case the contract was for sale of a house and land required for immediate residence. The purchase was to be completed on the 26th February. However, sale could not be completed on that day because the vendor failed to establish his title by that day. Some negotiations between the parties then followed which continued upto 7th April on which date notice was given by the purchaser of immediate abandonment of the contract. The vendor filed a suit for specific performance. It was held that:

...as a possible postponement of completion of the contract was contemplated by the terms of the agreement, time was not of the essence of the contract, and that if it had been so the purchaser ,by continuing the negotiations as to title after the day fixed for completion, had waived it, and could not rescind without reasonable notice.

52. The ratio of the decision apparently is, that having once gone on negotiating beyond the time fixed the vendee cannot give immediate notice of abandonment but must give a reasonable notice of his intention to give up his contract if a title was not shown.

53. The instant case is clearly distinguishable on facts inasmuch as notice Ex.P8 was served by the plaintiff on the defendant after the latter had failed to execute his part of the contract within the stipulated period and even thereafter. The plaintiff waited in vain for five months after the last delivery of the goods in June 1974 and more than three months after their letter dated 18th September 1974 for further deliveries to be made. Hence, the legal efficacy to the notice could not be washed away merely because the defendant again chose to approach the plaintiff with a view to effect settlement when nothing concrete emerged from

the negotiations. The mere fact that the solicitors of the plaintiff thought of arriving at a settlement if a reasonable proposal was forthcoming could not be tantamount to or construed as waiver of the notice so as to necessitate giving of a fresh notice. The notice was very much there. It stared the defendant in the face but the supplies were sent for the first time only in March 1975 in the hope that the plaintiff would agree to the revised schedule as proposed by the defendant in their letter dated 8th March 1975. That was not to be because the patience of the plaintiff had completely exhausted by then. The argument advanced, to my mind, is simply fallacious and I do not feel persuaded to subscribe to the view that a fresh notice of termination of contract after allowing reasonable time to the defendant to fulfil their obligations under the contract was necessary. Hence, I find that nothing concrete having emerged from the so-called negotiations aimed at dragging the contract over a spell of another year, the plaintiff was perfectly justified in rescinding the contract on the strength of notice Ex. P8.

Issues 6 & 7:

54. Both these issues being correlated in the sense that their decision hinges virtually on the same evidence, I take them-up together. As stated above, notice Ex. P8 given by the plaintiff through their solicitors evoked no reply from the defendant and it was only after another letter dated 20th December 1974, Ex. P9, was written by them to the defendant that they sent reply dated 24th December 1974, Ex. P3, inter alia, requesting the plaintiff's solicitors to bear with them till they, i.e. defendant, finalise their programme and write to them, i.e. plaintiff's solicitors. Shri Vidyalkar deposed that thereafter Shri Nanavati of M/s. Mulla & Mulla met him at Delhi sometime in January and February 1975 and he wanted a definite schedule of delivery of the product to the plaintiff as required in their aforesaid notice. He, i.e. Shri Vidyalkar, reiterated his difficulties and problems but Shri Nanavati persuaded him that from then onwards they should stick to some schedule of delivery. Thereupon the prepared a schedule of delivery and communicated the same to the solicitors of the plaintiff vide letter dated 1st March 1975 (Ex.P4). He, i.e. Shri Vldyalankar met Shri Nanavati again on 3rd of March 1975 and later submitted a fresh schedule of delivery dated 8th March 1975 (Ex. DW2/1). Thereafter they sent samples of three batches of Albumin Powder to the plaintiff in March 1975. However, they did riot receive approval in respect thereto from the plaintiff. Even then they sent samples of two or three more batches to the plaintiff in April 1975 but they were informed by Air India through which the same had been despatched that the plaintiff was not accepting those samples and as such the same were lying with them. Then they received letter dated 21st April 1975 (Ex.P11) from the solicitors of the plaintiff informing them that the plaintiff was no longer interested in the proposal for revised schedule of delivery.

55. From the foregoing narration of events it is manifest that at no stage subsequent to the giving of notice (Ex.P8) the plaintiff or their solicitors accepted

confirmed any revised schedule of delivery of the balance goods. In their reply dated 4th March 1975, to the letter of the defendant dated 1st March 1975, the plaintiff's solicitors made it abundantly clear that they would put the proposal made by the defendant to their clients for their acceptance. Of course, they asked the defendant to send the samples in respect of first batch of 27 Kgs by Thursday, the 6th March 1975 at the latest by air-mail. They further told the defendant that they would take care to mention to the plaintiff as intimated by them, i.e. the defendant, that their commitment would be firm and there would be no going back on the same for any excuse or reason whatsoever. Even a perusal of letter Ex.DW2/1 would show that it was just a proposal intimating a revised schedule of supplies to be made by the defendant during the year 1975 with respect to the remaining quantity of Albumin Powder. It is not suggestive of any concluded agreement regarding an agreed schedule of supplies by mutual consent of both the parties. Indeed, even the defendant (Shri Vidyalankar) when he was in the witness box did not say so. Under the circumstances, it cannot be inferred by any stretch of reasoning that there was any fresh agreement between the defendant and Shri H.D. Nanavati as representing the plaintiff with regard to the revised schedule of deliveries. Even the conduct of the plaintiff does not warrant any conclusion that they had consented to the revised schedule of delivery and all that happened was that some negotiations took place between plaintiff and the solicitors of the defendant but nothing concrete emerged therefrom. Hence, I find both the issues against the defendant.

Issue No. 9

56. Section 57 of the Act lays down that where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery. Thus, breach of contract on the part of the defendant in the instant case gives rise to the claim by the plaintiff to be compensated for the loss which he had to suffer on account of no delivery of goods. The learned Counsel for the defendant has, however, raised rather ingenious contention that the plaintiff having waived the breaches on the part of the defendant is no longer entitled to claim damages especially when he did not give any notice of his intention to claim damages at the time of waiver and instead went on accepting supplies upto June 1974 without demur. In this context, he has adverted to condition No. 2 of conditions printed on the reverse side of the contract Ex. PW.1/2. The said condition, inter alia, provides:

...In the event of there being any complaint as to the quantity of goods-delivered or the date of delivery of all or any instalments or the quality of the goods, it shall be a condition precedent to any such complaint being entertained that payment is made for such part or parts of the goods supplied as are not or the delivery of which is not the subject of any dispute. Further it shall be a condition precedent to any complaint being entertained that the same is made in writing to the seller within fifteen days of receipt of goods or due date of delivery if the complaint arises from delay on delivering, and if either or both of the

aforementioned conditions precedent are not fulfilled then the buyer shall be deemed to have waived all complaints whether justified or not and shall pay for the goods and accept delivery of instalments after due date as if this order has been properly complied with by the seller.

57. The argument put forth precisely is that failure on the part of the plaintiff to fulfil the condition precedent mentioned in the aforesaid clause disentitles the plaintiff to claim any damages. However, I do not find any substance in this contention for the reason that the plaintiff, as has been seen above, had been continuously pressing for early delivery of the goods but he had to wait and forebear because of the assurances given by the defendant from time to time that goods would be delivered as early as possible. Ex. D14 is one such letter in which Shri Vidyalankar expresses regret for the inconvenience caused to the plaintiff and apologized for not having written to Mr. Gould earlier. Hence, the aforesaid condition is, in terms, not attracted to the facts of the present case and it being a case of mere voluntary forbearance to insist upon delivery according to the strict terms of the written contract the original contract remained unaffected and the obligation to deliver and to accept the full contracted quantity continued. The plaintiff was, however, bound to call upon the defendant to make up the deficiency by giving a reasonable notice and this is what he precisely did. As said by Mc. Cardie J. in *Hartley v. Hymans* 1920 (3) KB 475 (supra) that:

...upon the expiration of a contract period the contract does not ipso facto become void. On the contrary it clearly remains alive - e.g. for the purpose of an action by the party not in default.

(See also *Ogle v. Earl Vane* (1868) 3 QB 272, *Hickman v. Haynes* (1875) LR 10 CP 598, *Bessler Waechter v. South Derwent Coal Co.* (1938) 1 KB 408 and *Tyres v. Rosedale & Ferry hill Iron Co.* (1875) LR 10 Exch 195).

58. In the last mentioned case Cockburn, C.J., observed as under:

I think the true effect of the correspondence is that there was merely a postponement of the period of delivery of the instalments, the contract still remaining open, and both parties being bound by it.

59. In AIR 1922 178 (Privy Council) , Lord Dunedin observed that:

The effect of Section 55 of the Indian Contract Act above quoted is, where the party having the option elects not to a void, to put agreement after the original date on the same footing as an agreement, as put by Baron Martin, just before the original date.

60. Thus, there is no escape from the conclusion that the plaintiff is entitled to verdict for full measure of damages.

61. Incidentally, some of the above mentioned authorities also deal with the question of date which would be relevant for determining the quantum of damages. Relying upon the principle laid down in *Hartley v. Hymans* 1920 (3) KB

475 (supra) it was held in *Hickman v. Haynes* 1875 LR 10 CP 598 (supra) that the plaintiff was entitled for damages assessed according to the price at the later date. Similarly, Judicial Committee of the Privy Council held in *Muhammad Habid Ullah v. Bird & Co.* (supra) that:

Section 55 para 3, means that the promisee cannot claim damages for nonperformance at the original agreed timer not that he cannot claim damages for non-performance at the extended time.

62. Hence, the relevant period for determining the quantum of damages will be December 1974/January 1975 because of the failure on the part of the defendant in supplying the remaining goods despite; letters dated 18th September 1974 and 25th November 1974 of the plaintiff.

63. The submission made by the learned Counsel for the defendant, however is that instant being a contract for supply of goods in instalments, the relevant dates for determining the damages would be end of each successive month commencing from January 1975 over which the defendant was required to supply the remaining goods. Reliance in this context has been placed by him on *Brown v. Muller* (1872) LR 7 Exch 319 and *Jugmohandas Varjeevandas v. Nasserwanji Jehangir Khambhatta* (1902) 4 Bom LR 504. In both these cases the goods were to be supplied in equal instalments over a certain period and on the contract having been breached, it was held that the plaintiff should be awarded as damages the sum of the difference between the Contract price and their value at the several duties of the breach. In *Brown v. Muller* (Supra) it was observed by Channel B. that:

The time when a contract is broken is one thing, the time when it is to be performed may be quite another. Here, it was to be performed by three separate deliveries of goods on specified days. And under these circumstances, in order to measure the damages, resort must be had to each final day of performance.

64. It is true that in the case of instalment contracts, the damages are prima facie to be calculated by a reference to the time at which each successive instalment ought to have been delivered or accepted. However, as has been observed earlier, the contract in question cannot be said to be a divisible one in the sense that failure to deliver each instalment would constitute a separate breach giving rise to a claim for damages on account of that breach. It bears repetition that the so-called instalments in this case did not specify strictly any particular quantity of goods to be supplied and in view of the flexibility in the quantity to be supplied each month it could not be enforced rigidly. That apart, the contract having been virtually repudiated by the defendant by their conduct culminating in letter dated 9th, September 1974 and the plaintiff not halving elected to rescind the contract at the time when the breach actually occurred, it cannot be said that there was any more contract for supply of goods by instalments. The mere fact that the plaintiff was obliged having postponed the delivery of the goods, to give a reasonable notice to make time of essence of the

contract again would not convert the waiver on his part into a contract to supply goods by instalments at specific time or date. Hence on the failure of the defendant to supply the goods in accordance with the notice dated 25th November 1974, there was absolute breach on the part of the defendant and the plaintiff was no longer required to wait for each separate delivery as indicated in the said notice and he was perfectly justified in treating it as a breach of the whole contract. Thus, viewed from any angle the relevant time for assessment of damages would be December 1974/January 1975.

65. That brings me to the last but perhaps the most crucial and ticklish question in this case, namely, the assessment of damages to which the plaintiff may be entitled. Section 57 of the Act does not lay down any guidelines with regard to the measure of damages which the buyer may recover in an action under that Section and, therefore, recourse will have to be taken to Section 73 of the Contract Act which prescribes the method for assessing the compensation due to a plaintiff suing upon a breach of contract. As contemplated in the said Section, there are two broad principles on which damages in cases of breach of contract are calculated. The first is that as far as possible he who has proved a breach of bargain to supply what he contracted to get is to be placed as far as the money can do it in as good a situation as if the contract had been performed. This is qualified by a second principle which imposes on a plaintiff a duty of taking all reasonable steps to make good the loss consequent on the breach and debars him from claiming any part which is due to his negligence to take such precaution. (See *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* 1912 AC 673 at p. 689 and *Murlidhar Chironjilal v. Harishchandra Dwarkadas* AIR 1962 SC 366, in which the principles as laid in the former authority have been quoted with approval.)

66. In the case of a contract for the sale of goods, the law is well settled that the normal measure of damages when a seller fails to deliver the goods is the difference between the contract price and the market price on the date of the breach. Of course, this rule will be applicable to a situation where there is an available market for the goods and special considerations may weigh in awarding the damages in special circumstances. It is because the market rate is only a presumptive test as the buyer is naturally concerned with an available market in the sense of his ability to buy substitute goods i.e. the ready capacity of willing sellers to supply quickly goods of the relevant category. (See *Erroll Mackay v. Kameshwar Singh* AIR 1932 PC 196). So, it is with these broad principles in view that I proceed to appraise the evidence on record.

67. Mr. I.S. Gould, P.W. 1, has deposed that the product in question was very much in short supply. So they contacted the companies who could supply the material and they received quotations from three companies, namely, M/s. Medexport, Moscow, a State Trading Organisation of U.S.S.R., M/s. Travenol Laboratories of United States and M/s. Productexa of New York. The quotation received from M/s. Medexport was the lowest being 1300 US \$ per Kg. whereas

the quotation of M/s. Travenol Laboratories was somewhere at 1400 US \$ a Kg. while the highest price quoted was 1540 US\$ per Kg. He asserted that the plaintiff had assessed the claim for damages on the basis of lowest quotation i.e. at 350 US\$ per Kg. which was the difference between the contract price and market price at the time of the breach. He has further explained that the claim was confined to 137 Kgs. which is admittedly the quantity which remained unsupplied. On cross-examination he denied the suggestion that the plaintiff did not suffer any loss and that they did not receive any quotations at any time from alternative suppliers to enable them to claim damages in the suit, He explained that the period during which they suffered the losses which was the basis of the claim in the suit was approximately from July 1973 to the date of Shri Vidyalkar's letter dated 9th September 1974. Significantly, no question was put to this witness that there was no increase in the price of the goods in question at the time of the breach of the contract. Still worse for the defendant, there is no iota of evidence in rebuttal of what has been deposed to by Mr. Gould, Shri Vidyalkar, for reasons best known, to him, did not even refute the claim of the plaintiff for damages at 350 US \$ per Kg when he was in the witness box. However, he was cross-examined by the plaintiff with respect to the same. At first he expressed his inability to say if the price of the. Albumin Powder in the international market was rising during the period 1st of March 1973 to October 1974, although he admitted that sometimes the commodity in question was in short supply. However, on further cross-examination he asserted that as per their information the international price of the product in question was still below 1000 US \$ per Kg and he stated that they had not exported the said commodity to anyone except their Bulgarian Collaborators at the old price of 785 US \$ per Kg. Evidently some wisdom seems to have dawned on him when he said so. Anyhow, the defendant has not led any evidence to substantiate the assertion made by Shri Vidyalkar by producing their own record or any other evidence.

68. The learned Counsel for the defendant has canvassed with considerable fervor that the evidence On the record is woefully inadequate for arriving at any definite conclusion about the prevailing price of the commodity in question at the relevant time, viz., on the date of breach. It is urged that in the absence of the quotations which were allegedly received by the plaintiff from the different companies mentioned above no reliance can be placed on the oral testimony of Mr. Gould and since the onus of proving the quantum of damages lay heavily on the plaintiff, which they have failed to discharge properly, they are not entitled to any damages whatsoever. At any rate it is, contended that the plaintiff may be allowed nominal damages. Reliance in this context has been placed on the following observations of Lord Goddard, C.J., in *Bonham-Carter v. Hyde Park Hotel Limited* (1948) 64 TLR 177:

plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak throw them at the head of the Court, saying : "This is what I have lost; I ask you to give me these damages." They have to prove it.

69. Since the evidence in the said case with regard to the damages was extremely unsatisfactory his Lordship assessed the damages at ? 275 and gave judgment for the plaintiff for that sum. It is not, however, clear what precisely the amount claimed by the plaintiff therein was. Reference in this context has also been made to *Ashcroft v. Curtin* (1971) 3 ALL ER 1208, wherein the aforesaid observations of Lord Goddard, C.J., were quoted with approval. It is, however, pertinent to note that the claim of the plaintiff in both these cases was based on tort and not breach of contract as such. In *Ashcroft v. Curtin* (supra) the lower Court had allowed a sum of ? 10,500 on account of company's annual profitability loss. However, the Court of Appeal reduced the amount to a mere ? 2,500 under that head. The following observation of Edmund Davies, L.J., is rather interesting to note:

Doing the best I can, and fully realising that I too am rendering myself liable to be attacked for simply "plucking a figure from the air I think the proper compensation under this head is ? 2,500.

70. It is thus obvious that the figure arrived at by the Law Lords was somewhat imaginary. Obviously both these authorities are of no avail to the defendant in the instant case because the damages are claimed on account of breach of contract for sale of goods and all that has to be seen is whether the evidence on the record is adequate and reliable enough to furnish a dependable basis to estimate the damages on well established principles of law.

71. The learned Counsel for the defendant also alluded to the following observations of Joshi, J., in *National Small Industries Corporation Ltd. v. Golden Workshop* (1978) 80 Pun LR (D) 70 at p. 73 that:

It was conceded by him that there was no evidence on the record as to the difference between the contract price and the market price of the machine on the date of breach of the contract and there was similar paucity of evidence as to the trouble and expense's necessary for securing another such machine and yet he held the respondent liable to pay damages...even if nominal because it had committed breach of the "contract". It was possible for the price of the machine to go up between the date of the contract and the date of its breach and it was equally possible for the same to climb down. The award of Rs. 3,000/- as damages to the claimant was thus wholly arbitrary and unjustified.

72. These observations were made by the learned Judge in relation to an award given by an arbitrator which was based on no evidence whatsoever. Obviously this case is of little assistance to the defendant.

73. It is no doubt true that there is virtually no evidence in the instant case of the prevalent price of the commodity in question on the date of the breach of contract. It is evidently because the commodity being of a special type there was no available market for it so far as the plaintiff was concerned. The term "an available market" postulates that the willing sellers should be immediately accessible to the buyer and within a reasonable distance of the place fixed for the

contract for delivery. Where the goods are to be manufactured specially to suit the particular requirements or specifications of the buyers, as in the instant case, it is most unlikely that there would be an available market in which he can buy suitable substitute goods. Shri Vidyalkar stated during his cross-examination that besides the defendant there were one or two other manufacturers of both the products in India but they (the defendant) were the largest manufacturers in the country. If that be so, it is highly doubtful that the plaintiff could have obtained substitute goods of the like quality from the other manufacturers in India within reasonable time of the breach of the contract. Obviously, therefore, the plaintiff had to look to some other international market for this purpose. Under the circumstances, I see no reason to disbelieve the statement of Mr. Gould about the plaintiff having received questions from the above mentioned three companies. Pertinently these facts were precisely set forth by the plaintiff even in the plaint and I, for one am not persuaded to believe that they are a mere concoction. It was obviously very difficult, if not impossible, for the plaintiff to prove authorship of those quotations. Further there is intrinsic evidence on the record to indicate that there was a steady rise in the price of Human Albumin Powder during the period the transaction in question was to be executed. As stated above, the price of this commodity was enhanced from US \$785 per Kg to US \$950 per Kg in August 1973 i.e. only after about four months of the contract. According to Mr. Gould the price was increased because Shri Vidyalkar intimated that he could not supply them any further material at the price negotiated with Dr. Kumar and they (i.e. the plaintiff) had already accepted orders from European clients and as such they were committed to supply the goods to them. The contention of Shri Vidyalkar, however, is that the price was increased because of their insistence that the plaintiff must buy Human Albumin in solution form also and in order to compensate them i.e. the defendant, they agree to the enhancement in the price of Albumin Powder. It is no doubt true that the defendant was insisting that plaintiff must purchase some quantity of Human Albumin in solution form also but the latter was reluctant. Since the defendant did not supply any quantity of Human Albumin in Powder form subsequent to the initial despatch of 27 Kg it is no wonder that the plaintiff felt compelled to enhance the price. All the same, there can be no shadow of doubt that the enhanced price could not be higher than the current market price at that time. At least it is nobody's case, hence, it can be safely assumed that the market price of the commodity had arisen to that extent within a short span of four months. The rising trend in the price of the commodity seems to have continued even thereafter. The conduct of the defendant in supplying in all a meagre quantity of 36 Kgs in small bits during the period August 1973 to June 1974 and then stopping the supplies altogether is itself suggestive of reluctance on the part of the defendant in 1985 Delhi/5 II G-20 honouring their commitment to one plaintiff. Although an effort was made to explain that it was on account of unforeseen and unavoidable difficulties which rendered proper and regular functioning of their factory impossible, the cat was out of the bag when Shri Vidyalkar in his letter dated 9th September 1974 blurted out that:

As the demand for Albumin powder has now grown high and at much higher price than we had been accepting so far, the company's Board had recently decided to give priority to such Customers who offered to purchase certain quantity of Gamma Globulin Ampoules too, along with Albumin powder.

74. It is thus crystal clear that the primary reason for non-supply of goods by the defendant was the price hike rather than the so called difficulties in adequate production of the commodity. Subsequent solicitude of the defendant to make good the quantity over a period of nine months in the year 1975 is hardly of any consequence in view of these glaring facts.

75. That besides, as stated above, the defendant has not adduced an iota, of evidence in rebuttal. No doubt, Shri Vidyalkar asserted during his cross-examination that the defendant had been supplying the commodity to their Bulgarian Collaborators at the old price of 785 US \$ per Kg but in the absence of the account books and other relevant documents which were in possession of the defendant and which could throw abundant light on the price of the commodity then prevailing or being charged by the defendant himself from their customers it is difficult to accept his oral testimony at its face value. It is well settled that where a defendant is in possession of account books or other documents kept by him and which are relevant for ascertaining the price of the goods he cannot be held to say, relying upon the abstract doctrine of onus of proof, that it was no part of his duty to produce them unless he was called Upon to do so. In a situation like this, the Court will be well justified in drawing an adverse inference against the defendant that the account books and other relevant documents if produced would have, in all probability, not supported the defendant's case. So even though the evidence on record is somewhat vague and deficient so far as the prevalent price of the commodity in question on the date of trial is concerned it clearly points out that there was a steady escalation in the price of the commodity. Under somewhat similar circumstances, in *A.V. Joseph v. R. Shew Bux* AIR 1918 PC 149, it was held that:

Where in a suit for damages the Court finds in favour of the plaintiff that there was a breach then simply because the plaintiff has not given sufficient evidence to show certain details of damages and that he has made one or two small misstatements as regards some of his expenses, it is not proper to grant only nominal damages.

76. The Chief Court in that case had awarded nominal damages for want of sufficient evidence. However, their lordships observed that "Really that would be a very serious thing to hold."

77. Similarly, it was held in *Frederick Thomas Kingsley v. Secretary of State for India* AIR 1923 Cal 149, that:

In cases admitting of proof of such damages the amount must be established with reasonable certainty. But this does not mean that absolute certainty is required nor, in all cases, is there a necessity for direct evidence as to the

amount Damages are not uncertain for there reason that the loss sustained is incapable of proof with the certainty of mathematical demonstration or is to some extent contingent and incapable of precise measurement. Certainty to reasonable extent is necessary and loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof.

78. With respect I may say that this is the correct statement of law. So the mere fact that it is somewhat difficult to assess the damages with certainty or precision does not relieve the defendant of paying adequate damages to the plaintiff so as to fairly compensate him for the loss suffered The plaintiff, in a situation like this, will be entitled to the benefit of every reasonable presumption as to the loss suffered. Hence, I find that the plaintiff is entitled to damages at the rate of US \$350 per Kg., being the difference between the contract price and the lowest quotation of US \$1300 received by the plaintiff from M/s. Medexport, Mosco, for the unsupplied quantity of 137 Kgs. Converted in Indian currency the amount so claimed has been worked out at Rs. 3,89,354/- at the exchange rate of Rs. 8/12P US \$. There is nothing on the record to suggest to the contrary. Hence. I find this issue accordingly.

Issue No. 10:

79. The legal position as regards award of interest for the period prior to the suit was enunciated by their Lordships of the Judicial Committee in B.N. Railway Co. Ltd. v. Ruttanji Ramji AIR 1938 PC 67, as follows:

...interest for the period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or "...under the provision of any substantive law entitling the plaintiff to recover interest, as for instance, u/s 80, Negotiable Instruments Act, 1881, the Court may award interest at the rate of 6 per cent per annum, when no rate of interest is specified in the promissory note or bill of exchange."

Their Lordships further observed that:

Under the Interest Act, 32 of 1839, the Court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument.

80. As regards interest by way of damages, it was observed that:

Section 73 is merely declaratory of the common law as to damages, and it has been held by the House of Lords in London, Chatham & Dover Railway Co. v. South Eastern Railway Co. 1893 AC 429 that interest cannot be allowed at common law by way of damages for wrongful detention of debt.

81. Referring to illustration (n) to Section 73 their Lordships said that:

It only shows that if any person breaks his contract to pay to another person a sum of money on a specific date, and in consequence of that breach the latter is unable to pay his debts and is ruined, the former is not liable to make good to the latter anything except the principal sum which he promised to pay, together with interest up to the date of payment. He is not liable to pay damages of a remote character. The illustration does not confer upon a creditor a right to recover interest upon a debt which is due to him when he is not entitled to such interest under any provision of the law.

82. From the foregoing it is crystal clear that interest cannot be allowed by way of damages. There is no contract express or implied between the parties to justify the award of interest. Even any mercantile usage entitling the plaintiff to interest on the amount of damages has not been proved. Since the damages claimed by the plaintiff was not a sum certain the question of award of interest on unliquidated damages under the Interest Act too does not arise. Even otherwise it is well settled that ordinarily no interest is allowed on the amount of damages arising out of breach of contract (See also *Ralli Brothers Ltd. v. Firm Bhagwan Das Parmeshri Dass* AIR 1945 Lahore 35 and *Mahabir Prasad Rungta v. Durga Datta* AIR 1961 SC 990).

83. The only other provision under which interest may be awarded in the absence of a contract to the contrary is Sub-section (2) of Section 61 of the Act. Under Clause (b) thereof the Court may award interest to the buyer in a suit by him, for the refund of the price in a case of breach of the contract on the part of the seller from the date on which payment was made. Obviously the instant is not a case of that type because no refund of the advance payment made by the plaintiff is involved.

84. To sum up therefore, the plaintiff is not entitled to any interest by way of damages or otherwise for the period preceding the institution of the suit. As regards interest pendente lite and future interest until the date of realisation of the decretal amount, the award of interest is within the discretion of the Court. Having regard to the flagrant and persistent default on the part of the defendant and other attendant circumstances I consider it just and proper that interest @ 6% per annum be allowed to the plaintiff on the decretal amount from the date of institution of the suit until realisation.

85. As a result I decree, the suit of the plaintiff for recovery of Rs. 3.89.354/-, (rupees three lakhs eighty nine thousand three hundred and fifty four only) with costs against the defendant. The plaintiff shall also be entitled to interest pendente lite from the date of institution of the suit as well as future interest from the date of the decree till realisation on the said amount at 6% annum.