
(2015) 03 BOM CK 0159
In the Bombay High Court
Case No : Suit No. 824 of 1980

Bajranglal Anilkumar Jaju and Others APPELLANT
Vs
The Vyasya Bank Ltd. RESPONDENT

Date of Decision : 12-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, Order 15 Rule 1, Order 23 Rule 3
Contract Act, 1872 — Section 15
Evidence Act, 1872 — Section 91

Citation : (2015) 03 BOM CK 0159

Hon'ble Judges : R.S. Dalvi, J.

Bench : Single Bench

Advocate : Nitin Parekh i/b. Pious Law Associates, for the Appellant; Shreya Deshpande instructed by Intralegal, Advocates for the Respondent

Judgement

R.S. Dalvi, J.—The plaintiff has sued for Rs. 2.38 crores with interest @ 15% p.a. from the defendant bank, for accounts, for a declaration that the defendant is holding all the sale proceeds of palm oil received by it under a consent decree obtained in Suit No. 855 of 1979 including a sum of Rs. 45.30 lakhs in trust for and as agents of the plaintiff, for an injunction against the defendant for remitting that amount the United Asian Bank (UAB) or to the credit of one Patel Holdings and for accounts and directions in that behalf.

2. The plaintiff carried on business in palm oil. The plaintiff got certain Letters of Credits (LCs) issued with regard to certain import consignments. The first consignment under the LCs was cleared. Thereafter the LCs were seen by the defendant bank to be fraudulently obtained by the plaintiff. The bank refused to act upon the LCs. The second consignment was not cleared as per the averments made in para 8 of the plaint itself. There has been another litigation between the parties upon the LCs, copies of which are not produced in this suit. When the third consignment arrived the defendant bank claimed that the LC was fraudulently obtained as per averments in para 9 of the plaint.

3. It is the plaintiff's case in paras 13 to 15 of the plaint that the suit consignment was confiscated by the Collector of Customs. It was declared unfit for human consumption. It was put up for public auction on or about 23rd May, 1978. The public auction came to be stayed.

4. It is the plaintiff's case in para 19 of the plaint that the shipper, one M/s. Tokyo Marine Company Ltd., filed a suit inter alia against the plaintiff as defendant No. 1 therein and against the defendant bank as defendant No. 3 therein. The parties entered into consent terms which have been recited in para 19 of the plaint. Under the consent terms a decree was obtained by the shipper for Rs. 8.75 lakhs against the plaintiff herein in full and final settlement of the claims of the shipper against the plaintiff herein. The shipper and the plaintiff herein authorised the defendant bank herein to pay Rs. 8.75 lakhs to the shipper. For that purpose the defendant bank was allowed to obtain delivery of 2403 metric tonnes of palm oil which was imported and stored. Defendant No. 3 bank was also to pay fine and penalty that may be levied upon the plaintiff herein. The possession of the palm oil imported by the plaintiff herein were agreed to be handed over to the defendant bank herein. It was agreed that the defendant bank herein would be entitled to obtain possession of the oil and sell the same by public auction or private treaty as it may deem fit at such price as it may deem fit and to appropriate the proceeds towards the satisfaction of the amounts payable by the plaintiff herein to the shipper. On the basis of the said consent terms decree was passed in Suit No. 855 of 1979 by this Court.

5. The plaintiff has claimed in para 20 of the plaint that the consent terms have been executed by the plaintiff under coercion and that the plaintiff has agreed to sign the consent terms to mitigate further losses and claims.

6. The plaintiff has averred in paragraph 21(b) of the plaint that after the consent terms were executed on 1/6/1979 the defendant bank obtained delivery orders of the oil from the Collector of Customs on 16th June, 1979 and the ultimate delivery by 11th July, 1979. It is the plaintiff's case that the defendant bank sold the oil to Liberty Oil Mills and Allana Oil Mills without consulting the plaintiff.

7. The plaintiff has challenged the sale of palm oil made by the defendant bank on the ground that it was sold at undervaluation. In para 21(c) the plaintiff claims that the defendant is only a banker and has no knowledge of the sale of oil. The plaintiff has further averred that it was understood between the parties that the oil will be sold only with the consent, approval and under the instructions of the plaintiff and not otherwise. That, of course, is not a part of the agreement represented by the consent terms. The plaintiff claims that the consent terms were signed pursuant to such oral agreement. Further terms of the agreement would be excluded under Section 91 of the Indian Evidence Act, 1872. It is also the plaintiff's case in para 21(c) of the plaint that the plaintiff would not have agreed to the consent terms, if the defendant had not agreed to sell the oil with the consent, approval and under the instructions of the plaintiff.

8. The plaintiff has claimed in para 21(e) of the plaint that the plaintiff continues to be the owner and the defendant was the trustee in respect of the consignment. The plaintiff called upon the defendant to fix the price of the palm oil under the oral agreement between the parties. The defendant denied any such agreement.

9. It is the plaintiff's case in para 23 of the plaint that the defendant sold 2400 metric tonnes of palm oil on 4/6/1979 for the price of Rs. 6970/- per metric tonne when the market price was higher about Rs. 1800/- to Rs. 2500/- per metric tonne arbitrarily, capriciously and with ulterior motive without ascertaining the market price. The plaintiff claims that the defendants sold about 1250 metric tonne to Liberty Oil Mills and about 1160 metric tonnes of oil to Allana Oil Mills. The plaintiff claims that those purchasers have paid the defendant Rs. 1.27 crores by 31st December, 1979 leaving a balance of Rs. 41.14 lakhs to be recovered by the defendant from the purchasers.

10. It is the plaintiff's case in para 24 of the plaint that it was the duty of the defendant to sell the palm oil at the best price with the consent and consultation of the plaintiff. The plaintiff claims that the defendant carried out the transactions behind the back of the plaintiff in the wrongful and irresponsible manner and has caused loss and damage to the plaintiff. The plaintiff has computed the damages suffered by the plaintiff in para 25 of the plaint.

11. The plaintiff has further claimed in para 26(b) that the defendant has wrongfully remitted various amounts to UAB without the consent of the plaintiff.

12. The plaintiff has claimed in para 27 of the plaint that the defendant bank cannot keep or retain any amount of the proceeds of the sale of the oil upon the cancelled or revoked letters of credit and despite the consent terms.

13. The plaintiff has accordingly claimed in para 28 of the plaint that the defendant bank has wrongfully and unauthorisedly debited the plaintiff's current account with Rs. 43.16 lakh in respect of the aforesaid consignment as also for legal expenses storage and insurance charges etc. The plaintiff claims that the wrongful debt with interest aggregates to Rs. 84.56 lakhs in the plaintiff's current account. The plaintiff has claimed loss and damages of Rs. 76.56 of account of the wrongful debits in para 28 of the plaint.

14. The plaintiff has further claimed in para 29 of the plaint that the defendant bank opened a Bills Maturity Deposit Account (BMDA), but has "not given" the plaintiff any credit for any sales realization. The plaintiff claims that the defendant bank has given wrongful debit advices in respect of the remittances to UAB and wrongfully carried the surplus of the sale proceeds in the BMDA account and has not credited the plaintiff's current account with the surplus or the interest earned by the defendant during that period though the defendant bank has charged interest to the plaintiff.

15. The plaintiff has claimed Rs. 6.92 lakhs from the defendant as also Rs. 9.19

lakhs as per the particulars of claim Exhibit-J to the plaint. These particulars of claim are in respect of the penalty paid to the Collector of Customs and interest thereon. The plaintiff has further claimed Rs. 2.38 lakhs from the defendant bank as per the particulars of Exhibit-K to the plaint which is for damages and loss suffered by the plaintiff due to undervaluation of the sale price of oil sold by the defendant being the difference in the prevailing market price less the actual sale price of oil with interest thereon @ 15% p.a. The plaintiff has claimed the aggregate sum of Rs. 2.38 crores from the defendant.

16. Hence in essence this is a suit for damages. The damages are upon the sale of oil at an undervaluation. The plaintiff has accordingly claimed a money decree of Rs. 2.60 crores with accounts and the declaration that the defendant bank held the sale proceeds in trust and an injunction against the defendant from remitting the proceeds to UAB or the export. The sale itself is challenged as made under an agreement which is voidable on the ground of coercion.

17. It is the defendant's defence that the plaintiff has no current account with the defendant. No LC was opened by the defendant. Certain forged and fabricated LCs were got issued by the plaintiff for the benefit of the plaintiff in connivance with the officers of the Foreign Exchange Department in relation to palm oil from one Patel Holdings without any requisite application for opening the LCs. The defendant has set out the normal procedure of opening LC which the plaintiff has not followed. The defendant has set out that the consignments arrived and were dealt with by the plaintiff and the custom authorities in the litigation between them to which the defendant was not a party. The defendant has refuted that the LCs were cancelled by the defendant because they were not even issued by the defendant, but fraudulently got obtained by the plaintiff.

18. It is the defendant's case that upon the shipper having sued the plaintiff as also the defendant herein, the parties entered into consent terms under which the defendant herein was to sell the oil which arrived under the three consignments at the price obtainable by it and to appropriate the proceeds towards the amounts payable by the defendant to the shipper on behalf of the plaintiff as the importer and upon remittance to UAB.

19. The defendant has denied the case of the plaintiff having signed the consent terms under coercion. The defendant claims that the plaintiff never challenged the validity of the consent terms though a case of coercion would make the consent terms voidable under Section 15 of the Indian Contract Act, 1872 and accordingly would fall with the explanation to Order 23 Rule 3 of the CPC relating to compromise of suits under such consent terms representing the agreement between the parties. The defendant has accordingly denied that it has illegally proceeded to sell the consignment of oil.

20. The defendant has denied the oral agreement alleged by the plaintiff that it had to obtain the consent of the plaintiff to sell the oil and relating to the consultation with the plaintiff for price of the oil. The defendant has denied that it

was the trustee of the plaintiff or any relationship with the plaintiff or that it breached the consent terms as such trustees. The defendant bank has claimed that it has sold the oil at the best available market price and has denied the sale to be arbitrary or under ulterior motive. It has denied the unlawful gains. It has denied that it has carried out sale behind the back of the plaintiff and claimed full authority under the consent terms to sell the oil in the manner it chose. The defendant has denied that it has gained wrongfully or irresponsibly or that the plaintiff has any legitimate dues from the sale price or cannot credit its account for any amount. The defendant has accordingly denied the entire claim of the plaintiff of loss or damage suffered by the plaintiff.

21. The plaintiff must, therefore, essentially prove that the consent terms were executed inter alia by and between the shipper, the plaintiff and the defendant herein by coercion. If that is not seen the entire case of the plaintiff and the sale having been effected at an undervaluation falls to ground. Upon proving the execution of the consent terms by coercion, the plaintiff must further show the sale of oil at an undervaluation by proving the market price of the oil on the precise dates of sale to be entitled to the damages claimed by the plaintiff to that end.

22. Justice Karnik as he then was framed the following issues on 15th June 2009 which are answered as follows:

Sr. No

Issues

Findings

1

Whether the plaintiff proves that he duly made applications for opening two Letters of Credit and duly opened the same as mentioned in para 5 of the plaint.

Has not been argued or pressed and is accordingly not answered.

2

Whether the plaintiff proves that the Consent Terms filed before this Court in Suit No. 855 of 1979 were signed by him under coercion and the same are not binding on him as mentioned in para 20 of the plaint.

No

3

Whether the plaintiff proves that the defendant was not entitled to sell the suit consignment of oil without prior consent of the plaintiff as mentioned in paras 21(e) and 24 of the plaint.

No

4

Whether the plaintiff proves that the defendant is holding the sale proceeds of the palm oil received by it under consent decree in Suit No. 855 of 1979 including the sum of Rs. 45,30,500/- in trust and as bankers for the benefit of the plaintiff as mentioned in paras 21(e) and 34 of the plaint.

No

5

Whether the plaintiff proves that he has suffered losses due to false allegations levelled by the defendant alleging opening of fraudulent Letters of Credit as mentioned in paras 9, 10, 11, 14, 25, 26 and 27 of the plaint.

No

6

Whether the plaintiff proves that he suffered further losses due to sale of palm oil by the defendant arrived per SS Fujit Suki Maru to Liberty Oil Mills and Allana Oil Mills pursuant to consent terms at arbitrary prices as mentioned in paras 23 and 25 of the plaint.

No

7

Whether the plaintiff proves that the defendant has wrongfully debited amount of Rs. 43,16,555.14 p. in the plaintiff's account without any proper authorization by him as mentioned in paras 23 and 29 of the plaint.

No

8

Whether the plaintiff proves that the prices as mentioned by him were the prevailing price at that time and he is entitled to recover a sum of Rs. 2,38,45,386.46 p. as per particulars of claim and further interest at 15% p.a. on the principal amount of Rs. 2,60,41,965.83 p. from the date of institution of the suit till payment or realization excluding the period between 16th April, 1996 and 23rd February 2000 as per undertaking dated 8th March 2000 as mentioned in paras 25 and 33 of the plaint.

No

9

Whether the defendant proves that the suit is bad for nonjoinder of State of Maharashtra as necessary party as mentioned in para 2 of the Written Statement.

No

10

Whether the defendant proves that the plaintiff had no current account with the defendant as alleged by the plaintiff at the time when the Letters of Credit was fraudulently procured by the plaintiff as mentioned in para 3 of the written statement.

Is not required to be answered as is accordingly not answered.

11

Whether the defendant proves that it was liable to remit the amount to the United Asian Bank, in spite of its claim that the Letters of Credit were fraudulent or unauthorisedly opened as mentioned in para 26 of the written statement.

Is not required to be and is accordingly not answered

12

What order ?

As per final order.

23. The plaintiff has led evidence of one Sureshkumar Jaju as also one Hitesh Anilkumar Jaju who are the family members of the plaintiff. The plaintiff has further examined a witness from the Bombay Commodity Exchange Limited to prove the market price of oil.

24. The evidence of P.W. 1 and 2 shows that the plaintiff had a current account with the defendant and held an import license. The plaintiff obtained two LCs in favour of the exporter one Patel Holdings through UAB, Penang, Malaysia. The plaintiff imported refined palm oil in three consignments. The first consignment was clear uneventfully. The second consignment resulted in an inquiry with the defendant by the Collector of Customs resulting in certain penalty of Rs. 28 lakhs imposed on the plaintiff. The defendant sued the plaintiff in Debt Recovery Tribunal (DRT) which suit has been dismissed. It is the plaintiff's evidence that the third consignment could not be cleared because the defendant informed the Collector of Customs that the LCs were cancelled. The Collector of Customs confiscated the goods and imposed a personal penalty of Rs. 12.65 lakhs which was paid by the plaintiff. The goods imported were declared unfit for the human consumption and were sold under auction on 23rd May, 1978. The plaintiff challenged the auction in a writ petition which resulted in certain minutes of the order being passed on 26th May, 1978. The shipper filed Suit No. 855 of 1979 in this Court in which the aforesaid consent terms came to be executed on 1st June 1979. It is averred in para 17 of the affidavit of evidence of Sureshkumar Jaju on behalf of the plaintiff that the defendant sold the consignment of oil without the prior consent of the plaintiff and which was less than the market price. The defendant remitted certain amounts to UAB and wrongfully debited the plaintiff's account. The defendant opened BMD Account but did not give credit to the plaintiff in the said account and hence the defendant is liable to pay Rs. 2.60

crores. It is also stated in the penultimate para of the said affidavit of evidence that the defendant owes Rs. 2.38 crores in the capacity of a trustee of the plaintiff for the benefit of the plaintiff.

25. The affidavit of evidence is followed by certain examination-in-chief before the Court with regard to the family members of the plaintiff. The plaintiff's status in the family and its business as HUF which is irrelevant and need not be adverted to. The cross examination of the said Sureshkumar Jaju is also initially with regard to the HUF and the business of the plaintiff in oil. Upon the personal knowledge of the witness he has been asked questions of three consignments which are admittedly received. Thereafter the witness has been asked about the price of oil. The oral answer of the witness shows the range of the price between Rs. 7000/- and Rs. 9000/- per metric tone. Later in the evidence the market price at the time of import in 1978-79 has been stated between Rs. 7000 to Rs. 9500 per metric tone. The witness has refuted that the market price was below Rs. 6000/- per metric tone and therefore, there was no loss to the plaintiff.

26. The other family member of the plaintiff Hitesh Anilkumar Jaju deposed that he assisted his father in his business and knew about the business of oil. He also deposed about the import license and the consignment of oil. Similarly he deposed about the confiscation by the Collector of Customs, the levy of penalty and the litigation between the plaintiff and the Collector of Customs upon the sale by public auction made by the Collector of Customs. He has deposed about the litigation between the parties to this suit and the Collector of Customs. He has also deposed that the plaintiff instructed the defendant bank not to remit any amount to UAB and that the defendant sold the goods below the then prevailing market price at Rs. 6970/- per metric tone even though the market price was higher by Rs. 2000/- to Rs. 2500/- in the range of Rs. 9000/- to Rs. 9500/-.

27. The witness has mentioned nothing of the consent terms executed by and between the plaintiff, the defendant and the shipper in Suit No. 855 of 1979, but has deposed that the defendant bank sold the consignment "without our consent and permission" at the rate lower than the prevailing market rate in para 17 of his deposition. He has deposed that because of the wrongful action of defendant bank the plaintiff was made to pay penalty of Rs. 12.65 lakhs out of which Rs. 5.73 lakhs was refunded and the plaintiff would be entitled to the balance amounts of Rs. 6.92 lakhs with interest. He has also deposed that the Collector of Customs held that the oil which was shipped was fit for only industrial use and should have been sold to industrial users, but was sold instead to Liberty Oil Mills and Allana Oil Mills on 4th June 1979 (3 days after the execution of the consent terms on 1st June 1979). He has deposed that the Collector of Customs removed the seal from the storage tank containing the consignment only on 15th June, 1979 and that on 15th June 1979 a stay was granted by the Bombay City Civil Court in another suit (number which is not mentioned) and was vacated on 3rd July, 1979. The evidence shows that he was surprised that the defendant bank admitted that the oil was sold on 4th June 1979 (which admission has not been

found on record). He has thereafter deposed about the amount of Rs. 45.13 lakhs being held by the defendant in trust including an amount of Rs. 8.79 lakhs lying to the credit of plaintiff's account No. 921 which, he has deposed, was a running account and not closed till the date of the evidence being 18th March, 2014. The admission of this amount by the defendant has not been shown to Court. He has deposed about the observations of the Court in some other litigation the relevance of which is not shown. He has thereafter deposed about the withdrawal of certain amount pending the suit, which also does not relate to the proof of the claim in the suit. He has deposed about another suit filed by UAB which came to be withdrawn, but has not produced or relied upon the papers and proceedings of any other suit deposed about. It may be mentioned that the suit could have been withdrawn in view of the consent terms in Suit No. 855 of 1979 which came to be acted upon and pursuant to which certain remittance came to be made.

28. The plaintiff has relied upon certain documents, only a few of which have been marked exhibits as being admissible in evidence by Justice Patel under his order dated 27th March, 2014 in the suit. Exhibit-P-1 is the power of attorney which may be accepted. Exhibit-P-3 is the certificate of the market price of oil in February 1980 and shall be considered presently. Exhibit-P-2 is the show cause notice issued by the Custom Authority dated 27th February, 1979, copy of the order passed in appeal against the order of Collector of Customs dated 29th January 1981, copy of the order in Suit No. 1861 of 1980 filed by the defendant bank against Union of India, the appeal which has been dismissed for default, copy of the order of DRT-2 dated 14th August 2006 in the application filed by the defendant herein against the plaintiff and the copy of the order dated 6th January, 2009 of this Court in Suit No. 2005 of 1980.

29. The plaintiff has relied upon these orders to show that the plaintiff's claim in this suit is merited and that the claim of the defendant has been dismissed throughout. It is argued on behalf of the plaintiff that the defendant filed 12 suits and one writ petition against the plaintiff all of which have been dismissed. It is, therefore, argued that this suit is merited.

30. From the aforesaid proceeding on record it may be stated that the show cause notice of the order of the Collector of Customs and in appeal do not matter as aforesaid Suit No. 855 of 1979 is an independent action of the shipper in which the aforesaid consent terms have been signed and which came to be challenged well before the order was passed in appeal which has been relied upon by the plaintiff. Similarly Suit No. 1861 of 1980 filed by the defendant against the Union of India is not material to determine the efficacy of the agreement between the parties as represented in the consent terms which are sought to be challenged for making the claim of damages. The application of the defendant which is stated to have been dismissed by the DRT is shown by Counsel on behalf of defendant to have been dismissed since in the cause title the name of defendant No. 2 is "substantially defective" that though the

borrower is HUF it is shown as the firm. The OA against the other defendants therein has been disposed off under the order dated 14th August, 2006, part of Exhibit-P2 (colly) which is relied upon by the plaintiff.

31. Another order relied upon by the plaintiff dated 6th January, 2009 decrees the suit of defendant No. 1 being Suit No. 2005 of 1980 essentially against the store keeper of the consignment of oil being one M/s. Navbharat Trading Corporation (Navbharat). In that suit the essential issue was whether the defendant bank herein which was the plaintiff in that suit was liable to pay the separate charges to Navbharat, whether it proved that it had the first charge on the oil under those consignments and whether Navbharat proved that it had a lien for the payment of its storage charges upon the consignments of oil. Navbharat did not defend the suit. The plaintiff bank (the defendant bank herein) proved its first charge. It is observed in that judgment that the plaintiff would be entitled to the same in preference to the lien claimed by Navbharat. The judgment makes a reference to the claim of the Custom Authorities for the default of Rs. 12.65 lakhs levied upon the plaintiff herein which was paid by the defendant bank herein as also the consent terms in Suit No. 855 of 1979 under which the plaintiff incurred and paid the demurrage charges and cleared the goods and thereafter obtained possession of the imported goods and was to sell the goods by public auction or private treaty and was entitled to appropriate the sale proceeds towards the satisfaction of the amounts due and payable by defendant Nos. 2 to 7 therein (including the plaintiff herein) which was admitted and acknowledged. Such suit of the defendant bank came to be decreed to the extent of the sale proceeds of the suit goods (which were the consignments of oil) with 17% interest thereon.

32. It is not known for what purpose the plaintiff has relied upon the decree in that suit which is essentially against Navbharat, but which in fact makes a reference of admission and acknowledgment of the claim of the defendant bank herein upon the sale of the goods being under the consignments of oil.

33. The Advocate on behalf of the plaintiff sought to rely upon copies of some other proceedings. It may be mentioned that the Court cannot rely upon any of the documents not produced on record. Hence no such copies are accepted on record or considered.

34. Such are the averments of the plaintiff and the oral and documentary evidence led by the plaintiff. It is upon such evidence that the above issues would be required to be decided.

35. Issue No. 1: The issue relates to the opening of the Letters of Credit (LCs) and the consequent import of the consignment of oil. The very opening of the LCs though stated to be fraudulently opened as per the case of the defendant has not been essentially pressed by the defendant because the plaintiff's claim of damages in the suit is upon the wrongful and arbitrary sale of oil at an undervaluation by the defendant. Consequently the LCs may be taken to be

correctly opened. Even if the goods were imported under genuine LCs which were issued in favour of the exporter M/s. Patel Holdings, the claim of the plaintiff is not upon the LCs. Hence this issue becomes irrelevant to consider in view of it not having been pressed by the defendant. Consequently this issue is not being argued or proved and is not answered.

36. Issue No. 2: This relates to the execution of the consent terms in Suit No. 855 of 1979 of the shipper against the plaintiff as defendant No. 1 therein and against the defendant bank as defendant No. 3 therein signed inter alia by the plaintiff. The plaintiff has claimed that the consent terms are not binding upon the plaintiff, it having been signed under coercion. The consent terms run thus:

"CONSENT TERMS

1. Decree in favour of the plaintiff in the sum of Rs. 8,75,000/- (Rupees Eight Lakhs Seventy Five Thousand) as against defendant No. 1 in full and final settlement of all their claims against the defendants. The plaintiffs and defendant No. 1 hereby agree and irrevocably authorise defendant No. 3 to pay the said sum of Rs. 8,75,000/- (Rupees Eight Lakhs Seventy Five Thousand) to Messrs. P and I Services of India on behalf of the plaintiffs in full and final settlement of all their claims and to recover the same from defendant Nos. 1 and 2.

2.

3.

4.

5. Agreed and declared that defendant No. 3 is entitled to and be entitled to obtain the exclusive possession of the said oil mentioned in Clause 3 herein above and to sell the same either by public auction or by private treaty as defendant No. 3 may deem fit and at such price and on such terms and conditions as may be deemed fit and proper by defendants No. 3 and to appropriate the proceeds thereof towards the satisfaction of all the amounts due and payable by defendant Nos. 1 and 2 to defendant No. 3 which defendant Nos. 1 and 2 hereby admit and acknowledge and if required to remit the same or any part thereof the United Asian Bank, Penang".

37. The consent terms have been set out in para 19 of the plaint. The plaintiff has averred that on the basis of the aforesaid consent terms a consent decree was passed by this Court. That was on 1st June, 1979.

38. The plaintiff has averred in para 20 of the plaint that the consent terms were obtained by coercion. This is because there were several proceedings which took place due to cancellation of LCs by the defendant and the plaintiff had no other alternative, but to agree to the consent terms under coercion in order to mitigate further loss and damages.

39. Upon the case of the defendant that the letters of credit were not at all opened by the plaintiff and that fact was brought to the defendant's notice much

later, the defendant may have initiated various actions, civil as also criminal, against the plaintiff. Indeed it is argued on behalf of the plaintiff that there were 12 other suits and one writ petition filed by the plaintiff and also a criminal case investigated by the CBI. The plaintiff has neither relied upon nor produced copies of any of the proceedings or any of the orders passed therein. It is merely argued by Counsel on behalf of the plaintiff that all those actions have been dismissed. No dismissal is shown except the dismissal on the technicality of the name of the plaintiff herein not being correctly mentioned as HUF, but as a firm which resulted in dismissal of the application before the DRT-2 on 14th August, 2006 against defendant No. 2. Even the judgment dated 6th January, 2009 which is in the suit filed by the defendant bank is essentially against Navbharat Trading Corporation, the storage keeper in respect of the lien claimed by the storage keeper but not proved by the storekeeper and which charge was confirmed as the first charge of the plaintiff upon the suit consignments.

40. Though the plaintiff has vaguely referred to "several proceedings" allegedly filed by the defendant due to cancellation of the LCs (which are stated not to have been cancelled by the defendant as they were not even issued in the first place) the plaintiff claims to be coerced because they were filed and also because the plaintiff would mitigate his loss.

41. Indeed a party may enter into consent terms in view of civil proceedings filed by the bank or any other party against it. The plaintiff, as a prudent businessman, would weigh the pros and cons of the various defences that suit party might have to take and agree to settle the dispute entirely by allowing the sale of the consignment. No such consent terms can be vitiated by coercion on that ground. If it was so, no consent terms entered into by parties before any Court could be accepted so as to bring to an end that litigation and/or various other litigations.

42. Even the case of coercion to mitigate further loss and damages is misconceived because any party, more specially a prudent businessman would enter into consent terms and agree to sell certain goods and to make payment from the sale proceeds indeed to mitigate the loss and damages otherwise incurred by such parties.

43. It would, therefore, have to be seen whether the coercion alleged by the plaintiff in para 28 of the plaint and upon which the aforesaid issue has been framed, would be coercion as defined in Section 15 of the Indian Contract Act, 1872, which runs thus:

"15. "Coercion" defined - "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement".

No party is shown or proved to have made the plaintiff sign the consent terms under threat of committing any offence under the IPC for e.g., of intimidation.

The plaintiff has not alleged that any party had unlawfully detained the consignment of goods or threatened to detain it if the consent terms were not signed to the prejudice of the plaintiff so that the plaintiff would be constrained to sign the consent terms.

44. It does not require authority to determine that entering upon the consent terms by the plaintiff herein (as defendant No. 1 in the action of the shipper) would not amount to coercion for selling the goods to pay off the legitimate claims of various parties. Indeed the plaintiff as the importer would have legal obligations to various parties including the shipper, exporter and the bank upon whom the LCs were opened, the custom authorities as also the port authorities, nothing of which is shown to have been separately and independently discharged by the plaintiff by payment to any of these parties. Even if genuine LCs were opened by the plaintiff they would be for payment to the exporter or the shipper. If not paid there would be legitimate mediation by the bank and/or the exporter or the shipper in respect of the consignment of goods imported for which the LCs were opened. The plaintiff as the prudent businessman would consider that amount it was obliged to pay including demurrage charges for the goods lying in the port, charges of penalty imposed by the custom authority as also the amount which would legitimately be expected to be claimed by the exporter, who had to be paid under the LCs, would be settled by sale of the consignment itself.

45. Coercion, which is expressed as duress in English law has been extensively considered with regard to the unlawful and illegitimate pressure exercised on a contracting party more specially in commercial transactions resulting in, what has been termed as, economic duress, which is voidable at law. Anson's Law of Contract, 29th Edition at page 350 shows the law on duress. In modern cases the pressure exercised to constitute duress is shown as "illegitimate pressure". Anson considers that the various pressures must be distinguished. The pressure which the contracting party is not expected to submit to is an illegitimate pressure as against legitimate pressures which the law does not take into account. Consequently illegitimate pressure may not be unlawful, but is yet illegitimate. Unlawful pressure occurs with the coercive party threatens to do something that is a breach of common law or a statutory duty. It may be a crime, a tort or a breach of contract. A contract executed under such pressure may be set aside by the other party. However the position is different where what is threatened is not an unlawful act. It is not duress to threaten to do that which one has a legal right to do for e.g., to refuse to enter into a contract or to terminate the contract lawfully.

Hence a party may threaten to take legitimate legal proceedings or having taken such proceedings may legitimately threaten to enforce it. Another party, weighing the situation may agree to settle. The threat to prosecute or continue a litigation legally would not result in illegitimate pressure. Hence the settlement entered into between the parties could not be termed as under coercion or duress.

At page 356 of the aforesaid edition of Anson's law of contract the author sets out that threats of lawful action is ordinarily not duress thus:

"It is not ordinarily duress to threaten to do that which one has a right to do, for instance to refuse to enter into a contract or to terminate a contract lawfully. In the cut-and-thrust of business relationships various types of pressure may be brought to bear in differing situations. Where there are shortages in goods or services the person who wishes to acquire them has little choice. Thus a private person or undertaking is generally permitted to refuse to deal with another at all or except on specified terms, and the poor person who has to agree to pay a high rent to get a roof over his head is nevertheless bound".

46. The author has cited the case of *Lloyds Bank Ltd. Vs. Bundy* 1975 QB 326 at page 336 in which Lord Justice Denning MR observed that no bargain will be upset which is the result of the ordinary interplay of market forces. He gave the illustration of a homeless man who agrees to pay high rent to the landlord to get a roof over his head for which the common law would not interfere and also a borrower in urgent need of money who borrows at high interest guaranteed by a friend for which also the common law will not interfere.

That case however dealt with an unfair advantage gained and unconscientious use of power by a stronger party against a weaker resulting in an unconscionable transaction accentuated by undue influence in a fiduciary relationship, the case being between the banker and the customer who has defaulted under a overdraft account resulting in "inequality of bargaining power".

Persons similarly placed may make contracts by which they are bound even if the terms appear unreasonable.

47. Hence in the absence of any inequality and in the case of businessman who have the same bargaining power as banks and other authorities mere claiming of influence or pressure is not enough.

48. In the case of *Lynch Vs. Director of Public Prosecutions for Northern Ireland (D.P.P.)* 1975 AC 653 at 669 *ENDLAWFINDER* it has been held that duress cannot be accepted as a defence to murder. In that case a person was charged with having murdered a police officer. The case against him was of abatement. He claimed that he was made to act under duress. The Lord Chief Justice in a unanimous decision held in the criminal Court of appeal that duress could not be accepted as a defence to murder.

The Court considered the question of duress in general at page 670 thus:

"Someone who acts under duress may have a moment of time, even one of the utmost brevity, within which he decides whether he will or will not submit to a threat. There may consciously or subconsciously be a hurried process of balancing the consequences of disobedience against the gravity or the wickedness of the action that is required. The result will be that what is done will be done most unwillingly but yet intentionally. Terminology may not, however,

much matter. The authorities show that in some circumstances duress may excuse and may therefore be set up as a special defence".

The Law Lord considered separately that duress cannot be negative criminal responsibility.

49. The case of *Pao On and Ors. Vs. Lau Yiu and Anr.* 1979(3) All ER page 65 is the authority of what constitutes economic duress in a commercial contract under English law. That was a case of purchase of shares of a listed company at specified prices under a written contract. The purchaser gave an undertaking that he would not sell or transfer certain of those shares allotted to him by heavy selling. The market could be depressed and the shares would be devalued. The purchaser realised that by his undertaking not to sell the shares he was exposed to the risk that the price of the shares might fall below par. Hence the purchaser sought a guarantee against a firm in the price of shares. The seller agreed to buy back the shares from the purchaser at the specified value under a separate written subsidiary agreement. The purchaser, appreciating that he had made a bad bargain, informed the seller that he would not complete the main agreement unless the subsidiary agreement was cancelled and replaced by a true guarantee by way of indemnity guaranteeing the price of a part of the shares. The seller was anxious to complete the transaction for keeping public confidence. He chose to avoid the litigation and gave the indemnity in place of the subsidiary agreement. He failed to fulfill his promise of indemnity under the guarantee and inter alia asserted that he was induced by economic duress on the part of the plaintiff when sued. At page 78 of the judgment it was held that the guarantee was not avoidable. It was held not to be duress as a coercion of the will so as to vitiate consent. It was observed that duress required coercion so as to vitiate consent and commercial pressure alone does not constitute duress. This could be seen from the fact of whether such party did or did not protest; whether he had an alternative course open to him (such as an adequate legal remedy) at the time of the alleged coercion, whether he was independently disposed and whether after entering into the contract he had taken steps to avoid it.

It was observed that in that case the defendant considered the matter thoroughly, chose to avoid litigation and formed the opinion that it was more apparent than real. It was held that there was commercial pressure, but no coercion.

The Court considered the aspect of "economic duress". It held that the compulsion had to be such that the party was deprived of "his freedom of exercising his will". He must have entered into the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure.

The Court also considered the American jurisprudence which lays stress on matters such as alternative remedy available, the fact or absence of protest, the availability of independent advice, the benefit received, and the speed with which

the victim sought to avoid the contract.

The Court concluded that the act must be such that the victim's consent was not a voluntary act.

50. It could hardly be said that in the case of a trader and an importer such as the plaintiff he would put his pen to paper as a non-voluntary act obtained without his consent. He is expected to and is seen to have considered the pros and cons of the transaction given the fact that the defendant bank contended that the LCs were fraudulently obtained by the plaintiff not issued by the bank.

51. In the case of CTN Cash and Carry Ltd. Vs. Gallaher Ltd. 1994(4) All ER 714ENDLAWFINDER the plaintiff carried on business from various warehouses. There were separate contracts entered into between the parties. The defendant arranged credit facilities for the plaintiff. One transaction was mistakenly entered into without realising that the consignment was stolen. The plaintiff paid the invoice of the defendant upon the defendant making it clear that unless the plaintiff paid, the defendant would stop the credit facilities.

This was held to be an arm's length transaction between the two trading companies. The defendant confidently believed that its threat was valid. The plaintiff would indeed have to make the payment of the price under the invoice, but for the facts that goods were stolen. It was held that the defendant's conduct did not amount to duress.

It was observed that the defendant was entitled to refuse to enter into any future contracts and was lawfully entitled to withdraw credit or refrain from entering into future contracts. The case of "lawful act duress" was held to be not necessarily objectionable. It was observed that extension of the right to voidability by coercion involving "lawful act duress" caused in a commercial contract under the bonafide claim would have far reaching implications.

"It would introduce a substantial and undesirable element of uncertainty in the commercial bargaining process. Moreover, it will often enable bonafide settled accounts to be reopened when parties to commercial dealings fall out. The aim of our commercial law ought to be to encourage fair dealing between parties".

It was, therefore, held that the defendant's conduct would not amount to duress, but that law compelled the result that the defendant could retain the sum though they later became aware that in truth not even due to them.

It was further held that when the defendant insisted on payment, it was in good faith. The defendant used its commercial muscle. It made the demand upon the belief that it was entitled to be paid. Even though the defendant was unjustly enriched the Court did not interfere.

52. In the case of R. Vs. Attorney General of England and Wales [2003] UKPC 22 [2003] E.M.L.R. 24 Privy Council 17th March, 2003 a soldier in the Gulf-war signed a confidentiality contract the breach of which would impose default as a

disciplinary offence. After the war he decided to publish his own account of his regiment and entered into a contract with a publisher. In an action for injunction, damages and account he pleaded that he had signed the contract under Military orders, the contract had been obtained by duress, that it was an unconscionable bargain not supported by consideration and contrary to the public policy being in restraint of trade. His contention of duress was negated upon holding that the penalty was lawful, the demand was justifiably made upon legitimate concerns relating to confidentiality. Relying upon the judgment of Lord Scarman in the case of *Universe Tankships Inc of Monrovia Vs. International Transport Workers' Federation* [1983] 1 S.C. 366, 400 L the Court considered the two elements of duress:

(1) The pressure amounting to compulsion of the will of the victim

And

(2) The illegitimacy of the pressure

And held that the threat was lawful. The confidentiality agreement was not an unfair exploitation and consequently the defence of duress was negated.

53. In the case of *Universe Tankships Inc of Monrovia Vs. International Transport Workers' Federation* [1982] 2 All ER 67 the parameters of economic duress was considered in a commercial transaction thus:

"It is, I think, already established law that economic pressure can in law amount to duress; and that duress, if proved, not only renders voidable a transaction into which a person has entered under its compulsion but is actionable as a tort, if it causes damage or loss: see *Barton V. Armstrong* [1975] 2 All ER 465, [1976] AC 104 and *Pao On V. Lau Yiu* [1979] 3 All ER 65, [1980] AC 614. The authorities on which these two cases were based reveal two elements in the wrong of duress: (1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted. There must be pressure, the practical effect of which is compulsion or the absence of choice. Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him".

54. In India the Gujarat High Court came upon such facts in the case of *Vijaysinh Mohansinh Solanki Vs. The Transport Manager, Ahmedabad Municipal Transport Service and Another*, . It is succinctly held that for consent to be caused by coercion the cause must be proximate and immediate. The coercion must have directly weighed with the promisor in acting in a particular manner. The consent can be vitiated only if it is shown that but for causes of coercion the effect would not have ensued. Hence if the act in question was not instrumental in making the promisee to do the act it would be of no avail. The word "cause" is not a term of art, but it is a term of science. Hence the effect of the coercion is

the direct outcome of the cause. If the cause is distinct and remote, but not proximate and immediate it cannot be a cause in legal parlance. Casual relationship can be established only when certain factors weighed upon the promisor without which the promisor would not have acted as he did.

55. Hence the coercion, if any, practiced by the defendant bank should have been such as to be so unconscionable that a prudent businessman like the plaintiff would have rejected the offer of the shipper or the bank herein to allow the bank to sell the consignment to pay off the dues of the bank and also the exporter. That could have been so only if the transaction was genuine and bonafide LCs opened by the plaintiff under which the plaintiff was prepared to make the payment through his bank to the bank of the exporter or the shipper to the export.

56. The tall claim of coercion is seen to be wholly misconceived and false upon the reading of the plaint itself. It does not fall under the definition of coercion at all. It only shows the prudent act of the businessman in calling it a day when he is met with a wall in his dealings.

57. Consequently the plaintiff has failed to prove that the consent terms were executed by the plaintiff under coercion.

58. Issue No. 3: This issue relates to the plaintiff's case that the defendant was not entitled to sell the suit consignment of oil without prior consent of the plaintiff.

59. The consent terms does not show any agreement between the parties that the defendant must take consent of the plaintiff before selling the goods. The consent terms would constitute the agreement between the parties, it being only an agreement which would dispose off the suit. It, therefore, bears all the essentials of an agreement. It is the plaintiff's case in para 20(c) of the plaint that before the consent terms were arrived at and the consent decree was passed on 1st June, 1979 in Suit No. 855 of 1979 it was specifically understood and agreed between the plaintiff and the defendant and the defendant will sell oil only with the prior consent, approval and under the instructions of the plaintiff and not otherwise. It is the case of the plaintiff that was the basic condition precedent to the acceptance of the consent terms and the decree. It is also the plaintiff's case that the plaintiff would not have agreed to the consent terms if the defendant had not also agreed to sell the oil with the prior consent, approval and under the instructions of the plaintiff.

60. This case has not been deposed about by the two witnesses of the plaintiff. There is absolutely no evidence led by the plaintiff on this aspect. Nevertheless, the case of the plaintiff in the plaint itself may be seen.

61. It may be mentioned that the case of the plaintiff in para 20 of the plaint would lend itself to dismissal at the first hearing of the suit itself and even without the defendant bank entering upon issue with regard thereto.

The provision contained in Order 15 Rule 1 of the CPC would be squarely applicable. Order 15 Rule 1 runs thus:

"ORDER XV

DISPOSAL OF THE SUIT AT THE FIRST HEARING 1. Parties not at issue - Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment".

It may be mentioned that the entire exercise of trial is not merited to decide the case of the plaintiff that the parties agreed to anything other than what was specified in the written agreement between them.

62. The agreement between the parties with regard to obtaining of consent and approval or the instructions of the plaintiff has not been mentioned in the consent terms. The consent terms represent the complete agreement between the parties as it was the consent terms on which the suit was disposed off. The terms between the parties which was agreed prior to the execution of the consent terms and the term which was the condition precedent to the acceptance of the consent terms is the fundamental term of the agreement which fundamental term has not been recited in the agreement.

63. Such oral agreement would fall within Section 91 of the Indian Evidence Act 1872 which runs thus:

"CHAPTER VI

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents - When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained".

64. Hence under Section 91 of the Evidence Act when the terms of the contract are reduced to writing evidence of proof of any other terms cannot be admitted. Hence the plaintiff cannot lead evidence of the specific term that it is only with the consent, approval and under the instructions of the plaintiff that the defendant can sell the oil. The defendant was, in fact, allowed to sell the oil, under Clause 5 of the Consent Terms cited above as it deemed fit at such price and on such terms and conditions as may be deemed fit and proper by it and to appropriate the sale proceeds towards satisfaction of the amounts due and payable to it, which was admitted and acknowledged by the plaintiff.

65. In this case though the term of the contract, requiring the consent and approval of the plaintiff for the sale of the oil is directly and diametrically

contrary to and different from clause 5 of the consent terms recited above. Had it been agreed that the defendant would obtain, consent or approval of the plaintiff or instructions of the plaintiff as regards the price, the defendant would not have been given the entitlement to sell the oil in its possession "as it deemed fit" or "at such price and on such terms and conditions as may be deemed fit and proper" by it.

66. It may be mentioned that the plaintiff has not led any evidence on this issue. The two affidavits of P.W. 1 and 2 on behalf of the plaintiff are wholly silent on this score. The case of the plaintiff of obtaining of the consent is, therefore, not proved by the plaintiff by direct oral evidence. The plaintiff could not have been cross examined on this issue. Even if the plaintiff led such evidence it would be inadmissible as it is included by Section 91 of the Indian Evidence Act, 1872.

67. It may also be mentioned that such a case is even otherwise not at all acceptable. The defendant bank is not the plaintiff's servant or agent. The defendant bank itself made a claim upon the plaintiff which was filed in the DRT/ (part of Exhibit-P2). The defendant bank would never have agreed to do what the plaintiff had to do if it was not upon its own discretion.

68. Consequently the plaintiff's case of requiring the plaintiff's consent or approval or taking instructions from the plaintiff is not proved and must be rejected. Issue No. 3, is, therefore, answered in the negative.

69. Issue No. 4.: This relates to the case of the plaintiff that the defendant held the sale proceeds in trust and as the banker for the benefit of the plaintiff.

70. A reading of clause 5 of the consent terms cited above analysed in Issue No. 3 above, which need not be repeated, rules out the case of any trust. The defendant was put in possession of the consignment of oil. The defendant was to sell it at the price deemed fit and proper by it. The defendant had to appropriate the sale proceeds for the amounts due and payable by the plaintiff. The amounts due and payable were admitted and acknowledged by the plaintiff. The defendant was further allowed to remit the sale proceeds or any part thereof to UAB, if required, after satisfaction of its dues.

71. The defendant was, therefore, in full charge and control of the oil. The plaintiff allowed it to sell it to satisfy the amounts due and payable. There is no express trust created in the consent terms. There is nothing which can be implied. There is no fiduciary duty of holding the sale proceeds specifically for satisfaction of the debt of the plaintiff and/or remittance to UAB. Hence the plaintiff has not proved any trust or any fiduciary relation.

72. Consequently issue No. 4 is also answered in the negative.

73. Issue No. 5: This relates to whether the plaintiff suffered loss because of the false allegations of the defendant that the LCs were fraudulently opened. The plaintiff has not shown that the letters of credit were bonafide opened. The plaintiff has only averred about the opening of the LCs. The plaintiff has not even

produced the LCs. They are not even marked in evidence by Justice Patel when the other documents were marked in evidence. The plaintiff has not even argued upon of the LCs.

74. The defendant in its defence has stated that the LCs were not opened by it. The defendant has denied the plaintiff's contention that the LCs were cancelled. The defendant has contended that there was no question of cancellation of LCs because they were not opened. The defendant only realized later that certain six LCs were fraudulently opened. However since the plaintiff has not sought damages upon any case of defamation of the plaintiff by the false allegation of the fact in contending that the LCs were fraudulently opened, the defendant has not pressed that defence.

75. It would be for the plaintiff to show and prove how the allegation of the defendant that the LCs were not even opened was false so that the allegation that they were fraudulently obtained can be termed as false. The plaintiff has not even averred in the plaint that the defendant falsely so contended. The plaintiff has not led any evidence of any damages and nor proved any loss suffered upon such statement of the defendant.

76. Consequently issue No. 5 is answered in the negative.

77. Issue No. 6: This issue pertains to the plaintiff's claim that the plaintiff suffered further loss due to the sale of palm oil being at arbitrary price.

78. It is for the plaintiff to prove that the price of the sale of oil was arbitrary. The plaintiff would essentially contend that it was sold at an undervaluation. The plaintiff must, therefore, prove the market price. The plaintiff has not shown the precise date of sale. From a reading of certain other orders it is contended that one installment was paid on 4th July, 1979. That would be 3 days after the execution of the consent terms. Precisely how much oil was sold on that date is not shown by the plaintiff.

79. The plaintiff has produced a certificate of the Bombay Commodity Exchange Limited showing prices of oil on the weekdays during the period of June 1979 to December 1979. That certificate has not been got proved by the plaintiff. Yet it may be considered. The price of oil from 2nd June, 1979 to 31st December, 1979 on specific week days the rate on 4th July, 1979 is shown to be Rs. 77.50.

80. The plaintiff has led evidence of P.W. 3 to prove the sale price. P.W. 3 is the Secretary of the Bombay Commodity Exchange Limited. He prepared another certificate dated 9th April, 2014 bearing No. 28/2014-50. He compiled the rates of RBD palm oil per 10 Kg. during the month of February, 1980. He collected the price from the records maintained by the company. He affirmed that the contents of his certificate were true. His certificate became admissible in evidence. It is marked P. 3. It shows the price of oil not in June 1979 but in February 1980.

81. P.W. 3 has explained in his cross examination that each day one staff member of the Bombay Commodity Exchange Limited has to phone the traders

of oil and obtain spot price from there. The same person does this work each day. If he is absent, another staff does his work. They collected prices of all oils including palm oil from the brokers every day.

82. The plaintiff has not led any evidence to show the precise price at which the oil was sold and the precise date on which the oil was sold aside from only the aforesaid dates being mentioned to Court by the Counsel on behalf of the plaintiff for unsale of oil. The affidavit of evidence of the plaintiff did not show any evidence in that behalf. In fact it is argued on behalf of the plaintiff that the prices, date of sale has not been shown to the plaintiff despite the plaintiff's requests and therefore, the plaintiff has produced evidence with regard to the sale price of oil for the months of June to December 1979 and February, 1980.

83. It may be mentioned that the evidence in that regard is not even required because only if the oil was to be sold at the market price, the market price would become relevant to consider to determine undervaluation in the sale price, if any. When the defendant was given full authority to sell the oil at the price it deemed fit and to appropriate the sale proceeds for satisfaction of the amount due and payable to it, it is for the defendant alone to sell. It is not for the plaintiff to even demand to know the price or for the defendant to inform the plaintiff. Indeed the defendant is silent on this score. The entire exercise of the plaintiff is in vain. In view of clause 5 of the consent terms executed by the plaintiff, the price at which the palm oil was sold by the defendant, whatever it be, cannot be taken to be arbitrary as alleged by the plaintiff. Hence issue No. 6 is answered in the negative.

84. Issue No. 7: This relates to the alleged wrongful debit of Rs. 43.16 lakhs by the defendant in the plaintiff's account. This follows as a matter of corollary from the sale proceeds of oil which came to be used towards settlement of the dues of the defendant by the plaintiff. The defendant banker would maintain its account. The account should be seen by the Court to be challenged. The copy of the account relied upon by the plaintiff has not been proved as it has not even been marked in evidence as an admissible document. In any event once the plaintiff fails to show the coercion in the consent terms and the consequent undervaluation in the sale of oil, the debit in the plaintiff's account cannot be challenged. Hence the plaintiff has not proved that the defendant wrongfully debited its account to the extent of Rs. 43.16 lakhs or any other amount. Consequently issue No. 7 is also answered in the negative.

85. Issue No. 8: This relates to whether the prices stated by the plaintiff are proved to be the prevailing prices so as to allow the plaintiff to recover Rs. 2.60 crores as claimed by the plaintiff. The affidavit of evidence of both the witnesses on behalf of the plaintiff being P.W. 1 and 2 show the price of oil in a range. The affidavit of evidence of P.W. 1 shows that the oil was sold on 4th June, 1979 at Rs. 6970 per metric tonne. That would be at Rs. 69.70 per 10 kgs. The certificate of p.w. 3 shows the price to be Rs. 77.50 per 10 kgs. on 4th June, 1979.

86. Whereas paragraph 17 of evidence of P.W. 1 shows that the market price of the goods was higher around Rs. 1800 to Rs. 2500 per metric tonne, the evidence of P.W. 2 in paragraph 15 of his deposition shows that the market price was higher by Rs. 2000 to Rs. 2500 in the range of Rs. 9000 to Rs. 9500 per metric tonne. This evidence is belied by the certificate of P.W. 3 showing the price not at Rs. 90 or Rs. 95 per 10 Kgs but at Rs. 77.50 on the date of the sale being 4th July, 1979. Consequently the plaintiff has failed to prove that the price as mentioned by the plaintiff was the prevailing price at the time of sale and consequently the plaintiff would be entitled to the damages claimed by the plaintiff in a sum of Rs. 2.60 crores. Hence issue No. 8 is also answered in the negative.

87. Issue No. 9: The defendant would claim that the State of Maharashtra should have been the party defendant in the suit. That claim is not pressed. That is not even seen from the dispute between the parties which the Court has to consider in the suit. Hence issue No. 9 is also answered in the negative.

88. Issue No. 10: This relates to the case of the defendant that the plaintiff had no current account with the defendant when the letter of credit was fraudulently procured. The defendant cannot prove in the negative. It is only the plaintiff to show a current account of the plaintiff held in the defendant bank. The plaintiff has not proved any such account. The plaintiff has not produced a certified copy of its account certified under the Banker's Book of Evidence Act by the defendant bank. The plaintiff has relied upon a photocopy of some account in the defendant bank. The photocopy is inadmissible in evidence and therefore, has been not marked in evidence by Justice Patel when the other documents were marked Exhibits-P1 and P2.

89. The case of the defendant that the LCs were fraudulently procured is not the dispute between the parties, though the plaintiff has relied upon the import of the goods under the letters of credit in three consignments. Whether or not the plaintiff had a current account is not even material for deciding the dispute between the parties. The denial is, therefore, not a denial of a material fact alleged by the plaintiff upon which an issue would arise which is required to be answered by the court under Order 14 Rule 1 of the CPC. The plaintiff has only to prove the consent terms being executed under coercion and if that is proved the sale at an undervaluation. The fact whether the plaintiff has a current account or not, not being a material statement of fact and the law, affirmed by the plaintiff and denied by the defendant does not call for an issue to be framed which could be required to be answered by the Court. Hence issue No. 10 is not required to be answered and is not answered.

90. Issue No. 11: This issue relates to the remittance by the defendant to UAB under the letters of credit. The plaintiff claimed that the plaintiff opened 3 LCs. The plaintiff admittedly imported 3 consignments of oil. The plaintiff is liable to pay the exporter or the banker of the exporter on behalf of the exporter under those letters of credit. The plaintiff would claim that the LCs were bonafide and

correctly opened. The plaintiff must, therefore, be liable to pay upon the LCs. UAB was the banker of the exporter. The plaintiff's banker (the defendant herein) was, therefore, liable to pay the exporter's banker the amount under the LCs.

91. Despite the case of opening of three LCs, the plaintiff would claim that the exporter should not be paid and hence no amount can be remitted to the banker of the exporter. This itself is a dishonest claim. It is implicit in every import under the LC that the importer would honour the LC. At least the first consignment was completely cleared. The exporter had to be paid.

92. Clause 5 of the consent terms also shows that the defendant bank could satisfy the amounts due and payable to it and if required to remit the same or any part thereof to UAB. Consequently under the consent terms itself the plaintiff authorized the defendant to remit at least a part of the sale proceeds to UAB. The plaintiff is bound by those terms.

93. The defendant has remitted as per its entitlement. The defendant is, therefore, not liable to prove that the remittance was correctly made. The defendant has, of course, claimed that the LCs were fraudulently obtained and were not even opened by it. The plaintiff's Advocate argued that no accounts have been given by the defendant. The plaintiff has claimed accounts in the plaint.

94. The consent terms is however completely contrary to and inconsistent to the rights of the plaintiff to claim any account. The defendant is not even required to show that it was liable to remit any amount to the UAB. It is the entitlement of the defendant to appropriate the sale proceeds. The plaintiff would argue that the expression "if required" shows that the defendant must account for it and take instructions from the plaintiff to remit any amount to UAB. A reading of the consent terms would show that the expression "if required" would be the requirement that was wholly dependent upon the satisfaction of the claim of the defendant bank which was acknowledged and admitted by the plaintiff and what the defendant bank deemed fit. Hence the defendant is not required to prove that it was required to remit the amount and hence remitted the amount or that it was liable to remit the amount.

95. Consequently issue No. 11 is not required to be and is not answered.

96. Issue No. 12:

ORDER

1. The plaintiff's case is wholly false and misconceived.
2. The suit is dismissed with costs of Rs. 1 lakh.