
(1949) 07 CAL CK 0035
In the Calcutta High Court
Case No : Suit No. 329 of 1946

Bishendas Agarwalla

APPELLANT

Vs

Nirmala Tea Co. Ltd.

RESPONDENT

Date of Decision : 04-07-1949

Acts Referred:

Citation : (1949) 07 CAL CK 0035

Judgement

Chatterjee, J.—This is a suit, instituted by a Calcutta merchant, against a company, which had its tea garden in the district of Daring and which had its registered office at Tejpur, also situate, in that district. The Plaintiff claims to be the owner of 59 maunds 39 seers of black tea and 222 maunds 23 seers of green tea of the Nirmala Tea Estate, which is the property of the Defendant company. There is also a claim for the delivery of the tea. There is an alternative prayer for, payment of Rs. 20,893-12, being damages for non-delivery of the said quantities of green tea and black tea and refund of Rs. 500 which had been paid in advance.

2. The case made in the plaint is that, on June 2, 1945, it was mutually agreed between the Plaintiff and the Defendant in Calcutta--

(a) that the Defendant would sell and deliver to the Plaintiff the entire output of black tea of the season 1945-46 of the Defendant's tea garden at the rate of eleven annas per pound inclusive of excise duty;

(b) the Defendant would sell and deliver to the Plaintiff 500 maunds of picked and sorted green tea of the season 1945-46 at the rate of thirteen annas per pound inclusive of excise duty.

3. The Plaintiff's case is that, in part-payment of the price of the tea to be sold and delivered, he had paid to the Defendant company Rs. 500 on July 31, 1945. Altogether the Defendant supplied to the Plaintiff the following quantities of tea:

Black tea--15 maunds 10 seers.

Green tea--277 maunds 17 seers.

4. The plaint makes the case that the property had passed in the quantities of black tea and green tea mentioned above for which the declaration aforesaid was asked. But this case was not pressed at the trial and really the fight was over the claim for damages. A good deal of time had been taken up on the question of the exact date on which an important letter, dated June 2, 1945 (Ex. B), was actually written and signed by the then managing director of Defendant company, Rai Sahib Dr. Hem Chandra Das.

5. The relevant documents have been admitted and I shortly summarise the same.

6. On May 3, 1945, the Rai Sahib as managing director of the Defendant company wrote to the Plaintiff in Calcutta that he was leaving Tejpur shortly and asked the Plaintiff to see him at 27A, Amherst Street, Calcutta. It is admitted that the Plaintiff met the Rai Sahib and there were interviews and discussions. Plaintiff's case is that the agreement as to the sale of both the green tea and the black tea was finalised on June 2, 1945, at Calcutta and on that date the Rai Sahib wrote out the letter of June 2, 1945 (Ex. B) and signed the same. The Defendant company disputes the same. Its case is that the letter was actually written out and signed about a year later towards the middle of March, 1946 or possibly little later than that.

7. A good deal of cross-examination was directed towards this letter (Ex. B) and the Rai Sahib has admitted that the statements made in this letter are true except that the date is wrong and the quantity 500 niaunds is not correct. This gentleman was obviously in a very unpleasant situation but he had to admit in cross-examination that the terms set out in Ex. B correctly represented the terms of the bargain between the parties except as to the quantity (Qs. 207, 208). Rai Sahib also said that it was signed by him in the middle of March, 1946 or in the latter part of that month when a winding up petition of the Defendant company was pending in this High Court (Q. 210).

I here set out that letter of June 1945:

Babu Bishendas Agarwalla 168, Cross Street, Calcutta

Camp Calcutta, 2nd June, 1945

Dear Sir,

Re. Second lot of 500 maunds green tea season 1945-46.

We hereby agree to sell to you 500 maunds green tea picked and sorted of the Nirmala Tea Estate of the latter part of the season 1945-46 at 13 annas only per pound including excise duty delivery ex. Factory in buyer's bags.

Buyer shall deposit with the Company Rs. 5,000 only without interest as advance within the month of October, 1945, otherwise the contract will be null and void.

B/1 with their relative documents shall be forwarded through bank in Calcutta for

clearance and the deposited money shall be deducted from the value of the last invoice.

Delivery of the green tea will commence in the month of November, 1945, if not earlier.

The company do not give any guarantee of the quality of the green tea being production of the end of the season and buyer accordingly will have no right for claim of the quality of tea.

Yours faithfully, For and on behalf of Nirmala Tea Co. Ltd., Hem Ch. Das, Managing Director.

8. On June 8, 1945, Dr. Das wrote to the managing director of the tea garden and informed him that he had entered into two contracts with two parties, each for 500 maunds of green tea. One contract was with a Jalpaiguri firm, which is borne out by Ex. 6 and was dated June 1, 1945. In that letter, it was stated that the second contract was with a Marwari firm in Calcutta and it is admitted that it refers to the Plaintiff firm. The manager pf the garden was asked by the managing director to manufacture one thousand maunds of green tea during the year for supply to the two parties.

9. On June 30, 1945, the managing director wrote to the Plaintiff. He there explains that for want of gunny bags, the black tea could not be sent to him, although he instructed the manager to despatch the same with the least possible delay. He wanted the Plaintiff to send 500 gunny bags to the manager of the garden. This request was complied with by the Plaintiff.

10. On July 31, 1945, Rs. 500 was paid by the Plaintiff to the managing director and he signed a receipt for the same at Tejpur. It is Ex. E, which I set out below:

The Nirmala tea company, limited, Head Office--Behali.

Tejpur, Assam, July 31, 1945.

The Nirmala Tea Estates, Steamer Ghat--Gamiri. P.O. and T.O. Helem (Assam).

Received with thanks from Babu Bishendas Agarwalla Rs. 500 only being advance for Black Tea all grade to be despatched in the month of August, 1945.

Hem Ch. Das, Managing Director, The Nibmala Tea Co., Ltd.

11. There is no dispute as to the total quantity of the tea, eitilter black or green, which was received by the Plaintiff. There is also no dispute as to the payments made. It is clear that the Plaintiff was asking for the fulfilment of the contract for 500 maunds of green tea. That is borne out by the letter dated August 29, 1945, addressed to the Rai Sahib and a letter dated September 3, 1945, addressed to the manager of the tea garden. On October 23, 1945, Rai Sahib, who was obviously on friendly terms with the Plaintiff, explained that he could not complete the supply of green tea to the Jaipaiguri firm, who were to get the first lot of 500 maunds of green tea. He assured the Plaintiff that severe attempts

were being made to manufacture the second lot of green tea for him.

12. In December, 1945, the parties met at Tejpur. On December 2, the Plaintiff wrote to the managing director (Ex. 1). By that time it is clear that the Plaintiff had an inspection of the stock in the garden, factory and realised that there was no chance of getting picked graded green tea. Therefore, he wanted to have unpicked green tea and naturally he wanted some deduction for the same. On December 19, the managing director wrote a letter to the Plaintiff at Tejpur stating that a settlement had been arrived at and the Plaintiff would be allowed deduction at two annas per pound for unpicked green tea which would be supplied to him. Thereafter something happened, which is not very clear, but ultimately a bill was made out on December 30, 1945, which shows that certain quantity of green tea was supplied and the Plaintiff was allowed some deduction but not at the rate mentioned in the letter of the 9th December. The total amount due was Rs. 13,502-2, against which the Plaintiff had advanced Rs. 10,800 and the balance due was Rs. 2,703-2, which was paid and the bill was receipted by the managing director (Ex. 3 and Ex. 4).

13. It appears that there was good deal of trouble with regard to the running of the tea estate of the Defendant company and two sets of shareholders or directors were at logger heads. Ultimately, the Rai Sahib had to vacate his office and Mr. Chandradbar Goswami, an Assamese gentleman, became the managing director and took over charge. Correspondence shows that the Plaintiff was pressing for delivery and towards the end of January, 1940, he wanted the despatch of the balance of black tea in bags.

14. On February 8, 1946, Messrs Nahar and Datta, attorneys for the Plaintiff, wrote to the Defendant company reminding them of the contract for 500 maunds of green tea, which _ had been entered into on or about June 2, 1945 and asked for delivery of the balance of 233 mawnds. On the same day, Mr. Goswami, the new managing director, wrote to the Plaintiff in answer to his letter of the 31st January repudiating any contract for black tea. He wanted a copy of the contract, which the Plaintiff had entered into with Rai Sahib Dr. Das, regarding green tea which obviously Mr. Goswami also repudiated.

15. On February 9, 1946, Messrs. Nahar and Dutt on behalf of the Plaintiff wrote to the Defendant company. Therein the case is made that the Defendant sold to the Plaintiff on, or about July 31, 1945, black tea of all grades of 1945-46 season at eleven annas per pound and received an advance of Rs. 500. The attorneys wrote to the Defendant company that the Plaintiff had been supplied with only 1,240 pounds and they wanted delivery of 59 maunds 39 seers of black tea which was lying in the Defendant company's factory. There was no favourable response to this letter of demand by the attorney and this action followed.

The following issues were raised:

1. Was there a contract for (a) green, picked, assorted tea 500 maunds and (5) for black tea as alleged in para. 2 of the plaint?

2. Was there as express or implied term as alleged in para. 4 of the written statement?

3. Did the Plaintiff demand delivery of the alleged balance of green tea and black tea and was there any refusal on the part of the Defendant?"

4. Was the Plaintiff ready and willing at all material times to take delivery of and pay for the alleged balance?

5. What was the amount of black tea and the second lot of green tea available for sale?

6. Has the Plaintiff suffered any damage? If so, what damages?

16. I take up issue No. 2 first, because on that important issue depends the fact of the major portion of the claim in this suit.

17. In the written statement the Defendant company denied the contracts in toto, but in para. 4 they made an alternative case. According to them the agreement for sale of the green tea was in respect of the second lot of 500 maunds to be manufactured at the Defendant's tea estate during the latter part of the season 1945-46. "It was expressly agreed and/or implied from the "nature of the contract for sale of future tea, that delivery would "only be given upon actual manufacture". During the said season only 277 maunds of tea were manufactured in respect of the second lot and it was not possible to supply more. The said 277 maunds were delivered to the Plaintiff and in the premises the Defendant contends there was no obligation to deliver the balance if any,, under the contract.

18. I am satisfied that there was no express term as alleged in para. 4 of the written statement, but the important question is, can the court infer an implied term as alleged therein? That depends on the true construction of the letter dated June 2, 1945, (Ex. B). The argument on this point was advanced on the footing that Ex. B is a genuine document and was signed on the date it purports to bear.

19. A number of cases has been cited by learned Counsel on both sides. Mr. G.P. Ear, counsel for the Plaintiff, has urged that there was an absolute contract between the parties and the governing word was "500 maunds" and as the quantity was specified unconditionally without any qualifying words, there was an obligation on the part of the Defendant to supply the same. On the other hand, Mr. A.K. Sen, counsel for the Defendant, urged that the quantity mentioned was merely an estimate of the second lot of the crop of 1945-46 from the particular tea estate and there could be no absolute obligation on the part of the seller either to raise the said quantity or to deliver the same and in any event, in such a contract, a term ought to be implied that there is an obligation to deliver the quantity specified, if it is in fact available for delivery.

20. As a general rule every positive and absolute contract for a certain quantity

of goods is prima facie an entire contract for that quantity and in such a case delivery of any quantity below that specified quantity will not constitute the fulfilment of the contract. The question is. Is there such a contract in this case or is the quantity, having regard to the context and the surrounding circumstances, a mere estimate?

21. The first case cited by Mr. Sen in *Gwillim v. Daniell* (1835) 2 C.M. and R. 61 (71) : 150 E.R. 26 (30). In that case there was a contract to sell all the naphtha which the Defendant might manufacture during a term of two years "say "from 1,000 to 1,200 gallons per month, at the rate of 2s. 6d. "per gallon". The Plaintiff was supplied 3,000 gallons and that was all that the Defendant had manufactured. The Plaintiff claimed damages for non-supply of the balance 7,000 gallons. It was held by Lord Abinger C.B. that the Defendant was not liable to deliver any quantity more than what he had manufactured. The court had to construe the words in the contract and held that the same did not amount to a warranty that the manufacturer would supply that number of gallons but they only amounted to an assertion of his belief that that was the quantity he would be able to supply. This case is an authority for the proposition that unless there is something in the context to give them a more positive signification, such words giving an idea as to quantity ought not to be construed as words of warranty.

22. I crave leave to quote the words of the learned Chief Baron:

In the present case ... we can only construe the agreement from the bare words employed, there being no averments in the declaration to give a different construction to those words. The agreement there is simply this, that the Plaintiff undertakes to accept all the naphtha that the Defendant may happen to manufacture within the period of two years. The words "say from 1,000 to 1,200 gallons" are not shewn to mean that the Defendant undertook, at all events, that the quantity manufactured should amount to so much. If is fraud the Defendant manufactured less than he ought to have done, the breach should have been shaped accordingly. Here it does not appear that in the ordinary course of his manufacture the Defendant ought to have produced a larger quantity than he has done and we cannot, therefore, say that he has broken his contract.

23. On the strength of this judgment Mr. Sen asked me to construe the contract (Ex. B) in favour of the Defendant as meaning merely that in all probability the quantity of green tea that would be produced as a result of the second lot of the crop in the specified season out of the particular tea estate would amount to 500 maunds. Really he wants me to read the contract as meaning that the Defendant company undertook to sell to the Plaintiff the" output of the second lot of that season from that tea estate which might probably amount to a quantity of 500 maunds but the quantity was really no part of the contract.

24. The next case cited by Mr. Sen is a case from Canada : *McConnel v. Murphy* (1873) L.R. 5 P.C. 203. In that case the contract was for sale of all the spars

averaging 16 inches. The above spars will be out of the lot manufactured by J.B. The lot manufactured by J.B. was found to consist of 603 spars of which only 496 averaged 16 inches.

25. Delivering the judgment of the Board, Sir Montague Smith held that upon the construction of the contract the buyer was bound to accept the 496 spars and the words "say about 600 red "pine spars" were merely words of expectation and estimate and did not amount to a warranty. The Judicial Committee held that the tender of 496 spars which were all of the specified lot with an average 16 inches was a substantial performance of the contract by the seller. The contract was construed as one for so many of the spars manufactured by McConnel as averaged 16 inches and not as a contract for 600 spars. *Gwillim v. Daniell* (supra) was approved and followed by the Judicial Committee.

26. I pointed out to Mr. Sen that both the cases cited by him used words qualifying the quantity mentioned in the contract. In one case the word was "say". In the other case the words were "say about" and these two words were put in for the purpose of showing that nothing absolute or definite in the way of specification of quantity was intended on the part of the vendor. The effect of the word "say" when prefixed to the "about" was considered as a safeguard on the part of the seller against having made any absolute promise as to quantity.

27. Mr. Sen then cited the well-known case of *Howell v. Coupland* (1874) L.R. 9 Q.B. 462 : on appl. (1876) 1 Q.B.D. 258, affirmed by the Court of appeal. In that case there was a contract entered into in the month of March to sell to the Plaintiff "200 tons of regent potatoes grown on land belonging to "the Defendant is Whaplode, at the rate of ?3. 10s. 6d. per ton "to be delivered in September or October". The, potatoes were not in existence at the date of the contract. But the Defendant had 68 acres ready for potatoes and they were sufficient for growing more than 200 tons in an ordinary season. There was a failure of the crop in the month of August when potato blight appeared and the disease attacked the crop and the Defendant was able to deliver only 80 tons. The Plaintiff brought an action for the non-delivery of the balance 120 tons. Blackburn J. held that the contract was for a portion of a specific crop and was subject to an implied term or condition excusing performance and was thus within the principle of *Taylor v. Caldwell* (1963) 3 B. and S. 826 : 122 E.R. 309. The contract was construed as being subject to the implied condition that the party shall be excused, if, before breach, performance becomes impossible from the perishing of the thing without default on the part of the contractor.

28. In *Howell's* case counsel for the Plaintiff contended that there was an absolute contract to deliver 200 tons of potatoes with an additional warranty that they should be grown on the Defendant's land. He relied on the well-established principle that where there is a positive contract to do a thing the contractor must perform it or must pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of the contract has become onerous or even impossible. This argument was not accepted by Lord Blackburn and he held

that the contract merely meant that the Plaintiff agreed to purchase and the Defendant agreed to sell 200 tons of a particular crop of potatoes which it was expected these 68 acres would produce. I should quote a portion of the judgment of Blackburn J.:

If that is the contract, it is a contract for the delivery at a future time of a specific thing, so far as this, that it is for the delivery of a portion of a specific thing.... Had the contract been simply for so many tons of potatoes of a particular quality then, although each party might have had in his mind when he made the contract this particular crop of potatoes, if they had all perished, the Defendant would still have been bound to deliver the quantity contracted for; for it would not have been within the rule of a contract as to a specific thing. But the contract was for 200 tons of a particular crop in particular fields and therefore there was an implied term in the contract that each party should be free if the crop perished.

29. In the Court of appeal this judgment was affirmed by Lord Coleridge C.J., who held that, on proper construction of the contract, there should be a condition implied that before the time for the performance of the contract the potatoes should be in existence when the time came for the performance. The Lord Chief Justice held that it was not an absolute contract to deliver under all circumstances, but a contract to deliver so many potatoes of a particular kind grown on a specific place, if deliverable from that place. James L.J. and Mellish L.J. also held the same view. Cleasby B. pointed out that it was not an absolute contract to deliver 200 tons of potatoes in September or October, but 200 tons of potatoes grown on a particular land. As the crop on that particular land failed, there was nothing to which the promise could apply.

30. Mr. Kar commented on this case of *Howell v. Coupland* (supra) and referred to the judgment of the Court of appeal in *In re Wait* (1927) 1 Ch. 606. There the question was whether 500 tons of wheat which had not been appropriated to the contract were "specific goods"? *Howell v. Coupland* was discussed. It was pointed out by Lord Hanworth M.R. that the performance of the contract was excused in *Howell's* case because the contract was interpreted as being subject to the implied condition that the parties should be excused if, before breach, performance would become impossible from the perishing of the subject matter of the contract without default on the part of the seller. Atkin L.J. pointed out that *Howell's* case had no reference to "specific" or "ascertained" goods for the purpose of passing the property or for the purpose of specific performance and that *Howell's* case would be covered by Section 5(2) of the English Sale of Goods Act [which corresponds to Section 6(2) of the Indian Act] or by the common law principles retained by Section 61(2) of the English Act [which corresponds to Section 60(1)(e) of the Indian Act]. Sargent L.J. pointed out that it was not correct to treat *Howell's* case as one merely of frustration or impossibility of performance. The reason why in *Howell's* case the contract had turned out to be impossible was because it was held to be a contract for the sale of specific goods

and these specific goods had partially failed.

31. *McLay and Co. v. Perry and Co.* (1881) 44 L.T. (N.S.) 152. There was a sale of a heap of scrap iron in the yard of a firm which was represented to be about 150 tons. The vendor only delivered 44 tons which was the actual quantity of the heap in the yard. In an action for non-delivery of the balance it was held that the words "about 150 tons" were merely words of estimate and expectation and there was no warranty as to the quantity and the Defendant was not bound to deliver 150 tons. The subject matter of the contract was not 150 tons of iron but the specific heap of iron which was in the Defendant's yard.

32. *Levi and the Browse Island Guano Company v. Berk and Co.* (1886) 2 T.L.R. 898. The buyer contracted for a cargo and mentioned a particular quantity. It was held that the governing word was "cargo" and the buyer was bound to take the cargo whatever its quantity might be. Lord Esher observed that effect must be given to the word "cargo" without requiring the quantity specified. Judgment was, therefore, given for the sellers. See also *In re Harrison and Micks, Lambert and Co.* (1971) 11 K.B. 755.

33. *Tancred Arrol and Co. v. Steel Company of Scotland Ltd.* (1890) 15 App. Cas. 25. There was a contract to supply "whole steel" required for the Forth Bridge. The contract also contained the following clause: "The estimated quantity of steel we understand to be 30,000 tons more or less." The House of Lords held that the contractors were entitled to supply the whole of the steel required for the Bridge and their right was not qualified or affected by the statement that the estimated quantity which would be required was understood to be "30,000 tons more or less".

Mr. Ear cited a number of authorities.

34. *Blackburn Bobbin Company Limited v. T.W. Allen and Sona* (1918) 2 K.B. 467. There the contract was for the sale of timber deliverable free on rail at Hull during the months June to November, 1914. On the outbreak of war, the German Government declared timber to be contraband and all transports were paralysed. The Defendant claimed that the contract was dissolved on the outbreak of the war on the ground that both the parties contemplated as the basis of the contract that the normal method of delivery should continue. McCardie J. held that no such condition could be implied and the contract had not been dissolved and the Defendant was liable in damages for the non-delivery of the timber. The contract was construed as simply a contract for the sale of unascertained goods which the seller agreed to deliver at Hull and it was no concern of the buyer as to how the seller intended to get the timber there. Although the seller intended to ship the timber in the ordinary way direct from a Finish port, the continuance of the normal method of delivery was not a matter contemplated by both the parties. Warrington L.J. held that it was not proved that the continuance of the normal mode of transport was at the basis of the contract in the mind and intention of the contracting parties. This case is of little assistance on the

question, of the construction of this contract, where the parties had previous dealings and must be deemed to have contracted on the basis of the continuance of the normal method of cultivation in the tea garden in question.

35. *Asmore and Sons v. C.S. Cox and Co.* (1899) 1 Q.B. 436. The contract was for sale by the Defendants of 250 bales of Manila hemp to be shipped from a port in the Philippine Islands "by sailer or sailers" between May 1 and July 31, 1898". There was a clause that if the goods did not arrive from loss of vessel or other unavoidable cause the contract was to be void. On account of the outbreak of the Spanish-American war shipment was not possible between these dates. The sellers shipped hemp by steamer in September which would arrive at about the same time as a cargo shipped on a sailer between May and July. On October 27, the sellers declared it against the contract. The Plaintiff refused to accept this declaration and returned it to the Defendants. On November 4, the sellers wrote that it was the only declaration they were in a position to make. It was held by Lord Russell of Killowen, distinguishing *Howell v. Coupland* (supra), that there was no implied condition that it should be possible to make shipment by sailer between the given dates and the Defendants were liable to pay damages, because it was an unconditional contract to ship hemp. The date for assessing damage was held to be November 4. It is to be noted that the contract was not to ship by any particular ship, but by any sailer or sailers and that was construed to be an absolute undertaking by the Defendants that the goods should be shipped on sailers and between certain dates. Really in this case the principle laid down in *Howell's* case was not challenged, but the judgment turned on the construction of the particular contract between the parties.

36. *Tribhovandas Narottamdas v. Nagindas Vijbhukandas* AIR (1920) (Bom.) 182. The Plaintiffs agreed to buy and the Defendants agreed to sell ginned cloth of a particular description under a contract, the material terms of which ran thus:

The abovementioned goods which are to arrive are sold (to you). These purchased by us from Graham and Co. are sold to you. Shipment thereof January or February. And there are (to be) two or three months in addition. To be delivered early if arrive early. To be delivered as and when the same may be received. To be delivered on the safe arrival of the steamer.... If the goods to arrive come late, the purchaser is to take delivery of the same.

37. The cloth that arrived was unginned and the Defendant tendered the same to the Plaintiffs with an allowance of Rs. 1-6-0 per piece for different quality. The Plaintiffs refused to take delivery and sued the Defendant for breach of contract claiming damages. The trial Judge, Mcleod C.J., dismissed the suit, holding that the clause that the goods were to be delivered as and when the same might be received meant that the-sellers had contracted that they would only give delivery when the goods contracted for did arrive and that if those very goods did not arrive at all then they could not give delivery and there would be no liability put upon them to pay damages for the non-arrival of the goods. The appeal Court affirmed the judgment of Mcleod, C.J. In effect, the arrival of the goods

contracted for was a condition precedent which was never fulfilled and therefore, the contract was at an end.

38. Hurnandrai Fulchand v. Pragdas Budhsen ILR (1922) 47. Bom. 344 : L.R. 50 IndAp 9. By a written contract, dated November 26, 1917, the Respondent sold to the Appellant 864 bales of dhotis as specified to be manufacturer by named mills, with whom the sellers had contracted for a larger flumber of bales. The contract provided that the goods--

are to be taken delivery of as and when the same may be received from the mills, delivery to be caused to be given in full by December 31, 1918.

39. The sellers delivered only part of the goods, owing to the mills failing to manufacture or deliver to them the balance. It was held by Lord Sumner that the words "as and when" cannot be construed as "if and when" and that the buyers were entitled to recover damages for the sellers. The stipulation as to delivery did not limit the goods to be delivered to those supplied by the mills in 1918, nor did they make delivery by the mills a condition precedent and the sellers were not relieved, of their obligation by frustration of the contract, or by any implied condition. If the contract is for a fixed quantity, then the sellers must find in the contract some matter of excuse or discharge or they must pay damages.

40. Ganesh Das-Ishar Das v. Ram Nath ILR (1927) Lah. 148. The Defendant in unequivocal terms undertook to sell to the Plaintiff goods shipped to India during specified months and to deliver the same in lots against payment as soon as the documents of title reached Delhi. It was held that, in the absence of any condition contained in the contract between the parties specifically providing for such contingency, the sinking of the goods en route to India, was no defence to the Plaintiff's claim for damages. The Lahore High Court really followed the judgment of the Privy Council cited above, as it was bound to do.

41. Mr. Kar also drew my attention to the observation of Agarwala J. In Noor Mohamad and Others Vs. Sonu Mistri and Others, . The general rule, according to the learned Judge, is that where a party has not qualified his obligation under a contract he is liable to make compensation in damages for non-performance, although the performance has been rendered impracticable by some unforeseen cause beyond his control (such as failure to return hired lights due to damages caused by rioters) and Section 56 of the Indian Contract Act does not depart from this rule. With this observation no one would disagree.

42. The last case cited by Mr. Kar was Bissweswar Lal Brij Lal v. Jai Dayal Udai Ram ILR (1945) Cal. 391. In that case under a written contract the Plaintiff agreed to buy and the Defendant agreed to sell certain goods. The material cause of the contract was as follows:

The sellers agree to sell and the buyers agree to buy five cases of Meltone as per Indent No. 1427, Superfine at 1/6? (Sterling) per yard shipment August/September, 1939, or such portion thereof as may be ready for delivery or as may

arrive and be deliverable under the terms and conditions of the contract.

43. Gentle J. held that the words "as may arrive" rendered the performance of the contract conditional upon the event of the arrival of the goods; and as the goods did not arrive performance of the contract by sellers was not required or was excused.

44. I had the privilege to appear as counsel for the Plaintiff in that case and I cited Hurnandrai Fulchand's case (supra) in support of the contention that there was an unconditional contract. My argument was not accepted by the learned Judge, and if I may say so with respect, he rightly held that it was a conditional contract and it did not contain an absolute warranty to deliver the goods irrespective of the arrival of the same.

45. In my opinion, the correct principle has been laid down in. Benjamin on Sale, 7th Ed. p. 736--

A statement of quality with the addition of qualifying words may by the context of the contract be shown to be a mere collateral estimate of the quantity and not part of the contract. This happens where other parts of the contract, contain a standard of quantity fixing the amount deliverable.

46. The quantity of goods contracted for is really determined by the construction of the contract. The words used and the surrounding circumstances in this case show that it was not an absolute contract to deliver 500 maunds of tea within a particular period, but it was a contract to supply such a quantity as may be produced from the 2nd lot of the crop of 1945-46 grown on the particular tea estate. Here the contract was for the sale of a (specific crop to be grown on specific land. It was not a contract, to sell and buy 500 maunds of a particular quality irrespective of its manufacture or growth on a particular plot of land. The words of Ex. B. refer to "500 maunds Green Tea picked and "sorted of the Nirmala. Tea Estate of the latter part of the season "1945-46". Then the company adds that it does not give any guarantee of the quality of the Green Tea and it explains the reason. Because it was going to be the product of the end of the season. Obviously, the buyer would be entitled to refuse to accept tea of any garden other than the Nirmala Tea Estate and the particular crop of that estate was in the mind and intention of the contracting parties. The buyer bought the 2nd lot of the latter half of the season. In my view the seller is bound to deliver and the buyer is bound to accept what in fact is produced during the relevant period out of the garden in question, even if the quantity may be less than 500 maunds. The 500 maunds, represented only an anticipative estimate of quantity and did not constitute any absolute warranty as to quantity. The subject-matter of the sale is defined by reference to certain peculiar attributes or standards and the quantity is not the governing word in the contract.

47. Therefore, neither party is liable if the particular crop does not yield the expected or estimated quantity. In my opinion, in order to give business efficacy an implied term should, be read into the contract that the obligation to deliver

500 maunds arises only if that quantity is available from the particular crop and that the parties are free from obligation if the yield is less. I hold that there was no absolute contract to grow or sell or deliver 500 matmds of tea of this garden under all circumstances, bat it is a contract to deliver 500 maunds of tea of a particular kind grown during a particular period on a specified place if it his in fact available from that place at the relevant point of time.

48. I take up now issue No. 1. My answer to this issue is that with regard to the contract for green picked sorted tea it was subject to the implied term which I have mentioned above.

49. I have already said that there was good deal of controversy as to the exact date when Ex. B was written. Having regard to the admission made by the Rai Sahib, it is not material on what date he actually signed this letter because he admits that the terms mentioned therein were actually the terms on which he had "entered into the bargain with the Plaintiff.

50. As evidence has been given on this question I should give my findings. I must say that at first I was impressed with the Plaintiff's story. He gave his evidence in a plaisible manner and prima facie it is difficult to accept the story that a responsible businessman of experience occupying some position in life would be a party to the preparation of a document after the institution of this suit and that he would ante-date the same. But there are certain peculiar factors in this case which make me hesitate to accept the Plaintiff's version. Firstly, in the plaint there is no mention of any written agreement or any reference to any letter incorporating the terms of any contract. Secondly, the plaint as engrossed stated that the agreement was verbally made but ultimately the word "verbally" was changed to "mutually". That by itself is not enough to cast any doubt on the Plaintiff's story. But I find that, on the very day he filed the plaint, that is on February 28, 1948, the Plaintiff applied for an interim order and in his petition, which he affirmed true to his knowledge, he stated in paragraph 2 that there was a verbal agreement on June 2, 1945, covering the sale of both green tea and black tea. In the affidavit in opposition, the Defendant company's new managing director, Mr. Goswami, denied the contract. In the affidavit in reply, dated March 25, 1946, for the first time a copy of Ex. B was set out in annexure and what is more significant, he also set out a letter of June 8, 1945, which was addressed by the managing director of the tea company to the manager of the tea estate, in-the district of Darrang. How the Plaintiff could get hold of a copy of this letter, it is difficult to understand.

51. Then I should refer to the letter of particulars. Particulars were asked for on the basis that the agreement between the parties was verbal. In the letter of Mr. S.N. Sen, Defendant's attorney, dated the 13th March, 1946, the questions put were as follows:

Paragraph 2: Where was the alleged agreement made? Who represented the Defendant company?

52. In the reply of Messrs. Nahar and Datta, dated March 25, 1945, an attempt is made to improve upon the pleadings and some information is volunteered in order to prepare the ground for the ultimate reception of Ex. B which had come into existence by this time. It is stated that the agreements were entered into at No. 27, Amherst Street, Calcutta, between the Plaintiff and Rai Sahib Hem Chandra Das, the managing director of the Defendant company. It further stated, which was obviously not in answer to any question, that the agreement regarding green tea was in writing and the agreement regarding black tea was verbal. I find from the documents exhibited that the two groups of rival shareholders were fighting bitterly and in the month of March, 1946, both Hem. Chandra Das and Chandradhar Goswami had affirmed affidavits in the winding-up matter pending in this Court. Rai Sahib says that he had signed this letter, Ex. B, in order to spite Goswami and his party who were opposing the winding-up application which he supported.

53. I was asked by Mr. Kar to hold that the Plaintiff's attorneys had made some mistake in writing that letter of demand of February 9, 1946. I regret I cannot accept the suggestion, having regard to the pleadings and the answers to the particulars and the petition I have referred to. The other difficulty which I feel in accepting the Plaintiff's case is that, if really Ex. B had been written and signed on June 2, 1945, when, according to him the agreements with regard to both green tea and black tea had been concluded, then surely Ex. B would have contained some reference to black tea. The Plaintiff was cross-examined with regard to this. His explanation in examination-in-chief was that there was no reference to black tea in Ex. B, because there was no certainty as to the quantity of black tea that would be available and further the quantity would be rather small (Q. 20). In cross-examination he gave another explanation when he said that the managing director (Rai Sahib Mr. Das) "was not writing according to my dictation." He won't "write and I can not force him to write" (Q. 143). It is not possible to accept this explanation. There was no difficulty in putting down, in Ex. B that he was also buying and the Defendant company was selling the entire output of black tea.

54. The conduct of the previous managing director of the Defendant Company was not at all creditable. He ought not to have been a party to the preparation of Ex. B with full knowledge of this suit which had been instituted by the Plaintiff against the Defendant company. Put it down to spite or grudge or anything else, such conduct is to be deprecated and he had to admit in the witness box that he did something which he ought not to have done. However, the onus is on the Plaintiff to prove that Ex. B was written on the date it tears and I am constrained to hold that, having regard to the facts I have stated before, he has not been able to discharge that onus.

55. With regard to black tea I hold that a contract was entered into on July 31, 1945, when the receipt was signed at Tejpur and that the entire output was contracted to be sold. There is some force in Mr. Kar's contention that the

Defendant's case is not consistent with the correspondence, specially with the letter of June 30, 1945 (Ex. F). Rai Sahib had to admit that there were negotiations with regard to the purchase of black tea before July 31, 1945 and there was some talk in the interview which the parties had in the month of May in Calcutta. But to my mind, it is immaterial on what date this contract for black tea was entered into, whether it was the 2nd June or the 31st of July. The Defendant admits that there was a contract and the Plaintiff also accepted the position in his cross-examination that the agreement for black tea was made on July 31, when the Rai Sahib signed the letter or receipt.

56. I find that, with regard to the green tea, there was a contract subject to the implied term as mentioned above. With regard to black tea, there was a contract, but not on the date alleged in the plaint, but on July 31, 1945.

57. Issue No. 3. I am satisfied that the Plaintiff made demands for delivery both for green tea and black tea. In regard to black tea Mr. Sen contends that the date of delivery was August, 1945, according to Ex. E and there was no demand by the Plaintiff in that month. I cannot accept this contention. Plaintiff's letter of August 29, 1945, shows that he was demanding despatch of black tea. In December, 1945, parties had met and there was some kind of settlement but it is doubtful whether the settlement was actually acted upon and the bill which was sent on the 31st of December seems to support the story of the Plaintiff.

58. Issue No. 4. I decide this issue in favour of the Plaintiff.

59. Issue No. 5. With regard to black tea, it is admitted that there was a quantity available in the garden and the damages claimed are for that quantity not delivered, namely, 4,900 pounds. With regard to the green tea, really no question was put in cross-examination to challenge the case of the Defendant and no attempt was made to show that they had in fact manufactured more green tea than what they had supplied to the Plaintiff. I have gone through the affidavits which were used in the winding-up proceedings and it is clear, particularly from the annexure to the affidavit of Hem Chandra Das, dated March 4, 1946, that early in January, 1946, the garden was in a bad way. On January 10, 1946, the new managing director, Mr. Goswami, wrote So the retired managing director, Rai Sahib Hem Chandra Das, that the normal activities of the garden had practically come to a standstill. I hold, that in respect of the second lot of green tea of the season 1945-46, there was nothing more available for supply to the Plaintiff.

60. Issue No. 6. Then comes the issue of damages. Having regard to my findings, the Plaintiff is not entitled to any damages for green tea. With regard to the black tea, I am satisfied that the Plaintiff is entitled to damages for black tea not delivered, namely, 4,900 pounds. He has claimed damages on the basis of the market rate at Rs. 1-2 per pound. The evidence adduced by the Plaintiff is not very satisfactory, but because the estimate of damage is difficult I should not deprive the Plaintiff of damages.

61. The general principle is well-settled that, in giving damages for breach of contract, Plaintiff should be placed in the same position as he would have been if the contract had been performed. If there is no available market at the place of delivery, market price of the nearest place or the price prevailing in the controlling market, or the price prevailing at the destination of the goods, may be taken into consideration: *Wertheim v. Chicoutimi Pulp Company* (1911) A.C. 301. In this case, having regard to the course of dealings between the parties and the manner in which tea of Assam gardens was sold in this city, I should take into account the market price in Calcutta. The rate of black tea of Nirmala Tea Estate is not available in or about the second week of February, 1946, when the contract was repudiated. I have gone through the evidence of Mr. Manindra Bhattacharjya and of Mr. Motiram as well as of the Defendant's witness Mr. Khaund. I have already held that there is a clear breach by the Defendant company with regard to black tea and it cannot escape liability because the damage is difficult to assees: *Chaplin v. Hicks* (1911) 2 K.B. 783. Having regard to the evidence adduced before me I award damages on the basis of the market rate of black tea at 15 annas per pound. The contract rate was 11 annas per pound. Therefore, the Plaintiff will be entitled to damages in respect of 4,900 pounds of black tea at 4 annas per pound which will mean Rs. 1,225.

62. I pass a decree for this sum of Rs. 1,225 plus Rs. 500 which the Plaintiff had deposited, making a total of Rs. 1,725.

63. The general costs of the action the Plaintiff is entitled to get. There will be no order as to the costs of the hearing of the suit.