
(1960) 02 CAL CK 0025
In the Calcutta High Court
Case No : Appeal No. 134 of 1957

B.R. Herman and Mohatta (India) Ltd.	APPELLANT
Vs	
Pran Ballav Majumdar	RESPONDENT

Date of Decision : 29-02-1960

Acts Referred:

Contract Act, 1872 — Section 73, 74
Sales of Goods Act, 1930 — Section 31, 35

Citation : AIR 1960 Cal 524 : 64 CWN 798

Hon'ble Judges : P.B. Mukharji, J; H.K. Bose, J

Bench : Division Bench

Advocate : S.C. Sen and R.N. Pyne, for the Appellant; Sisir Mukherjee and Sankar Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Bose, J.—This appeal is from a decision of Mr. Justice G.K. Mitter and involves determination of the true nature and scope of two contracts for the sale of certain goods. On 9-11-1948 the appellant-Company entered into two written contracts with the respondent for the sale of caustic soda to be imported from U. S. A, at the price of Rs. 32/8/- per cwt. Ex. Jetty Calcutta on inter alia the terms and conditions that shipment was to be November-December, 1948 and the respondent would have to pay 25 per cent of the price by way of advance deposit. In pursuance of the contracts, the respondent on 15-11-1948 paid Rs. 8,125/- being the 25 per cent of the price of the goods. The case of the respondent, as alleged in the plaint, is that the goods were not shipped during November and December, 1948 and the appellant failed to deliver any goods of November-December shipment or at all and they thus committed breach of the contracts. The respondent, therefore, claimed refund of Rs. 8,125/- and Rs. 5,000/- as damages for loss of profit. Before the learned trial Judge no evidence was given as to the claim for damages. The only relief that the learned Judge has granted is a decree for refund of the sum of Rs. 8,125/- in favour of the plaintiff-respondent. It may be pointed out that although in the plaint a definite

case was made that the defendant-company had wrongly entered the terms of the two contracts in their printed C. I. F. contract form and the two contracts were not really C. I. F. contracts but were Ex. Jetty contracts, the plaintiff did not pursue the case at the hearing that the terms had been wrongly entered in C. I. F. contract form-as alleged in the plaint. Before us the main contention of the learned counsel for the appellant is that the learned trial Judge is wrong in his finding that the defendant-appellant had committed a breach of the contracts. Before dealing with the contentions raised, it will be convenient to set out at this stage the relevant clauses of the contract. There is a heading in the contract form which is as follows:

"Indent on C. I. F. Terms, No. FC/114.

Shipment:-- November/December. 1948.

Price: Rs. 3278/- Ex. Jetty. (This was substituted after scoring out the following words Rs. 25/8/- (Twenty-five and annas eight only) per cwt, C. I. F. Calcutta).

Payment-- An advance deposit of 25 per cent of the C. I. F. value and duty i. e. Rs. 6,500/-(Rupees Six thousand five hundred Only) we shall pay forthwith, on acceptance of this Indent while the balance we undertake to pay immediately on presentation of shipping documents."

It may be pointed out in this connection that in the other contract the following words appear against this item "payment."

"Payment--An advance deposit of 25 per cent, of the C.I.F. value plus customs duty and clearing charges amounting to Rs. 1,625/- (Rupees one thousand six hundred and Twenty five only) x x x"

Then clause 2 of the contract runs as follows:

"Payment shall, on receipt by the Indentors of notice to pay, be made forthwith to the firm in case at Calcutta against documents which shall consist of-

- (1) The Firms or at their option their Home friends" invoice.
- (2) Bill of Lading or at the Firm's option Delivery Order or Letter of Guarantee or Delivery Telegram and
- (3) Policy of Insurance or at the Firm's option Certificate of Insurance or Letter of Insurance. No payment or any part thereof when due hereunder shall under any circumstances be withheld by the Indentors owing to any claim whatsoever in respect of the goods and all such claims if any shall be notified in writing to the Firm within 14 days from the arrival of the goods at port of destination after which no claim shall be entertained by the firm."

Clause 5 of the contract is as follows:--

"It is hereby expressly agreed that the goods under this Indent shall after arrival of the steamer at port of destination continue to remain at the sole risks in all

respects of the Indentors and that on failure of the Indentors to pay against and take up the documents as abovementioned the Firm may at their option but shall not be bound to land, clear and store the goods for the Indentors' account and may at the like option but without obligation as aforesaid insure the goods, x x x x x""

The next relevant clause is clause 11 which reads as follows:

"The indentors shall not under any circumstances raise any dispute as to late shipment or delivery if same be only 15 days after the specified time and they agree to abide by the condition of the Bills of Lading and to accept the date of the Bill of Lading or the date of "Received for shipment", Bill of Lading or the date of steamer owners" or agents or other transport. Agency or Carrier"s dock, canal, railway or wharfinger"s receipt or certificate as conclusive evidence of the date of shipment without further proof being required."

2. Now the first question to be considered is what is the nature and scope of this contract. The form in which the contract is entered into is designated as "C.I.F." It is well settled that the essential feature of an ordinary C.I.F. contract as compared with an ordinary contract for the sale of goods rests in the fact that performance of the bargain is to be fulfilled by delivery of documents representing the goods and not by the actual physical delivery of the goods by the seller. The principal obligations which, a seller undertakes in a C.I.F. contract in the strict sense of the term are (a) to ship at the port of shipment within the time mentioned in the contract goods of the description " contained in the contract, (b) to procure on shipment a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract, (c) to effect an insurance on the goods upon the terms current in the trade which will be available for the benefit of the buyer, (d) to make out an invoice of the goods and (e) to tender these documents to the buyer -- the bill of lading, the invoice and the policy of insurance. But variations in one or other of these obligations, or inclusion of terms in the contract inconsistent with these obligations do not prevent the contract from being a C. I. F. contract provided they do not affect the essential character of the contract. The only obligation on the buyer, apart from express agreement is to be ready and willing to pay the price in exchange for the documents. There is some controversy on the question as to whether the payment of the price and the tender of the documents are concurrent conditions or the buyer must pay the agreed price within a reasonable time of the presentation of the documents. It is not however necessary for the purpose of this case to enter into a discussion of this controversial question.

3. In a recent decision of the Madras High Court reported in R.V. Narayanaswami Chetty, sole Proprietor of R.V.N. Chandrasekhara Chetti Vs. Soundararajan and Co. Ltd., , the nature and scope of the C.I.F. contract has been described) in the following words:--

"The vendor on C.I.F. terms is in the absence of any specific provision to the

contrary, bound by his contract (i) to make out an invoice of the goods, sold, (ii) to ship the goods at the port of shipment unless the contract is in regard to goods already afloat, (iii) to procure on shipment a contract of affreightment under which goods will be delivered at the destination contemplated by the contract) and (iv) to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. The seller having procured the necessary documents is under an obligation to send them forward to the buyer accompanied by an invoice showing the amount due from the buyer within a reasonable time. He must make every reasonable exertion to send them forward as soon as possible after he has destined the goods to the buyer. If no place be named in the contract for the tender of the shipping documents, they must prima facie be tendered at the residence or place of business of the buyer. The buyer must be prepared to pay or accept the draft, as the case may be, according to the terms of the contract of sale, within a reasonable time after the shipping documents are tendered to him. What is a reasonable time is a question of fact depending on the circumstances of that case. In ordinary cases obviously payment must be made promptly on the tender of the documents with the invoice. As the essential feature of a contract of sale C.I.F. is that performance is satisfied by delivery of documents and not by the actual physical delivery of the goods, it follows that all that the buyer can call for is the delivery of the documents we have mentioned. This represents the measure of the buyer's right and the extent of the vendor's duty. The buyer cannot refuse the documents and ask for the actual goods nor can the vendor withhold the documents and tender the goods they represent."

4. In the present case the contract, as I have pointed out, already bears the heading "indent on C.I.F. terms". But it has been held that the use of the label "C.I.F." is not conclusive. The true effect of all the terms of the contract must be taken into account though of course the description C.I.F. must not be neglected (see *Comptoir d'Achat et de Vente du Boerenbond Belge S/A v. Luis de Ridder (The Julia)* 1949 AC 293. The next term in the contract which is material for the purpose is that the price is fixed as Rs. 32/8/- Ex. Jetty in place of Rs. 25/8/- per hundredweight C.I.F. Calcutta which was the price originally agreed upon. This indicates that the parties were contracting that delivery would be given and taken from the jetty after the arrival of the goods at the port of Calcutta. In a decision of the House of Lords reported in *Yangtze Insurance Ltd. v. Lukmanjee* 1918 AC 585, where a contract was entered into for purchase of teak logs to be shipped at a price "ex-ship, payment against documents", the contract was construed by Lord Sunnier in the following words: --

"In the case of a sale "ex-ship" the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery and has reached a place therein, which is usual for the delivery of goods of the kind in question. The seller has therefore to pay the freight or otherwise to release the ship-owner's lien and to furnish the buyer with an effectual direction to the ship to deliver. Till this is done the buyer is not bound to pay for the goods."

5. So the expression "price Rs. 32/8/- ex-jetty" along with the other term in the contract to the effect that the buyer will make an advance deposit of 25 per cent of the C.I.F. value and duty on acceptance of the indent and the balance on presentation of the shipping documents indicates that the seller undertook to pay in the first instance the C.I.F. value of the goods and customs duty and also the clearing charges at the port of destination and after clearing the goods to give delivery to the buyer at the jetty. So, although the expressions payment "on presentation of shipping documents or "against documents" (clause 2) find place in the contract and although in clause 2 the nature of the documents is also specified which are usually the documents which a seller in a C.I.F. contract is bound to procure and tender to the buyer, it is clear from the perusal of the contract as a whole that the contract in the instant case contemplates that the duty of the seller was to clear the goods at the port of destination after payment of the customs duty and the landing charges and to deliver the goods to the buyer ex-jetty and not to tender the shipping documents merely to the buyer immediately on the arrival of the shipping documents. The buyer is also not under any obligation to pay the balance of the price until after arrival of the goods at the port-of destination and until after the clearing of the goods through the Customs and the landing of the goods have taken place. It is only after the landing of the goods that the buyer would have to pay the balance in exchange for such documents as could be made over to the buyer, namely, the policy of insurance, the invoice and an additional copy of the bill of lading if available, in order to enable the buyer to make a claim against the insurance company in case any portion of the goods is found to be damaged or lost. It is, therefore, clear that the ordinary or orthodox C.I.F. contract stood modified or varied to the extent indicated above. That this is the right construction of the contract in question also receives support from a decision of this Court reported in *Madhoram Hurdeodas v. G. C. Sett*, ILR Cal 28: (AIR 1918 Cal 830). In that case also the delivery of the goods under a contract entered into in C.I.F. form was to be made after the arrival of the goods within three days of arrival, and the buyer was given 45 days' credit after the date of delivery for payment of the price. It was held that these variations did not alter the nature of the C.I.F. contract, although the ordinary C.I.F. contract stood modified to the extent of the special terms agreed upon between the parties. At p. 45 of the report (ILR Cal : (at p. 833 of AIR) the expression "delivery ex-jetty" finds place though such expression was no part of the contract. Sanderson, C. J. in construing the contract which was the subject-matter of construction before him in that case made the following observations:--

"After some discussion during the argument it appeared that there was little, if any, material difference between the interpretation placed upon the contract by the learned counsel appearing for the plaintiffs and defendants; and both argued the case on the assumption that the contract was an ordinary C.I.F. contract with this variation that the payment specified in the contract was not to be made as usual against the documents and was not to be made in this case until 48 days

after the landing of the goods. That having regard to the special terms of this contract, it was not the duty of the defendants to hand over the documents relating to the goods as soon as the documents arrived but that they were entitled to retain them until the goods arrived when it would be the duty of the defendants to hand over the documents to the plaintiffs for the purpose of taking delivery or for the defendants to take delivery themselves in the first instance and that payment would become due 48 days after the landing of the goods. The question, therefore, arises what were the incidents of the defendants' undertaking in such a contract. The variation of the terms as to the time of payment does not, in my judgment, alter the nature of the contract as C.I.F. contract."

Mookerjee, J. in dealing with the question observed as follows:--

"The agreement between the parties constitutes what is known as C.I.F. or C.F.I, (costs, freight and insurance) contract subject to an important variation. The rights and liabilities of the parties to a C.I.F. contract were formulated by Mr. Justice Hamilton in *Biddell Brothers v. E. Clemens Horst Co.*, 1911-1 KB 214 in the following terms which were approved by Kennedy L. J. in his celebrated dissentient judgment in the Court of Appeal -- *Biddell Brothers v. E. Clemens Horst Co.* 1911 1 KB 934 which was upheld by the House of Lords and characterised by Lord Loreborne L. C. as a remarkable judgment illuminating the whole field of controversy: *E. Clemens Horst Co. v. Biddell Brothers* 1912 AC 18:--

"A seller under a contract of sale containing such terms has, firstly, to ship at the port of shipment goods of the description contained in the contract; secondly, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract; thirdly, to arrange for an insurance upon the terms current in the trade which will be available for " the benefit of the buyer; fourthly, to make out an invoice as described by Blackburn, J. in *Ireland v. Livingston* 1872 5 H.L. 395 at p. 406 or in some similar form; and, finally, to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods if they arrive and recover their loss if they are lost on their voyage. Such terms constitute the agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivered on board the ship at the port of shipment. It follows that against tender of these documents, the Bill of Lading, Invoice, and Policy of Insurance which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price" (see also *Houlder Brothers Co. Ltd. v. Public Works Commissioner* 1908 A C 276. In the case before us there was this departure from the normal incidents of a C I.F. contract that the payment was to be made not against the documents but 48 days after the goods had been landed. It follows accordingly that the defendants were under no obligation to hand over the documents to the plaintiffs immediately on receipt thereof; they could tender the documents on arrival of the goods or might take delivery themselves and make

over the goods to the plaintiff."

6. Now in the present case although the defendant-appellant by their letter of the 10th of February, 1949 had assured that the arrival date of the ship by which the goods were coming would be intimated to the plaintiff in due course, no such intimation was given. It was on the 6th of April, 1949 that the defendant for the first time informed the plaintiff that they had cleared the goods from the ship and had stored them in the godown and asked the plaintiff to take delivery upon payment. So it is clear that the delivery was not given Ex jetty upon arrival of the goods and the defendant committed breach of the contract and failed to give delivery in terms of the contract although this was the undoubted obligation of the sellers to do u/s 31 of the Sale of Goods Act. The plaintiff on receipt of the letter of the 6th of April, 1949 pointed out by their letter of the 18th of April 1949 that physical delivery of the goods themselves had not been offered to them at all till then. The defendant replied on 20th of April, 1949 inter alia in the following terms:

"We are afraid you are under a misapprehension when you suggest that our clients must offer the goods. On the contrary the position is that your clients must apply for delivery."

This is a curious attitude taken up by the defendants. If no intimation was given of the arrival of the goods, the plaintiff could not possibly be expected to apply for delivery. The defendant in an earlier letter written on the 24th of February, 1949 called upon the plaintiff, apparently under a misapprehension of the rights and obligations of the parties to the contract, to pay the balance of the C. I. F. value of the goods and not the agreed contract price as against the shipping documents as they perhaps thought that the nature of the contract was not altered by the special stipulation as to delivery Ex Jetty and they also perhaps thought that it was their duty to offer the shipping documents as soon as such documents arrived, as is normally to be done under an ordinary C. I. F. contract. But why they asked for payment of an amount less than the actual price agreed upon is not at all clear. But this fact certainly raises a cloud of suspicion in the mind of the court as to the bona fides of the attitude taken up by the defendant by this letter. There is no doubt that by not giving delivery of goods Ex Jetty, the defendant had committed a breach of the contract and the buyer was not under any obligation to take delivery of the goods after the goods had been removed to the godown. Furthermore, the seller was also under the obligation to tender the documents agreed upon in Clause 2 of the contract to the buyer in the present case after the arrival of the goods at the port of destination and after they were landed at the Jetty against payment of the balance of the price. The decided cases lay down the proposition, as I have indicated already, that in an ordinary C. I. F. contract the seller has to tender the C. I. F. documents or the agreed documents to the buyer at the latter's residence or place of business in the absence of any contract to tender the documents at any other place. It is sufficient to refer to the case of *Johnson v. Taylor Bros, and Co., Ltd.* 1920 A. C.

144 where at page 156 of the Report Lord Atkinson after referring; to the cases of (1872) 5 H. L. 395: (1911) 1 K.B. 934, and C. Sharpe and Co. v. Hosawa Co., (1917) 2 KB 814 proceeded to make the following observations:

"These cases also establish that if no place be named in the c.i.f. contract for the tender of the shipping documents they must prima facie be tendered at the residence or place of business of the buyer."

Our attention was drawn by the learned counsel for the appellant to the case of Stein Forbes and Co. v. County Tailoring Co. (1916) 115 L. T. 215 where Atkin, J. had to construe a contract described as a C. I. F, one and containing words to the following effect:

"Payment" : "net cash against documents on arrival of the steamer."

The learned Judge observed as follows:

"I am satisfied that the defendants were informed by telephone of the arrival of the steamer immediately after she arrived. It was said, however, that the plaintiffs should have tendered the documents to the defendants at the defendants' office. In the absence of any express stipulation to this effect, or some trade usage or course of business between the parties importing such a stipulation, I doubt whether the obligation on the vendor exists."

The learned Judge also referred to Section 29(1) of the English Sale of Goods Act, 1893 and to the past conduct of the defendants, in coming to the conclusion that there was no obligation Or duty on the plaintiffs to tender the documents at the defendants office. It appears to me that the general proposition sought to be laid down by Atkin, J. to the effect that no obligation is imposed on the vendor to tender documents at the buyers' office in the absence of express stimulation or trade usage or course of business can no longer be regarded as good law in view of the observation to the contrary made by Lord Atkinson in 1920 A. C. 144 at p. 158 and in the cases referred to at that page. In the case before us the delivery of the goods having been stipulated Ex. Jetty, it is possible to construe the contract as imposing an obligation on the seller to tender the agreed documents specified in Clause 2 of the contract at the Jetty and not at the buyer's place of business. But even this obligation does not appear to have been performed by the defendant in this case. No such tender was at all made in the instant case. Therefore, both in the matter of giving actual delivery of the goods and in the matter of tendering the proper documents, the defendant-appellant in my view committed breach of the contracts in question.

7. It may be noted at this stage that although the goods were not admittedly shipped during November or December 1948 but were shipped on 12th January, 1949 the learned trial Judge has found that under Clause 11 of the contract the sellers were entitled to an additional grace period of 15 days for effecting shipment of the goods, and so the shipment was in terms of the contract. This finding of the learned Judge has not been challenged before us, on behalf of the

respondent.

8. A good deal of argument has, been addressed on the question of construction of Section 35 of the Sale of Goods Act and about the buyers and sellers obligation under this section. It has been argued that it was incumbent on the plaintiff as buyer to apply for delivery of the goods whether the defendant intimated to the plaintiff about the arrival of the ship or not, and as that was not done, the plaintiff's suit for damages or for refund of the advance on the ground of non-delivery is not maintainable. Section 35 of the Sale of Goods Act is as follows:

"Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery."

9. It is clear from the language of this section that the section is designed for the benefit of the seller. The effect of the section is that in all contracts of sale, of goods a term is to be imported that the seller is not bound to deliver the goods until the buyer applies for delivery and this term may be negatived only by an express agreement or term dispensing with the obligation of the buyer to apply for delivery to the seller. It is well-known that this section 35 has been substituted in place of Section 93 of the Contract Act with a slightly different wording. In Section 93 of the Contract Act the words were "in the absence of any special promise the seller of goods is not bound to deliver them until the buyer applies for delivery."

In the case of AIR 1935 67 (Privy Council) the Judicial Committee in construing Section 93 of the Contract Act observed:

"It is important to observe that Section 93 applies unless there is a special promise which in their Lordships' opinion indicates an express stipulation as to delivery which relieves the buyer from the obligation to apply for delivery, or the necessary implication of such a stipulation from the nature of the contract as expressed. It might also arise out of usage or custom of trade, as provided in Section 1 of the Contract Act. But in their Lordships' opinion an obligation -- assuming that it existed in the present case as is suggested by the High Court -- on the seller to inform the buyer when the goods are in a deliverable state is not a special promise within the meaning of Section 93, though it may postpone the obligation of the buyer to apply for delivery, and, on the elapsing of a reasonable time to enable the goods to be procured by the seller from the mills, the buyer would be entitled and bound to apply for delivery."

10. It appears to me that the expression "apart from any express contract" is introduced in Section 35 for excluding the scope of any implied stipulations. It may be pointed out that in *Dinkerrai Lalit Kumar Vs. Sukhdayal Rambilas*, Chagla, J. (as he then was) held that this statutory obligation on the buyer to apply for delivery must be performed before he can be said to have a cause of action against the seller for non-delivery. The learned Judge remarked as follows:

"When a buyer sues a seller for damages for non-delivery application for delivery on his part is a part of the cause of action and must be explicitly stated."

11. Now it is to be pointed out that in the case before us the goods were being imported from a foreign country by the seller and the delivery was to be given at the jetty. So there was clearly an obligation on the sellers to inform the buyer about the arrival of the goods at the port of destination. It was only then that the obligation, if any, of the buyer to apply for delivery would arise. But as I have pointed out already no intimation was given at all about the time of the arrival of the goods or the ship. It is only after committing a breach of the contract by not delivering the goods at the jetty and after removing the goods to the godown that the plaintiff was called upon to take delivery. So, in the circumstances of this case the plaintiff in my view cannot be made liable for breach of the statutory obligation. But the question that arises further is whether Section 35 has any application to a c. i. f. contract in the strict sense of the term, or to a c. i. f. contract which has been coloured by certain special stipulations or terms agreed upon between the parties. It is clear from the cases which have been referred to in the earlier part of the judgment and which dealt with the nature" of the c. i. f. contract that there is a clear obligation on the seller to tender the shipping documents or certain agreed documents at a particular stage and the buyers" obligation is to pay the price against the tender of the documents or against delivery of goods and tender of the documents. So it appears to me that when it is an initial obligation of the seller to tender the documents and it is upon such tender that the obligation of the buyer arises to pay the price in exchange of the Documents and to take delivery of the goods, the provisions of Section 35 are not applicable to such a case. It has been pointed out already that according to the proper construction of the contracts with which we are concerned in this case, the obligation of the seller was to deliver the goods ex jetty after the arrival of the goods at the port of destination and to tender the appropriate documents at that stage. Such being the nature of the obligation of the seller under the contract in this case, I do not think that the buyer can be made liable for any breach of the statutory obligation to apply for delivery, or can be called upon to make an application for delivery as contemplated by the section.

12. The further question that has been canvassed before us is whether the plaintiff respondent is entitled to obtain refund of Rs. 8,151/-which was paid by way of advance deposit. It has been argued by the appellant that this sum was paid by way of security for due performance of the contract and so it is liable to be forfeited. The contention of the respondent is that it is a mere advance or part payment and the consideration having wholly failed by reason of non-delivery of the goods, this amount is refundable to the plaintiff. Attention was drawn to certain passages in the leading case of *Howe v. Smith* (1884) 27 Ch. D. 89 and to certain other decisions reported in *Mayson v. Clonet* 1924 AC 980, *Farr, Smith" and Co. Ltd. v. Messrs. Ltd.* (1928) 1 KB 397, *D. Rattamma v. K. Krishnamurthy* AIR 1928 Mad 326, *Venkataperumal Naidu v. Thiruppuvanam Panchayat Board*, (S) AIR 1936 Mad 717, *Katherine Stiffles v. C. M. Martin* 39 CWN 174, and

Naresh Chandra Guha Vs. Ram Chandra Samanta and Others, . But I do not think it necessary to deal with these cases at any length or to express any definite opinion on this point in view of my finding that it is the defendant who has committed breach of the contracts and not the plaintiff. The weight of authority is in favour of the view that it is only when the buyer who has made the advance payment or deposit as security for future performance of the contract has committed a breach of the contract that he can be deprived of the benefit of obtaining; a refund of such payment and such payment is liable to be forfeited by the seller. I may, however, point out that there is a reference to most of the relevant cases on the point in a recent decision of a single Judge of the Allahabad High Court reported in Kanpur Iron Brass Works and Flour Mills Vs. Banarsi Das and Others, , where the learned Judge had to consider a case of payment which was made by way of advance and as deposit, as in the case before us, and the learned Judge construed the payment as not an advance simpliciter but also as an offer of security for future performance of the contract having regard however to the other evidence before him which supported such a construction.

13. As I have indicated already, the buyer not having been guilty of any breach of the contract, there is no question that he is entitled to obtain a refund of the money paid by him whether such payment is regarded as an advance simpliciter or as a guarantee for the future performance of the contract.

14. In the result, this appeal must fail, and it is dismissed with costs. Certified for two Counsel.

P.B. Mukharji, J.

15. In any view of the facts, whether the contract in this case is an orthodox C.I.F. contract or a hybrid C. I. F. contract or an ordinary contract for delivery of goods, the appellant cannot succeed.

16. If the contract in suit is a C. I. F. contract, then it is established on the facts of this case that there has been no tender of the necessary documents. It is essential in a C. I. F. contract that all the documents required thereunder must be tendered. The omission of any one of them entitles the buyer to reject even though the goods had arrived safely. See Kennedy's C, I. F. Contracts, Third Edition, p. 118. The observations of Blackburn J. in (1872) 5 HL 395 at p. 406 also supports this view. In this appeal before us the particular bill of lading which has been disclosed does not even identify either the quantity or the Quality of caustic" soda which the parties stipulated under the contract. No invoice showing the price and identity of these goods and no insurance policy are even disclosed. There is no proof by the seller-appellant that he in fact at any stage tendered these particular documents.

17. The importance of tendering all the documents and the correct documents relating to the goods was emphasised by McCardie, J. in Manbre Saccharine Co. Ltd. v. Corn Products Co. Ltd., (1919) 1 KB 198 at p. 205, where the learned

Judge observed:

""Even if the defendants had tendered the policies actually held by them I should still have held the tender bad, for they were policies which covered a quantity of goods outside those mentioned in the bills of lading and invoices sent to the plaintiffs. In any opinion a purchaser under a c. i. f. contract is entitled to demand, as a matter of law, a policy of insurance which covers and covers only the goods mentioned in the bills of lading and invoices."

If policy of insurance is so essential and if it is so essential that that policy must show that only the goods under the contract are covered and nothing else, a fortiori the bill of lading which is tendered must show that it covers only the goods of the buyer and nothing else. The seller-appellant has failed to establish this.

18. Secondly, on the facts of this appeal the tender of the goods by the appellant was made Ex godown and not Ex jetty as stipulated under the contract. That again is breach by the appellant. The decision of the English Court of Appeal in *Fisher, Reeves and Co. Ltd. v. Armour and Co. Ltd.*, (1920) 3 KB 614 is an authority for saying that where the goods contracted to be sold were "ex store Rotterdam" but were after arrival in fact stored in lighters and the seller offered them from the store, of the lighters, the goods so stored could not be correctly described as sold "ex store," and that the buyers were entitled to repudiate the contract. I think the buyers in this case were justified in refusing to accept any goods from the appellants godown when the contract was Ex Jetty because Ex Jetty delivery more greatly ensures that the goods are really imported stuff while delivery ex godown leaves room for disputes and differences on the point. It is all the more so here because specific clauses 4 and 5 of this contract show what the seller-appellant should have done in case of the buyer's refusal to follow the contract. These rights were, first, the right to re-sell! the goods and, secondly, to have the option to land, clear and store the goods on the refusal of the buyer to pay against the documents and charge the landing, clearing and storage and other expenses to the buyer and then to re-sell them on notice. The appellant did not act either according to Clause 4 of this contract or according to Clause 5 of the contract. Therefore, the appellant also committed breach on that ground as well.

19. If it was not a C. I. F. contract but a contract to deliver the goods on arrival, then the fact is established that in, this case the seller did not give any notice to the buyer of the arrival of the goods or of the ship nor did they give any notice to the buyer that the goods having arrived the buyers had not taken delivery of them at the jetty. I and the sellers would be removing them to their godown. In fact, goods were never offered by seller to be delivered against price in this case. Therefore, if it is not a C. I. F. contract, even then the appellant is in breach.

20. It is necessary to add a few words on the nature of a C.I.F, contract and the

applicability or Section 35 of the Indian Sale of Goods Act to such a contract. The main principles of a C. I. F. contract and its essential features are authoritatively summarised in several well known judgments of the English Courts. It will therefore be wholly unnecessary to repeat them here. The six principles of Lord Atkinson in his speech in the House of Lords in 1920 AC 144 at p. 155 remain the classic insignia of a C.I.F. contract. They are:

"First, to make out an invoice of the goods sold. Second, to ship at the port of shipment goods of the description contained in the contract. Third, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable despatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of insurance, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of their price. These cases also establish that if no place be named in the c. i. f. contract for the tender of the shipping documents they must prima facie be tendered at the residence or place of business of the buyer."

21. That tender of the documents at such place was not made by the appellant, for their letter of 24-2-1949 by which it was attempted to be done does not answer that test of tendering the shipping documents at the residence and place of business of the buyer.

22. In Volume 55 of Corpus Juris at p. 39 a C. I. F. contract is defined in the following terms:

"A "c. i. f. contract" of sale, is a well-known form of shipping contract, and is a contract for the sale of goods to be performed by the delivery of certain stipulated documents, and under which the purchaser pays a fixed price, for which the seller furnishes the goods and pays the freight and insurance to the point of delivery, and all risks while the goods are in transit are for the account of the buyer."

These main principles or essential features of a C. I. F. contract are not in dispute. The real question in every case, however, is to remember and recognise that apart from these general features or principles, C, I. F. contracts can take and assume various forms and patterns. It is a part of the Common Law and Law Merchant. Therefore, the exigencies of every situation, the peculiar requirements of individual buyers and sellers are always making new types and clauses in the contract suited to the needs and demands in each case. So long as these new types or clauses introduced in Individual cases do not infringe on the essential features of the C. I. F. contract, they still remain patterns and varieties of C. I. F. contract. To seek any rigid pattern in this respect will be to unnecessarily restrict commerce, and particularly international commerce and trade. This does not mean that terms may be introduced into contracts in a form which will conflict

with the essential C. I. F. terms or principles and prevent them from being C. I. F. contracts, Law, therefore, will have to steer clear of both the extremes on either side.

23. In the Calcutta case of ILR 1918 Cal 28: (AIR 1918 Cal 830) it was held *inter alia* by Sanderson C. J. and Mookerjee J. that the variation of the terms as to the time of payment did not alter the nature of the contract as a C. I. F. contract. Again, the mere fact that there is a stipulation as to delivery or arrival in a C. I. F. contract is not sufficient to alter the effect of the C. I. F. contract. In *Tregelles v. Sewell* (1862) 7 HN 574 the contracts specially stipulated "delivered at Harbrough, cost, freight and insurance" and yet it was held that according to the true construction of the contract the seller did not contract to deliver the iron which was the subject-matter of the contract at Harbrough and that the seller was discharged of his liabilities when he put on board the ship bound for Harbrough these goods and handed the buyers the shipping documents. A frequent case is where the contract is expressed to be C. I. F. but provides for payment on arrival of the ship. That is illustrated by *Fragano v. Long* (1825) 4 BC 219. In spite of the express stipulation that three months' credit was to be given from the time of "arrival" in the contract in that case, it was held that the arrival was not considered to be a condition precedent to the payment. These different types and forms are also discussed in the celebrated dissent of Kennedy, L. J. in (1911) 1 KB 934 at p. 963 and which dissent was ultimately upheld by the House of Lords. The most recent decision is the one of the House of Lords in the case of (1949) AC 293. The ratio of the decision of the House of Lords is that the criterion of a C. I. F. contract was that the buyer undertook to pay for and accept the documents as representing the goods rather than the goods themselves. That is why sometimes C. I. F. contracts have been described as a contract for sale of documents, an expression used by Scrutton, J. in *Amhold Karberg and Co. v. Blythe Green. Jourdain and Co.* (1915) 2 KB 379 at p. 388 but an expression which was not approved in the Court of Appeal in that case reported in (1916) 1 KB 495 at pp. 510 and 514.

24. Applying these principles and tests and without seeking for rigid patterns and purity of forms and admitting that there are many miscellaneous C. I. F. contracts some of whose terms are strictly C. I. F. while others are not so, it appears to me that the correct view of the contract in suit is to treat this contract as essentially a C. I. F. contract with special modifications particularly with regard to the clause relating to price and payment.

25. The price clause originally stated that it was, Rs. 25/8/- per cwt. C. I. F. Calcutta which was crossed out and a new clause written by him stating "Rs. 32/8/- Ex Jetty." The clause relating to payment has already been quoted by my learned brother, and the only point that I would emphasise here is that the last portion of that payment clause reads ""The balance we undertake to pay immediately on presentation of shipping documents." These two clauses on a proper reading in my view show that the essential nature of the c. i. f. contract

was retained because although the price was declared to be ex jetty, the presentation of shipping documents was retained and because Clause 2 of the contract stipulated that the payment was to be against specific documents. Therefore this 13 a c. i. f. contract with special variations.

26. The next point about the application of Section 35 of the Indian Sale of Goods Act to such a contract raises interesting and complex controversies. The history of Section 35 of the Indian Sale of Goods Act shows that it draws its descent from its old and forgotten parent in Section 93 of the Indian Contract Act, 1872 which read as follows -

"In the absence of any special promise the seller of goods is not bound to deliver them until the buyer applies for delivery."

Indian Sale of Goods Act came into the statute book in India in 1930. Before then the law relating to "sale of goods in India thrived as a part of the Indian Contract Act. The whole of the sale of goods portion appeared then from Section 76 to Section 123 of the Indian Contract Act, 1872. When the new statute of the Indian Sale of Goods Act came to be framed, the inspiration was the English Sale of Goods Act of 1893. The English Sale of Goods Act was copied almost totidem verbis by the Indian Sale of Goods Act, specially the relevant sections which are under discussion on this point. But when the Indian statute came to the old Section 93 of the Indian Contract Act, it did not know what to do with it because that provision was absent from the English Sale of Goods Act so, perhaps it was thought that it was safe not to exclude this although its introduction in the Indian Sale of Goods Act meant a departure from the total imitation of the English Sale of Goods Act which it was making so far. The Select Committee's observation in their Report that "It is true that there is no specific provision in the English Act corresponding to it (i. e. s. 35). But the principle seems to have been well recognised in England also" appears erroneous in the last part because we have not been able to trace any single English case where this principle was at all recognised in English law. That is how we have today now both Section 31 of the Sale of Goods Act which is the copy, word for word, for Section 27 of the English Sale of" Goods Act. 1893 (and Section 35?). Now Section 31 of the Sale of Goods Act as introduced provides:

"It is the duty of the seller to deliver the goods and of the buyer to accept and pay For them in accordance with the terms of the contract of sale."

Section 35 of the Act as it stands now is as follows:

"Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery."

27. Plainly these two sections appear to be on the first reading contradictory. If it is the duty of the seller to deliver u/s 31 in accordance " with the contract, then to provide again subsequently that the seller is not bound to deliver until the buyer applies is either to graft an exception on Section 31 which is framed

without qualification or to indicate a plain contradiction. An attempt was made to reconcile, as it has to be made as best as one can, by the suggestion that the seller's duty to deliver u/s 31 of the Sale of Goods Act is only to do so "in accordance with the terms of the contract of sale," as though there could be any other kind of delivery except according to the contract of sale. But in Section 35 of the Act by reason of the expression "apart from any express contract," it was said that the seller's obligation to deliver would only be there if parties expressly made such a contract. I confess that I am a little puzzled not only over the argument to reconcile the irreconcilable but also because I do not see the common sense behind it. It seems to me odd indeed if parties were to stipulate in a contract expressly that the seller will be bound to deliver without the buyer applying for it. I cannot imagine such a course normally to be taken by traders and merchants who will not know the mysteries of the Indian Sale of Goods Act. Secondly, what is this express contract in Section 35? I can understand express as opposed to implied. But "express contract" can be either oral or in writing. Then the question will arise whether the custom or usage of the trade relating to c. i. f. contracts would be included in the expression "express contract." The point almost came to a head in AIR 1935 67 (Privy Council) but just missed the fire. My learned brother has quoted the observation of Lord Thankerton who delivered the advice of the Judicial Committee at page 97 of that Report (Ind App): (at. p. 70 of AIR). There of course the usage or custom of trade came in through Section 1 of the Contract Act and the expression "special promise" which the Judicial Committee was considering under the old Section 93 of the Indian Contract Act of 1872. It is necessary perhaps that Parliament will have to pay some attention to this curious provision contained in Section 35 of the Indian Sale of Goods Act. Until that is done, we have to do as best as we can with this statutory provision and I propose to deal with it in this manner.

28. In the first place, I am of the opinion that Section 35 of the Indian Sale of Goods Act only refers to delivery of goods. The expression in that section is "the seller of goods is not bound to deliver them." Therefore, where goods are to be delivered, it is only there that Section 35 can at all be attracted sensibly in spite of Section 31 of the Indian Sale of Goods Act. It does not apply where under the contract goods are sold by what is known as the sale of documents such as in c. i. f. contracts. Secondly, I propose to make Section 35 innocuous for the purposes of this appeal by holding on the facts that there is an express contract to deliver which answers the test, if the test of Section 35 at all applies. The expression "contract to deliver the goods without an application from the buyer" as contemplated u/s 35 of the Indian Sale of Goods Act in this case is contained in the opening words of the contract where the respondent agreed to buy these goods on the express terms ex jetty and on the express terms of notice to pay as contained in Clause 2 and on the express terms contained in Clause 4 which gave the seller the right to re-sell after three days from the failure of the payment on the presentation of the documents and also on the express terms as contained in Clause 5 of the contract.

29. The decision in Dinkerrai Lalit Kumar Vs. Sukhdayal Rambilas, holding that u/s 35 of the Sale of Goods Act it was obligatory upon the buyer to apply for delivery before the seller could be bound to deliver the goods, following the Judicial Committee, does not apply to the facts of this case because that decision was not concerned with the c. i. f. contract.

30. Having regard to our view that the Appellant committed breach of contract in this case, the other interesting question whether in this case the deposit was a deposit or really a security, does not arise for decision. The words used in this particular contract in suit are "advance deposit." This expression does not appear to have ever been construed by any decision. The leading case of (1884) 27 Ch. D. 89 and other decisions such as Naresh Chandra Guha Vs. Ram Chandra Samanta and Others, , R.M.K. Venkataperumal Naidu Vs. The Thiruppuvanam Panchayat Board, Thiruppuvanam, have been cited before us. The law is well settled on the point that the words deposit, security or earnest are relevant but not by themselves conclusive. It is also well settled that an express forfeiture clause is also not necessary to make it forfeitable, although the absence of a forfeiture clause may be a relevant consideration for a decision on the point. In fact the law is, as we understand it from the numerous decisions, that each case will have to be judged on its own facts to find out the true character of the deposit or advance according to the real intention of the contracting parties. In this case it appears that if it were necessary to hold we would have held that this was only a part payment of the price for three main reasons. First, the words "advance deposit" appear to indicate that this was not a deposit but really an advance towards the price and not a deposit in the sense of a guarantee for the performance of the contract. Secondly, throughout the correspondence even when there was acknowledged refusal by the buyer in spite of repeated requests of the appellant, the appellant never claimed to forfeit the money. Even in the solicitor's letter, forfeiture was not claimed by the appellant. Indeed even in the written statement the appellant does not plead forfeiture. The learned counsel for the respondent therefore graphically described the situation by saying that "it is only the counsel for the appellant who forfeited the money at the trial." Thirdly, having regard to the numerous details on which the contract speaks it is almost an irresistible inference that this was not intended to be forfeited.

31. I agree with my learned brother that the appeal should be dismissed with costs, certified for two counsel.