(2006) 09 CAL CK 0051

In the Calcutta High Court

Case No : Ordinary Original Civil Jurisdiction Original Side Suit No. 173 of 1980

Calicut Engineering Works (P) Ltd. APPELLANT

Vs

Batliboi Ltd. RESPONDENT

Date of Decision : 01-09-2006

Acts Referred:

Sales of Goods Act, 1930 — Section 12(3)

Citation : (2007) 1 CALLT 466

Hon'ble Judges : Arun Kumar Bhattacharya, J

Bench : Single Bench

Advocate : Surajit Nath Mitra, Arindam Sinha, Reetobroto Kumar Mitra and Rwitika Banerjee, for the Appellant;Shyama Prasad Sarkar, Rudradeb Chowdhury, Debjani Ghosh and Debasri Dutt, for the Respondent

Judgement

Arun Kumar Bhattacharya, J.—The Court: This is a suit for recovery of the price of machine together with interest amounting to Rs. 12,59,354.13 p. and loss of profit to the tune of Rs. 15,00,000/-.

2. A thumbnail sketch of the Plaintiffs case is that in or about March, 1977 it was agreed between the Plaintiff and Defendant which sells the products of Strojimport of Chechoslovakia in India, that the Defendant would sell and deliver to the Plaintiff a Gear Hobbing Machine Model OF-16 manufactured by M/s. ZPS Gottwaldov, Praha, Czechoslovakia for a price of Rs. 8,24,474.67 p. on terms and conditions set forth in the Order dated 26.03.77 of the Plaintiff and. accepted by the Defendant. At the time of entering into the said reagreement, the Plaintiff duly intimated the Defendant that the machine would be put to immediate use for meeting the ever-increasing demand of the Plaintiff''s product; in the market thereby leading to higher profit. In terms of the agreement the Plaintiff paid a sum of Rs. 8,24,474.67 p. by three cheques dated 02.03.77 for Rs. 50,000/-, dated 29.03.77 for Rs. 7,24,474.67 p, and dated 30.03.77 for Rs. 50,000/-, all drawn on Dena Bank, Park Street Branch which was duly encashed by the Defendant. On 31.03.77 the Defendant delivered to the Plaintiff at its Works at

1/2B, Khagendra Chatterjee Road, Calcutta five boxes said to contain the machine including accessories thereof, out of which one was found to be in broken condition. On 01.04.77 after unpacking the boxes and preliminary examination of the same, the machine was found to be not of the Model of-16 as agreed to be sold, the machine parts were soaked and cavities thereof filled with water and there were extensive rust on the body of the machine, on many vital parts of the accessories electronic assemblies were loose and shaky and some parts missing the machine including the accessories were not in the original packing of the manufacturer and without any packing list inside and the contents of the boxes were not packed in waterproof papers and that no literature or instruction manual of the manufacturer was there. Immediately the Plaintiff brought the same to the notice of the Defendant through its Manager over phone on 01.04.77 followed by a letter dated 02.04.77 to the Defendant rejecting the machine and accessories with a request to replace the machine by a new one. The Defendant failed and wrongfully refused to comply with the said requisition of the Plaintiff. The machine which has since been lying at the Plaintiffs Works was inspected and surveyed by a Chartered Engineer and a qualified Marine Surveyor who found the same badly damaged and not in accordance with the order placed. Instead of supplying a Gear Hobbing Machine OF-16, manufactured by ZPS Gottwaldov, Praha, Czechoslovakia, the Defendant had supplied an old and used machine Model OF-16, manufactured by M/s. TOS Celakovice E.P. There was a sale of the said machine by description, but the Defendant committed breach of contract by supplying a machine which did not correspond with the description, for which the Plaintiff has suffered damages. There was thus a total failure of consideration and the Plaintiff is entitled to refund of the amount of Rs. 8,24,474.67 p. together with interest @ 18% p.a. to the tune of Rs. 4,34,879.46 p. under the provisions of the Indian Sale of Goods Act, 1930 and by way of damages. Installation, commission and utilization of the said machine would have enabled the Plaintiff to earn a minimum profit of Rs. 5,00,000/- p.a. which for the last three years would have aggregated to Rs. 15,00,000/-, of which the Defendant had and has due notice and/ or knowledge. Hence the suit.

3. The suit is contested by the Defendant by filing a written statement inter alia denying the material allegations made in the plaint. The defence case, in short, is that the Plaintiff company made a formal enquiry in or about February, 1977 for purchase of one Czechoslovakian made Gear Hobbing Machine from the Defendant which submitted a quotation for the said machine, subsequently amended onJ26.03.77, to the Plaintiff. Thereafter, the Plaintiff submitted its order on 26.03.77 for purchase of the said machine which was accepted by the Defendant to sell the machine for Rs. 8,24,474.67 p. subject to the terms and conditions contained in the said order and in the said two quotations. The Defendant made clear to the Plaintiff that the machine was ready for immediate delivery from the incoming consignment already booked for Bombay Port. Pursuant to the said contract the Plaintiff had paid to the Defendant a sum of Rs. 8,24,474.67 p. and the Defendant duly delivered a brand new machine of

Czechoslovak origin contained in five boxes on 31.03.77 to the Plaintiff which accepted the same. At the time of delivery it was noticed that one of the five packing boxes in which the machine was packed was in a slightly damaged condition. The said Czechoslovakian make Gear Hobbing Machine was marked with Model No. OF-16 which is also known as OF-16. "OF" in Czechoslovak language stands for "Odvalovaci Frezka" which in English language means "Gear Hobbing Machine", and the Plaintiff at all material times was aware that there was no difference between OF-16 and FO-16 Model and it did not affect specification, capacity and character of the machine which was clarified by the manufacturer of the machine, in case of Czechoslovak machine, packing instructions are generally not inserted in the boxes of machine but the documents are supplied separately. It was made clear by the Defendant to the Plaintiff in the instructions note that the Defendant company shall supply one set of literature and instructions, and it was not incumbent on the Defendant to insert the literature and instructions manual inside the packing box of the machine. On 31.03.77 in the evening the Plaintiff through its Managing Director informed Mr. S.C. Nagpal, Manager of Machine Tools Division of the Defendant over phone about certain allegations of the machine which was duly attended to by the Defendant''s Service Engineers and the said Mr. Nagpal who found the machine absolutely in cruer except that some slight superfluous rust in the gear box and slides of column. The machine and the accessories thereof were otherwise found to be in perfect order and condition. During joint inspection of the machine and accessories by the Service Engineers of the Defendant along with one Mr. Singh and Mr. Gupta representing the Plaintiff, the same were found in correct condition except that one square handle was found missing, and accordingly a report was prepared taking inventory of the machine and accessories which was duly signed by the said Service Engineers, but Mr. Singh and Mr. Gupta refused to sign the same. A letter dated 02.04.77 was received by the Defendant from the Plaintiff intimating unilateral rejection of the said machine including the accessories thereof which being illegal and wrongful was never accepted by the Defendant. In the instructions manual and in the inspection report issued by the firm, which inspected the machine and found the same in order, it was made clear that OF and OF marking are one and the same. The Defendant by its letter dated 15.04.77 duly explained and clarified the position regarding the alleged complaint and made it clear that the machine supplied was a brand new machine and was in accordance with the specification as contained in the acceptance of the order made by the Plaintiff and as per terms and conditions of the contract and that the Defendant was ready and willing to perform its obligation to supervise the erection of the machine, commissioning the same and to make the trial runs of the machine under terms of guarantee given by the Defendant which was turned down by the Plaintiff. In such circumstances, the property in the machine having already passed to the Plaintiff, the question of removal and replacement of the machine did not and does not arise. The alleged inspection and survey by Chartered Engineer and Marine Surveyor was conducted by the Plaintiff unilaterally without any notice to the Defendant which was absolutely irregular, illegal and not binding on the Defendant. The Defendant repeatedly called upon and requested the Plaintiff to hold a joint survey of the machine and fixed up appointment for the purpose, but the Plaintiff refused to produce the said machine for the purpose of further inspection and survey. There was no breach of agreement nor any failure of consideration nor the Plaintiff suffered any damage, as alleged.

4. Certain sums towards price of the machine and on account of octroi duty, sales tax, surcharge and additional surcharge to the tune of Rs. 43,623.13 p. along with interest @ 18% p.a. thereon from the date of the bill i.e. 31.03.77 is due from the Plaintiff and the Defendant is entitled to set off/counter-claim for the said amount.

5. Hence, the suit merits dismissal.

6. Upon the above pleadings, the following issues were framed:

(1) Has the Plaintiff any cause of action?

(2) Is the suit barred by limitation?

(3) Was the machine delivered to the Plaintiff by the Defendant in conformity with the terms and conditions of the Agreement and Order?

(4) Was the purported rejection of the machine by the Plaintiff illegal, wrongful and not according to law?

(5) Is the Plaintiff entitled to get a decree, as prayed for?

(6) To what relief, if any, is the Plaintiff entitled?

Issue No. 2: Not pressed.

Issue Nos. I, 3 to 6: All these are taken up together for the sake of convenience and brevity and in order to avoid repetition.

7. The Plaintiff has brought this suit for recovery of the price of the machine to the tune of Rs. 8,24,474.67 p. together with interest @18% from 01.03.77 till 29.02.80 amounting to Rs. 4,34,879.46 p., totaling to Rs. 12,59,354.13 p. and loss of profit to the tune of Rs. 15,00,000/-.

8. The facts undisputed in the present case are as follows: The Plaintiff company placed an order dated 26.03.77 (Ext. B) for supply of a Gear Hobbing Machine Model OF-16, remanufactured by M/s. ZPS Gottwaldov, Praha, Czechoslovakia for a price of Rs. 8,24,474.67 p. to Defendant which accepted the same and delivered a Gear Hobbing Machine Model FO-16, manufactured by M/s. TOS Celakovice E.P., Czechoslovakia on 31.03.77 (Ext. E) contained in five boxes at the Works of the Plaintiff at 1/2B, Khagendra Chatterjee Road, Calcutta. The price of the said machine of Rs. 8,24,474.67 p. was paid by the Plaintiff by three cheques, one dated 02.03.77 for Rs. 50,000/-, another dated 29.03.77 for Rs. 7,24,474.67 p. and the other dated 30.03.77 for Rs. 50,000/-. After unpacking of

the said boxes on 01.04.77 the Plaintiff could detect certain defects which were brought to the notice of the Defendant on that very date over phone followed by a letter dated 02.04.77 (Ext. F) to the Defendant intimating rejection of the machine inter alia on the grounds that it is damaged, rusty, appeared to be old and of different model being FO-16, with a request for removal of the same at their cost and for replacement of the machine by a new one. The Defendant by letter dated 15.04.77 did not agree to the said request contending that the machine supplied was the latest and brand new one in terms of the contract.

9. To prove the Plaintiffs case Mr. Sital Kumar Dutta and Mr. R.K. Poddar Agarwal, Managing Director of Plaintiff Co. were examined as P.W. 1 and P.W. 2 respectively, while Mr. Amarendranath Dey was examined as D.W. 1 on behalf of the Defendant.

10. Mr. Sarkar, learned Counsel for the Defendant, on referring to the said letter dated 15.04.77 of the Defendant to the Plaintiff, letter dated 21.04.77 of supplier Strojimport, Czechoslovakia to the Defendant and letter dated 26.04.77 (Ext. J) from Trade Representative of Czechoslovakia in India to the Plaintiff advanced argument contending that the word "OF" in the Czechoslovak language stands for "Odvalovaci Frezka" which in English language means "Gear Hobbing Machine" and as there is no difference between Model OF-16 and OF-16 which is a mere nomenclature and when the machine corresponds with the specification, capacity and character as spelt out in the Order dated 26.03.77 of the Plaintiff and without trial it''s functioning could not be determined, the rejection of the machine on the part of the Plaintiff was totally unjustified as there was no breach of the contract on the part of the Defendant. On account of wrong stamping, Mr. Sarkar contended, Model OF-16 instead of OF-16 on the machine took place and through clerical error manufacturer ZPS Gottwaldov instead of TOS Celakovice, as deposed by D.W. 1A. Dey (Q-157), occurred in the quotation of the Defendant, and that ZPS does not manufacture any Gear hobbing Machine. Mr. Sarkar on referring to Sub-section (3) of Section 12 of the Sale of Goods Act, 1930 further contended that as the machine was on the high sea for sometime there was slight superfluous rust or the gear box and slides of column which could be removed by splash of Kerosene and it did not affect at all the quality of the machine nor was it any ground for rejection of the machine and repudiation of the contract, in support of which the cases of V.K. Kumaraswami Chettiar and Others Vs. P.A.S.V. Karuppuswami Mooppanar, , Hopkins v. Hitchcock, reported in (1863)143 ER 369 at 370 and National Traders, a Firm of Merchants in Partnership Vs. Hindustan Soap Works, a Firm of Merchant, were relied on.

11. Mr. Mitra, learned Counsel for the Plaintiff, on the other hand, on drawing Court''s attention to the initial offer of the Defendant to the Plaintiff through letter dated 22.02.77 (Ext, N), quotation from the Defendant (Ext. A), Order dated 26.03.77 of the Plaintiff (Ext. 13), preformed invoice (Ext. C), delivery order dated 29.03.77 (Ext. E), bill dated 31.03.70 raised by the Defendant (Ext. 4), import application (Ext. Q/1) and customs document (Ext. Q/2) submitted

that in all the aforesaid documents Model OF-16 has been specifically mentioned and in some of them (Exts. N, A and B) the name of the manufacturer ZPS Gottwaldov, Praha finds place, and even at the time of negotiation the brochure (Ext. 1) made over to the Plaintiff and at the time of examination of defence witness another brochure (Ext. 2) produced speak of Model OF-16, but ''still when the machine of a different model and manufacturer was supplied, there was completely a breach of contract on the part of the Defendant. Mr. Mitra on referring to the Plaintiffs letter dated 02.04.77 (Ext. F) further submitted that after receipt of five boxes one was found to be in broken condition and after unpacking the boxes the machine was found to be covered with heavy rust and damage, rust having been penetrated inside the body, and some parts were missing and the machine appeared to have been installed somewhere prior to the delivery, and so in such circumstances his client was not obliged to accept the machine, as it was a pure case of sale by description and failure of consideration, and for that reason requested the Defendant to replace the same which they failed to comply.

12. To start with, the defects in the machine may first of all be ascertained. According to the defense contention, on being informed by Mr. Agarwala, Managing Director of the Plaintiff over phone, Mr Nagpal and Service Engineers of the Defendant inspected the machine and found slight superfluous rust on the gear box and slides of column, and during the joint inspection by the Service Engineers of the Defendant along with one Mr. Singh and Mr. Gupta of the Plaintiff company, one square handle was found missing. According to the Plaintiff, the machine parts were so aked and cavities thereof filled with water, and there was extensive rust on the body of the machine and vital parts thereof as also on its accessories, and some parts were missing. According to the report (Ext. O - subject to objection) of survey conducted by an Engineer of the Plaintiff company, there were rust on various parts of the machine viz. gears and pinions of gear box for longitudinal and horizontal feed, vertical slide way of the main body, reverse clutches, work table and longitudinal screw thereof etc., and the cause of rust/corrosion might be due to keeping the machine in open place without proper packing for a considerable period resulting in accumulation of rain water inside the machine cavity and consequent rust damage to various bright parts to such an extent that the entire protective coating had deteriorated and peeled off in many places and this may likely to impair the satisfactory performance and accuracy of the machine. According to the report of joint survey (Ext. 3) conducted by the surveyor Mr. E.R.K. Swami, there were three defects only viz. (1) one number square handle missing, (2) rust damage on the gears of the gear box, and (3) rust damage on the sliding surface of the vertical column. In the letter dated 21.04.77 (Ext. U/l) from Strojimport to the Defendant it has been stated that the machine was packed with sea-worthy packing, but ignorance has been expressed as to the cause for the rusty condition. None of the Surveyors of the Plaintiff and Defendant has been examined. Even if the evidence of the Defendant is taken into account it becomes undisputed that the

machine was damaged with rust and an important part was found missing. Now, if a brand new machine was properly packed sea-worthy and was on voyage only for a period of one and a half months, it is something unusual that it would be rusty and damaged for that reason only.

13. Nevertheless, u/s 15 of the Sales of Goods Act, where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. In other words, sale as per the above provision may take place in two ways viz. (1) sale by description, and (2) sale by sample as well as by description. The effect of Sub-section (1) of Section 41 of the Sale of Goods Act is that in cases where there has been no previous examination of the goods, "the mere fact that the buyer has taken delivery of them does not amount to an acceptance until he has had a sufficient period for examining them to see whether they are or are not in accordance with the contract". The said provision of Section 15 covers two types of cases viz. failure to secure exact conformity to the full contractual description of goods and total failure to perform the contract. In the said second type of cases the goods supplied are to be regarded as not being the goods ordered and therefore the contract is not performed. As a matter of law, every item in a description which constitutes a substantial ingredient in the identity of the thing sold would be a condition, as was held in the case of Couchman v. Hill, reported in (1947) K.B. 554 at 559. The key to Section 15 is identification. The "description" by which the goods are sold is confined to those words in the contract which are intended by the parties to identify the kind of goods which were to be supplied. Ultimately the test is whether the buyer could fairly and reasonably refuse to accept the goods proffered to him, on the ground that their failure to correspond with that part of what was said about them in the contract makes them; goods of a different kind from those he had agreed to buy. The failure of the seller to supply goods answering the description in the contract is a total failure to perform it, and not merely a breach of one term of it, as was held in the case of Sorabji Hormusha Joshi and Co. Vs. V.M. Ismail and Another, Whether the property appears to have passed to the buyer or not, he is entitled to reject the goods if they are not in accordance with the description in the contract, provided that the description forms an actual part of the conditions of the contract and is not something collateral to it. A man is not bound, unless he has altered his position by some conduct of his own, to accept and to pay for goods which are not in accordance with the description of the goods he bargained for.

14. As per provision of Sub-section (2) of Section 12 of the said Act, a condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contracts as repudiated, whereas under Sub-section (3) of the said section, a warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages

but not to a right to reject the goods and treat the contract as repudiated. Sub-section (4) provides that whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract, and a stipulation may be a condition though called a warranty in the contract.

15. A condition is a clause "going to the essence of contract" and a warranty as a clause is "only collateral to the contract", the difference between an essential condition and a non-essential promise (a warranty) being that in the former case, the innocent party, on becoming aware of the breach, can consider himself discharged and sue for damages for loss of the contract or keep the contract on foot and recover damages for the particular breach. The question whether a term in a contract is essential or not, depends upon the intention of the parties. The test of the former is whether the promise is of such importance to the promise that he could not have entered into the contract without an assurance of a strict or substantial performance of the promise. A contracting party is bound to perform his contract according to its terms, to deliver the specific goods, if he sold ascertained goods, or to supply goods answering the description in the contract if he contracted to sell goods not ascertained. Offer of a thing different from what was contracted for is not a breach of one term, but a total failure to perform the contract. In the usual sense, the condition means an essential undertaking in the contract which one party promises will be made good. It it is not made good, not only will the other party be entitled to repudiate the contract but also to sue for damages for" breach, as was observed in the case of M/s. Venkateswara Minerals v. Jugalkishore Chiranjitlal, reported in AIR 1986 Kar 14 at 19. In the case on hand, D.W.I stated that TOS Celakovice is the manufacturer of Gear Hobbing Machine in Czechoslovakia (Q-14) and the name of ZPS Gottwaldov in their offer took place due to typographical mistake (Q-153) which is contradictory to his subsequent evidence that Gottwaldov is another manufacturing company Czechoslovakia (Q-156) That apart, ModeljDF-16 has specifically mentioned in all the above documents pointed out by the learned Counsel for the Plaintiff the name of manufacturer ZPS Gottwaldov has been borne out in the offer letter (Ext. N), quotation (Ext. A) and Order (Ext. B) which was duly accepted by the Defendant. Merely because "OF" in Czechoslovak language stands for "Odvalovaci Frezka" thereby meaning in English language "Gear Hobbing Machine" or that other specifications e.g. maximum diameter with and without support stand etc. correspond with the contract, it does not necessarily follow that machine supplied was in conformity with the order placed by the Plaintiff and accepted by the Defendant. Here, not only the model but also the manufacturer differ from the said order and acceptance. That the machine was wrongly stamped as FO-16 instead of OF-16 as contended by the learned Counsel for the Defendant or that the manufacturer ZPS Gottwaldov was reflected in the offer letter through clerical or typographical mistake, as deposed by D.W. 1 does not find place in the defense pleadings. To a suggestion put to P.W.2 R.K. Poddar Agarwal that OF-16 and FO-16 mean the same thing in Czechoslovakian language, he replied, that is the altogether story made by the

Defendant, and had it been so, he would have written FO-16, but he wanted to purchase OF-16 (Q-79). It is his further evidence that he ordered for OF-16 machine and in challans, bills: delivery order everywhere it was mentioned as OF-16 he purchased (Q-85). It is his evidence that he was possession of FO-6 machine which cuts upto 6 module, for last 20 years, but this FO-16 is a bigger one which cuts upto 16 module, but there was no precision accuracy machine. They have other American and English made machine and when they suggested that this is a high quality precision machine he was influenced by that and ordered for the same (Q-58). To a question that the machine or arrival was rejected on visual inspection, he stated that his technical persons, his foreman were there and they checked the machine and rejected the same then and there (Q-90). It is his further evidence that he did not purchase machine from TOS Company and he has already a few machines of them, and there are other machine of that company at different places at Calcutta and whoever purchased the machine of that company repents. Where the contract was for supply of a Gear Hobbing Machine Model OF-16 manufactured by M/s. ZPS Gottwaldov, Praha but the Defendant supplied such machine of different mode being FO-16 manufactured by TOS Celakovice E.P., it cannot be said that it was in conformity with the contract, no matter whether other specifications relating to maximum diameter with and without support stand and gears cut upto module may correspond. As such, the present case being a sale by description and breach within the meaning of Sub-section (2) of Section 12 of the said Act, it is a pure and simple case of breach of contract, and the Plaintiff could reject the machine.

16. The case of Hopkins (referred to in Kumaraswami case) involved a contract for sale of iron bars with marks "S. and H. Crown" which were manufactured by a firm called Snowden and Hopkins and sold with the marks "S. and H. Crown". Snowden retired and firm''s name was changed to Hopkins and Co. and the marks on the goods were altered into "H. and Co. Crown". But they were rejected by the purchasers on the ground that they did not bear "S. and H. Crown" and were, therefore not in accordance with the description. The jury found that the goods were of the same quality and on that it was held that there was a proper tender. In other words, the same company with altered name sold the goods which is not the situation here. The facts being quite different from the case on hand, the said decision has no manner of application here. Similarly, the case of National Traders (supra) involving different facts and circumstances is of no aid to the defense, on the contrary, it favors the Plaintiff, since it was held that in every contract to supply goods of a specified description, which the buyer had no opportunity to inspect," the goods must not only answer the description but must be saleable or merchantable under that description. Those two conditions namely (1) answering the description in the contract, and (2) merchantable quality are embodied in Section 15 and 16 of the Sale of Goods Act. u/s 15, if there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description. u/s 16(2) there is a further implied condition where there had been no previous inspection

by the buyer, that the goods are of merchantable quality. The effect of these two definitions is to give a right or an occasion to the buyer to reject the goods in case what was tendered did not answer the description or was not of merchantable quality. The passing of property in the goods is not the ^ test as to the applicability of this right. If the goods do not conform to the description there is no performance of the contract at all. If the goods are not of the merchantable quality the thing for which the buyer bargained for was not given. In either case the default of the seller goes to the root of transaction and therefore the occasion would arise to the buyer to reject the goods and sue for the price if he had paid the price.

17. On referring to Section 73 of the Contract Act Mr. Sarkar argued that in case of breach of contract, the party suffered by the breach is entitled to compensation for any loss or damage which the parties knew, at the time of making the contract, to be likely to result from the breach, but compensation cannot be given for any remote and indirect loss or damage, and since neither his client nor the Plaintiff was aware of the loss or damage at the time of making the contract, the question of payment of damage by his client does not arise. Referring to the Contract Act by Chestire, 14th Edition, p. 728 and relying upon the case of Sha Thilokchand Poosajiv. Crystal and Co., reported in AIR 1955 Mg. 481 (para 14), Mr. Sarkar contended that even if for argument sake is considered that the Plaintiff is entitled to damage, he cannot claim both price and damage, and as the Plaintiff has already got back the price paid by it and, thus has exercised its option, it cannot claim further damage.

18. Before dealing with the subject, it is worthwhile to mention that the said machine was sold at a price of Rs. 10,50,000/- to the highest bidder in 1988 and after adjusting the costs, charges, expenses and remuneration, Rs. 10,00,000/- was lying with the joint receivers who were directed by order dated 17.02.89 to pay the purchase price of Rs. 8,24,414.67 p. to the Plaintiff and the balance sum was directed to be deposited in fixed deposit. The said payment to the Plaintiff was made on an undertaking that the Plaintiff would deposit the amount and would refund the same as and when called for by the Court.

19. Nevertheless, the law with respect to damages for breach of contract of sale of goods is contained in Sections 56, 57, 59, 60 and 61 of the Sale of Goods Act, 1930, and by virtue of Section 3 of the said contracts of sale of goods are governed by Sections 73 and 74 of the Contract Act. In the absence of stipulation of sum in case of breach and other stipulations by way of penalty, Section 74 does not apply in the present case.

20. u/s 73 of the Contract Act, where a contract is broken, the party suffering from the breach of contract is entitled to receive compensation from the party who has broken the contract. Compensation can be recovered for loss or damage:

(a) that arose in the usual course of things from such breach; or

(b) which the parties knew at the time they made the contract as likely to result from such breach.

21. It is the fundamental principle of damages for breach of contract that these are awarded to place the injured party in the same position in which he would have been, had he not sustained the injury of which he complains, and accordingly damages must be commensurate with the injury sustained. In the case of Sha Thilokchand Poosqji (supra), so referred to by the learned Counsel for the Defendant, it was held that when a seller delivers goods not answering to that contracted for, the buyer has one of two alternative remedies open to him, viz. (a) reject the goods and obtain a refund of the price if paid in advance and sue for damages for non-delivery. In such an event, the damages he would obtain would be the difference between the contract price and the market price of the goods on the date of the breach if the latter were higher; and (b) waive condition and accept the goods and sue for damages for a breach of warranty. Though the above decision is mainly on Section 59 of the Sale of Goods Act, which deals with Remedy for breach of warranty and not breach of condition like the case on hand, the principle squarely remains the same. The case of Rameswardas Poddar v. Paper Sales Ltd., reported in AIR 1944 (31) Bom 21 at 23 may also be referred to where it was held that when goods are paid for at the time of purchase and the seller fails to deliver them the purchaser is entitled to recover the purchase money with interest from the date when it was paid till judgment in the suit for damages filed by him and that the purchaser would also be entitled to damages for breach of contract on the usual basis, the measure of damages being the difference between the contract rate and the market rate prevailing at the date of the breach.

22. Mr. Sarkar submitted that no document has been produced on behalf of the Plaintiff showing that it incurred loan from bank and as such interest, if payable, should be nominal from the date of alleged breach of contract till the date of recovery of the amount.

23. Interest may be recoverable in the following cases:

(1) where there is an agreement to pay interest;

(2) where interest is payable in accordance with a usage;

(3) where a course of dealing between the parties justifies the award of interest, and

(4) where a case falls within the provision of Interest Act, 1839, or some other law.

24. In the case of AIR 1938 67 (Privy Council) it was held that though there can be no objection to the order for the payment of interest from the date of institution of the suit to the date of the decree and from the date of the decree of the Trial Court to the date of payment the same found due to the Plaintiff at the date of the said decree u/s 34 of the Code of Civil Procedure, interest for the period prior to the date of the suit may be awarded, if there is an agreement for

the payment of the interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the Plaintiff to recover, interest. It was further observed that the Proviso to Section 1 of the Interest Act, 1839 applies to a case in which the Court of equity exercises jurisdiction to allow interest. But in order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction. Reference may also be made to the case of Mahabir Prashad Rungta Vs. Durga Datt, . Here, existence of a sta of circumstances having not been established, the Plaintiff is not entitled to get any interest prior to the date of institution of the suit.

25. In the present case, though, as stated earlier, the Plaintiff has claimed interest (c)18% p.a., in the application for payment of the entire sale proceeds it contended that it has to pay interest to Dena Bank Park Street Branch, Calcutta against a loan of Rs. 6,00,000/- in cash credit account. P.W.2 claimed 15% interest which he is said to has paid to the Bank (Q-91) but no document in support of the said statement has been produced. Even then, when the said sum of. Rs. 8,24,474.67p. was blocked for a considerable period and the general provision u/s 34 CP. Code is based upon justice, equity and good conscience, awarding a simple interest @10% p.a. on the above sum from the date of institution of the suit i.e. 04.03.80 till the date of payment i.e. 07.12.89 will, to my mind, meet the ends of justice. In this connection, reference may be made to the case of Sovintorg (India) Ltd. Vs. State Bank of India, New Delhi, .

26. As regards damages the contract took place on 26.03.77 and the machine which was an imported one was rejected on 02.04.77, and so there was no difference between the contract rate and the market rate on the date of breach. Accordingly, no damage on this ground can be allowed to the Plaintiff.

27. The next question that arises for consideration is who is entitled to the surplus amount of Rs. 10,00,000/-minus Rs. 8,24,474.67 p. so paid to the Plaintiff.

28. As stated earlier, u/s 41(1) of the Sale of Goods Act, in cases where there has been no previous examination of the goods, "the mere fact that the buyer has taken delivery of them does not amount to an acceptance until he has had a sufficient period for examining them to see whether they are or are accordance with the contract". Section 42 provides that the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them. As per provision of Section 43 of the Act, when a buyer properly rejects the goods, it is not his duty to send them back to the seller and it is enough for him to give clear notice that they are not accepted, and then they are at the seller''s risk; he is not bound to put himself to the expense and trouble of returning the goods, and it is the seller''s business to

take away the goods if he is so minded. Once a buyer elects to reject the goods, he divests himself of his title to them and the property is thereupon vested in. the seller. It follows that he cannot thereafter without the consent of the seller re-appropriate the goods to the contract and purport to accept them as in performance of the original contract. Where the seller does not accept the rejection, it is clear that in a case where this divesting of the property from a buyer and the vesting of it in the seller takes place as a result of the conjoint action of the buyer anu the seller, the buyer cannot subsequently, by any unilateral act of his own, divest the seller of his title to the property and purport to accept the goods as in performance and delivery of the original contract, as was held in the case of Sha Thilokchand Poosaji (supra). So, when of account of rejection of the machine by the Plaintiff it divested itself of its title to the same, it vested in the seller, i.e. the Defendant and as such Plaintiff cannot claim the surplus amount which obviously belongs to the Defendant.

29. As regards loss of profit, it has been contended by the Plaintiff that had the machine bargained for been delivered "and installed it would have earned a minimum profit of Rs. 5,00,000/- p.a. and thus totalling to Rs. 15,00,000/- in three years. In support of such contention a number of orders from different firm and companies and cancellation of the same (Exts. X, Z, AA, BB, CC etc.) have been produced. All the said orders are long after the date of rejection of the machine. It is the evidence of P.W.2 that after purchase of the machine they informed their customers that they have purchased a new big Gear Hobbing Machine with better precision (Q-27). But here purchase did not take place at all. It is his further evidence that he did not accept any order before arrival of the machine as he could not be able to supply if he had no such machine (Q-92). If that be so, the question of loss of profit of the Plaintiff does not arise at all. On the face of the said evidence and in view of the aforesaid proposition of law that a buyer can claim refund of the purchase price with interest and damage, there is no scope for allowing this prayer.

30. The Defendant, as discussed earlier, has claimed set off/counter claim to the tune of Rs. 43,623.13p. towards price of the machine and on account of octroi duty, sales tax, surcharge and additional surcharge, along with interest @ 18% p.a. thereon. An issue in this regard should have been framed, but frankly speaking, it was missed. Nevertheless, it was ultimately not placed by the learned Counsel for the Defendant.

31. In the premises, let me hasten to sum up that the Plaintiff is entitled to refund of the purchase i.e. 8,24,474.67p. plus simple interest @ 10% p.a. the said sum from the date of institution of the i.e. 04.03.80 till the date of payment of the said sum the Plaintiff i.e. 07.12.89 which comes to Rs. 8,04,747/-. The surplus amount out of the sale-proceeds of Rs. 10,00,000/- after deducting the aforesaid purchase price of Rs. 8,24,474.67p. and interest amount of Rs. 8,04,747/- is payable to the Defendant.

32. All the said issues are accordingly answered in favour of the Plaintiff.

33. The suit is, as such, decreed in part with cost against the Defendant. The Plaintiff do get a decree for Rs. 8,24,474.67 p. towards refund of of the machine. The Plaintiff do further get a decree for simple interest @ 10% p.a. on the aforesaid sum from the date of institution of the suit i.e. 04.03.80 till 07.12.89 which comes to Rs. 8,04,747/-. Since the said amount of Rs. 8,24,474.67p. has already been paid to the Plaintiff, the said payment stands adjusted and the Plaintiff is discharged from the undertaking given by it to refund the said sum. If the amount in fixed deposit is not sufficient to meet the said amount of interest the Plaintiff will be at liberty to recover the balance amount of interest in due course of law. After meeting the amount of interest from the fund in fixed deposit, if there be any surplus, such surplus amount be paid to the Defendant. The joint receivers shall stand discharged after withdrawal of the amount in fixed deposit and payment of the same Plaintiff and thereafter the surplus amount, if any, to the Defendant as aforesaid.

34. The department is directed to draw up the decree as expeditiously as possible.

35. The department and all parties are to act on a signed copy of the operative part of this order on the usual undertakings.

Urgent xerox certified copy of this Judgment, if for, be supplied to the parties with utmost expedition.

