

(1962) 12 BOM CK 0009
In the Bombay High Court
Case No : Appeal No. 467 of 1960

Chalisgaon Shri Laxmi Narayan Mills Co. Ltd.

APPELLANT

Vs

Armitlal Kalidas Kanji

RESPONDENT

Date of Decision : 06-12-1962

Acts Referred:

Companies Act, 1913 — Section 171
Contract Act, 1872 — Section 55, 73
Limitation Act, 1908 — Section 14, 3

Citation : AIR 1964 Bom 76 : (1963) 65 BOMLR 746 : (1963) ILR (Bom) 587

Hon'ble Judges : Patel, J;K.K. Desai, J

Bench : Division Bench

Advocate : V.V. Divekar, for the Appellant; C.N. Daji, instructed by Dixit Maneklal and Co., Attorneys, for the Respondent

Judgement

K.K. Desai, J.—This is an appeal against the decision of the Civil Judge, Senior Division at Jalgaon, in Special Suit No. 26 of 1955, dated 11th April 1960, decreeing in favour of the plaintiff Rs. 49,673-6-0 with proportionate costs and further interest at 4 per cent per annum.

2. The short relevant facts are as follows:

By a provisional contract dated 2nd July 1950 (being Exh. 52-A), the appellant-defendants" Mills agreed to sell and the respondent-plaintiff agreed to purchase 1,49,693 yards of grey calendar long cloth for export at the ex-Mill price of Re 0-10-9 per yard for July-August 1950 delivery. The provisional contract, admittedly, was made because of export control restrictions which were in existence at all material times. In pursuance of this provisional contract, the Mills agreed to sell and the plaintiff agreed to purchase by 3 contract in writing dated 24th July 1950 (being Exh. 57-A), the above, goods at the price as mentioned above. The relevant provisions in this contract run as follows:

"Delivery was to be taken at Chelisgaon. Ex-Mill Godown Delivery.

As per annexure "B" Export Licence No. UMM 336 dated 18th July 1950 against our Provisional Contract for Export Cloth dated 2nd July 1950"

The plaintiff repeatedly demanded delivery of the goods, in this connection, his letters of demand dated 3rd February 1951 (being Exh. 69) and 22nd May 1951 (being Exh. 77), are clear and relevant. There are other letters of demand, which are on record. In connection with the contract as agreed between, the parties, the plaintiff paid Rs. 25,000 by way of deposit in the first instance. The plaintiff also furnished to the defendants" Mills an export licence dated 15th July 1950. In August 1950 the defendants" Mills forwarded to the plaintiff a proforma invoice in connection with 43,693 yards of the contract goods and called upon the plaintiff to pay Rs. 34,205-3-0. The plaintiff deposited Rs. 24,205-3-0 in the account of the defendants" Mills and gave credit to the defendants" Mills for the sum of Rs. 10,000 out of the deposit of Rs. 25,000 that he had made and called upon the defendants" Mills to effect delivery. Despite repeated demands, the defendants" Mills failed to give delivery of the goods and the plaintiff thereupon by his Attorneys" letter dated 14th November 1950, once again made a demand for delivery. The defendants" Mills made false excuses and did not give delivery of the goods. The plaintiff from time to time extended the date for export of the goods under the export licence that was issued to him. By agreement of parties, the time for delivery of the contract goods was extended to 31st July 1951. Prior to that date, in the correspondence, the plaintiff pointed out that it was apprehended that Government would impose export duty on export of goods and intimated the defendants" Mills that he would claim the export duty which the defendants would become liable to pay having regard to their failure to effect delivery. The defendants" Mills made it clear in their replies to the plaintiff that they were not prepared to and would not bear the export duty in any event. The time for delivery was, in spite of the above refusal of the defendants" Mills to agree to pay the export duty, extended by agreement of parties to 31st July 1951, as already stated above. Even though the extended due date expired, the defendants" Mills failed to effect delivery of any of the goods. It is, however, an admitted fact that ultimately the defendants" Mills delivered and the plaintiff accepted delivery of 49,693 yards of the contract goods in June 1952. The plaintiff had arranged to pay the price due in respect of that quantity as already stated. The defendants" Mills failed to give delivery of the remaining balance of 1,00,000 yards of goods. In respect of the goods delivered the plaintiff had to pay export duty before exporting the goods in the sum of Rs. 10,649-4-0.

3. After correspondence, the plaintiff filed this suit on 6th June 1955. In the schedule to the plaint the plaintiff has claimed 6 items of moneys as being due to him as follows:-- (1) for damages for non-delivery of 1,00,000 yards of the contract goods at Rs. 0-5-3 per yard and loss of profit and claim of overseas buyers, Rs. 32,812-8-0; (2) damages for late delivery of 49,696 yards of the contract goods at Re. 0-2-0 per yard; and (3) export duty amounting to Rs. 10,649-4-0. It is unnecessary to refer to the remaining items as they have not been awarded in favour of the plaintiff, who has not filed any cross-objections.

4. By their written statement the defendant's Mills raised several contentions and, inter alia, contended that the defendants' Mills had not committed breach of the contract; that the time for performance of the contract was not extended; that the plaintiff was not ready and willing to perform his part of the contract at material times; that the suit was barred by the Law of Limitation; and that the plaintiff was not entitled to damages as claimed.

5. The learned Judge negatived the contention that the defendants' Mills had not committed breach of the contract or that the suit was barred by limitation. The learned Judge held that the time for performance of the contract was extended to 31st July 1951, and that the plaintiff was always ready and willing to perform his part of the contract. The learned Judge disallowed the plaintiff's claim to interest. As regards the claim for damages, on the evidence led, he held that the plaintiff was entitled to payment of the sum of Rs. 32,812-8-0 in connection with the 1,00,000 yards of goods not delivered and sum of Rs. 6,211-10-0 for late delivery of the quantity of goods delivered and also to the export duty amount of Rs. 10,649-4-0 which had been expended towards the export duty by the plaintiff.

6. In this appeal, Mr. Divekar for the appellants (defendants' Mills) has contended (1) that the plaintiff was not ready, and willing to perform his part of the contract, (2) that the suit was barred by the Law of Limitation and (3) that the damages awarded are excessive.

7. In connection with the first contention; the argument advanced by Mr. Divekar is that having regard to the terms in the contract made between the parties, it was necessary for the plaintiff to make demand for delivery along with tender of cash that there was no evidence that the plaintiff tendered any cash payment along with the demand for delivery and that for that reason one must come to the conclusion that the plaintiff was not ready and willing to perform his part of the contract. In this connection, he relied upon the provisional contract dated 2nd July 1950, and the ultimate contract dated 24th July 1950, as also the correspondence which is on record. Now it is true that under the contract between the parties, the delivery was to be effected by the defendants Mills ex-their godown at Challsaon. It is also true that in term 1 in the provisional contract it is provided that delivery of the goods will be given against cash payment. In this connection, it is also necessary always to bear in mind that at all material times transactions between the manufacturing Mills and the purchasers of cloth for export were governed, inter alia, by the provisions of the Export Control Act and the Cotton control Order. Manufacture of cloth was controlled in the widest possible manner. In connection with the cloth manufactured, it was impossible for the purchasers to know the quantities manufactured and as to whether the manufacturing Mills were in a position to effect delivery of the goods contracted to be sold. As is shown by the correspondence that is on record, it is clear that In connection with the goods to be manufactured for delivery under the contract in suit, the plaintiff repeatedly

wrote to the defendants" Mills inquiring about the manufacture of the contract goods and the probable dates for delivery thereof. In the correspondence the defendants Mills continuously informed the plaintiff that the goods were not ready for delivery. In connection with their liability to make deposit, the plaintiff made initial deposit of RS. 25,000 as required. When the plaintiff was informed in August 1950 by delivery of pro forma invoice of the defendants" Mills that 49,696 yards were ready for delivery the plaintiff immediately in accordance with the provisions in the contract and what had been discussed between we parties in correspondence paid In cash Rs. 24,205-3-0 and made available, from out of the initial deposit of Rs. 25,000 Rs. 10,000. The plaintiff thus in fact paid the total price of Rs. 34,205-3-0 that was shown by the defendants" MIIIS in their pro forma invoice as payable towards the price of the goods, in spite of the above payments made by the plaintiff in August 1950, the defendants" Mills failed and neglected to give delivery of the quantity mentioned in the pro-forma invoice (49,693 yards), till 7th June 1952. in spite of the conduct of the defendants" Mills in neglecting delivery even of these goods, the plaintiff repeatedly in correspondence made demands not only of these goods, but also of the whole of the contract quantity of the goods. The defendants continuously expressed their inability to effect delivery of the goods offered as well as the balance of goods. Even so, the plaintiff from time to time for the convenience of parties agreed to extend time for delivery of the goods to 31st July 1951. It is abundantly clear that the plaintiff was throughout ready and witting to pay the price of goods, if they were manufactured and offered or available for delivery by the defendants. The defendants in fact having received the price of 49,696 yards of the contract goods in August 1950 effected delivery thereof after expiry of due date in June 1952. The defendants wilfully committed breach of the contract by expressing their inability to effect delivery of the remaining goods. It is difficult to appreciate how under these circumstances the contention made as above by Mr. Divekar can be accepted. In our view, the plaintiff was always ready and willing to pay cash against delivery. The defendants were wilfully negligent in effecting delivery. In those circumstances the plaintiff was not bound to tender price in cash or at all. The first contention must, therefore be negatived.

8. As regards the question as to whether the suit was barred by the Law of Limitation, Mr. Divekar has argued that admittedly the date of breach must be 31st July 1951, and that this suit was filed on 6th June 1955, i.e. more than 3 years, after the date of the breach. The suit being a suit for damages ought to be filed within 3 years from the date of the breach and therefore, was barred by the Law of Limitation. In this connection, Mr. Daji has relied upon the following facts: An order for winding up of the defendants" Mills was passed on 17th December 1951. The plaintiff lodged his claim for damages In respect, of the contract in this suit amounting to Rs. 1,79,103-11-9 with the Joint Official Liquidators of the defendants" MIIIS On 14th June 1952. On a reference by the Liquidators of the claim to the District Judge, the same was investigated by him. As regards the balance of deposit money i.e., Rs. 15,000 and interest, the District Judge granted

the claim of the plaintiff. By his order dated 30th April 1955, the District Judge held that "the claim being a claim for damages" the plaintiff "should establish and prove the same by filing a suit against the defendants" Mills". Having regard to that order, by their application dated 6th June 1955, the plaintiff applied to the District Judge, East Khandesh, who was dealing with the winding up of the defendants" Mills to give to the plaintiff leave to file the suit for the balance of the claim. By his order dated 6th June 1955 the District Judge granted that permission and the plaintiff accordingly filed this suit on 6th June 1955. Mr. Daji also relies upon the provisions of Section 171 of the Companies Act, 1943, which was applicable to the facts of the case, the section provides:

"When a winding up order has been made, no suit or other legal proceeding shall be proceeded with or commenced against the company, except by leave of the court and subject to such terms as the Court may impose"

He also relies upon the explanation to Section 3 and Section 14 of the Limitation Act. His first contention is that having regard to Section 171 of the companies Act, institution of the suit was completely barred and that having regard to the explanation to Section 3 and Section 14 of the Limitation Act, the application made to the joint liquidators on June 14, 1952, claiming the damages as claimed in this suit, was a civil proceeding in the Court of first instance. That proceeding was, for the inherent difficulty that the Court found in summary trial of the claim for damages, dismissed on 30th April 1955. The time that expired between the date of the winding up order and dismissal of that proceeding on 30th April 1955, must be excluded in computing the period of limitation. According to him, in any event, the time taken in the civil proceedings before the liquidators between 14th June 1952 and 30th April 1955, should be excluded In computing the period of limitation.

9. Mr. Divekar contends that the provisions in Section 171 do not bar institution of suits, and, therefore, the Gate of the winding up order has no relation with the computation of the period of limitation. He further contends that the lodging of the claim before the joint liquidators on 14th June 1952, cannot be considered as a suit or a civil proceeding and that In any event the dismissal of that claim in the manner mentioned above is not dismissal of a suit by a Court for defect of jurisdiction or any other cause of a like nature within the meaning of Section 14 of the Limitation Act and the time cannot be excluded.

10. In this connection, it is Important to notice the explanation to Section 3 of the Limitation Act. The first paragraph of Section 3, inter alia, provides that every suit or application instituted after the period of limitation prescribed therefor shall be dismissed. The explanation to the section provides:

"A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer, in the case of a pauper, when his application for leave to sue as a pauper is made; and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator".

11. In the case of *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 in connection with the proceedings instituted by the liquidators of a company in liquidation, their Lordships of the Privy Council considered the true construction and effect of the provisions of Section 3 of the Limitation Act. The suit in that case was instituted by a company in liquidation through its liquidators. In connection with the language in the explanation to that section, their Lordships observed: "The application of the liquidators would not be a suit within Section 3, if that section stood alone, unaccompanied by the explanation". Their Lordships did not accept the argument that the explanation showed by its concluding sentence, that the claim against a company in compulsory liquidation can be considered to be a suit instituted within those words in Section 3. They further observed:

"The explanation is not concerned with the question of what is a suit, or is to be considered a suit, within Section 3. It is addressed to quite a different subject-matter. It assumes the existence of a suit which has been instituted by the presentation of a plaint, and is concerned only with the point of time at which that suit is for the purpose of Section 3 to be treated as being instituted. The ordinary rule is stated by the explanation to be that the suit is instituted when the plaint is presented; but to this two exceptions are prescribed, namely, (1) in the case of a suit by a pauper, the time at which that suit is (for the purposes of Section 3) instituted, is to be taken as an earlier date, namely, the date when the application for leave to sue as a pauper was made; and (2) in the case of a suit against a company which is being wound up by the Court, the institution of the suit is (for the purposes of Section 3) advances also to an earlier date--namely, the date when the claim, was first sent in to the official liquidator".

Now, this observation of their Lordships, in our view, applies to the facts of this case in all particulars. The present suit is a suit against a company which is being wound up by the Court. As regards this suit, in accordance with the observations of Their Lordships, the date of the institution of the suit is not the factual true date being June 6, 1955, but for the purposes of Section 3 it stands advanced to an earlier date, viz. the date when the plaintiff lodged his claim in the first instance before the joint liquidators, i.e. June 14, 1952. That being the true position, having regard to the observations of Their Lordships, in this case we must hold that this suit though in truth instituted on June 6, 1955, was in law instituted on June 14, 1952. The result is that the suit was filed within about 11 months and 2 weeks from the date of breach being July 31, 1951.

12. The further observations as contained in the case of *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 also support the view that the application before the joint liquidators can be considered to be a civil proceeding instituted in a Court within the meaning of those words in Section 14 of the Limitation Act.

13. The relevant part of Section 14 of the Limitation Act provides.

"In computing the period of limitation prescribed for any suit the time during

which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or In a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and Is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature is unable to entertain it."

The first question that arises is as to whether the proceeding by way of lodging the claim before the joint official liquidators is "a civil proceeding in a Court of first instance" as referred to in the section. There would have been some difficulty in accepting the contention of Mr. Daji that the liquidators must be considered as the Court of first instance, if the language of the explanation to Section 3 as quoted above was not clear in providing that a claim lodged before the liquidator is relevant in connection with a suit against a company in liquidation, it is also clear having regard to the provisions of the Companies Act that all claims in respect of a company in winding up must be made by lodging them before the liquidator. It is not necessary or compulsory for any party having a claim against a company in liquidation to file a suit for recovering the amount due to the party. It is, on the contrary, necessary under the provisions of the companies Act that ordinarily a creditor of a company in winding up must initially lodge a claim for the amount due to him before the liquidator in accordance with the scheme prescribed by the Companies Act. The Act further provides for appeal and reference to the Civil Court for decision in the ultimate instance of the claims preferred before the liquidator. In appeals before the Court, the decisions of liquidator are liable to be confirmed, modified, and altered in all respects. It is having regard to that scheme that the Companies Act provides that as against a company ordered to be wound up no suit or proceedings could be continued or commenced except by leave of the Court. It is in the light of these provisions and the scheme of the Companies Act that we have come to the conclusion that a claim lodged before a liquidator of a company ordered to be wound up must be held to be a civil proceeding filed before a Court of first instance as provided in Section 14 of the Limitation Act. An extremely difficult and absurd position must arise if this is not the true construction of the provisions of Section 14 of the Limitation Act. In spite of a claim duly lodged before the liquidator having been fought out in the ultimate court, it would be permission for the defendants in a further suit which may have to be tiled to contend that the time that was taken in the proceedings before the liquidator cannot be excluded in computation of the period of limitation. In our view, the provisions of the Companies Act and the scheme therein provided for proof of claims by lodging the same before the liquidator were not intended to bring about such a situation.

14. In this connection, we may observe that similar questions have arisen having regard to the provisions in the insolvency Law and the courts have always held that where claims could be lodged before receivers and official assignees the time taken in infructuous proceedings before the receivers and the official assignees was liable to be excluded in computing the period of limitation.

15. We cannot accept the contention made by Mr. Divekar that the claim of the plaintiff was not rejected by the Court on the grounds as mentioned in Section 14 of the Limitation Act, viz. from defect of jurisdiction or other cause of a like nature. The claim of the plaintiff before the liquidators was ultimately rejected by the District Judge only on the ground that it was a claim for damages and could not be therefore disposed of summarily in the proceedings by way of claim. The District judge himself directed the plaintiff to file this suit if he wanted to substantiate his claim. It was hereafter that the District Judge dealing with the defendants' Mills in winding up gave leave for filing this suit. This rejection of the plaintiff's claim lodged before the liquidators, in our view, must be held to be rejection though not on the ground of defect of jurisdiction, in any event, on the cause of a like nature. It was permissible for the District Judge to deal completely with the claim of the plaintiff. He, however, appears to have felt difficulty in summarily dealing with the plaintiff's claim. He accordingly rejected the claim and directed the plaintiff to file the suit. These must be held to be the circumstances indicating the cause of a like nature within the meaning of that phrase in Section 14 of the Limitation Act. Having regard to the above findings, in our view, the period that expired between June 14, 1952 and April 30, 1955, must be excluded in computing the period of limitation for the filing of this suit.

16. In this connection, reference may be made to the case of *The Upper India Rice Mills Ltd. Vs. The Jaunpur Sugar Factory Ltd.*, where it is observed:

"The rule is that the liquidator of a company which is in liquidation being a trustee for the creditors, time does not run after an order, or resolution, for winding up. The date for testing the liability is the commencement of the winding up."

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17. Mr. Divekar for the Appellants has relied upon the decision in the case of *Nazir Ahmad v. Peoples Bank of N.I.* AIR 1942 Lah 289. In that case, there was no question relating to the true construction and effect of the provisions of Section 3 or Section 14 of the Limitation Act in connection with a suit filed against a company in liquidation. The question there related to the suit filed, against a company in liquidation without leave u/s 1/1 of the Companies Act. The Court held as follows:

"Where a plaintiff institutes a suit against a company in liquidation without the leave of the Court u/s 1/3 and subsequently applies for such leave within the period of limitation of the suit and the leave is granted only after the period of limitation has expired, the suit should not be dismissed and limitation should be calculated in the same way as if the suit had originally been instituted with leave. In our view, there is nothing in that case which is applicable to the facts of this case.

18. Having regard to what we have observed above, the contention made by Mr. Divekar that the plaintiff's suit was barred by the Law of Limitation must be

negatived.

19. The further contentions made by Mr. Divekar relate to the quantum of damages awarded to the plaintiff. A sum of Rs. 10,649-4-0 was awarded to the plaintiff as export duty that was levied by Government and paid by the plaintiff in connection with 49,693 yards of the contract goods that were accepted by the plaintiff in June 1952. A further sum of Rs. 6,211-10-0 was awarded in connection with these very goods as damages arising by reason of late delivery. The only ground on which the amount of export duty expended by the plaintiff could be awarded to the plaintiff would be that the item must form part of damages payable in connection with the late delivery of the above quantity of the contract goods. The plaintiff's case is that the due date for delivery in this case was extended upto July 31, 1951. Subsequent to that date, there was no obligation on either side to give or take delivery. The question is as to whether because the defendants gave delivery subsequent to the date of the contract and the plaintiff accepted belated delivery in July 1952, they become entitled to damages in connection with late delivery. It appears to us that this question can be resolved by referring to the provisions of Section 55 of the Contract Act, which relates to "effect of failure to perform at fixed time the contract in which time is essential". The first paragraph of the section in effect provides that in a contract where time is of essence and the contract is to be performed at or before the specified time and the promisee fails to perform his obligation at or before the specified time, so much of the contract that has not been performed becomes voidable at the option of the promisee. The second paragraph of the section relates only to contracts where time for performance is not of essence and is not relevant to the purposes of this suit. The third paragraph of the section provides:

"If, in case of a contract voidable on account of the promiser's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisee of his intention to do so".

As the contract between the parties was for sale of goods, the time for delivery must be held to be essence of the contract. The time for delivery in this case expired on July 31, 1951. The plaintiff accordingly was entitled to avoid the contract altogether and not accept delivery at any time subsequently, in the correspondence the plaintiff stated that he would charge the defendants the expenses incurred towards export duty as also damages that would ensue if late delivery was effected. The defendants refused to give delivery to the plaintiff if he insisted upon the above conditions. In fact the export duty was imposed in April 1951. Even so and in spite of the defendants having informed the plaintiff that the defendants would not pay any amount of the export duty, the time for performance was by consent of parties extended to July 31, 1951. By agreeing to

the above extension, the plaintiff, must be held to have given up and waived any right to payment of the export duty as damages, upon extension of the due date to July 31, 1951, the parties proceeded on the footing that for all purposes the plaintiff would have to pay and bear the export duty for himself. The plaintiff cannot, therefore, be entitled to recover the sum of Rs. 10,649-4-0 which he expended in connection with the export duty for consignment of the 49,693 yards that were delivered to the Plaintiff in July 1952.

20. As regards damages that arose due to late delivery, it is relevant to point out that the defendants' Mills committed wilful breach of contract and expressed inability to deliver any goods. The plaintiff thereupon towards late 1951 filed criminal complaint and prosecution against the directors and managing agents of the defendants' MILLS. The accused then appear to have arranged to get 49,593 yards of goods delivered to the plaintiff. The defendants' Mills were then ordered to be wound up. The liquidators then carried out arrangements made to effect delivery. The delivery was given under arrangements made due to criminal complaint and prosecution. The plaintiff having procured delivery in the above circumstances, must be deemed to have waived his right to damages arising on late delivery. Having regard to the above position, the plaintiff is not entitled to recover any amount by way of damages for late delivery of the 49,693 yards of the contract goods.

21. The further question relates to the sum of Rs. 32,812-8-0, which has been awarded to the plaintiff as damages in respect of breach of the contract by nondelivery of 1,00,000 yards of the contract goods. The breach admittedly occurred on July 31, 1950. Though it is not clear from the judgment of the trial Court, it appears that the damages in the above sum have been awarded on the footing that the plaintiff was entitled to payment of all less of profits that he would have recovered if the contract goods had been delivered. For awarding damages on the above footing, nothing is mentioned by way of explanation in the judgment. It is, therefore, necessary to record that generally having regard to the provisions of Section 73 of the contract Act, the party suffering damages is entitled to receive from the party who has broken the contract compensation for loss or damage which naturally arises in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. The above language of the section has been construed again and again to mean that in an cases ordinarily the damages must be assessed by finding out the difference between the contract rate and the market rate of the contract goods at the date of the breach. The market rate is the true criteria for arriving at what may be described as the loss or the damage which naturally arises in the usual course of things. Whenever damages are awarded on any other footing, It is necessary to explain the circumstances why the criteria of market rate was not applicable to the facts of that case. It is true that having regard to the latter part of the above quoted language of the section, damages are awarded in exceptional cases on the footing that the other party was aware of the circumstances which entitled the claimant to damages on the

other footing, in this second class of cases damages are occasionally awarded on the footing of loss of profits because of knowledge of the promisee or the other party. The relevant circumstances in connection with the claim for damages in this case may be summarised as follows:--

22. At the date of the contract as well as the breach thereof, contracts relating to export of cloth were governed by the provisions of the Export trade Control Act and the Cotton Control Order, the result of the above circumstance was that there was in fact no open market for purchase and sale of cloth for export. Even so it was quite possible that the defendants' Mills or other Mills may have made contract for export of cloth on or before July 31, 1951, The plaintiff's evidence in this case is that the goods of the description which the defendants had agreed to sell to him were not available in market for export. It would have been easy for the defendants to produce their own contracts for sale for export at relevant times if there was open market for purchase and sale of cloth for cloth for export at material dates. The defendants have not produced any such contracts. This case must, therefore, be decided on the footing that there was no open market for sale and purchase of the cloth of the contract quality for export at relevant date viz July 31, 1951.

23. It is established beyond doubt that to the knowledge of defendants the contract in suit was made for export of cloth. The plaintiff has established that he had contracted to export the cloth to foreign purchasers in Africa. Having regard to non-existence of open market at the material time the plaintiff claimed damages on the footing that he was entitled to loss of profits on the footing of the contracts that he had made with foreign purchasers. The learned Judge appears to have accepted that position and considered the evidence led on behalf of the plaintiff on that footing, there are 3 contracts, Exhs. 172, 173 and 174, which the plaintiff made for re-sale of the whole of the quantity of the contract goods on August 14, 1950. Exh. 172 is for sale of 49,693 yards at the rate of Rs. 1-3-0 per yard F. O. B. Bombay to Messrs. Rawji Amarsi and Co., Mombasa, Exh. 173 is for sale of 50,000 yards at the rate of Rs. 1-3-0 per yard F.O.B. Bombay to Messrs. Kalidas Kanji (Africa) Ltd., Mombasa, Exh. 174 is for sale of 50,000 yards on the same terms as to price to Messrs Juthalal Velji Ltd., Darasselaam. The plaintiff led his own evidence as also evidence of partners and directors of the above foreign contracting parties to prove the above contracts. The plaintiff admitted that for the consignment of the goods to the foreign parties he had to take delivery of the grey calendar cloth from the defendants' Mills and to have it processed and thereafter shipped the same from Bombay. The plaintiff led conclusive evidence to prove the expenses that he incurred in connection with processing and up to the stage of putting the same on board of steam-ship as regards the 49,693 yards grey calendar cloth. That evidence is contained in the accounts, which are Exhs. 186 and 198. The evidence led by the plaintiff conclusively proves that the plaintiff spent Re. 0-2-11 per yard for processing, dyeing and transporting the goods from Chalisgaon to Bombay and thereafter shipping the same. This however, does not include the amount of export duty

that the plaintiff was bound to pay at the date of breach if the goods were delivered and shipped, it is also necessary to record that it is clear from the correspondence that has been tendered that the foreign purchasers were willing to accept delivery of these goods at the contract rate of Rs. 1-3-0 per yard F. O. B. Bombay as late as May 1951. The plaintiff's case throughout was that as at the date of breach purchasers in Africa were willing to make contracts for export of cloth on July 31, 1951 at the rate of Rs. 1-3-0 per yard F. O. B. Bombay. As there was no open market for purchasing cloth for export at the date of breach and as to the knowledge of the defendants the contract in suit was made for export purposes only, the damages in this case can be ascertained by relying upon the market rate for export contracts for Africa that were available at the date of breach. The plaintiff proved by his above evidence that at the date of breach the market rate was Rs. 1-3-0 per yard F. O. B. Bombay. From that market rate the expenses for processing and shipping of the goods at the rate of Re. 0-2-11 per yard as deposed to by the plaintiff must be deducted. Now this rate of Re. 0-2-11 per yard does not include the further expense which the plaintiff as exporter would have to, bear as regards the payment of export duty. Without considering the amount of export duty on the above basis, the learned Judge calculated the damages payable in respect of 1,00,000 yards of cloth at Rs. 32,812-8-0. From out of this amount awarded to the plaintiff, the export duty expense which the plaintiff was bound to incur in connection with these goods if they were shipped must be deducted. Both Mr. Daji and Mr. Divekar have informed us that the amount of export duty in respect of 1,00,000 yards of goods would come to Rs. 17,187-8-0. The plaintiff accordingly would be entitled to damages only in the sum of Rs. 15,625. The damages as awarded by the trial court will be set aside.

24. These were the only contentions made on behalf of the Appellants in this case,

25. The decree passed by the trial court will accordingly be modified. There will be a decree in favour of the respondent-plaintiff against the defendants' Mills in the sum of Rs. 15,625 with future Interest at 4 per cent per annum from the date of the suit till payment. As the defendants have succeeded in getting the amount of damages reduced in this appeal to a very large extent the parties will bear and pay their own costs throughout.

26. Order accordingly.