

(1992) 04 SHI CK 0004
In the High Court Of Himachal Pradesh
Case No : Civil Suit No. 86 of 1983

Chemiplast Industries (Regd.) and Another	APPELLANT
Vs	
H.P. Agro Industries Corporation Ltd.	RESPONDENT

Date of Decision : 30-04-1992

Acts Referred:

Contract Act, 1872 — Section 46
Partnership Act, 1932 — Section 59
Sales of Goods Act, 1930 — Section 35

Citation : (1994) ShimLC 398 Supp

Hon'ble Judges : D.P. Sood, J

Bench : Single Bench

Advocate : Anand Sharma, Trilok Chauhan and Chhabil Dass, for the Appellant;
B.K. Sood and K.D. Sood, for the Respondent

Judgement

D.P. Sood, J.—This is a commercial cause. The Plaintiffs are the partnership firm registered under the Partnership Act, whereas Defendant is the Company incorporated under the Companies Act, and is carrying on its trade at Shimla with its registered office at Summer Seat", Shimla-171001. The Plaintiffs firm instituted this suit against the Defendant Company for the recovery of an amount of Rs. 2,14,750 plus interest and costs.

2. The Plaintiff's case as disclosed in the plaint is that on June 14, 1981 the order for the supply of one lac metres of high density of polythene pipe of 20 mm. size of Kgf/CM² was placed by the Defendant Company vide letter of even date (Ex. P-3). The Plaintiffs agreed to sell and deliver the above said goods according to the terms and conditions of the purchase-letter. The alkathene pipe was agreed to be supplied at the rate of 3.80 per metre F. O. R. Parwanoo within a month from the date of the above supply order. It was also a term and condition of the agreement that 1.00% payment was to be made by the Defendant's Company against the delivery of the material at Parwanoo. The Defendant-Company had undertaken to supply Form D against local purchases. Another expressed term agreed to in between the parties was that in case the

supplies were not arranged within 30 days, the order was to be considered cancelled. The aforesaid supplies were agreed to be arranged in truck loads containing 20,000 to 30,000 running metres, In case of due compliance of the terms and conditions regarding the supply of the alkathene pipe within time, the Plaintiffs' firm was assured of further order for the supply of one lac metres of the goods. The Plaintiffs assert that vide bill No. 121 dated 9-7-1981 (Ex. P-5) 40,000 metres of the required polythene pipe was supplied to the Defendant-Company but the same was not accepted and the Plaintiffs' firm was asked to supply only 14,000 metres and prepare another bill for the same quantity. Accordingly, bill Ex. P-5 was cancelled and vide bill (Ex. P-6) of the even date, the required quantity of 14,000 metres was supplied Thereafter another lot of 14,000 metres of polythene pipe was again supplied on 9th July, 1981 vide bill No 123 dated 9-7-1981 (Ex. P-12). It is alleged that Plaintiffs vide their letter dated 9th July, 1981 (Ex P-14) asked the Defendant Company to lift the entire remaining polythene pipe immediately as ordered which was ready for despatch with them. However, Defendant Company failed to do so despite repeated requests through several visits and telephonic messages to their local office at Parwanoo. Eventually only 17,000 metres of the goods were lifted on 31-7-1981 for which a bill was sent to the Defendant Company. Subsequently, request to lift the remaining 55,000 metres of polythene pipe through letters dated 4th September, 1981 and 31st October, 1981 was also made but of no avail A bill in respect of the remaining goods dated 1-8-1981 worth Rs. 2,09,000 was also sent but this mode bore no fruit as well. Ultimately, Plaintiffs alleged to have served a notice dated 30th November, 1981 calling upon the Defendant-Company to lift the balance of goods against due payment which was replied to vide letter dated 14th December, 1981 whereby the Defendant-Company refused to lift the goods on the plea that the same were not supplied within stipulated time and as such the order was automatically cancelled. The Plaintiffs allege that they were always ready and willing to supply the goods as ordered and they did ask the Defendant to make arrangements for its receipt till 15th December, 1981 but the latter failed to honour its commitment and" discharge its legal obligations. According to the Plaintiffs, the Defendant-Company took up various false pretexts regarding the quality of the material which had given rise to the receipt of the complaints by them and also criticism in Hindi Newspapers. It is alleged that the goods so supplied conformed to the specifications and were accepted by the Defendant Company after due examination of the entire length of the pipe and then payment thereof was made to the Plaintiffs. At no point of time, the goods were rejected.

Seeing the attitude of the Defendant-Company, the Plaintiffs assert that they sold the remaining lot of goods aforesaid for an amount of Rs. 33,000 after inviting tenders by advertising the same in the daily Tribune dated 4-12-1982 and after sending a notice to the Defendant Company of their intention to dispose of the same under compelling circumstances and intimating them that in that case they (Defendant-Company) would be liable for indemnifying the loss.

Thus the Plaintiffs after adjusting the aforesaid amount claimed the aforesaid amount as under:

(i) To balance of amount of cost of 55,000 metres of high density polythene pipe 20 mm, size of 6 Kgs/CM².

Rs.2,09,000-00

(ii) To cost of advertisement.

Rs.800-00

(iii) To interest at the rate of 9 per cent per annum from 8-7-81 to 8-7-83

Rs.37,950-00

Total

Rs.2,47,750i00

(iv) Less sale price of 55,000 metres of polythene pipe.

Rs.33,000-00

Net claim

Rs.2,14,750-00

through this suit. In addition to the above, they have also claimed interest pendente lite as also future interest at the rate of 9% per annum from the date of the suit till its payment.

3. The Defendant Company denied the Plaintiffs firm to be a partnership -firm. However, they admitted the supply order and the terms referred to in their correspondence dated 15/16th June, 1991, respectively as also the supply of 28,000 metres of polythene pipe by the Plaintiffs in two lots referred to above, against the payment made to them. However, it was contended that the time was of the essence of the agreement and Plaintiffs having failed to supply the goods within stipulated period as per the terms and conditions, were not liable to indemnify the loss allegedly suffered by the Plaintiffs firm. Regarding the supply of 17,000 metres of polythene pipe to its branch office at Bhangrotu, it was contended to be a direct deal in between the branch office of the Defendant-Company at Bhangrotu and the Plaintiffs firm. Defendant-Company admitted the receipt of letter dated 9.8-1981 and not that of 8-7-1981 as alleged by the Plaintiffs. It was contended that Plaintiffs never offered the remaining polythene pipe within stipulated period nor they were in a position to do so. Receipt of the notice and counter reply has been admitted.

4. On the pleadings of the parties, this Court framed the following issues:

1. Whether the Plaintiffs' firm is a partnership firm with Sh. M. L. Gupta as its partner ? OPP.

2. Whether the Plaintiff has performed its part of the contract? OPP.
3. Whether the Defendant has performed its part of the contract ?
4. Whether the sale of goods vide invoice No, 132 dated 31-7-1981 valued at Rs. 64,000 was not covered under the contract/supply order and was independent transaction ? OPD.
5. To what amount, if any, the Plaintiff is entitled ? OPP.
5. I have heard the learned Counsel for the parties at length They have also taken me through the entire record. I have also carefully examined the record.
6. There are admitted documents proved and exhibited as Ex P-3 to P-7, Ex. P-12 P-13, P-15, P-16, P-17, P-18, P-20, P-21 and P-22 by the Plaintiffs and documents marked as Ex. D-1, D-3, DW-4/A DW4/B DW4/C, DW5/A, DW5/B, DW5/C, DW5/D and DW9/A by the defendants.
7. On behalf of the Plaintiffs, Sh. Mohan Lal Gupta (PW-1, partner of the Plaintiffs firm and Sushil Kumar (PW-2) purchaser of the remaining polythene pipe measuring 55,000 metres have given evidence. On behalf of the Defendants S/ Shri Dinesh Kumar and Jagdish Ram (D Ws 1 and 2) who simply brought and produced the record have appeared as such Besides S/Shri Ram Surat Singh, the then Horticulture Development Officer and District Horticulture Officer, Mandi, B. S. Raha the then Service Manager of the Defendant Company of their branch office at Bhangrotu, M. L. Mahajan, the then Branch Manager of Defendant Company at Parwanoo, Bal Krishan Chauhan, the then Deputy Commissioner Mandi, Amar Chand Advocate, the then Chairman Block Samiti (Sadar) Mandi, Janki Dass, Advocate, the then Pradhan Gram Panchayat Kotli and R.K. Sharma, the then Chief Purchase Officer of the Defendant Company (D Ws 3 to 9) have appeared as witnesses on behalf of the Defendant Company.

Issue No. 1

8. This issue raises the question whether Plaintiffs firm is a partnership- firm with Shri M. L. Gupta as its partner. In support of it PW-1 has appeared and proved the fact by proving extract of the register of the " firm (maintained u/s 59 of the Indian Partnership Act, 1932) and a certificate of partnership (both photostat copies) Ex. P-1 and Ex P-2 respectively. His statement to this effect is unrebutted No evidence in rebuttal has been produced. From the above evidence, issue No 1 is proved to the hilt and is decided accordingly.

Issues No. 2, 3 and 4

9 All these issues are intrinsically mixed up with each other as they together require a re-perusal of discussions of evidence, I proceed to decide

10. The prime question is whether in the instant case time is of the essence of the legal position on this subject, under both the Contract Act and the Sales of Goods Act there is no legal presumption that time is of the essence of the

contract. Whether or not time should be regarded as an essential condition of the contract, is purely a question of intention of the parties to be gathered from the terms of the contract and the surrounding circumstances of the case. Time is always considered of the essence of the contract in the following cases:

1. Whether the parties have expressly agreed to treat it as of the essence of the contract ;
- 2 Where delay operates as an injury ; and
3. Where the nature and necessity of the contract require it to be so construed.

Where time is of the essence of the contract and is extended, the extended date is also of the essence of the contract.

11. In the instant case admittedly as per letters Exs. P-3 and P-4 dated 15th June. 1981 and 16th June, 1981 respectively, the Plaintiff was required to supply one lac metre of polythene pipe of the requisite specification within 30 days from the date of the supply order against due payment and in otherwise case it was to be deemed to have been cancelled. In other words parties specifically stipulated the time for the execution of the agreement upto 15-7-1991 and as per there intention time was of the essence of the contract.

12. This takes me to the question as to whether the Plaintiff had performed his part of the obligation ? The assertions of the Plaintiff are that they supplied 28,000 metres of polythene pipe in two lots to the Defendant on 7-7-1981 and 9-7-1981 against due receipt of it,s payment. This fact is not disputed Further allegation is that he had notified the Defendant Company through letter dated 9-7-1981 Ex. P-14 to lift the entire remaining goods immediately which was lying ready for despatch with them. The letter has disputed the receipt,of this letter on 9-7-1981. According to Defendant this letter had been received by them on 12-8-1981. In case the despatch of this letter on 9-7-1981 is proved, Plaintiffs would be deemed to have performed his part of obligation vis-a-vis the agreement in question.

13. The perusal of this letter P-14 shows that digit "8" indicating the month, had been converted into "7" i, e. date of this letter shown as 9-8-1981 has been changed into 9-7-1981 and similarly in the subject-matter of this letter, date of the agreement i.e. 15-7-1981 stood changed into 15-6-1981 by altering the digit "7" into 6\\ Shri M. L. Gupta PW-1 is the author of this letter Ex P-14. He in his statement on oath states that change was effected by him in this letter after the despatch of the original to the Defendant-Company ; that he did not intimate the buyer of the said change so effected either orally or in writing. No other evidence has been produced by the Plaintiffs to show that this change was notified to the Defendant Company.

14. DW-5 Shri M. L. Mahajan was the Branch Manager of the Defendant-Company at Parwanoo Branch at the material time. He has unhesitatingly stated that letter Ex. P 4/A = Ex. P-14 had been received by him on 12-8-1981 as per

note by him on the original. Plaintiff has not produced any acknowledgement of this letter by producing the Peon's book or diary or despatch register or any other cogent or convincing evidence in this behalf. Therefore, on this scanty evidence it cannot be concluded that this letter Ex P-14 was sent on 9-7-1981. In the circumstances it is held that this letter was, in fact sent on 9-8-1981 and it was received by the Defendant-Company thereafter. In other words Plaintiff has failed to prove that he ever notified the Defendant-Company to lift the remaining goods within the stipulated period i.e. on or before 15-7-1981.

15. Things do not end here. The pleadings of the parties reveal that 17,000 metres of polythene pipe in question was supplied by the Plaintiffs to the Defendant-Company after the expiry of the stipulated time on 31st July, 1981 vide bill No, 132 (Ex. P-13) In order to appreciate whether the aforesaid supply of the goods in question was pursuant to the agreement of sale and purchase in between the parties or whether it was a direct deal between the H.P. Agro Industries Corporation Ltd branch at Bhangrotu and the Plaintiffs, the main consideration would be as to, firstly, what is the relations in between H.P. Agro Industries Corporation Ltd., Branch at Bhangrotu and the Defendant; secondly who placed the order ; thirdly who made the payment and fourthly, to which account the aforesaid payment was credited to.

16. Admittedly, H.P. Agro Industries Corporation Ltd. Bhangrotu is a Branch of the Defendant Company and the over all supervisory powers over the working of the said branch are with the Defendant- Company. PW-1 has stated on oath that the aforesaid supply was made at the behest of the Defendant-Company and in conformity with the terms and conditions of their supply order as per letters Exs P-3 and P-4 dated 15-6-1981 and 16-6-1981 respectively. This fact is supported by the statement of DW-5 Shri M. L. Mahajan, who has stated on oath that Defendant-Company had placed the order for the supply of alkathene pipe in question to the Plaintiffs. The above said evidence proves that it was the Defendant-Company at whose instance the alkathene pipe was to be supplied to its branch as well located at different places in Himachal Pradesh Even according to DW-9 who was the then Chief Purchase Officer of the Defendant-Company at Shimla, the goods in question were being purchased from the draught-relief-fund which had been received by the Defendant-Company from the Centre. He also deposed that the pipe in question supplied by the Plaintiffs to Bhangrotu branch was also debited to the Defendant Company to the draught-relief fund pertaining to district Mandi. Obviously, Bhangrotu is located within District Mandi. It has also come in his evidence that the purpose for purchasing the pipe in question was the distribution thereof to the needy farmers. Simultaneously, DW-5 in his statement on oath states that-officials of Defendant branch in Bhangrotu informed him that they wanted to purchase some quantity of the said goods and he told them to contact the Plaintiffs' firm directly for that purpose. In this respect question arises whether officials/officers of Bhangrotu branch could enter into a direct deal with the Plaintiffs firm In this respect the statement of D Ws 5 and 9 are again material. Both have stated that direct purchase could only be

made pursuant to the Issuance of an indent by Bhangrotu branch to the Plaintiffs. There is no dispute that as per the terms of the agreement, the Plaintiffs were required to supply the goods in question to the Defendant-Company through their branch FOR at Parwanoo. Now DW-5 Sh ML. Mahajan, was the branch-Manager of the Defendant-Company at Parwanoo at the material time. He has stated that he did not receive any such indent from any officer of Bhangrotu branch nor did he handed it over nor made any endorsement upon any such indent nor personally directed the Plaintiff to make any such supply to Bhangrotu branch. At this stage it would be pertinent to note that the Plaintiffs Unit of manufacturing the polythene pipe in question was also located at Parwanoo. DW-3 Ram Surat Singh, the then- District Horticulture Officer and District Horticulture Officer at Mandi had also sent an indent detailing the quantity and specifications of the goods in question therein to the Defendant Company at Shimla for (he purpose of making purchases thereof. No oral or documentary evidence has been adduced by the Defendants to show that the order for the supply of 17,000 metres of alkathene pipe was pursuant to direct deal between Bhangrotu Branch of the Defendant" Company and the Plaintiffs. Thus considering the entire evidence together no other inference other than the one that aforesaid supply of 17,000 metres of alkathene pipe was made by the Plaintiffs to Bhangrotu Branch of the Defendant Company at the behest of latter and pursuant to the terms contained in the agreement entered into in between the parties to the instant case. It is material to note that the payment of the aforesaid alkathene pipe was made at the rate of Rs. 3.80 per metre as per the rate settled in the agreement. Even the notice terminating the contract issued by Defendant Company (Ex. P-21) reveals the receipt of 45000 metres of goods in question against due payment. This fact also shows that the contention of direct deal in between Bhangrotu branch of the Defendant Company and the Plaintiffs is an afterthought one. Accordingly, I hold that the supply of 17,000 metres so made was pursuant to the terms of the agreement entered into between the parties to the suit in question.

17. The next question now arises whether by acceptance of the above said goods on 31-7-1981 after expiry of the stipulated time, the Defendant Company had extended the time for the performance of the contract within a reasonable time, further time of its execution having not been stipulated. Obviously, the answer would be in the positive inasmuch as the evidence discussed above supports this view. Also subsequent letters dated 4-9-1981 (Ex. P.15) and 30-10-1981 (Ex. P-17) issued by the Plaintiffs and replied to by Defendant Company vide telegram dated 30-11-1981 (Ex. P-20) show that the matter pertaining to the supply of polythene pipe in question continued to remain under consideration of the latter. In addition they indicated that reply to this effect would be sent to the Plaintiffs on or before 15-12-1981. Thus instead of terminating the contract, the Defendant Company treated the agreement in question to be in existence. It is to be noted that in letters Ex P-15 and P-17 the Plaintiff had notified the Defendant Company that the entire remaining lot was ready for despatch with them and

that Defendant Company should lift the same immediately and make arrangements for its receipt. This evidence indicates subsequent actual intention of the parties to keep the agreement in question alive.

18. The abovesaid discussion leads me to the next question as to whether the Plaintiff was capable of performing his part of the contract qua remaining supply of goods within a reasonable time. It is well settled law that where no time for performance is specified, the engagement must be performed within a reasonable time and question what is reasonable time is in each particular case is a question of fact as expressly laid down by Section 46 of the Contract Act.

19. The receipt of letters P-15 and P 17 as also replies thereto is admitted by the Defendant-Company. Further it is to be noted that possession of the alkathene pipe to the tune of 55,000 metres and ultimate sale thereof through advertisement in the Tribune to owner of Regal Plastic Sadar Bazar, Delhi, by inviting tenders by advertisements in the Delhi Tribune dated 4-12-1982 is proved on the record by PW-2 Sushil Kumar. Even otherwise the notice dated 30-11-1981 (Ex. P-18) and counter notice dated 14-12-1981 (Ex. P-21) reveal that Plaintiffs were in possession of the entire remaining alkathene pipe in question and they asked the Defendant Company to lift the same and make arrangement for its receipt whereas the stand taken by the Defendant Company was that agreement in question had automatically been cancelled because of the non-supply of alkathene pipe in question by the Plaintiffs to them within the "stipulated time. It was never pleaded nor shown by the Defendant Company that Plaintiffs were neither in possession of alkathene pipe within the stipulated time or thereafter till 20-11-1981 when they assured Plaintiffs that they would be given suitable reply regarding the lifting thereof on or before 15-12-1981.

20. After the expiry of the stipulated time the Defendant Company and the Plaintiff remained in correspondence with each other and the latter pressed the former to accept the supply by lifting the same. It appears that on account of certain complaints received from the farmers through Chairman of their Cooperative Societies regarding the substandard quality of the aforesaid alkathene pipe for agricultural purposes, was the main reason due to which it was not lifted. Even the statement of D Ws 3 and 6 indicate that the complaints from the Chairman Panchayat Samiti Mandi Sadar and other places were under inquiry. The above said fact gives rise to the question whether alkathene pipe in question being supplied by the Plaintiffs to the Defendant Company conformed to the required standard and specifications of the buyer. The careful examination of the record shows that goods in question did conform to the standards and specifications of the Defendant Company. Sh. Ram Sural Singh (DW-3) the then Horticulture Development Officer and District Horticulture Officer Mandi admitted in his cross-examination that he had sent the indent for the supply of alkathene pipe of 20 mm. dia metre and 3/4" vide letter dated 2-2-1981 (Ex. DW-3/B). He further stated that 20 mm. dia metre referred to outer dia metre of the alkathene pipe. He also admitted that the supply so made conformed to the

specification given by him in the aforesaid indent, but factually the indent was not placed in accordance with the requirement with the specification of 20 mm. dia metre from inside and instead it was placed for 20 mm dia metre from outside. Thus the Plaintiffs were not at fault in regard to the specification nor any complaint had been lodged with them with respect to the sub-standard quality of the alkathene pipe at any time.

21. From the above discussion-of the entire evidence, it standi proved that Defendant Company had waived the stipulation making time of the essence of agreement in question and that the Plaintiffs were ready and willing to perform their part of the contract within a reasonable time.

Besides DW-4 M. L. Mahajan admits that they had never applied for the delivery of the goods at any time before terminating the contract as envisaged u/s 35 of the Sale of Goods Act, 1930 According to it there is a statutory obligation on the buyer to call upon the seller to perform delivery. On the other hand the Plaintiffs had been insisting upon due performance of the contract by the Defendant Company. Accordingly issue No. 2 is decided in the affirmative and issue No. 3 is held in the negative. Under discussion, of issue No. 4 it is. Id that it was part of the agreement entered into between the parties for the supply of goods in question and it was not an independent transaction.

Issue No. 5

22. PW-1, a partner of the Plaintiffs firm, in his cross-examination has stated that in June 1981 efforts were afoot to place their product on rate contract with DGS and D. This fact is also corroborated by the contents of Ex. D-2 which is a letter issued by the Plaintiffs to the Director Demanding Officer of the Defendant Company. Rather in this letter it was made clear that Plaintiffs were awarded the rate contract for the supply of high and low density polythene pipe by the DGS and D vide their rate contract letter dated 15-7-1981 and that this rate contract was valid upto 19-6-1982. Item at serial No. 1 under the head "Working Pressures" pertaining to 20 mm, dia metre polythene pipe of Class V. was offered at Rs. 4 per metre which appears to have been offered for supply to the Defendant Company at Rs. 3.80 per metre apparently in view of the demand of high quantity to the tune of one lac metres. Under discussion of the above said issues, I have already held that Defendant Company was at fault in not having lifted the remaining quantity of the polythene pipes in question at the agreed rate. Obviously, in view thereof the Plaintiffs firm has suffered a loss. They had to take steps to sell it into the market by inviting tenders through advertisements in the newspapers and thereby they could only recover an amount of Rs. 33,000. This loss suffered by them is as under:

(i) To balance of amount of cost of 55,000 metres of high density polythene pipe 20 mm size of 6 Kgf/CM. Rs. 2,09,000 (ii) To cost of advertisement. Rs. 800

Rs. 2,09,800

(iii) Less sale price of 55,000 metres of polythene pipe. Rs. 33,000

Net Loss Rs. 1,76,800 _____

23. The contract had been terminated by the Defendant Company as early as on 14-12-1981, and the steps for its re-sale for the first time had been taken on 4-12-1982. The Plaintiffs firm has not given any explanation as to why steps had not been taken for the re-sale of the aforesaid polythene pipe in question for about one year despite the clear cut termination of the contract by the Defendant Company. Normally such goods are liable to deteriorate due to atmospheric reaction unless they are kept in safe custody. It appears that the Plaintiffs firm are also grossly negligent and thus liable for having unnecessarily kept the remaining goods in question with them. Had they put the said goods in the market at the earliest, it could have fetched more value keeping in view the condition thereof. There is no evidence adduced by the Plaintiffs to show that the goods in question remained in the same condition at the time of its sale as they were at the time when Defendant Company had terminated the contract without any cogent reason. Thus in view of that, I am not inclined to hold that the Plaintiffs are entitled to any interest upon the gross amount of loss suffered by them. In other words, to my mind the Plaintiffs are only entitled to the net loss suffered by them as stated above.

24. In view of the position discussed above, a decree in the sum. of Rs. 1,76,800 is passed in favour of the Plaintiffs firm and against the Defendant-Company with proportionate costs. The Defendant-Company is directed to pay the aforesaid amount within two months from the date of this judgment. In otherwise case, the Plaintiff firm shall be entitled to future interest at the rate of 12% per annum from the date of the decree till its realisation.