
(2011) 01 MAD CK 0107
In the Madras High Court
Case No : CS. No. 14 of 1994

Colgate Palmolive (India) Ltd.

APPELLANT

Vs

SVNR Exports, K.V. Nrasimhan and S. Vaidyanathan

RESPONDENT

Date of Decision : 28-01-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 50, Order 30 Rule 1, Order 30 Rule 8
Contract Act, 1872 — Section 55, 66
Partnership Act, 1932 — Section 69

Citation : (2011) 01 MAD CK 0107

Hon'ble Judges : Aruna Jagadeesan, J

Bench : Single Bench

Advocate : Suresh Balakrishnan, for the Appellant; V.K. Elangho, for the Respondent

Judgement

Aruna Jagadeesan, J.—This suit has been filed to pass a judgment and Decree for a sum of Rs. 6,94,461/- with interest at 20% p.a. on Rs.

4,73,494.46/- from this date till date of payment and for a sum of Rs. 18,35,915.07/- towards damages suffered by the Plaintiff on account of

breach of contract by the Defendants and for costs.

2. The plaint averments are as follows:

a. The Plaintiff Company incorporated under the Indian Companies Act, 1913 is carrying on the business of leather exports. The 1st Defendant is

a Partnership Firm and the Defendants 2 and 3 are its partners. The 1st Defendant approached the Plaintiff in January 1991 and expressed its

willingness to procure leather garments to be exported by the Plaintiff. This arrangement was understood to be on back-to-back basis, that is, the

orders to be secured by the 1st Defendant Firm would in turn be based on export

orders finalised by the Plaintiff. Based on the assurance of the 1st Defendant of supply of quality leather garments, the Plaintiff approached one of its long standing foreign buyer, namely, Jeffrey Brown Leader Limited. The Plaintiff requested the Defendants to submit samples of different styles of leather garments. The samples were checked and approved by the Plaintiff on submission and were in turn forwarded to the said foreign buyer on 29th May 1991. Based on the verbal offer of the 1st Defendant and the samples approved, the Plaintiff sent its offer to the said Jeffrey Brown Leader Limited for export of leather garments in style "LULU" and "2163". The offer of the Plaintiff was accepted by Jeffrey Brown Leader Limited with a specific request that the delivery should be effected by mid August 1991.

b. The 1st Defendant submitted its formal offer to the Plaintiff by a telex dated 4th June 1991 for 1000 pieces of style "LULU" at Rs. 1250/- per piece to be delivered by the end of July 1991. Based on the Defendants' offer, the Plaintiff confirmed to Jeffrey Brown Leader Limited its acceptance of the order for export of 1000 garments of style "Lulu" to be shipped by the end of August 1991. The Plaintiff accepted the offer of the 1st Defendant on even terms vide telex dated 5th June 1991 and informed the Defendants that the garments should be ready for inspection latest by the end of July. The Plaintiff also agreed that the payment will be made for full value against delivery. The importance of supplying the right merchandise was also stressed, as the Plaintiff was expected to do a large volume of business with Jeffrey Brown Leader Limited. The Plaintiff received a formal offer for supply of garments by the end of July from the 1st Defendant by letter dated 17th June 1991 with a request to the Plaintiff to send the contract for the same. On 20th June 1991, Jeffrey Brown Leader Limited placed a further order for 440 garments on the Plaintiff. The Plaintiff immediately communicated to the Defendants its confirmation of the order for the additional 440 garments as also the specifications as to size and measurements. The Plaintiff reiterated the need to keep the garments ready for inspection by the end of July 1991. The Plaintiffs thereafter confirmed to Jeffrey Brown Leader Limited its acceptance of the additional order and also forwarded its invoice to enable Jeffrey Brown Leader Limited to open a letter of credit.

c. After confirmation of the additional order, the Plaintiff forwarded its formal purchase order dated 20th June 1991 to the Defendants for

1440 garments. The delivery clause clearly stipulated "end of July 1991" as the deadline for delivery of garments by the Defendants, for which the

Defendants had accepted. The contract also provided that the garments would be subject to inspection by the Plaintiffs as well as its buyer, Jeffrey

Brown Leader Limited. After finalising the orders with Jeffrey Brown Leader Limited as well as the Defendants, the Plaintiff made regular enquiries

to ascertain the progress of work on the order placed with the Defendants. The Defendants assured that the manufacture of the garments were on

schedule and would be ready for inspection by 31st July 1991 as contracted. The Plaintiffs informed Jeffrey Brown Leader Limited that the entire

consignment or a minimum of 50% of the order would be shipped by 20th August 1991. On 25th July 1991, when the representative of the Plaintiff

visited the factory of the Defendants, it was found that not even a single garment was ready for inspection at that time. The partner of the 1st

Defendant Firm Narasimhan asked for extension of time upto 15th August to complete the contract. The Plaintiff acceded to the said request of the

Defendants. Again during the first week of August, when the representative of the Plaintiff visited the factory of the Defendants, it was found that

only 30 garments out of 1440 were ready, that too not in conformity with the samples approved by the Plaintiff.

d. On 10th August 1991, the representative of the Defendants pleaded inability to honour their commitment by 15th August 1991 and informed

that only 400 garments out of 1440 would be ready by 15th August 1991. The Plaintiff agreed to take 400 garments by 16th August 1991. The

Plaintiff supplied raw leather valued at Rs. 4,73,494.46/- from the open market to complete the production of 1440 garments and informed Jeffrey

Brown Leader Limited that 700 garments would be despatched by 24th August 1991 and the balance by 31st August 1991. During the course of

inspection on 12th August 1991, the Plaintiff found that the garments were not in conformity with the samples and the specifications approved by

the Plaintiff. Due to the defects, the garments had to be returned for rectification, which resulted in further delay. On 28th August 1991, on

inspection 252 garments were approved and cleared by the Plaintiff for despatch. In the mean time, the Defendants raised an invoice dated 19th

August 1991 for Rs. 3,12,500/- for 250 garments. The Defendants sent a letter dated 23rd August 1991 requesting the Plaintiff to make payment

within two days of presentation of bills. The Plaintiff sent a telex message dated 5th June 1991 that the payment would be made for the full value of

the goods against delivery. After final inspection on 28th August 1991, the Plaintiff requested the Defendants to make arrangements for delivery of

252 garments. On 29th August 1991, the Defendants expressed inability to deliver the goods due to alleged limitation imposed by their bankers.

The Defendants were deliberately avoiding delivery of the goods for one reason or the other.

e. The Plaintiff requested Jeffrey Brown Leader Limited for extension of time by end of September 1991 for shipment, by procuring raw materials

from other associates and the Jeffrey Brown Leader Limited reduced the quantity of garments to 1180. Thereafter, the Defendants expressed their

willingness to deliver the goods provided that the payment was made prior to delivery and the Plaintiff sent a reply dated 31st August 1991, calling

upon the Defendants to repay the Plaintiff Rs. 4.73/- lakhs being the cost of the raw leather supplied to the Defendants, to which the Defendants

sent a reply dated 9th September 1991 expressing their desire to settle the matter amicably and the Plaintiff also sent a telex message dated 20th

September 1991 to the Defendants to come forward to resolve the issue on 23rd September 1991. After discussions on 23rd September 1991,

the Plaintiff agreed to take delivery of 252 garments, since the Plaintiff had arranged for production of the balance with other manufacturers.

However, the Defendants insisted that they were prepared to deliver the entire lot as per the contract and the Plaintiff should accept the same. The

Plaintiff offered to take the available stock with the Defendant at Rs. 1000/- per piece, for which the Defendants did not agree. As the matter

could not be resolved, the Plaintiff sent a telex dated 11th October 1991, calling upon the Defendants to reimburse the Plaintiff a sum of Rs.

4,73,494.46/- being the cost of the raw leather supplied. The Defendant replied by telex dated 12th October 1991 asking the Plaintiff to lift the

garments. The Defendants sent a letter dated 25.10.1991 to the Plaintiff requesting to make payments and to take the garments kept ready. In the

mean time, the Plaintiff procured 912 finished garments from the other sources and shipped the same to Jeffrey Brown Leader Limited at Rs.

1465.50/- per piece. Therefore, the Plaintiff suffered a loss to the tune of Rs. 1,96,536/-. Thereafter, the Plaintiff sent a reminder letter dated 29th

January 1992 calling upon the Defendant to repay the sum of Rs. 4,73,494.46/- to the Plaintiff with interest at the rate of 20% for three months.

The Defendants sent a reply dated 24th January 1992, enclosing a letter alleged to have been sent on 28th December 1991, wherein the

Defendant had stated that they were forced to liquidate their stock of 800 garments at Rs. 1000/-each. Hence, the Plaintiff sent a legal notice

dated 7th August 1992, calling upon the Defendants to pay to the Plaintiff a sum of Rs. 4,73,494.46/- being the cost of the raw leather supplied,

interest thereon at 20% p.a. from September 1991 till the date of payment and for damages to the tune of Rs. 18,35,915.07/- for the loss suffered

on account of breach of contract. The Defendants sent a reply notice dated 20.8.1992 making baseless allegations and untenable claims against the

Plaintiff. In such circumstances, this civil suit has been filed.

3. In the Written Statement filed on behalf of the Defendants, it is averred as follows:

a. The 1st Defendant is a small scale industry. Suppressing the material facts, the Plaintiff filed the suit with false claims. The Defendants are not

aware as to what transpired between the Plaintiff and Jeffrey Brown Leader Limited. The Plaintiff has supplied materials to Jeffrey Brown Leader

Limited at extra cost and have unjustly enriched themselves. The Plaintiff was not even ready and willing to give advance towards their order.

When the Defendants demanded advance, the Plaintiff informed that as a Policy of the Company, they cannot advance or open any letter of credit

for local supplies. Without advance, it will be very difficult for them to supply the garments. It was finally agreed that the Plaintiff would pay the

money and then take the garments in lots of 250 units each. The Plaintiff placed orders for quantity of 1000 pieces in black and 440 pieces in brown

at the rate of Rs. 1250/- per piece. Since the Plaintiff was not willing to pay advance, the Defendants took up the work with an adhoc bank

advance of Rs. 4 to 5 lakhs and the time is not the essence of the contract. The allegation that in the factory of the Defendants on 25.7.1991, not

even a single garment was ready for inspection is false. The Defendants have been processing only the order placed on them by the Plaintiff. The

extension of time was done by mutual consent. The allegation that the garments were not in conformity with the samples by the Plaintiff is false. The

Defendants have been fabricating the leather garments as per the order and as per the specifications after raising advance from their bankers. The

raw leather was supplied by the Plaintiff only to manufacture about 250 to 300 garments.

b. When the Plaintiff came forward with an offer to supply raw leather, the Defendants had completed 400 garments in full shape and as per the

specifications. There has been novation of the contract, from time to time, at the instance of the Plaintiff and they cannot go behind the same. When

the Defendants requested the Plaintiff to take delivery of the finished garments, duly packed after inspection, after making payment, the Plaintiff

started evading and started raising untenable pleas. The Defendants raised an Invoice No. 19 dated 19.8.1991 for 250 garments for a value of Rs.

3,12,500/- and requested the Plaintiff to take delivery of the same and make payment, but the Plaintiff did not turn up. The production of the

garments as per the purchase order dated 30.6.1991 was going on in the factory of the Defendants. After completion of manufacture of

400 garments, the Defendants raised another Invoice No. 20 dated 23.8.1991 for 400 garments for the value of Rs. 5 lakhs. But, the Plaintiff did

not take delivery and make the payment. Even thereafter, the Defendants continued to manufacture of garments and totally 800 leather garments

were fully ready as per the specifications and the Defendants raised two invoices for 650 garments and the remaining 150 garments were inspected

and approved by the representative of the Plaintiff and they were ready for being packed. But, the representative of the Plaintiff, though promised

that they will come with payment after consulting with their Head Office, did not turn up. The Plaintiff sent a telex message dated 5.6.1991 stating

that payment would be made for the full value of the goods against delivery, but the Plaintiff did not make payment for the value of the goods

against delivery. The Defendants have been insisting that the Plaintiff has to take delivery of the goods against payment which can be made to their

bankers. The Defendants were ready to deliver the goods against payment when they have completed 800 garments in good shape and as per the

specifications in August 1991. The Plaintiff said that they had applied for extension of time from Jeffrey Brown Leader Limited, but the Plaintiff

have fabricated the garments with their associates at Bangalore and despatched the same. The Plaintiff could have taken delivery of the finished

leather garments from the Defendants and could have exported the same. The Export Manager of the Plaintiff came forward with suggestion in the

month of September 1991 that the Defendants should be ready to delivery the garments at the rate of Rs. 1,000/- per piece, which is nothing but a

clear act of breach of contract and breach of trust. When the garments were ready, there was no necessity for the Plaintiff to place orders with

others. There was no delay in the execution of the order by the Defendants.

c. The Defendants have incurred a loss to the tune of Rs. 80,000/- byway of interest and they have also lost orders to the tune of Rs. 1,50,000/-

and the revenue loss of Rs. 1,50,000/- because of the bankers choosing to limit the financial assistance. Thus, the Defendants have incurred a loss

of Rs. 4,30,000/- due to the breach committed by the Plaintiff. Hence, the Defendants raised a debt note for Rs. 4,30,000/- which they sent to the

Plaintiff along with their letter dated 28.12.1991. After a period of 7 months, the Plaintiff sent a legal notice dated 7.8.1992 making false claims,

for which the Defendants sent a reply dated 20.8.1992. The Plaintiff cannot dictate terms and unilaterally vary the terms of the contract. When the

contract between the Plaintiff and the Defendants was subsisting, there is no question of the Plaintiff procuring orders from some other sources.

The suit claim is false, frivolous and vexatious. In such circumstances, the suit is liable to be dismissed with costs.

4. The following issues were framed for determination:

1. Whether the suit is not maintainable in view of the 1st Defendant being an unregistered Firm?
2. Whether the time is the essence of the contract?
3. Whether the Defendants have committed breach of contract?
4. Whether the Plaintiff has fulfilled its part of contractual obligation as agreed?
5. Whether the goods supplied were in conformity with the specifications?
6. Whether the Plaintiff is entitled to a sum of Rs. 6,94,461/- together with further interest?
7. Whether the Plaintiff is entitled to a sum of Rs. 18,35,915.07/- towards damages on account of breach of contract by the Defendants?

8. To what other relief's the Plaintiff is entitled to?

5. On the side of the Plaintiff, the Plaintiff examined its Branch Finance Manager as PW.1 and marked Exs.P1 to P43. On the side of the

Defendants, the 2nd Defendant was examined as DW.1 and Ex.D1 and D2 were marked.

6. This Court heard the learned Counsel on either side and also perused materials on record.

7. Issue No. (1):

7. The 1st Defendant is an unregistered partnership Firm and the Defendants 2 and 3 are the partners. The contention raised in the Written

Statement is that the suit is not maintainable, as the 1st Defendant is an unregistered Firm. It is disclosed from the evidence of DW.1, the 2nd

Defendant herein who is also one of the partners of the 1st Defendant Firm that apart from the Defendants 2 and 3, there are other partners of the

1st Firm, namely, R. Ramesh, S. Venu, V. Srinivasan and Mythili Ramachandran. The learned Counsel for the Plaintiff would submit that there is no

provision in the Indian Partnership Act, 1932 prohibiting any suit being filed against an unregistered partnership Firm. He would submit that a suit

can be filed under Order 30 of the CPC against a Firm without joining all or any of the individual partners by name as Defendant and a valid and

binding decree can be passed which will be executable against the Firm's property. The learned Counsel would further submit that a decree

against the Firm will lie not only against Firms' property, but also against all the partners and if a decree is passed against the Firm, then such a

decree is executable against the partners of such Firm.

8. In support of his submissions, the learned Counsel for the Plaintiff relied on the judgment of the Honorable Supreme Court reported in Ashutosh

Vs. State of Rajasthan and Others, wherein the Honourable Supreme Court while considering the scope of Order 21 Rule 50 of Code of CPC in

respect of a decree passed against the Firm and after adverting to the observations made by the Honourable Supreme Court in the case of Her

Highness Maharani Mandalsa Devi and Others Vs. M. Ramnarain (P) Ltd. and Others, held that a suit may be filed and a decree may be obtained

against a Firm under Order 30 of Code of CPC and such a decree may be executed against the property of the partnership Firm and against all

the partners by following the procedure of Order 21, Rule 50 of CPC.

9. Applying the above said settled principle of law to the facts of the case, it is not disputed that the 1st Defendant partnership Firm is an

unregistered one. Admittedly, all the other partners have not been impleaded. Since a Firm has no legal existence, the partnership property will

vest in all the partners and in that sense, every partner has an interest in the property of the partnership Firm. Order 30 Rule 1 of Code of CPC

makes it permissible to file a suit by or to be sued in Firm's name not as a distinct legal entity, but as a convenient mode of describing the partners

at the time accrual of the cause of action. The Firm, as a party to the suit is merely a collective name of its partners and suit is really against all the

partners of the Firm at the time of the cause of action though for institution of a suit by or on behalf of a Firm, the Firm must be registered u/s 69 of

the Partnership Act. It is true that a Firm does not have a legal entity, but Order 30, Rule 1 of Code of CPC permits two or more persons claiming

as partners may sue or be sued in the name of the Firm.

10. In the present case, the suit is filed against the Firm and two of the partners impleaded as the Defendants 2 and 3. They have filed Written

Statement on behalf of the Firm and on behalf of themselves. In respect of a suit filed against a Firm, Rule 8 of Order 30 of Code of CPC enables

a person served as a partner of the Firm to appear under protest and to deny that he is a partner of the Firm which is sued. But, in the instant case,

no such protest is made by the Defendants 2 and 3. As the Defendants 2 and 3 had filed their appearance without protest, their appearance will be

deemed to be on behalf of the Firm. In this case, the procedure prescribed under Order 30 of Code of CPC has been adopted and therefore, the

Plaintiff is within his legal rights in suing the partnership Firm and its partners the Defendants 2 and 3. In view of the reasons stated above, the suit is

held maintainable and the issue (1) is answered accordingly.

11. Issue Nos. 2 to 8:

It is not in dispute that there is a concluded contract between the Plaintiff and the Defendants for the supply of leather garments at the first instance

for 1000 pieces of jackets in black and later for 400 pieces of jackets in brown. The garments were meant to be exported by the Plaintiff to a

buyer in the United Kingdom, namely, Jeffrey Brown Leader Limited. Ex.P4 is the

telex message from the said Jeffrey Brown Leader Limited placing order to the Plaintiff for supply of 1000 pieces of jackets in black in style 864891 in different sizes. Under Ex.P5 the 1st Defendant had offered to supply the said 1000 pieces of Lulu SheepNappa Jackets on the specification given by the Plaintiff regarding size and quantity. Ex.P6 is the telex message sent to the 1st Defendant by the Plaintiff accepting the offer, wherein it is said that the garments should be made ready for inspection by the end of July 1991. It is also mentioned that payment would be made for the full value against delivery and the Plaintiff would give a disclaimer and undertaking to the bank to enable the 1st Defendant to avail packing credit at the concessional rate. Ex.P13 is the formal letter dated 17.6.1991 from the Defendants to the Plaintiff confirming the offer for the supply of 1000 pieces with size break up 10, 12, 14, 16, 18, 20, 22, 24, 26, 28 and 32 at Rs. 1250/- per garment accepting to deliver by the end of July 1991 after approving the samples by the Plaintiff. In none of the communications to the Defendants, the Plaintiff's contract with Jeffrey Brown Leader Limited for the supply of garments is mentioned. In Ex.P13, it is stated that the sales would be under Form-Transactions. In the telex message dated 20.6.1991, the said Jeffrey Brown Leader Limited had given alterations in measurements and size for 1000 pieces and further placed an order for 440 pieces in brown, both to be despatched by mid August 1991. On the same day, the Plaintiff has passed on the telex message to the 1st Defendant in Ex.P15 giving the specification as noted by Jeffrey Brown Leader Limited and also placed order for 440 pieces in brown specifying that the garments should be made ready for inspection by end July 1991. In Ex.P16 telex message dated 20.6.1991, the Plaintiff had accepted to supply 440 pieces of jackets in brown and requested Jeffrey Brown Leader Limited to establish the letter of credit in favour of the Plaintiff.

12. Subsequent to the above said negotiation, the Plaintiff has placed the order with the 1st Defendant for the supply of 1000 pieces of jackets in black and 440 pieces of brown jackets and specifying the time of delivery as end July 1991 and fixing the price at Rs. 1250/- per piece. Ex.P17 is the copy of the said order. Admittedly, no advance amount has been paid. Though the Plaintiff agreed to give a disclaimer and undertaking to the

1st Defendant's bank, but no such disclaimer was given. According to the 1st Defendant, they have made their own arrangements by availing loan

from the Bank for the manufacture of the garments as ordered by the Plaintiff.

13. The period fixed for delivery by Jeffrey Brown Leader Limited is mid August 1991. The Plaintiff has asked the 1st Defendant to get ready with

the garments 1000+440 pieces for inspection by the end of July 1991. Though in Ex.P17 there is an express stipulation to the effect that the goods

to be delivered by the end of July 1991, but the time was extended to 15th August 1991. It is to be mentioned here that the time of delivery is

fixed by the Plaintiff based on the correspondence with Jeffrey Brown Leader Limited, as the same would be evident from the telex message dated

15.7.1991 given by the said Company to the Plaintiff. In the said telex message, the Plaintiff has been asked to despatch the goods before 20th

August, 1991, but however if not possible, the Plaintiff has been requested to send 50% of each size and colour by 20th August 1991. The Plaintiff

also had sent a reply to the effect that it would send the entire quantity by 20th August 1991 and if not possible it would despatch at least 50% of the

ordered quantity in all sizes. Admittedly, the Defendants were not made aware of the above said time stipulation made by the said foreign

Company to the Plaintiff. But, only thereafter, the Plaintiff has extended the delivery date from end July 1991 to 15th August 1991. At this juncture,

it is relevant and important to note that the Plaintiff has conveyed to the Jeffrey Brown Leader Limited by fax message that due to heavy rains in

South India, processing and drying of the leather has been hampered resulting in undue delay. This has not come from the Defendant. It is relevant

to note that the same has come from the Plaintiff explaining the delay. Hence, it is evidently clear that the delay has occasioned due to unforeseen

circumstances. In the above said circumstances of the case, though the time was stipulated in this case for delivery of goods, but it could be

inferred that time was not considered as the essence of the contract. In order to find out whether the time was the essence of the contract in the

instant case, we have to look at the nature of the contract, the surrounding circumstances and also the intention of the parties. Mere inclusion of a

clause in Ex.P17 order that the delivery should be made by the end of July 1991 will not indicate that the time is the essence of the contract. On

going through the correspondences between the parties, more particularly Ex.P23 dated 13.8.1991, it is clear that the Plaintiff was well aware that

the delivery cannot be made within the time stipulated in the contract. In this case, whether the time is the essence of the contract could be inferred

from the following circumstances.

14. It is clear from the correspondences made between the Plaintiff and the Defendants that the fault in non delivery of garments by the end of July

1991 by the Defendant was excused and in fact, in response to the such acceptance from the foreign Company with whom the Plaintiff had entered

into a contract, it had extended the time to mid August 1991. As per the invoice dated 19.8.1991, Ex.D1=Ex.P24, the Defendant has made ready

250 pieces of garments and had duly informed the Plaintiff by letter dated 23.8.1991 regarding the invoice submitted on 19.8.1991 for a value of

Rs. 3,12,300/-. They have also further informed that invoice for 400 garments for a value of Rs. 5,00,000/- is also being sent for payment. The

Plaintiff has not responded to it and had remained silent till they sent a reply dated 31.8.1991 Ex.P29 for the letter sent by the Defendants on

30.8.1991 under Ex.P28. The silence on the part of the Plaintiff in either not rejecting the goods nor responding to the letter sent by the Defendant

would clearly show that the Plaintiff did not elect to avoid the contract and held it as subsisting.

15. The Plaintiff by its conduct had given a go-by to the original term of the contract as regards the time being the essence of the contract. There is

no provision or clause in the contract that on failure to perform the work by the given time, the contract would stand terminated without any further

act on the part of the parties. Even if the time was the essence of the contract, u/s 55 of the Contract Act, 1872 such a contract will not come to an

end by itself after the expiry of the period and the promise has to terminate it by proper notice as provided in Section 66 of the Contract Act,

otherwise, the option to avoid the contract will be deemed to have been waived and the contract subsisting.

16. In the instant case, though the Defendants had made ready 250pieces of garments, as per their invoice No. 19 dated 19.8.1991 Ex.P24 and

sent the goods to the Plaintiff with Ex.P25 letter intimating that another 400 pieces of garments were under the finishing stage and sought for

payment, the Plaintiff failed to make any payment. It is pertinent to point that no advance was paid by the Plaintiff. According to the Defendants,

250 pieces were made ready as per the Plaintiff's specifications and it was duly inspected and approved by one of their representatives of the

Plaintiff namely one Kiran Mohan. It is also seen that the Defendants have completed the manufacture of another 400 garments which was also

said to have been inspected by the Plaintiff's representative namely Kiran Mohan and one Rajkumar. But, those persons were not examined by the

Plaintiff. Ex.D2 invoice is for 400 garments dated 23.8.1991. The Plaintiff has not taken delivery of those articles. It is not the case of the Plaintiff

that those garments were manufactured not as per their specifications. The said fact does not reflect in the correspondences between the parties

prior to Ex.P29. On the failure to take delivery of the goods by the Plaintiff, the first notice have emanated from the Defendants on 30.8.1991,

wherein it has been stated that they had already submitted the bill for 250 pieces and further 400 pieces were also ready requesting the Plaintiff to

make payment for the bill. It appears from the correspondence between the parties that even though the payment was released by the office of the

Plaintiff, but the Plaintiff was holding it for some reason. The Defendants have requested the Plaintiff to take delivery and make payment. Only after

receiving the said letter, the Plaintiff has replied on 31.8.1991 returning the invoices Ex.D1 and D2, but, however, suggesting for settlement of the

dispute. It also appears that the Plaintiff has come forward to take delivery provided that the Defendant reduces the prices from Rs. 1250/- per

garment to Rs. 1000/- per garment. Thereafter, both the parties, have tried for settlement, but without any fruitful result.

17. It is seen from the evidence placed on record that the Defendants never refused to deliver the garments, but in fact 650 garments had been

made ready as per the invoice Ex.D1 and D2 and wanted for payment by the Plaintiff. But, there was no reply from the Plaintiff and no compliance

also made. Thereafter, as the Plaintiff categorically refused to take delivery, the finished garments had been sold in the open market by the

Defendants which had fetched Rs. 1000/- per garment.

18. The Plaintiff claims that they procured 912 finished garments from other sources and shipped the same to Jeffrey Brown Leader Limited at a

considerable higher cost of Rs. 1,465.50/- per piece. At the outset, when 650 garments were made ready as on 19.8.1991 and 23.8.1991 and the

Defendants have duly intimated to the Plaintiff about the delivery at the rate of Rs. 1250/- per piece, there was no necessity for the Plaintiff to

procure the garments at a higher cost of Rs. 1465.50/- per piece. That apart, the Plaintiff has not substantiated their claim by producing evidence

about the said procurement made by them at Rs. 1465.50/- per piece.

19. In the instant case, the Plaintiff has agreed to make payment against delivery and when delivery was made by invoices Ex.D1 and D2 the

Plaintiff has not made any payment in spite of presentation of bills by the Defendants within the time stipulated at least for 650 garments. The

Plaintiff was well aware of the cause for the delay in manufacturing the garments which is disclosed from Ex.P23. It is not every delay which will

give rise to the Plaintiff a right to rescind the contract unilaterally. The correspondence which had passed between the parties show that the

Plaintiff's attitude towards completion of the transaction was lacking and the transaction could not be completed largely because of the attitude of

the Plaintiff. Therefore, notwithstanding the express stipulation as to time for performance of the contract, the surrounding circumstances and the

conduct of the parties would excuse the Defendants' failure to complete the transacting within time. Therefore, I am of the considered view that the

Defendants cannot be held guilty of breach of contract. In such circumstances, the Plaintiff is not entitled to the relief of damages from the

Defendants.

20. However, the evidence disclosed that the Plaintiff has supplied leather worth of Rs. 4.73/- lakhs. The Defendants have admitted the said

supply in Ex.P39 letter dated 24.1.1992. Even in Ex.P28, the letter sent by the Defendants to the Plaintiff, the supply of leather on various dates

between 12.8.1991 and 22.8.1991 has been admitted by the Defendants. Ex.P22 contains the details of leather supplied between the period

12.8.1991 to 22.8.1991 to the value of Rs.4,73,494.46/-. Admittedly, the said leather supplied by the Plaintiff were made use of by the

Defendants in preparing the garments. The Defendants, after breaking up of the contract between the Plaintiff and the Defendants, have sold the

finished garments at Rs. 1000/- per piece to third parties. Therefore, the

Defendants are liable to return a sum of Rs. 4,73,494.46/- being the cost of leather skin supplied at the instance of the Plaintiff. The Plaintiff is entitled to the interest of 12;p.a. for the said sum from the date of the suit till the date of payment. Accordingly, issues 2 to 8 are answered.

21. In the result, the suit is decreed in part and the Plaintiff is entitled to a decree for a sum of Rs. 4,73,494.46/- together with interest at 12; p.a. from the date of the suit till the date of payment. However, in the circumstances of the case, there will be no order as to costs.