
(1969) 05 CAL CK 0024
In the Calcutta High Court
Case No : Suit No. 2243 of 1965

Colles Cranes of India Ltd.

APPELLANT

Vs

Speedeo Spares Corporation

RESPONDENT

Date of Decision : 19-05-1969

Acts Referred:

Contract Act, 1872 — Section 46, 51, 55, 73

Citation : AIR 1970 Cal 321 : (1970) 1 ILR (Cal) 614

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : Sankar Ghose and D.P. Mukherji, for the Appellant; D.K. Chatterjee, for the Respondent

Judgement

P.B. Mukharji, J.—This is a commercial cause. The plaintiff company instituted this suit against the defendant firm for the recovery of a sum of Rs. 12,862.73 P., interests and costs.

2. The plaintiff's case on the plaint is as follows. On May 1, 1964 the plaintiff company placed an order, being purchase Order No. 1330, with the defendant for the sale to the plaintiff of iron joists and other articles, the particulars of which are mentioned in the order itself. The defendant agreed to sell and deliver these goods according to the terms and conditions of that purchase order. These iron joists and other articles were intended to be used in the construction of a building and/or a factory. It was also a term and condition of the agreement that the defendant should deliver the said goods within 10 days of the date of the agreement. In other words, the supply was to be completed within 10-5-1964. It is pleaded that time was of the essence of the contract. On that very same day, i.e., May 1, 1964, the plaintiff paid Rs. 40,188.46 P. in advance to the defendant towards the price of the said goods. The plaintiff further states in the plaint that the defendant failed to deliver the goods according to the contract and within the time stipulated thereunder. It is, therefore, alleged that the defendant committed breach of the contract. The further pleading of the plaintiff is that it extended the

time for delivery of the goods to enable the defendant to fulfil their obligations under the contract and the last date extended for the delivery of such goods was up to August 21, 1964. With regard to the delivery and supply of these goods, the position is that the defendant from time to time delivered diverse quantities of Roods under the contract not only up to the extended time of 21-8-1964 but also up to 27-11-1964. There is a balance of 9.037 M. Tonnes of 400 x 100 m.m. joists still outstanding under the said contract. The whole case of the plaintiff now is based on the fact that the defendant failed to deliver the said balance quantity of goods or any part thereof under the contract. By a letter dated 30-12-1964, the plaintiff terminated the contract. The plaintiff company now claims a refund for the sum of Rs. 12,362.73 P. being the balance on the aforesaid advance payment of Rs. 40,188.46 P. after deducting Rs. 27,325. 73 P. being the price of the goods delivered by the defendant and accepted by the plaintiff. The plaintiff also by a letter dated 10-9-1965 gave notice to the defendant that unless payment of Rs. 12,862.73 P. was made by the defendant, the plaintiff would charge interest on the said sum at the rate of 6% per annum.

3. There are two Annexures to the plaint. Annexure A gives the details of the quantities delivered and supplied by the defendant and the particulars for the sum and also the sum of Rs. 12,862.73 P. as outstanding which is the subject of the claim for refund. Annexure B also gives the statement of accounts giving particulars of the heads of account of the said sum.

4. The defendant filed a written statement denying the claim of the plaintiff. In particular, the defendant denies that time was of the essence of the agreement. It is also alleged in the written statement that the termination of the contract by the plaintiff was not lawful. The further defence is that the defendant was always ready and willing to deliver the balance of the said goods. What the defendants allege in the written statement is that the time was extended because the goods in question were not easily available in the market and they had to be manufactured and the defendants had to place orders with their suppliers. According to the defence, by reason of the wrongful cancellation and termination of the contract by the plaintiff, the defendant claims to set-off a sum of Rs. 13,962. 73 P. mainly on the ground that the deposits of money which the defendant had to make with their suppliers had been forfeited by the defendant's suppliers. The defendant also claims to forfeit the sum of Rs. 12,862.73 P. which the plaintiff is claiming. The particulars of this defence of set off and forfeiture will be found in paragraphs 6 and 7 of the written statement.

5. On these pleadings the counsel for the defendant raised the following issues which were accepted by the plaintiff and settled by the Court:

(1) Whether time was of the essence at the agreement?

(2) Did the plaintiff lawfully terminate the said agreement?

(3) Was the defendant ready and willing to deliver the balance quantity of the materials under the said agreement?

(4) Is the defendant entitled to set off Rs. 13,960.73 P. or forfeit the plaintiff's alleged claim of Rs. 12,862.73 P. as alleged in paragraphs 6 and 7 respectively of the written statement?

(5) To what reliefs, if any, is the plaintiff entitled?

6. There are admitted brief of documents marked Exts. A, B and C in this suit. There are also further documents disclosed and exhibited as Exts. 1 and 2.

7. On behalf of the plaintiff, Japendra Nath Chowdhury, a purchase assistant has given evidence. On behalf of the defendant, Balai Bhattacharjee, the sole proprietor of the defendant has given evidence.

8. Issue No. (1):-- The first issue raises the question whether time was of the essence of this contract. In support of this issue the plaintiff has relied on the purchase order appearing at page 3 of Ex. A. It is dated the 1st May, 1964, It is numbered 1330. At the end of this purchase order, under the clause "deli-very" this is what appears: "Delivery: Should be supplied within ten days or earlier". Even in the defendant's letter of offer dated the 28th April. 1964 appearing at page 1 in Ex. A it was expressly stated by the defendant that "delivery will be effected within ten days from the date of the receipt of the order." This was repeated in a continuation letter dated the 1st May. 1964 appearing at page 2 in Ex. A, where the defendant said: "Delivery shall be effected as already stated in our abovementioned quotation within ten days from the date of the receipt of your order." After these two letters of the defendant, the formal purchase order followed with the clause which I have quoted.

9. From this it follows that when the contract was made, time was of the essence of the contract. The clause "ten days or earlier" shows that ten days was the ultimate limit and the words "or earlier" show the urgency of the time within which it had to be completed.

10. From this I can only construe and interpret the contract as showing a clear intention both on the part of the defendant as well as of the plaintiff that time was to be regarded as the essence of the contract. I should, therefore, answer the first issue in the affirmative holding that time was of the essence of this contract.

11. But one fact must be recorded here. The point is that although time was stipulated to be the essence of the contract, the treatment of the contract and its subsequent execution by deliveries equally show that this clause Was not insisted. The evidence discloses that deliveries were made long after the stipulated time of the 10th May, 1964 and were duly accepted by the plaintiff Correspondence shows that time was extended from time to time. It was first extended till the 27th June. 1964 which will appear from the letter of the 16th June, 1964 appearing at page 10 of Ex. A. Again, the letter of the 17th August, 1964 appearing at page 21 of Ex. A shows that the time for delivery was extended till the 21st August, 1964. Even thereafter certain goods were supplied

by the defendant on the 27th November, 1964 which were also duly accepted by the plaintiff.

12. Issue No. (2):-- The second issue raises the question whether the plaintiff's termination of the agreement was lawful. The letter of termination was written by Balaji, the purchase officer of the plaintiff company, dated the 31st December, 1964, inter alia, in the following terms:--

"Due to considerable delay in the supply of the materials which according to the order should have been delivered within 10 days from receipt of our order as agreed by you, we have had to obtain supplies from another source and so we inform you that this order is cancelled and no more materials are to be supplied against it. In view of the above we should be pleased to receive the cheque from you in settlement of the out-standings."

The defendant challenges this termination as unlawful in the facts and circumstances of this case.

13. Section 55 of the Contract Act provides:

"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

From this part of the provision of Section 55 of the Contract Act it follows, in my opinion, that the effect of the failure to perform at a fixed time in a contract where time is of the essence makes the contract only voidable, and not void. It becomes voidable at the option of the promisee, the promisee therefore, will have to exercise his power and express his intention and say to the promisor that he treats the contract as void.

14. Section 55 of the Contract Act also provides in the third paragraph thereof,

"if, in case of a contract voidable on account of the promisor'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 promisor of his intention to do so."

Now, this part of the provision of Section 55 of the Contract Act provides the effect of acceptance of performance at a time other than that agreed upon. At the extended time in this case when the plaintiff accepted deliveries beyond the time stipulated under the purchase order, the plaintiff never gave any notice of such intention. Therefore, it follows in this case that the plaintiff accepted the performance of the defendant even by late delivery as late as the 27th November, 1964. I shall only make reference to two more sections of the

Contract Act in this connection. One is Section 66 of the Contract Act which provides that, "The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal."

Now, if a reference is made to Section 6 of the Contract Act, it will be seen that it provides, *inter alia*, that a proposal is revoked by the communication of notice of revocation by the proposer to the other party. This notice, the plaintiff states, was a notice given by the letter dated the 31st December, 1964.

15. Even if time were not of the essence of the contract in this case the Court will always find out what was the 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 the question what is a reasonable time is in each particular case a question of fact, as expressly laid down by Section 46 of the Contract Act. Surely, the plaintiff, even though it extended time for delivery and accepted deliveries upto November 1964, could in the circumstances of a case of this nature say, that it is not going to extend time any more and terminate the contract. It did terminate the contract at the end of the year 1964. I consider that for an express contract where the express term for delivery said that the delivery had to be completed within 10 days or earlier i.e., within the 10th May 1964, it would not be unreasonable for the Court to hold in the facts and circumstances of this case, where extension was in fact granted from time to time, that the reasonable time within which it must be performed was at least by the end of the year 1964. That was the time which the plaintiff gave by its letter dated the 31st December 1964. I do not think that a contract of this nature could be left open for performance even after December, 1964 when the original engagement of the 1st May 1964 was to complete the delivery by the 10th May 1964. Therefore, even applying the doctrine of reasonable time I see nothing wrong in the termination of a contract by the plaintiff. I am of the opinion that extension of time even in such cases cannot go on indefinitely and the plaintiff is entitled in such a case to say that after a certain extension it is not going to give any further extension.

16. I am aware of the case made by the defendant that delay in the delivery was caused mainly by reason of the fact that (a) the goods in question were not easily available in the market and (b) that the size or measurements were rather odd and unusual in some cases. But even then that is no excuse on the facts of this case because knowing them to be so, the defendant, with eyes open entered into this contract that they would supply and complete the deliveries within the 10th May 1964. I am therefore, unable to accept the defendant's version on which Mr. Balal Bhattacharjee the witness spoke that the contract really was to supply these goods as and when they could be obtained from the market. No doubt the correspondence indicates at different stages that the defendant was complaining that the goods were not available and the defendants were trying to get them in the market. But the point is, how long could this be kept open? The

nature of the goods is not such. They are iron joists, channels, angles and flats and cannot be said to be such that they are rare commodities. The purpose for which they were being obtained by the plaintiff was known to the defendant and It was for the construction of a factory shed or a building. See for instance all the original bills appearing from pages 30 to 34 of Ex. A indicating that the goods had to be delivered to Messrs. Mackintosh Burn Ltd., Stores Department, and also the admission by the defendant by their letter dated 28th December 1964 at page 29 of Ex. A stating the supplies were made to Messrs. Mackintosh Burn Ltd. In this view of the circumstances and facts of the present case I cannot accept Mr. Bhattacharjee's version appearing in his answer to questions 139 to 144 that the goods were to be supplied as and when available and that 10 days' stipulation regarding time was only a matter of form. There is also the further feature, when due to the delay of the defendant in supplying the goods the plaintiff insisted as a security of guarantee of performance, there was a cheque for Rs. 25,000 from the defendant and which in fact was issued on the 12th June 1964 as will appear from the cheque at page 8 of Ex. A. The letter of the plaintiff dated the 13th June 1964 at page 9 makes it clear that the cheque for Rs. 25,000 on account was to be adjusted against the advance payment made by the plaintiff to the defendant. No doubt this cheque was not ultimately cashed and it would be seen from the letter of the 16th June 1964 from the defendant that as the time of delivery was extended till the 27th June 1964 the defendant stopped payment of the cheque. This letter of the 16th June 1964 will appear at page 10 of Ex. A.

17. For these reasons I hold that the plaintiff's termination of the said agreement was lawful and I answer the second issue in the affirmative.

18. Issue (3):-- This third Issue raises the question of the readiness and willingness of the defendant to deliver the balance quantity of the goods.

19. The learned counsel for the defendant relies on certain facts and circumstances in this case to show that the defendants were always ready and willing to perform this contract. He relies first on the correspondence in Ex. A where in such letters as dated the 21st July 1964 at page 19, dated the 17th August 1964 at page 21, dated the 18th August 1964 at page 22, dated the 9th November 1964 at page 25, dated the 30th November 1964 at page 27, to indicate that throughout the defendants were trying to get the goods, keeping the plaintiff informed about the difficulty of availability of these goods in the market and also that the defendants were trying all the time to secure these goods. The learned counsel for the defendant also relies on letters subsequent to the termination of the contract such as the letter dated the 13th January 1965 and the letter dated the 12th April 1965, both from the defendant to show that even thereafter the defendants were looking out in the market to get the Roods.

20. It is a fact that these letters record these considerations. That has also been the evidence of the defendant's witness Mr. Bhattacharjee. But there is no supporting evidence. There is no independent evidence, oral or documentary on

the point. There is no evidence of the market that these joists were not available at that time. There is no evidence of the market that some of these goods were of odd size. Therefore, the mere absence of denial by the plaintiff in any reply to such letters from the defendant on the point would not in my view establish the defendant's version. Mr. Bhattacharjee in answer to Q. 58 for the defendant said that some of these goods were of odd size but the fact remains that even so, knowing them to be so the defendant entered into that contract and in fact the major part was supplied to the plaintiff. Therefore while I appreciate the attempt to prove the defendant's readiness and willingness to deliver as appearing from (1) correspondence (2) by actual conduct in the supply of the major part of the goods (3) and even out of 16.014 tons of joists of odd size as much as about 7 tons were supplied leaving only a balance of 9 tons, I cannot but feel that such readiness and willingness in the facts and circumstances of this case can exonerate the defendant from the terms of the contract. It may be noticed here that while the defendants were expressing their readiness and willingness the plaintiff was also expressing its readiness and willingness to accept delivery even beyond time.

21. It has been argued by the learned counsel for the defendant that the plaintiff had committed breach of the terms of the contract even before its alleged termination on the 31st December 1964. Reliance is placed on the fact that even the letter of termination dated the 31st December 1964 confesses that the plaintiff "had to obtain supplies from another source." It is therefore, argued for the defendant that if that was so, the plaintiff itself was committing breach of the contract by obtaining supplies from other persons. The argument has an apparent attraction but suffers from the defect that the contract never stipulated that because the plaintiff ordered the defendant for supply of some of these goods, they could not purchase such goods at all from other sources also. (See in this connection Japendra Nath Chowdhury's answer to qq. 199-203).

22. On these facts, I have therefore come to the conclusion that although the defendant was ready and willing to deliver the balance quantity of the goods, but such readiness or willingness were not according to the terms of the contract. I answer the Issue 3 accordingly. I need only add that readiness and willingness as a concept in a contract for sale of goods is a limited doctrine. Section 51 of the Contract Act provides that when a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise. The reciprocity when applied to the facts of this case cannot mean more than this that while the plaintiff was willing to accept delivery even for sometime beyond the agreed or specified time, it does not mean that the plaintiff should be obliged to do so indefinitely and the defendant need not perform his part of any reciprocal promise or his obligation.

23. Issue (4):-- The 4th Issue raises the question whether the defendant is entitled to set-off the sum of Rs. 13,960.73 or forfeit the plaintiff's claim for

refund of. Rs. 12,862.73 p. as alleged in paragraphs 6 and 7 of the Written Statement.

24. Now, the original advance by the plaintiff towards the price is an admitted fact. The advance was of this sum of Rs. 40,188.46 p. which also is admitted. The particulars of the account are clearly set out in Ex. A of the plaint which Es proved by plaintiff's witness Chowdhury (Japendra Nath Chowdhury's answers to qq. 10-17). Ex. A to the plaint shows the items, the quantities ordered, the quantities supplied and the price. The total price of the goods delivered under the contract on this account is Rs. 23,325.73 p. including delivery charges. This sum, therefore, is deducted from the advance payment of price, i.e. Rs. 40,188.46 P. On such deduction, the outstanding balance Rs. 12,862.73 P. which is claimed by the plaintiff.

25. There Is no dispute about these figures. The defence is right to forfeit and a claim for set-off. It would therefore, be necessary to examine the exact points of the defence and the claim of the defendants to set-off and to forfeit. In para 6 of the Written Statement it is alleged in the particulars "Balance of the deposit amount forfeited by the suppliers of the defendant Rs. 12,000" and "Sales Tax paid by the defendant Rupees 1,960.73" amounting to total figure of Rs. 13,960.73 P.

26. On this basis, the defendant wants to set-off the whole of the plaintiff's claim for the return of the balance of the advance price amounting to Rs. 12,862.73 P.

27. On the evidence, I am afraid, the defendant has not succeeded in proving that the balance of the deposited amount paid by the plaintiff was forfeited by the defendant's own suppliers and such forfeiture amounted to the exact figure of Rs. 12,000 as shown In the particulars in para 6 of the Written Statement. Not one of the suppliers of the defendant has been called as a witness. The defendant's excuse for not calling any one of the suppliers is that they are "Kalwars" and they do not have the papers. I am unable to accept this version, specially because there should be some documents or some papers, and secondly their oral evidence could also have been at best a corroboration. If the defendant's case is that they deposited some monies with each one of these suppliers for manufacturing these goods, then there must be some receipt of this money. But not one of these receipts have been produced. The receipts must be with the defendant and not with the "Kalwars". There is no letter or correspondence from any of the suppliers of the defendant that any one of them has forfeited any deposit made by the defendant with them. What is attempted is proof of this by showing some entries of the Cash Book and the Ledger of the defendant which are marked as Exts. 3-A, 3-B, 3-C, 3-D in the Cash Book and 4-A, 4-B and 4-C in the Ledger. Mr. Ghose appearing for the plaintiff has commented on these entries in the cash book and in the ledger. His first comment is that these entries do not give any particulars regarding the goods of the contract against which these advances were supposed to have been made by

the defendant to the kalwars. He has also commented on the words "advance against purchase" appearing in different inks in the entries of the cash book such as under dates 15th May 1964 and 8th May 1964. These two comments are not without weight but they may not be enough to displace those entries. But the difficulty with the defendant is that they cannot be identified with the particular orders or the nature of goods mentioned in the dispute in this suit and the articles mentioned in the purchase order in this suit. Bhattacharjee's evidence on this point may be found in his answers to qq. 77, 80, R3, 86 and 94. In answer to question 83 Bhattacharjee for the defendant says that so far as the purchases from kalwars are concerned no documents or vouchers would be made available because they generally give them. But in answer to q. 86 Bhattacharjee for the defendant said that "I do not have these documents because they were meant for kalwar parties but I have got other documents also to prove these advances: But these other documents are not on record to connect or identify the transaction mentioned in the entries in the cash book and ledger with the goods in this suit.

28. Then again it will be found from Bhattacharjee's answers to qq. 46 to 50 that he could not establish the exact figure of Rs. 12,000 mentioned in the particulars of paragraph 6 of the Written Statement. On his calculation he only arrived at a figure of Rs. 11,800 and in answer to question 47 he said that the calculation in the written statement may be wrong.

29. A more cogent point was made by the learned counsel for the plaintiff by reference to even the post cancellation letters dated 13th January 1965, 12th April 1965 and 17th September 1965 appearing respectively at pages 37, 39 and 42 of Ex. A that these letters do not even show that the suppliers of the defendant forfeited the amounts which are now being claimed as a set off against plaintiff's claim. Attention is also drawn to the fact that these alleged suppliers of the defendant were to deliver the goods within 24 hours of the payment received by them. See Bhattacharjee's answer to q. 192. Yet those payments were made by the defendants to their suppliers in May and July 1964.

30. I, therefore, must come on these facts to the conclusion that the defendant has failed to prove and establish the first item in the particulars of paragraph 6 of the written statement showing that Rs. 12,000 has been forfeited by the suppliers of the defendant.

31. The next point in the particulars as indicated above and as alleged in paragraph 6 of the written statement is concerned with sales tax paid by the defendant to the extent of Rs. 1,960.73 P. Here again I think the defendant has failed to prove the payment of the sales tax. There is utter confusion in this branch of the case so far as the defendant is concerned. The plaintiffs witness Chowdhury also has not been very truthful on this point. I shall just indicate the facts as on record before I state my conclusion.

32. For the defendant two letters with enclosures dated respectively the 13th and

14th April 1964 marked as Exts. 1 and 2 have been exhibited in support of this claim. They are with regard to the sales tax declaration form. But the difficulty with these two exhibits 1 and 2 is that they do not relate at all to the goods in question and payment of sales tax upon such goods in suit. They therefore, are in my view irrelevant.

33. The evidence of the witness Chowdhury on behalf of the plaintiff on this point is most unsatisfactory. Generally his version of the case on this point may be found in his answers to qq. 254 to 283. The main burden of his evidence on the point is that there was no agreement to pay sales tax in respect of the transactions in suit. He tried all kinds of answers to get out of a very inconvenient situation. He tries to say that both Purchasers and sellers pay sales tax. Then he said that if the purchaser was registered under Sales Tax then the purchaser paid the sales tax. Then he tried to say that he did not know whether the plaintiff company was registered or not under the Sales Tax until he was shown that the very purchase order itself showed the sales tax registration number of the plaintiff. Again he tried to say that the plaintiff company pay sales tax when required to pay the same but in respect of the transactions in suit there was no such understanding. So the plaintiff company did not pay. For instance see his answer to question 279. The fact remains, however, that the plaintiff company in this case paid the sales tax for all deliveries that it took from the defendant. They are as plain and clear as could be seen from numerous bills from the plaintiff company itself to the defendant appearing at pages 30 to 34 of Ext. A where expressly and broadly on the face of each bill appear the words "Add West Bengal Sales Tax at 5%" and each bill gives the figure of sales tax included in the bill itself. Therefore, Chowdhury's testimony that the plaintiff company did not pay sales tax in respect of the transactions in suit and that there was no understanding about the Payment of such sales tax is entirely untrue and false. But this does not help the defendant because so far as the plaintiff's claim for the refund of the balance of the advance payment of the price is concerned it is with respect to goods undelivered upon which no sales tax is either payable or due, regard being had to the fact that goods delivered by the defendant and accepted by the plaintiff have already been accounted for by payment of the sales tax by the plaintiff as shown from the bills just mentioned. Therefore, the claim for sales tax by the defendant cannot be sustained. It appears that a sum of Rupees 31,356.58 as total sales tax has already been paid by the plaintiff on the bills disclosed relating to the deliveries taken by the plaintiff.

34. I need only record here that having regard to these facts Mr. Chatterjee, learned counsel for the defendant gives up the defendants claim to forfeit primarily on the ground that there was no clause of forfeiture in the purchase order or in the contract in the suit. I need only add that what the plaintiff is claiming in this suit is return of a part of the purchase price paid in advance on the ground that a certain balance of the goods under the contract has not been supplied. When price is paid in advance against goods to the supplier then the

seller cannot claim a right to forfeit such money paid as advance price because I consider such advance payment of price as in the nature of a trust or quasi trust ear-marked for the purpose of price for the goods to be supplied and when there is a failure to supply the goods, such advance payment of price cannot be diverted or forfeited for other purposes or on the ground that there was an alleged breach on the part of the buyer. Having regard to the concession of Mr. Chatterjee the learned counsel for the defendant in this point I do not need to pursue this matter.

35. Having regard to these facts found by me it is unnecessary to enter into any detailed discussion of the two cases referred to by Mr. Ghose. learned counsel for the plaintiff, namely, (1) Bhudar Chandra v. C. R. S. Betts AIR 1916 Cal 901 and (2) Pulgaon Cotton Mills v. Gulabai AIR 1953 Naff 345 The Calcutta case lays down the principle that on the construction of the contract in that case parties intended that time should be of the essence of the contract and therefore, the defendant was liable to pay damages for breach of that contract There the defendant agreed to deliver the elephant to the plaintiff on October 1, 1910 but subsequent to the contract obtained an extension of time till October 6, 1910 for the delivery of the elephant But the defendant did not deliver the elephant till October 11, 1910. It was held there that such extension did not destroy the fact that time was of the essence of that contract. This case, however, has no application to the present facts: first, because there the contract showed the urgency as the elephant was required for the seasonal Kheddah operations and secondly, because the time was insisted upon and not extended repeatedly as in the present case.

36. The Nagpur case also lays down the principle that where time is of the essence of the contract and is extended, the extended date is also of the essence of the contract. The point here remains that even thereafter- the final extended date, expressly stated to be "final" by the plaintiff till August 21. 1964, the plaintiff continued to accept delivery in November 1964. Normally, ever since the old English case in Robinson v. Cook (1815) 6 Taunt 336 decided in 1815, the view usually taken is that unless a contrary Intention is clearly shown, a time fixed for delivery in a contract for sale or delivery of the goods should be exactly observed. But Lord Parker has observed in Stickney v. Keeble 1915 AC 386 at p. 416 as follows:

"But this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties for reasons best known to themselves stipulated that the time fixed should be essential, or where there was something in the nature of property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract. It should be observed, too, that it was only for the purposes of granting specific performance that equity in this class of case interfered with the remedy at law. A vendor who had by his conduct lost the right to specific performance had no equity to restrain

proceedings at law based on the non-observance of the stipulation as to time."

37. As Indicated in the 6th Edn, of the Law of Contract by Cheshire and Fifoot at pp. 466-67, the real position in law is indicated by the intention of the parties. The intention is not only in the letter but also in the spirit and in the conduct. The learned authors state the law on this point in the following terms:--

"In short, time is of the essence of the contract even in equity if such was the real intention of the parties. Moreover, an intention to this effect may be expressly stated or may be inferred from the nature of the contract or from its attending circumstances. By way of summary it may be said that time is essential in equity, first, if the parties expressly stipulate in the contract that it shall be so (Hudson y. Temple (1860) 29 Beav 536) ; secondly, if in a case where one party has been guilty of undue delay is notified by the other that unless performance is completed within a reasonable time, the contract will be regarded as broken 1915 AC 386 also Rickards (Charles) Ltd. v. Oppenheim (1950) 1 KB 616 ; and lastly, the nature of the surrounding circumstances or of the subject-matter makes It imperative that the agreed date should be precisely observed."

38. Under the last heading, it was held that a date fixed for completion is essential if contained in a contract for the sale of property which fluctuates in value with the passage of time, such as a public house, business premises or a reversionary interest. It is, needless, in my view, to pursue this particular point any more having regard to my findings in the contract in suit,

39. For these reasons, I answer Issue 4 in the negative and I hold that the defendant is not entitled to set-off or forfeiture as claimed in paragraphs 6 and 7 of the Written Statement.

40. Issue 5:-- This issue relates to the relief to which the plaintiff is entitled. This relief follows from my findings mentioned above. The only point to which I need make any particular reference is about interest. Interest and notice for interest have been given in the two letters dated 7-4-1965 and 10-9-1965, appearing at p. 38 and p. 40 of Ex. A. In fact, interest is claimed in the plaint from 10-9-1965. This suit was filed on 21-12-1965. In those circumstances, the plaintiff is entitled to claim this interest and I consider 6% per annum to be reasonable.

41. There will, therefore, be a decree for the sum of Rs. 12,862.73 P. as claimed by the plaintiff with interim interest and interest on judgment at the rate of 6% per annum thereupon and costs.