

(2014) 02 CAL CK 0075
In the Calcutta High Court
Case No : C.S. No. 311 of 1998

G.S. Fertilisers Private Ltd.

APPELLANT

Vs

The Associated Cement Companies Ltd.

RESPONDENT

Date of Decision : 07-02-2014

Acts Referred:

Contract Act, 1872 — Section 8

Citation : (2014) 02 CAL CK 0075

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Ajoy Krishna Chatterjee, Mr. Murali Mohan Roy, for the Appellant; Dhrubo Ghosh, Aniruddha Mitra, Ashok Bose and Mr. Ajoy Gaggar, for the Respondent

Judgement

Debangsu Basak, J.—The plaintiff wanted to set up a plant at Orgram in Burdwan, West Bengal. Plaintiff required large quantities of cement for the construction of the plant. The defendant was a manufacturer of cement. The plaintiff negotiated with the defendant for supply of cement. Negotiations were done verbally. By a letter dated October 24, 1997 the defendant offered to supply 1,500 metric tonnes of cement of a particular quality at the rate of Rs. 1,900/- per metric tonne together with West Bengal Sales Tax as applicable F.O.R. at site of the plaintiff. The plaintiff issued a letter dated October 24, 1997 which the plaintiff claimed to be a counter offer where the plaintiff wanted supply of 1,500 metric tons of the same quality of cement at the same price. It was specified that the price would remain firm during the pendency of the order. According to the plaintiff, it sent a cheque for Rs. 3,00,000/- along with the letter dated October 24, 1997 to the defendant. Such cheque was encashed by the defendant. With the encashment of such cheque, the plaintiff claimed, that a concluded contract came into being on the terms contained in the letter of the plaintiff dated October 24, 1997. According to the plaintiff, the parties acted on the basis of letter dated October 24, 1997 of the plaintiff. According to the plaintiff, out of the contracted of 1,500 metric tonnes the plaintiff received 577

metric tonnes leaving 923 metric tonnes to be delivered by the defendant to the plaintiff. From time to time the plaintiff made advance payments to the defendant aggregating to a sum of Rs. 13,00,000/-. The value of the goods supplied by the defendant to the plaintiff was Rs. 10,96,300/- Therefore, according to the plaintiff the defendant was liable to refund a sum of Rs. 2,03,700/- on account of the advance payment received by the defendant. According to the plaintiff, the defendant acted in breach of the contract and by a letter dated May 8, 1998 sought to increase the price to Rs. 2640 per metric tonne. The defendant was not entitled to do so. No supply was made subsequent to the letter dated May 1, 1998. The plaintiff being in urgent need of cement purchased the same from a different agency at the rate of Rs. 2,600/- per metric tonne. The plaintiff claimed the difference of such supply from the defendant. The plaintiff claimed that in terms of the contract as understood by the plaintiff, the defendant was to supply cement at the site of the plaintiff which included the handling charges. Under the new contract the plaintiff was required to pay the handling charges. The plaintiff claimed the handling charges from the defendant. The plaintiff quantified such claim at Rs. 8,655/-. The plaintiff in addition to the three claims as enumerated above claimed compensation at the rate of Rs. 2,00,000/- per day.

2. In its written statement the defendant claimed that the terms and conditions contained in the letter dated October 4, 1997 for the plaintiff was contradictory and/or was inconsistent with the terms and conditions agreed upon between the parties. It claimed that the supply made by the defendant was in terms of the defendant's letter dated October 24, 1997. The defendant claimed that it was entitled to increase the price. Price of cement was not fixed. The request for increase in price contained in the letter dated May 1, 1998 of the defendant was in terms of the agreement as understood by the defendant. The defendant claimed that the plaintiff repudiated the contract wrongfully. According to the defendant, the plaintiff was not entitled to any claim.

3. Issues with regard to the instant suit were framed on September 9, 2013. Nine issues were framed which were as follows:-

1. Whether the sale and purchase of 1500 MT of ACC super Portland slag cement by the defendant to the plaintiff was governed as per the terms and conditions contained in the defendant's order dated 24th October 1997 or the Plaintiff's purchase order dated 24th October 1997?

2. Is there any agreement between the parties with regard to the price offered by the plaintiff for ACC super Portland slag cement throughout the tenure of the agreement as alleged by the plaintiff in paragraph 5 of the plaint?

3. (a) Whether the defendant committed breach in not supplying cement to the plaintiff at the rate of Rs. 1900/- per MT?

(b) If so, was the defendant liable to compensate the plaintiff for such breach?

4. Is the plaintiff entitled to Rs. 7,38,400/- being the difference in price of the cement purchased from the market and the price at which the cement was to be supplied by the defendant @ Rs. 1900/- per MT?

5. Is the plaintiff entitled to Rs. 32,00,000/- for loss and damages suffered as claimed in paragraph 11(b) of the plaint?

6. Is the defendant liable to return to the plaintiff Rs. 2,03,700/- being the amount lying in deposit with the defendant?

7. Is the plaintiff entitled to Rs. 8,655/- on account of unloading charges as claimed in paragraph 11(d) of the plaint/

8. Is the plaintiff entitled to interest @ 18 % per annum?

9. To what reliefs the plaintiff is entitled?

4. Two witnesses of the plaintiff were examined in chief by the plaintiff and cross-examined by the defendant. The defendant did not produce any witness. Nine documents were tendered in evidence and marked exhibits.

5. Mr. Ajoy Krishna Chatterjee learned Senior Advocate for the plaintiff submitted that there was only one contract between the parties and that such contract was on the basis of the terms and conditions enumerated in the letter dated October 24, 1997 of the plaintiff being Exhibit "B".

6. He submitted that the parties acted on the basis of Exhibit "B". Along with Exhibit "B" the plaintiff forwarded a cheque for Rs. 3,00,000/-. The defendant encashed such cheque unconditionally. There was no contemporaneous letter from the defendant that the defendant was not accepting the terms and conditions as contained in Exhibit "B" or that the defendant was acting in terms of their letter October 24, 1997 which was Exhibit "A". He contended that, the counter offer of the defendant as contained in Exhibit "B" was accepted unconditionally by the defendant and such unconditional acceptance by the defendant would be evident from encashment of the cheque of the plaintiff by the defendant; continuance of delivery by the defendant without any demur; no contemporaneous letter from the defendant disputing the deletion of the price escalation clause of Exhibit "A" by Exhibit "B"; not abiding by the terms of exhibit "A" inasmuch as the defendant continued supplied beyond January 31, 1998 which such date was the terminus of Exhibit "A"; and accepting that the supply of cement was in terms of the purchase order of the plaintiff being Exhibit "B" by the letter dated May 8, 1998.

7. Therefore, according to him, Exhibit "B" was accepted by the defendant unconditionally and acted upon by the parties. Exhibit "B", according to him was a valid and binding contract between the parties.

8. Mr. Chatterjee compared Exhibit "A" and "B" with each other. Exhibit "A" was a letter dated October 24, 1997 issued by the defendant to the plaintiff. Exhibit "A" had a price escalation clause which such clause was not present in Exhibit

"B". Furthermore, the quantity in Exhibit "A" was 2,500 metric tonnes while in exhibit the quantity was 1,500 metric tonnes. In Exhibit "A" the validity of the rate was till January 31, 1998 while in Exhibit "B" no such terms were included. Contrasting the two exhibits Mr. Chatterjee submitted that the terms and conditions contained in the two exhibits were fundamentally different. Both the letters could not stand together. Moreover, he submitted that the parties acted on Exhibit "B" since the defendant continued to supply even after January 31, 1998 at the same rate. The defendant gave a go bye to the validity period contained in Exhibit "A".

9. By the letter dated May 8, 1998 marked as Exhibit "C" the defendant wanted to increase the rate of Rs. 2,640/- per metric tonne. He submitted, placing Exhibit "C", that the defendant referred to Exhibit "B" in the letter dated May 8, 1998 being Exhibit "C" and that the defendant confirmed by Exhibit "C", that they were supplying cement to the factory of the plaintiff as per Exhibit "B". Mr. Chatterjee submitted that the contents of Exhibit "C" was an additional confirmation from the defendant that the parties were acting on the basis of Exhibit "B" and not otherwise. He submitted that the case made out in the written statement by the defendant was an afterthought.

10. He, therefore, submitted that the contract between the parties appeared from Exhibit "B". The defendant was bound by the terms and conditions of Exhibit "B". The defendant acted in breach of Exhibit "B" in issuing the letter dated May 8, 1998 being Exhibit "C".

11. The plaintiff was entitled to receive 1,500 metric tonnes of agreed quality of cement at the rate of Rs. 1,900/- per metric tonnes from the defendant. The defendant wrongfully and unilaterally sought to increase the rate to Rs. 2,640/- by Exhibit "C". Such increase in price was not in terms with Exhibit "B". Furthermore, he submitted that the increased price of Rs. 2,640/- was not in terms of Exhibit "A" assuming though not admitting that Exhibit "A" was the basis of the contract between the parties.

12. The plaintiff was obliged to seek supply from other sources. The plaintiff brought cement for the balance quantity of 923 metric tonnes at the rate of Rs. 2,600/- per metric tonne. This was established from Exhibit "D". The plaintiff through its Advocate's letter dated May 14, 1998 being Exhibit "G" called upon the defendant to compensate the plaintiff for the loss and damages. The defendant through its Advocate replied thereto by a letter dated May 19, 1998 which was Exhibit "H". The stand of the defendant taken in the written statement was not reflected in the reply dated May 19, 1998.

13. He referred to Exhibit "E" which were the invoices and Exhibit "F" which were the challans in respect of the 923 metric tonnes of cement that the plaintiff purchased from the third party at the rate of Rs. 2,600/-. He claimed that the difference in price ought to be made good by the defendant. On the quantum of unloading charges Mr. Chatterjee submitted that the contract of Exhibit "B" was

on F.O.R. basis at the plant site of the plaintiff at Orgram, Burdwan. The contract between the plaintiff and the third party was not on F.O.R. at plant site basis. The defendant, therefore, was liable to compensate the plaintiff for the handling charges. He referred to questions and answers being numbers 71 to 79 of Mr. Tapan Kumar Mukherjee and submitted that the claim of the plaintiff Rs. 8,655/- in that regard was established. On the claim for damages of Rs. 2,00,000/- per day Mr. Chatterjee fairly submitted that there was no evidence to such effect. He, however, referred to the questions and answers put to Mr. Tapan Kumar Mukherjee being question numbers 80 to 89 in that regard. Mr. Chatterjee relied upon Section 8 of the Indian Contract Act, 1872. He submitted that Exhibit "B" his client had forwarded a cheque for Rs. 3,00,000/-. The letter of the plaintiff being Exhibit "B" was accepted by the defendant without any demur. The cheque enclosed with Exhibit "B" was encashed by the defendant without any demur. He relied on All India Reporter The Union of India Vs. M/s. Rameshwarlall Bhagchand,) and Food Corporation of India and Another Vs. Ram Kesh Yadav and Another, on the point of Section 8 of the Indian Contract Act, 1872. He submitted that Exhibit "B" was a conditional offer. The defendant had the choice or either accepting the conditional offer or rejecting the conditional offer or making a counter offer. According to him, the defendant accepted the conditional offer unconditionally. The defendant did not reject the conditional offer contained in Exhibit "B" nor made any counter offer to Exhibit "B". The defendant having accepted the conditional offer contained in Exhibit "B" was not entitled to accept a part of such offer which resulted in the performance by the offerer and then reject the condition subject to which the offer was made.

14. Mr. Dhrubo Ghosh learned Advocate for the defendant contended that Exhibits "A" and "B" were to be read together. He urged that a harmonious construction was required to be given to both Exhibits "A" and "B". Exhibits "A" and "B" were both dated October 24, 1997. None of the Exhibits "A" and "B" according to Mr. Ghosh was a stand alone document.

15. Mr. Ghosh justified the reading of Exhibits "A" and "B" in a harmonious manner on the foundation that in the event Exhibit "B" was to be considered as a stand alone document then the terms of Exhibit "B" were against commercial usage. According to him Exhibit "B" did not specify the validity period of the supply. In other words, he contended that, were Exhibit "B" to be read without Exhibit "A" then in such an event Exhibit "B" would mean that the defendant was obliged to supply 1,500 metric tonnes of cement for an unspecified period. The contract would, therefore, remain valid till such time 1,500 metric tonnes were supplied by the defendants. This according to him was against commercial usage. On the contrary he urged that Exhibits "A" and "B" can be read together harmoniously. He submitted that the quantity of 1,500 metric tonnes was required to be supplied within the period prescribed in Exhibit "A" which was till January 31, 1998. He submitted that the contract between the parties could not be urged to be an open ended contract. The contract ought to be considered commercially and a commercial interpretation ought to be given.

16. He then submitted that the claim of the plaintiff failed on the ground of inadequate evidence. According to him, the plaintiff failed to prove its case by tendering adequate evidence. The plaintiff failed to prove the quantum of damages. The handling charges were not proved. Exhibit "I" which purported to be a statement of account was not the original books of accounts. He submitted that Exhibit "I" did not have any evidentiary value.

17. He referred to the various answers by given the witness of the plaintiff in cross-examination. He submitted that Mr. Tapan Kumar Mukherjee, witness of the plaintiff admitted that the validity period of the contract entered into between the parties was for two months. He also submitted that the witness of the plaintiff admitted that Exhibit "B" was not a counter offer.

18. He distinguished the two cases cited by Mr. Chatterjee as not applicable to the facts and circumstances of the present case. He submitted that the fact situation obtaining in the Gauhati High Court case was different to the present suit. He distinguished Food Corporation of India & Anr. (Supra) by submitting that the case related to compassionate appointment and did not have any manner of application to the facts of the instant suit. He submitted that the claim of the plaintiff be dismissed.

19. The first two issues required answers prior to the other issues were taken up for consideration. On one end of the spectrum was the suggestion of the plaintiff that Exhibits "A" and "B" were stand alone documents for the reasons contended on its behalf. On the other hand of the spectrum was the suggestion of the defendant that taking Exhibit "B" as a stand alone document would lead to an absurd situation and that in such an event the terms of Exhibit "B" would be against commercial usage.

20. No doubt the terms and conditions of Exhibits "A" and "B" were different and I dare say fundamentally on quantity, price escalation and the duration of the contract. As against Exhibit "A" quantity of 2,500 metric tonnes Exhibit "B" was for 1,500 metric tonnes. Exhibit "A" had a price escalation mechanism, while Exhibit "B", on the contrary, specified that the price would remain firm during the pendency of the order. Exhibit "A" specified that the contract was valid for orders received up to November 30, 1997 and supplied up to January 31, 1998. Exhibit "B" on the other hand did not specify any period of time. On the contrary, it specified that the price was fixed during the pendency of Exhibit "B". Exhibit "B" required the defendant to deliver in terms of 10 metric tonnes each in phases as per the schedule to be given by the plaintiff.

21. The defendant in its letter dated May 8, 1998 being Exhibit "C" stated that it was supplying cement to the plaintiff at the plant site of the plaintiff at Orgram, Burdwan as per Exhibit "B".

22. Exhibit "A" which the defendant claimed to be the contract contained a time period. According to Exhibit "A" the rate of Rs. 1,900/- was valid for firm order up to November 19, 1997 and supply up to January 31, 1998. Evidence in this

case established that the defendant supplied cement to the plaintiff for the period subsequent to the January 31, 1992. In fact, it continued supplied till May 9, 1998. This fact that supply continued till May 9, 1998 was the admitted position of the parties. The defendant itself did not act on Exhibit "A" as the subsisting contract between the parties. There was no evidence from the defendant suggesting that the defendant acted on Exhibit "A" as the contract between the parties. There was another notable fact. The defendant increased the price to Rs. 2,640/- by Exhibit "C". The increased price claimed by the defendant was not in terms of Exhibit "A". Exhibit "A" allowed the defendant to increase the price when the railway freight increased or in the event of increase in any statutory costs and levies, road freight, cost of other inputs. The price and price escalation clauses of Exhibit "A" established that the parties were working on a firm price, which would stand increased at the discretion of the defendant, on the happening of the events specified and to the extent specified. By its letter dated May 8, 1998 being Exhibit "C" the defendant increased the price to Rs. 2,640/- per metric tonne without stating that such increase was required due to the happening of the exigencies stated in Exhibit "A". The defendant did not attempt to establish in evidence the occurrence of any of the exigencies contemplated in Exhibit "A" permitting the defendant to increase the price to Rs. 2,640/- per metric tonne. Therefore, at least on two counts the defendant did not act on the terms that Exhibit "A" was the subsisting contract between the parties.

23. Exhibits "A" and "B" cannot be read together and given a harmonious construction as urged on behalf of the defendant. The contradictions in Exhibits "A" and "B" were such that they could not be reconciled, more so, given the conduct of the parties subsequent to the October 24, 1997 being the dates of the two exhibits. Harmonious construction of Exhibits "A" and "B" was not possible in view of the price escalation cause which although being present in Exhibit "A" was absent in Exhibit "B". The price escalation clause in Exhibit "A" allowed the defendant to revise the price in the event of any increase of statutory cost and levies, namely, Excise Duty, Sales Tax, railway freight, octroi and others.

24. The defendant did not suggest that Exhibit "B" otherwise was an invalid contract. It urged that Exhibit "B" taken as a stand alone document and without being read in harmony with Exhibit "A" was contrary to commercial usage so far as the validity period of the contract was concerned. It was contended on behalf of the defendant that, even the witness of the plaintiff in answer to questions 108 and 118 put in cross-examination admitted that the validity period of a contract of nature of Exhibit "B" would be for a duration of two months. This evidence in cross-examination was in consonance with Exhibit "A". Therefore, the defendant suggested that a time duration should be read into Exhibit "B" which would be for two months.

25. Exhibit "B" was the contract between the parties. Exhibit "B" spelt out the terms and conditions which were contrary to the Exhibit "A". Exhibit "B" was a

counter offer to the defendant. The defendant accepted the terms and conditions of Exhibit "B". The defendant encashed the cheque enclosed with Exhibit "B" without any objection. The defendant did not object to any of the terms and conditions of Exhibit "B". The defendant commenced supplies and continued to do so till May 8, 1998. It received advances from the plaintiff from time to time till May 8, 1998. It supplied 557 metric tonnes to the plaintiff without raising any objections as to Exhibit "B". The conditions of Section 8 of the Indian Contract Act, 1872 stood satisfied by the dispatch of Exhibit "B" to the defendant on behalf of the plaintiff and the acceptance thereof by the defendant unconditionally and unequivocally. In the Union of India (Supra) the Gauhati High Court was concerned with a case where a Cheque for sent with the covering letter stating that the same would be in full and final settlement of the claim. Such cheque was encashed without any objection. Subsequently a demand was raised. In the facts of that case the Gauhati High Court was of the view that since the cheque was encashed without repudiation of the terms on which such cheque was sent it must be assumed in terms of Section 8 of the Indian Contract Act, 1872 that the proposal contained in the letter enclosing the cheque was accepted. The subsequent letter would not alter the position in any manner.

26. In Food Corporation of India & Anr. (Supra) the Supreme Court was concerned with a voluntary retirement scheme which also provided for compassionate appointment. In that case an employee of Food Corporation of India made a composite application for conditional voluntary retirement on medical grounds subject to appointment of his son in his place on compassionate ground. Food Corporation of India accepted the voluntary retirement of the employee but did not give compassionate appointment to his son on the ground that the right to retire voluntarily and the right to obtain compassionate appointment were distinct. On facts, the Supreme Court found, that, the employee clearly indicated that if employment on compassionate ground was not provided to his son, he was not interested in pursuing his retirement on medical grounds. Food Corporation of India ought to have informed the employee that he could not make such a conditional offer of retirement contrary to the scheme. Food Corporation of India did not do so. On the other hand Food Corporation of India accepted the conditional offer unconditionally. The Supreme Court was of the view, that, when an offer was conditional, the offered had the choice of accepting the conditional offer, or rejecting the conditional offer, or making a counter offer. It went on to say that the offeree could not do when an offer was conditional, to accept a part of the offer which resulted in performance by the offerer and then reject the condition subject to which the offer was made.

27. In the instant case Exhibit "B" was a counter offer of the defendant. The plaintiff on receipt of such counter offer did not reject the same nor did he make any other offer. The defendant on the contrary accepted and acted on Exhibit "B". It could, therefore, be safely held that Exhibit "B" was the contract between the parties.

28. In view of the fact that, the parties were governed by Exhibit "B" so far as the duration of Exhibit "B" was concerned, although the witness of the plaintiff in cross-examination said that the validity period of Exhibit "B" was for two months no such evidence was available on Exhibit "B" itself or on any other document.

29. Exhibit "A" was not the contract between the parties. Exhibits "A" and "B" cannot be read together in harmonious construction as urged by the defendant. Apart from the answers in cross-examination there was nothing that the duration of contract at Exhibit "B" was for two years. The contract between the parties was in writing. The terms and conditions in writing would, therefore, prevail. Moreover, although the contract was dated October 24, 1997 supplies were made by the defendant till May 9, 1998 which was much beyond the period of two months as the defendant in the course of arguments suggested. The defendant also contended that without a duration being specified to Exhibit "B" the same would be contrary to commercial usage. Again the conduct of the defendant demolished such contention. The contention that the contract of Exhibit "B" was for a duration of two months was demolished by the conduct of the defendant when it supplied cement from October 1997 till May 1998 unconditionally. Moreover, the plaintiff was in the process of constructing a plant. It was in the interest of the plaintiff to procure the cement as quickly as possible. There was nothing on evidence to suggest that the plaintiff was delaying the execution of its plant. No commercial usage in the manner as suggested by the defendant was established in evidence. Without such commercial usage being established it would be improper to circumscribe a written contract or read anything into it.

30. The contract at Exhibit "B" was subsisting when the defendant issued the letter dated May 8, 1998 at Exhibit "C". The defendant was obliged to supply another 923 metric tonnes to the plaintiff when the letter dated May 8, 1998 was issued during the subsistence of the contract at Exhibit "B". The action of the defendant in issuing the letter dated May 8, 1998 was wrongful repudiation of the existing contract between the parties. The plaintiff did not accept the repudiation.

31. The defendant thus became liable to compensate the plaintiff for the loss and damages that resulted from such wrongful repudiation.

32. The quantum of compensation receivable by the plaintiff next arose for consideration. By the letter dated May 8, 1998 the defendant demanded a sum of Rs. 2,640/- per metric tonne from the defendant. The plaintiff did not accept such rate. On the contrary, it proceeded to buy cement of same quality from the market at the rate of Rs. 2,600/- from a third party. The difference between the contracted rate of Rs. 1,900/- and new rate of Rs. 2,600/-. In the plaint a sum of Rs. 7,38,400/- was claimed. The differential value of 923 metric tonnes would, therefore, be a sum of Rs. 6,46,100/- was Rs. 700/-. The plaintiff was entitled to such sum from the defendant. Exhibit "E" established the rate for new purchase at Rs. 2,600/-. The sum of Rs. 6,46,100/- was arrived at after multiplying 923 metric tonnes with Rs. 700/-. The entitlement to such sum the plaintiff arose on

May 8, 1998 when the defendant acted in breach of the contract.

33. There was no evidence for the claim of Rs. 2,00,000/- per day as made by the plaintiff. The questions put in examination in chief does not assist the matter in any manner whatsoever. The claim on this account cannot be allowed on the ground of lack of evidence.

34. So far as the claim of a refund of Rs. 2,03,700/- was concerned the plaintiff relied upon Exhibit "I". The defendant contended that Exhibit "I" did not have any evidentiary value. The defendant suggested that the claim of the plaintiff was inadmissible. In any event according to the defendant it was entitled to Sales Tax and other charges on the goods supplied. The plaintiff did not pay the Sales Tax and other charges which the defendant legitimately was entitled to for the supplies effected. Therefore, according to the defendant, the plaintiff was not entitled to any amount on this head.

35. The defendant did not file any counter-claim for its alleged claim on account of arrears of Sales Tax and other charges. It did not submit any statement of account or any other evidence to establish that any amount was receivable by the defendant from the plaintiff on account of arrears of Sales Tax or any other charges. The rate of Sales Tax was not established. The defendant did not adduce any evidence by way of a witness in support of its claim that amounts were due and payable by the plaintiff to the defendant. The sum of Rs. 2,03,700/- claimed by the plaintiff represented the difference of the advance paid by the plaintiff and the value of the goods received by it from the defendant. These advances were paid by way of cheques. The factum of receipt of these cheques were not denied by the defendant. The defendant supplied 557 metric tonne cement to the plaintiff. This was an admitted position. So, also the rate of Rs. 1,900/- per metric tonne was an admitted position. Therefore, a sum of Rs. 10,96,300/- was required to be deducted from Rs. 13,00,000/-. The defendant did not supply the plaintiff with cement for the value of Rs. 2,03,700/-. The plaintiff was entitled to refund of the sum of Rs. 2,03,700/- from the defendant. The plaintiff was entitled to such refund from May 8, 1998 being the date when the defendant acted in breach of the contract.

36. A sum of Rs. 8,655/- was claimed on account of handling charges by the plaintiff. Apart from eight questions put in examination in chief there was no other evidence. This lack of evidence was highlighted on behalf of the defendant to contend that the claim on this count was not proved and was liable to be rejected.

37. Exhibit "B" was a contract which required delivery of cement at site of the plaintiff. The defendant acted in breach of the contract in May 8, 1998 by unilaterally increasing the price. The defendant procured such goods on the third party on the terms and conditions appearing at Exhibit "D". The new contract was not for delivery at site. The plaintiff, therefore, incurred expenses for taking delivery at site. The quantity claimed by the plaintiff was not backed up by any

documentary evidence. The fact remained that considering the terms and conditions of Exhibit "B" and Exhibit "D" it could be safely deduced that the plaintiff incurred handling charges. The plaintiff claimed Rs. 8,655/- on such account. Such claim was for unloading of 923 metric tonnes at the site of the plaintiff. The plaintiff established by Exhibit "F" that the deliveries of cement were received by it on May 21, 1998. The plaintiff, therefore, claimed to have incurred the handling charges on that date. The claim being reasonable and the plaintiff having adduced some evidence in that regard such claim was allowed. The plaintiff would be entitled to Rs. 8,655/- from May 21, 1998.

38. The nature of transaction between the parties was obviously commercial. No evidence was forthcoming with the commercial rate of interest prevailing at the material point of time. However, for the ends of justice it would be proper to award 12% interest on and from the respective dates from which the plaintiff was found to be entitled to the respective sums from the defendant until realization.

39. The suit is decreed accordingly. The parties will bear their respective costs. The department is directed to draw up the decree as expeditiously as possible.

LATER

The Court: Mr. Ghosh, learned Counsel appearing for the defendant prayed for stay of the decree which is refused.