
(1947) 06 CAL CK 0010
In the Calcutta High Court
Case No : Suit No. 1233 of 1943

Haroon Tar Mohammed and Company APPELLANT
Vs
Bengal Distilleries Company Ltd. RESPONDENT

Date of Decision : 09-06-1947

Acts Referred:

Citation : (1947) 06 CAL CK 0010

Final Decision : Dismissed

Judgement

Das, J.—This suit arises out of a contract for sale of a quantity of molasses by the Plaintiff firm to the Defendant company to be despatched from Maholi, in the United Provinces, to Konnagar, in Bengal.

2. For many years past the United Provinces of Agra ,and Oudh have been the largest growers of sugarcane and the largest manufacturers of sugar and molasses in India. The production of molasses in the United Provinces has always been in excess of the local requirements of that province and large quantities are exported from there to other provinces in India. The crushing season begins from November and extends up to about April and in some bumper years goes on a little longer.

3. The Plaintiff firm carries on business in Calcutta. It has been a dealer in molasses for the last forty years. Formerly, it used to import molasses in large quantities from Mauritius and Java, but, after the sugar industry became well established in India, it has confined its activities mainly in India. Its business has been and is, to buy molasses from sugar mills in the United Provinces and to sell the same mainly to different distilleries, including the Defendant company. It also sells some quantities of molasses to manufacturers of country tobacCompany Its practice is generally to buy the whole yield of a particular year or season of particular mills and sometimes it also buys definite quantities.

4. The Defendant company is the owner of a distillery situate at Konnagar, on the East Indian Railway, about ten or twelve miles from Calcutta and has an office at

Calcutta. Its business has been and is mainly to manufacture country spirit out of mohua and molasses. It has a running contract with the Government of Bengal for the supply of large quantities of country spirit to licensed vendors and it receives payment for such supplies from the Government on the basis of the cost price of materials with a sliding scale of commission thereon. It also manufactures gin, rum, whisky and during the war, it also used to manufacture power alcohol and the like. It sells these products locally, and during the war, it used to sell its products in large quantities to the military authorities. It pays excess profits tax of about a lakh of rupees and excise duty to the tune of a crore.

5. For many years the Plaintiff firm had been the principal, if not the sole, supplier of molasses to the Defendant company. The transactions between the parties used to be effected generally by means of sale-notes. Copies of the sale-notes recording their transactions from the years 1938 to 1942, which are similar in form, have been exhibited in this case. Those sale notes usually provided for delivery of stated quantities in instalments in tank wagons to be certified by the Defendant company. This certificate was necessary to facilitate the allotment of tank wagons by the railway authorities. The practice was for the Plaintiff firm after every consignment to forward the relative railway receipt together with its bills to the Defendant company, which used to make payment to the Plaintiff firm in Calcutta, formely a week and latterly fifteen days, after receipt of the goods. The business relationship between the parties, prior to the present unfortunate hitch, has been of the most cordial kind.

6. In March, 1942, there were two contracts between the Plaintiff-firm and the Defendant-company, evidenced by two sale notes, for the supply by the Plaintiff firm to the Defendant company of a total quantity of 30,000 maunds of best quality 1942 molasses at Re. 1 per maund f.o.r. Konnagar, to be delivered in stated quantities from March and May, 1942, respectively, in tank wagons to be certified by the Defendant company. At the end of August, 1942, some 16,000 maunds out of the above quantity still remained to be delivered under the said contracts.

7. On or about August 24, 1942, the Plaintiff firm agreed to purchase the entire quantity of molasses to be produced by the Upper Ganges Sugar Mills of Seohara during the crop year 1942-1943, which was estimated to be about 1,25,000 maunds.

8. On September 9, 1942, the United Provinces Government, in exercise of the powers conferred by Rule 81(2) of the Defence of India Rules, promulgated an order for controlling the movement and sale of molasses. The purpose of the order, as stated in its preamble, was to ensure that adequate supplies of molasses at a reasonable price were made available to distilleries for the manufacture of power alcohol and rectified spirit and to prevent the wasteful use of transport. Clause 1 of the order prohibited the movement after September 15, 1942, of molasses by rail from any station in the United Provinces except under a permit issued by the Excise Commissioner, United Provinces and except in terms

of such permit. Clause 2 enjoined that no owner or occupier of a sugar factory or other person holding stocks of, molasses should, after September 15, 1942, sell molasses at a price exceeding that fixed from time to time by the Excise Commissioner, United Provinces. Clause 3(1) empowered the Excise Commissioner, United Provinces, to issue directions to any producer of molasses to supply molasses to such distillery at such time and in such manner as might be prescribed in the directions and Sub-clause (2) of that clause required every producer, notwithstanding any existing agreement with any other person, to give priority to and comply with the directions issued to him under Sub-clause (1). Clause 4 provided for returns of molasses to be filed with the Excise Commissioner. The last paragraph of the order made the contravention of any of its provisions punishable with imprisonment or with fine or with both.

9. It will be noticed that this order did not itself fix the price of molasses, but left it to the Excise Commissioner, United Provinces, to do so. Therefore, until the price was actually fixed, Clause 2 had no practical importance and persons were free to buy and sell at any price. The other clauses became operative immediately after September 15, 1942 and after that date not an ounce of molasses could be moved by rail from any station in that province, except under a permit from the Excise Commissioner, United Provinces and the latter had the power to direct a producer to deliver molasses to any distillery notwithstanding any existing agreement. The price was fixed by an order dated March 1, 1943.

10. I have already mentioned that, at the end of August, 1942, the Plaintiff firm had still to deliver some 16,000 maunds of molasses to the Defendant-company under the two contracts made in March, 1942. The Plaintiff firm had also, on August 24, entered into an agreement for the purchase of the entire yield of the Upper Ganges Sugar Mills of Seohara, which I shall hereinafter call the Seohara Mills. To implement and fulfil the above commitments, the Plaintiff firm had to secure permits from the Excise Commissioner, United Provinces, under the Molasses Control Order I have mentioned. Accordingly, on October 13, 1942, the Plaintiff firm addressed a representation to the Excise Commissioner, United Provinces at Lucknow. After describing its status as a dealer in molasses of long-standing and stating the volume of its business and the names of its constituents, it informed the Excise Commissioner, United Provinces, of its purchase of the entire field of 1942-1943 of the Seohara Mills estimated at 125,000 maunds of molasses and requested the Excise Commissioner to grant it permits to remove the molasses as it was produced by the mill. On October 15, 1942, a copy of this representation was sent to the office of the Excise Commissioner, United Provinces at Allahabad. These representations do not, however, appear to have evoked any reply.

11. On November 15, 1942, the Plaintiff firm bought from the Luxmiji Sugar Mills Company, Ltd. of Maholi (which I shall hereinafter call the Maholi Mills)--the total molasses production of 1942-1943 season estimated at 1,30,000 maunds at annas 7-9 per maund ex-mills delivery from December 1, 1942 to November 30,

1943 and upon terms and conditions recorded in a letter addressed by it to the mills on that date. The Plaintiff firm deposited with the Maholi Mills Rs. 10,000 as security for the due performance of the said agreement. Under Clause 12 of the terms the Maholi Mills were to be at liberty to sell 15,000 maunds out of the production of that season to any person locally. Thus the Plaintiff firm had purchased practically the entire output of two mills, namely, the Seohara Mills and the Maholi Mills. The crushing season had begun in November and arrangement had to be made to get permits for moving the molasses from the mills.

12. On November 24, 1942, the Plaintiff firm wrote a letter to the Excise Commissioner, United Provinces, submitting a list of its commitments for supplying molasses to various distilleries, giving their respective names and the respective quantities to be supplied to them. It appears from that list that it had to supply the aggregate quantity of 240,000 maunds to six several distilleries. The Defendant company was one of them and the quantity to be delivered to it was shown at 16,000 maunds. This was the balance deliverable under the two contracts of March, 1942, I have already mentioned. It was pointed out that to meet the above commitments the Plaintiff firm had the total output of the two mills estimated at 1,25,000 maunds each. It specified the particular mills from which supplies were intended to be made to particular distilleries. According to this programme, 16,000 maunds were intended to be supplied to the Defendant company from the Seohara Mills. The Plaintiff firm asked for permits for removal of molasses from the particular mills to the particular distilleries. In addition to these permits, the Plaintiff firm also asked for permits for removal of 10,000 maunds from each of the two mills for fulfilling its local sales.

13. It appears that, on November 26, 1942, there was an interview between Mr. Kamalani and Mr. Buch representing the Plaintiff firm and Mr. Shankar Prasad, the Excise Commissioner, United Provinces, at the latter's office at Allahabad. Mr. Shankar Prasad was examined on commission as a witness on behalf of the Defendant company and Mr. Kamalani has deposed before me on behalf of the Plaintiff firm. Mr. Buch has not been called. There is a marked divergence between Mr. Shankar Prasad and Mr. Kamalani in their respective versions as to what transpired at that interview. Mr., Shankar Prasad states that his primary concern was to ensure supply to distilleries of his own province and in allotting supplies he had to take into consideration the transport arrangement, the idea being that supplies would go to the distilleries from the nearest mills so as to prevent wasteful use of transport. He stated that he made it definitely clear to the representatives of the Plaintiff firm that it could not expect anything from Maholi Mills and that permits would be issued only to distilleries. Mr. Kamalani, on the other hand, stated that all that Mr. Shankar Prasad did was to mention that the general policy was to see what the requirements of the United Provinces distilleries would be and that after providing for their requirements permits would be issued for delivery of molasses to distilleries of other provinces, but that it could not then be stated with any amount of certainty as to what quantities

would be available from any particular mill. I shall revert to this divergence hereafter. The net result of this interview was, however, that on November 27, 1942, seven permits, Nos. 10095 to 11101, were issued on the Seohara Mills for the aggregate quantity of 1,25,000 maunds, namely, six permits in favour of six distilleries and one in favour of the Plaintiff firm (Shankar Prasad, qs. 369 to 326). These six permits, although issued in the names of the different distilleries, were made over to the Plaintiff firm.

14. Permits having been issued for the whole quantity of Seohara Mills, the Plaintiff firm's next concern was about the permits on the Maholi Mills. On December 3, 1942, the Plaintiff firm wrote a letter to the Excise Commissioner, United Provinces, referring to its previous letters and the personal interview that had taken place and expressing the hope that the position with regard to the molasses from the Maholi Mills had by then become clear and that permits for removing molasses from Maholi Mills might be granted to it and requesting the Excise Commissioner to communicate his decision in the matter. This was followed by another letter written by the Plaintiff firm to the Excise Commissioner, United Provinces, on December 14, 1942. In that letter, the Plaintiff firm again told the Excise Commissioner, United Provinces, that it had purchased the entire production of the Maholi Mills and further that the said molasses had been sold to various distilleries which had been pressing for supply and asked for permits to enable it, to effect quick delivery thereof. The names of six distilleries and the respective quantities to be supplied to them were set out at the bottom of the letter.. It appears from that list that 5,000 maunds were shown against the Defendant company. There was no reply to these letters.

15. It appears that on December 23, 1942, a meeting was held at the office of the Excise Commissioner, United Provinces at Allahabad, which was attended by the representatives of several distilleries. The decisions arrived at at that meeting will be found in the form of a note which has been exhibited in this case. "According to this note and particularly, the marginal notes made by the Excise Commissioner, United Provinces, Maholi products were reserved partly for Carew and Company, Rosa and partly for Unao distillery and also possibly for Cawnpore Sugar Works. This allotment has been greatly stressed and referred to in this case as the December programme.

16. In the meantime and while the Plaintiff firm was thus trying to secure the permits from the excise authorities on Maholi Mills, the Defendant company began pressing the Plaintiff firm to quote for the new season's molasses. Eventually, after some correspondence and conversation over the telephone and at an interviews to which I shall refer hereafter in detail, a contract for sale of 1,00,000 maunds of Maholi molasses of 1942-1943 season at Re. 1-12 per maund f.o.r. Konnagar was concluded between the Plaintiff firm and the Defendant company in February, 1943. The present disputes arise out of this contract.

17. This suit was filed on August 7, 1943. The cause of action pleaded and the

reliefs claimed in the plaint are as follows:

By a contract made in February, 1943, partly by parol and partly in writing, the Defendant company agreed to buy and the Plaintiff firm agreed to sell to the Defendant company 1,00,000 manuds of the best quality cane liquid molasses of 1942-1943 crop and produced by Luxmiji Sugar Mills of Maholi in the United Provinces at Re. 1-12 per maund f.o.r. Konnagar payable fifteen days after delivery which was to be at the rate of 12,000 to 15,000 maunds per month or as required by the Defendant company and as released by the Government of the said provinces from March, 1943, in tank wagons to be certified by the Defendant company. When entering into the said contract it was agreed between the parties by parol that the Defendant company would be responsible for obtaining from the United Provinces Government all necessary permits for moving the said commodity from the said mill to the Defendant company's sidings at Konnagar. Pursuant to the said contract and at the request of the Defendant company, the Plaintiff firm, between February 11, 1943 and April 24, 1943, delivered and the Defendant company accepted a total of 15,688 maunds of molasses and in accordance with the course of dealings between the parties, the Plaintiff firm submitted the relative railway receipts together with bills, but the Defendant company did not pay" the price of those goods. By letters addressed to the Plaintiff firm on March 27, 1943 and April 7, 1943, the Defendant company wrongfully repudiated the said contract. The Plaintiff firm claims Rs. 18,959-8 for the price of 15,688 maunds of molasses after deducting the railway freight, Rs. 49,182 for damages in respect of 84,312 maunds which the Defendant company refused to accept and Rs. 243 for interest on the price of goods sold and delivered at 6 per cent, per annum as per notice given on June 2, 1943, by the Plaintiff firm through its attorneys, Messrs. A. P. Roy and Company

18. The Defendant company filed its written statement on November 8, 1943, setting up the following defence:

The Defendant company admits the contract, but denies that it was made partly by parol and states that it was contained in correspondence. The Defendant company contends that the said contract was subject to the order made by the United Provinces Government on September 9, 1942 and all Government regulations and restrictions for the time being in force. By order dated September 9, 1942, made by the United Provinces Government under the Defence of India Act and Rules, the said Government prohibited the removal of molasses from the said province except under permits issued by the Commissioner of Excise and prohibited the sale of molasses at prices exceeding those fixed by the said Commissioner from time to time. By order made by the Commissioner of Excise, United Provinces, the price of molasses from Maholi was fixed at annas 4 per maund ex-mills. The Defendant company denies that it agreed by parol or otherwise to be responsible for obtaining from the United Provinces Government all necessary permits for moving the molasses from the mills to its railway sidings at Konnagar and states that the Plaintiff firm

undertook to deliver the goods and to do all acts necessary for such delivery. The Defendant admits that, during the period mentioned in the plaint, 15,688 maunds of molasses despatched by Luxmiji Sugar Mills were delivered to the Defendant company, but states that 6,879 maunds and 24 seers despatched prior to March 1, 1943, were delivered under the said contract and that, accordingly the Plaintiff firm is liable to pay the price thereof at Re. 1-12 per maund amounting to Rs. 12,039-5 less freight amounting to Rs. 3,748-2, that is to say Rs. 8,291-3. The balance of 8,808 maunds and 16 seers had been despatched after March 1, 1943 and it was unlawful for the Plaintiff firm to claim any price in excess of annas 4 per maund. The Defendant company admits the letters, dated March 27, 1943 and April 7, 1943, but denies that it repudiated the contract wrongfully or at all. The Defendant, company submits that, in any event, the Plaintiff firm did not accept the alleged repudiation. The Defendant company states that, assuming that 15,688 maunds had been delivered under the said contract, the Plaintiff firm failed and neglected to deliver the balance of the said goods and cannot claim any damages in respect thereof. The Defendant company states that, under the Defence of India Act and Rules, the United Provinces Government issue permits to enable mills to supply molasses to distilleries to the extent of their requirements and not to any dealer and from time to time, reserve a particular mill to supply the requirements of a particular distillery. The Commissioner of Excise of the United Provinces Government issued permits for the supply of molasses by the Luxmiji Sugar Mills of Maholi to the Defendant company, but, as from April 17, 1943, the United Provinces Government stopped the supply of molasses from the Maholi Mills to the Defendant company and in the premises the performance of the said contract was frustrated and became void.

19. In answer to requisitions made by the Defendant company's attorneys, the Plaintiff firm by its attorney's letters, dated November -19, 1943 and December 6, 1943, furnished certain particulars regarding the allegations in paras. 3 and 4 of the plaint, to which reference will be made hereafter in greater detail.

20. On September 23, 1944, the Defendant company paid to the Plaintiff firm's attorneys the sum of Rs. 18,959-8 claimed in the plaint as price of 15,688 maunds of molasses at Rs. 1-12 per maund, less railway freight, upon the terms that such payment would be treated as a payment into Court with all its legal consequences.

21. By an additional written statement filed, with the leave of the Court on November 16, 1944, the Plaintiff firm pleaded in reply as follows:

The Defendant company reiterated its repudiation by its letter, dated April 20, 1943. The Plaintiff firm treated the contract as repudiated and sued accordingly. The Plaintiff firm denies having failed or neglected to deliver the balance of the goods. It also denies that the contract became impossible of performance or was frustrated and states that the alleged frustration or impossibility if any was wrongfully induced by or was due to the acts and election of the Defendant

company in that the Defendant company induced and procured the Excise authorities; (a) in March, 1943, to put obstacles in the way of the Plaintiff firm's molasses being moved from the Maholi Mills to the Defendant company's distillery by causing the said authorities to cancel all existing permits and also to refuse further permission for such movement, (b) in April, 1943, to make the East Indian Railway administration withdraw all tank wagons allotted by them for transport of the Plaintiff firm's goods and (c) in March, 1943, to order the said Sugar Mills to deliver molasses direct to the Defendant company and other distilleries thereby preventing the Plaintiff firm from delivering molasses to the Defendant company.

22. On the pleading the following issues were raised:

1. Was the agreement between the parties with regard to purchase of molasses made partly by parol and partly in writing or was it reduced into writing?
2. Was it agreed by parol that the Defendant would be responsible for obtaining from Government of the United Provinces permits for moving the goods from Maholi to Konnagar?
3. Did the contract between the parties become impossible of performance and/or frustrated and/or void at any material period as alleged in the written statement?
4. Was the impossibility or frustration of the contract induced by or due to the acts or election of the Defendant as alleged in para. 3 of the additional written statement?
5. Was there any repudiation by the Defendant as pleaded?
6. If so, was the repudiation wrongful?
7. Was the Defendant's repudiation, if any, accepted by the Plaintiff?
8. Did the Plaintiff fail or neglect or refuse to deliver the balance of the goods?
9. To what sum if any, is the Plaintiff entitled?

23. Regarding Issue 1. In para. 3 of the plaint the contract for sale of 1,00,000 maunds of molasses is said to have been arrived at between the parties in February, 1943, partly by parol and partly in writing. In the particulars supplied by the Plaintiff firm it has been stated that the contract, in so far as it was made in writing, was contained in the Defendant company's letter dated February 10, 1943 and in two letters from the Plaintiff firm to the Defendant company, both dated February 15, 1943 and in the draft sale-note which had been sent by the Defendant company to the Plaintiff firm along with its letter of March 5, 1943 and that, in so far as it was made by parol, it was made in course of the conversations over the telephone between Mr. Sattar Moosa, whose full name is Sattar Moosa Kamalani and Mr. Prabha Shankar (whose name is Prabha Shankar Daulatram and who is also known as Mr. Buch) of the Plaintiff firm and Biren

Babu the head clerk of the Defendant company in January and early part of February, 1943 or some dates not exactly remembered and at an interview between Mr. Kamalani and Mr. Buch of the Plaintiff firm and Mr. Hayward, the managing director of the Defendant company, on February 10, 1943 at the latter's office at Konnagar. There is no dispute that there was some conversation over the telephone in January, 1943 and that there was an interview on February 10, 1943 at Konnagar. It is common case that both Mr. Kamalani and Mr. Buch were present at the interview with Mr. Hayward at Konnagar. As to " the telephone conversation, Mr. Kamalani in his evidence stated that he spoke to Biren Babu but the latter stated that it was Mr. Buch who did so. There is serious divergence in the evidence as to the actual conversation that took place over the telephone and at the interview. That divergence, however, is with regard to the collateral contract pleaded in para. 4 of the plaint which forms the subject-matter of issue 2 and does not affect issue 1 which is concerned with the principal contract pleaded in para. 3 of the plaint, for the parties are in substantial agreement as to its main terms. The telephonic conversation and the interview were followed by correspondence and the sale-note referred to in the particulars. It is fairly clear and it is not disputed, that, so far as the principal contract is concerned, its terms were, embodied in those correspondence and sale-note. In these circumstances, it must be held that the terms of the principal contract arrived at as a result of the conversation over the telephone and at the interview were eventually reduced into writing in the form of the sale-note and I answer issue 1 accordingly.

24. Regarding Issue 2. This issue" relates to the collateral contract pleaded in para. 4 of the plaint. This contract is said to have been made by parol at the time when the principal contract was entered into. The position is further clarified in the particulars supplied by the Plaintiff firm, wherein it is stated that this collateral contract was made in course of the same telephonic conversation in January, 1943 and the same discussion at the same interview at Konnagar on February 10, 1943 between the same persons.

25. This collateral contract is sought to be established by the oral evidence of Mr. Kamalani and the correspondence. Learned Counsel for the Defendant company objected to the admission of such evidence. Indeed the object of issue 1 was to lay the foundation for this objection. Further, at the time of the settlement of the issues, Learned Counsel for the Defendant company sought also to add a rider to issue 2 as to whether such evidence was admissible. I did not consider that the proposed rider was properly speaking, an issue in the case and did not, accordingly, raise it as an issue, but left it open to him to take the objection in course of the trial, if and when attempt would be made to adduce such evidence. When Mr. Kamalani in his examination-in-chief spoke to the conversations that took place over the telephone and at the interview, objection was taken by Learned Counsel for the Defendant company to the admissibility of such oral evidence u/s 92 of the Evidence Act. After hearing arguments on both sides, I over-ruled the objection and allowed the evidence to go in, for I was of opinion

that prov. (2) to that section applied. I may also mention here that, when Mr. Hayward was examined on commission long before the trial, Learned Counsel for the Defendant company led evidence on the conversation that took place at the interview at Konnagar on February 10, 1943.

26. My attention was next drawn to the decision of the Judicial Committee in *Twentsche Overseas Training Company Ltd. v. Uganda Sugar Factory Ltd.* A.I.R (1945) (P.C.) 144 in which were quoted the following observations of Lord Moulton in *Heilbut Symons and Company v. Buckleton* (1913) A.C. 30, 47.

Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.

27. The last mentioned case was no doubt one for damages for fraudulent misrepresentation and for breach of warranty, but the fact that the Judicial Committee quoted the above passage clearly indicates that the principle enunciated therein is of general application. It was pointed out by Learned Counsel for the Plaintiff firm, that, while in the case before the Judicial Committee, the attempt was to add a term to the principal contract, in the case before me, the collateral did not seek to add any new term to the principal contract, but was only designed to implement the same or, to adopt Learned Counsel's own words, to help or prop up the principal contract. This distinction, while it is attractive in its expression, does not appear to me, in the facts and circumstances of this case, to be of substance. By the collateral contract certain onerous duties, not to be found in the principal contract, are sought to be imposed on the Defendant company as a matter of legal obligation and to that extent it certainly adds to the principal contract. I have, therefore, to scrutinise the evidence before me in the light of the observations of Lord Moulton quoted above and to see whether the Plaintiff firm has discharged the onus that is on it to strictly prove the collateral contract pleaded in para. 4 of the plaint, as clarified by the particulars subsequently supplied.

28. There is no dispute that prior to the making of the contract both parties knew that not an ounce of molasses could be moved out of the United Provinces except under a permit issued by the Excise Commissioner, United Provinces. I have already referred to the interview which Mr. Kamalani and Mr. Buch had on November 26, 1942 with Mr. Shankar Prasad, the then Excise Commissioner, United Provinces. Mr. Shankar Prasad said that at that interview he had definitely told the representatives of the Plaintiff firm that they could not expect anything from Maholi Mills and that permits would be issued only to distilleries and not to

middle-men. It is true that, although in its letter dated November 29, 1942, the Plaintiff firm asked for permits on both Seohara Mills and Maholi Mills, the Excise Commissioner, United Provinces, issued seven permits for the total quantity of 1,25,000 maunds on Seohara Mills only, but none on the Maholi Mills. But the exclusive reservation of Maholi Mills for United Provinces distilleries had not been made until December 23, 1942 and on November 26, 1942, there could be no reason for Mr. Shankar Prasad to be so emphatically explicit about it. If he did make it clear that nothing could be expected from Maholi Mills then it is not at all intelligible how the Plaintiff firm could on December 3 and December 4, 1942, ask him to issue permit on Maholi Mills. Again, if the reservation of Maholi for United Provinces distilleries was final and sacrosanct, it is difficult to understand why, when the Excise Commissioner, Bengal, on the 26th-27th January, 1943 asked for permits for the Defendant company for 80,000 maunds from Maholi Mills, Mr. Shankar Prasad, who had himself reserved Maholi Mills for United Provinces distilleries, did not in his letter, dated January 30, 1943 to the Excise Commissioner, Bengal, state categorically that no permit could be issued on Maholi Mills. Indeed, that letter of Mr. Shankar Prasad, which was in reply to the letter of the Excise Commissioner, Bengal, asking for permit on Maholi Mills, not only did not explicitly state that there would be any difficulty in issuing permits on Maholi, but, on the contrary, was calculated to give the impression, on a plain reading of it, that such permits would be forthcoming, though not all at once in a big lump, but in monthly instalments, after particulars, as to requirements, were duly submitted. The fact that, on the February 1, 1943, a permit for 15,000 maunds was actually issued only strengthens this impression. On February 18, 1943 the Defendant company wrote to the railway authorities to arrange for tank wagons for transport of molasses from Maholi Mills to Konnagar at the rate of 12,000 maunds per month, for which, it was stated, the Excise Commissioner, United Provinces, would grant permits to it. A copy of this letter was on February 19, 1943, forwarded to the Excise Commissioner; United Provinces, with the expression of hope that he would find it in order. If the reservation of Maholi Mills for United Provinces distilleries was final, one would have expected a prompt reply from the Excise Commissioner, United Provinces, stating that no permit would be issued on Maholi Mills. There was no such reply and we have only got a note on this letter made by somebody in the office that it should be put up when the reply to its letter was received from Bengal. In its letter of January 30, 1943, it asked for certain particulars as to stock and monthly requirement to enable the Excise Commissioner, United Provinces, to issue permits. Therefore, this office note does not at all indicate that no permit would be issued on Maholi Mills. The matter does not, however, rest there. On March 3, 1943, there was a meeting at Allahabad between the Excise Commissioner, United Provinces and the Excise Commissioner, Bengal, when the question of supply of molasses from United Provinces Mills to Bengal distilleries was discussed. After this interview, the Excise Commissioner, United Provinces, wrote a letter to the railway authorities on March 8, 1943, enclosing certain statements showing, amongst other things, that the quantity to be moved from Maholi to Konnagar from March 1 to August

31, 1943, was 60,000 maunds at the rate of 10,000 maunds per month. On the same day a permit for 10,000 maunds was issued on Maholi Mills in favour of the Defendant company. This was followed on March 16, 1943, by yet another permit for despatch of 20,000 maunds to Konnagar. All these facts clearly indicate that the reservation of Maholi Mills exclusively for United Provinces distilleries, if made, was not strictly acted upon.

29. [After discussing the evidence upon which the above conclusion is based, Das J. proceeded as follows:]

The position prior to February 10, 1943, when the contract was made, may, therefore, be summarised thus the Plaintiff firm did not succeed at the interview held with the Excise Commissioner, United Provinces, on November 26, 1942, to get permits on Maholi Mills, because there was some doubt about getting permits on Maholi Mills; the Plaintiff firm was hesitating to make any contract in spite of the pressing requests of the Defendant company whose stock was very low; the representative of the Plaintiff firm over the phone informed Biren Babu of the difficulty in securing permits; Biren Babu on behalf of the Defendant company offered to move the excise authorities of Bengal with which it was in constant and intimate touch to take up the matter; the Excise Commissioner, Bengal, did intervene and write to Excise Commissioner, "United Provinces, pressing him to allot 80,000 maunds of Maholi molasses to the Defendant company; this intervention had borne fruit in that the Excise Commissioner actually for the present issued a permit in Maholi Mills for 15,000 maunds in favour of the Defendant company and as for the future, asked for information as to its stock and its monthly requirements for which permits were required, thereby giving an impression that permits would be issued, not all at once but in monthly instalments. It was in these circumstances that a meeting was held on February 10, 1943, at the Defendant company's office at Konnagar which I now proceed to discuss.

30. [After discussing the evidence as to what transpired in the meeting, Das J. proceeded as follows:]

In a case where there is conflict of testimony the acts and conduct of the parties are likely to show where the truth lies. On the same day, i.e., on February 10, 1943, the Defendant company wrote a letter to the Plaintiff firm referring to the interview and confirming the contract and stating that the usual sale-note would be sent to the Plaintiff firm for its signature. According to Biren Babu this letter was written before Mr. Kamalani and Mr. Buch had left Konnagar after the interview. The Plaintiff firm confirmed the sale by its Fetter dated February 15, 1943. It is admitted that as a result of another telephonic conversation that took place on the same day (February 15, 1943) the quantity agreed to be sold was raised from 80,000 maunds to 1,00,000 maunds and by a second letter of that date the Plaintiff firm confirmed the same. On March 5, 1943, the Defendant company sent a draft sale-note to the Plaintiff firm for signature. This sale-note was in the usual form used on previous occasions with this main difference, that

in the delivery clause were inserted the words "and as released by the United Provinces Government" which are not to be found in any of the earlier sale-notes. Learned Counsel for the Defendant company very strongly relied on the absence, either in the letters confirming the sale or in the sale-note of any reference to the term as to the Defendant company being responsible for securing the permits and submitted that such omission was very strong, if not Conclusive, evidence that there was no such collateral contract. I agree that this is a point which must be taken into consideration but I cannot accept the contention that this omission by itself negatives the existence of the collateral contract. The question of a separate collateral contract by parol arises because the written principal contract is silent on the point and therefore, to reject the existence of a parol collateral contract merely because there is nothing in the written contract will amount to excluding parol collateral contract altogether and in all circumstances. If that were so, prov. (2) to Section 92 of the Evidence Act will be wholly meaningless and nugatory. In my opinion, the fact that the written contract is silent on the point is a circumstance which only gives rise to some doubt in the mind of the Court and induces the Court to insist upon strict proof of the parol collateral contract. The omission of any reference to the subject-matter of the parol contract by itself cannot be a ground for holding that there was no collateral contract by parol.

31. [His Lordship then discussed the evidence and came to the conclusion on this issue as follows:]

On a consideration of the evidence, oral and documentary and the probabilities arising out of the surrounding circumstances referred to above, I am inclined to hold that the Defendant company did agree to move the excise authorities and to do all acts necessary for securing the issue of the permits. I do not think that the Defendant company undertook an absolute obligation to secure the permits in the sense that a failure to secure permits would make it liable in damages. I do not think the animus contrahendi went to that extent. But I am satisfied that the Defendant company agreed to move the excise authorities, to apply for the permits and to do all acts necessary for getting the permits. In this sense and to this extent I answer issue 2 in favour of the Plaintiff firm.

32. Regarding Issue 3. It will be remembered that on September 19, 1942, the Plaintiff firm entered into an agreement with the Maholi Mills to buy the entire yield of that mill of the 1942-1943 season at annas 7-9 pies per maund ex-mill delivery from December 1, 1942 to November 30, 1943. The terms and conditions of that contract were recorded in a letter written by the Plaintiff firm to the said mill on that date. One of the terms was that the Maholi Mills would be entitled to sell 15,000 maunds out of the production to any person locally. It is quite clear that it was an executory contract for sale of unascertained goods.

33. This contract was made when the Molasses Control Order promulgated by the United Provinces Government, in exercise of powers conferred on it by the Defence of India Rules, was already in force. I have hereinbefore summarised

the provisions of that order. Shortly put, it prohibited the movement of molasses except under a permit (Clause 7) and also the sale of molasses by certain persons at a price exceeding the price to be fixed (Clause 2) and it empowered the Excise Commissioner to issue directions to any producer of molasses to despatch the same to such distillery at such time and in such manner as he might prescribe and such direction was to be complied with notwithstanding any existing contract with any other person (Clause 3).

34. As I have said, in the beginning of the latter half of January, 1943, there, was a conversation over the telephone with Biren Babu. There was a discussion about sale of some 50,000 to 80,000 maunds of Maholi molasses but nothing could be finalised on account of the difficulties as to getting permits. Biren Babu offered to approach the excise authorities in that connection. The Excise Commissioner of Bengal and the Secretary to the Government of Bengal were moved in the matter and through their intervention, a permit was obtained on February 1, 1943 for despatch of 15,000 maunds of molasses from Maholi to the Defendant company's siding at Konnagar. The letter of the Excise Commissioner, United Provinces, dated January 30, 1943, was, as I read it, clearly calculated to give the impression that there would be no difficulty in issuing monthly permits after certain particulars asked for had been submitted. In fact after the interview of the Excise Commissioner, Bengal, with his counterpart in United Provinces on March 3, 1943, two permits were issued, on March 8 and March 16, 1943. Molasses were despatched from Maholi and the railway receipts were handed over by the Maholi Mills to the Plaintiff firm which in its turn submitted them along with its bills made out at the contract rate to the Defendant company and the contract between the parties went on being implemented and performed until April 12, 1943, when the Excise Commissioner, United Provinces, in his letter to the Excise Commissioner, Bengal, stated that his office had made a mistake in issuing permits for despatch of molasses from Maholi to Konnagar, that Maholi had been reserved for United Provinces distilleries and that further supplies from Maholi would not be possible. The interview that the Plaintiff firm's representative and its counsel had with the Excise Commissioner, Bengal, on April 5, 1943, had not obviously produced any favourable result. The Plaintiff firm's representative and counsel went up to Allahabad and interviewed Mr. Wally, a Secretary to the United Provinces Government, on April 14, 1943. Nothing came out of that interview either, in spite of subsequent correspondence. On April 17, 1943, the Excise Commissioner, United Provinces, wrote to the railway authorities modifying the previous programme laid down by his office letter dated March 8, 1943 and allotted Simbhooli Mills to Konnagar and issued permit on the last mentioned mill for 20,000 maunds. The railway authorities were told that tank wagons would not be necessary for Maholi as the previous permits had been cancelled. On April 22, 1943, Mr. Wally wrote to the Plaintiff firm that the United Provinces Government were unable to interfere in the matter. On June 30, 1943, the Maholi Mills wrote to the Plaintiff firm cancelling the contract for sale of molasses to the Plaintiff firm." The Plaintiff firm after

registering its protest accepted the cheque sent by the Maholi Mills on July 15, 1943, representing the deposit money after deducting the price of molasses already delivered. Learned Counsel for the Defendant company contended that after April 17, 1943, it became impossible for the Plaintiff firm to implement the contract any more.

35. A large number of judicial decisions of very high authority relating to the doctrine of frustration of contracts was relied on by Learned Counsel on both sides in support of their respective arguments. Learned Counsel for the Plaintiff firm contended that the refusal of the Excise Commissioner, United Provinces, to grant further permits on the Maholi Mills and the cancellation of the existing permits thereon only brought about a temporary and not a permanent interruption of delivery of molasses under the contract. This temporary stoppage only postponed delivery for two months, for, at the meeting of the railway officials and the excise authorities, held on June 26, 1943, it was decided to issue permits on the Maholi Mills in favour of the Defendant company and in fact permits on Maholi Mills were again issued from July 5, 1943 onwards. The contract provided for delivery of molasses "as released" by the United Provinces authorities, and therefore, if there was delay in releasing the goods, the time for delivery was only postponed. Indeed, under the old contracts, delivery was being continued and parties raised no objection. Learned Counsel concluded that the temporary non-release of molasses only postponed the delivery and therefore suspended but did not dissolve the contract. He referred me to the case of *Hadley v. Clarke* (1799) 8 T.R. 259 : 101 E.R. 1377. In that case the Defendants contracted to carry the Plaintiffs goods from Liverpool to Leghorn. On the vessel's arrival at Falmouth in the cause of her voyage an embargo was laid on her by an order of His Majesty in Council "until" the further order in Council." This embargo remained operative for over two years. It was held that such embargo only suspended but did not dissolve the contract. It will be noticed that in point of form the embargo purported to be of a temporary nature and in point of fact such an embargo for two years or so was assumed and regarded as a temporary interruption of the voyage. Lord Kenyon's judgment was based on the general proposition "that a temporary interruption of a voyage "by an embargo does not put an end to such a contract as this." As pointed out by Lord Wrenbury in *Horlock v. Beal* (1916) A.C. 486 there was no finding in *Hadley v. Clarke* (supra) that the adventure had been frustrated. His Lordship was of opinion that that case was no authority for the proposition that a marine adventure remained binding when a supervening cause had rendered it impossible to perform it within such a time as that the adventure could be fulfilled as a commercial adventure. *Beale v. Thompson* (1803) 3 Bos. and P. 465 : 127 E.R. 221 was concerned with the question of a mariners wages during a temporary seizure of the vessel. In that case the Czar of Russia made a hostile seizure of British ships in his ports and imprisoned British seamen on shore. After six months, the seamen were released and they resumed and concluded their voyage and the owners received their freight. It was held that this seizure did not put an end to

the mariners contract for wages even during the period of detention and imprisonment. It has been pointed out in *Horlock v. Beal* (supra) that *Beale v. Thompson* (supra) was decided at a time when the doctrine that freight was the mother of wages prevailed. The jury found that the Plaintiff had performed his services properly and the freight was admittedly earned. Besides, the Plaintiff was taken back by the owners into their service and he properly performed his service and the owners earned their freight and therefore, there really was no frustration at all. I need not pause to consider closely the cases of *Grimsdick v. Sweetman* (1909) 2 K.B. 740 and *London and Northern Estates Company v. Schlesinger* (1916) 1 K.B. 20 for both of them were concerned with leases and before the decision of the House of Lords in *Cricklewood Property and Investment Trust Limited v. Leighton's Investment Trust Limited* (1945) A.C. 221 the doctrine of frustration was supposed not to apply to a lease. The case of *Andrew Millar and Company, Limited v. Taylor and Company, Limited* (1916) 1 K.B. 402 in the Court of appeal turned on the very special facts of that case. There, the time for delivery was six weeks to two months from the date of the contract. During the currency of the contract proclamation was issued prohibiting export of the contracted goods. This prohibition lasted ten days or at most fifteen days. In these circumstances, it was held that the party repudiating further performance should have waited a reasonable time before repudiating the contract. I was also referred to the cases of *Admiral Shipping Company, Limited v. Weidner, Hopkins and Company* (1916) 1 K.B. 429 and *Scottish Navigation Company Limited v. W.A. Souter and Company* (1916) 1 K.B. 675 in support of the contention that, in order to amount to frustration, the delay brought about by intervening circumstances must be such as would make it unreasonable to go on with the contract when the object which both parties had in view was frustrated. Both these cases were on time charter party and not on voyage charter party and it was doubted whether delay due to a cause contemplated and provided for by the charter party, even though the delay itself was protracted beyond what might have been expected, ever amounted to frustration of the adventure. A distinction was made in the effect of delay on a time charter and on a voyage charter. Both these cases were reversed on appeal (1917) 1 K.B. 222. It was held that the parties to the contract contemplated a commercial adventure, namely, a Baltic round and the enforced delay was of such indefinite duration as to completely frustrate the commercial adventure and therefore the contract was determined and the shipowner was not entitled to the hire claimed. The case of *Leiston Gas Company v. Leiston-cum-Sizewell Urban District Council* (1916) 2 K.B. 428 which was followed in *Wycombe Borough Electric Light and Power Company, Ltd. v. Chipping Wycombe Corporation* (1917) 33 T.L.R. 489 was cited in support of the proposition that partial frustration did not dissolve the contract and the parties remained bound if part of the contract could be performed. My attention was drawn to a letter of the Maholi Mills to the Plaintiff firm dated September 16, 1943 offering to sell 27,000 maunds of molasses which the Maholi Mills had been authorised by the Excise Commissioner, "United Provinces, to dispose of. Some calculations were made showing that a large quantity of

molasses from Maholi Mills were still available. The Plaintiff firm, on September 28, 1943, without prejudice to its contentions stated in previous letters" expressed its willingness to take delivery of such quantity of molasses as the mill would be able to deliver and as could be taken outside United Provinces. It sent a reminder to the mill on October 14, 1943. On October 18, 1943, Maholi Mills sent a copy of a letter dated October 13, received from the excise authorities. By the last mentioned letter, the excise authorities, in modification of its previous order, directed Maholi Mills to supply 55,000 maunds to four distilleries in United Provinces. Therefore, in effect no supply could be had by the Plaintiff from Maholi Mills.

36. In the facts and circumstances detailed above, it appears to me that the stoppage of movement of molasses from Maholi to Konnagar in implementation of the contracts between the Maholi Mills and the Plaintiff firm and that between the Plaintiff firm and the Defendant company was complete from April 17, 1943, when all existing permits were cancelled. It is true that the Excise Commissioner, Bengal, by his letter, dated January 26 and January 27, 1943, asked the Excise Commissioner, United Provinces to issue permits for 80,000 maunds of molasses from Maholi to the Defendant company at the same rates of prices fixed for the supply thereof to the United Provinces distilleries, but, in the first permit issued on Maholi on February 1, 1943, there was no mention of any rate, as no rate had then been fixed. The rate was fixed by the Excise Commissioner, United Provinces, by order, dated March 1, 1943, which was gazetted on March 6, 1943. The permits issued on March 8 and March 16, 1943, directed the Maholi Mills to despatch the respective quantities therein mentioned to Konnagar at rates fixed by the United Provinces" Government, namely, at annas 4 per maund. Strictly speaking these permits could not be regarded as intended to implement either the Plaintiff firm"s contract with the Maholi Mills wherein the agreed rate was annas 7-9 per maund or its contract with the Defendant company which provided for the rate of Rs. 1-12 per maund. In reality and in their legal effect, these permits constituted directions, under Clause 3 of the United Provinces Molasses Control Order, 1942, by the Excise Commissioner, United Provinces, on Maholi Mills to despatch molasses to the Defendant company at annas 4 per maund in supersession of the Maholi Mills" existing contract with the Plaintiff firm. The parties, however, overlooked this aspect of the matter and treated these permits as if they were issued to enable the Maholi Mills to fulfill their contract with the Plaintiff firm and to enable the latter to discharge its obligation to the Defendant company, for I find that the Maholi Mills sent the railway receipts along with their bills to the Plaintiff firm and the latter in its turn handed over the railway receipts and its own bills to the Defendant company. The explanation given by Kishorilal, the Managing Director of the Maholi Mills, in his evidence on commission, namely, that the Maholi Mills sent the railway receipts and bills to the Plaintiff firm as their agent for collection is wholly unconvincing and cannot possibly be accepted. The fact is that all parties concerned utilised these permits in aid of their respective contracts until objection was taken and the Defendant company

insisted on the Maholi Mills submitting the railway receipts and bills direct to the Defendant company. This contention was eventually upheld by the excise authorities and I find that when, on July 5, 1943 and on subsequent dates permits began to be issued again on Maholi Mills in favour of the Defendant company at the controlled rate, the Maholi Mills forwarded the railway receipts and bills to the Defendant company direct. Therefore, these subsequent permits cannot possibly be regarded as resumption of supply under the private contracts between the parties, but were issued by the authorities and accepted by the Maholi Mills and the Defendant company as directions under Clause 3 of the Molasses Control Order, 1942, overriding the existing contracts. The Plaintiff firm had no concern in the movement of goods under these permits. Therefore, the stoppage of delivery under the Plaintiff firm's contract with the Maholi Mills and its contract with the Defendant company was final and complete and not of a temporary nature and delivery under those contracts was in fact never resumed. These facts make the decisions relied on by Learned Counsel for the Plaintiff firm wholly inapplicable to the present case. Further, assuming that I am wrong in the view. I have taken on this point and that eventually the suspension or interruption of delivery was removed, the result appears to me to be the same. What has to be looked at is the position of the parties when the interruption intervened. What were the parties to do then? The parties entered into their bargain and arranged for a programme of delivery spread over a period to suit their requirements. Were their respective factories to remain at a standstill during the period of suspension and then to work overtime when the supervening interruption ceased? I do not think any commercial person will reasonably take this view. Further, were the parties to wait indefinitely in the hope that some day the difficulty might pass over? In *Geipel v. Smith* (1872) L.B. 7 Q.B. 404, 414. Lush J. observed:

If the impediment had been in its nature temporary I should have thought the plea bad ; but a state of war must be presumed to be likely to continue so long and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this.

37. Quoting parts of the above observation, Scrutton J. in *Embiricos v. Sydney Reid and Company*, (1914) 3 K.B. 45, 54 added:

If there is such a likelihood and probability the fact that unexpectedly the restraint is removed for a short time does not involve that the parties should have foreseen this unexpected event and proceeded in the performance of an adventure which at the time seemed hopelessly destroyed.

38. Then referring to an observation of Lord Gorell in *The Savona* (1900) P. 252, 259. Scrutton J. concluded:

Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not; they must be entitled to act on reasonable commercial probabilities at the time when

they are called upon to make up their minds.

39. The principle of frustration was also discussed at length by Lord Sumner in *Bank Line, Limited v. Arthur Capel and Company* (1919) A.C. 435. It is neither necessary nor profitable to discuss the different legal theories on which different Judges sought to found the doctrine of frustration and I, therefore, refrain from dealing with the numerous cases cited by Learned Counsel on both sides. For the purposes of this case it suffices to say that on the evidence before me I find that it is not a case of temporary interruption of the performance of the contract. For reasons stated above the frustration was final and complete. Further, even if I assume the possibility of a doubt remaining as to whether, on the facts subsequently known, the Defendant company has quite discharged the onus of proving a total stoppage of delivery for all time to come, I respectfully adopt the following observation of Scott L.J. in *Kulukundis v. Norwich Union Fire Insurance Society* (1937) 1 K.B. 1, 43.:

* * * it is important to bear in mind the legal principle that in a commercial adventure men must know where they are and be free to take and act on immediate decisions in the light of the facts as known to them at the time, assuming reasonable assurance that they have taken all possible steps to obtain the necessary information.

40. In my opinion the refusal of the Excise Commissioner, United Provinces, to grant any more permits on Maholi Mills on and from April 17, 1943 and the cancellation of all existing permits for despatch of molasses from Maholi Mills to Konnagar constituted a complete frustration of the contract Between the Plaintiff firm and the Maholi Mills and that between it and the Defendant company and in any event the position arising out of such cancellation was such as in the circumstances then known to the parties either party was entitled to proceed on the basis that the contract was dissolved by reason of frustration.

41. Apart from this factual, frustration resulting from the administrative orders of the Excise Commissioner, United Provinces, the Defendant company also relied on frustration induced by supervening illegality. The argument is put in this way: On March 1, 1943, the Excise Commissioner, United Provinces, in exercise of the powers vested in him by the Molasses Control Order of September, 1942 fixed the prices at which molasses" could be sold thereafter. After that order had come into force, which it did at the latest in its publication in the Official Gazette on March 6, 1943, it became illegal for any owner or occupier of a sugar factory or other person holding stocks of molasses to sell the same at a price exceeding that fixed by the Excise Commissioner. Both the contracts, namely, that between the Maholi Mills and the Plaintiff firm and that between the Plaintiff firm and the Defendant company were executory contracts for sale of unascertained goods. In other words, they were agreements for sale and not sales within the meaning of the Sale of Goods Act. When the molasses were produced and put into tank wagons the goods became ascertained and the property therein passed from the Maholi Mills to the Plaintiff firm and through the Plaintiff firm to the Defendant

company under the provisions of the Sale of Goods Act and the agreements for sale then matured into sales. Therefore, such sales as took place after the controlled rate came into force were illegal under the United Provinces Molasses Control Order, 1942. Learned Counsel for the Defendant company relied on *Mischeff v. Springett* (1942) 2 A.E.R. 349 which appears to me to be in point. Learned Counsel for the Plaintiff firm contended that that case had no application, because the Molasses Control Order, 1942 and the fixation of price by the Order of 1943 did not affect the Plaintiff firm or the Defendant company, for these two parties carried on business outside United Provinces and made their contracts outside United Provinces and any order promulgated by the United Provinces authorities could not possibly have extra-territorial force. It was pointed out that the Plaintiff firm was neither an owner or occupier of a sugar factory nor a stockist according to the accepted meaning of that term. "Stockist" means and implies a tradesman who keeps specified goods in stock for sale like an ordinary shopkeeper. Let me analyse the position separately, first, as between the Maholi Mills and the Plaintiff firm and then as between the latter and the Defendant company. The Maholi Mills were certainly owners or occupiers of a sugar mill within the meaning of the United Provinces Molasses Control Order of 1942. The agreement was for sale ex-mill. The Plaintiff firm, according to the evidence of Mr. Kamalani (Q. 341-2), had its representative at the Maholi Mills to look after its interest and see to the loading of the goods. As between the Maholi Mills and the Plaintiff firm, it was suggested that the property in the molasses passed as soon as the same came out of the crushing, for the sale was of the entire output. This is not strictly accurate for the sale was in reality of the entire output less 15,000 maunds. In the premises it could not be predicated of any particular quantity that property therein passed on production. In my view, the property in molasses passed only when they were loaded in the tank wagons and therefore, with regard to the goods thus loaded the agreement for sale became a sale. Any such sale that would take place after controlled price came into force would be illegal. Even if I accept the contention that property would pass immediately on production, then also the agreement for sale would become a sale, with regard to molasses produced after the order of March, 1942 came into force, as soon as they would be produced and such sale would become illegal. If the sale, as between the Maholi Mills and the Plaintiff firm became illegal, the contract between the Plaintiff firm and the Defendant-company must have fallen with it, for the last mentioned contract could not be implemented except with goods acquired under the first contract. Apart from this and assuming that the illegality of the first-mentioned contract did not vitiate the second-mentioned contract the position would be the same. As soon as the property in the molasses passed to the Plaintiff firm under the first contract, it would also pass from the Plaintiff firm to the Defendant company and the agreement for sale would at once become a sale. The Plaintiff firm may not be a stockist in the ordinary sense of that term, but surely it held stock. The word "stockist" is not used in the order of 1942 and I do not see why the expression "any person holding stocks of molasses" would not cover the Plaintiff firm. It was said that, as between the

Plaintiff firm and the Defendant company, the property did not pass until the goods were actually delivered at Konnagar, for the contract was f.o.r. Konnagar. As I read the correspondence and the sale-note the price of Rs. 1-12 per maund was f.o.r. Konnagar, that is to say the words "f.o.r. Konnagar" were attached to the price clause and not to the delivery clause and therefore the railway freight up to Konnagar was included in the price. The delivery was to be given in instalments in tank wagons to be certified by the Defendant company. Therefore the contract contemplated delivery to the railway company at Maholi freight paid for transmission to the Defendant company at Konnagar and u/s 39 of the Sale of Goods Act such delivery would be delivery to the Defendant company. This delivery would take place at Maholi in United Provinces and property will pass and the sale would take place there upon such delivery. As soon as I come to this conclusion there is no escape from the United Provinces Molasses Control Order.

42. In my judgment, the contract between the Plaintiff firm and the Defendant company became frustrated in two ways: first, by reason of the impossibility of delivery brought about by the administrative orders of the United Provinces Excise authorities cancelling the existing permits and refusing to issue fresh permits and secondly, by reason of illegality such as I have mentioned. Issue 3, therefore, must be answered in favour of the Defendant company.

43. Regarding Issue 4. This issue arises out of the reply filed by the Plaintiff firm. The object of this issue is to take advantage of the principle that "reliance cannot be placed on a "self-induced frustration" Per Lord Sumner in *Bank Line, Limited v. Arthur Capel and Company* (supra). Lord Wright expressed the principle in *Maritime National Fish Limited v. Ocean Trawlers Limited* (1935) A.C. 524, 530, 531 in the words following:

The essence of "frustration" is that it should not be due to the act or election of the party.

44. At p. 531 His Lordship concluded:

If it be assumed that the performance of the contract was dependent on a licence being granted, it was that election which prevented performance and on that assumption it was the Appellants own default which frustrated the adventure; the Appellants cannot rely on their own default to excuse them from liability under the contract.

45. In the application of this principle the first thing to consider is the question of onus. Is the person against whom the plea of frustration is put forward to prove, to repel that plea, that the frustration was induced by the act or election of the person alleging frustration or is the person who relies on frustration to prove the negative that the frustration he relies upon was not self-induced? The question arose in *Joseph Constantine Steamship Line Limited v. Imperial Smelting Corporation Limited* (1942) A.C. 154 where the House of Lords reversing the decision of the Court of appeal held that the person alleging frustration having proved frustration was not bound to prove further that the frustration was not

due to his own neglect or default. This clearly implies that initially the onus of proving frustration is on the party alleging it and when he establishes frustration the onus shifts on the other party to prove that such frustration was self-induced, i.e., that it arose out of the act or election of the party alleging frustration. Keeping these principles in mind, I proceed to examine the evidence to ascertain whether the Defendant company, having established frustration, the Plaintiff firm has succeeded in showing that the frustration so established was due to the act or election of the Defendant company.

46. Paragraph 3 of the additional written statement filed by way of reply, on which this issue has been raised, specifies certain particulars of the acts and election of the Defendant company, which, according to the Plaintiff firm, brought about the impossibility or frustration. It is there alleged:

(a) The Defendant company in or about March, 1943, induced and procured the excise authorities of United Provinces and Bengal to put obstacles in the way of the Plaintiff firm's molasses being moved from Maholi to Konnagar by causing the said authorities to cancel all existing permits and to refuse further permits.

(b) The Defendant company in or about April, 1943, caused or induced the United Provinces excise authorities to make the railway authorities withdraw all tank wagons allotted for transport of the Plaintiff firm's molasses.

(c) The Defendant company in or about March, 1943, induced and procured the United Provinces authorities to make orders upon the Maholi Mills requiring them to deliver molasses direct to the Defendant and other distilleries and thereby prevented the Plaintiff firm from delivering molasses to the Defendant company.

47. The Plaintiff firm must be held to these particulars.

48. It will be remembered that, while the Plaintiff firm was trying to secure permits from United Provinces excise authorities, the Defendant company on and from December 7, 1942, was pressing the Plaintiff firm to quote for the new season's molasses. I have already referred to the various letters on this subject. This led to the conversation on the telephone between Biren Babu and a representative of the Plaintiff firm. It was during this conversation that difficulties about obtaining permits was referred to and Biren Babu offered that the Defendant company would take up the matter with the Excise authorities. The Defendant company, accordingly, on January 19, 1943, wrote to the Excise Commissioner, Bengal, to move the Excise Commissioner, United Provinces, to grant to the Defendant company an export permit for 50,000 to 80,000 maunds of Maholi molasses. The Excise Commissioner, Bengal, promptly on the 26th/27th January, 1943, took up the matter with the Excise Commissioner, United Provinces and requested the latter, amongst other things, to allot 80,000 maunds of Maholi molasses to the Defendant company at the same rates of prices fixed for the supply thereof to the United Provinces distilleries. Up to this point of time, there was no concluded contract between the Plaintiff firm and the Defendant company and there is no reason to think that the Excise Commissioner, Bengal,

was moving the Excise Commissioner, United Provinces, to issue permits for implementing any private contract between them. The reference in his letter to price fixed in United Provinces clearly indicates that the Excise Commissioner, Bengal, was asking the Excise Commissioner, United Provinces, to exercise his powers under Clause 3 of the United Provinces Molasses Control Order of 1942 and to direct the Maholi Mills to despatch 80,000 maunds to the Defendant company irrespective of any existing contract. At that time, however, no rate had been fixed in United Provinces. This letter was replied to by the Excise Commissioner, United Provinces, on January 30, 1943, to which I have already referred. A permit was issued on Maholi Mills for 15,000 maunds on February 1, 1943. The contract between the Plaintiff and the Defendant company was concluded as to 80,000 maunds on February 10, 1943 and as to another 20,000 maunds on February 15, 1943. The Plaintiff firm, however, had prior to that informed the Maholi Mills by its letter dated January 22, 1943, that the molasses it had purchased from them were to be delivered to the Defendant company. Accordingly, when the permit came to the Maholi Mills they considered it had been issued at the instance of the Plaintiff firm to enable it to fulfil its contracts and accordingly, upon despatch of molasses, the Maholi Mills forwarded the relative railway receipts along with their bills to the Plaintiff firm, which, in its turn, passed on the railway receipts together with its own bills to the Defendant company. The price of molasses not having been fixed up to then the Defendant company was quite content with this procedure being followed. On February 2, 1943, the Secretary to the Government of Bengal wrote to the Secretary to the United Provinces Government to arrange for permits for the Defendant company. On February 5, 1943, the Defendant company wrote direct to the Excise Commissioner, Bengal, for release of 80,000 maunds of Maholi molasses. The contract between the Plaintiff firm and the Defendant company was concluded on February 10 and February 15, 1943. On February 15, 1943, the Defendant company wrote to the Excise Commissioner, Bengal, informing him of its aforesaid purchase and asked him to arrange for release of molasses. On February 18, 1943, the Defendant company informed the railway authorities of its purchase of 10,00,000 maunds of molasses from the Plaintiff firm to be despatched at the rate of 12,000 maunds monthly from March 1, 1943. A copy of this letter was forwarded by the Defendant company to the Excise Commissioner, United Provinces, expressing the hope that the latter would find it in order. A copy of this covering letter was sent to the Excise Commissioner, Bengal, with a request to arrange for permit. A similar request was again made by the Defendant company in its letter to the Excise Commissioner, Bengal, dated March 4, 1943. Up to this point of time, there can be no question or doubt that the Defendant company was trying to secure permits for the purpose of implementing its contract with the Plaintiff firm and there is no indication that it was trying to evade its responsibilities under the contract. On March 6, 1943, was published the order made by the Excise Commissioner, United Provinces, fixing the price of molasses. On March 8, 1943, the Excise Commissioner, United Provinces, sent to the railway authorities a programme for removal of molasses

from United Provinces" Mills to different distilleries. In this programme it has shown that 60,000 maunds were to be moved from Maholi to Konnagar at the rate of 10,000 maunds per month. On March 8, 1943, a permit was issued for despatch of 10,000 maunds from Maholi to Konnagar at the rate fixed by the United Provinces Government, i.e., at annas 4 per maund. The reference to the controlled rate was perhaps a pointer.

49. In the meantime, on March 3, 1943, the Excise Commissioner, Bengal, met the Excise Commissioner, United Provinces, at Allahabad and the question of supply of molasses from the United Provinces Mills to the distilleries in Bengal was discussed. On March 8, 1943, there was an interview between Biren Babu and the Inspector of Distilleries and the result of that interview was recorded in the Defendant company's letter to the Excise Commissioner, Bengal, dated March 9, 1943. It was stated that it understood that the Excise Commissioner, Bengal, had decided to arrange for the supply of molasses to the Defendant company from United Provinces and to take such steps as would ensure the cancellation of the Defendant company's previous contract with the Plaintiff firm. Biren Babu in his evidence said (Q. 188-201) that he was told that the Excise Department had officially arranged for supply of molasses from the United Provinces Mills to the Defendant company at their own price, meaning obviously the controlled price. Biren Babu said (Q. 98) that the Excise Commissioner, Bengal, did not confirm this assurance. I am not in the least surprised at this, for the excise authorities could not be expected to openly state that they were taking steps to bring about a cancellation of the contract between third parties. Further it appears from the Defendant company's letter dated March 11, 1943, that on March 10, 1943, there was a conversation over the telephone between somebody on behalf of the Defendant company and the Excise Commissioner, Bengal and so there might have remained no further necessity for a written confirmation. In this letter it expressed the view that its contract with the Plaintiff firm would apparently come to an end automatically by reason of the fact that the United Provinces authorities were not prepared to license the sale of molasses to dealers but would do so only to distillers direct. The letter concluded with an expression of thanks to the Excise Commissioner, Bengal, for all the trouble taken on its behalf.

50. Whether the fixation of the price and the reference to the controlled price in the permit dated March 8, 1943, read with the Molasses Control Order, 1942, made the Defendant company to think that if it could get rid of its contract with the Plaintiff firm, it could get direct supplies from the United Provinces Mills at the controlled price and led it to take the initiative and induce the excise authorities of Bengal to move the excise authorities of United Provinces to that end or the Excise Commissioner of Bengal, in the interest of his Government, with whom the Defendant company was under a contract for supply of country spirit at prices fixed on the basis of cost price of raw materials, took the initiative and moved the Excise Commissioner, United Provinces, to arrange for direct supply, is more than I can say on the present materials before me. Major

Hoskins, the Excise Commissioner of Bengal, is the person who might have thrown considerable light on the question. He has not been examined in this case. It is perfectly clear to me, however, that the arrangement for direct supply of molasses from United Provinces" Mills to the Defendant company at the controlled price admirably suited the Defendant company. If the initiative came from the Excise Commissioner of Bengal and the Defendant company acquiesced in the suggestion of the Excise Commissioner, Bengal, it did so not only willingly but almost enthusiastically. It was pointed out, by reference to the charts prepared by the Defendant company and tendered in evidence during the examination of Mr. Hayward, that about 80 per cent, of the molasses received by the Defendant company went into production of country spirit, for which the Defendant company was paid on the basis of cost price and a commission thereon, and therefore, the cost price did not matter to it and that the remaining 20 per cent, of molasses which were used for producing gin and other like products "was not likely to produce a, profit of over Rs. 10,000 and it was urged that a respectable company which was paying such huge amounts as excise duty and excess profit tax was not likely to stoop to such meanness as to evade its contractual obligations with a firm with which it had been dealing for years. The argument is forceful, but, at the same time, the different positions taken up by the Defendant company, which have been characterised by Learned Counsel for the Plaintiff firm as subterfuges, do not appear to me to be quite straight forward. There is some force in the comment that the acts and conduct of the Defendant company show that by hook or by crook the Defendant company was bent on breaking its contract with the Plaintiff firm.

51. [His Lordship then discussed the evidence and proceeded as follows:]

On the facts above, it is impossible to hold that the Defendant company had no hand in bringing about the frustration of its contract with the Plaintiff firm. As I have said, Major Hoskins, not having been examined in this case, it is not possible to ascertain with any amount of certainty as to whether the suggestion for direct supply from the United Provinces" Mills to the Defendant company emanated from the Defendant company or from the Excise Commissioner, Bengal. Even if it came initially from the Excise Commissioner of Bengal or of United Provinces, the Defendant company was not merely a passive agent, but took up the cue with alacrity and pursued it actively and enthusiastically and it cannot, in the facts of this case, absolve itself from the responsibility of having brought about or actively contributed to the frustration in collaboration with and under encouragement from the excise authorities. But for its acts and election and its participation in the scheme devised for arranging such supplies, the frustration would not have been as effective and complete as it, in fact, turned out to be. On the whole, I am satisfied that the Plaintiff firm has discharged the onus on this issue and the issue should be answered in the affirmative.

52. I desire, however, to make it clear that this answer must be" taken as one with reference to the frustration or impossibility brought about by the

administrative orders of the excise authorities. In other words, this answer relates to the factual frustration only and does not affect the frustration brought about by illegality of sale made in contravention of the provisions of the United Provinces Molasses Control Order of September, 1942, read with the order of March, 1943, fixing the price. There can be no question of the Defendant company, having brought about that legal frustration, for that frustration resulted directly and solely from the provisions of the United, Provinces Molasses Control Order, without the Defendant company having had anything to do with it. Even if the Defendant company be precluded from relying on the frustration which was induced by its own acts and election I do not see why it should not be allowed to rely on frustration resulting from illegality brought about by the terms of the United Provinces Molasses, Control Order.

53. Regarding Issues 5, 6 and 7. In para. 7 of the plaint it has been pleaded that by letters addressed to the Plaintiff firm on March 27, 1943 and April 7, 1943, the Defendant company, wrongfully repudiated the said contract. The Defendant company, in its written statement, admits the letters, but denies that it repudiated the contract wrongfully or at all and in any event, submits that the Plaintiff firm never accepted the alleged repudiation. In the additional written statement filed by way of reply, the Plaintiff firm states that the Defendant company reiterated the repudiation of the contract by a letter addressed to the Plaintiff firm on April 20, 1943 and that the Plaintiff firm treated the contract as repudiated and sued accordingly. I have considerable doubts whether the Plaintiff firm can properly, by way of reply, add to the cause of action pleaded in the plaint by setting up a fresh repudiation. I do not think that the normal function of a reply can be to enlarge the scope of the suit. I would have strictly limited the Plaintiff firm to the two specific repudiations pleaded in the plaint, but, seeing that the Defendant company took no step to get the additional written statement amended by striking out the new allegation of an additional repudiation, I propose to deal with the same.

54. In its letter of March 27, 1943, to which I have already referred, the Defendant company urged that in view of the restrictions imposed by the United Provinces Government the Plaintiff firm apparently would not be allowed to export molasses and therefore, the dealings between the parties for United Provinces molasses during that year would have to cease. The Defendant company enquired if it would be possible for the Plaintiff firm to arrange supplies from any other province, where no restriction was in force. Learned Counsel for the Defendant company in what appeared to me to be a half-hearted manner suggested that this letter contained a mere expression of view put forward for the purpose of discussion and did not amount to a repudiation of the contract at all. I am unable to accept this interpretation of the letter. In the context of the surrounding circumstances, in which this letter came to be written, it cannot but be regarded as a repudiation of the contract. The suggestion of a fresh arrangement for supply from another province strengthens this view. The proposed future discussion was obviously for the purpose of the fresh

arrangement and had, nothing to do with the contract which was in preceding part of the letter wholly repudiated. In the premises, I have to hold that this letter constitutes a repudiation of the contract.

55. It will be noticed that this repudiation was founded on the impossibility of the Plaintiff firm performing and fulfilling the contract by reason of the restrictions imposed by the United Provinces Government. It should be remembered that up to this date the permits had not been cancelled and no express direction had been given by the Excise Commissioner, United Provinces, on the Maholi Mills to effect direct supply to the Defendant company in supersession of their existing contract. Therefore, this repudiation had nothing to do with any express administrative order, but was based wholly upon the illegality of a sale in contravention of the restrictions imposed by the United Provinces Government Molasses Control Order of September, 1942, read with the order of March, 1943, fixing the price which had just been published. If this contention of illegality be right, as I have held to be, it must follow that such a repudiation cannot be and was not wrongful.

56. The Plaintiff firm replied to this letter on March 30, 1943. In its reply the Plaintiff firm stated that it did not anticipate any difficulty in supplying molasses in terms of the contract and that there was no reason why the dealings between the parties during that year should cease and that there would be no difficulty for the Defendant company to obtain the necessary permits. It is quite obvious from this reply that the Plaintiff firm was insisting on the contract being performed. This reply, therefore, cannot possibly be read as acceptance of the repudiation of the contract.

57. The second repudiation is said to have been contained in the Defendant company's letter, dated April 7, 1943. By that letter the Defendant company acknowledged receipt of five railway receipts for molasses despatched from the Maholi Mills and raised the question as to whether those supplies were made by the Maholi Mills against the permits issued in favour of the Defendant company or out of the Plaintiff firm's stock with them. Seeing, however, that the railway receipts came from the Plaintiff firm it was thought as evident that the latter had arranged for those despatches although the Defendant company had by its telegram and letter, dated March 11, 1943, asked the Plaintiff firm to withhold despatches. The Defendant company stated that, to save demurrage, it would take delivery, but would not be responsible if its taking delivery caused any breach of the United Provinces Government orders. It further stated that, in the light of what it had written in its letter of March 27, 1943, it could not enter into any arrangement with the Plaintiff firm for supply of molasses during that year unless and until the Plaintiff firm took up the matter with the United Provinces Government and obtained permission for the same. The Defendant company proposed to show these supplies as excess received against the old contracts and suggested that the price for those supplies would be settled by mutual consent later on. Here again I cannot but read this letter as a repudiation of its

obligations under the contract by the Defendant company. The statement that the Defendant company could not enter into any arrangement with the Plaintiff firm altogether ignores the subsisting contract and cannot but be regarded as a pretence. The suggestion that these despatches should be appropriated to the old contract but at a price to be mutually settled later on shows that the Defendant company was not recognising the existence of the contract of February, 1943. I, therefore, hold that this letter also amounts to a repudiation.

58. It will be noticed that there is a reference in this letter to the Defendant company's earlier letter of March 27, 1943. In that letter, the contract was sought to be repudiated on the plea of illegality. Although there is that reference to that letter, yet it is clear that in this letter of April 7, 1943, the repudiation is sought to be founded on the Plaintiff firm despatching these supplies in spite of directions to the contrary given by telegram and letter and on the pretext that there was no concluded agreement between the parties. The suggestion of mutually settling the price of these supplies is nothing but a suggestion that an agreement should be made in future. In the context of the surrounding circumstances this repudiation does not purport to be based on any lawful excuse or ground. In my opinion, this repudiation was not based on the supervening illegality of a contract admittedly entered into as in the case of the repudiation by the letter of March 27, 1943, but was founded upon two inconsistent grounds, namely, first, non-compliance of directions stopping further despatches until further notice which is referable to the contract because delivery was to be given as required and secondly, on the pretext that there was no concluded agreement between the parties. In my opinion, this repudiation must, in the circumstances, be regarded as wrongful.

59. This letter was replied to by the Plaintiff firm on April 10, 1943. In this reply the Plaintiff firm expressed its inability to understand how, after clamoring for delivery, the Defendant company could send the telegram stopping further despatches and also its inability, in view of the transport problem, to stop the flow of tank wagons. The Plaintiff firm maintained that the deliveries had been made in pursuance of the firm contract for 1942-1943 molasses and had no relation to the old contract. The Plaintiff firm also stated that it knew of no Government order, by which the Defendant company was bound, preventing it from taking deliveries from the Plaintiff firm pursuant to the existing contract. The Plaintiff firm concluded by saying that it would continue to offer delivery and send the railway receipts as before. I do not think there could be a more definite non-acceptance of repudiation than this letter.

60. The last repudiation is said to have been made by the Defendant company by its letter dated April 20, 1943. In this letter a suggestion was made that the Plaintiff firm had obtained the permit, dated February 1, 1943, by false pretences, namely by asserting that it had a contract with the Defendant company while in fact there was only some preliminary arrangement whereby the Defendant company proposed to purchase Maholi molasses from the Plaintiff

firm. The Defendant company maintained that such preliminary arrangement had since been superseded by Government orders. It pointed out the irregularity of sending supplies under later permits when a balance was due on the earlier permit. It ended by saying that as it had not received and reply to its letters, dated March 27, 1943 and April 7, 1943, it had made arrangements to carry out Government orders in taking direct supplies from the United Provinces mills "against its permits. There can be no question that this letter clearly constitutes a repudiation of the contract.

61. This repudiation it will be noticed is also based on two grounds, namely, that there were only preliminary arrangements and not a concluded contract and secondly that such preliminary arrangements had been superseded by Government orders. It was not based on illegality flowing from the construction of the provisions of the Molasses Control Order and the Government orders referred to were clearly intended to be references to the order cancelling the existing permits and refusing to issue fresh permit on Maholi. It will be remembered that on April 12, 1943, the Excise Commissioner, United Provinces, told his counterpart in Bengal that his office had made a mistake in issuing permits on Maholi which had been reserved for United Provinces Distilleries and that no further permits would be issued on Maholi. A permit was in fact issued on Simbhaoli Mills at or about the same time. Then on April 17, 1943, the Excise Commissioner, United Provinces, informed the railway authorities and the Maholi Mills that all existing permits had been cancelled. It is against this background that this letter has to be scrutinised. I have already said that, even, if the idea of direct supply of molasses from the United Provinces mills to the Defendant company at controlled price had initially emanated from the Excise Commissioner, Bengal, or United Provinces, the Defendant company took up the idea and worked laboriously to give practical effect thereto and the cancellation of the existing permits and the refusal to issue fresh permits were certainly procured by the Defendant company in collaboration with the excise authorities. I am expressing no opinion as to whether the excise authorities, were or were not justified, in the interests of the Government, to assist in bringing about this frustration, but I am of opinion that so far as the Defendant company is concerned it certainly contributed to that result. In the premises the repudiation of the contract for reasons alleged in this letter was self-induced and brought about by the acts and election of the Defendant company and was as such wrongful.

62. There could be no stronger evidence of refusal to accept this repudiation than what is contained in the Plaintiff firm's letter, dated April 28, 1943, to which I have already referred. The Plaintiff firm clearly and unequivocally held the Defendant company firmly bound to the contract.

63. For reasons stated above I answer these issues as follows:

5. Yes.

6. The repudiation by the letter, dated March 27, 1943, was not wrongful but the subsequent repudiations by letters dated the 7th and 20th April, 1943, were wrongful.

7. No.

64. The question then arises as to what is the effect of an unaccepted repudiation. It is clear on principle and on authority that there cannot be a rescission of a contract by unilateral repudiation. To bring about a rescission of the contract there must be a repudiation by one party and acceptance thereof by the other. The principle is that a contract which was brought about by mutual consent can be dissolved by mutual consent. It is thus stated by Lord Wrenbury in *Bradley v. H. Newsom Sons and Company* (1919) A.C. 16, 51-2:

A contract between two persons results from the consensus of the the two minds agreeing *animo contrahendi* to terms which each accepts and which create obligations between them. The contract, having been entered into, may be determined in any one of three ways. First, consensus created the contract and consensus may determine, it. If the two parties agree to determine the contract it is determined. Secondly, some contracts, though expressed in absolute terms, are, by the nature of the matter, so obviously dependent upon the possibility of performing the promise that a term is implied excepting the events which render performance according to the promise impossible. In the case of such events happening the contract ceases to be operative. Thus, in a contract for personal service for a term of years, will be implied a condition if the party shall so long live. Thirdly, if one party to the contract, by words or by conduct, expresses to the other party an intention not to perform his obligation under the contract when the time arrives for its performance, the latter may say, "I take you at your word ; "I accept your repudiation of your promise and will sue you for breach." This is really no addition to, but a particular application of the principle first above stated. The first party has, in fact, made an offer This offer is : "I am not "going to perform the contract. I offer to end it here and now and to accept the "consequences of ending it, those consequences, as I know, being that you can "sue me for damages for my refusal." The other may accept or may decline that offer. If he accepts, then by consensus the contract is determined, but with a right to damages against the party who has refused to perform. In each of these cases it is the consensus of the parties which brings the contract to an end. In the first and third cases it is consensus *dehors* the contract. In the second, it is the consensus to the implied term contained in the contract.

65. Learned Counsel for the Defendant company referred me to a number of cases beginning from the leading cases of *Hochster v. De La Tour* (1853) 2 E&B. 678 : 118 E.R. 922 and *Avery v. Bowden* (1855) 5 E&B. 714 : 119 E.R. 647 down to *Heyman v. Darwins Limited* (supra) and several text books.

66. The authorities clearly establish that, under the English law, if one party to a contract states his intention not to perform the contract, even though the time

for performance has not yet arrived, the other party may treat the contract as discharged and sue for damages without being under any obligation to perform his own part, but he will not be allowed to do so unless he accepts such repudiation. When there is repudiation by one party the other party has the option of taking one of two courses. He may accept the repudiation, in which case, by consensus, the contract is at an end subject to a right to sue for damages, or he may refuse to accept the repudiation in which case the contract subsists for all purposes and both parties continue to be bound thereby. The privilege of adopting one of two courses clearly implies that the party having this privilege must elect which of the two courses he will adopt. The general principle of election is that once the election is made freely and with full knowledge of all facts there can be no going back on it and it becomes irrevocable. If, as Lord Wrenbury puts it, repudiation by one party is to be regarded as an offer accepted there is a consensus of two minds and by this consensus the old contract is dissolved. Once the repudiation is accepted the contract is dissolved and there can be no revival of the contract except by another consensus. Likewise, if the repudiation is not accepted the repudiation lapses as does an offer which is unaccepted and therefore, after rejection of the offer implied by the repudiation it cannot be open to the party who had rejected the offer to change his mind and accept the repudiation, for the repudiation like an offer lapses by non-acceptance. Therefore, whether the matter is tested according to the general principles of election or of contract, once the repudiation is rejected there can be no subsequent change of mind unless of course the repudiation is renewed expressly, or impliedly. I do not think there is any doubt as to these principles of English law.

67. Applying these principles, it is urged by Learned Counsel for the Defendant company that in this case the Plaintiff firm rejected each and every one of the three repudiations and elected to keep the contract as subsisting. The repudiation, not having been accepted, the Plaintiff firm has no cause of action at all. It is pointed out that, in the plaint, there is not even an averment of acceptance of repudiation and therefore the plaint discloses no cause of action. I am not certain that the pleading of acceptance of the repudiation is a necessary condition and that no suit can be filed before formally accepting the repudiation and communicating the same to the party. In certain circumstances the filing of the suit may itself be regarded as the acceptance of the repudiation. It was stated by Viscount Simon L.C. in *Heyman v. Darwins Limited* (1942) A.C. 356, 362.:

The issue of the writ may, however, sometimes be regarded as amounting to the exercise of the Plaintiffs claim to rescind and for the purposes of the appeal I am content so to regard it.

68. A reference to Bullen and Leake's *Precedents of Pleadings*, 7th Ed., p. 218, also supports the view that acceptance of repudiation need not be specifically pleaded and that the issue of the writ may itself be regarded as the acceptance

of the repudiation. I need not pursue this matter further, for I find, on the facts, that the Plaintiff firm definitely declined to accept each of the repudiations and elected to treat the contract as subsisting. Having thus elected the Plaintiff firm cannot change its mind and accept the repudiation now and maintain this suit. There is no suggestion that, except on the footing of repudiation, this suit is maintainable. The delivery was to be given in stated instalments but as required by the Defendant company and as released by the United Provinces Government. Therefore, at the date of the suit the time for performance was not over and therefore there had been no breach which would entitle the Plaintiff firm to maintain this suit. To avoid this the Plaintiff firm must support this suit on the basis of repudiation accelerating his right of suit. In this the Plaintiff firm is met by the plea that it had declined to accept the repudiation and therefore it had no right to institute the suit at the time it did. The repudiation having been rejected and the time for performance not having expired the Plaintiff firm had no cause of action. At one stage, Learned Counsel for the Plaintiff firm signified that he might apply for an amendment of the plaint by making an alternative case of breach of the contract. No application was, however, made and having regard to the delivery clause of the sale-note, it would be difficult to maintain that at the date of the suit there had been a breach of the contract except by repudiation.

69. Learned Counsel for the Plaintiff firm submitted that the judicial decisions relied on by the other side only reproduced the English Common Law but that the law in India was different and there was a deliberate departure in Indian law from the Common Law of England. I was referred to Section 39 of the Indian Contract Act and Section 60 of the Indian Sale of Goods Act. His argument was that the refusal of the Plaintiff firm to accept the repudiation only gave the Defendant company a locus penitentiae and if the Defendant company was not penitent the Plaintiff firm could at any time exercise its option to accept the repudiation. This, argued Learned Counsel, was the result of the Indian law. Now turning to Section 39 of the Indian Contract Act, it is clear that the argument cannot be supported by reference to the terms of that section. The language of that section and particularly the concluding words beginning with "unless he has signified, andc", clearly indicate that the right of putting an end to the contract can be exercised only "unless" the party "has signified, by words "or conduct, his acquiescence in its continuance." Once the party has so signified his acquiescence, the right to put an end to the contract is gone. Section 60 of the Indian Sale of Goods Act was next relied upon. It was pointed out that that section did not point to any particular point of time when the election had to be made. The very provision for two alternative rights suggests the necessity for election. Further the language clearly indicates two alternatives. A party must adopt one or other of them. The first alternative is that he might treat the contract as subsisting and wait till the date of delivery. It is a composite alternative. It is not open to a party to say that he will treat the contract as subsisting but will not wait till the date of delivery. This alternative right is one and the party must take it as a whole and not a part of it. The right is: (i) to

treat the contract as subsisting and wait till the date of delivery or (ii) to treat the contract as rescinded and sue for damages. If a party adopts the first course, he must treat the contract as subsisting and wait till the date of delivery. The two parts of this alternative are not severable but make one alternative. If by treating the contract as subsisting a locus penitentiae is given to the party repudiating the contract the locus penitentiae must continue until the date of delivery. So understood, I do not see that Section 60 of the Indian Sale of Goods Act is different, in its effect, from the English Common Law. In my opinion, on a proper construction, neither of the two sections I have been referred to supports the maintainability of this suit. In the premises, the repudiation of the Defendant company not having been accepted the Plaintiff firm must be regarded as having definitely elected to keep the contract subsisting and therefore, must wait till the date of delivery and could not file this suit at the date it did, for the date of delivery had not then expired.

70. Regarding Issue 8. In view of my findings on and my answers to, the other issues this issue does not really arise. There is no doubt that all that was delivered under the contract up to the end of April, 1943, was 15,688 maunds. The rest of the goods were not delivered. The Plaintiff firm avers that it was prevented from doing so by the acts and conduct of the Defendant company in not having applied for permits and in wrongfully repudiating the contract. If my answers to all the foregoing issues were in favour of the Plaintiff firm I would have had no difficulty in answering this issue also in its favour. In view of my answers to the other issues no answer is necessary to this issue.

71. Regarding Issue 9. I have held that the contract in suit was frustrated and became void by reason of illegality and the repudiation thereof on that ground by the Defendant company by its letter, dated March 27, 1943, was not wrongful. I have also held that the Plaintiff firm had not accepted any of the repudiations and thereby elected to keep the contract subsisting and the date of delivery not having gone past, had no right to bring this suit, except as to the price of goods already delivered. Therefore, there will be a decree against the Defendant company for the sum of Rs. 18,959-8 for principal and Rs. 1,475 for interest thereon. The amount paid by the Defendant company into the hands of the Plaintiff firm's attorneys will be appropriated towards the decree. The Plaintiff firm will also get the costs of this suit up to September 23, 1944. The suit shall stand dismissed as regards the rest of the Plaintiff firm's claim. The Plaintiff firm must pay one half the costs of this suit including costs of the commission and reserved cost from September 24, 1944. Certified for two counsel.