

(1945) 07 BOM CK 0005
In the Bombay High Court
Case No : O.C.J. Suit No. 1078 of 1942

Phoenix Mills Ltd.

APPELLANT

Vs

M.H. Dinshaw and Co.

RESPONDENT

Date of Decision : 04-07-1945

Acts Referred:

Contract Act, 1872 — Section 63

Citation : AIR 1946 Bom 469 : (1946) 48 BOMLR 313

Hon'ble Judges : Chagla, J

Bench : Single Bench

Judgement

Chagla, J.—On August 29, 1941, the plaintiffs and the defendants entered into a contract whereby the defendants agreed to supply to the plaintiffs certain dyeing and. bleaching machinery consisting of one scutcher, one piler and one six-bowls water mangle at certain rates and on certain terms and conditions. The contract is expressed to be a c. i. f. contract, and it is important to note this because most of the controversy between the parties in this suit has turned round the rights and obligations of the contracting parties under a c. i. f. contract. On September 15, 1941, the plaintiffs paid to the defendants a sum of Rs. 3,500 being approximately the one-third price of the machinery. The plaintiffs after that wrote several letters to the defendants making inquiries as to the arrival of the goods. On February 11, 1942, the defendants replied to the plaintiffs stating that they had received the shipping documents of the articles contracted to be sold. They asked the plaintiffs to send the cheque so as to enable" them to deliver to the plaintiffs the bill of lading. They also enclosed with this letter their bill. The bill sets out with some particularity the description of the goods, the rate, the price, the full amount payable under the contract, and the part-payment of Rs. 3,500 which had been received by the defendants and the final amount due and payable by the plaintiffs. On February 16, 1942, the plaintiffs wrote to the defendants pointing out that the balance of the price was to be paid on intimation by the bank that the shipping documents had arrived. That is one of the terms of the contract. The plaintiffs point out that so far they had not

received any intimation from any bank; then they go on to state that as, according to the defendants, the shipping documents had arrived, they would be prepared to pay the balance against the defendants handing over all the necessary documents. It is common ground that on February 16, 1942, the plaintiffs paid the balance, viz. Rs. 7,046 to a representative of the defendants and it is also common ground that the only document which was delivered by the defendants to the plaintiffs on that day was the bill of lading. The plaintiffs have filed this suit for a refund of the full price paid by them on the ground that the defendants failed to perform their obligations under the contract and also there was a failure of consideration. The plaintiffs' contention is in brief that the defendants merely gave them the bill of lading but failed to deliver to them the original invoice and a proper policy of insurance. The defendants' answer to the suit is that the documents delivered by them were the proper documents which they were bound to deliver under a c. i. f. contract. In any event the defendants say the plaintiffs have waived their right to the original invoice and what according to them is a proper policy of insurance. In the alternative the defendants contend that the plaintiffs have dispensed with the performance of those obligations on the part of the defendants u/s 63 of the Indian Contract Act, 1872; and finally they also base their defence on an estoppel operating against the plaintiffs.

2. The incidents of a c. i. f. contract have been very clearly and precisely defined by Mr. Justice Hamilton in *Biddell Brothers v. E. Clemens Horst Company* [1911] 1 K.B. 214. He defines these incidents as follows (p. 220):

A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract: of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn J. in *Ireland v. Livingston* (1872) L.R. 5 H.L. 595, 406 or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that .against tender of these documents, the bill of lading, invoice, and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price.

Therefore, under a c. i. f. contract, the seller can give symbolic delivery of the goods by tendering to the buyer three documents, viz. a bill of lading, an invoice and a policy of insurance. In law the tendering of these documents is tantamount to giving delivery of the goods covered by these documents and the buyer is bound to accept these documents and pay the price. As pointed out by

Halsbury's Laws of England, Hailsham Edition, Vol. XXIX, p. 210, the commercial reason for the evolution of the "c. i. f." contract lies in the length of time taken in the carriage of goods by sea. The contract which has been ultimately evolved is both for the benefit of the seller and the buyer. It is to the seller's interest to receive the money equivalent of the goods as soon as possible after the date of the contract of sale; on the other hand, it is to the interest of the buyer to be able to deal with the goods for resale or finance as soon as possible.

3. As I have pointed out, the only documents that were delivered to the plaintiffs by the defendants by February 16, 1942, were the bill of lading and the defendants' bill upon the plaintiffs. There is some dispute with which I shall presently deal as to whether the defendants' bill constituted a proper invoice under a c. i. f. contract; but there is no dispute and there can be no dispute—that as far as the defendants were concerned, they did not deliver a very essential document under the c. i. f. contract, namely, the policy of insurance, on February 16, 1942, when they received the price from the plaintiffs. If the plaintiffs had paid the price without more, then clearly the defendants could have contended that they had waived their rights to receiving any further documents under the contract. But the plaintiffs' case is that they did not make the payment on February 16 unequivocally or unconditionally. Their case is that they made this payment only on the assurance given by the defendants' representative that the remaining documents would be delivered in a day or two. Whether this is so or not is a question of fact to be determined by oral evidence and also in the light of correspondence that has passed between the parties.

4. Keshavdev Fatechand Ruia, who was the stores purchaser of the plaintiff mills during the material period and who is no longer in the employ of the plaintiffs and has no connection with them whatsoever, has given evidence on this point. He has stated that after the plaintiffs had sent their letter of February 16, 1942, to which I have referred, someone on behalf of the defendants, whose name he did not know, came to him with a bill of lading. Keshavdev told him that the documents were not complete and the plaintiffs wanted the policy of insurance and the original invoice. To that the reply of the defendants' agent was that these documents would be sent in a day or two. Thereupon Keshavdev took the bill of lading and gave him a cheque for the balance of the price. Keshavdev has told me that he (Keshavdev) knew that the goods could not be cleared from the customs without the original invoice; and Framroz Shapurji Homavazir, the manager of S. D. Engineer and Son, the plaintiffs' clearing agents, has also told me that usually when his clients wanted the goods to be cleared, the documents that were sent were the bill of lading, the original invoice and the insurance policy. Keshavdev further stated that a day or two after this interview he telephoned to the office of the defendants and told them that the plaintiffs had not yet received the documents.

5. The evidence of Keshavdev has been very strongly attacked by Mr. Bhatt on behalf of the defendants. There is no doubt that there are discrepancies in his

evidence, and the strongest discrepancy is the fact that in subsequent correspondence this particular interview of February 16, 1942, is not referred to. I shall presently consider the correspondence, and to my mind it is quite apparent, looking at the correspondence as a whole, that the plaintiffs made it perfectly clear to the defendants that they insisted upon the performance of all the defendants' obligations under the contract; and the defendants equally clearly realised that they were under an obligation to perform whatever duties they had to under the contract. Neither party in this correspondence even suggested that the plaintiffs had waived their rights under the contract and that the defendants were no longer bound to perform their obligations. It seems that the plaintiffs forwarded the bill of lading to their clearing agents, Messrs. S. D. Engineer and Son, on February 16, 1942, asking them to clear the goods. On February 17, Messrs S. D. Engineer and Son replied stating that they understood that the ship by which the goods were arriving was not coming to Bombay on account of causes arising out of the war and therefore they returned the bill of lading. Then we have, according to Keshavdev, the telephonic conversation to which I have referred. Nothing further happens till March 19, 1942, when the plaintiffs address a letter to the defendants. In this letter they specifically mention that they had handed over the balance of the price on the defendants having given to the plaintiffs all the shipping documents except the insurance policy and the original invoice; then they go on to state that when they reminded the defendants on the telephone, the defendants assured the plaintiffs that the same would be sent in a day or two. Then the plaintiffs; make a complaint of the fact that although a month had passed, they had not received the insurance policy and the original invoice; they even accuse a reputable firm like the defendants of dilly-dallying. The reply to this letter is sent by the defendants on March 25, 1942. There is no denial of the telephonic conversation nor of the assurance given by the defendants to the plaintiffs; on the contrary there is an explanation as to why these documents have not yet been sent to the plaintiffs. The defendants point out that the insurance policy had not yet been received by them and they had asked for the policy to be sent by air mail and that it would be sent to the plaintiffs as soon, as it was received. With regard to the invoice, the defendants said that they had sent it to the customs authorities for verification. The plaintiffs wrote another letter on March 25 apparently before they received the defendants' letter of the same date where they again make a complaint of their not having received the insurance policy and the invoice and charge the defendants with delaying the matter and not giving a straightforward reply. Then on April 1, 1942, the defendants acknowledge the plaintiffs' letter of March 25, 1942, and forward an insurance certificate which they had received. It is to be noted that even in this letter of April 1 which refers to the plaintiffs' letter of March 25, there is no denial of the fact that the defendants had given certain assurances to the plaintiffs with regard to the remaining documents. On April 9, 1942, the defendants inform the plaintiffs that they had received a cablegram from their principals in England that the steamer carrying the machinery sold to the plaintiffs had been sunk by enemy action. Then on April

14, 1942, the plaintiffs approach their attorneys, and a letter is written on that day by their solicitors. Then further correspondence follows.

6. It is difficult to believe in the first instance that a man like Keshavdev who was an experienced man would have paid the balance of the price against the receipt of merely the bill of lading. Whatever the position with regard to the invoice might be, it is incredible that any business people, especially in times of war, with constant danger to all ships on the high seas, would have paid the full amount without receiving any policy and without their interest in the goods being properly safeguarded and they being indemnified against the risk of the ship being lost at sea. Further if it be true that Keshavdev telephoned to the defendants two days after this interview and reminded them of the assurance given, it cannot be that he would have done this for the first time if nothing had transpired on February 16 itself. If the payment by the plaintiffs was an unequivocal payment in satisfaction of their rights under the contract, it is difficult to understand why the plaintiffs' man should telephone to the defendants and remind them that the documents had not been received nor is any explanation forthcoming why the defendants should have not contradicted these statements which occur in the letters of March 19, 1942, and March 25, 1942. The only explanation that Hormusji Dinshaw, the sole proprietor of the defendant firm, has given to me in the witness-box is that he wanted to be polite and courteous and did not want to alienate the plaintiffs. But in my opinion there is a limit beyond which politeness and courtesy cannot go and the limit is certainly reached when the other side is alleging something which is totally opposed to the truth.

7. Finally I see no reason why I should disbelieve Keshavdev. He has no interest in telling something which is not the truth. He is no longer in the employ of the plaintiffs. It is not suggested that he is a biased witness. Mr. Dinshaw, who is the sole proprietor of the defendant firm, who has gone into the witness-box, unfortunately has no knowledge of what transpired on February 16, 1942, between his representative and Keshavdev. Mr. Dinshaw has admitted that he had sent his clerk by the name of Darasha with the bill of lading to be handed over to the plaintiffs. The defendants are not in a position to call Darasha because, according to Mr. Dinshaw, Darasha is not on good terms with him. He has started a rival business and they are trade rivals. That may be rather unfortunate for Mr. Dinshaw, but the fact remains that I have the uncontradicted oath of Keshavdev as to what transpired at the interview of February 16, 1942, and I see no reason why I should disbelieve this witness. I therefore hold that on February 16 the plaintiffs paid the balance of the price on their being assured that the remaining documents under the contract would be given to them within a day or two, and therefore, as far as the payment of February 16 was concerned, it cannot act as a waiver or an estoppel or a dispensation u/s 63 of the Indian Contract Act. Therefore the payment of the balance of the price by the plaintiffs on February 16 did not relieve the defendants of their obligation under the contract to tender to the plaintiffs all the three necessary documents. As I

have already pointed out, the defendants did hand over to the plaintiffs the bill of lading. It is common ground that the policy of insurance was not handed over on February 16. The defendants did hand over a bill to the plaintiffs on February 11, and what I have now to consider is whether that bill was the invoice which the defendants were under an obligation to tender to the plaintiffs under a c. i. f. contract or if it was not a proper invoice as contended by the plaintiffs. In order fully to appreciate this controversy, it is necessary to state a few facts. The contract goods were purchased by the defendants from William Bates, Son & Company, Limited, and the invoice sent by William Bates, Son & Company, Limited, was received by the defendants. The bill of lading shows that the goods were put on board the ship, which was ultimately sunk, on October 8, 1941, that is, some time after the contract in suit was entered into. Mr. M. V. Desai's contention for the plaintiffs is that the proper invoice which the defendants should have tendered to the plaintiffs was the invoice sent to the defendants by William Bates, Son & Co., Ltd.

8. What an invoice is was defined by Mr. Justice Blackburn as far back as 1872 in *Ireland v. Livingston* (1872) L.R. 5 H.L. 395, 406, and that definition still holds good. Mr. Justice Blackburn defined an invoice as debiting the consignee with an agreed price (or the actual cost and commission, with the premiums of insurance, and the freight, as the case may be), and giving him credit for the amount of the freight which he would have to pay to the shipowner on actual delivery; and as pointed out in Halsbury's Laws of England, Hailsham Edition, Vol. XXIX, p. 211, the reason why an invoice is required is, firstly, to identify the goods sold with the goods shipped and insured and so to complete the record of the transaction, and, secondly, in order to show on the face of the documents the price of the goods and thereby to enable the buyer the more easily to raise money upon their security.

9. Now if one looks at the bill which was sent by the defendants to the plaintiffs on February 11, 1942, in my opinion it satisfies all the requisite conditions of an invoice. It mentions and identifies the goods which the plaintiffs had purchased; it gives the price; and it states what amount is due and payable by the plaintiffs. I fail to see what right the plaintiffs have to demand from the defendants the invoice which their sellers William Bates, Son & Co., Ltd., had sent to them. When the goods were shipped from England, the goods already belonged to the defendants. The defendants had purchased them from William Bates, Son & Co., Ltd. There is no privity between the plaintiffs and William Bates, Son & Co., Ltd., and it does not stand to reason that under a c. i. f. contract the defendants should be compelled to disclose to the plaintiffs the name of their sellers and at what price they had bought the goods from the sellers. The invoice which the plaintiffs are entitled to demand is the invoice relating to the contract goods and setting out the price for which those goods were sold. The invoice of William Bates, Son & Co., Ltd., does not satisfy those requisites. It is an invoice which relates to an entirely different contract—the contract between William Bates, Son & Co., Ltd., and the defendants, and not an invoice which relates to the contract

between the defendants and the plaintiffs. No authority has been cited before me by Mr. M.V. Desai which lays down the proposition that under a c. i. f. contract a party is entitled to an invoice which is not an invoice relating to the specific contract but an invoice which relates to an entirely different contract. How curious the results would be if Mr. Desai's contention was sound is apparent if one looks at the invoice of William Bates, Son & Co., Ltd. That invoice does not merely mention the contract goods and the prices at which William Bates, Son & Co., Ltd., sold them to the defendants, but it also contains items which are not at all germane to the contract in suit. Therefore, according to Mr. M. V. Desai, if he was entitled to this invoice, he would not only know at what price William Bates, Son & Co., Ltd., sold the goods to the defendants but he would also know something about other transactions with which the plaintiffs had no concern whatsoever.

10. At one time it was contended by Mr. M. V. Desai that the original invoice was necessary because the plaintiffs could not clear the goods from the customs without such an invoice. If that had been the true position, I could have understood the necessity for the plaintiffs obtaining such an invoice because under a c. i. f. contract there is an obligation upon the seller to do everything in his power to see that the buyer is in a position to obtain delivery of the goods shipped. Although Mr. Homavazir, the manager of S. D. Engineer & Son, the plaintiff's clearing agents, did state in the witness-box that the original invoice was necessary for the customs authorities, Mr. M. V. Desai has now conceded very fairly and frankly that in view of the provisions of Sections 29 and 30 of the Sea Customs Act, what the customs authorities have to know for the purpose of imposing duty is not the price as found in the original invoice but the price of the goods as indicated in the bill sent by the defendants to the plaintiffs. Therefore, in my opinion, the defendants did deliver the proper document when they submitted their bill to the plaintiffs on February 11, 1942.

11. The next and the final question that remains to be determined is with regard to the policy of insurance. As I have already pointed out, no policy of insurance was tendered on February 16, 1942, On April 1, 1942, the defendants wrote to the plaintiffs stating that they had received the original insurance certificate from their bank and they forwarded that certificate with that letter to the plaintiffs, and the first question that falls to be determined is whether this insurance certificate was a policy of insurance which the defendants were bound to tender to the plaintiffs. This certificate is given by one C. R. Harland on behalf of J. S. Holt & Moseley, Ltd., who are ship and insurance brokers, and he certifies that J. S. Holt & Moseley, Ltd., have effected a marine insurance with the Western Assurance Company, Limited, for the account of themselves. C. R. Harland also states that the goods are insured against war risks with the War Risks Insurance Office, London, Now this document does not contain all the terms and conditions of the original policy. It is merely a statement of fact vouchsafed by J. S. Holt & Moseley, Ltd., that a marine insurance has been effected with the Western Assurance Company, Limited, and a War Risks Insurance with the Government in

England. The policy of insurance which a seller is under an obligation to tender to the buyer under a c. i. f. contract must be such a document as would enable the buyer to sue on the policy. It is clear that on this document the plaintiffs could not enforce their claim either against the Western Assurance Co., Limited, in respect of the marine insurance or against Government in respect of the war risks. As stated in Halsbury's Laws of England, Hailsham "Edition, Vol. XXIX, p. 217, unless there is an express stipulation to the contrary, nothing short of an actual policy of insurance properly stamped is a good tender under a c. i. f. contract. For instance, no broker's cover note, or certificate of insurance, or other document which does not include all the terms of the usual contract of insurance is good tender under the ordinary c. i. f. contract. This document, it is clear, can have no pretensions whatever to be a policy of insurance, and even Mr. Bhatt's clients could not bring themselves to say that what they had tendered was a policy of insurance. Therefore it is clear to my mind that the document which the defendants ultimately tendered to the plaintiffs on April 1, 1942, was not a policy of insurance.

12. The next question-and which is a more interesting question-is whether assuming that this was a proper policy it was a policy for a sufficient and adequate amount. The certificate shows that the goods were insured under a marine policy for ? 705 and against War Risks for ? 578. The ship was sunk by enemy action and the grievance of the plaintiffs in the plaint is that the war risks insurance was not proper and was only partial. The object of a seller having to insure the goods under a c, i. f. contract is clearly to afford a reasonable protection and indemnity to the buyer against the risk of the goods being lost at sea, and whether the amount for which the goods are insured is proper or not is a question of fact and can only be determined by considering whether the amount for which the policy is insured does or does not in fact afford a reasonable protection and indemnity to the buyer. In this case the price which the plaintiffs had to pay for the contract goods was Rs. 10,546 and the parties are agreed that the amount realized under this war risks insurance was only Rs. 7,554-2-0 exclusive of Rs. 150 paid by the plaintiffs as collecting charges. To my mind it is impossible to contend that when a seller insures the goods which he has sold to the buyer for about Rs. 10,500 for only about Rs. 7,500 or Rs. 7,600, that insurance affords a reasonable protection and indemnity to the buyer. Under a c. i. f. contract a buyer either gets the actual goods under the bill of lading, or if the goods are lost, he must under the policy of insurance get the equivalent of the goods in money. As this case clearly demonstrates, the buyer did not get the goods, and as far as the policy was concerned, all that he could get was a sum of Rs. 7,554-2-0 as against what he had paid for the price of the goods, namely, Rs. 10,546.

13. Mr. Bhatt on behalf of the defendants has- strongly relied on a decision reported in *Tamvaco v. Lucas* (1861) 1 B. & S. 185. According to him, this decision lays down that the buyer is not entitled to have his full interest in the goods insured and that what the seller is bound to insure is the value of the

goods in England and not what the buyer has to pay under the contract. In my opinion this decision does not lay down the proposition for which Mr. Bhatt contends. The facts of that case were that there was a contract for the sale of a cargo of wheat to any safe port in the United Kingdom. The seller tendered a provisional invoice which estimated the cargo of wheat calculated at the price of fifty shillings per quarter, at ?4,626 which included freight at ? 1,001-10-0. The goods were insured at ? 3,600. The buyer claimed to be entitled to reject the tenders because the policy was for an insufficient amount. Now if one looks at the decision, the main question with which the Court was concerned was whether the seller was bound to insure the amount which had been paid for freight, and the Court came to the conclusion that the seller was not because the buyer would be liable to pay the freight only if the goods arrived at the port of destination and he would not be so liable if the goods were lost. It was then contended by the buyer that even so the amount insured fell short by about ? 24-10-0; and the learned Chief Justice in delivering the judgment in that case expressly pointed out that the deficiency between the cost price and the amount for which the goods were insured was so small and so comparatively insignificant that it did not justify the buyer to treat it as a pretext for a departure from the contract when substantial and bona fide protection was afforded to the buyer by means of the policy. The Court came to the conclusion that whether a particular policy afforded a proper protection to the buyer or not was not a question of law and each case must be determined on the facts of that particular case. In that case the Court came to the conclusion that notwithstanding the small deficiency the buyer had obtained a substantial and bona fide protection. In my opinion in this case a deficiency of about Rs. 4,000 on a cost price of about Rs. 10,500 cannot and does not afford a substantial and bona fide protection to the buyer against his risk. Mr. Bhatt has further argued that the obligation of the buyer is merely to tender the policy for which the goods were originally insured by William Bates, Son & Co., Ltd. Mr. Bhatt argues that as a c. i. f. contract may pass from hand to hand, it is not contemplated that the amount of the policy should also be varied according to the price which different buyers might have to pay for the same goods. I am not concerned with hypothetical cases; but in this particular case, as the correspondence shows, the goods were sold by William Bates, Son & Co., Ltd., to the defendants before they entered into the contract in suit, and as I have already pointed out, they were put on board the ship only on October 8, 1941. Therefore if the defendants were so minded they had sufficient opportunity to increase the amount of the policy after they had contracted to sell the goods to the plaintiffs for a much larger amount than the amount for which they had purchased them from William Bates, Son & Co., Ltd. The policy -which William Bates, Son & Co., Ltd., had taken out was sufficient protection to the defendants under their contract with the firm, but I do not see why the plaintiffs should be compelled to accept the same policy when their risk under their contract with the defendants was much larger. In my opinion, therefore, neither in form nor as far as the amount of the insurance was concerned the document tendered by the defendants to the plaintiffs on April 1, 1942, was a proper policy

of insurance as required under a c. i. f, contract.

14. The last and final contention of the defendants is that the plaintiffs have waived their right to obtain a proper policy, that they accepted this certificate of insurance on April 1, 1942, as a proper document under the contract and that, therefore, they are not now entitled to contend that the defendants did not discharge their obligation to tender a proper policy of insurance.

15. The law with regard to waiver in India is very different from the law in England, In England waiver is contractual and there must be an agreement to waive either supported by consideration or it must be by contract under seal. The only other kind of waiver known to English law is the waiver which is based on an estoppel. In India the law with regard to waiver is to be found in Section 63 of the Indian Contract Act which entitles the promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or entitles him to accept instead of that promise any satisfaction which he thinks fit.

16. My attention was drawn by Mr. M. V. Desai to a decision of the Privy Council in *Dawsons Bank, Ltd. v. Nippon Menkwa Kabushiki Kaisha* (1935) 37 Bom. L.R. 544, P.C., where their Lordships, while drawing a distinction between estoppel and waiver, point out that waiver is contractual and that it may constitute a cause of action; it is an agreement to release or not to assert a right. Now, with great respect to their Lordships, this particular observation of theirs is an obiter because the decision ultimately turns on the question of estoppel. But I am conscious of the fact that even obiters of the Privy Council deserve the highest respect. I must observe again, with very great respect, that their Lordships completely overlooked Section 63 of the Indian Contract Act and also their earlier decision reported in *Chimna Mal-Ram Nath v. Mool Chand-Ram Bhagat* (1928) L.R. 55 IndAp 154. The proposition that their Lordships were laying down was perfectly sound as far as the English law was concerned; but, as I have just pointed out, there is a wide and material difference between the provisions of the English and Indian law on this subject. In *Chunna Mal-Ram Nath v. Mool Chand-Ram Bhagat* their Lordships strongly dissented from the observation of Sir Lawrence Jenkins, Chief Justice, in *Abaji Sitaram v. Trimbak Municipality* (1903) ILR 28 Bom. 66: 5 Bom. L.R. 689 where the learned Chief Justice took the view that a dispensation or remission u/s 63 involved an agreement as defined by Section 2, Sub-section(e), of the Indian Contract Act. Dealing with this view of the learned Chief Justice, their Lordships of the Privy Council in *Chunna Mal-Ram Nath v. Mool Chand-Ram Bhagat* (1928) L.R. 55 IndAp 154 say (p. 160):

The language of the section does not refer to any such agreement and ought not to be enlarged by any implication of English doctrines.

17. In my opinion in order to constitute a waiver or a dispensation of a promise u/s 63 of the Indian Contract Act, neither consideration nor an agreement is necessary. Mr. M. V. Desai drew my attention to a judgment I have recently delivered sitting with the learned Chief Justice in *Anandram Mangtaram Vs.*

Bholaram Tanumal, and where I expressed the opinion that time cannot be extended by the promisee u/s 63 of the Indian Contract Act by a unilateral act of his, and in order to extend time there must be an agreement between the promisor and the promisee. Now, as I have pointed out in that judgment, Section 63 provides that the promisee may make certain concessions to the promisor which are advantageous to the promisor, and one of these concessions is the extension of time for the performance of the contract; but time can only be extended provided the promisor wants it, and when he applies for the extension of time and the promisee agrees to it, an agreement is formed. It would be no advantage to the promisor if the promisee unilaterally extended the time and altered the date of the performance of the contract and, therefore, also the date of the breach at his own sweet will. That, as far as I can see, was the reasoning of the judgment that I had delivered in that case. But I do not think it follows from that judgment that every dispensation made by the promisee u/s 63 of the Indian Contract Act necessarily requires an agreement between the promisor and the promisee. The very illustrations to the section, which though they cannot control the language of the section are certainly a good guide as to its construction, clearly show that no agreement is necessary for the purpose of attracting the application of Section 63 of the Act.

18. Now let us see what the facts are in this case and whether the defendants have succeeded in making out a case of dispensation by the buyer of the obligation of the seller to tender to him the policy of insurance. The strongest fact on which Mr. Bhatt relies is that although this document was tendered on April 1, 1942, the plaintiffs did nothing till April 14, 1942, when they merely objected to the insufficiency of the amount covered by the policy, and it was only when the suit was filed that they objected to the form of the policy. According to Mr. Bhatt, this conduct is tantamount to the acceptance by the buyer of the certificate of insurance in place of the proper policy of insurance to which he was entitled under the contract. (Now although an agreement may not be necessary u/s 63 of the Indian Contract Act, it is clear that a promisee can only dispense with the performance of the promise by a voluntary conscious act. It must be an affirmative act on his part. A mere omission to assert his rights or insist upon his rights cannot amount to a dispensation within the meaning of Section 63 of the Act. Even negligence to assert his rights, although it might in certain cases result in an estoppel, cannot possibly amount to a dispensation within the meaning of the section. Now it is clear on the correspondence that right up to March 25, 1942, the plaintiffs were insisting upon an insurance policy and an invoice. When the certificate of insurance was sent to the plaintiffs on April 1, 1942, all that they did was that they did not return it nor did they say anything about it; and Keshavdev Fate-chand Ruia in his evidence has said that he did not even peruse the contents of the certificate. It can only be contended that this certificate was accepted if it is shown that the plaintiffs with the knowledge that the certificate was defective or not proper consciously and voluntarily accepted this defective document in place of the one they were entitled to. Now there is no evidence

that any time between April 1, 1942, and April 14, 1942, the plaintiffs knew that the certificate was defective or that they had applied their mind to it. The most that the plaintiffs can be taxed with is that they were negligent in not going straightaway to their solicitors and putting the document before them; but, as I have already said, that by itself cannot lead the Court to hold that the plaintiffs had voluntarily given up their rights to obtain the proper documents. I think it would be placing an intolerable burden upon every promisee if the Court were lightly to infer from his omission or negligence that he had given up a valuable right u/s 63 of the Indian Contract Act. The position is the same with regard to not taking objection to the form of the certificate till the suit was filed because it may be that the legal advisers of the plaintiffs did not realize that particular defect till the suit came to be filed. That again does not establish a conscious voluntary act on the part of the plaintiffs to give up their rights to have a policy in the proper form. In my opinion, therefore, there was no waiver or no dispensation u/s 63 of the Act as contended for by the defendants.

19. The last question that arises is: are the plaintiffs estopped from denying that the policy which they had received was not the proper document ? Now estoppel can only come into play if by the plaintiffs' conduct the defendants had changed their position in any way to their prejudice. The only suggestion made by Mr. Bhatt is that if the plaintiffs had rejected the document straightaway and had not led the defendants by their conduct to believe that they had accepted the document, the defendants could have had the goods insured for the full amount and could have obtained a proper policy. Unfortunately for the defendants on the, very day that they sent the certificate of insurance to the plaintiffs they received a cablegram from William Bates, Son & Co., Ltd., that the ship with the machinery which it was carrying-and which was the subject-matter of the contract-had been lost. The cablegram shows that it was received in Bombay on April 1, 1942, at 9-42 P.M. Now it cannot be suggested that even by the strictest standard the plaintiffs should not be given a day or two to consider the matter, and even if they had given intimation to the defendants on April 3 or 4, it was much too late for the defendants to take out another policy and insure the goods for the full amount. The ship was already sunk and the defendants had that information either on April 1 or 2. Therefore the conduct of the plaintiffs in not intimating to the defendants earlier about their rejection of the insurance certificate did not in any way make the defendants change their position to their prejudice or detriment. In my opinion, therefore, there is nothing in the contention of the defendants that an estoppel operates against the plaintiffs. Therefore the plaintiffs' suit must succeed, the defendants having failed to deliver one of the three essential documents, namely the policy of insurance. The defendants have committed a breach of the contract, and in any event there is a failure of consideration. The plaintiffs are, therefore, entitled to the refund of the price they paid for the goods of which they never received delivery either physically or symbolically.

20. There will, therefore, be a decree for the plaintiffs for Rs. 2,841-14-0 with

interest at six per cent, on Rs. 10,546 from April 23, 1942, till December 24, 1943, and thereafter interest on Rs. 2,841-14-0 at six per cent, till judgment, costs of the suit and interest on judgment at six per cent.