

(2016) 09 CAL CK 0009
In the Calcutta High Court
Case No : C.S. No. 133 of 2008

Phosphate Company Limited

APPELLANT

Vs

Emirates Trading Agency LLC

RESPONDENT

Date of Decision : 27-09-2016

Acts Referred:

Citation : (2016) 4 CalLT 490

Hon'ble Judges : Shivakant Prasad, J.

Bench : Single Bench

Advocate : Mr. Ajoy Krishna Chatterjee, Senior Advocate and Mr. A.P. Agarwalla, Advocate, for the Plaintiff; Mr. K.K. Thaker Mr. Avinash Kankani, Mr. Indradeep Basu and Ms. Sreenita Ghoshdastidar, Advocates, for the Defendant

Final Decision : Dismissed

Judgement

Shivakant Prasad, J. - This is a suit for a decree for Rs. 3,73,75,000/- with interest upon judgment @ 12% per annum on account of breach of contract against the defendant.

2. Plaintiff case in brief is that at all material times the plaintiff carried on and still carries on business of producing and selling Single Super Phosphate a chemical fertilizer and sulphuric acid an intermediate product from its factory at Rishra in the State of West Bengal. Bright Yellow NIGC Sulphur Crude in bulk (hereinafter referred to as the "said commodity"), the basic raw material for producing sulphuric acid which in turn is also used in production of Single Super Phosphate.

3. M/s. Kesoram Rayon, a unit of Kesoram Industries Ltd., The Jay Shree Chemicals & Fertilizers a unit of Jay Shree Tea & Industries Ltd. and used to purchase the said commodity for their manufacturing requirements and the plaintiff used to co-ordinate with each other for import of the said commodity.

4. By a letter/communication dated 27th September, 2007 addressed to the defendant, the said M/s. Kesoram Rayon for itself as well as on behalf of the said Jay Shree Chemicals & Fertilizers and the plaintiff expressed intention to

purchase 10,000 MTs. of the said commodity of the specifications contained in the said letter for shipment in end October/early November, 2007 with discharge rate of 1,500 MTs. per day, the discharge port being Haldia requesting the defendant to send its best offer indicating C & F Haldia Port rates at the earliest.

5. In response to the said letter dated 27th September, 2007 of M/s. Kesoram Rayon, the defendant by a FAX message dated 16th October, 2007 submitted its firm offer for supply of the said 10,000 MTs of the said material plus minus 10% on the terms and conditions and at the rate as mentioned in the said message.

6. By a FAX message dated 20th October, 2007 (Exbt.- E) the said M/s. Kesoram Rayon for itself, M/s. Phosphate & Co. Ltd. (plaintiff) and M/s. Jayshree Tea & Co. Ltd. gave a counter offer to purchase such specified quantity of the said commodity at a price of US\$ 271 per Metric Ton, C & F Haldia/Calcutta at buyers option, the other terms being as per the offer of the defendant as contained in its FAX message dated 16th October, 2007. (Exbt.- B)

7. In the said FAX message dated 20th October, 2007, M/s. Kesoram Rayon sent to the defendant giving written confirmation to purchase 4750 Mts. of the said commodity for itself; 1250 MTs. for the plaintiff and 4000 MTs. for Jayshree Tea & Co. Ltd. with written confirmation by the respective companies to follow and requested the defendant to send a formal offer for the same.

8. Pursuant thereto, the defendant by a FAX message dated 21st October, 2007 (Exbt.- F) sent to the plaintiff confirmed to sell and supply to the plaintiff 1250 MTs. plus minus 10% of the said commodity having the specification mentioned therein @ US \$ 271.00 PMT (US Dollar two hundred and seventy one only) CNF free out Haldia, India with payment on CAD (Cash Against Documents) or against irrevocable L/C payable at sight basis and on other terms and conditions as contained in the said message including the discharge rate to be 1500 MTs. per day and the defendant expressed its intention to have a formal order confirmation from the plaintiff. According to plaintiff, the said discharge rate was contrary to the rate of discharge of 1000 MTs. per day as provided in the earlier correspondence and the plaintiff corrected the discharge rate from 1500 MTs. per day to 1000 MTs. per day and re-faxed the same to the defendant by signifying the acceptance of the same by endorsing the acceptance and contended that there is a concluded contract by and between the parties for purchase and sale of the said 1250 MTs. of the said commodity which would be evident from the subsequent conduct of the parties.

9. It is further contended that under the said contract with the plaintiff, the defendant was obliged to effect shipment of the agreed quantity of 1250 MTs. of the said commodity during 1st half of November, 2007 from Bandar Abbas Iran for Haldia India. The said delivery period was the essence of the contract having regard to the requirements of the said commodity by the plaintiff as basic raw material for its production/manufacturing activity.

10. Suddenly, on 5th November, 2007 the defendant by its E-mail sent, inter alia,

to the plaintiff forwarded a purported message received by it from its supplier stating that due to embargo on Iranian trade/financial transaction it was unable to supply the sulphur and the defendant by its said E-mail sought to allege the existence of "Force Majeure" condition expressing its inability to supply the said commodity.

11. Plaintiff contended that under the said contract between the plaintiff and the defendant no financial transaction was involved in Iran nor any letter of credit or any other commitment was required from any bank in Iran. There is no term under the said contract that the supply of the said commodity by the defendant to the plaintiff would depend upon procurement of the same by the defendant from any third party.

12. Specific case of the plaintiff is that on a true and correct reading of the said US sanction dated October 25, 2007 it would be evident that the said sanction has no relevance to the transaction under the said contract. This fact has also been confirmed by the Office of the Foreign Assets Control, USA by their E-mail dated October 6, 2007 and Iran Petrochemical Company, Iran has also by their E-mail dated November 5, 2007 confirmed that there was no difficulty in shipment of sulphur from Iran.

13. The defendant has contested the suit by filing a written statement denying all material particulars made in the plaint and contended inter alia, that there is no concluded contract between the plaintiff and the defendant in respect of the subject matter of the suit and therefore the plaintiff is not entitled to any reliefs as prayed for in the suit.

14. On the above pleadings the following issues were framed?

1. Was there any contract between the parties in respect of the subject matter of the suit alleged to have been entered into on 21st October, 2007?
2. If there was a contract, was the same frustrated by supervening impossibility of procuring cargo from NIGC, Iran due to sanctions imposed on Iranian Banks by US Government as alleged in paragraph 23 of the written statement?
3. Is the plaintiff entitled to the relief sought for?
4. To what other reliefs, if any, is the plaintiff entitled to?

Issue Nos. 1 & 2:

15. The above issues are taken up together for convenience in discussion and for brevity.

16. Mr. Ajoy Krishna Chatterjee learned counsel for the plaintiff invited my attention to paragraph 8 of the plaint wherein it is averred that pursuant to FAX message dated 20th October, 2007 (Exbt.-E) sent by M/s. Kesoram Rayon to the defendant, the defendant sent to the plaintiff a FAX message dated 21st October, 2007 and confirmed to sell or supply to the plaintiff 1250 MTs plus minus 10% of

the said commodity having the specifications mentioned therein @ US \$ 271 per Metric Ton only C & F free out Haldia, India with payment on CAD (Cash Against Documents) or against irrevocable letter of Credit payable at sight basis and on other terms and conditions as contained in the said message.

17. It would appear from Letter No. KRH.11.01.255 dated 27.9.2007 of Kesoram Rayon addressed to M/s. Emirates Trading Agency LLC, Dubai (Exbt.-A) requesting the defendant to send the best offer indicating C & F Haldia Port rates at the earlier as the Kesoram Rayon, Jayshree Chem. and Phosphate are interested in buying 10000 mt. Sulphur as per details given therein. The defendant gave its offer for supply of the order for 10000 MT + 10% NIGC, Iran sulphur for shipment during October 2007 from Bandar Abbas, Iran, for Haldia, India vide its FAX message reference Sul/628/MC dated 16.10.2007 by Ajay Mathur addressed to M/s. Kesoram Rayon, Calcutta (Exbt.-B) with the price US\$ 272.00 PMT (US Dollars Two Hundred Seventy Two only) CNF Free Out Haldia, India, payment on CAD (Cash Against Document) or against irrevocable L/C, payable at sight basis, with discharge rate 1000 Mt Pwwd Shex Eiu (Laytime from 1700 hours on Saturday to 0800 hours on Monday not to count, even if used) and further condition for payment 100% payment on CAD (Cash Against Documents) or by irrevocable and unrestricted L/C, payable at sight basis, against negotiation of the documents on loadport basis as mentioned in the said letter and the L/C condition and the offer was valid till Close of Business (COB) on Friday, i.e. 19th October, 2007. The defendant company looked forward for the order of the plaintiff's confirmation and early L/C opening from its end.

18. It depicts from E-mail of S.K. Patodia of M/s. Kesoram Rayon addressed to Ajay Mathur of the defendant company that an acknowledgement was given in respect of offer no. Sul/628/MC dated 16.10.2007 for 10000 MT +/- 10% NIGC, Iran sulphur for shipment with the intention to revert back to him and in response to the said E-mail the defendant requested Mr. Patodia by its E-mail dated 16th October, 2007 to confirm receipt of their offer for 10000 MT +/- 10% NIGC, Iran sulphur for shipment during 22nd October, 2007 vide Exbt.-C but the said offer of the defendant was not confirmed by plaintiff company.

19. In this context, Mr. K.K. Thaker, learned counsel for the defendant submitted that the offer vide Exbt.-B was not acted upon as it lapsed on 19th October, 2007.

20. It reflects from the FAX message dated 20.10.2007 of S.K. Patodia, Vice-President (Commercial) of M/s. Kesoram Rayon addressed to Emirates Trading Agency LLC, Dubai, Exbt.-E that M/s. Kesoram Rayon gave written confirmation to purchase 4750 Mts. of the said commodity for itself; 1250 MTs. for the plaintiff and 4000 MTs. for Jayshree Tea & Co. Ltd. with written confirmation by the respective companies to follow and requested the defendant to send a formal offer for the same. Therefore, there was no written confirmation on behalf of the plaintiff by sending a formal offer.

21. Thereafter, Mr. Ajay Mathur of defendant co. by FAX message reference

Sul/632/MC dated 21.10.2007 addressed to M/s. The Phosphate Company Limited, Kolkata, plaintiff (Exbt.-F) confirmed sale for supply of 1250 mt + 10% NIGC, Iran Sulphur with the Price US\$ 271.00 PMT (US Dollars Two Hundred Seventy One only) CNF Free Out Haldia, India, payment on CAD (Cash Against Document) or against irrevocable L/C, payable at sight basis and with the term for Shipment during 1st half of November, 2007 from Bandar Abbas, Iran, for Haldia, India and Discharge rate 1500 Mt Pwwd Shex Eiu (Laytime from 1700 hours on Saturday to 0800 hours on Monday not to count, even if used) and requested the plaintiff for formal order of confirmation and early L/C opening at the end of the plaintiff.

22. According to Mr. Chatterjee, this agreement is the subject matter of the suit alleging breach of the contract resulting in loss and damage to the plaintiff, for that a decree for the sum of Rs. 3,73,75,000/- together with interest upon charge @ 12% P.A. has been claimed.

23. It is revealed from the aforesaid documents that the first offer by the defendant for supply of Iran Sulphur was to be concluded by 19th October, 2007 but that was not given effect by any of the parties, however, in continuation of the same as per the telephonic discussion concerning the offer dated 19.10.2007 M/s. Kesoram Rayon proposed a counter offer but the same was not accepted by defendant rather the defendant proposed to reduce price @ US\$ 271 PMT but gave a condition for Discharge rate at 1500 Mt and requested M/s. Kesoram Rayon to give formal order of confirmation of their term. It is no doubt curious to note that the Discharge rate has been altered unilaterally by the plaintiff The Phosphate Company Ltd. by putting 1000 instead of 1500 and the plaintiff claimed that the altered term by the plaintiff was sent to the defendant but maintained silence.

24. Mr. K.K. Thaker, learned counsel for the defendant submitted that the Discharge rate has been interpolated by altering it from 1500 MT to 1000 MT unilaterally and the parties were not ad idem.

25. Mr. Chatterjee invited my attention to E-mail communications between the plaintiff and the defendant vide Exbt.-G series in connection with contract no. sul/631/MC DT 21-10-2007 showing the conduct of the parties to the suit. E-mail messages are reproduced hereunder for profitable appreciation of facts as to whether a case of concluded contract is inferred out of the conduct of the parties?

26. "-----Original Message-----

From: Ajay Mathur

To: "Havi"; havi@emirates.net.ae; "Havi Ocean Commercial"

Sent: Thursday, November 01, 2007 4:45 AM

Subject: FW: Shipment of supphur pursuant to contract no sul/631/MC DT 21-10-2007

Please revert urgently with Haldia vessel nomination" (Exbt.-G2)

"From: krcomml [krcomml@dataone.in]

Sent: Thursday, November 01, 2007 4:53 PM

To: "Ajay Mathur"

Cc: "suresh@bangurmall.com"; "spatodia@jaysreetea.com"

Subject: Shipment of supphur pursuant to contract no sul/631/MC DT 21-10-2007

Dear Sri Ajay Mathur

I trust we have completed all the formalities in respect to the above contract and you have received all the papers/documents/acknowledgements etc.

We would urge upon you to make the shipment at the earliest and in any event before 15th Nov 2007 since we have ver limited stock at our disposal and sulphur is our raw material.

Kindly acknowledge

Thanking you,

Best regards,

S.K. Patodia" (Exbt.-G3)

"From: Havi [mailto:saeed@havi.ae]

Sent: Thursday, November 01, 2007 6:41 PM

To: Ajay Mathur

Cc: commercial

Subject: Re: Shipment of supphur pursuant to contract no sul/631/MC DT 21-10-2007

Dear Mr. Mathur

Thanks for your below, and following our meeting this afternoon, much regret to inform you that due to embargo on Iranian trade/finantial transaction we are unable to supply the sulphur.

Please consider the situation as Force Majure, and notify your counter parts accordingly

Thanks

HAVI" (Exbt.-G)

"From: "Ajay Mathur"

To: "krcomml"krcomml@dataone.in;"sanjay patodia"spatodia@ jayshreetea. com;

Cc:"Farooque-Hyder"fhyder@hotmail.com;gflaccts6@ca13.vsnl.net.in;gfl@cal.vsnl.net.in;

Sent: Monday, November 05, 2007 10:22 AM

Subject: Shipment of 12,000 MT+/- 10% NIGC, Iran Sulphur for Haldia, India
5th November 2007

Mr SK Patodia, M/s Kesoram Rayon, Kolkata

Mr Sanjay Patodia, M/s Jayshree Chemicals, Kolkata

Mr Suresh Bangur, M/s Phosphate Company, Kolkata

Mr Hardev Singh, M/s Teesta Agro, Kolkata

Dear Sirs,

Please find message from our supplier M/s HAVI on declaration of "Force Majeure" for our shipment of 12,000 MT+/- 10% NIGC, Iran Sulphur from Bandar Abbas, Iran for Haldia, India.

HAVI is unable to advise their L/C to their Iranian counterparts due to banking sanctions imposed by US on 25th October 2007, which has resulted in this "Force Majeure" condition.

You are free to cover up your cargo from elsewhere, as the situation is serious.

Best regards,

Ajay Mathur

ETA Dubai" (Exbt.-G1)

"From: krcomml [mailto:krcomml@dataone.in]

Sent: Saturday, November 03, 2007 12:33 PM

To: "masnavi"

Subject: FW: Shipment of sulphur

Sir

On or about 21-10-2007, We have entered into a contract with Emirates Trading Agency LLC, Dubai for purchase of 10000 mt of sulphur, shipment to be made before 15-11- 2007. We would be extremely grateful to you if you please confirm to us that shipment of sulphur from Iran is continuing and no problem is foreseen in making the shipment in forcessable future.

thanking you,

best regards,

S.K. Patodia

Vice President (Commercial)

Kesoram Rayon"

The plaintiff company sent a letter dated 18.4.2013 to M/s. Kesoram Rayon "Industry House", Kolkata regarding e-mails confirmation exchanged between Keshram Rayon and masnavi@petrochem-ir-net vide Exbt.-L and letter no. Krh/SUL/13-14 dated 19.04.2013 of Kesoram Rayon addressed to M/s. The Phosphate Company Limited, Kolkata, about exchanged mails with masnavi@petrochem_ir_net during 03.11.07- 05.11.07 vide Exbt.-M. The said e-mails are appended hereunder for better appreciation of the intention of the parties :

"From: masnavi@petrochem-ir-net

Sent: Monday, November 05, 2007 10:41 AM

To: "krcomml"

Subject: RE: Shipment of sulphur

Dear Sir/Madam

Please be informed that we have no problem to supply the cargo as usual.

Best regards,

Masnavi"

"From: krcomml [mailto:krcomml@dataone.in]

Sent: Monday, November 05, 2007 8:00 AM

To: "masnavi"

Subject: FW: Shipment of sulphur

thanking you,

best regards,

S.K. Patodia"

Thereafter the plaintiff company sent a letter being Ref. No. 1388/1102 dated 8 November 2007 to M/s. Emirates Trading Agency LLC, Dubai, U.A.E. vide Exbt.-H which reads thus :

"Our Ref: 1388/1102 8 November 2007

M/s. Emirates Trading Agency LLC

Dubai, U.A.E.

Fax no. 00971-4-2682574

Attention: Mr. Abdul Razick/Mr. Ajay Mathur

Dear Sir,

This has reference to our contract no-SUL/632MC dated 21-10-2007

We are in receipt of your mail dated 5-11-2007 and noted the contents.

The contract does not fall under "Force Majeure."

We have check there is no restriction in movement/shipment of material from Iran.

Therefore, you are fully obliged to make the shipment under the above contract, and would request you to make shipment as per the terms of the contract.

You are well aware sulphur is our ram material and timely shipment is the essence of this contract. Your failure/delay in making the shipment will cause heavy losses to us for no fault of ours.

We await the details of shipment.

Thinking you,

Yours faithfully,

For The Phosphate Co Ltd.

[Suresh Bangur]

Chief Executive"

27. There is categorical statement of the defendant that shipment of cargo was not possible due to "Force Majeure" as the defendant's supplier M/s. Havi was unable to supply the sulphur from Bandar Abbas, Iran for Haldia, India. E-mail from M/s. Havi to Ajay Mathur of defendant co. Exbt.- G reflects that M/s. Havi regretted to inform the defendant concern that due to embargo on Iranian trade/ financial transaction, they were unable to supply the sulphur in connection with contract no. Sul/631/MT dated 21.10.2007. This was in response to E-mail of Ajay Mathur addressed to M/s. Havi on the same day i.e. 1st November, 2007 at about 4.45 A.M. Exbt. G2 is in connection with the said contract when the defendant requested Havi to revert urgently with Haldia vessel nomination. It depicts from Fax message Exbt.- G3 that M/s. Kesoram Rayon urged upon the defendant to make the shipment of sulphur at the earliest and in any event before 15th Nov 2007 informing that they have completed all the formalities in respect of the said contract since the plaintiff have limited stock at their disposal as sulphur is their raw material.

28. Mr. Chatterjee fortified his argument adverting to the said communications vide Exbt.- G series, between the parties taken together with International bulletin Exbt.- Q relating to FMB Review dated 29th November, 2007 and submitted that the said bulletin Exbt.- Q corroborates that there is a concluded and existing contract for supply of Iran sulphur by the defendant to the plaintiff

and a case of concluded contract is inferred and further relied on the authority in the case of *Seth Thawardas Pherumal v. The Union of India (UOI)* (AIR 1955 SC 468, wherein it has been observed thus?

"It is well settled that governments can only be bound by contracts that are entered into in a particular way and which are signed by the proper authority. A reference to the agreement, Ex. A(1), will show that it was accepted on behalf of the Dominion Government by the Additional Chief Engineer and not by an Executive Engineer. A letter written to the Executive Engineer would therefore have no effect and even if it be assumed that the letter was forwarded to the Additional Chief Engineer for consideration, what does it amount to? A tender embodying certain terms is submitted and is accepted on 1-11-45. Both sides are agreed on all matters contained in it and their conduct shows that both sides indicated that the contract should be reduced to writing. Before the agreement is signed, one party wants to include a further condition in the contract. We will assume that the request was made to the other contracting party. But without waiting for the assent of the other side, both sides accept and sign the contract as it existed before the fresh suggestion was made. It is an error in law to deduce from this that there was acceptance of the fresh proposal. On the contrary, the legal conclusion is that the new suggestion was dropped and that the contractor was content to accept the contract as it was without" this condition. In any case, a person cannot be bound by a one-sided offer which is never accepted, particularly when the parties intend that the contract should be reduced to writing. That is the whole point of insisting on a document. It excludes speculation as to what was and what was not agreed to however much the matter might have been raised by one of the parties during the stage of negotiation."

29. The factual aspects of the cited case is quite distinguishable from this case. This Court has to construe from the correspondence of the parties to infer the concluded contract binding on the parties.

30. In this context, proposition of law held in case of *M/s. Rickmers Verwaltung Gmb H v. The Indian Oil Corporation Ltd* (AIR 1999 SC 504), is required to be dwelt upon wherein the question to be decided was as to whether any agreement can be spelt out from correspondence exchanged between the parties? It is observed in paragraph 15 thus?

"15. In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were *ad idem* from that material to infer whether the intention as expressed in the correspondence was to bring into existence a

mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence."

31. In case of Bharat Petroleum Corporation Ltd v. The Great Eastern Shipping Co. Ltd reported in AIR 2008 Supreme Court, 357, wherein it has been observed in paragraph 19 thus?

"19. It is, no doubt, true that the general rule is that an offer is not accepted by mere silence on the part of the offerree, yet it does not mean that an acceptance always has to be given in so many words. Under certain circumstances, offerees silence, coupled with his conduct, which takes the form of a positive act, may constitute an acceptance-- an agreement sub silentio. Therefore, the terms of a contract between the parties can be proved not only by their words but also by their conduct."

32. Per contra, Mr. Thaker learned counsel for the defendant submitted that taking into consideration the factual aspects of case reported in Seth Thawardas Pherumal (supra), a person cannot be bound by one-sided offer which is never accepted and reiterated that in Exbt.-F the proposal for Discharge rate being 1500 MT was unilaterally interpolated by putting 1000 MT and the payment term was also not complied with as per Exbt.-F which would be evident from answer to the question nos. 41, 42 and 43 put to the witness namely, Suresh Bangur, the Chief Executive Director of the plaintiff company. On behalf of the defendant E-mail Exbt.-3 dated 22.10.2007 has been pressed in service contending that the offer was of discharge rate being 1500 MT by the defendant. It reflects that the plaintiff offered through Kesoram Rayon with discharge rate 1000 mt PWWDSHEXEIU and requested the defendant to forward the contract for confirmation and further on the same day at 1:20 P.M. Kesoram Rayon addressed to Ajay Mathur of defendant that confirmation made on 20.10.2007 mentioned the discharge rate as 1000 mt and requested the defendant to amend the contract and send to the plaintiff for signature and approval. This E-mail Exbt.-3 clearly shows that defendant concerned was informed about the alteration made to 1000 mt from 1500 mt and the defendant was silent over the matter without giving any confirmation in that regard.

33. Mr. Thaker adverted to answers given by the witness Suresh Bangur to question nos. 153, 155, 156 & 158 and submitted that the said counter offer by the plaintiff was not accepted by the defendant for not having agreed on the discharge rate of 1000 mt which is the essential term of contract. Therefore, the parties were not ad idem as there was no concluded contract binding on the defendant. Questions and answers are reproduced hereunder ?

153. Are you aware whether this counter offer was accepted by the defendant or

not?/This was the offer we received and we have placed the purchase order?/Yes

155. Did the defendant accept this counter offer?/Yes

156. Have you disclosed any document in support of that this counter offer was accepted by the defendant?/Yes.

158. Which part of this purchase order will show that the defendant has accepted your counter offer?/Yes. We have the e-mail from the supplier showing that supply is going to be effected and for which they have already commenced the process of nominating a vessel. There is an e-mail to that extent.

34. Mr. Thaker invites my attention to provision of Section 7 and Section 8 of the Contract Act, 1872 which read thus?

"S.7 Acceptance must be absolute.?In order to convert a proposal into a promise, the acceptance must?

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribed a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.

S.8. Acceptance by performing conditions, or receiving consideration.?

Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal."

35. I understand on conjoint reading of the above provisions of the Act to the proposition of law that the basis of enforcement of contract is consensus theory of contract and there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional unequivocal and absolute and that there is no place for negotiation in any unilateral contract in which only one party is bound. However, at any stage of the contract, most crucial question to be decided that whether the parties intended to be bound by the terms conclusively agreed upon.

36. Appraising the evidence on record, and on bare reading of the aforesaid communications by and between the parties through E-mails being the Exbt.-G series and having perused the E-mail being the part of Exbt.-K sent by Office of Foreign Asset Control to M/s. Kesoram Rayon in respect of shipment of sulphur from Iran, I find that U.S. sanctions apply to U.S. persons only. However, some International financial Institution may, nevertheless, adhere to U.S. sanctions regulations. Thus, in clear crystal term it proves that there was no "Force Majeure" binding on the defendant. E-mail Exbt.- F reflects that term of payment

was payable at sight basis, against negotiation of the documents and the correspondence of the plaintiff. E-mail Exbt.-G3 reveals that Kesoram Rayon completed all formalities in respect of the aforesaid contract which the defendant had received and urged upon the defendant to make the shipment at the earliest in any event before 15th November, 2007. The correspondences between the parties show that shipment was made ready for the cargo to sail but the defendant wriggled out of the contract on account of alleged "Force Majeure". It would be pertinent to take note of the fact that the FMB Sales Review dated 29th November, 2007 Exbt.- Q unequivocally reflects that a contract for supply of the said commodity @ 271 cfr in November, 2007 was concluded between them.

37. In this context, Mr. Thaker urged that the FMB report cannot be taken into account as the Journal report is not conclusive, without author being examined. I do not agree with such contention of Mr. Thaker inasmuch as the said FMB Sales Review was admitted on evidence as an exhibit without any ire from the defendant and in absence of any evidence to the contrary, I accept the said report as collateral documentary evidence.

38. Therefore, taking a cue from the observation in case of M/s. Rickmers Verwaltung GMB H (supra) and the general principle of law decided in Bharat Petroleum Corpn. Ltd. (supra), that although an offer is not accepted by mere silence on the part of the offeree, nevertheless, it does not mean that an acceptance always has to be given in so many words and therefore, I hold that there was a concluded contract inasmuch as the contract vide Exbt.-F was accepted by both the parties by putting their company's seal.

Thus, I decide the issue no. 1 in the affirmative in favour of the plaintiff as because there was consensual bargaining process by and between the parties and issue no. 2 is decided in the negative against the defendant.

Issue nos. 3 & 4:

39. The above issues being interlinked are taken up together for convenience in discussion and for brevity.

40. To decide the above issues, this Court is called upon to consider as to the quantum of damage to which the plaintiff would be entitled by reason of breach of contract by the defendant. I have already held in the forgoing issues that there was a concluded contract which was not honoured by the defendant on the plea of existence of "Force Majeure" forbidding the defendant from shipment of the cargo.

41. Mr. Chatterjee submitted that the defendant company committed a breach of contract by taking a false plea of "Force Majeure" by US Government inasmuch as the communication of OFAC in actual term reflects that there was no "Force Majeure" applicable in case of the Indian concern and that too is well reflected from the International bulletin which clearly goes to show on the material point of time Havi had supplied and was supplying through the defendant to different

other Indian co.. Such a plea was taken by the defendant only to avoid supply of the commodities as there was a hike in price of the commodities at the relevant point of time as a result the plaintiff claimed to have suffered damage to the tune of Rs. 3,73,75,000/- as per the particulars in paragraph 28 of the plaint described hereunder?

Particulars

a) Principal sum (US \$ 3,75,000/-) Equivalent to as mentioned in Paragraph 21 above

Rs. 1,60,87,500.00

b) Principal sum as mentioned in Paragraph 22

Rs. 2,00,00,000.00

c) Interest at the rate of 12% as Stated in paragraph 27 above up to June, 2008

Rs. 12,87,500.00

Total Rs. 3,73,75,000.00

42. The legal notice by Attorney-At-Law & Advocate Mr. A.P. Agarwalla Ext-"I" dated 5th February, 2008 was sent to the defendant calling upon the defendant company to pay to the plaintiff company the sum of USD 300 per MT being the difference in market price and contract price for the contracted quantity of 1250 MTs and the total amount payable which comes to USD 375000 on the allegation that defendant company committed breach of contract commodity to the plaintiff resulting in cutting down the manufacturing activity by the plaintiff.

43. To counter the allegation the defendant by its letter reference Sul/032/MC dated 7th February, 2007 addressed to the said Advocate on record pointed out that the defendant is not liable to pay the sum of Rs. 3,73,75,000/- .

44. Mr. Chatterjee referred to a decision in case of Firm H. Sham Sunder And Sons v. Ram Chand Spinning And Weaving Mills reported in AIR 1957 Punjab 90, where according to contract of sale of bales of cloth between the defendant and the plaintiff, the defendant contracted to deliver certain number of bales by certain time and the plaintiff deposited an amount as advance price, but the defendant failed to make the delivery at the stipulated time. The contract was held to be governed by Section 57, Sale of Goods Act and not by Section 73 of the Contract Act and the plaintiff was entitled to sue the defendant for damages for non-delivery and it is held that measure of damages is the difference between the contract price and the market price at the date of the breach.

45. It has been observed relying on the provision of Section 57 of the Sale of Goods Act thus:

"S. 57. Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for nondelivery."

46. In Mulla's Contract Act at page 385 the law has been stated in the following terms:

"Under a contract for the sale of goods the measure of damages upon a breach by the buyer is the difference between the contract price and the market price at the date of the breach. If the seller retains the goods after the breach, he cannot recover from the buyer any further loss if the market falls, nor is he liable to have the damages reduced if the market rises."

47. Reliance made to a decision of the Privy Council in *Sally Wertheim v. Chicoutimi Pulp Company*, (1911) App Cas 301 (A), where it was laid down that in the case of late delivery the measure of damages is the difference between the market price at the respective dates of due and actual delivery of the goods purchased and the general intention of the law in giving damages for breach of contract is that the plaintiff should be placed in the same position as he would have been if the contract had been performed.

48. Thus, it has been held that the difference in the market price is the measure of damages for the purposes of determining the amount of compensation payable to the buyer in a case like the present.

49. The facts of the cited decision is distinguishable from the instant case as there was no advance payment for the goods to be delivered by the defendant to the plaintiff. In this regard learned Mr. Thaker submitted that the decision does not hold good in view of the decision of the Hon'ble Supreme Court in case of *Karsandas H. Thacker v. The Saran Engineering Co. Ltd.* reported in AIR 1965 SC 1981, wherein it has been observed that illustration (k) to Section 73 of the Contract Act is apt for the purpose of the case. According to that illustration, the person committing breach of contract has to pay to the other party the difference between the contract price of the articles agreed to be sold and the sum paid by the other party for purchasing another article on account of the default of the first party, but the first party has not to pay the compensation which the second party had to pay to third parties as he had not been told at the time of the contract that the second party was making the purchase of the article for delivery to such third parties and accordingly, the Supreme Court was pleased to dismiss the appeal upholding the decision of the High Court that the appellant suffered no such damage which he could recover from the respondent.

50. Mr. Chatterjee placed reliance in the case of *Ramalingam Chettiyar v. Gokuldas Madavji And Co.* Reported in AIR 1926 Madras 1021, wherein it has been held that the difference between the contract price and the market price on the date of the breach is the amount of the damages prima facie payable and when the plaintiff claims damages on any other special basis he must prove his case and also referred to decision in the case of *Tularam Nathmall v. Bilasroy & Co.* Reported in The Calcutta Law Journal, Civil 1949, wherein it has been observed?

"It is true that ordinarily the measure of damages upon a breach of contract for

sale of goods is the difference between the contract price and the market price on the date of breach. The market price on the date of breach is accepted as the basis because the buyer can go into the market and buy the goods at that rate and that is presumed to be true value of the goods. The defaulting party is bound however to place the other party in the same position in which he would have been if the contract was performed. Where there is no available market and there are difficulties in assessing the damages on the ordinary footing, the Court must do its best to award such damages as will put the seller in the same position in which he would have been if the contract had been performed."

51. Reference is also made to a case of *Union of India (Uoi) v. Mouji Lal Shaw And Ors.* reported in AIR 1960 Cal 729, wherein reliance was made to a case in *Barrow v. Arnaud* (1846) 8 Q. B. 595 that the common law principle of the English law on the point was stated in the following language:

"Where a contract to deliver goods at a certain price is broken, the proper measure of damage in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy".

52. The Indian law is declaratory of the above common law principle, as was held in the case of *A.K.A.S. Jamal v. Moola Dawood, Sons and Co*, 43 Ind App 6 : (AIR 1915 PC 48) Lord Wrenbury, in delivering the judgment of the Board observed:

"The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach"

with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach -- or is the seller bound to reduce the damages, if he can, by subsequent sales at better price? If he is, and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market price rises.

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Staniforth v. Lyall*, (1830) 7 Bing. 169 is an illustration of this. But the fact that by reason of the loss of the contract which

the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the latter contract: *Yates v. Whyte*, (1838) 4 Bing. (N. S.) 272; *Bradburn v. Great Western Railway*, (1874) 10 Ex. 1; *Jebson v. East and West India Dock Co.* (1875) 10 C. P. 300.

The decision in *Rodocanachi v. Milburn*, (1886) 18 Q. B. D. 67 that market value at the date of the breach is the decisive element, was upheld in the House of Lords in *Williams Brothers v. Agius Ltd*; (1914) A. C. 510."

The decision in 43 Ind App 6: (AIR 1915 PC 48) was referred to by Sir Shadilal in *Bengal Nagpur Rty. Co. v. Ruttanji Ramji* and he was also of the opinion that Section 73 of the Indian Contract Act was merely declaratory of the common law principles, as to measure of damages."

53. Relying on the authority in the case of *Gambhirmull Mahabirprasad v. The Indian Bank Ltd.* and another reported in AIR 1963 Calcutta 163, Mr. Chatterjee submitted that nominal damages can be awarded where the assessment cannot be made with mathematical precision.

It is profitable to reproduce the observation which reads thus:

"The fact that damages are difficult to estimate and cannot be assessed with certainty or precision does not relieve the wrong-doer of the necessity of paying damages for his breach of duty, and is no ground for awarding only nominal damages. A distinction must be drawn, however, between cases where the difficulties are due to uncertainty as to the causation of damage, where questions of remoteness arise, and cases where they are due to the fact that assessment of damages cannot be made with any mathematical accuracy. Lack of relevant evidence may make it impossible to assess damages at all, as where the extent of the loss is dependent upon too many contingencies, and in such cases, where the liability is established, nominal damages only may be awarded. Where it is established, however, that damage has been incurred for which a defendant should be held liable the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus the Court doing the best that can be done with insufficient material may have to form conclusions on matters on which there is no evidence, and to make allowance for contingencies even to the extent of making a pure guess."

54. In case of *The Union of India (Uoi) v. Tarachand* reported in AIR 1976 MP 101, it was held that if the seller breaks the contract to deliver any goods in a contract for sale of future goods, one or more of the following remedies may be open to the buyer namely :-

- (i) he may sue for damages for non-delivery under Section 57 of the Act;
- (ii) if the price has been paid by him, he may recover it in a suit for money.

It is further held that in a suit for damages for non-delivery, the loss to be

ascertained is the loss at the date of the breach .The measure of damages would, therefore, be the difference between the contract price and the market price on the date of the breach.

55. In R.V. Narayanaswami Chetty, Sole v. Soundararajan And Co. Ltd. reported in AIR 1958 Mad 43, Hon''ble Court held that the amount of the damage would be the difference between the contract price and the market price on the date of the breach.

56. The Court has to appreciate as to whether there is any evidence of the market price on the date of breach.

57. Now, it is for the plaintiff to prove the quantum of damages and the market price on the date of the breach to permit a calculation of the damage suffered by the plaintiff. This Court has to appraise the evidence laid by the plaintiff as regards the market price at the relevant date, unless there is proof, there cannot be a decree for damages against the defendant as prayed by the plaintiff as per particulars stated above.

58. Mr. Thaker also relied in case of Jamal v. Moolla Dawood Sons and Co., wherein it has been held that the market rate at the breach is the decisive element and this principle applies to a breach by either seller or buyer and submitted that the quantum of damages in such a case has to be determined under Section 73 of the Contract Act, 1872 and placed the authority in case of M/s. Murlidhar Chiranjilal v. M/s. Harishchandra Dwarkadas and Anr. reported in AIR 1962 SC 366 : [1962] 1 SCR 653, it is observed :

"When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.....

" Explanation-In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

It was held that two principles in relevance to the compensation for loss of damage caused by the breach of the contract as per Section 73 of the Indian Contract Act, 1872 read with the Explanation would be that the person who has proved a breach of a bargain to supply what he contracted to get was to be place, as far as the money could do it as if the contract had been performed. The reasonable steps should be taken to mitigate the loss consequent of the breach and debars him from claiming any part of the damage which was due to the person's neglect to take such steps. In this context it is submitted that appraisal E-mail sent by the defendant clearly speaks that the plaintiff was intimated well ahead about a "Force Majeure" in contemplation of a concluded contract and such reasonable step was taken to mitigate the situation that the plaintiff was

free to cover the cargo by some other source. As such the plaintiff cannot claim any damage.

59. To prove the case for damage, Mr. Chatterjee invites my attention to paragraph 21 of the plaint wherein it is averred that the defendant is bound and obliged to compensate the plaintiff for the damages so suffered by the plaintiff being the difference between the international price of US dollar 571 per M.T. of the said commodity on the date of breach that is in the middle of November, 2007 and the contract price of US dollar 271 per M.T. which comes to US dollar 3,75,000/- on account of non-supply of the commodities for which the plaintiff was compelled to suspend the production activities at the said factory for a long time and the plaintiff also suffer loss and notional damages of Rs. 2 crores.

60. Mr. A.P. Agarwalla, Advocate on behalf of the plaintiff issued notice dated 05.2.2008 to the Emirates Trading Agency LLC Trading & Shipping Division, Dubai, UAE, calling upon the defendant to make good the loss suffered by the plaintiff to the tune of USD 3,75,000/-, vide Exbt.- I. The said letter was replied by the defendant contending that plaintiff was not entitled to any damage as prayed in the plaint, vide Exbt.- J.

61. Mr. Thaker has submitted that price of the said commodity in the middle of the November, 2007 was not at the rate of USD 571 per metric ton and there was no suspension of production at the plaintiff's factory for non-supply of the said commodity. The nominal loss as claimed by the plaintiff has no basis for its calculation.

62. It is further pointed out that the plaintiff went in the open market and procured the goods from the difference sources so question of damage on account of loss as alleged is not maintainable.

63. Mr. Thaker also adverted to the evidence in cross-examination of Mr. Bangur and answer given to question no. 239 shows that the plaintiff procured 100 mt. sulphur from Indian Oil Corporation during the said period to run their plant. Answer to question no. 232 reveals that the plaintiff obtained NOC and T/L for transportation of sulphur from Haldia refinery to the factory of the plaintiff and this fact also finds corroboration by the letter of plaintiff dated 1st November, 2007 Exbt.-1.

64. Consent letter dated 02.11.2007 of Indian Oil Corporation addressed to the plaintiff Exbt.-2 reflects that IOC may release 1000 Mt. sulphur Ex-Haldia installation subject to availability of product provided NOC, T/L and CST from the competent authority are submitted in advance.

65. It would also reflect from the Invoices of the Indian Oil Corporation Exhibit-4 and Exhibit-S collectively that supplies of sulphur was made to the plaintiff by Indian Oil Corporation vide Invoices dated 08.12.2007, 10.12.2007, 13.12.2007 and 15.12.2007 and Invoices dated 07.01.2008, 16.01.2008 and 17.01.2008.

66. Thus, the aforementioned documents on evidence clearly goes to show that

as on the date of alleged breach of contract the supplies of sulphur from Indian Oil Corporation was obtained by the plaintiff, ergo, question of ascertaining the damage did not arise. As I have discussed above that catena of decision postulates a clenched position of law that it is for the plaintiff to prove the market price of the commodity on the date of breach.

67. Mr. Chatterjee relied on the month-wise production statement for sulphuric acid plant from November, 2007 to February, 2008 vide Exhibit-N proved by Mr. Suresh Bangur of plaintiff company who has deposed that the said summary report has been prepared based on the documents provided by the Works Manager at the factory which has been duly verified by the company's accountant. It would appear therefrom that as per the report Exhibit-N lower production from 1st November, 2007 to 28th December, 2007, lower production was due to plant stoppage for maintenance. Therefore, as on the alleged breach of contract it cannot be said that the plaintiff suffered loss as damages due to non-supply of the commodities by the defendant. The production was restricted for want of sulphur on and from 29th December, 2007 till 13th February, 2008 as per the said report but they cannot be said to be as on the date of the breach of contract in the mid of November as alleged by the plaintiff.

68. It reflects from the letter dated 09.01.2008 of KPL International Ltd. vide Exhibit-O collectively that price quoted is Euro 390/MT CIF, Haldia, value of which is USD 575/MT approximately. Plaintiff used to procure Iranian sulphur from United Organics Private Limited indirectly through other suppliers depending on their demand till February, 2008 vide Exhibit-P which reflects that expected freight from Iran to Haldia is approximately USD \$ 40-42 per ton. Plaintiff also relied on International bulletin report vide Exhibit-Q collectively in respect of FMB Sales Review 29th November, 2007 that the Iranian sulphur were shipped to Indian through other sources at the rate of 242 CFR in November, if the aforesaid documents being Exhibit-O, Exhibit-P and Exhibit-Q collectively are taken into consideration in the context of market price on the date of breach being on the middle of November, 2007 then it can be held that price quoted vide Exhibit-O collectively by KPL International Limited to the plaintiff and Exhibit-P collectively by United Organics Private Limited dated January 25, 2008 cannot be considered as a standard objective for calculation of the damages as on the date of breach allegedly committed by the defendant company. FMB sulphur report 3 January, 2008 vide Exhibit-R can also not be taken into consideration for the calculation of such damages as prayed by the plaintiff because in view of no binding or enforceable contract question of a breach by the defendant does not arise and damages so claimed cannot survive.

69. Mr. A. P. Agarwalla, Advocate wrote letter to the defendant dated 03.3.2008 vide Exhibit-K alleging that the defendant has tried to wriggle out of the contractual commitment on the pretext of "force majeure".

70. As submitted by Mr. Chatterjee I am not in agreement with his contention for awarding nominal damages. The general damages may also not be awarded as I

am of the view that the measures by which the damages are to be assessed have not been well proved by the plaintiff.

71. If at all the IOC Invoices are considered though not admitted by the defendant, the difference of price comes to Rs. 12010-Rs. 11625= Rs. 384/- per MT. but that may also not be calculated as there is no Invoice of the Indian Oil Corporation submitted in evidence as on the date of communication by the defendant about "Force Majeure" dated 5th November, 2007 and/or on the date of breach of contract alleged by the plaintiff in the plaint as on the 15th November, 2007.

72. In the context of the above discussion, this Court hold that despite the issues being 1 and 2 decided in favour of the plaintiff, nonetheless, the plaintiff is not entitled to damages as claimed on the allegation of breach of contract for non-supply of the commodities. Thus, the issue nos. 3 and 4 are answered in the negative. Ergo, the suit is dismissed, however, without any order as to costs.

73. Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.