(1991) 09 PAT CK 0055

In the Patna High Court

Case No : Appeal from the Original Decree No. 135 of 1986 (R)

Sri Phani Lal Banerjee APPELLANT

Vs

Central Coalfields Ltd. RESPONDENT

Date of Decision : 03-09-1991

Acts Referred:

Citation : (1991) 09 PAT CK 0055

Final Decision : Allowed

Judgement

S.B. Sinha, J.—This First Appeal is directed against a Judgment and decree dated 30.6.1986 passed by Sri Harballava Chandra Prasad, Additional Subordinate Judge, Ranchi in Money Suit No. 61/32 of 1981/83, whereby and whereunder the said learned court decreed the Plaintiff-Respondent''s suit for damages.

2. The fact of the matter lies in a narrow compass.

3. A Notice Inviting Tender was issued by the Plaintiff-Respondent inviting tender from manufacturer of mine''s boots or their authorised agents for entering into a rate contract for one year for supply of Steel Toe-cap Miners'' safety Rubber canvas boots strictly conforming to the ISI specification No. IS: 3976-1975 required for the collieries situated in the States of Bihar, Orissa, Madhya Pradesh and U.P. (Ext. A). In the said notice inviting tender, there was a price escalation clause, which is in the following terms:

Normally the rates are not subject to any upward revision until the period of the contract is completed. However, under certain abnormal conditions like in cases where additional statutory imposts are levied by the Government in the form of duties and taxes during the currency of the contract which directly affects the cost of the materials, a price increase may be permitted after full justification for such increase is provided by the, firm, with documentary evidence.

4. In response to the aforementioned notice inviting tender, the Defendant submitted his quotation on 7.3.1978 which was received by the Plaintiff on 14.3.1978 and was marked as Ext. B.

5. In terms of a letter dated 29.4.1978, the Defendant was informed by the Plaintiff that his above referred quotation has been accepted for yearly rate contract for supply of safety Rubber Canves Boots for miners Type II, ISI marked and DGMS approved as per ISI 3976-75 at a unit price of Rs. 30.20 per pair F.O.R. Calcutta inclusive of Excise Duty, sales tax extra, for the (B & K), (A), (O) and Kathara Area. It was further slated therein that its formal rate contract with detailed terms and conditions was under issue.

The Defendant however in the meantime, was requested to arrange to make supplies with the "direct demanding officers" against the demand orders if placed with it. The said letter dated 19th June, 1978 has been marked. Ext. D.

6. However, it appears that by an earlier; letter dated 29.4.1978, the Defendant informed the Plaintiff that he will agree for about the 30 days'' of deferred payment in respect of the goods supplied by him. (Ext. C).

On or about 22.6.1978, the Plaintiff requested the Defendant to commence supply of the boots pending issuance of formal rate contract (Ext. E). On or about 23.6.1978, however formal rate contract in duplicate was issued which was marked as Exts. F and F/1. It is admitted that the Defendant did not send back the copy of the said rate contract after signing the same in token of his acceptance of the terms there of.

7. According to the Defendant in the said rate contract, the escalation clause as contained in Ext. A was deleted. The Defendant, therefore, objected to the deletion of the aforementioned escalation clause by issuing a letter dated 4.7.1978, which was marked Ext. G.

8. By another letter dated 7/10th July, 1978 the Plaintiff informed the Defendant that price escalation clause would stand deleted from the rate contract and further informed that hit request to include a price variation clause was not acceptable (Ext. 8).

The Defendant in turn by his letter dated 17.7.1978 did not agree to the condition of the Plaintiff to delete the price variation clause and according to him, in that view of the matter, the contract became unilateral and thus invalid. The said letter dated 17.7.1978 has been marked as both Ext H as also Ext. 10. By another letter dated 11.8 1978 the Defendant requested for amendment of the rate contract, which has been marked as Ext. J as also Ext. 11. By another letter dated 16.8.1978, which is contained in Ext. 13 the Defendant informed about the terms of payment and further by mother letter dated 22.8.1978 (Ext. k) the Defendant requested the amendment of the rate contract.

9. Admittedly, in the meanwhile, the Defendant had been continuing to supply goods as and when requisitions therefore were sent by the authorised representative (s) of the Plaintiff.

10. By a letter dated 29.8.1978 (Ext. M) the Defendant raised a specific claim for increase in price of the articles supplied from Rs. 30.20 paise to 32.00. It was

further stated that the price of boots has increased mainly owing to increase in Excise duties of different commodities. Along with the said letter, the Defendant annexed a chart showing comparative price structure which was prevalent at the time of submission of the tender and at the relevant time.

11. The Defendant further appended a chart showing detailed price costs analysis together with compact cost structure and percentage of involvement in each group so that the same may be considered by the Plaintiff.

12. The Defendant further contended that a total cost involvement increased to Rs. 4/- per pair approximately, but he would request for price escalation @ Rs. 2/- per pair approximately to cope with the situation and to maintain supplies.

. The Defendant, therefore, by reason of the said letter gave its price as follows:

The price is Rs. 32/- per pair on F.O.R. Calcutta, inclusive of packing and forwarding charges which will remain firm during the currency of the contract.

It was further stated therein that other terms of the contract would remain the same.

13. The Defendant further stated in this aforementioned letter that inspite of above escalated price of Rs. 32/- per pair, excise duty would not be charged extra. The said letter dated 29.8.1978 was marked as Ext. M.

In response to the Defendant''s aforementioned letter, the Plaintiff sent telegrams on 29.8.1978, 19.9.1978 and 22.9.1978 (Ext. N. N/1 and N/2) requesting the Defendant to hold discussions in the matter.

14. The Defendant however by his letter dated 19.9.1978 (Ext. 18), stated that it was not possible for him to depute an authorised representative immediately and requested the Plaintiff to fix a date at the end of the said month so that his authorised representative may be sent there for holding discussions in the said matter.

15. By a letter dated 20.9.1978, the Defendant however requested for adjustment in the delivery schedule. Thereafter, the Defendant sent a telegram stating that in view of the fact that there has been a Hood, nobody could be sent to attend the meeting. The said telegram is contained in Ext. N/3 as also Ext. 20 and 21.

16. According to the Defendant, Western Coalfields Ltd., however, in relation to a similar contract agreed to the request of price escalation clause by Rs. 3/- per pair of boots as requested for by the Defendant. The telegram of W.C.L. dated 6.11.1978 intimating its approval for price-increase has been marked as Ext. N/4.

17. By a letter dated 10.11.1978, the Plaintiff issued a notice upon the Defendant to supply remaining part of the shoes agreed to be supplied by 16.11.1978 and it was threatened therein that on his failure to do so, the risk purchase clause shall be invoiced.

The said letter was'' marked as Ext. O.

18. The Defendant by his letter dated 28.11.1978 requested the Plaintiff for giving a date, so that the differences can be sorted out by holding a discussion (Ext-J). The Plaintiff however by another telegram dated 4.12.1978 (Ext. 16) called upon the Defendant to resume the supply.

19. It appears from a letter dated 13.12.1978 (Ext. 17) issued by the Defendant that discussions had been held by and between the representative of Defendant and the Materials Manager of Central Coalfields Ltd, Ranchi, wherein it has emphasised that it had been explained to him that due to act of god, the Defendant had lost the manufacturing capacity and therefore, he was helpless and the supply cannot be accelerated. It was further contended therein that he has been able to resume a small production, therefore, he is in a position to make a supply of 2000 pieces in the month of December, 1978.

With regard to the price escalation, it was contended therein that in the meeting held on that date, the Materials'' Manager of the Respondent-Company asked the Plaintiff to furnish to him a certificate from a licensed Rubber Dealer showing the running price of the Rubber at the time of R/Q and also current prices of Rubber at Calcutta so that the same may be considered.

20. By reason of another letter dated 6th April, 1979, which was marked as Ext. 24, Plaintiff sent a final risk purchase notice alleging therein that they had procured boot from alternative sources at the risk and the cost of the Defendant and the extra expenditure of Rs. 1,44,000.00 in this respect has been incurred which was to be recovered from him,.

21. The Defendant, by reason of his letter dated 18.2.1984 addressed to the Sr. Purchase Officer, CCL, Ranchi expressed his surprise in receiving the said notice and also expressed his intention to call on him to explain the situation so that the parties may overcome any misunderstanding for mutual benefit.

The Plaintiff has contended that it had to buy the boots from the Bata India Ltd. as the Defendant failed and/or neglected to perform its part of contract at the rate of Rs. 36.75 paise per pair and in that view of the matter, it was entitled to a sum of Rs. 1,44,000.70 paise by way of damages which sum it had to pay extra to the aforementioned Bata India Ltd.

22. The aforementioned basic facts are not in dispute.

23. However, the Defendant in its written statement took up various pleas alleging therein that there had been no concluded contract and thus it is not bound to pay any damages on the basis of the purported risk purchase clause contained in the rate contract.

24. The Defendant farther contended that in view of terms and conditions in the notice inviting tender (Ext. A), it was entitled to the benefit of the Clause relating to escalation of price and the Plaintiff on insisting with the said Clause-1 deleted

from the contract has itself committed a breach of contract.

25. In short, the Defendant in his written statement reiterated its denial in respect of:

(i) the existence in fact or in law, of any alleged formal operative and binding rate contract;

(ii) the good faith and the bona fides of the alleged purchase by the Plaintiff of the Miners Boots from the Bata Shoe Co. Ltd. ac Rs. 36.75 per pair;

(iii) Any liability on that account by the Defendant whatsoever at all;

(iv) The merits, the tenability, the justifiability of the alleged letter dated the 3rd May, 1975 (Annexure-4).

(v) Of any risk or costs over accruing to the Defendant either in accordance with the law or any contract.

26. In view of the aforementioned pleadings of the parties, the learned court below tamed the following issues:

(1) Is the suit as framed maintainable?

(2) Has the Plaintiff got cause of action to sue?

(3) Was there a concluded rate contract between the Plaintiff and the Defendant for the supply of the goods?

(4) Was the Defendant entitled to claim increase in the price of the miner''s safety boots per pair in view of Clause 9 of the tender Ext. A and whether such claim was justifiable?

(5) Was the Plaintiff entitled to make purchase from other sources at the risk and cost of the Defendant?

(6) Whether the Plaintiff took all reasonble steps for mitigating the losses alleged to have been sustained on account of the breach of contract.?

(7) Whether the Plaintiff is entitled to claim for compensation and money as claimed for?

(8) Is the Plaintiff entitled to any other relief?

27. The learned court below took up issues No. 3, 4, 5 and 6 together and held that the contract entered into by the parties was a concluded one. It further held that the Plaintiff was entitled to make purchase of the remaining quantity of miners'' boots not supplied by the Defendant at its risk and costs at the prevalent market price which Bata India Ltd offered to the Plaintiff.

With regard to the issue ho. 7, the learned court below held that the Plaintiff was entitled to a decree for a sum of Rs. 1,43,733.00 by way of damages for non-supply of 21944 pairs of the Miners'' boots calculated on the basis of difference in price namely @ Rs. 6.55 per pair.

28. Mr. M.Y. Eqbal, the learned Counsel appearing on behalf of the Appellant raised two contentions in support of this appeal.

It was firstly submitted that from the pleadings of the parties as also the evidences on record, it would appear that there has been no concluded contract entered into by and between the Plaintiff and the Defendant with regard to the rate at which the Defendant was required to supply miners'' boots to the Plaintiff.

29. The learned Counsel contended that the Defendant''s quotation dated 23.6.1978 being in response to the Plaintiff''s notice inviting tender dated 1.3.1978 was an offer which having not been accepted by the Plaintiff by its letter dated 19.6.1978 (Ext. D), the said contract was not a concluded one. It was also submitted that the Plaintiff could not have by reason of its subsequent offer namely dated 23.6.1378 (Ext. F) insisted on deletion of the escalation clause which was a material term in the notice inviting tender.

The learned Counsel, in this connection has placed strong reliance upon in AIR 1933 29 (Privy Council) , AIR 1946 97 (Privy Council) and Kollipara Sriramulu Vs. T. Aswathanarayana and Others, .

30. Mr. Eqbal, next contended that in any event from the conduct of the Plaintiff, it is evident that it never tried to mitigate its damages inasmuch as even assuming that the Defendant had committed a breach of contract, in view of the fact that it had offered to supply the boots at the rate of Rs. 32/- per pair, refusal to accept the said price and purchase of the said boots from Bata Shoe Ltd. at the rate of Rs. 36.75 per pair must be held to be wholly unjustified.

31. According to the learned Counsel, it was obligatory on the part of the Plaintiff to show that it took all reasonable steps to mitigate its losses and failure on its part to do so will disentitle it to claim damages.

32. Mr. Debi Prasad, the learned Counsel appearing on behalf of the Respondent, on the other hand, submitted that risk purchase clause being one of the terms and conditions of the contract, the Plaintiff was entitled to invoke the same in law so as to entitle to recover the damage it suffered by way of excess payment made to a subsequent seller.

33. According to the learned Counsel, such measures of claiming damages is permissible in terms of Section 73 of the Indian Contract Act.

The learned Counsel, in this connection, has strongly relied upon a decision of this Court in Firm Rampratap Mahadeo Prasad and Others Vs. Sasansa Sugar Works Ltd., .

34. In view of the rival contentions of the parties, the following questions will arise for consideration in this appeal:

(i) Whether a concluded contract was arrived at by reason of the Plaintiff''s letter dated 19.6.1978?

(ii) Whether the Plaintiff was entitled to delete the price escalation clause, as contained in Clause-9 of the Notice inviting Tender (Ext. A)?

(iii) Whether in the facts and circumstances of the case, the Plaintiff has been able to prove that its action in purchasing quantity of non supplied miners boots by the Defendant from M/s. Bata Shoes Ltd. was fair and reasonable and thus it was entitled to the relief?

Re-Questions-I & II

35. As both the contentions are inter-related, the same are being taken up for hearing together.

36. The notice inviting tender (Ext. A) dated 1.3.1978 was a proposal and in response whereof, the Defendant made an offer on 7.3.1978 (Ext. B).

From a perusal of the Plaintiff''s letter dated 19.6.1978 (Ext. D) it appears to have stated as follows:

Your above referred quotation has been accepted for yearly rate contract for supply of Safety Rubber Canvas Boots for miners Type II, ISI marked and DGMS approved as per ISI 3976-75 at a unit price of Rs. 30.20 pet pair F.O.R. Calcutta inclusive of Excise Duty, the Sales tax extra, to our (B&K), (A), (O) and Kathara Area.

Our formal rate contract with detailed terms and conditions is under issue. In the meantime, you are requested to please arrange supplies to the direct demanding officer against the demand order if placed with you.

37. According to Mr. Eqbal, if by reason of Ext. D the Plaintiff had made an unequivocal acceptance of the offer made by the Defendant, then and then only, the same will fructify in a concluded contract.

38. Mr. Debi Prasad, on the other hand, submitted that as the formal rate contract with detailed terms and conditions was to follow : by reason of Ext. D, the offer of the Defendant was accepted subject to the terms and conditions which were to be contained in the rate contract and which in fact was issued by the Plaintiff on 26.6.1978 (Exts. F & F/1).

39. From the facts, as stated hereinbefore, the clear picture which emerges is that Defendant never accepted the deletion of escalation clause from the notice inviting tender which was to form part of the agreement itself.

40. It is further clear that the Defendant had all along been insisting for inclusion of the escalation clause and in fact, by a letter dated 29.8.1978 (Ext. M), it made a specific Claim for increase in the price of goods from Rs. 30.20 paise to Rs. 32.00.

It is, therefore, clear that the purported acceptance of offer made by the

Defendant in response to the Plaintiff''s proposal was a counter proposal and not an absolute accepting of the offer.

41. Section 7 of the Indian Contract Act reads as follows:

Acceptance must be absolute. - In order to convert a proposal into a promise the acceptance must:

(i) be absolute and unqualified.

(2) be expressed in some usual and reasonable manner, unless the proposal prescribed the manner in which it is to be accepted. If the proposal prescribes 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.

42. It is well known that except consensus ad idem, there can be no contract. The consideration for an object of agreement must be something which both sides agree with each other.

The letter of the Plaintiff dated 19.6.1978 (Ext. D) has to be read in this context. In that letter, there is nothing to show that the Plaintiff expressed its intention to delete the escalation clause which is a material condition in a commercial contract

The Defendant, therefore, began to make supplies in terms of the Plaintiff''s aforementioned letter dated 19.6.1978 treating the same Ho be an absolute acceptance of its offer. Reading the letter, as a whole, it is not possible to accept the contention that the same was intended to make a substantial variation in the contract, inasmuch as, as indicated hereinbefore, there is nothing to show that the rate agreement was to contain terms and conditions which would be at substantial variance with the proposal made by the Plaintiff itself in response whereof, the Defendant made the offer by reason of Ext. B.

43. However, if the contention of Mr. Debi Prasad is accepted that the acceptance of the offer was a conditional one and. subject to the terms and conditions of the formal rate contract, in such an event, it must be held that no concluded contract was arrived at by and between the parties.

44. In Haji Mohammad Haji Jiya v. E. Spinner and Ors. ILR 24 Bom 511, Sir L.H. Jenkins, Kt. Chief Justice, after referring to Section 7 of the Contract Act, observed that until there is such an acceptance the stage of negotiations has not been passed, and no legal obligation in imposed. Similarly, any departure from the terms of the offer or any qualification vitiates the acceptance it accompanies unless it is agreed to by the person from whom the offer comes. In other words, an acceptance with a variation is no acceptance; it is simply a counter proposal, which must be accepted by the original promisor before a contract is made.

45. Further, in this case, admittedly, the formal rate contract (dated 26.6.1978) in duplicate was sent to the Defendant for his acceptance of the terms contained

therein by putting his signature thereupon. It is admitted that the Defendant never returned the said formal rate contract upon putting his signature in a copy thereof.

46. Bombay High Court in Huji Mohamad Haji Jiya''s case (supra) considered such a situation and held that because the acceptance was not shown to have been returned, no inference could be drawn that the Defendant must have assented to the term''s in which it failed to correspond to his offer.

It further held that it is clear that a person making a proposal cannot impose on the party to whom it is addressed i the obligation to refuse it under the penalty of imputed assent, or attach to his silence the legal result that he must be deemed to have accepted it

47. Mr. Debi Prasad submitted that in any event, the Defendant must be held to have accepted the counter offer inasmuch as it began to supply the goods which continued upto 29.11.1978.

The learned Counsel, therefore, submitted that Ext. F reflects a concluded contract.

48. Mr. Debi Prasad, in this connection, strongly relied upon Exts. 12 and 13, which according to him, signify the acceptance of the offer of Plaintiff by the Defendant, although the Plaintiff did not agree to the incorporation of the escalation clause in the contract.

It appears from Ext. 13 which is a letter dated 16th August, 1978 issued by the Plaintiff that thereby, it reminded the Defendant about its assurance to provide them with necessary amendment in inspection Clause which was still awaited. The said letter was issued in response to the Defendant''s letter dated 23.6.1978.

49. In that letter, it was further mentioned that payment in respect of the goods supplied had not been made and if payments were not made promptly, further supplies might have to be stopped.

50. It is true that from Exts. 12 and 13, it does not appear that the Defendant in his letter made any grievance about the non-incorporation of the price escalation Clause. For the purpose of finding out as to how and when a concluded contract had been arrived at by and between the parties, the entire conduct of both the parties are relevant.

51. It is not a case where the offer made by the Defendant was unequivocally accepted, subject to preparation of formal document but even in such a case, where the agreement is made subject to certain conditions thence specified or to be specified by the party making it, then until those conditions are accepted, there is no final agreement such as the court will enforce.

See : Raingold v. Bromley reported in 1931 All ELR 822.

52. It is, therefore, a question of construction where the execution of the formal

contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties, as to the manner in which the transaction already agreed to will in fact go through

In the former case, there is no enforceable contract either because the condition is unfulfilled or because ''aw does not recognises contract to enter into a contract. In the latter case, there is no binding contract,

Reference, in this connection may be made to AIR 1946 97 (Privy Council) , wherein the Judicial Committee laid down the law thus:

It is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.

53. In Kollipara Sriramulu Vs. T. Aswathanarayana and Others, , the Supreme Court held that:

It is well established that a mere reference to a future formal contract will not prevent a binding bargain between the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the refernce to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case.

In that decision, the Supreme Court referred with approval the decision of the Privy Council in AIR 1933 29 (Privy Council) .

54. It is well known that an acceptance with a variation is no acceptance. It is a simple counter proposal which must be accepted by the offerer before a contract is made.

See : Pacific Minerals Ltd. Vs. Singhbhum Mining Syndicate, & Haji Mohamad Haji Jiya''s case (supra).

55. However, in this case, as noticed hereinbefore, Mr. Debi Prasad has contended hat the contract came into being by reason of inaction on the part of the Defendant to mist upon the escalation clause. Although, n a certain class of cases, a concluded contact can be presumed by applying the doctrine of acceptance sub silentio : but, as is veil known its application is very limited.

56. However, in this case, from the records, it is evident that not only the Defendant tad all along been insisting for insertion of he price escalation clause but also in fact, gave its offer of Rs. 32.00 per pair on F.O.R. Calcutta.

In this case, it is further evident from Ext. 17 that the Plaintiff even agreed to give enhanced price to the Defendant, subject to his furnishing certain certificate which the Defendant did vide Ext-U series.

57. However, from the conspectus of events, it appears that immediately thereafter, the risk purchase clause was invoked and within a period of about three months, the balance quantity of the goods were purchased by the Plaintiff from Bata India Ltd. as would be evident from Ext. 24, which is the final risk purchase notice dated 6.4.1979.

58. An implied contract brought only by the conduct of the parties merely gives rise to a case of quasi contract as envisaged u/s 70 of the Contract Act.

See : Craven Ellis v. Canons Ltd. 1936 (2) All ELR 1066.

59. Mr. Debi Prasad, in support of his contentions relied upon in Heavy Engineering Corporation Ltd. Vs. Crompton Greaves Ltd., , Haji Mohammed Ishaq Wd. S.K. Mohammed and Others Vs. Mohamad Iqbal and Mohamed Ali and Co., and in Shiv Pal Karan Kholi and Others Vs. State of U.P. and Others, .

The decision cited by Mr. Prasad are not applicable to the facts of this case.

60. In Heavy Engineering Corporation Ltd. Vs. Crompton Greaves Ltd., , it was held that the Respondents had accepted the terms contained in the counter offer. In that situation, it was held:

Thus even if the tender was submitted subject to the special conditions, the said special conditions never became part of the contract between the parties. The said special conditions never applied to the contract between the parties.

In this case, Clause-9 of the notice inviting tender was a part of the notice inviting tender.

61. In Haji Mohammed Ishaq Wd. S.K. Mohammed and Others Vs. Mohamad Iqbal and Mohamed Ali and Co., . the Supreme Court was dealing with a situation that where the Plaintiff had been proceeding on the basis of the express contract but it was found that although, no express contract could be proved, the case, pleaded would bring the matter within the purview of an implied contract brought about by the conduct of the parties namely, supply of the goods by the Defendant and their acceptance by the Plaintiff.

In that case, it was held that goods were supplied on an implied contract and thus the Plaintiff was entitled to receive the price thereof. It is, thus, not a case where the Plaintiff''s counter proposal to delete the price escalation clause from the notice inviting tender was accepted by the Defendant.

62. In Shiv Pal Karan Kholi and Others Vs. State of U.P. and Others, , a Division Bench of the Allahabad High Court was dealing with a case of allotment of House under Government Housing Scheme wherein the Government at a later stage of the contract increased the costs and the allottee paid the increased payment and obtained possession.

In that situation, it was held that the contract being a concluded contract, the

Petitioner can not be allowed to re-open the question on the ground of estoppel.

63. Taking thus all facts and circumstances into consideration in my opinion, it is clear that no concluded contract came into being by and between the Plaintiff and the Defendant and thus the Plaintiff in law could not have enforced the risk, purchase clause.

Only an implied contract came into being in relation to supply of goods wherefor the Defendant became entitled to recover the price actually supplied by him to the Plaintiff.

Re-Question No. III

64. In view of my findings aforementioned, it was not necessary to deal with the other questions but as the matter has been argued at length, I intend to deal with the same very briefly.

65. A risk purchase clause is not unconstitutional or against public policy. Such a risk purchase clause is not hit by Section 23 of the Indian Contract Act, nor such a claim is unconscionable.

66. Reference, in this connection, may be made to a recent decision of this Court in Kumarjuri Fire Bricks and Anr. v. Bokaro Steel Ltd. Co. F.A. No. 65 of 1982(R), disposed of on 6th April, 1990.

67. There cannot be any doubt that in a case of breach of contract, the Plaintiff is en-tilled to damages suffered by either in terms of Section 73 or Section 74 of the Indian Contract Act, even if no such clause exists in the contract.

68. Where a party breached a condition of contract the other contracting party suffering losses pursuant thereto is entitled to damages.

However, even in such a case, the Plaintiff can not have unequivocal discretion nor can it claim damages arbitrarily. Such a risk purchase clause is subject to the provision of law with regard to the reasonable conduct of the parties. A reasonable conduct on the part of the Plaintiff is also necessary in view of the fact that the Plaintiff is a ''State'' within the waning of Article 12 of the Constitution of India.

(See : Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, .

69. In Halsbury''s Laws of England (4th Edition) Vol. 22 at para-1193, the law has been stated thus:

The Plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the Defendant''s wrong, and, if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided.

70. In Cheshire and Fifoot''s Law of Contract (ninth edition), Page-604, the

learned authors state:

The rules given above are subject to this limitation, that the law imposes a duty upon the Plaintiff to take all reasonable steps to mitigate the loss caused by the breach of contract, and debars him from claiming compensation for any part of the damage which is due to his neglect to do so.

71. In Anson''s Law of Contract (25th Edition) at page-570, the law has been stated thus:

It follows from the rule that damages are compensatory only that one who has suffered loss from a breach of contract must take any reasonable steps that are available to him to mitigate the extent of the damage caused by the breach. He cannot claim to be compensated by the party in default for loss which is really due not to the breach but to his own failure to behave reasonably after the breach.

72. In Union of India (UOI) Vs. West Punjab Factories Ltd., , the Supreme Court held that it is will settled that the market price at the time of damage is the measure of damages to be awarded and the contract price is no measure of damages to be awarded.

73. In this case, there is no dispute that the Defendant himself offered to supply miners'' boots at the rate of Rs. 32/- per pair. Such rate, therefore, was the market rate which was prevalent at that time.

In such a situation, the Plaintiff could have purchased goods from the Defendant and sue him for damages on the basis of differences in price.

74. In Payzu Ltd. v. Saunders (1918 All ELR 219 : 1919(2) Kings Bench 586) Scrutton, L.J. observed:

Whether it be mere correct to say that a Plaintiff must minimise his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the Defendant''s breach, the result is the same The Plaintiff must take "all reasonable stops to mitigate the loss consequent on the breach" and this principle "debais him from claiming any part of the damage which is due to his neglect to take such steps". British Westing House Electric and Manufacturing Co. v. Underground Electric Railways Co. of London, Ltd. (1) per Lord Haldane, L.C. Counsel for the Plaintiffs has contended that in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded. That is contrary to ray experience. In certain cases of personal service it may be unreasonable to expect a Plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default.

75. In that view of the matter, there cannot be any doubt that the Plaintiff, if at all could sue the Defendant for damages only on the differences in price at the

rate of Rs. 1.80 per pair of Miners'' boots.

76. In view of my findings aforementioned, this appeal is allowed and the judgment and decree passed by the learned court below is set aside, but in the facts and circumstances of the case, the parties are directed to bear their own costs throughout.

