
(2012) 04 DEL CK 0489

In the Delhi High Court

Case No : FAO (OS) No. 53 of 1986

State Trading Corporation of India

APPELLANT

Vs

Indian Sugar Mills

RESPONDENT

Date of Decision : 24-04-2012

Acts Referred:

Arbitration Act, 1940 — Section 30, 33, 39

Contract Act, 1872 — Section 56

Sales of Goods Act, 1930 — Section 23, 23(1), 23(2)

Citation : (2012) 04 DEL CK 0489

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Gunjan Kumar and Mr. Ankit Khurana, Ads, for the Appellant; Sandeep Sethi, with Ms. Sunita Bansal, Abhishek Swaroop and Ms. Pankhuri Jain, Ms. Priya Kumar, for UP State Sugar Corporation Ltd., Rampur. Mr. A.S. Mathur and Ms. Shruti Verma for Kichha Sugars, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.—Thirty-three (33) years and still going strong! This is the fate of the present dispute which was referred to arbitration in the year 1979. The appeal itself is of the vintage 1986 when practically all appeals up to the year 2006 have been decided. Since a part of the decretal amount was directed to be released to the beneficiaries of the award, which are 155 sugar mills, against bank guarantee, issue of extension of bank guarantee has been going on before the Registrar and but for a search as to whether there was any older appeals pending, it would not have come to light that the appeal is rotating before the Registrar's Court on something which has nothing to do with the final hearing of the appeal. The observations made by the Supreme Court as far back as in *Guru Nanak Foundation Vs. Rattan Singh and Sons*, in the opening paragraph (which has also been referred to in the impugned order) sound so apposite:

1. Interminable, time consuming, complex and expensive court procedures

impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 ("Act" for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at very stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Courts been clothed with "legalese" of unforeseeable complexity. This case amply demonstrates the same.

We note with anguish that having located this appeal, which was displayed for a whole week in the cause list making it clear that this appeal will be taken up on a particular date and no accommodation will be granted, yet the first request made on behalf of the appellant was to seek an adjournment which we declined and then we proceeded to hear the counsels for the parties.

2. Now coming to the facts of the case. Two orders for supply for export of sugar, one from Iran for 1,20,000 metric tonnes and another from European Economic Community i.e. EEC for 25,000 metric tonnes were placed on the appellant, State Trading Corporation of India (for short "STC"). To meet the commitments, the STC in turn entered into agreements with Indian Sugar Mills Association (for short "ISMA")/respondent No. 2 and National Federation of Co-operative Sugar Factories Ltd. (for short "NFCSF")/respondent No. 1 vide agreement dated 23.3.1977 for supply of 1,25,000 metric tonnes of sugar of grade C/D/E-30. We may note that NFCSF (for co-operative factories) and ISMA (for privately owned and limited companies) represented all the 155 sugar factories. The agreement envisaged in clause 4 that the dispatch will be completed by the sugar factories by 31.5.1977. The pre-requisite, however, was: (i) ISMA & NFCSF will give factory-wise break up of allocation immediately upon receipt of region-wise break up from STC; (ii) all formalities required to be completed by STC/their agents, at least, 30 days before the last date of delivery by factories (implying that the factory should have in their possession all valid documents 30 days before the last date of delivery). In case of failure to provide all requisite documents within the stipulated time of 30 days, the factory had the option to either dispatch the quantity or treat it as cancelled partly or wholly.

3. The STC appointed Indian Sugar Industry Export Corporation Ltd. (for short "ISIEC") as their handling agent which would enter into contracts incorporating usual terms & conditions with each sugar factory supplying sugar against the purchase made under the agreement (clause 6).

4. The disputes inter se the parties, if any, were required to be settled through the process of arbitration in terms of clause 7, which reads as under:

7. Arbitration. - All disputes or differences whatsoever arising between the

parties out of xxxx relating the construction, meaning and operation or the effect of this agreement or breach thereof shall be settled in accordance with the Rules of arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on all the parties. The venue of arbitration shall be New Delhi.

5. ISIEC consequently executed separate factory-wise agreements from April, 1977 onwards, which inter alia contained clause 9 (f) as under:

Since the contract with the foreign buyers generally stipulates delivery of 5% more or less of the contracted quantity ISIEC shall be free to take delivery up to 5% less than the accepted quantity. The balance quantity, if any, left with the factory shall be disposed of without claiming any damage in the international market in accordance with the release order(s) normally issued by the Chief Director, Directorate of Sugar and Vanaspati.

The STC also obtained release orders for export at agreed price for dispatch of sugar as per ISIEC instructions from 6.4.1977 onwards. However, an unforeseen eventuality occurred in the form of export of sugar being suspended by the Government pending finalization of export policy by the Government in April, 1977 itself. The consequence was that STC could lift only 58,730.3 metric tonnes of sugar by the stipulated date of 31.5.1977.

6. It appears that issues arising from such suspension of export of sugar received the attention of the Government resulting in a decision in a meeting of the Cabinet Committee on Economic Affairs on 19.7.1977 that the sugar to be export during 1977-78 session to the extent of commitments made should be handed in a manner which would minimize the extent of financial loss. Thus, on 10.8.1977, the Under Secretary to the Government of India asked STC to immediately go ahead to meet the export commitments to Iran and EEC while clearing 1.13 lakh metric tonnes of sugar lying with STC advising that any delay would not be in their interest. However, by that time apparently Iran became disinterested in import from India and EEC expressed inability to lift sugar before March, 1978.

7. The factual matrix which emerged in the arbitration proceedings showed that ISIEC insisted upon signing of contract by Modi Sugar Mills on 11.8.1977 and a number of contracts were signed much beyond 31.5.1977 till as late as 11.8.1977. It is on 10.10.1977 that STC informed Nizam Sugar Factory that export of sugar was suspended since April, 1977 pending finalization of sugar export policy by the Government and assured that ISIEC would be taking steps to procure undelivered quantity as soon as the sugar is required at the port for further shipments. In October, 1977 itself a note emanated from the Commerce Secretary to the Cabinet Committee on Economic Policy and Co-ordination referring to a decision of 19.7.1977 and noticing that STC had 1.13 lakh metric tonnes of stocks available, out of which 47,000 tonnes were lying in the port godowns and 66,000 tonnes were lying with the sugar factories. These stocks were from 1976-77 crops and earmarked for exports, as they were not required

for meeting past commitments for exports, it was decided to take an early decision qua their disposal. Thereafter, the Cabinet took a decision on 9.12.1977 that 1.13 lakh metric tonnes of sugar with the STC should be sold in the local market and not exported at a loss. Despite this decision the STC is alleged to have taken no steps and forced sugar factories to hold over the stock. It is on 26.12.1977 that the STC informed ISIEC about the decision of Food Department to cancel the un-dispatched quantity of sugar of 1976-77 crop of approx. 66,000 tonnes lying with the individual sugar factories purchased at Rs. 290.00 per quintal and to release the same out of 1977-78 production simultaneously. Information was sought from ISIEC regarding un-dispatched sugar lying with the factories. ISIEC consequently vide letter dated 29.12.1977 sought grade-wise quantity that the factories would supply from 1977-78 production against the un-dispatched quantities of 1976-77 production already being released and NFCSF stated in response dated 19.1.1978 that 1976-77 production quantity was purchased by STC about ten (10) months back and the factories are facing considerable hardship both financially and on account of storage and, therefore, the STC is committed to lift the quantity. In view of the stand taken by the sugar mills STC is stated to have obtained an opinion from its law department which advised that unless release orders were cancelled at the instance of STC, the stock lying at the factories will be treated as the property of the STC. The STC thereafter informed sugar mills on 20th March, 1978 that they have referred the matter to the Government (Directorate of Sugar) and shall revert on receipt of their advise with regard to the un-dispatched quota.

8. It is on 12.6.1978 that STC sought cancellation of release order from the Department of Food on the strength of legal opinion sought from the lawyer on the consequences of cancellation of release orders with sugar factories. In the meantime on 26.6.1978 NFCSF & ISMA while acknowledging receipt of ISIEC's circular dated 29.12.1977 informed STC that requisite information had already been given to ISIEC and that they were awaiting dispatched instructions for 66,269.6 tonnes as the export of sugar had already been resumed. STC was also put to notice that in case instructions are not issued within fifteen (15) days of receipt of the letter, sugar factories would treat STC to be in breach of the contract and would have no option but to sell the balance quantity of sugar in free market at the risk and cost of STC and claim all losses & damages suffered by sugar factories. There was, however, no response to this letter.

9. On 7.7.1978, STC's Department of Food admitted that as per the legal opinion, cancellation of release orders would put an end to the existing contract as on date of withdrawal of release orders and if no dispatch instructions were issued then sugar factories would sell sugar in free market and recover losses & damages suffered from STC. NFCSF instructed all co-operative sugar factories on 26.7.1978 to request the Sugar Directorate to release the said un-lifted sugar for sale in the free market as the STC had failed to take delivery of the same. The ban against export of sugar was ultimately lifted on 16.8.1978.

10. In view of the facts that STC did not take any steps to cancel the release order, NFCSF & ISMA invoked the arbitration clause on 6.3.1979 against STC and sought appointment of an arbitrator by the Indian Council of Arbitration. Justice V. Bhargava (Retd.) was consequently appointed as the arbitrator vide letter dated 31.8.1979. This letter stated that as per the sugar mills, STC had failed to lift the balance quantity of 66,269.6 tonnes of sugar and did not issue any dispatch instructions to the mills concerned in spite of their repeated requests. The sugar mills ultimately disposed of the sugar in the local market after sending notice to STC and were claiming losses and damages suffered by them on this account from the STC. 94 sugar mills had filed their references giving authority to ISMA while 53 mills had filed their references giving authority to NFCSF totaling to 147 references. The claims were in the range of Rs. 50,000.00 to Rs. 46.00 lakh per sugar mill. The consent of the arbitrator was sought which was duly given and the arbitrator entered upon reference and proceeded with the arbitration.

11. An award was made and published on 10.6.1981 by the arbitrator qua 155 claims made by sugar factories. Different amounts were awarded to different sugar mills inclusive of interest up to date of filing of the claim being quantified and further interest @ 12 per cent per annum on the principal amount from date of filing of the claim till date of award. The award was filed on the Original Side of the Delhi High Court and since there were different claims, they were registered as Suit No.895A-1049-A/1981. STC filed objections under Sections 30 & 33 of the Arbitration Act, 1940 (hereinafter referred to as the "said Act") on 2.11.1981 and the first adjudication by the learned single Judge took place on 30.7.1982. This adjudication resulted in the matter being referred back to the arbitrator for re-consideration on the issues raised in paragraph 64 of the judgement dated 30.7.1982. We may notice that the award dated 10.6.1981 was a non-speaking award but the material on the basis on which the award was made was discussed at length by the learned single Judge in the order dated 30.7.1982. The learned single Judge was conscious of the limitation in dealing with such a non-speaking award given the legal position and noticed the same in paragraph 63 of the judgement. The learned single Judge observed that the rival contentions and the material had been referred to in order to ascertain whether the contention of the STC that the learned arbitrator fell into a basic error in computation of damages, and further ignored certain material evidence placed before him has any basis. The learned single Judge took a view that if material documents are ignored while arriving at a just decision to resolve the controversy between the parties, then the award can be treated to suffer from an error of law despite the award emanating from a legal luminary of the stature of Mr. Justice V. Bhargava (Retd.), an expert in the field. It would be, thus, useful to reproduce paragraph 64 of that judgement, which reads as under:

64. In my considered opinion, the award in the present cases suffer from infirmity when the learned arbitrator over-looked the very material documents relating to the restrictions placed by the Government in July, 1977 on the export

of sugar. The position about these documents has been discussed at some length above in paras 29, 33 & 59. It is for the learned arbitrator to consider their implications on the controversies raised before him whether the contracts became frustrated, and whether they could not be treated as alive after 31.5.1977 or July, 1977. Those documents can also throw light how far the observations made above, specially in paras 47 and 48, with regard to the non-marketing of the sugar in domestic market after 31.5.1977 have relevance, and the sugar mills and the government were interested to not allow the domestic price of sugar to fall. How far in that case the STC could be made liable, has to be considered. The clause in the contract about 5% of the stipulated quantity being less lifted, has not been referred to by the learned arbitrator. In present cases where damages have gone to crores, those 5% can have material bearing. Similarly documents referred to in paras 48 and 51 to 54 and others having bearing on the computation of damages may be looked into. Their probative value has to be considered for arriving at just decisions. I am, in the circumstances, constrained to remit back the award to the learned arbitrator for consideration of all these aspects.

12. The record discloses that a SLP was filed against the judgement dated 30.7.1982 being SLP No. 949-1103/1983, which was, however, dismissed as withdrawn on 3.3.1983.

13. Justice V. Bhargava (Retd.) thereafter proceeded to hear the matter, once again, in pursuance of the order of remand and made and published the award dated 1.5.1984 adopting the view taken earlier. It may be added that the arbitrator now gave detailed reasoning for his view in respect of all issues, not restricted only to the limited question on which the matter was remanded back to him. This award was, once again, filed on the Original Side of this Court and registered as Suit No. 857A-1049A/1984. STC, once again, filed objections under Sections 30 & 33 of the said Act on 9.8.1984. These objections were dismissed by the learned single Judge vide judgement dated 18.11.1985 and the award was made rule of the Court. It was further directed that in case the awarded amount was not paid within three (3) months by the STC there would be a liability to pay interest @ 12 per cent per annum from the date of the award till date of release. The STC thereafter filed the present appeal u/s 39 of the said Act on 20.1.1986 and the appeal was admitted on 9.2.1987. In terms of order dated 9.2.1987 the proceedings in execution of decree were stayed for four months and STC was also directed to deposit the decretal amount within four months, leaving out (i) the disputed amount of interest from the date of award till date of decree; and (ii) compensation for 5% of the goods for which there was an option with STC under the contract. This amount, as noticed in the beginning, was to be released to sugar factories against bank guarantees to be furnished by them.

14. The learned arbitrator in the award dated 1.5.1984 noticed that both the parties had requested him to give a reasoned award because they had apparently given an undertaking to obtain such an award in the various cases

before the arbitrator. The arbitrator thereafter proceeded to deal with all the issues raised before him point by point.

15. The first issue raised by the appellant was that the property in the sugar which was sold at a loss never vested in the STC in view of the provisions of Section 23 of the Sale of Goods Act, 1930 (hereinafter referred to as the "Sale of Goods Act"). The second point was that the sugar mills themselves had pleaded that the breach of contract by the STC took place on 31.5.1977 when delivery was not taken of the balance quantity from the sugar factories and, thus, the sugar factories ought to have sold the sugar soon thereafter to mitigate their losses. In such an eventuality there would not have been much losses as there was no fall of prices soon after 31.5.1977.

16. Learned arbitrator noticed that during 1976-77 sugar was a controlled commodity when a certain percentage of sugar used to be taken by the Government as levy sugar at a low price while the remaining percentage of sugar could be sold in the open market by the sugar factories where they would charge prices as per the prevalent market position. The latter sugar was, however, subject to release orders. Release orders were in turn of different forms: in some cases the release orders permitted the sugar factories to sell their sugar anywhere they could find the market at any price which they could obtain and the second class of release orders were where the party to which the sugar had to be sold was named and the free sugar could only be sold to a particular party and not in the open market.

17. In order to appreciate the findings of the learned arbitrator, we consider it appropriate to reproduce Section 23 of the Sales of Goods Act, which reads as under:

23. Sale of unascertained goods and appropriation.-

(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) Delivery to carrier.- Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

18. The plea of the appellant was that the sugar which was sold was unascertained quantity of sugar which was kept in the sugar factories did not vest in the STC in terms of Section 23(1) of the Sale of Goods Act. On the other hand, the sugar mills based their case on Section 23 (2) of the Sale of Goods Act, to

canvas that the property in goods vested in the STC because sugar factories themselves kept that sugar apart to be delivered to the buyer (STC) and did not have the right of disposal because of the scheme in force at the time of breach of the contract. The fact that the sugar had been kept apart for being collected by the STC/its agent ISIEC found support from the documents on record. The arbitrator found that the documents on record clearly and unambiguously supported the plea of the sugar mills that ascertained quantity of sugar was kept apart to satisfy the obligations to STC. The communications emanating from the Government of India referred to already in the beginning were relied upon by the arbitrator. No doubt the commitment made to the foreign buyers had become infructuous both because of the stand of the Iranian Government resulting in disinterest in obtaining the sugar and the EEC not being willing to lift the sugar before March, 1978. However, the second limb of the commitment of the sugar factories, as a result of which the property in 66,000 tonnes of sugar lying with the sugar factories vested with the STC remained, emerged from the Cabinet note itself referring to two quantities of 47,000 tonnes in port godown and 66,000 tonnes with the sugar factories. The admission of Mr. Rajinder Singh, Chief Marketing Manager of STC who appeared in the witness box was noted that the instructions of the Government related to 1.13 lakh metric tonnes of sugar including 66,000 tonnes lying with the sugar factories.

19. As far as the second plea arising from delay in selling the sugar in the open market and mitigating losses was concerned, the arbitrator found that it was in ignorance of the scheme of control of sugar discussed by the arbitrator. 66,000 tonnes sugar had been released specifically at the request of the STC for delivery to STC for export and the factories were then not in a position to dispose it of in the open market. It is only when the control on sugar was lifted on 16.8.1978 that the sugar factories were in a position to sell the sugar in the open market. Since the property in sugar had already vested in STC, the sugar lying with the factories fell in the second kind of non-levy sugar. In some of the cases, STC had issued release orders in favour of the mills where the sugar factories had not laid claim. The arbitrator found that the obligation was not on the sugar factories but on the STC that they had to obtain the cancellation of the order in their favour from the Government of India so that the factories were not required to keep the stock which they did maintain until de-control of sugar took place on 16.8.1978.

20. As far as the plea of frustration of contract advanced before the learned single Judge at first instance is concerned, the arbitrator noted that despite opportunity given STC failed to prove the terms of the ban by not producing a copy of the Cabinet Resolution or an order issued under the signature of the Secretariat Staff on behalf of the President of India. However the reference to the Cabinet Resolution did seek to indicate that there was a ban but the ban was conditional subject to honouring the commitments already made to the extent of 1.13 lakh metric tonnes of sugar which included 47, 000 tonnes of sugar lying on the port godowns and 66,000 tonnes of sugar lying with the sugar factories. Thus, no question of frustration arose.

21. The second limb of what emerged from paragraph 64 of the order dated 30.7.1982 was thereafter discussed, i.e., the STC had the option to take delivery of 5 per cent less sugar than the contracted quantity. Learned arbitrator relied upon the correspondences exchanged, to come to the conclusion that the contractor was required to keep in stock the entire quantity including 5 per cent right up to 16.8.1978, the date of de-control. If the STC prior to de-control had agreed to take delivery of the sugar, the factories were bound to give delivery of the entire sugar without deducting 5 per cent. In fact, this was never the stand of the STC in any correspondence till the arbitration proceedings.

22. The arbitrator also took note of the fact that suddenly if 66,000 tonnes of sugar is dumped in the market, it would fetch a low price, more so when it had been stored for such a long period time. The sugar produced in 1977-78 crushing season had already come into the market. The seasonal effect of sugar had been taken into account by the arbitrator. The arbitrator also noticed that the average price was made applicable though the same need not be accepted as a final proper figure for which purpose the prevailing rates as shown in the publications of the Federation will have to be taken into account and in any special case where the sale had been for a very low price, the factories had been given the liberty which may justify that course. In such cases cross-examination of witnesses of factories were also permitted. The statement showing rates at which sugar was sold was filed by the factories and the STC did not take any objection that any of the sales were made at too low prices and, thus, no question arose for recording of evidence any further.

23. The aforesaid is, thus, the reasoning of the arbitrator.

24. The objections to the award have been examined in depth by the learned single Judge in the impugned judgement dated 18.11.1985. The learned single Judge took note of the scope of scrutiny to the objection to an award that proceeded to trace out the history of the dispute. In view of the earlier award dated 10.6.1981 and the judgement dated 30.7.1982 remitting the matter to the arbitrator within the narrow compass of paragraph 64 of the said judgement, the following issues were framed:

1. Whether the award/order dated 1.5.1984 is bad in law for not examining/ considering the matters which had been specifically directed to be considered by the remission order of this Court; if so, to what effect?
2. Whether the award in dispute is liable to be set aside for the reasons stated in the objection petition?
3. Relief.

25. An important aspect taken note of by the learned single Judge while considering the merits of the controversy was that the arbitrator, as a measure of abundant caution, had even gone ahead to pen down reasons on the submissions made by the appellant, which, in fact, were not within the domain of the

remittance order as contained in paragraph 64 of the judgement dated 30.7.1982.

26. We may note that it is surprising that learned counsel for the appellant before the learned single Judge raised the issue that the question of applicability of Section 23 of the Sale of Goods Act ought not to have been examined as it did not form a part of the order while remitting the matter to the arbitrator. The fact remains that this was an issue agitated by the counsel for the appellant itself. It is in view of the submission of the appellant that the learned arbitrator proceeded to examine this plea on the basis of the facts on record and the appellant can hardly make a grievance in that behalf. The Commerce Secretary to the Government of India vide note dated October, 1977 itself set out the stock position of the STC emanating from the stocks of 1976-77 crops and earmarked for exports. The stock consisted of 1.13 lakh metric tonnes out of which 47,000 tonnes was lying at the port godown while 66,000 tonnes was lying in the factories. It is in that context that a decision of the Cabinet was sought as to whether the STC should be directed to export 1.13 lakh metric tonnes of sugar which was lying in the stock with it to avoid likely losses of about Rs. 15.37 crore or what other alternative course should be adopted. The Cabinet Committee on Economic Affairs in its meeting held on 8.12.1977 decided that 1.13 lakh metric tonnes of sugar lying with the STC should be sold in the market and not exported at a loss. This position was accepted by the STC vide its letter dated 26.12.1977 to the Manager, ISIEC. Even the legal opinion obtained by the STC from the Law Department was that the stocks lying with the factory would be treated as property of the STC and this was the stand of the STC before the learned arbitrator. The STC proceeded to obtain further information regarding the quantity of sugar released, total quantity dispatched and total undelivered quantity lying with the factories and their agents but despite this the matter did not move further. Thus, the learned single Judge found that the STC treated the contracted sugar as their own lying in the deliverable state with the factories but for the reasons best known to them took no steps to cancel the release order in spite of repeated notices and reminders of the sugar factories.

27. We can hardly doubt the aforesaid finding of the learned single Judge on this aspect. Firstly we must note that the findings of the arbitrator are based purely on appreciation of evidence. It is not as if now that any material evidence is stated to have been ignored. In fact, no other findings could have been reached in view of the material on record and the legal position has been correctly applied both by the arbitrator and the learned single Judge. This is also the manner in which the respective parties understood their obligations. Once ascertained quantity of sugar kept to meet the obligations of the factories to the STC, it cannot be said that there are no ascertained goods in which property has passed to the STC. The STC, one can only presume because of some indecision or lethargy, did not take the call to deal with the sugar lying with the factories but instead kept on vacillating over the issue. Even the legal opinion which it obtained as well as the options available to it in view of the notes of the Cabinet

Committee discussed aforesaid were not followed up.

28. We fail to appreciate how the appellant can assail the findings not only in respect of the aforesaid but seek to put the burden on the sugar factories that they ought to have disposed of the sugar contracted for in the open market before the delivery date or subsequently till the cancellation of the release order. The factories were required to keep ready the contracted sugar for dispatch on or before 31.5.1977 which they did. They were awaiting instructions thereafter from the STC. The communication on record shows that when endeavour was made by the sugar factories to obtain permission from STC to sell the sugar in the open market, the goods were not released. The letter dated 11.10.1977 of ISIEC, agent of the STC, informed the sugar factories that STC advised them not to issue any dispatch instructions presently. This was not qua one of the factories, Nizam Sugar Factory but in all other factories when further instructions were issued on the basis of the principal's advice. Thus, there is ample evidence on record to show that STC neither terminated the contract nor treated it as cancelled for the disposal of the un-lifted sugar on or before 31.5.1977 and even thereafter but on the other hand compelled the sugar mills to keep the contract sugar available for their benefit.

29. A perusal of paragraph 64 of the judgement dated 30.7.1982 shows that material documents relating to the following aspects were stated to have been ignored: (i) the documents relating to the restrictions placed by the Government in July, 1977 in export of sugar and, thus, whether the contracts became frustrated or whether they could not be treated alive after 31.5.1977 or July, 1977; (ii) the non-marketing of sugar in the domestic market after 31.5.1977; (iii) the option available to STC to lift 5 per cent less sugar than the contracted quantity.

30. Despite the aforesaid position the learned arbitrator in the subsequent award dated 1.5.1984 has noticed that the senior counsel for the appellant during the oral arguments did not seek to emphasise the points which had led to the High Court to remand the matter to the arbitrator but on the other hand raised two new points, i.e., (a) the property in the sugar which was sold at a loss had never vested with the STC in view of provisions of Section 23 of the Sale of Goods Act; (b) the claimants having pleaded that the breach of contract by the STC took place on 31.5.1977 when the delivery was not taken the sugar factories ought to have taken steps forthwith to dispose of the stock with them to mitigate the losses which would have resulted in no major variation as the prices had not gone down by then.

31. It is, thus, the counsel for the appellant who sought to open a new chapter by raising these two new points which have been rightly rejected for the reasons set out hereinbefore and correctly appreciated both by the arbitrator and the learned single Judge.

32. In so far as the issue of frustration of the contract is concerned, which is an

aspect referred to in paragraph 64 of the judgement dated 30.7.1982, the learned single Judge has, once again, examined this plea. The documents on record and the testimony of Mr. Rajinder Singh, Chief Marketing Manager of the STC clearly shows that STC had rightly understood that the property in the goods vested with the STC and it is the STC which had to make the necessary arrangement for lifting of the goods. The Minutes of the meeting of the Cabinet Committee on Economic Affairs dated 9.12.1977 also substantiated that the decision was of the STC to take necessary action to sell the stocks in the open market rather than export them at a loss. The Department of Food was required to closely monitor the internal supply to ensure that the average price remained stable. Despite this, the STC failed to take any steps and the logjam would have continued on account of the inaction of the STC but for the fortuitous circumstance that the sugar was de-controlled on 16.8.1978 and, thus, the factories were in a position to sell the stock in the open market to mitigate their losses after having put STC to notice. The stock was lying with the factories causing considerable hardship to them. Another interesting aspect which emerged is that on a question being raised in the Lok Sabha qua the issue of the Government stopping export of sugar and the losses suffered as a result thereof, a statement was made that the Government never stopped the export of sugar and as such there is no question of losses. The Government took a further decision on 19th July, 1977 that the sugar for the year 1977-78 should be exported to the extent of the existing commitments. Despite this STC neither cancelled the orders nor issued the release orders while simultaneously not issuing any dispatch instructions for the disposal of the un-lifted sugar with the result that the sugar mills were found to have suffered heavy losses. De hors all the aforesaid factual matrix the property in the goods lying at the factory had already passed to STC and, thus, the question of frustration of the contract would not arise. The property in goods had already passed to STC. The question of frustration of the contract would have arisen only after the contract was entered into but before the property in goods had passed or the contract had become impossible of legal performance (see the observations of the Supreme Court in Raja Dhruv Dev Chand Vs. Harmohinder Singh and Another, relied upon in the impugned order). The STC had already purchased its sugar and the only task they had to perform was to lift the sugar from the factories and to make the payment to the sugar factories. These two obligations were not incapable of being discharged by the STC. The STC, in fact, did not lift the sugar not because of a Government ban but because of foreign buyers' refusal to take the sugar from the STC and, thus, the benefit of Section 56 of the Indian Contract Act, 1872 (hereinafter referred to as the "Contract Act") is not available to STC.

33. The sugar factories in view of the aforesaid position had no option but to retain the stocks awaiting a response of STC which was not forthcoming.

34. The learned single Judge has also examined the issue of mitigation of losses contended by learned counsel for the appellant on account of paragraph 64 of the judgement dated 30.7.1982 and the subsequent discussion in the award

dated 1.5.1984. The agreement inter se the parties provided the stipulated date as 31.5.1977 with regard to the obligation of the factories to complete dispatches subject to the condition that all formalities required to be completed by the STC were completed, at least, thirty (30) days prior to the last date of delivery by the factories. The contract was, however, kept alive by both the parties even after the stipulated date of 31.5.1977. The STC continued to assure sugar factories that they would be lifting the quantities from the factories and it was not permissible for the sugar factories to have marketed the goods in which the property had passed to the STC. The only way the STC could have facilitated the sugar factories to sell the sugar in the open market was by cancellation of the release order. The STC, however, continued to treat the sugar as its own and in this behalf the communication of STC dated 7.7.1978 has been relied upon by the learned single Judge where a reference has been made to the procurement of the un-lifted quantity of 66,000 tonnes of sugar of 1976-77 production. The stipulated date of 31.5.1977 was not the stipulated last date for the STC to lift the sugar and was material only with respect to the factory obligation and the STC was free to lift the sugar even after that date. The finding of the learned single Judge is, thus, unexceptionable qua this issue. The STC also understood their obligation at the contemporaneous time in this manner and thus it did not revoke the contract but on the other hand continued to represent to the sugar mills that they would lift the sugar as and when the shipment schedule was fixed.

35. As far as the issue of quantification of damages is concerned, both the sides had agreed upon a formula with regard to the grant of damages. The parties had agreed that damages would have to be assessed on one of the two basis: (a) the actual sale price in respect of un-lifted quantities sold by various factories; (b) the figure worked out from the prevailing rate as shown with the publication "co-operative sugar".

36. The sugar factories prepared a chart on the basis of the first alternative showing the rates at which various sugar factories sold the sugar in respect of which they had filed the claim. The finding interestingly is that had the damages been quantified at the alternative agreed price on publication of "co-operative sugar", the claimant factories would have been entitled to higher amount. The arbitrator did not traverse this path but awarded the amount on the basis of the first alternative. The charts given were never doubted by the STC nor did they seek to cross-examine any witnesses of the STC in this behalf for which option had been made available as noticed by the arbitrator in the award dated 1.5.1985. Even in respect of the option of 5 per cent less delivery than the contracted quantity the STC had got the release order issued for the entire quantity and, thus, never opted for obtaining a lesser quantity. In such a situation even the 5 per cent quantity could not have been disposed of by the factories as rightly held in the impugned order.

37. The last aspect discussed by the learned single Judge is qua the plea advanced on behalf of the appellant that the arbitrator had gone beyond the

term of reference by passing an award in respect of even claims regarding production of sugar out of the year 1977-78, which was never the subject matter of contract between the parties. This allegation is qua 26 sugar mills.

38. The learned single Judge has noticed that the terms of reference under which disputes were referred are contained in the letter dated 6.3.1979 from NFCSF to the Registrar, Indian Council of Arbitration. In the said letter the entire claims including claim arising from re-processed sugar of 1977-78 was set out and, thus, was referred to arbitration. The arbitration was qua the sugar lying with the mills "indicating deterioration in quality". Along with the letter the names of the sugar factories, the quantity of sugar sold by them was annexed. At no stage of the proceedings either while reference was sought to be made or before the arbitrator or before the learned single Judge thereafter and the earlier award dated 10.6.1981 came under challenge or thereafter before the Supreme Court or in the remand proceedings before the learned arbitrator this objection was raised or pressed by the appellant. It was sought to be raised really as a new issue for the first time after the second award passed on 1.5.1984 and the objections to that award were filed. The stand of the sugar mills was that what was mentioned as 1977-78 production was really a reference to the contracted sugar of 1976-77 which became sugar of 1977-78 production on re-processing because of provisions of explanation (ii) of Clause 4 (ii) of the Sugar Packing and Marketing Order, 1970 made by the Central Government in exercise of the power conferred by Clause 5 of the Sugar Control Order, 1966. The learned single Judge has also found that the STC has not suffered any loss because if sugar of 1977-78 had been taken into consideration the same is for the benefit of the STC as the sugar of 1976-77 would have fetched much lower price.

39. We may also note that the observations out of the order dated 30.7.1982 of the learned single Judge cannot be taken out of the context to canvas that the award dated 10.6.1981 had been set aside by the learned single Judge while the fact remains that in the operative paragraph 64 of the judgement dated 30.7.1982, the matter had been remitted to the arbitrator only on a limited account. In fact, on that limited account the arbitrator noticed in the subsequent award dated 1.5.1984 that no submission were made by the appellant. The arbitrator as a matter of abundant caution dealt with the issues raised before him even for the first time post remittance.

40. In the end we may note that we have taken care to go through both, the voluminous records and the awards and judgements to ensure that whatever pleas were urged and formed a part of the opinion of the learned single Judge in the impugned order are dealt with by us even though the submissions of learned counsel for the appellant did not touch all these aspects. This has been done so as to keep no further questions to be adjudicated in view of the long pendency of this dispute.

41. We may note the submission of learned counsels for the respondents that, in fact, some of the factories may no more be existing and have been wound up

over a passage of time. We find the appeal completely meritless and dismiss the same with costs quantified at Rs. 50,000.00.