
(1996) 05 DEL CK 0025

In the Delhi High Court

Case No : OMP 19 of 1995, Suit No. 1091 of 1995 and OMP 112 of 1995

State Trading Corporation of India Ltd.

APPELLANT

Vs

M/s. Universal Paper Export Company Ltd.

RESPONDENT

Date of Decision : 09-05-1996

Acts Referred:

Citation : (1996) 05 DEL CK 0025

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Mr. Ram Panjwani and Mr. Vijay Panjwani, for the Appellant; Mr. Laxmi Kumaran, Mr. Madhav Rao and Mr. R H. Pancholi, for the Respondent

Judgement

K. Ramamoorthy, J.—The petitioner has filed this OMP 19/95 for a declaration that the contract dated 30th of March, 1991 between the petitioner and the Universal Paper Export Co. Ltd., hereinafter called the respondent respondent is invalid and ultra virus and the arbitration agreement dated 30th of March, 1991 also is invalid and ultra vires. In Suit No. 1091/95, the reliefs prayed for are as follows :

"(i) to grant declaration to the plaintiff that the contract dated 30th March 1991 is ultra virus and void ab initio.

(ii) to declare that the contract dated 15 May 1991 is ultra virus and void ab initio.

(iii) to declare that there does not exist any clause of arbitration in the second contract dated 15.5.1991 and Therefore, it cannot become subject matter of arbitration.

(iv) to declare that the Clause 16 relating to arbitration in the contract dated 30 March 1991 perishes with the contract itself.

(v) to grant any other relief that the Court may deem just and proper."

2. In OMP 112/95 the relief prayed for is as follows :

"(i) to declare that the arbitration agreement dated 15.5.1991 is not in existence.

(ii) to declare that arbitration agreement is not valid and it is illegal.

(iii) to declare that the claims and disputes of respondent/defendant cannot be subject matter before the arbitrators.

(iv) Arbitrators have no jurisdiction to hold arbitration proceedings."

3. OMP. 19/95 was presented on 6.2.1995, Suit No. 1091/95 was presented on 24.4.1995 and OMP. 112/95 was presented on 13.10.1995 when the other two cases were taken up for hearing. A Public Sector Undertaking has instituted these actions little Realizing that it is setting up a bad example to others and without considering the impact of the litigation on the trade and commerce of India in the International arena. In the light of a great spurt in global activities Public Sector Undertakings in any system, under any Government, are the custodians of not only the Capital on the country but great managers and professions in harnessing the capital provided by the Government so that the peoples of the world in general and citizens of the country in which it is functioning, in particular, get the benefit of their commercial activities. The benefits derived from the functioning of the Public Sector Undertakings should percolate to the masses and towards that direction Public Undertakings should work. Therefore, being initiating any action, sufficient care and thought must have been bestowed and Public Sector Undertakings should not indulge in vexatious, frivolous litigations amounting to abuse of process of Court.

4. Before I go to the pleadings in the three cases, I had to note the events chronologically so that we may appreciate later on, the contentions of the parties in their proper perspective. If the events are borne in mind, one can easily focus one's attention to the core of the matter and the real purpose of this litigation. On 26.2.1991 the petitioner floated global tender inviting offers for the purchase of Standard newsprint and glazed newsprint. In this case, we are concerned with the purchase of glazed newsprint. Regarding the specifications, the petitioner stated as follows :

"The Buyer reserves its right to lodge quality and/or quantity claims on the Seller within 60 days of the date of discharge of goods at the port of designation. Samples will be drawn by independent surveyors of international repute, appointed by the Buyer and acceptable to the Seller, whole decision shall be final and binding on both the parties.

The following rules to be observed in respect of such claims :

10% of the newsprint to be kept intact and be made available for inspection till 30 days after a claim has been filed.

Samples to be drawn out of at least 10% of the number of reels available. It must be stated from which reels the samples have been taken.

Samples to be drawn by an independent surveyor of repute. The samples shall be sealed and sent to the Seller. Newsprint to be considered as correctly delivered if the weight purchased by more than 4 (four) per cent. Test of samples to determine the correct weight or grams per square meter of paper to be made under atmosphere relative moisture of 65%."

Clause 5 of the tender under the marginal note Manufacturer's Certificate/Letter of Authority, it is provided "if the offer is not from the manufacturer, same should be accompanied by Certificate from Manufacturer to back up the offer. If offer is from Manufacturer's representative it should be accompanied by Manufacturer's Letter of Authority in favor of tenderer authorising them to submit offer, negotiate and finalise business on their behalf with STC." After this tender, it appears the petitioner held meetings with intending offerers wherein the petitioner had to clarify a few things. On 5.3.1991 the respondent wrote to the General Manager of the petitioner in the following terms :

"We are thankful to you for the clarifications given during the Newsprint meeting held yesterday at the STC and it will give a long way in helping us to service STC requirements for the future. We appreciate this gesture on STC's part.

As you are aware we will be participating in this tender both the Glazed and Standard Newsprint. We wish to advise you that our head office has air freighted Two reels of Glazed Newsprint of size 32" Wide, 30" Dia, 3" Core, direct to Delhi for testing and approval, consignee is STC. The reels are of Canadian origin."

Therefore, in the very first meeting the respondent had participated and had made known to the petitioner that it was going to offer for the supply of glazed newsprint. On 12.3.1991 the respondent through its office at Delhi wrote to the General Manager of the petitioner that from Canada two reels of glazed newsprint had been sent for testing purposes and the petitioner may authorise M/s. K. L. Bharara & Co. to take delivery on behalf of the petitioner. On 13.3.1991 the respondent from Delhi wrote to the petitioner that the aforesaid reel of glazed newsprint had been sent by M/s. Miramichi Pulp and Paper INC, New Castle, Canada at the instance of the respondent. It was also clarified by the respondent that M/s. Miramichi Pulp and Paper Inc. is a subsidiary unit of Repap Enterprises Inc/Repap Sales Corporation on the same date i.e. 13.3.1991, the Repap Sales Corporation wrote to the petitioner in the following terms :-

"Repap Sales Corporation, hereby authorize M/s Universal Paper Export Co. Ltd., 1198 Mountain Street, Montreal, Quebec, H3G1Z1, Canada to participate in the forthcoming tender, offer and sell glazed newsprint manufactured by Miramichi Pulp and Paper INC, 345 Curtis Road, Newcastle, NB E1V3, 3, a subsidiary of Repap Enterprises INC., 1150 Peel St., Suite 3209, Montreal, Quebec, H3B4V9."

On 15.3.1991 the respondent submitted its offer for the supply of glazed newsprint. The following details are given by the respondent :

"(B) Manufacturer : Miramichi Pulp and Paper INC., P.O. Box 5040, Newcastle,

N.B., Canada, E1V3 NC (a subsidiary of M/s Repap Enterprises INC, Canada).

(E) Shipment : April/June within 30 days from receipt in Canada of confirmed order of acceptable letter of credit. Shipment from Newcastle, N.B. on suitable non Indian vessel if order on C.N.F. basis.

(G) Manufacturers letter of authority : This has been submitted and sent to STC, Delhi VIA Fax on 13.3.1991. By our principles M/s Miramichi Pulp and Paper INC.

(H) Samples : Two Reels being tested in India.

(I) Validity : up to 22nd March, 1991."

On 21.3.1991 the respondent wrote to the petitioner extending the validity of the offer up to 10.4.1991. On 25.3.1991 the Times of India wrote to the Registrar of Newspapers in India stating that the sample reels had been tested and the rest report is sent along with the letter. On 25.3.1991 Living Media India Limited wrote to the Registrar of Newspapers for India sending the proforma of test report of the printers M/s. Thompson Press India Ltd., Faridabad.

5. On 30.3.1991 there was an emergency meeting of the Newsprint Purchase Committee of the petitioner. The Committee had decided to accept the offer of the respondent in the name of Repap Sales Corporation. It has to be noticed at this stage that on 13.3.1991 itself the Repap Sales Corporation had authorised the respondent to place the offer. Therefore, the mentioning of the name on 13.3.1991 by the Newsprint Purchase Committee of Repap Sales Corporation was a mistake committed by the petitioner. The whole case of the petitioner was based on this and, Therefore, I refer to it now itself. I shall be dealing within it a little later when I consider the contention of the petitioner.

6. On 1.4.1991 the petitioner wrote to M/s. Miramichi Pulp & Paper Inc., Canada through the respondent (Universal Paper Export Company Limited, New Delhi) stating that Telex message had been sent on 30.3.1991 and the petitioner was Realizing the specifications for 5,000 MT Glazed Newsprint. The details are given below :

Order No.	Dated	Quantity (MT)	Discharge Port	1	1.4.1991	3,000	Bombay	2
				1.4.1991	2,000	Madras		

The respondent was asked to manufacture the goods. Therefore, on the day when the petitioner wrote this letter the petitioner was fully aware that the respondent was making the offer and the manufacturer was Miramichi Pulp & Paper INC. Repap Sales Corporation was not in the picture at all. This factual position stands established by the letter of the petitioner itself.

7. On 2.4.1991 the respondent wrote to the petitioner requesting to nominate testing agency for pre-shipment inspection. On 11.4.1991 the petitioner responding to the letter of the respondent dated 4.4.1991 issued the following Telex message :

"STC

New York

Dr. Hasija from Bhupinder Rai MM NP DIVN we had nominated SGS Montreal for inspection of the cargo to be shipped by M/s Repap Sales Corporation Canada for the Glazed Newsprint to be shipped per v. State of Manipur and also for the balance quantity to be loaded by them X all the inspection charges are to be borne by the Sailors X THRFK kindly intimate to M/s SGS Montreal if they should present their bill for the inspection of the cargo to Universal Paper Export Co. Ltd., 119B Mountain Street Montreal Quebec, 121, Canada.

Para

Transchart has nominated VSL Chandidas to lift balance QTY X this may also please be informed to M/s. Repep. Please confirm"

The Organisation SGS is a company well versed with this subject. It has an office in Delhi. The petitioner has sent a note in the following terms to its Delhi Office :-

"cc : - M/s. SGS India, 608/609, Sahyog 59, Nehru Place, New Delhi in continuation to our letter dated 11.4.1991. Kindly note it as already intimated in last but one para of the said letter the payment for inspection of the cargo is to be made by the - Now M/s. Universal Paper Export Co., as above are the sailors in this case. Hence they will make the payment".

On 16.4.1991 the respondent wrote to the petitioner to nominate steamers for shipment and also requested the petitioner to intimate the full details. On the same date on 16.4.1991 the respondent wrote stating that with reference to contract terms the supplier should be read as Universal Paper Export Co. Ltd., Mountain Street, Montreal Quebec, Canada. The respondent further wrote that every effort will be made to ship the consignment on 25.4.1991 and if vessel is not available then shipment will be on F.E.I.S. basis. The respondent requested the petitioner to amend the contract accordingly. On 19.4.1991 the respondent again wrote to the Marketing Manager, petitioner that as vessel was not available for shipment in April, the earliest shipment will be in the first week of May 1991 and the respondent required 15 days notice to manufacture the cargo and to make it ready. The respondent requested the petitioner to make a request to the Shipping Corporation of India to arrange for a vessel. On 24.4.1991 the State Bank of India, Overseas Branch, New Delhi wrote to the petitioner enclosing the guarantee. The original guarantee was given to the respondent Co. On 25.4.1991 the respondent wrote to the petitioner enclosing the original Performance Guarantee for 1,75,000 US Dollars. The guarantee executed by the State Bank of India on 24.4.1991. In Volume I page 82 of the type set filed by the respondent we find the guarantee. The first sentence in the guarantee is as follows :-

"Our Guarantee No. OB/GUA/16/4013 in favor of yourselves at the request of M/s. Universal Paper Export Company Limited."

In the second paragraph it is stated :

"Whereas by a Contract No. STC/NP/REPAP Sales/10/Canada 91-92 dated 30.3.1991 hereinafter referred to as the "said contract" made between M/s. Universal Paper Export Co. Ltd., 1198 Mountain Street, Montreal, Quebec H3G1Z1, Canada hereinafter referred to as the "supplier", which expression shall unless excluded by or repugnant to the context mean and include its successors and assigns, and the State Trading Corporation of India Limited, a Company incorporated under the Indian Companies Act, 1956."

On the same date on 25.4.1991 the petitioner wrote to the State Bank of India requesting for amendment to make the guarantee to be in force till the last date of the agreed delivery schedule and that the guarantee amount is payable against beneficiary's receipt accompanied by beneficiary's statement certifying that accounted failed to comply with contract terms deleted. The petitioner sent a copy to the respondent also. On 1.5.1991 the State Bank of India wrote to the petitioner amending the guarantee issued on behalf of Universal Paper Export Company Limited. On 1.5.1991 the respondent wrote to the petitioner that the vessel State of Manipur is ready to take the cargo of about 2,000 MT. The shipment was to be made in St. John instead of Newcastle where an element of internal freight was involved. The respondent requested the petitioner to instruct Transchart to lift the cargo from St. John. On 2.5.1991 the respondent wrote to the petitioner enclosing the letter dated 1.5.1991 from the State Bank of India amending the guarantee. On 2.5.1991 the respondent wrote the following letter :-

"Reference to your order for 5000 MT Glazed Newsprint, please note M/s. Repap Sales Corporation, Canada has fixed following letter to you directly and as well as to STC, New York to be passed on to you.

Quote

Further to our fax DATED 3/4/1991 Miramichi will be manufacturing the glazed newsprint offered to STC through our agent M/s Universal Paper Export Co. Ltd., who have been co-ordinating the shipping arrangements with SCI/Transchart/Dyson and would advise you of the delivery schedule in accordance with the shipping arrangements made we look forward to clearly completion of their order. Unquote."

On 9.5.1991 the respondent informed the petitioner that the loading will be at Port St. John on S.C.I. vessel State of Manipur and vessel is expected to sail around 12th of May, 1991. On 9.5.1991 the petitioner wrote to the State Bank of India about the amendment of the bank guarantee. On 13.5.1991 there was a meeting of the Newsprint Purchase Committee of the petitioner wherein the Committee had noted "The Committee also noted a reduction of 1.5 US Dollars offered by Dais Howa and also in payment terms on C.A.D. basis by Universal Paper and decided to accept the same without disturbing their status in the comparative statement". At the end, the Committee had also appreciated the

action taken by the STC in breaking the Canadian Cartel.

8. On 15.5.1991 the STC had given the fax message to STC New York in the following terms :

"STC

New York

Dr. Hasija from Bhupinder Rai MM NP DIVN we had nominated SGS Montreal for inspection of the cargo to be shipped by M/s Repep Sales Corps-Canada for the glazed newsprint to be shipped per v. State of Manipur and also for the balance quantity to be loaded by them X all the inspection charges are to be borne by the sailors X their kindly intimate to M/s SGS Montreal if they shud present their bill for the inspection of the cargo to Universal Paper Export Co. Ltd., 119B mountain street Montreal Quebec, 121, Canada.

Para

Transchart has nominated VSL Chandidas to lift balance Qty X this may also pls be informed to M/s. Repep. PL confirm -"

Here also the petitioner had sent a note to SGS Office in India. It appears that on 17.5.1991 the vessel State of Manipur left the port at St. John in Canada. On 17.5.1991 the respondent wrote to the petitioner in the following terms :

"We would request you to kindly send an urgent message to M/s. SGS, Montreal, clearly certifying that the seller is M/s. Universal Paper Export Co. Ltd., 1198, Mountain Street, Montreal, Quebec H3G1Z1, Canada instead of Repap Sales, and the manufacturer is M/s. Repap Sales/Miramichi Mills. We would appreciate if this instructions are sent urgently as holding up all documentations. We would also appreciate if STC could ensure Transchart clearly instruct the vessel Chandidas to load cargo at port New Castle and firm u ETA/ETS, enabling us to release production order to Repap well in advance."

At page 90-981 of Volume I of the type set filed by the respondent we find the Bill of Lading dated 16.4.1991 showing that the cargo was loaded on board on that date. On 23.5.1991 i.e., pages 93 to 95 we find that the certificate or origin about the cargo and the invoices raised by the respondent to the petitioner showing the value of the cargo. At page 104 we find the certificate given by the manufacturer about the quality of the cargo. At page 96 we also see the quality with the list of cargo which is approved by the Montreal Board of Trade.

9. On 23.5.1991 the respondent wrote to the petitioner about the additional 5,000 MT glazed newsprint requesting the petitioner to note the H.O. and requesting the petitioner to release full order in the name of Universal Paper Export Co. Ltd., Mountain Street, Canada. At page 98 we see the certificate of quality and quantity issued by SGS (Society General Surveillance), which is also at page 101). On page 118 we see the letter from the respondent to the petitioner relating to 5,000 MT glazed newsprint. At page 119 we have the

communication from the respondent dated 27.5.1991 to the petitioner relating to the future shipment by the respondent. On 27.5.1991 the respondent wrote to the petitioner confirming the shipment of 2342.554 MT from St. John on board vessel State of Manipur and also stating that the respondent H.O. will be sending invoice for reimbursement cost for transportation from New Castle to St. John Port. On the same date petitioner sent a message stating that it would not bear any transport charges from New Castle Port to St. John. On 30.5.1991 the respondent presented the papers to the Royal Bank of Canada for collection of the money on C.A.D. through State Bank of India, Overseas Branch giving the summary of the invoice. On 31.5.1991 the respondent wrote to the petitioner about the transportation charges from New Castle to St. John. On 3.6.1991 the petitioner wrote to the Repep Sales Corporation through the respondent releasing the specifications for future shipment. On 4.6.1991 the respondent wrote to the petitioner about the shipment of the balance of 2658 MT out of 5000 MT 10. On 5.6.1991 the respondent wrote to the petitioner about the internal freight charges from New Castle to St. John for the shipment of 2342.554 MT.

10 & 11. On 6.6.1991 the respondent wrote to the petitioner about the future shipment of 5,000 MT.

On 10.6.1991 the respondent wrote to the petitioner about the balance quantity out of 5,000 MT. On 1.6.1991 the respondent wrote to the petitioner enclosing documents covering shipment of glazed newsprint. On 10.6.1991 the respondent H.O. sent a message to the petitioner about the balance of 2,668 MT to be sent.

12. On 11.6.1991 the respondent wrote to the petitioner that Miramichi Pulp & Paper Co. is proceeding with the production of balance 2668 MT in anticipation of the shipment by the end of June, 1991. The petitioner was also requested to instruct Shipping Corporation of India for making available the vessel. On 11.6.1991 the respondent again sent copies of documents covering the shipment of glazed newsprint.

13. On 12.6.1991 it appears that the vessel State of Manipur reached Bombay port. On 14.6.1991 the STC sent a communication to the respondent in the following terms :- 1s

"Kindly refer your various correspondence regarding change of supplier i.e. Universal Paper Export Co. Ltd., instead of Repap Sales Corporation, Canada. As desired, enclosed find herewith 3 copies each of contract No. STC/NP/Repap Sales 10. Canada 91-92 dated 30th March 1991 for supply of 5000 MT of Glazed Newsprint and Addendum No. 1 dated 15th May, 1991 to the above referred contract for supply of 5000 MT of Glazed Newsprint of 60 GSM plus/minus 4% in reels/width required as per STC's standard specifications duly signed by us as the buyer. You are requested to please sign both contract and Addendum as the seller and return 2 copies of each to us for our record."

By this letter the respondent was requested to sign the contract. This was done. On 17.6.1991 the respondent wrote to the petitioner about the shipment of

balance of 2688 MT. On 18.6.1991 the respondent Co. (Canada) gives a certificate of quality stating "we hereby certify that the quality of the order under the above contract No. is Glazed Newsprint Paper of 60 GSM +/- 4 PCT with not less than 70 PCT Mechanical Wood Pulp and conforms to the STC's technical specification for the glazed newsprint". On 19.6.1991 the petitioner gave a specification about the future shipment. On 20.6.1991 the petitioner gave Telex message to the respondent about the future shipment. On 24.6.1991 the petitioner sent a Telex message to respondent at Canada in the following terms :

"YR implementation of our order for Glazed NP as per STC's standard specifications X as UR aware we hv authorised SGS Canada to carry out per shipment inspection of NP at loading port at YR cost X notwithstanding certificate issued by SGS, Canada kindly note it if any duty higher than that is levied by Indian customs for this item over and above it meant for Glazed NP same shall be to YR account X RGDS."

On 25.6.1991 the respondent wrote to the petitioner about the balance 2658 MT. On 26.6.1991 the respondent wrote to the petitioner for payment of 163,97,87.80 US Dollars against invoice R.S. 2955 to R.S. 2984 which had fallen due. On 27.6.1991 the respondent's Delhi Office wrote to the petitioner in the following terms :

"We have received following telex message for you from our head office in Montreal, Canada :

Quote

Attention : Mr. A. M. Desai, General Manager, STC, New Delhi.

Regarding your order 1 of 1.4.1991 Glazed Newsprint. Reference is made to your fax of 24.6.1991 contents of which we do not understand. As you are aware, we have implemented your order strictly in accordance with STC's terms and standard specifications duly inspected and verified by SGS which had certified the same. Our terms of sale and contract with STC stipulates FAS or CFF delivery of Glazed Newsprint complying with STC's STC's standard specifications. Since we have fully complied with your terms and conditions and quantity we cannot accept any other charges like duties etc. which are to STC's Account and over which we have no control.

Unquote."

14. On 5.6.1991 the respondent wrote to the petitioner for the payment and informed the petitioner that if payment was not made the respondent would be charging interest w.e.f. 1.6.1991. On 28.6.1991 the petitioner sent a message to the respondent Delhi about the balance of shipment. On 1.7.1991 the respondent again insisted on the payment for the shipment made. On the same date 1.7.1991 the respondent sent a letter enclosing original invoice reflecting the internal freight cost from Port New Castle to port St. John. On 3.7.1991 the respondent New Delhi wrote to the petitioner about the balance of 2658 MT. Then

on 4.7.1991 the respondent wrote to the petitioner about the future shipment. On 4.7.1991 the petitioner wrote to the respondent New Delhi that at no time the petitioner had agreed to pay the internal freight charges. On 4.7.1991 the respondent wrote to the petitioner asking for payment. On 5.7.1991 the respondent wrote to the petitioner about the future shipment. On 5.7.1991 respondent from Delhi wrote to the petitioner about the future shipment of 2658 MT. On the same date 5.7.1991 respondent (Delhi) wrote to the petitioner about the lots to be sent to Madras instead of Bombay, as suggested by the petitioner. On 5.7.1991 the respondent reiterated the request for payment of the outstanding from the shipment made. On 8.7.1991 the respondent (Delhi) wrote to the petitioner in the following terms :

"Our bankers in Montreal, Canada, the Royal Bank of Canada have received a reply, which is quoted below, against their enquiry for non-payment of our invoices against the above mentioned shipment.

Quote

Documents not yet paid and delivered

Unquote

We understand that documents acceptance was given to the State Bank of India on 18th of June. We would Therefore request you to kindly advise us the real reason for the non-payment."

On 9.7.1991 the respondent Co wrote for payment. On 10.7.1991 the respondent (Delhi) wrote to the petitioner for payment. On 10.7.1991 the respondent wrote to the petitioner about the internal freight charges. Then on 12.7.1991 the STC sent a message about the rates for the future shipment of 2658 MT. On 16.7.1991 the respondent wrote to the petitioner stating that the respondent will be charging interest @ 20% per annum on the total outstanding payments. On 17.7.1991 the respondent wrote to the petitioner about the future shipment.

15. On 19.7.1991 the respondent wrote to the petitioner about the future shipment. On 19.7.1991 the petitioner wrote to the Collector of Customs about the import of Glazed Newsprint (2351.527 MT) against contract dated 30.3.1991 with Universal Paper Export Co. Ltd., Canada. It is stated therein that the petitioner had entered into a contract on 30.3.1991 and Addendum was sent on 15.5.1991. It is also stated therein the first consignment of 2351.527 MT had arrived in Bombay per vessel M.V. State of Manipur on 12.6.1991 and discharged the cargo at 61.D. What is stated further is, out of the above, a quantity of 430.686 MT were sold by it on High Sea Sale Basis to actual users like Messrs Bennett Coleman & Co. Ltd. Bombay, Hindustan Times, New Delhi, Chitralekha, Bombay, Mitra Prakashan Group of Publications, Allahabad and the balance quantity of 1911.868 MTs and that it had filed the Bill of Entry for self-clearance through our Handling Agent Messrs Kamat & Co., Bombay. However, the

appraising group did not clear our B/E until today. It is stated that on 27.6.1991 the Central Intelligence Officer searched its Bombay Branch and had recorded statements from the officers and seized the files but subsequently returned on 1.7.1991. It is also stated therein that the Collector of Customs wanted to test at random. The petitioner requested the Collector to allow clearance of the goods because they are needed by the actual users to whom the allotments had been made I.C. Sales. The petitioner also requested for issue of a detention certificate to get remission in demurrage on the cargo for about a month. On 22.7.1991 the respondent wrote to the petitioner about the opening of L/C.

16. On 25.7.1991 the Chairman of the petitioner wrote to the Chairman, Central Board of Excise and Customs in the following terms :

"We had imported Glazed newsprint manufactured by M/s. Miramichi Pulp & Paper Inc. Canada through M/s. Universal Paper Export Co. Ltd., Canada. This Canadian supplier had coffered us the glazed newsprint at a substantially lower prices than the suppliers from Scandinavia by taking the initiative to break the cartel which had been existing for sometime. Before placing this order, two reels of newsprint were air-freighted by them which were tested by the industry and found suitable.

However, when their first consignment reached Bombay, the Customs detained the consignment for taking samples and testing etc., probably on account of some complaint.

The samples as required by the Customs have already been drawn and we understand that the material has been tested. We would request you to please authorise release of the goods on provisional basis so that the newsprint does not deteriorate due to heavy rains in Bombay and we can distribute it to the actual users."

If there are any discrepancies found, they may be brought to our notice and we shall be happy to take appropriate action against the supplier."

The Chairman, Mr. H. C. Vaish, of the petitioner had made it clear that the cargo was obtained at a substantially lower price and in the circumstances the Collector of Customs should be directed to release the goods on provisional basis so that the petitioner could distribute it to the actual users. The Central Board had not taken proper action in this manner and its insaneness had impaired its image as an apex body in the Department.

17. On 29.7.1991 the respondent wrote to the petitioner for payment. On 30.7.1991 the respondent again wrote to the petitioner for payment. On 31.7.1991 the respondent wrote to the petitioner about the future shipment.

18. On 5.8.1991 the respondent wrote to the petitioner about the non-payment. On 6.8.1991 Ms. Rita Kunur, General Manager of the petitioner Co. wrote to Mr. Anil Bhardwaj, Central Board of Excise & Customs in the following terms :

"We are grateful for the courtesy extended when our Executive Director, Shri. Rajesh K. Vachher and the undersigned visited your office on 1st August, 1991.

We had discussed the case in detail with you and had requested that this material may please be released to us on provisional basis till the matter is resolved completely so that our actual users are not put to any hardship. Further, it has been brought to our notice by one of the users M/s. Bennet Coleman & Co. Ltd. who are one of the allottees of part consignment, that the material is deteriorating due to heavy rains in Bombay.

Our office in Bombay has informed that the decision to release this material heavy to be conveyed to the Customs Authorities in Bombay from CBEC, New Delhi. We shall be grateful if CBEC could convey their decision to Customs authorities so that goods are cleared and distributed expeditiously.

Further, if any information or clarification is required in this particular case, please feel free to get in touch with us."

The same request made on 25.7.1991 is made in this letter but again there had been no response from the Central Board of Excise and Customs.

19. On 12.8.1991 the respondent wrote to the General Manager, petitioner Co. about the future shipment. On 13.8.1991 the respondent from Canada wrote to the petitioner for payment. On 14.8.1991 the respondent office from Delhi wrote to the petitioner about the payment and also informed the petitioner that the balance quantity of approximately 2600 MT is manufactured and already delivered to Port of New Castle incorporating storage charges. The respondent emphasised by saying "Your lack of action on these two issues is creating heavy expenses which please take note will be billed to you." The respondent further stated that in future there will be no shipment on C.A.D. terms and all Canadian Newsprint suppliers would insist on L/C payment. On 21.8.1991 the Chairman of the petitioner Co. wrote to the Ministry of Finance, Department of Revenue in the following terms :-

"Kindly refer to your D.O. No. 394/130/91. Cus. (AS) dated 15th July, 1991 regarding the consignment of glazed newsprint imported from M/s. Universal Paper Export Co. Ltd., Canada. This consignment has been detained by the Custom since 12.6.1991.

Our Executive Director, Shri. Rajesh K. Vachher and General Manager Ms. Rita Kunur have had detailed discussions regarding the above consignment with Shri Anil Bhatnagar, Director and with Shri Tarun Roy, Member, CBEC.

We hope that the investigations have now been completed and the consignment can be released quickly. We are under pressure from the actual users for whom these goods have been earmarked and we have also yet to release payment to our foreign suppliers. Also, the glazed newsprint will deteriorate with storage in these monsoon conditions.

I shall be grateful for your intervention in this matter."

Here also, the respondent Co. is shown as the supplier. On 30.8.1991 the petitioner wrote to the respondent (Canada) in the following terms :

"Please refer to our contract dated 30.3.1991 read with addendum dated 15th May, 1991 for purchase in all of 10,000 MTs of Glazed Newsprint paper of the quality and specifications and on the terms and conditions specifically mentioned in the said contract read with the said addendum. Pursuant to the said contract the quantity already ordered of 2351.52 MTs arrived at Bombay by M.V. State of Manipur on 12th June, 1991.

2. As you know and are aware the said-consignment of the quantity already ordered of 2361.52 MTs on arrival at Bombay, has not been allowed to be cleared by the Customs Authorities, we understand, on the ground that the goods are not as per specifications of the contract. Inspire of our best efforts, we have not succeeded in persuading the Customs Authorities to allow the goods to be cleared.

3. You would appreciate that the action of the Customs Authorities in not allowing the goods to be cleared for home consumption is beyond the control of the Corporation and is one of the force majeure circumstances. Even though we are doing our utmost to get the goods cleared expeditiously through customs but they are still not convinced about the specifications of the goods. You may, Therefore, like to rush further information, technical data/certificates etc., regarding the specifications of the goods so that we could try to convince the customs authorities and have the goods cleared without further loss of time.

4. In so far as the balance quantity of approximately 2,600 MTs, which is said to be already manufactured and delivered to port of New Castles where it is said to be incurring storage charges, is concerned, please note that the Corporation will not be able to accept said quantity, unless the consignment which has already arrived at Bombay is cleared by the Customs Authorities as being of contracted quality and specification. Under the circumstances we deny our liability towards any alleged charges, expenses etc., in the matter. We further deny that we are liable to pay to you any penalty or other interest as alleged.

In view of the foregoing, please note that it will not be possible for the Corporation to clear the remittance towards price of the goods already arrived at Bombay and/or to nominate a vessel or to give any dispensation until the Customs Authorities allow the consignment to be cleared for home consumption."

On 5.9.1991 petitioner again wrote to the Central Board of Excise & Customs in the following terms :

"As desired by you over telephone this afternoon regarding consignment of Glazed Newsprint arrived at Bombay and shipped by M/s. Universal Paper Export Co. Ltd., Canada per vessel State of Manipur, this is confirmed that out of total quantity of 2342.55 MTs, 1420.97 MTs was earmarked for our Buffer Stocks.

Highseas Sales have been made to the tune of 921.589 MTs.

We enclose herewith a list of allottees on Highseas Sales basis to whom material has been allotted as per allocations issued by RNI."

The respondent wrote to the petitioner explaining the nature of newsprint shipped and how the consignment is in accordance with the specifications stipulated by the petitioner.

20. On 12.9.1991 the Collector of Customs, Bombay issued a show cause notice to the petitioner calling upon the petitioner to show cause as to why :

(a) the goods imported per M.V. State of Manipur IGM No. 1145 Line Nos. 25 to 54 should not be confiscated u/s 111(d) of the Customs Act, 1962 read with Section 8(2) of the Import & Export (Control) Act, 1947 and also u/s 111(m) of the Custom Act, 1962.

(b) the goods should not be assessed to duty at the rate of 55% + 50% + CVD Rs. 19,000/- MT + 10% + 1/8% Cess + 10% CVD under CTH 4810-21 as light weight coated paper.

(c) why penal action u/s 112(a) of the Custom Act, 1962 should not be initiated against them.

They should also state in their written reply as to whether they would like to be heard before the case is finally adjudicated in Case no reply is received within the above stipulated period the case would be decided on the basis of evidence on record without any further reference in this regard.

This Show Cause Notice is issued without prejudice to any other action that may be taken against them under the provisions of the Customs Act, 1962 or any other for the time being in force in India."

It is stated therein that a specific information was received by the Special Investigation Intelligence Branch that the cargo was containing mechanical wood pulp less than 70% and as such not eligible for clearance at concessional rate of duty under which the clearance was sought. According to the Collector, representative samples were drawn and they were sent to Central Pulp and Paper Research Institute, Saharanpur and the test report shows the content of mechanical wood pulp to be less than 70%. According to the Collector, that the goods imported did not appear to be newsprint and as such not permissible for import and Therefore, the goods are liable to confiscation u/s 111(m) of the Customs Act, 1962. It may be noticed that the Collector of Customs had drawn samples without any reference to the petitioner or the respondent.

21. On 20.9.1991 the petitioner wrote to the respondent (Canada) in the following terms :

"Kindly refer to your letter No. Upec/STC-233 dated 9th September, 1991 addressed to our Chairman regarding the subject matter.

We have forwarded a copy of your letter under reference and the technical details attached thereto to Member - CBEC for their information and decision. As soon as we hear from Customs, we shall let you know of the same.

In the meantime, please note that the action of the Customs Authorities in not allowing the goods to be cleared or allowing delayed clearance for home consumption, as already informed vide our letter dated 30th August 1991, is beyond the control of the Corporation and is one of the force majeure circumstances.

In view of the facts and circumstances of the case, we deny our liability towards any alleged charges, expenses etc., in the matter. We further deny that we are liable to pay to you any penal or other interest as alleged and also the price for the goods already arrived. Please also note that any penalty etc., levied on STC will also be to your account for goods already arrived at Bombay."

Without any attempt to get the clearance of the goods in a proper way by proper testing the petitioner called in aid the force majeure clause. The petitioner ought to have made a request to the Collector of Customs to take a sample in its presence and get it tested in its presence in public interest. The petitioner has miserably failed to act in a prudent manner. In my view, the petitioner was negligent and proper action is called for against the concerned officials for having acted in a thoroughly irresponsible manner. On 25.9.1991 the respondent Co. sent a Fax message from Canada to the petitioner in the following terms "Attention : The Chairman, State Trading Corporation of India We have now been informed that the customs house, Bombay, has issued a show cause notice to STC that the importation of glazed newsprint was not permissible under OGL and also not entitled for exemption under notification No. 28/87-CUS.

2. We had occasion to go through the show cause notice and all the alleged facts stated in the show cause notice are clearly wrong. Since we are sure of the actual composition of the mechanical pulp in the import of glazed newsprint, we would like to give our comments on the allegations contained in the show cause notice and also attempt a draft reply to the show cause notice on behalf of STC, which could be filed with the collector of customs, Bombay. If this show cause notice is not properly replied or not properly represented before the customs authorities without proper assistance from us. The collector may decide the case otherwise. Hence we are offering this help. The STC to overcome the present difficulty at our own cost.

3. The main contention raised in the show cause notice is that the content of mechanical pulp in the glazed newsprint is less than 70 per cent and for this the show cause notice relies on the test report of Chief Chemist, Central Revenue Central Laboratory, Delhi, Central Pulp and Paper Research Institute, Saharanpur and Indian Institute of packaging, Bombay. From the notice it is not clear whether the samples of paper was drawn in the presence of STC officials or their representatives. We understand that during the drawal of sample by the customs

authorities none of the officials or STC or their representative were present. Accordingly we are of the view that the drawal of the sample is wrong and any decision taken on the basis of the test report is also clearly incorrect. We Therefore request you to take up the matter with the Collector of customs, Bombay under intimation to us for fresh drawal of samples in our presence. This drawal of samples shall be as per procedure laid down by I.S. No. 1060 Part-I year 1966. After drawal of the samples and after getting the same tested from the Chief Chemist, Central Laboratories, Delhi, detailed reply will be drafted and sent to the STC for filing with collector of customs. Since the consignment is lying in the port for quite some time, we are very keen to file the reply as fast as possible, but one of the basic requirement of filing the reply is that a fresh sample is drawn as per procedure laid down in our/STC presence and tests conducted. This has to be taken up with the collector of customs on an immediate basis.

4. It will be very premature to file a reply to the show cause notice at this stage in the absence of proper sampling and testing. If the customs department rely on the samples drawn in our absence, any inference drawn on such test report cannot be used by the customs authorities against STC to vindicate our stand that the imported glazed newsprint did contain 70 per cent mechanical pulp, fresh drawal of sample is absolutely necessary.

5. Since there is no provision in the customs law to implead their parties upon adjudicating authorities, our comments/reply to the allegation in the show cause notice had to be sent to STC who in turn can file the same with the collector under intimation to us."

22. On 25.9.1991 the respondent Delhi Office wrote to the petitioner requesting the petitioner to write a letter to the Collector of Customs for drawing of a fresh sample and requesting the petitioner not to file any reply or document until the test is completed. On 26.9.1991 the petitioner wrote to the respondent (Canada). The petitioner has made a reference to the contract signed between the STC and Universal Paper Export Co. Ltd. The General Manager Ms Rita Kunur had stated that the Custom Authorities have sought to penalise the Corporation for violation of various provisions of the Customs Act. On 3.9.1991 the President of the respondent Co. with a Technical Expert and other representatives visited the office of the petitioner, met the Chairman of the petitioner. The details given by them were forwarded to the Custom Authorities but unfortunately the same did not convince the Custom Authorities. But General Manager would state "If you are agreeable to furnish P.D. Bond for 100% custom duty to the satisfaction of the Custom Authorities or in the alternative to give a counter P.D. Bond Guarantee to the satisfaction of the STC, STC may approach the authorities for necessary approval to allow the goods to be cleared on furnishing P.D. Bond to their satisfaction". It is further stated by the General Manager "Further, as a result of the consignment not being allowed to be cleared by the Custom Authorities, STC has suffered loss of business, profit and reputation for which you

are liable and would be held responsible." It appears that on 3.10.1991 the respondent moved an application before the Collector of Customs to intervene in the matter proceedings. On 4.10.1991 the respondent wrote to the General Manager Ms. Rita Kunur in the following terms :-

"This is with reference to your letter dated 26th September, 1991 enclosing a show cause notice No. P. No. SG/Misc-77/VKS/91 SIIB S/10-78/VKS/91 SIIB issued by the Asstt. Collector of Customs.

2. The main contention is the show cause notice is that the glazed newsprint under importation is not having a minimum of 70% mechanical wood pulp. Accordingly, the concessional rate of customs duty applicable under notification 28/87 is proposed to be denied.

3. There has been come oblique reference to the paper being known as light weight coated paper. There is also an allegation that STC could not have imported goods under importation under OGL but it required an import licence.

4. The allegation regarding the mechanical wood pulp content is based on the alleged test reports from -

(a) Central Pulp and Paper Research Institute, Saharanpur.

(b) Indian Institute of Packaging, Bombay.

(c) Chief Chemist, CRCL, Delhi.

5. We have once again checked up the matter with MIRAMICHI who confirms that the glazed newsprint exported through STC did contain 70% mechanical wood pulp. The so-called test reports relied on in the show cause notice are Therefore incorrect. We are sceptical about the method of sampling and also the test-results themselves. Your kind attention is invited to clause 11 of the contract No. STC/NP/REPAP Sales/Canada/91-92 dated 30.3.1991, according to which it was mandatory to draw samples by independent-surveyors of international repute appointed by the buyer and acceptable to us within 60 days from the date of discharge of the goods, at the port of destination. Any other method of drawing samples and testing of the same would have no binding effect on Universal Paper Export Co. Ltd. We have very serious doubts about the method of sampling and we have more serious doubts about the protocol followed by the laboratories/institutions while testing the paper. It is not known how STC or their agents agreed with the Customs for the drawal of the samples without informing Universal Paper Export Co. Ltd.

6. Instead of joining issue with STC on this issue at this stage, to vindicate our stand, we are taking appropriate steps to intervene in the adjudications proceedings before the Collector of Customs (Judicial) Bombay. We shall keep you informed about further development in this regard periodically. We once again assure you that the quality of the paper supplied to you as per the contract referred to above is strictly in accordance with the specifications given in the

contract and the entire issue is being born out of proportion in the media without any basis whatsoever."

The respondent made it very clear that the method adopted by the Customs was absolutely wrong and if the proper method had been adopted the truth will come out.

23. On 11.10.1991 the General Manager Ms. Rita Kunur sent a message to the respondent (Canada) that STC had decided to abandon the consignment.

24. On 12.10.1991 the same message is conveyed to the respondent.

25. It seems that the Newsprint Purchase Committee of the petitioner met on 4.10.1991, 11.10.1991 and 16.10.1991. About the testing of the newsprint it was decided by the Committee in the following terms :

"A point was raised about the testing of the material whether it should be carried out by the 2 Newspaper agencies nominated by RNI as is being done presently or the testing should be done by the Saharanpur Laboratory or Shri Ram Centre. It was decided that the testing can be done by the 2 Newspaper agencies nominated by the RNI, and on addition the sample will also be sent to Saharanpur test house which is a Government Institution. The Members of the INS stated that no norms had been laid down for testing the Newsprint and the same used to be standardised. For this purpose a sub-committee will be formed and they will suggest the norms to be laid down for testing of newsprint. This sub-committee will be formed by INS."

About the cargo sent by the respondent the decision by the Newsprint Committee is reflected in the following terms :

"The glazed newsprint imported from Universal Paper Export Co., Canada was seized by Customs at Bombay. The facts as reproduced below were brought to the notice of the Members of the Newsprint Purchase Committee with regard to above consignment.

"In the month of February, 1991, a tender was invited and the Newsprint Purchase Committee took decision on purchase of both standard and glazed newsprint. For glazed newsprint the lowest offer was of M/s. Universal Paper Export Co. Ltd., for goods to be manufactured by M/s. Miramichi Paper & Pulp Inc., Canada at US \$ 70 higher on FOB basis at landed cost, the second offer would have been US\$ 55.45 higher. Hence, the Newsprint Purchase Committee decided to place an order with M/s Universal Paper Export Co. Ltd., for initially 5000 MTs. This decision was taken keeping in view the price advantage and by way of abundant caution, the STC prescribed pre-shipment inspection by M/s General Superintendence Company (SGS) - an organisation of repute on this work.

The first consignment of this glazed paper weighing 2346 MTs was received at Bombay Port in June, 1991. This was subjected to a checking and test by the

Customs authorities who came to the conclusion that it cannot be classified as newsprint because the mechanical wood pulp content was less than 70 per cent. On the basis of this test, the Customs authorities have issued notice to STC and also to various members of the Newsprint industry who had bought this newsprint on high sea sales. The STC has with M/s Universal Paper Co. Ltd., provided in the contract itself the specifications which exist in the definition of newsprint in the Customs law. Moreover, this shipment was cash against document (CAD) and STC has not yet paid for this consignment. M/s Universal Paper Export Co. Ltd., are contesting the validity of the test conducted by the Customs authorities. STC has taken a position that as a prudent purchaser it took all precautions in this purchase which were possible. Now, as long as the Customs verdict stands, this consignment is not newsprint but light weight coated paper. The STC, Therefore, is under no obligation to either pay for this consignment or to take its delivery. The STC had put the suppliers on notice. The STC also is duty bound to protect its customers who were to take delivery of the consignment on good faith as high sea sales and STC will do so."

It will Therefore be seen that there has been no fault or negligence on the part of STC.

In consideration of the facts stated above, the Committee decided that the remaining quantity of 5000 MTs for which an order was placed on 13.5.1991 with the above firm should be cancelled and the balance quantity of about 2600 MTs which is yet to be shipped against the order placed on 30.3.1991 should also be cancelled. A mention was made about heavy demurrage that is being incurred on account of withholding of the consignment by the Customs authorities. Legal steps have already been intimated to save STC from any liability on account of the confiscation of these goods.

Subsequently, acting on legal advice, the goods were abandoned and NPC was informed about it at the meeting held on 16.10.1991. The NPC had then decided to cancel this quantity of 2346 MTs also."

26. It is significant to notice that the STC and the Newsprint Purchase Committee had acted in an arbitrary fashion because the petitioner had not ascertained by having a second test whether the first report relied on by the Custom Authorities is correct or not. No Explanation has been forth coming from the petitioner as to why this was not done and the petitioner was aware on 3.10.1991 that the respondent had sought permission to intervene before the Collector of Customs.

27. On 19.10.1991 the petitioner sent a reply to the show cause notice to the collector of Customs. The reply demonstrates how the petitioner had acted without being aware of the consequences of its reply. The petitioner admits in the reply that the Collector of Customs had not even given the copies of the test reports relied on by him. The petitioner would express shock at the report relied on by the Collector and yet the petitioner had not applied for obtaining a second test report on taking samples in its presence. It is very regrettable to notice the

stand taken by the petitioner for abandoning the consignment. In paragraph 15 of the reply to the show cause notice, it is stated :

"Since STC are at complete loss as to how such an incident could ever occur, and since STC's bonafide are totally honest and above-board, with a view to full co-operate with the Customs authorities and as a responsible Government Agency STC hereby declares that under the provisions of Section 23 of the Customs Act 1962, they relinquish their title to the said consignment of imported GNP irrevocably and that they will not make any claim in respect of the said imported consignment on the Customs Authorities at any time hereafter."

The petitioner had also admitted that it had made sales on the basis of I.C. Sales to actual users. The following are the details of the parties and quantities :

----- S. No.	Name of Party	Quantity
----- 1.	Maya Marrorama (H.F. Mitra Prakashan) 166.609	2. Dalal Street Investment (E/F) 25.594
3.	Saptahik Hindustan (H-J) Nandan (HM) (Hindustan Times)	89.706
4.	Film Fare (E-M) Bennet Coloman & Co. 37.010	5. Times of India Group (Famina (E.F.) 60.960
6.	Chitralkha, Bombay 50.807	----- 430.686
-----	-----	-----

The petitioner had pleaded that the Collector of Customs should not impose any penalty. One would expect a great public sector like the petitioner to act with circumspection and in accordance with law. Without any kind of awareness to its obligations the petitioner had first cancelled the contract and had relinquished the title to the consignment as if any unilateral part on its part would absolve the petitioner from its commitment to the respondent.

28. When the Collector of Customs did not comply with the request of the respondent the respondent moved the Bombay High Court for drawal of sample in the presence of the respondent. The Bombay High Court on 20.10.1991 allowed for redraw of samples in the presence of the respondent. On 6.11.1991 the respondent wrote to the petitioner in the following terms :

"Kindly refer to Contract No. STC/NP/REPAP Sales/10/Canada/91-92 dated 30.3.1991 by which you had placed an order with us for supply of 5,000 tonnes of glazed newsprint according to the specifications given in the contract. After conducting the necessary pre-shipment-inspection by SGS as nominated by you, 2342.554 tonnes was shipped by vessel nominated by you and the same is lying in the port of Bombay. In the meantime, a show cause notice has been issued by the Collector of Customs, Bombay to you on two counts, viz.

(a) that the mechanical wood pulp content of the imported glazed newsprint was less than 70% and Therefore

(b) the imported glazed newsprint did not satisfy the specifications for glazed newsprint.

2. While we, Universal Paper Export Co. Ltd., are concerned with regard to the contention raised at (a), viz., that the mechanical wood pulp content was less than 70%, we had earlier written a detailed letter to you to prove that the imported consignment did contain 70% mechanical wood pulp.

3. You may also recall in this connection that you have informed us that you have abandoned the consignment now lying in the Bombay Port for reasons better known to you. In as much as we are sure about the quality of the glazed newsprint shipped, we wanted to vindicate our stand before the Collector of Customs, Bombay and since he was not permitting the same, we took the extreme step of filing a writ petition before the Hon"ble High Court of Bombay pleading that we should intervene in the adjudication proceedings before the Collector of Customs, Bombay. After hearing both sides, the Bombay High Court passed the following judgment :-

"Mr. Desai on instructions from the Respondents states that the petitioner shall be allowed to intervene in the adjudication-proceedings. Any further testing or retesting of the goods at their instance will be at their cost. Certified copy expedited and out of turn. Petition disposed of."

4. We are now in a position to assist you and the Collector of Customs in coming to the right conclusion regarding the quality of the paper. While the matter is still pending before the Collector of Customs and when our intervention application has been allowed by the Bombay High Court, we have now got a communication that you at trying to invoke and enforce the bank guarantee for US\$ 1,75,000. As stated by us earlier, the quality and specifications of the paper exported by us to you fully conform to the specifications given in the contract and you have not taken any steps in terms of para 11 of the contract for making any formal claim against us with regard to the quality. No samples have been drawn in our presence by you, nor the same has been got tested by any international agency as per the terms of the contract. While we are put to extreme financial difficulties by you not making any payments for the glazed newsprint exported to you, your recent decision for enforcement of the bank guarantee is like the proverbial "last straw on the camel's back". Needless to say, the State Trading Corporation is an instrumentality of the State and there should be fairness and not arbitrariness in each and every action of STC. STC is not any other trading company manned by private individuals but has been created by a specific provision of law and is supposed to act in the larger public interest. While the matter is still sub-judice before the Collector of Customs, we are really not aware of the reasons for your abandoning the goods before the Collector of Customs and on top of it to enforce the bank guarantee at this stage which does not seem to be proper. If there is any further need, we are prepared to extend the date of expiry of bank guarantee and our only request at this juncture is not to enforce the bank guarantee till at least the Collector of Customs disposes of the matter in not till the conclusion of the arbitration proceedings which may commence if the circumstances so warrant. We would Therefore request you to issue immediate

instructions to the State Bank of India for withdrawing your letter of enforcement of bank guarantee, under intimation to us."

The respondent expressed its confidence to assist the petitioner in the matter before the Collector of Customs. In the letter the respondent had also stated "No samples have been drawn in our presence by you nor the same has been got tested by any international agency as per the terms of the contract". Clause 11 of the contract reads as follows :

"The Buyer reserves its right to lodge quality and/or quantity claims on the Seller within 60 days of the date of discharge of goods at the port of destination. Samples will be drawn by independent surveyors of international repute, appointed by the Buyer and acceptable to the Seller, whose decision shall be final and binding on both the parties.

The following rules to be observed in respect of such claims.

- 10% of the Newsprint to be kept intact and be made available for inspection till 30 days after a claim has been filed.
- Samples to be drawn out of at least 10% of the number of reels available. It must be stated from which reels the samples have been taken.
- Samples to be drawn by an independent surveyor of repute. The samples shall be sealed and sent to the Seller. Newsprint to be considered as correctly delivered if the weight per square meter does not exceed or fall below the weight purchased by more than 4 (four) per cent. Test of samples to determine the correct weight or grams per square meter of paper to be made under atmosphere relative moisture of 65%."

Even this normal procedure has not been followed by the petitioner. It appears on 6.11.1991 the petitioner wrote the State Bank of India for invocation of the Performance Guarantee by the respondent. On 7.11.1991 the respondent instituted a suit in this Court for permanent injunction praying for the following reliefs :

"(a) grant a permanent injunction restraining the State Bank of India (Second defendant) from making any payment against or under the said bank guarantee No. 08/GUA/16/4013 dated 24.4.1991.

(b) grant a permanent injunction restraining the STC (first defendant) from receiving or demanding any payment against or under the said bank guarantee.

(c) grant leave under Order 2 rule 2 of the code of Civil Procedure, 1908 to the plaintiffs for bringing any other/further proceedings against the defendants;

(d) direct the first defendant to bear the costs of the present suit and pass any further order or orders as may be deemed fit and proper."

In December 1991 reply was filed by the petitioner to the application for injunction admitting that the petitioner entered into a contract with Universal

Paper Export Co. Ltd. on 30.3.1991.

29. On 5.12.1991 fresh samples had drawn by the Asstt. Collector of Customs in the presence of the respondent and the test report showed that the samples contained 70% of the wood pulp. In other words, the consignment sent by the respondent was in accordance with the specifications sent by the petitioner and as per the quality certificate given by the Manufacturer which was also approved by the Board of Trade Montreal and the assumption on the part of the Collector of Customs in the show cause notice was absolutely unwarranted and arbitrary and without any basis.

30. On 16.12.1991 the petitioner invoked the Performance Guarantee given by the respondent.

31. On 11.3.1992 the respondent wrote to the petitioner for payment. On 23.4.1992 the respondent wrote to the petitioner referring to the fact as to how the respondent was very careful even at the stage of manufacturing to maintain the quality and to conform to the specifications given by the petitioner. In paragraph 2 of the letter it is stated :

"Before the shipment of this quantity of Glazed Newsprint, and in accordance with the terms of the contract, SGS Supervision Services Inc., Canada, the internationally reputed surveyors appointed by STC were present in the factory of Miramichi Pulp & Paper Inc., when the Glazed Newsprint in question was being manufactured and after satisfying themselves about the quality of the Glazed Newsprint in question they certified that the Glazed Newsprint manufactured by Miramichi and supplied by Universal Paper Export Co. Ltd., (hereinafter referred to as Universal Paper) was strictly in accordance with the terms of quality stipulated in the contract. This certificate was also sent Along with other documents."

In para 5 it is stated :

"After the receipt of the letter from STC about the show cause notice issued by the Bombay Customs to them, we reverted back to SGS Supervision Services Inc. and sought clarification vide our letter dated 7.10.1991 (copy enclosed) and sought their comments on the test results of the institutions mentioned in the show cause notice. SGS Supervision Services Inc., vide their letter dated 16.10.1991 (copy enclosed) had reaffirmed that the quality of the Glazed Newsprint supplied by Universal Paper was strictly in accordance with the terms of the contract and that the test results and the method of sampling by the Customs are open to question. In fact based on their letter only we requested for the drawal of the fresh samples by the Customs which had to be enforced through the Bombay High Court."

32. It is interesting to notice how the respondent acted in a very prudent way consistent with trade practice to vindicate its rights while the petitioner had acted in a very arbitrary manner. If the respondent had not taken necessary steps in

this behalf it would not have been possible for the Collector of Customs to come to a correct conclusion. It is to be appreciated that the Collector of Customs, who was In charge of the matter, had considered the reports received subsequently. In paragraph 6 of the letter, the respondent had stated :-

"Be that as it may, seeing the attitude of STC in not defending the show cause notice for taking help from Universal Paper, Universal Paper had no option but to intervene in the matter before the Collector of Customs, Bombay and since the authorities were not allowing them to intervene on their own, they had to approach the Hon'ble High Court of Bombay to allow them to intervene in the proceedings and also order the drawal of fresh samples in the presence of Universal Paper. Pursuant to the Judgment of the Hon'ble High Court of Bombay, Customs authorities drew samples of the Glazed Newsprint imported by STC and lying in the Customs area of Bombay. It appears that these samples from each of the 30 lots were sent to the same three institutions to which originally the alleged representative samples were sent. Universal Paper also requested the Collector of Customs, Bombay vide their letters dated 28.11.1991 and dated 2.12.1991 to pose the following specific queries to the institutions while testing the samples :

(a) Whether the paper under consideration is an Art Paper, Chromo Paper, Marble Paper, Flint Paper, Poster Paper, Stereo Paper ?

(b) What is the percentage by weight of the Mechanical Wood Pulp content (ground wood pulp content) ?

(c) While giving the report regarding the percentage by weight of the Mechanical Wood Pulp content the protocol followed by the testing authorities in calculating the percentage by weight may also be furnished.

(d) What are the tolerance limits specified in International testing procedures which determine the percentage by weight of Mechanical Wood Pulp ?

Universal Paper also requested the Assistant Collector that they be furnished copies of all the test reports of (i) By Chief Chemist, Bombay, (ii) Chief Chemist, New Delhi, and (iii) Central Pulp and Paper Research Institute, Saharanpur as well as copies of the Bills of Entry filed for the 30 lots covering import of glazed Newsprint by the STC.

7. Universal Paper even today is not aware as to when the samples were sent to the institutions nor whether the queries posed by Universal Paper were posted by the customs to the institutions in question. In any case Universal Paper have now received the test reports from the three institutions viz.,

(a) Chief Chemist, CRCL

(b) Central Pulp & Paper Research Institute, Saharanpur

(c) Indian Institute of Packaging, Bombay

Copies of these test reports are enclosed. Our analysis of these test reports are as under :

(a) All the three test reports are clearly stating that the imported glazed newsprint is not coated paper and is other than art paper, chromo paper, poster paper, etc. Further the test report from the Chief Chemist, Central Revenue Control Laboratory indicates that the percentage of mechanical wood pulp after applying the tolerance is well above 70%. In fact even without applying any tolerance atleast in five cases the mechanical wood pulp content was 70% and above and after applying the tolerance which is to be allowed according to the international standards, Indian standard, as also the Report itself, all the samples are found to contain more than 70% wood pulp.

(b) Coming to the report sent by Central Pulp & Paper Research Institute, all the samples are found to contain more than 70% mechanical wood pulp after applying the tolerance. In fact even without applying any tolerance twelve samples are stated to contain more than 70% mechanical wood pulp. These test reports Therefore, clearly indicate that the glazed newsprint supplied to STC is strictly in accordance with contractual terms between the STC and M/s Universal Paper even according to the test conducted by the Indian Customs through their own laboratory and other laboratories designated and chosen by them. It is our contention that these reports are very much on the conservative side and if proper procedures are adopted the percentage of mechanical wood pulp content would be seen more than what is indicated in these reports.

(c) Even from the above analysis it is very clear that the Glazed Newsprint supplied by us to STC vide contract No. STC/NP REPAP SALS/10/CANADA 91-92 dated 30.3.1991 was strictly in accordance with the quality specifications stipulated in the contract."

The respondent made it clear that if there is any dispute regarding the quality the petitioner should have sought resolution of the dispute in accordance with their terms of the contract and the petitioner cannot rely upon the test report of the sample drawn in the absence of the respondent and if the Custom authorities had taken the view, which was not correct in law, that will not be binding on the respondent. The respondent also brought home the point that the petitioner ought to have taken the appropriate steps for testing the paper after drawing sample in the presence of the respondent and should have got it tested by institutions of international reputation. It also stated that the Custom authorities have accepted the test reports from the institutions to which Custom authorities sent the samples and it is beyond doubt that the petitioner is guilty of negligence. The respondent made a demand on the petitioner to pay the value of the cargo and also pay the respondent all expenses and also damages.

33. On 27.4.1992 the respondent wrote to the petitioner about the balance of 2658 MT asking the petitioner to open an irrevocable L/C.

34. On 3.6.1992 the respondent wrote to the petitioner about the internal freight

charges from Port New Castle to Port St. John.

35. On 14.7.1992 the petitioner wrote denying the liability to pay internal freight charges.

36. On 15.7.1992 the Custom authorities tentatively decided to release the consignment in view of the fact that the results of the test conducted by the Department on the first, third and fourth stage conform that the declaration given in the Bill of Entry. inspire of it, the petitioner stood by its earlier decision, to abandon the title to the goods irrevocably. It is very unfortunate that the petitioner should have resorted to such a posture totally oblivious to its obligations under the contract and its duty to the public. The reason for the decision makes it clear that the petitioner thought it was not answerable to anybody and it could act is own whims and fancies. The petitioner had the audacity to write to the Committee on Public Undertakings on this aspect in the following terms :-

"In the event of withdrawing decision of abandoning, problems envisaged were that material have been imported at a higher price and after payment of custom duty B.P.T. charges etc., disposal could have been impossible because the quality had deteriorated and internal price had dropped substantially and the goods were older than 3 months. It was, Therefore, felt that under the given circumstances to maintain the stand of abandonment was economically and operationally advisable. In the light of above, the matter was considered in E.C. meeting held on 27.9.1992 (after decimalization of import of newsprint from April 1992 NPC automatically got dissolved) and it was decided by E.C. that earlier decision of STC of abandonment of goods be maintained."

37. On 22.7.1992 the Collector of Customs (Jdl.) passed an order dropping all further proceedings. The Collector held "Thus, keeping in view of the above facts that the percentage by weight of mechanical wood pulp varies with the respective testing methods and the test results on fourth stage categorically conforms to the declarations in the Bills of Entry all the consignments are eligible for the benefit of Notification No. 28 of 87 CUS, for concessional rate of duty. Therefore, there is no ground whatsoever to sustain the charges alleged against them in the show cause notice dated 19.9.1991. However, unfortunately for reasons best known to STC, possibly as a panic reaction in the letter dated 19.10.1991 they have irrevocably relinquished their title to the said consignments in terms of Section 23(2) of the Customs Act, 1962. "By letter dated 22.7.1992 petitioner confirmed the decision in abandoning the goods, which is noticed by the Collector.

38. On 6.8.1992 the respondent wrote to the petitioner making a demand for the payments.

39. On 3.9.1992 the respondent wrote to the petitioner again for payment stating that in view of the fact that the Collector of Customs had dropped the proceedings the petitioner should make the payments. On 17.9.1992 the

petitioner wrote to the respondent stating that it cannot comply with the demand of the respondent. It is stated that the petitioner as a responsible Public Sector Undertaking had no option but to abandon the consignment which according to the Customs was not glazed newsprint having mechanical wood pulp more than 70% by weight of total fibre content but was light weight coated paper. It is really amazing that the petitioner should give unto itself a certificate that it is responsible Public Sector. What is stated in paragraph 5 of the letter makes the position worse. It is as follows :

"You are also aware that instead of making available to the Corporation certain test reports which were subsequently obtained by Customs department at your instance, an order dated 22.7.1992 was passed by the Collector of Customs (Judicial), Bombay whereby the original show cause notice which was issued to the Corporation was allowed to abate/was discharged. As such, today the Corporation has been left in the dark as to the correct specifications or otherwise of the said goods in terms of the contract, between the Corporation and yourselves. The Corporation cannot presume as a responsible Public Sector Undertaking either about the contents or the correctness of the said subsequent test reports or that the said subsequent test reports from the only basis on the strength of which the said show cause notice was allowed to abate/discharged. As far as the Corporation is concerned, they reiterate their stand that serious allegations were made in the show cause notice dated 12.9.1991 issued by the Customs Department with regard to the goods shipped by you to the Corporation. The Corporation's subsequent actions were all taken reasonably and in the public interest."

It is stated in paragraph 8 that :

"Suffice to state however, that we have always taken all reasonable steps prior to the show cause notice dated 12.9.1991 to clear the goods supplied by you to the Corporation, on the reasonable expectation and belief that the same conform to the contract specifications. It is, Therefore, completely wrong to state in your letter dated 3rd September, 1992 that once the Corporation's problems with the Customs arose, the Corporation took that an excuse for not effecting payment to you."

The petitioner denied its liability and made a claim from the respondent of 3,33,545.17 US Dollars.

40. On 9.11.1992 the respondent wrote to the petitioner that the Canadian High Commissioner had informed the respondent that they had received advice from the Commerce Minister that instructions had been sent to petitioner to release immediately all outstanding amount to the respondent. The respondent exhorted the petitioner in the following terms :

"I am sure, Mr. Chairman, you would not relish such a accusation directed towards you or any of your present officials. Accordingly, I would urge you to clear completely and urgently our account in all respects and prevent the future

tarnishing of STC's name internationally. I remind you that today India's trade practices are being questioned around the world. Responsibility for such negative feelings must rest squarely on people in the STC for the long term harm done to the country. Accordingly, we trust you will take remedial actions immediately."

But nothing would move the petitioner which is like Sphinx. On 11.11.1992 the respondent Delhi Office wrote to the petitioner on the same terms.

41. On 4.1.1993 the respondent Delhi Office wrote to the Chairman of the petitioner that the petitioner had chosen to disregard the directives from the Ministry and Chairman had done grave harm to the image of the STC by his arbitrary action and gross high handedness by not honouring the contractual obligations to the respondent.

42. On 29.4.1993 the Committee on Public Undertakings, constituted by the Lok Sabha and the Rajya Sabha, had gone into this aspect of what is called "Universal case". The conclusion of the Committee reads as follows :

"1. The Committee's examination of import of newsprint by STC has revealed gross administrative negligent, grave irregularities, serious lapses and malpractices in the purchase of newsprint from foreign suppliers. Contracts of newsprint purchases regarding few such cases are dealt with in the succeeding paragraphs.

2. In one case, STC entered into a contract with Universal Paper Export Co., Canada initially on 30.3.1991 for supply of 5,000 MTs of glazed newsprint and again on 15.5.1991 for supply of another 5,000 MT glazed newsprint. The first consignment of about 2300 MTs of glazed newsprint supplied by the Universal Co. arrived at Bombay port on 12.6.1991. The first stage results of samples tested in the departmental laboratory in the Bombay Customs House was satisfactory. Customs however issued a show cause notice to STC on the basis of subsequent test result of samples sent to the three laboratories which indicated that the goods did not tally with the declarations made in the Bills of Entry. At this state STC abandoned the consignment. The retests conducted on the direction of Bombay High Court at Supplier's intervention however revealed that the consignment conformed to the declarations made. Even at this stage STC maintained their original decision to abandon the goods. The total cost involved in this case taking into account all demands of the supplier is stated to be approx. Rs. 20 crores. The Committee are distressed to find that handling of this case by various organisations left much to be desired.

3. The Committee are shocked to find that the decision taken by the Chairman & Mg. Director of STC to abandon the goods supplied by Universal Co. was not preceded by any systematic evaluation of the commercial and legal implications of all the options available to STC. The Committee are distressed that there was failure on the part of the CMD to place this matter before the Board of Directors and to obtain its decision in a case such as this which involves not only crores of rupees but the image of the country as well. The circumstances of this case

indicated below clearly shows that there was unmistakable failure on the part of the CMD to exercise care and caution in deciding the course of action.

- The fact that STC was satisfied about the correctness of the specifications contained in the pre-shipment inspection certificate of SGS who was an internationally reputed agency.
- Substantial low price of the glazed newsprint supplied by the Universal Co. to break the cartel which had been existing for long.
- Non-clearance of the material under provisional duty bond-even after the opinion of the solicitor Shri Pockhanwalla, who had opined in clear terms that even if PDB is furnished, STC still had the option to contest the case before the appellate authority in customs, failing which they could also go to the Supreme Court.
- STC's knowledge about rival suppliers" motivated publicity campaign in the national press having lost the captive market.
- The view of STC's counsel that abandoning the goods will be burning the bridges and that automatically does not absolve STC from the liability.
- That the newsprint supplied by Universal could not in any case be the expensive Light Weight Coated paper at the price at which STC had contracted the newsprint.

The Committee are surprised to notice that STC did not think it proper though there was a valid ground for STC to contest the show cause notice and to get retest of samples done by the customs. According to the Ministry of Commerce also, the case suffered because of gross administrative negligence on the part of STC which acted in a totally irresponsible and professional manner. The Committee are in agreement with the Ministry that by inefficient handling of the case STC has not only brought upon itself considerable financial loss but also discredit to the country. In Committee's view, the CMD being head of the Institution and responsible for taking all important decisions himself is to be blamed. They do not appreciate the shifting of the burden on his part on the officers who are junior to him. The Committee are of the firm view that safeguarding the commercial interests of public sector undertaking is the prima responsibility of the Chief Executive any person who fails to discharge his duties in this regard has no normal right to continue and more so when it is a commercial undertaking like STC.

4. The Committee are also distressed at the role played by the three laboratories in this case viz. (I) Central Revenue Control Laboratory, New Delhi, (II) Indian Institute of Packaging, Bombay and (III) Central Paper and Pulp Research Institute, Saharanpur. All the three laboratories initially reported that the samples tested by them did not conform to the declarations made in the Bill of Entry. When samples were sent again for retesting all the three laboratories surprisingly indicated that the goods conform to the specifications. Considering

the test results at the first, third and fourth stages the Committee cannot but conclude that there appeared to be a definite bias in the initial test reports of these laboratories reasons for which are not known. What dismays the Committee is that the Ministry of Finance (Deptt. of Revenue) have also not thought it fit to enquire into the reasons for contradictory test reports of those three laboratories inspire of the fact that their original test reports necessitated seizure of cargo with inevitable consequences.

5. The customs and the Deptt. of Revenue have also not acquitted themselves creditably. It is regrettable that the credentials of the informer was not verified nor the information provided by him properly ascertained by the different wings of customs. The Revenue Secretary was frank enough to admit that there was lack of coordination in this regard. Evidently, sufficient care and caution was not exercised nor the common sense used by the Deptt. of Revenue in this case even when the facts and circumstances of import of newsprint from Universal Co. were apprised by STC. The Committee find that this is a fit case which require a thorough probe to be made into the various aspects of the case without further loss of time. They recommend that the matter be referred to CBI and they be intimated of the fact of such reference within 3 weeks from the date of presentation of this Report."

43. It may be noticed that when the Commerce Ministry had asked the STC to make payment to the respondent it appears that the STC was placing the matter before the Board and in its meeting held on 7.3.1993 the Board decided that it was a commercial transaction by the STC with the foreign supplier which ought to be settled within the terms of the contract. The Board considered it appropriate to reopen the dialogue with the Company but nothing was done. The Parliament Committee asked the STC about the present position. They reply by the STC was as follows :

"The contract provides for a clause of arbitration in case of dispute but M/s Universal has not taken recourse to this clause of arbitration for establishing their claim. This matter was considered in the meeting of the STC Board on 17.3.1993 and it was decided that as it was a commercial transaction between STC and Universal it ought to be settled within the terms of the contract. It was also decided to reopen the dialogue with the Universal to clarify the position of all concern and to keep the Government inform of his stand taken."

44. Therefore, it is clear that the petitioner had accepted the position that the respondent was the supplier, that there was a contract and there was an arbitration clause for the adjudication of the disputes between the parties.

45. On 14.5.1993 the respondent wrote to the petitioner claiming the amounts. On 22.7.1993 the petitioner wrote the respondent that inspire of frustration of the contract the arbitration clause survives for settlement of any dispute as was also mentioned on 12.5.1993 when a representative of the respondent met the petitioner. The petitioner quoted clause 16 of the contract relating to the

arbitration. The petitioner also stated that any legal action initiated by the respondent will be at the risk of the respondent and the petitioner reserved its right to file counter claims. Therefore, as on July 1993 the petitioner was aware of the arbitration clause and wanted the respondent to invoke the arbitration clause.

46. On 20.10.1993 the respondent wrote to the petitioner making its claims before going for arbitration.

47. On 4.11.1993 the petitioner again wrote to the respondent to go for arbitration.

48. On 2.2.1994 the respondent filed its claim before the Indian Council of Arbitration. The petitioner filed its reply and counter claims before the arbitrators and the arbitrators had entered upon reference and the matter was being considered by the arbitrators.

49. It is in the above back drop, as it were, the allegations in the petition OMP. 19/95 have to be considered.

50. It is stated in paragraph 20 of the petition that the Purchase Committee did not give the contract to the respondent. The newsprint was a canalised item till 31.3.1992. The Central Government by order dated 31.10.1983 reconstituted the Newsprint Purchase and Sale Committee. This Committee has the exclusive power and no one else had the power to give contract in respect of newsprint. In paragraph 26 it is stated that the contract was not entered into between the petitioner and Universal Export Co. Ltd. on 30.3.1991. The Universal Export Co. Ltd. is an outsider. The company manager and maneuvered and manipulated to enter into the agreement. The company played fraud on STC. The Newsprint Purchase Committee has not awarded the contract to Universal Paper Co. Ltd. and Therefore, the persons who signed the agreement had no authority to bind State Trading Corporation. In paragraph 29 it is stated that the contract entered into between the Universal Paper Export Co. Ltd. and State Trading Corporation is ultra virus and void ab-initio because the said contract never came before the Newspaper Purchase Committee. In paragraph 30, it is stated that STC cannot be estopped in establishing that there was no authority in the persons who signed the contract on behalf of the State Trading Corporation In paragraph 32 it is stated that the Universal Paper Export Co. Ltd. has knowledge of all the facts and in paragraph 31 it is stated that the Articles of Association are open to all who are minded to have any dealings whatsoever with the Co. The contract was awarded to Repap Sales Corporation. There is no valid and legal deed of transfer from Repap Sales Corporation to the respondent. In paragraph 40 it is stated that an act which is ultra virus the company is null and void and it is outside its statutory authority. The Board of Directors of the Company is not authorised to act. The arbitration agreement is also invalid and ultra vires.

51. The respondent filed a detailed counter repudiating the allegations and in view of the events already given it is not necessary to recount the facts set out in

the reply .

52. On the same allegations, Suit No. 1091/95 was filed for the reliefs, as stated above. The allegations in the petition and in the suit are the same and, Therefore, the allegations need not be repeated. The defendant Universal Paper Export Co. Ltd. filed its written statement and the allegations in the reply in OMP. 19/95 and the averments in the written statement are almost identical and I, Therefore, do not propose to refer to the pleadings in detail.

53. On the same allegations OMP. 112/95, as stated above, was filed on 13.10.1995 for a declaration that the arbitration agreement dated 15.5.1991 is not in existence, and it is not valid and legal.

54. In view of the fact that the allegations are identical, I have decided to dispose of all the three matters by this common judgment.

55. In the context of the pleadings two vital issues would arise for consideration which would dispose of the suit. Accordingly, by virtue of the provisions of Order 14 Rule 2 of the CPC I frame the following two issues :

Issues :

1. Whether the proceedings initiated by the plaintiff are frivolous, vexatious and/or abuse of process of Court and the pleadings of the plaintiff are liable to struck off ?

2. Whether the suit is in time ?

56. The learned Senior Counsel Mr. Ram Panjwani for the State Trading Corporation formulated his points thus : (1) State Trading Corporation is performing statutory functions and Therefore, if the act done by the Corporation is beyond the Statute, it is open to the State Trading Corporation to challenge its own actions. (2) the contracts dated 30.3.1991 and 15.5.1991 are against the statute and Therefore, were valid and void; (3) the proposition is well settled that there is no estoppel against statute and Therefore, the STC is well within its rights to contend that the contracts are against the statute and Therefore, the respondent cannot proceed against the petitioner before the Indian Council of Arbitration; (4) the contract is hit by Section 23 of the Contract Act, Therefore, void; (5) till the 22nd of October 1994 the State Trading Corporation was not aware of the illegality and it cannot be said that the STC had acquiesced in the arbitration proceedings; and (6) the respondent had played fraud on the STC and there was no contract between the petitioner and the respondent.

57. Mr. Laxmi Kumaran, learned Counsel for Universal Paper Export Co. Ltd., formulated his submissions in the following terms :

"1. The Newsprint Purchase Committee is not a statutory body, STC is not performing any its statutory functions;

2. Import Policy itself is not statutory;

3. The respondent cannot be said to have any knowledge about the internal management of the STC and Therefore, the STC is bound by the contract signed by the persons mentioned in the contract and the learned Counsel relied upon the doctrine of indoor management and doctrine of ostensible authority;

4. The STC has not given any particulars about fraud and the petitioner has failed to prove the case of fraud;

5. The suit 1091/95 is not maintainable and the validity of the contract cannot be challenged in a suit;

6. The suit and the petitions are barred by time; and

7. That the proceedings initiated by the STC are vexatious, frivolous and an abuse of process of Court and the pleadings of the STC should be struck off and they are liable to be dismissed in limine, in the light of the Report by the Committee on Public Undertakings.

58. In the contract dated 30.3.1991 the terms are mentioned and clause 16 provides for arbitration.

59. On 15.5.1991 there was an Addendum No. 1 with reference to additional quantity of 5,000 MT of Glazed Newsprint. It is stated at the end of the Addendum "The present addendum forms an integral part of contract dated 30.3.1991".

60. On 16.7.1991 the petitioner wrote to the respondent conveying its acceptance to the proposals made by the respondent in its letter dated 3.7.1991. Here also it is stated that this letter would form an integral part of the contract dated 30.3.1991 and Addendum No. 1 dated 15.5.1991, to the above referred contract.

61. The petitioner has filed the letter dated 26.9.1973 from the Secretary of Ministry of Information & Broadcasting to the Chairman, STC reconstituting Newsprint Purchase Committee. The petitioner also filed a letter dated 31.10.1983 from the Ministry of Commerce to the STC reconstituting the Newsprint Purchase Committee.

62. I shall first take up the statutory nature of duty of the STC through the medium of Newsprint Purchase Committee. The New Trade (Impex) Policy 1992-93 Vol. I give an indication of the nature of the duties of the STC and the Newsprint Purchase Committee. This policy was produced by the learned Counsel for the respondent. At the time when the policy was produced, Mr. Ram Panjwani, learned senior Counsel submitted that it is a confidential matter and it is not known how the respondent could produce the policy. The matter is published by Anupam Publishers and there is no question of any law made by the Govt. of India being confidential. Therefore, I permitted the learned Counsel for the respondent to take me through the book. In Chapter IV under the caption Canalisation of Imports, Paragraph 53 is relevant which deals with Imports.

Distribution and Pricing of Canalised Items. Sub-para 3 reads as follows :

"(3) Imports, pricing and distribution of the canalised items appearing in Appendix 5, Part-B will be governed by the connected policy of the Government in respective Ministries as detailed therein. No other person will be eligible to import them unless otherwise specifically licensed by the Chief Controller of Imports & Exports, New Delhi."

At page 199 of the Book we find Appendix 5-Part B and the Heading is as follows :

Petroleum products, fertilisers, drugs, feature films/vide films, oil/seeds, cereals, newsprint, fatty acids and acid oils.

In Clause 6 Newsprint is mentioned. The same reads as follows :

"6. In the case of newsprint, including baggies based newsprint, import will be made only by the State Trading Corporation of India (STC) under Open General license on the basis of foreign exchange released by the Government in its favor Imports, distribution and pricing will be made by the STC as per the connected policy for the Government in the Ministry of Information and Broadcasting."

63. The learned Counsel for the respondent also produced the Government of India (Allocation of Business) Rules. The Ministry of Information and Broadcasting is allotted of allocation of Newsprint and Newspapers. Ministry of Information and Broadcasting had issued public notice in terms of para 6 of the Appendix 5 Part B to the Import and Export Policy for April 90 to March 1993. The Govt. of India in the Ministry of Information and Broadcasting hereby informs the Newsprint Allocation Policy for the Licencing year April 1991 to March, 1992. According to the Notification, the Newsprint shall be allocated by the Registrar of Newspapers for India. It also states that the work relating to distribution of imported Newsprint will be handled entirely by the STC as authorised by the RNI in accordance with Policy and in compliance with the provisions of Newsprint Control Order as amended from time to time.

64. The Newsprint Control Order provides for the import of Newsprint. Thus, it will seen that there is no statute providing for the constitution of Newsprint Purchase Committee and the State Trading Corporation is not a statutory body.

65. The Articles of Association of the State Trading Corporation of India gives a complete picture of the constitution of the STC. Article 80 vests the general power of the Company in the Board. Article 81 gives specific powers to Directors to make contracts. Article 91 provides for the delegation of powers by Board to the Committees. There is a schedule of delegation of powers. In its 387th meeting held on 30.9.1985 the Newsprint Purchase Committee/Sales Committee was constituted. That Committee is given powers for conclusion of purchase & sale contracts of Newsprint and matters identical thereto.

66. In the Import & Export Policy, 1974-75 it was provided that import of certain

items will be arranged only through Public Sector Agencies and the list of such items with the names of Canalising Agencies is given in Section 3. STC is the Agency for the distribution of Newsprint. Same thing is provided in Import Export Policy 1977-78. It is stated therein that the import of Newsprint will be canalised through STC, New Delhi for meeting the requirements of the publishers and printers. Therefore, there is no question of STC performing any statutory functions. The learned senior Counsel Mr. Ram Panjwani referred to the same Policies but I am not able to find any useful material to come to the conclusion that any statutory functions are performed by the STC relating to import of Newsprint. It is one thing to say that STC is to function under the framework of law but it is another thing to say that it is performing statutory duties. The learned senior Counsel for the petitioner referred to S.G. Jaisinghani Vs. Union of India (UOI) and Others, . That was a case where the direct recruits of Income Tax Officers claimed that the Government should follow Rule 4 of the Income Tax (Clause I and Grade II) Service Recruitment Rules and inasmuch as the Union of India did not follow the Rules there should be a writ issued against the Union of India directing it to follow the Rules. At page 715 the Rule is extracted by the Supreme Court, which reads as follows :-

"The Service shall be recruited by the following methods :

- (i) By competitive examination held in India in accordance with Part II of these Rules.
- (ii) By promotion on the basis of selection from Grade III (Class II Service) in accordance with Part III of these Rules."

Rule 4 reads :

"Subject to the provisions of Rule 3, Government shall determine the method or methods to be employed for the purpose of filling any particular vacancies, or such vacancies as may require to be filled during any particular period, and the number of candidates to be recruited by each method."

Rule 5 states :

"Vacancies in the Service which are filled otherwise than by promotion shall be apportioned between the various communities in India in accordance with the provisions of the Government of India (Home Department) Resolution No. F. 14/17-B/33-Ests. dated the 4th July, 1934 (regarding communal representation in the services) and No. 23/5/42-Ests. (S) dated the 11th August, 1943 (regarding representation of Scheduled castes in the Services) and the supplementary instructions connected therewith."

At page 717 the Supreme Court observed :

"We are unable to accept the argument the argument of the Solicitor-General that the quota rule was not legally binding on the Government. It is not disputed that rule 4 of the Income Tax Officers (Class I, Grade II) Service Recruitment

Rules is a statutory rule and there is a statutory duty cast on the Government under this rule to determine the method or methods to be employed for the purpose of filling the vacancies and the number of candidates to be recruited by each method."

Therefore, this case is of no assistance to the STC.

67. The learned senior Counsel referred to judgment of the Supreme Court in *Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others*, . There a Municipal Committee in Punjab exempted the writ petitioner from paying octroi duty. That was permitted by the Government for a particular period. Later on, the exemption was withdrawn by the Government. That was challenged by the petitioner. The Court considered the plea of promissory estoppel. I do not want to deal with this case any further because this was overruled by the Supreme Court in *Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.*, . Even otherwise, this case is of no assistance to the petitioner.

68. The learned senior Counsel then referred to *Kiran Singh and others v. Chaman Pawan and others* (1955 SCR 117), wherein the Supreme Court held that it is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity and that its validity could be set up whenever and where-ever it is sought to be enforced or relied upon even at the stage of execution and even in collateral proceedings.

69. The learned senior Counsel relied upon the decision of the Madras High Court reported in *State of Madras Vs. Saifudin Abdul Hussain, Proprietor and Partner of Industrial Engineering Stores*, , where the scope of Article 299 of the Constitution of India is dealt with. The learned senior Counsel also relied upon *B. D. Naithani v. State of U.P.* (AIR 1966, Allahabad 507). I fail to see how these decisions help the petitioner.

70. The learned senior Counsel, for the proposition that there is no estoppel against statute, relied upon the following cases :-

1. *The First Additional Income Tax Officer, Mysore v. H. N. S. Iyengar* (Suppl. 1962 SCR 1)
2. *M/s. Madhra Prashad & Sons v. State of Punjab* (Suppl. 1962 SCR 913).
3. *Phulwasi Devi Vs. Union of India (UOI) and Another*, .
4. *L. Prem Parakash v. Pt. Mohan Lal* (AIR 1943 Lahore 268).
5. *Abdula Saheb Vs. Guruvappa and Co.*,

I am not able to appreciate the submissions and when there is no statutory power involved there is no question of any estoppel against the statute. That concept does not apply at all.

71. The learned senior Counsel submitted that the contract is void u/s 23 of the Contract Act and relied upon the decision of the Supreme Court reported in *Smt.*

Surasaibalini Debi Vs. Phanindra Mohan Majumdar, and the decision of the Bombay High Court Bharat Barrel and Drum Mfg. Co. Pvt. Ltd. Vs. Hindusthan Petroleum Corporation Ltd. and Others, . The learned senior Counsel relied upon the decision of the Supreme Court in Amrit Banaspati Co. Ltd. and another Vs. State of Punjab and another, . This was a case where the writ petitioner relied upon an alleged promise by the Government of Haryana to refund of Sales Tax. The Supreme Court held that the constitutional requirements of levy of tax being for the welfare of the society and not for a specific individual the agreement or promise made by the Government was in contravention of public purpose thus vocative of public policy. No legal relationship could have arisen by operation of promissory estoppel as it was contrary both to the Constitution and the law. Realizing tax through State mechanism for the sake of paying it to private directly or indirectly is impermissible under the constitutional scheme. The law does not permit it nor equity can countenance it. The scheme of refund of sales tax was thus incapable of being enforced in Court of law. The dictum laid down by the Supreme Court in Amrit Banaspati Co. Ltd. and another v. State of Punjab and another (supra) cannot at all be called in aid by the petitioner.

72. The learned senior Counsel relied upon the decision of the Privy Council in Maritime Electric Co. Ltd. v. General Diaries Ltd. (1937 (1) A.E.R. 748). The appellant Co. (Maritime Electric Co. Ltd.) was a public utility company within the meaning of the Public Utilities Act of New Brunswick, Canada. It was under the statutory duty u/s 10 of the Act to provide reasonably adequate service and facilities. u/s 16 of the Act the Public Utility Company was enjoined to collect only correct rates for services rendered, not a pie more or less. If it was found that there was an excess collection from the Customs or there was deficiency in collection, u/s 18 of the Act it would be guilty of unjust discrimination and u/s 19 it was liable for penalty. The respondent company was supplied electricity by the appellant company. For the services rendered, the appellant company by committing an error in the reading of the meter collected from the respondent company 546.28 Canadian Dollars instead of 2478.10 Canadian Dollars. The appellant company instituted action to recover 1931.82 plus costs. The trial court decreed the suit and it was affirmed by the appellate court. There was a second appeal to the Supreme Court of Canada which reversed the judgment of the lower courts mainly on the round of estoppel. The Privy Council observed :

"To the plea of estoppel, two objections were raised by the appellant company. First, it was contended that, apart from any other reason, estoppel was barred or precluded by the provisions of the Public Utilities Act. It was contended (citing Halsbury, Hailsham Edn., Vol. 13, p. 474, para 542) :

A party cannot be representation, any more than by any other means, raise against himself an estoppel so as to create a state of things which he is under a legal disability from creating.

Secondly, it was contended that (apart from the statute) there could be no estoppel, since the representations contained in the monthly statements were

not intended to induced the part of the respondent company any course of conduct other than the payment of the amounts stated to be due. On this point, great reliance was placed by the appellant company on the well known and often-cited propositions relating to estoppel in case laid down in 1875 by BRETT, J. (afterwards LORD ESHER, M.R.) in the case of Carr v. London and North Western Ry. Co. (1), at p. 316. It was urged that the representation relied on as funding the estoppel must be one intended or calculated to bring about the particular course of conduct which was the cause of detriment to the party relying on the estoppel. Either of these contentions, if sound, would suffice to defeat the estoppel, and to entitle the appellant company to judgment. RICHARDS, J., in a careful judgment in the King's Bench Division of the Supreme Court of New Brunswick, decided both points in favor of the appellant company, and gave judgment for \$1,931.82 and costs. In the Appellate Division, this judgment was confirmed by BAXTER, J. AND GRIMER, Acting C.J., on the second of the two grounds above stated, LE BLANC, J., intimating a doubt as to whether the result might not have been different if negligence on the part of the present appellant company (which had not been pleaded) had been alleged. When the matter came on appeal before the Supreme Court of Canada, another view was taken, and DYSART, J., delivered the judgment of the court (concurred in by DUFF, C.J., and LAMONT, CANNON and DAVIS, JJ.), deciding both the contentions in favor of the present respondent company, and Therefore accepting the plea of estoppel, with the result that the appeal was allowed, and the judgment reversed and set aside with costs in all the courts. In the view of their Lordships, assisted by able and exhaustive arguments by counsel on both sides, the two points are of considerable difficulty and importance. It will be convenient to deal, in the first place, with the contention based on the statute.

The problem cannot be more admirably stated than by DYSART, J. He said :

Applied to the present case, the Act imposes a duty on the electric company to charge, and on the dairy company to pay, at scheduled rates, for all the electric current supplied by the one and used by the other, during the 29 months in question. The specific question for determination here is, can be duty so cast by statute upon both parties to this action be defeated or avoided by a mere mistake in the computation of accounts ?

In the view of their Lordships, the answer to this question, in the case of such a statute as is now under consideration, must be in the negative. The sections of the Public Utilities Act which are here in question re sections enacted for the benefit of a section of the public, that is, on grounds of public policy, in a general sense. In such a case and their Lordships do not propose to express any opinion as to statutes which are not within this category-where, as here, the statute imposes a duty of a positive kind, not avoidable by the performance of any formality for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstance that an estoppel is only a rule of evidence which, in

certain special circumstances can be invoked by a party to an action; it cannot, Therefore, avail, in such a case, to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law. To hold, as the Supreme Court has done, that in such a case, estoppel is not precluded, since, if it is admitted, the statute is not evaded, appears to Lordships, with respect, to approach the problem from the wrong direction; the court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision. A similar conclusion will be reached if the question put by the learned judge is looked at from a somewhat different angle. It cannot be doubted that, if the appellant company, with every possible formality, had purported to release its right to sue for the sums remaining due according to the schedules, such a release would be null and void. A contract to do a thing which cannot be done without a violation of the law is clearly void. It may be asked, with force, why, if a voluntary release will not put an end to the obligation of the respondent company, an inadvertent mistake by the appellant company, acted upon by the respondent company, can have the result of absolving the appellant company, acted upon by the respondent company, can have the result of absolving the appellant company from its duty of collecting and receiving payment in accordance with the law. To collect the money due will, in one sense, cause lesser injury to the respondent company, to the extent of \$1,931.82. Their Lordships do not know, because the admission (No. 9 above) does not cover the point whether to allow the estoppel will not leave the respondent company with an advantage, consisting of the difference between the sum of \$1,931.82 and the total amount by which the respondent company was led to increase its payments of cream to farmers and others. It is, however, clear that to disallow the estoppel will leave the respondent company out of pocket, to the extent of the increased amounts just referred to. It is an unfortunate result; but the obligation to obey a positive law is more compelling than a duty not to cause injury to another by inadvertence. In the present case, it may be observed that the injury is not a cause of action. Their Lordships are unable to see how the court can admit an estoppel which would have the effect *pro tanto* and in the particular case of repealing the statute."

The Privy Council relying on the dictum of House of Lords in *Antil v. Manufacturers' Life Insurance Co.* (1899) A.C. 604, LORD WASTON observed that "The rule of the Code appears to them to be one which rests upon general principles of public policy or expediency, and which cannot be defeated by the private convention of the parties. "The Privy Council ultimately held that if a deed was executed in contravention of a statute there could be no estoppel. The learned senior Counsel for the same proposition relied upon 1949 (2) AER 719 and *Rhyl Urban District Council v. Rhyl Amusements, Ltd.* 1959 (1) AER 257.

73. In my view, these cases do not help the petitioner at all. The Newsprint

Purchase Committee is not a statutory body. It is a Committee coming within the ambit of the Articles of Association of the STC and STC is a Company and, Therefore, there is no question of any statutory function.

74. The learned senior Counsel for the petitioner Mr. Ram Panjwani vehemently contended that the persons who had signed the contract had no authority to sign the contract. I am afraid, that a Public Sector Undertaking should have taken such plea, especially when its activities had been completely considered by the Committee on Public Undertakings (Parliament). I have only stated this to reject it.

75. The learned senior Counsel contended that a fraud had been committed on the STC by the respondent. It is very unfortunate that the petitioner should have taken such a plea without any particulars therefore, as required under Order 6 Rule 4 CPC. Such an argument cannot at all be countenanced. The plea of the petitioner that the contract was not between the petitioner and the respondent is also frivolous and vexatious, in the light of its own admission before the Committee on Public Undertakings (Parliament).

76. The learned senior Counsel for the petitioner has not been able to establish that Import Policy is a statutory one and NPC is a statutory authority and it has not been established that persons who signed the contract are not authorised by the STC.

77. About the arbitration for the alleged second contract, the learned senior Counsel Mr. Ram Panjwani relied upon the judgment of the Supreme Court in *Alimenta S.A. Vs. National Agricultural Co-operative Marketing Federation of India Ltd. and Another*, . I need not go into this judgment and the judgment referred to by the learned Counsel for the respondent for two reasons. First is that the facts in the instant case are different from the facts in the Supreme Court case and the Addendum makes it clear that it was part of single contract and there was no question of any second contract. Second is that the STC had admitted before the Committee of Public Undertakings (Undertaking) that the claims of the respondent were arbitrable.

78. The learned Counsel for the respondent vehemently contended that when the Committee on Public Undertakings (Parliament) had gone into the question in detail and has directed action to be taken against the erring officials, the proceedings instituted by the STC are vexatious, frivolous and an abuse of process of Court. The Committee had observed with reference to the role of the Ministry in exercising control over STC, the Ministry of Commerce stated in its reply.

"The Ministry of Commerce deals with the policy aspects of the management of PSUs under its administrative control and does not interfere with the commercial aspects of the PSU functioning. This is with a view to strike a delicate balance between governmental control for achieving the best returns on investment and autonomy and operational freedom to be accorded to the PSU for the most

efficient use of its resources. The strange hold maintained by Administrative Ministries over the PSUs under their control in the years past has been receiving severe criticism in the Parliament and without. With a view to encourage a "hands off" relationship the Government has devised a Memorandum of Understanding (MOU) for monitoring the performance of the Public Sector Undertakings under the aegis of the Deptt. of Public Enterprises. STC is one of such PSUs who have signed a MOU."

About the performance by the STC, the Ministry of Commerce in a detailed written note replied in the following manner :-

"Ordinarily, the Ministry does not undertake any review of the performance of any organisation on a commercial transaction basis. However, in the instant case, since it had been taken up by the Canadian High Commission, a meeting was convened to discuss some of the issues arising in the case.

Shri B. P. Misra, JS, Ministry of Commerce (MOC) held discussions on some of the issues involved in this case at a meeting held on 17.9.1992 which was attended by representatives of the STC. On consideration of the material made available by STC and on the basis of the discussions it was concluded that STC had acted in an irresponsible and unprofessional manner in this case and not only brought upon itself considerable financial loss but also discredit to the country. Certain specific advice was consequently given to the STC on the basis of the review. As a result of the review, the view taken in the Ministry was that the case had suffered because of gross administrative negligence and that STC had acted in an irresponsible and un-professional manner. However, no detailed review of all aspects of the transaction was undertaken by the Ministry. The Ministry views the commercial success or failure of STC in terms of the annual MOU and not in terms of success or failure in a single transaction or group of transactions as this would not be representative of the performance of the organisation as a whole. This is also in consonance with the terms of the MOU. Against failure in some cases of commercial transaction by STC, the company has proved to be a success in the large majority of its transaction. Its occasional failures should therefore be viewed in this light."

79. Considering the conclusion and these two remarks it is clear that the proceedings initiated are thoroughly frivolous, vexatious and abuse of process of the Court. Order 6 Rule 16 CPC reads as follows :

"The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading -

- (a) which may be unnecessary, scandalous, frivolous or vexatious, or
- (b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or
- (c) which is otherwise an abuse of the process of the Court."

80. Having regard to the circumstances in this case, it is clear that the STC was

found guilty of various act of commissions and omissions and it does not lie in the mouth of STC to come forward with the cases, it is a clear abuse of process of Court. I have no hesitation in striking out the pleadings of the petitioner in all the three cases.

81. I hold on issue No. 1 that suit No. 1091/95 is frivolous, vexatious and is an abuse of process of Court.

82. The Court of Appeal in England had an occasion to consider the question under similar situation in *Greehalgh v. Mallard* 1947 (2) AER 255. There the defendant in the suit had substantial interest in a company called *Ardene Cinemas Ltd.* The plaintiff was also a shareholder in that company. There was an agreement between the plaintiff and the defendants in any by which the defendant agreed to support and vote for the plaintiff. Disputes arose between the parties. On July 1, 1941 the plaintiff commenced an action for a declaration that the agreement between the plaintiff and the defendants was valid and enforceable. On October 3, 1941 the Court decided the case in favor of the plaintiff. After this difference of opinion arose between them. In January 1942 the plaintiff instituted an action against the defendants stating that the defendants wrongfully and fraudulently conspired together to defeat the said judgment rendered in favor of the plaintiff on July 1, 1941. The trial court dismissed the suit and the appeal there from was also dismissed.

83. In 1947 the plaintiffs instituted an action claiming damages on the same allegations. The Master of the Court passed an order striking out the statement of claim on the ground that the causes of action therein alleged are *res-judicata*, and that the same are frivolous and vexatious and an abuse of the process of the Court.

84. The plaintiff appealed to the Judge. The learned Judge of the Chancery Division allowed the appeal and that was challenged before the Court of Appeal.

85. The Court of Appeal allowed the appeal restoring the order of the Master and held that the suit was vexatious, frivolous and an abuse of the process of Court.

86. The Court of Appeal again had an occasion to consider the question in *Wright v. Bennett* (1948 (1) AER 227. The Head Notes gives the fact and it is as follows :

"The plaintiff failed in an action in which he claimed damages for fraudulent misrepresentation against two defendants and damages for negligence against one of them. He then began a second action against the same defendants, covering substantially the same ground as the first, but based on an allegation of fraudulent conspiracy. On an application by the defendants to have the statement of claim struck out on the ground that the action was frivolous and vexatious."

At page 230 it is held as follows :

"FRY, L.J., said (*ibid.*, 10) :

The short ground for this application is either that a plea of *res judicata*, if put on

the record, must succeed; or that the proceedings in this action be shewn to be vexatious and an abuse of the process of the court. In my opinion, the defendant is right in both these contentions.

Finally he said, after dealing with *res judicata* :

Suppose, however, this to be otherwise, still, in such case, I do not hesitate to say that such successive actions in respect of the same libel would be an abuse of the process of the court, and so, *quacunque via* , the application should succeed, and the action be stayed.

I think that that sentence in the judgment in *FRY, L.J.*, is completely applicable to the present action, that the decision arrived at by the master and *CASSELS, J.*, was clearly right, and that this action was properly dismissed."

The same view is taken by the Court of Appeal in *Re. Langton (deceased) Langton v. Lloyd's Bank, Ltd. and others* 1964 (1) AER 749. The Court of Appeal observed the Courts inherent jurisdiction to prevent abuse of its process attaches at the earliest moment at which an officer of the Court is called on to exercise a judicial discretion.

87. It is also well settled that when the claim of the petitioner or plaintiff is based on falsehood, he is not entitled to any indulgence from Court and on this ground also the claims of the STC are liable to be thrown out at the threshold. The following cases are relevant in this behalf :-

1. *The King v. The Gent. Commissioners for the Purposes of Income Tax Acts for the District of Kensington* 1917 (1) KB 486 (C.A.) at page 504).
2. *Bashesar Nath and others v. Municipal Committee, Monga* AIR 1940 Lah 69.
3. *Udai Chand Vs. Shankar Lal and Others*, .
4. *Charanji Lal and Others Vs. Financial Commissioner Haryana, Chandigarh and Others*, .
5. *Anand Swarup Malik Vs. Municipal Corporation of Delhi*, .
6. *M/s. Seemax Construction (P) Ltd. Vs. State Bank of India and another*, .
7. *T.A. George and Another Vs. Delhi Development Authority and Others*, .
8. *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, .

88. Therefore, I hereby direct the striking off the pleadings of the petitioners in the petitions and the suit.

89. The contract was entered into in March 1991. The Addendum was in May 1991. The actions are instituted in 1995. In the suit relief of declaration is prayed for. The relevant Article is Article 58 of the Limitation Act, 1963. The said Article reads as follows :-

-----	Description of
Period of Time from which period Suit Limitation begins to run	
-----	58. To obtain
Three years When the right to sue any other first accrues. declaration.	

I would also like to refer to the residuary Article 113 of the Limitation Act, 1963. That Article reads as follows :-

-----	113. Any suit
Three years When the right to sue for which no accrues limitation is provided	
elsewhere in this	Schedule.

90. Taking the facts of this case in the context of the third column of the two Articles, the starting point of limitation in this case is June 1991. According to the learned senior Counsel Mr. Panjwani, it is for the first time in October 1994 the petitioner came to know about the real facts and Therefore, the actions are instituted in 1995. Therefore, even by the time the petitioner came to know about the real facts the three year period had expired. The suit is barred by time which has been filed beyond three years from the date when the right of action accrued to the plaintiff. Accordingly, I answer issue No. 2 in Suit No. 1091/95 against the plaintiff.

91. The period of limitation for the petitions u/s 33 of the Arbitration Act, 1940 is governed by the Limitation Act, 1963 and since they are also filed beyond three years, they are also barred by time under Article 137 of the Limitation Act, 1963. Article 137 reads as follows :-

-----	137. Any other
Three years When the right to application lot apply accrues. which no period of	
limitation is provided elsewhere in this	Division.

92. Accordingly, OMP. 1995, OMP. 112/95 and Suit No. 1091/95 are dismissed. There shall be no order as to costs.

93. Petition dismissed.