(1965) 06 CAL CK 0009

In the Calcutta High Court

Case No : Appeal from Original Decree No. 92 of 1962

Union of India (UOI) APPELLANT

Vs

Nuddea Mills Company Ltd. RESPONDENT

Date of Decision : 26-06-1965

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 80
Sales of Goods Act, 1930 — Section 12, 18, 2(4), 23, 23(1)

Citation : (1966) 2 ILR (Cal) 98

Hon'ble Judges : P.B. Mukharji, J;Masud, J

Bench : Division Bench

Advocate : Gouri Mitter, A.C. Bhabhra and M. Mukherjee, for the Appellant;S.M. Bose, General, B. Das and Amiya K. Basu, for the Respondent

Final Decision : Dismissed

Judgement

P.B. Mukharji, J.—This is an appeal by the Defendant, Union of India, against the judgment and decree of A.N. Ray, J, who decreed the suit for the sum of Rs. 1,61,700 in favour of the Plaintiff company with interest and costs.

2. The facts of the case briefly are as follows : By a contract in writing dated April 5, 1952, the Appellant, Union of India, purchased and agreed to accept from the Plaintiff 600 bales of B''Twills, each bale containing 300 bags, to be delivered at Calcutta, in three equal monthly instalments during the months of April, May and June, 1952 respectively. The price agreed was at Rs. 217 per hundred bags. By a letter dated May 1, 1952, the Appellant, Union of India, cancelled the said contract, stating the grounds of cancellation as follows:

In terms of the contract quoted above, the Mills'' Pucca Delivery Orders in respect of the first (April) consignment of the goods numbering 200 bales should have been tendered to this office on 30th April, 1952. You have however failed to deliver the Mills'' Pucca Delivery Orders in respect of the first consignment on the due date i.e. 30th April, 1952. You have therefore failed to deliver the first consignment of the goods within the period prescribed for such delivery. You have committed breaches of the said conditions of contract. In exercise of the option contained in the conditions of contract and the other powers contained therein, the said contract is hereby cancelled.

3. The Plaintiff company contends and pleads that this cancellation is illegal and wrongful and that the Appellant, Union of India, committed breach of the contract by such wrongful cancellation and repudiation. It may be said here that it is the Plaintiff company''s case that it offered the May and June quotas of the goods but the Appellant refused to take them on the ground that it had already cancelled the whole contract. The Plaintiff company claimed damages for the breach of contract assessed at Rs. 1,65,600. The particulars of such damage are given in Annexure ''B'' to the plaint which has been proved by the Plaintiff company at the trial. The Plaintiff also served notice under the Interest Act claiming interest and served notice upon the Appellant, Union of India, u/s 80 Code of Civil Procedure. The prayer made in the plaint was for a decree for a sum of Rs. 1,65,600 or alternatively, an enquiry into loss and damage suffered by the Plaintiff and a decree for such sum to be found due on such enquiry.

4. The defence of the Appellant is that this contract depended on its terms and conditions as also the terms and conditions embodied in W.S.B. Form 133 of the Directorate of Supplies and Disposals. The Appellant justifies its cancellation on the ground that under the terms of the contract the Plaintiff company should have tendered and delivered the Pucca Delivery Order on April 30, 1952, but failed to do so. It is on that ground of failure to deliver and tender the Pucca Delivery Order on April 30, 1952 that the Appellant, Union of India, cancelled the contract. There was a denial of damage in the written statement.

5. The determination of this appeal depends on the terms and conditions of the contract and their interpretation. It also depends on certain questions of fact about the incidents that took place on April 23, 1952. The terms of the contract will appear in the contract in writing dated April 5, 1952 annexed to the plaint. It is called acceptance of tender.

6. Certain clauses in the contract which are material for the purpose of determination of this appeal may be set out as hereunder;

1. With reference to the above, an Acceptance of Tender is hereby placed on you for the supply of the undermentioned stores as per terms and conditions specified herein.

This is followed by certain clauses for instance as follows:

2. Schedule of Delivery : The total quantity ordered herein as shown in the schedule attached is required to be delivered in three equal monthly instalments during the period April/June, 1952.

3. Date of tendering P.D.O.:

(a) 30th April, 1952 in respect of April quota.

(b) 31st May, 1952 in respect of May quota.

(c) 30th June, 1952 in respect of June quota.

4. Terms of delivery.... F.A.S. Calcutta.

5. Inspection:

(a) The stores ordered herein are required to be accepted in inspection prior to delivery by the A.I.G.S., East India, G.S.I.D., Hastings, Calcutta.

(b) Place of inspection--At the premises of the Mills concerned.

6. Submission of Challans : You are requested to ensure that challans giving full particulars of the quantity ready for inspection are submitted to the A.I.G.S., so as to reach him not later than 30th April, 1952, 31st May, 1952 and 30th June, 1952 respectively in respect of the April, May and June quotas. Please note carefully that challans received after this date will not be accepted for purposes of inspection. To facilitate inspection you are requested to submit challans earlier than the date specified, if possible.

Kindly note that full particulars of the relevant Mill''s Pucca Delivery Orders should invariably be indicated on the challans for the information and record of the A.I.G.S. Without these particulars, the challans will not be considered as valid challans for purposes of inspection.

7. Delivery Instructions : Delivery instructions will be issued to you in due course by the Regional Director of Food, Calcutta, or his authorised clearing agents. Kindly note in this connection that delivery instructions will be issued by the aforesaid officer or his authorised clearing agents only after the Mill''s Pucca Delivery Orders have been received in this office.

8. Payment:

(a) Payment in respect of this order will be made in exchange of Mill''s Pucca Delivery Orders.

(b) Your bills are required to be submitted to this office on the prescribed Govt. Bill Forms and should be duly pre-receipted with revenue stamp as usual. To ensure that your cheque is kept ready for delivery on the due date, it is essential that your bills should be received in this office not later than 23rd April, 1952, 23rd May, 1952 and 23rd June, 1952 respectively in respect of April, May and June quotas. Bills received after this date would not be entertained as it is not possible for this office to go on accepting bills up to the last date and also make payment on due date.

(c) When your representative calls to collect the cheque in exchange of Delivery Orders, he should bring an unstamped but signed receipt (in duplicate) on the receipt form attached. Kindly note that it would not be possible for this office to hand over the cheque unless the delivery orders are handed over on the due date along with the aforesaid unstamped receipt.

9. Conditions of Contract : Conditions of Contract in Form WSB 133 as amended up-to-date apply to this contract.

10. Special Instructions : Kindly note that Mill''s Pueca Delivery Orders should be issued in favour of the Director of Supplies, Calcutta, Copies of the contract contained in this letter were among others sent to A.I.G.S. East India, Calcutta, G.S.I.D., Hastings, with the following note:

(a) Kindly note that full particulars of the Mill''s Pucca Delivery Orders as recorded on the challans should be indicated in the inspection notes so as to enable the consignee to link up the Mill''s Pucca Delivery Orders with inspection certificates.

7. Before coming to the discussion of the interpretation and construction of these different terms in the contract it will be appropriate to refer to the incidents that took place on April 23, 1952. As will be seen from the terms of the contract set out above, April 23, 1952, was the last date on which the relative Bill for the April supply was required to be submitted to the Appellant. Now on this April 23, 1952, it is the Plaintiff''s case that under a Bill cover it sent both the Bill and the Pucca Delivery Order. The Plaintiff''s case is that the Defendant Appellant refused to take the Pucca Delivery Order on April 23, 1952, on the ground that the due date for delivering and tendering it was April 30, 1952. The Defendant Appellant''s version is that there was no refusal to accept the Pucca Delivery Order, but what happened was that the Plaintiff refused to deliver the Pucca Delivery Order unless the cheque also was paid on that date. These respective versions of facts will appear from the evidence of Ram Chandra Ghosal, witness for the Plaintiff company and Sourendra Kumar Seal for the Defendant Appellant. The relevant part of the evidence of Ram Chandra Ghosal is contained in answers to questions Nos. 7, 9, 10, 18, 19, 20, 21, 22, 23, 26 to 28, 37, 43 to 45 and 52 to 55 of the evidence of Ram Chandra Ghosal. The relevant evidence of Sourendra Kumar Seal on this point will be found in his answers to questions Nos. 5 to 12, 43 to 46, 56 to 67, 75 to 83 and 91 to 93.

8. On a perusal of the evidence of these two witnesses Ram Chandra Ghosal and Sourendra Kumar Seal and on a consideration of the circumstances we are satisfied that the evidence of Ram Chandra Ghosal on this point should be accepted. We are unable to accept the Appellant''s contention that the Plaintiff company refused to deliver the P.D.O. on April 23, 1952, on the ground that unless the cheque was immediately paid across the counter the P.D.O. would not be delivered. Ram Chandra Ghosal''s evidence is clear and is specific on this point. This witness Ghosal came with a Bill cover under instructions from Ganapati Babu. (Q. 43 to Q. 45). This Bill cover is a significant circumstance which proves that the Plaintiff company''s version on this point is correct. This Bill cover is an Exhibit in the suit. On this Bill cover two documents are clearly specified, namely, (i) the Bill itself and (ii) the Pucca Delivery Order. This circumstance shows that the Plaintiff company was sending both the Bill and the Delivery Order and tendering them to the Appellant. The Plaintiff company knew

under the very express terms of the clause relating the contract as quoted above that the Bill had to be submitted by April 23, 1952 and by that very term no cheque could possibly be made ready immediately thereupon. The term quoted above in the contract expressly shows that the cheque will come later. It would be, therefore, unreasonable to expect that the Plaintiff company who would take the trouble of sending under the Bill cover both the documents--the Bill and the Delivery Order, would refuse to hand over the Delivery Order unless payment was made immediately. There was no need there for the Plaintiff company to send the Delivery Order on April 23, 1952, along with the Bill. The second circumstance is the fact that it is admitted that the Delivery Order was in fact sent on April 23, 1952. The Appellant contends that the Plaintiff company''s representative called for immediate payment then and there on April 23, 1952, against the Delivery Order under Clause (a) of the terms of payment in the contract which said that payment will be made "in exchange of Mill''s Pucca Delivery Orders". We are unable to construe these words, "payment will be made in exchange of Mill''s Pucca Delivery Orders" as payment across the counter simultaneously with the tender of the Pucca Delivery Orders. These words should be construed in their normal business sense. They mean nothing more than this that the Pucca Delivery Orders have to be given first before payment could be called for or expected. It does not mean more than this and it does not certainly mean that immediately the Pucca Delivery Orders was tendered, the payment must be made forthwith on the spot across the counter simultaneously. The third circumstance, which is against the Appellant on this point, is the endorsement made on behalf of the Appellant on "that Bill cover which reads as follows : "Only Bill received". Now this is a curious endorsement in the context of facts. The place where this endorsement was being made showed clearly above it that the two documents mentioned in the Bill cover were (i) the Bill and (ii) the Delivery Order. Admittedly the Delivery Order was there at the time. The normal endorsement if the Plaintiff''s version were true then would be Bill tendered but not the Delivery Order. But that was not the endorsement. If the Appellant''s version were true then in that case also the endorsement should have stated that the Bill was tendered but the Delivery Order was not tendered on the ground that no payment could be made on April 23, 1952. The circumstances seem to us to be entirely against the Appellant''s version of the facts on this point. Normally when a Bill cover is brought it is received by the addressee who endorses on the Bill cover not only the receipt of the Bill but an indication when and on what date it was expected that there would be a call for payment. The person bringing the Bill cover takes away that endorsement, then brings on the subsequent date indicated on this endorsement on the very same cover for payment. If, therefore, the Appellant''s version is that the cheque was to be paid on April 30, 1952 and not on April 23, 1952, then there was nothing to prevent the Appellant from endorsing the Bill cover to the effect that "call for payment against the P.D.O. on April 30, 1952". Lastly, it seems to us unthinkable that the Plaintiff company would make such a demand on April 23, 1952, that payment must be made on that day forthwith. After all, the Plaintiff company''s representative was bringing the Bill for the first time and the Bill being the only document to indicate the price for which the cheque had to be drawn and after the Bill is received the cheque would be drawn subsequently and no payment could in the nature of things be expected on that very day at that very moment. That is why the term of payment in the condition in the contract expressly stipulated for earlier submission of the Bill first, before payment was called for.

9. It will be proper at this stage to mention the fact that this case which the Appellant was making through its witness Sourendra Kumar Seal was made for the first time at the trial in the witness box. It was never made before at any stage of the correspondence. Significantly, it was not made even in answer to the protest by the Plaintiff company against the Appellant''s cancellation. When the Appellant cancelled the contract on May 1, 1952, the Plaintiff company immediately on May 2, 1952, protested inter alia in the following terms:

Please note that in accordance with the usual procedure our Bill and P.D.O. was sent to you on 23rd April. The Bill was detached from the P.D.O. and the voucher endorsed "only bill received--23/4". This does not in any sense mean that only the Bill was tendered but merely that the assistant only took receipt of the Bill. Our Sircar saw nothing wrong in this as it followed previous procedure and on enquiry he was told that intimation would be given when the cheque would be ready. This in every respect follows what has been done in the past. Furthermore our Bills bore the P.D.O. number and date and therefore were in every way legally tendered as required by the contractor. Under these circumstances the cancellation of contract is unacceptable to us and we must ask for your reconsideration of this matter.

10. Although the Appellant Union was prompt to cancel the contract immediately on expiry of April 30, 1952, by letter of May 1, 1952, yet it ceased to be prompt in answering this letter of protest of the Plaintiff company dated May 2, 1952. That answer came two months and a half thereafter on July 16, 1952. The only point there made is,

The Pucca Delivery Orders were however not tendered to this office on the due date i.e., 30th April, 1952. The contract has therefore been properly cancelled.

Your information that your Sircar was advised that information would be given to him regarding the readiness of the cheque is not correct. According to our established procedure, no such intimations are given and the collecting Sircar''s call on our payment section on the due date and obtain payment in exchange of the Pucca Delivery Order.

11. The significant point is that the Appellant Union of India did not make this case which it is now making that the Plaintiff company refused to deliver the P.D.O. without payment. The Appellant Union did not make the case that it was prepared to keep the P.D.O. but could not do so because the Plaintiff company''s representative insisted on immediate payment. That case is made at the trial through his witness Sourendra Kumar Seal who was giving evidence on

September 18, 1961, which was about ten years after the contract.

12. It is needless to point out that the Bill itself which was admittedly delivered to the Appellant expressly mentioned the Delivery Order No. 8 in this case. The Bill bore the clause "Payment by the Director of Supplies in exchange of Delivery Order No. 8". The delivery order therefore was issued and was in existence. The Delivery Order No. 8 was also expressly mentioned in the Inspection challan admittedly sent by the Plaintiff company through the Appellant dated April 25, 1952. That Inspection challan which is an Exhibit in the suit clearly specified the entire goods under the contract with full description and specification as in the Delivery Order itself dated April 22, 1952. This Inspection challan dated April 26, 1952, was sent by the Plaintiff company by a covering letter dated April 28, 1952 and was in fact received by the Appellant on April 29, 1952, which was prior to April 30, 1952 and which was prior to the cancellation made by the Appellant on May 1, 1952. Whatever was there in the Delivery Order therefore was already in the Inspection challan. The existence of the Delivery Order is a proved fact not only by the incident of April IS, 1952, but by reason of the recitations of the number of the Delivery Order both in the Bill dated April 22, 1952 and the Inspection challan dated April 26, 1952.

13. In those circumstances, apart from any technicality there appears to be no real reason, merit or substance or ground for the cancellation of this contract by the Appellant. The swiftness with which the Appellant moved in this matter is also a matter of comment. No sooner than April 30, 1952, expired the cancellation followed immediately with the dawn of May 1, 1951. The impression one receives from this kind of unreasonable action is that the Appellant was more keen and anxious to break the contract than to express any readiness or willingness to perform or carry it out. No doubt, it has been said on behalf of the Appellant that the Appellant was ready and willing because the cheque for the amount of the Plaintiff''s Bill was being made and in fact was ready on April 30, 1952, Indeed, that makes it all the more curious that if the cheque was ready for the full amount of the Plaintiff''s Bill on April 30, 1952, could not the Appellant, Union of India, wait for a day before cancelling the contract. It looks as if the Deputy Director himself snaps the whole contract. The circumstances are truly remarkable on this point. These gunny bags were necessary for food shipment. They were urgently required by the Appellant. The urgent need for those goods is a proved fact. The goods were ready. The cheque was ready. Why then is this unreasonable hurry to cancel the contract? What is worse, subsequently no goods even were obtained to fulfil the need although it was a falling market. See in this connection the peculiar answers given by Ashadul Huq, Deputy Director in answer to Q. 351-355, 154-235 and finally the Court''s Q. 240.

14. We shall now turn to the important question of the construction and interpretation of the different clauses in this contract appearing on the point under decision in this appeal.

15. The learned Advocate-General contends and submits that the clause relating

to the date of tendering of the P.D.O. in the contract above-mentioned was not a term of a contract and he had persuaded the learned trial Judge to accept that view. That conclusion of the learned Judge is erroneous. The contract itself as set out above expressly states "as per terms and conditions specified herein" and among those terms appears the clause relating to the "date of tendering of the P.D.O." Secondly, it was also pleaded by the Plaintiff himself in this case that the tendering of the Pucca Delivery Order was a term of the contract. The learned Advocate-General''s submission amounts to this that the provision relating to the tendering of the Pucca Delivery Order in the contract was some kind of instruction or advice and not a term or condition of the contract. According to him the clause relating to "conditions of contract" was the only condition of the contract and those conditions related to conditions appearing in form WSB 133. We have no hesitation in rejecting that contention of the learned Advocate-General and in holding that the clause relating to the "conditions of contract" was as much a condition and a term as the clause relating to the "date of tendering the P.D.O." A contract should be read as a whole and not in part for a proper appreciation, construction and effect of the contract. Speaking of a contract of carriage Lord Halsbury observed in Glynn v. Margetson and Company 1893 A.C. 351 (357), that,

It seems to me that in construing this document, which is a contract of carriage between the parties, one must in the first instance look at the whole of the instrument and not at one part of it only.

The express words of the contract in this case and the Plaintiff''s own pleading therefore make it quite clear that the tendering of the Pucca Delivery Order in this contract was a term and condition of this contract.

16. At this stage the learned Advocate-General tried to make a distinction by suggesting that this clause relating to the tendering of the Pucca Delivery Order was not a condition but a warranty. The idea of this argument is that the breach of a warranty in any event would not justify cancellation of the contract. In support of this argument he relied on Section 12 of the Sale of Goods Act and argued that a condition is a stipulation essential to the main purpose of the contract and that tendering of the Pucca Delivery Order was not such a stipulation essential to the main purpose of this contract. We are unable to accept this contention. Tendering of the Pucca Delivery Order appears to us on the interpretation and construction of the different clauses of the contract in suit as a term and condition because it is fundamental to the execution of the contract itself. It is fundamental because without delivery and tender of the Pucca Delivery Order in this case the very delivery instructions under the clause relating to "Delivery Instructions" could not be given by the buyer Appellant. Delivery is a main term of the contract of this nature. Again, the contract in this case expressly makes it clear that full particulars of the relevant Mill''s Pucca Delivery Order should invariably be indicated on the challans and without those particulars the challans themselves would not be considered as valid challans for

the purpose of inspection. This is expressly provided in the last paragraph of the clause relating to "submission of challans" in the contract quoted above. That clause again makes it clear that submission of this challan is fundamental to the inspection provided in the contract. Inspection again is an express term of the contract in this case. Finally, the clause relating to "payment" in the contract makes it clear that payment under this contract will be made in exchange of the Pucca Delivery Order. Payment is a material term and condition of the contract. It will, therefore, appear on a construction of these different clauses in the contract in suit that without the Pucca Delivery Order such important parts of the contract cannot be worked out such as (i) Delivery instruction, (ii) Submission of challan and (iii) Payment. In short, tender and delivery of the Pucca Delivery Order is the very kingpin on which the execution of the whole contract moves and depends in this case. We, therefore, have no hesitation in holding that the clause relating to the date of tendering the Pucca Delivery Order is a term and condition of the contract in this case.

17. It will be appropriate to make a reference at this stage to a decision of the Supreme Court in The Commissioner of Income Tax, Madras Vs. Mysore Chromite Limited, , which was cited at the Bar. There the Supreme Court came to the conclusion that on the terms of the contract there involved the property in the goods could not have passed to the buyer earlier than the date when the bill of exchange was accepted by the buyer''s bank in London and the documents were delivered by the Assessee company''s agent to the buyer''s bank. At pp. 857-58 the Supreme Court noticed the argument that the Assessee company placed the goods on board the steamer and therefore the goods became ascertained and the property in the goods passed immediately to the buyer. The Supreme Court rejected the argument on the ground that such an argument overlooked the word, "unconditionally" used in Section 23 of the Sale of Goods Act. The question there was whether there was unconditional appropriation of the goods by merely placing them on the ship. The Supreme Court observed on a construction of the particular contract in that case as follows at p. 858:

Prima facie, such delivery of the goods to the buyer and the pissing of the risk in respect of the goods from the seller to the buyer are strong indications as to the passing also of the property in the goods to the buyer, but they are not decisive and may be negatived, for u/s 25 the seller may yet reserve to himself the right of disposal of the goods until the fulfilment of certain conditions and thereby prevent the passing of the property in the goods from him to the buyer.

18. This case does not at all help the learned Advocate. General''s argument in this case that the tendering of the Pucca Delivery Order was not a term or condition of the contract in this case; The clauses here are very different and are quite clear. We have given reasons to show why we consider tendering of the Pucca Delivery Order in the contract in this case as going to the very root of this contract and is a term and condition thereof on which depends the working of the whole contract in respect of delivery instruction, challan and payment. It is

needless to say that the point in this appeal before us has nothing to do with the question of passing of title to the goods from the seller to the buyer, the point which fell to be decided by the Supreme Court in that case.

19. The next point-of construction relating to this contract arises on the clause about "Date of tendering of the Pucca Delivery Order" as quoted above. The three dates for the three equal monthly instalments are mentioned as April 30, 1952, May 31, 1952 and June 30, 1952. It is significant that the preposition "on" does not appear as against these three dates. All that the clause says is the date of tendering the Pucca, Delivery Order against these dates. The question for construction is whether these three specific dates-are the only particular dates on which the delivery order could be tendered and that such delivery order if tendered either a day before or a day after would mean cancellation of contract. Prima facie, such a construction would reduce the business effect of such a contract almost seriously up to the point, of so great a handicap as to render it unworkable in many instances. If on those particular elates like April 30, or May 31, or June 30, any accident happens or some mischance prevents tendering o? the delivery order then that would be fatal to the contract according to the Appellant. The Appellant contends that except on those three specific dates delivery order could not be tendered on any other date and not even any day prior to those dates. What would be the result of such construction? If a delivery order is sent by registered post by the seller to the buyer, say by April 28, 1952 and the registered cover reaches the buyer on the following day, April 29, 1952, then according to the Appellant, Union of India, the tender is bad meriting cancellation of the contract. That seems to us as most unreasonable and unjustified a construction.

20. Delivery order facilitates working of the contract. It is supposed to help the seller in respect of delivery instruction and challan for inspection and for payment. Why then in such context, tendering of the delivery order a day before or a week before these specific dates like April 30, May 31 and June 30, be not at least good tender? Indeed the earlier the delivery order is delivered the better for the seller. Because it gives time for delivery instruction and for the challan for inspection and also a little time to arrange for payment.

21. In this case the delivery order was tendered on April 23, 1952. There is apparently no reason why such a tender on April 23, would be a bad tender to merit the punishment of cancellation of the contract. No doubt, under the contract and its clauses the seller has a right to withhold payment until April 30, 1952. On a construction of the clauses it is plain that the cheque could not be made ready on the very day of submission of the Bill, which accompanied the delivery order in this case. On the facts we have already come to the conclusion that not only was the tender with delivery made, there was no admission by the Plaintiff company that the cheque must be paid on that very date, April 23, 1952. Reading the clause relating to payment that it should be made in exchange on the Mill''s Pucca Delivery Order and that unless the Bills are received at least a

week before those dates, payment could not be made on those "due dates", it will be clear that payment by cheque could not be called for as a matter of right before April 30, or May 31, or June 30, 1952, under that clause. There fore, even if the delivery order is tendered before April 30, payment could be delayed until April 30.

22. In other words, the clause in the contract relating to the "date of tendering of the Pucca Delivery Order" April 30, 1952 etc. should be read as by April 30, 1952. In other words, those dates April 30, 1952, May 31, 1952 and June 30, 1952, are intended to be the last dates for the tendering of the P.D.O. On a construction of this clause we hold that it does not mean that the P.D.O. could not be delivered earlier than the last date. We also hold that it was so delivered on April 23, 1952, in this case and that it was wrongly refused by the Appellant.

23. Much of the confusion arising on this branch of the case springs from the failure to appreciate the legal nature and character and the incidents of the Pucca Delivery Order. Delivery Order is an order by the seller on its own Mills in favour of the buyer and usually begins with such words as "please deliver" the specified quantity of goods of certain description to the buyer. It is usually addressed to the place from where delivery is to be taken, namely, the seller''s place or other place. In this case the Delivery Order is addressed by the Plaintiff''s managing agent to the Manager of the Nuddea Mills and Company, Naihati directing "please deliver to the Director of Supplies, Calcutta", the goods mentioned in the contract. This Delivery Order is dated April 22, 1952 and was delivered and tendered on April 23, 1952, to the seller who wrongly refused to accept it on that date. The Delivery Order is numbered 8. Not only was the delivery order issued, there was also an inspection challan that was issued by the seller on April 26, 1952, which reached the buyer-Appellant on April 29, 1952. That was also before April 30, 1952. The inspection challan also quoted the Delivery Order No. 8 and gave all the particulars of the goods mentioned in the Delivery Order as being open for inspection by the Appellant. On April 29, when the buyer got this inspection challan the contract had not been cancelled by the Appellant and it could have acted on the inspection challan to take inspection of the goods specified therein. That makes the cancellation in this case all the more unreasonable and unjustified on the alleged ground that the Delivery Order was not delivered on April 30, 1952, which we have held to be a wrong contention on the part of the Appellant.

24. Coming back to the nature of the Delivery Order, it is essential to emphasise that the delivery order is a document of title to the goods u/s 2(4) of the Sale of Goods Act. It is, therefore, an important document of title. In the other words it is a document of ownership. It is really in the nature of a warrant and represents the goods. It is not like a bill of lading representing the goods and does not by itself transfer possession. It operates as an authority to receive the goods referred to in the document. The learned Editor of Benjamin on Sale, Seventh Ed. at p. 894 observed:

It was also decided at common law that a delivery order differed in effect from a bill of lading, that the endorsement of it by a buyer to a sub-buyer was unavailing to oust the possession of the original seller; and that his lien remained unaffected when neither the first buyer nor the sub-buyer had procured the acceptance of the order, nor taken actual possession of the goods before the order was countermanded. But the law," so far it affects the sub-buyers, has now been altered by the Factors Act,

25. Benjamin on Sale, Seventh Ed. at p. 772, characterises the delivery order as "mere tokens of an authority to receive possession", in the future; consequently in the case of these documents the attornment of the bailee is necessary, or possession of the goods must be taken by the buyer.

26. The leading case on delivery order is the decision of Sir Lawrence Jenkins, C.J. and Woodroffe, J. in Anglo-India Jute Mills Company v. Omademull ILR Cal. 127. It emphasises the incident that a delivery order is recognised as a document of title and under a delivery order the transferee acquires a title to the goods to which it relates. Secondly, it emphasises the long and ancient usage of the jute trade in Calcutta where pucca delivery orders are issued only on cash payment and are normally passed from hand to hand by endorsement and are sold and dealt with in the market; as absolutely representing the goods to which they relate. That case decided that the seller Defendant company was estopped from denying that cash had been paid for the goods to which delivery order related and they could not claim to be entitled to lien against the Plaintiff buyer. It also decided that the seller Defendant company were further estopped from denying that they had appropriated the ''goods of the required quantity and description to the delivery Order and that they held those goods for the Plaintiffs.

27. How far goods can be said to be appropriated by the seller when it has already issued a delivery order has been the subject of controversy. Reference in this connection was made to the Supreme Court decision in Jute if Jute and Gunny Brokers Ltd. and Another Vs. The Union of India (UOI) and Others, . That case had occasion to notice, the Calcutta decision in Anglo-India Jute Mills Company (3, Supra). But it has to be emphasised that in that case before the Supreme Court it was not in dispute that the goods covered by the Pucca Delivery Order were not ascertained at the time the said order was issued and that the ascertainment took place in the shape of appropriation when the goods were actually delivered in compliance therewith. There it was an admitted fact before the Supreme Court that the goods had not been ascertained at the time when the Pucca Delivery Order was issued. Indeed, whether appropriation and ascertainment of goods took place by the Delivery Order must necessarily depend upon the exact terms of the Delivery Order in each case and they have got to be examined with care and precision. Wanchoo, J. delivering the judgment of the Supreme Court at pp. 1222-23 observed as follows:

The appeal Court in our opinion was therefore right in holding that the property in the goods included in the pucca delivery orders did not pass to the holders "thereof in view of Section 18 of the Sale of Goods Act in spite of the decision; in the case pi the Anglo-India Jute, Mills Company Supra. What that case decided; was that in a suit between a holder of a pucca delivery order--be he the first holder or a subsequent holder who has purchased the pucca delivery order in the market--and the mills, there will be an estoppel and the mill will be estopped from denying that cash had been paid for the goods to which the delivery order related and that they held the goods for the holder of the pucca delivery order. That case, therefore, merely lays down the rule of estoppel as between the mill and the holder of the pucca delivery order and in a suit between them the mill will be estopped from denying the title of the holder of the pucca delivery order but that does not mean that in law the title passed to the holder of the pucca delivery order as soon as it was issued, even though it is not disputed that there was no ascertainment of goods at that time and that the ascertainment only takes place when the goods are appropriated to the pucca delivery order at the time of actual delivery.... That case (I.L.R. Cal. 127) was not dealing with the question of title at all as was made clear by Jenkins C.J. but was merely concerned with estoppel.

28. It is necessary to explain that in the above case the Supreme Court was dealing with a triangular conflict between the buyers, sellers and the Government. The goods there were requisitioned by the Government of India under the Defence of India Rules. The question arose in connection with the fact whether notice of requisition should be given only to the seller Mill or also to the holder of the Pucca Delivery Order. Naturally the question of estoppel was there also and it was held that the Government of India was not barred by estoppel of which Jenkins C.J. was speaking in the case of Anglo-India Mills Company Supra. So far as the buyer and seller are concerned the delivery order is a document of title as between them u/s 24 of the Statute--the Indian Sale of Goods Act. In this case this, delivery order specifies with accuracy and precision the quantity and description of the goods intended to be delivered by the Mills to the buyer and normally as between them it will be appropriation and as between them i.e. between the buyer and the seller there will be estoppel. That is enough for the purpose of our decision, in this appeal.

29. Air that we need to observe is that the whole question of appropriation in the sale of goods is important when actual deli very had not yet been made. When actual physical delivery has been made there is no further question of appropriation of the goods. In law, appropriation of goods is important in connection with that stage only where before the actual delivery is made, some act and conduct on the part of the seller would show that the goods had been appropriated towards the contract by which he is committed. The whole theme of Section 23 of the Sale of Goods Act indicates the position Sub-section (1) refers to a contract for sale of unascertained or future goods by description and goods of that description and in a deliverable state. It mentions the fact of unconditional appropriation to the contract and assent of the buyer or the seller as the case may be. In Sub-section (2) it expressly provides for the goods where

delivery is made to a carrier for the purpose of transmission to the buyer without reserving the right of disposal and in that event delivery to the carrier would be regarded as an unconditional appropriation of the goods under the contract. No juristic or legal question of appropriation can, therefore, arise after there has been physical and actual delivery of the goods to the buyer.

30. It is contended on behalf of the Appellant that the clause relating to "schedule of delivery" in the contract is delivery by the tender and delivery of the Pucca Delivery Order. It is submitted for the Appellant that delivery really in this whole contract is symbolic by delivery of the document of title, namely, the Pucca Delivery Order. We are unable to accept that construction. We shall state our reason briefly.

31. The words such as (i) "Total quantity", (ii) "required to be delivered" and (3) "three equal monthly instalments during the period of April-June 1952" are indicative of the physical delivery of the goods. They do not reconcile with notional or symbolic delivery by the delivery of the title deed or rather the Pucca Delivery Order. It is difficult to imagine pucca delivery orders in "equal monthly instilments" and "the total" quantity" to be delivered only in terms of the Pucca Delivery Order. These concepts represented by these words in the contract do not at all accord with the idea of notional delivery or symbolic delivery by the Delivery Order. The word "during" shows that this physical delivery of the goods can be done throughout the months such as April for April quota, May for May quota and June for June quota. That again is the reason why we feel that the date of tendering the P.D.O. as showing the last date will not prevent earlier submission of the P.D.O. before those specific dates such as April 30, May 31, or June 30, Indeed, it is rather the intention that instead of delivering it on the last day the P.D.O. should as a matter of business procedure be delivered or tendered a few days earlier to make possible the schedule of delivery work up according to the express language used in the clause relating to the schedule of delivery as quoted above.

32. The Learned Counsel relied on the case Codington v. Paleologo L.R. 2 Ex. 193. That was an interesting case. The Plaintiffs there contracted to supply the Defendants with goods under a clause which stated "delivering on April 17th, complete 8th May". The Plaintiffs there made no delivery on the 17th and the Defendants on the following day rescinded the contract and refused subsequent tenders of the goods. The Plaintiffs brought an action for non-acceptance. The Court held that, if on the true construction of the con tract the-Plaintiffs-were bound to commence the delivery on April 17, the Defendants were entitled to rescind for the failure to deliver on that day. But Kelly, C.B. and Pigot B. held that it did not bind the seller to commence delivery on the 17th; but only to deliver St reasonable times between the 17th and the 8th and Martin and Bramwell, B.B. came to the conclusion that the contract did bind the seller to commence delivery on the 17th. But then; in that case there was the use of the word "on" in the clause in the contract which is significantly absent in the contract in the present

case be fore us. Besides, there are many other clauses in the present contract which are to be read together in order to give a harmonious meaning to the whole contract and to make it commercially; effective from the business point of view.

33. On behalf of the Appellant, reliance was placed on the case of Edmund Bowes, J.B. Martin and W.L. Kent v. Charles Shand, Alexander Shand and R.A. Robinson 2 A.C. 455. The construction of the words "Madras rice to be shipped at Madras or coast, for this port, during the months of March and/or April 1874, per Rajah of Cochin" was the subject of that decision. Now the vessel in that case arrived at Madras in February and therefore, the shipment was made in February and not during March and/or April as provided in the contract. Naturally the buyer refused to accept the rice and it was held that the contract was not complied with. The observations of Lord Chancellor (Lord Cairns) at p. 463 make it clear that

it is a mercantile contract and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance and that alone might be a sufficient answer.

Later on, the learned Lord Chancellor at p. 464 of that report observed as follows:

Prima facie, I should say it meant that the shipment must be made, that the rice must be put on board; during the two specified months and neither before nor after those months.

We do not think that the above observations help the Appellant in this case because the language here is different and the clauses in the contract also are different.

34. Next comes the question of the Appellant''s right to cancel the contract. On the facts and construction we have come to the finding that the. Appellant committed breach of the contract by cancelling it and therefore, it was the Appellant who was in default and not the seller Respondent. The learned trial Judge came to the conclusion that Clause 11 of the WSB 133 form of the contract to which this contract was expressly subject; did not apply because Clause 11(iii) uses the words "should the contractor fail to deliver the stores or any consignment thereof". It is provided that in that event the Appellant shall be entitled; at his option to cancel the contrast. Under Clause 1 of the WSB 133 form of the contract containing the definitions, "stores" were defined by Clause (xiii) to mean "what the contractor agrees to supply under the contract as specified in the acceptance of the tender". The learned trial Judge construing that expression came to the finding, that there "stores" meant the actual goods and as the Appellant''s whole contention was that delivery was only by delivery of the P.B.O., Clause 11 gave no right to the Appellant to cancel the contract for failure to deliver the P.D.O. on April 30, 1952. Having come to that conclusion the learned Judge also refused the right of cancellation to the Appellant under Clause 20 of the WSB 133 form of the contract which expressly gave the Appellant,

at any time by notice in writing summarily determine the contract without compensation to the contractor commits any breach of this contract not-herein specifically provided for.

The learned trial Judge expressed his conclusion on this point iii this way:

First, Clause 20 speaks of summary determination. There has been in fact no summary determination in the present case. Secondly, Clause 20 speaks of ''breach of contract not herein specifically provided for''. If Clause 11 be relied on by the Defendant Clause 20 could not be relied on in the same breath.

35. We are of opinion that the learned Judge was not right in expressing that conclusion on the construction of these two clauses. If he held that Clause 11 did not apply then the fact that Plaintiff had invoked Clause 11 would not disentitle him from relying on Clause 20 which expressly provides for cases not otherwise provided before. If the learned trial Judge had come to the conclusion that Clause 11 did not provide for this kind of breach because it related to actual case of tendering of the P.D.O., then it must follow that Clause 20 is attracted. The Appellant by its letter of cancellation quoted above not only tried to exercise the "option" mentioned in Clause 11 of WSB Form contract but also the "other conditions" of the contract which would obviously include Clause 20 of WSB Form contract. Nor can we accept the learned Judge''s conclusion that this was not a summary determination. The determination was certainly summary in this ease. According to the construction which the Appellant thought that the only date to deliver and tender the P.D.O. was April 30, 1952, between the office hours and that having passed, it issued the termination forthwith on May 1, 1952. If that is not summary, we do not know what summary is.

36. But then this aspect is immaterial. We are satisfied that under the contract in corporating the special Clause 20 of the WSB 133 the Appellant has in appropriate cases, the right to cancel the contract and even if it did not, the right to cancel or repudiate the contract would flow from the Contract Act and the Sale of Goods Act. It is not that this contract does not give this power or right to cancel the contract under this clause. But then the right of cancellation has got to be exercised on the breach committed by the buyer. On the facts here We hold that the seller did not commit any breach at all and therefore the buyer had not right to cancel the contract.

37. Then comes the question whether the Appellant should have repudiated the whole contract on the alleged failure by the seller to tender and deliver the P.D.O. on April 30, 1952. The question then is whether each instalment under the contract is a separate contract pr a whole contract so that breach of a part would justify cancellation of the whole. On that point reliance was placed on the authority of The Mersey Steel and Iron Company v. Naylor, Benzon and Company 9 A.C. 434. The House of Lords affirmed the decision of the court of appeal in that case that upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery;

that the Respondent in that case had not by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract or so as to release the company from further performance. Earl of Selborne L.C. at p. 439 discussed this question that the actual circumstances of the case must be examined always in order to see whether the one party to the contract is relieved of its future performance by the conduct of the other and how far the conduct amounts to a renunciation or an absolute refusal to perform the contract, to justify the other party to accept it as a reason for not performing his part. At p. 439 Earl of Selborne L.C. observed as follows:

The Contract is for the purchase of 5000 tons of steel blooms of the company''s manufacture; therefore, it is one contract for the purchase of that quantity bf steel blooms. No doubt, there are subsidiary terms in the contract as to the time of delivery; ''delivery one thousand tons monthly commencing January next''; and as to the time of payment, ''payment nett cash within three days after receipt of shipping document''; but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of sp many distinct quantities of iron, It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron, to be delivered as those times and in that manner and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent to the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract by the delivery of the undelivered steel.

38. Applying that test, the contract in this case is one and we are of the opinion that the learned trial Judge was wrong in holding that the contract was not one. The contract was to supply a particular quantity of B-Twill bags. No doubt that quantity was to be deliverable is three equal monthly instalments. But that did not make it a different contract. The: contract is one; the delivery is staggered. Therefore, whether the Appellant had a right to cancel the whole contract for the failure to deliver the first quota, would depend on the terms of Clause 11 and 20; whichever applied. But then it is unnecessary to, go into that question because of the facts in this case. The Appellant himself proceeded on this basis and treated it as one whole contract. Even after the contract'' was cancelled by the Appellant, the Plaintiff-Respondent submitted the second and the third bill on May 21, 1952 and June 19, 1952, respectively and also the respective challans for inspection. In each of these cases the Appellant took the view that as the contract had already been cancelled, the Bills and the challans in respect of the second and the third deliveries were refused and were therefore returned. Indeed, the Plaintiff waited till the time for the third delivery under the contract expired before filing this suit which was done on April 1, 1953. u/s 60 of the Sale of Goods Act it is expressly provided that where either party to a contract of sale repudiates the contract before the date of delivery, the other party may either

treat the contract as subsisting and wait till the date of delivery or he may treat the contract as rescinded and sue for damages for the breach. The Plaintiff company waited in this case, as it had a right to do, to at least tender or make offer for delivery in respect of the second and the third, quotas and brought the suit thereafter.

39. Some argument has been addressed to us about the attitude and conduct adopted by the Appellant in respect of another contract with Ganesh Jute Mills. We do not think that the other contract should be brought in for the construction and interpretation of this contract and we are of opinion that the act and conduct in relation to another contract with another jute mill is, strictly speaking, irrelevant for the purpose. The idea of referring to the contract with Ganesh Jute Mills was to show how unreasonable the Appellant was in this case, towards the Plaintiff. The-contention of the learned Advocate-General was that there was preferential treatment or discrimination because the receipt of the delivery order of Ganesh Jute Mills on May 2, in this case, was not treated as fatal to the contract by the Appellant and that the Appellant did not treat the tender of the P.D.O. on May 2, by the Ganesh Jute Mills to be a breach of similar contract. We express no opinion on this point of preferential or discriminatory treatment because we consider that to be irrelevant for construing the contract in this case.

40. The learned trial Judge awarded a decree for Rs. 1,61,700 as damages. The Appellant has not contested the quantum of damages before us nor was there any dispute about the quantum at the trial Court. The evidence on the damage, the falling market, the rates prevailing at the date of the breach at the different times of delivery under the three different quotas of April, May and June is conclusive and there is no other evidence to contest the quantum. A Division Bench of this Court in Bilashram Thakurdas v. Gubbay ILR Cal. 305 of Sanderson, C.J., Woodroffe and Mookerjee JJ. expressed the view that on the true construction of the contract before that Court the buyer had the right to demand delivery of the goods by separate shipment spread over the months from July to December and the true measure of damages was the aggregate of the differences between the contract price and the market price at the appointed times of delivery in each month. That principle should also apply to the facts of the present case. As we hold that the breach of the contract is on the part of the Appellant and that the cancellation of the contract by the Appellant was wrongful, the damage must necessarily follow for the amount decreed in favour of the Plaintiff-Respondent.

41. There was some argument at the Bar about the readiness and willingness to perform the contract on either side. Both the Appellant and the Respondent contended that they were ready and willing to perform the contract. Even assuming readiness and willingness on either side to perform the contract, this is clearly established by reason of misinterpretation of the contract in suit that the Appellant committed breach of the contract by cancelling it and by refusing to accept the delivery order tendered on April 23, 1952. On behalf of the Appellant

readiness and willingness are supported by the fact that the cheque was made ready on April 30, 1952. On behalf of the Respondent readiness and willingness were proved by the fact that even a week before April 30, they had submitted the Bill along with the P.D.O. Thereafter on April 26 to 29, the inspection challan even was given to the Appellant and subsequently even after April the Respondent made offers to deliver and perform their part in respect of the May-June quotas under the contract. If it was necessary to prove in that context, who was more ready and more willing to perform the contract, we would be bound to hold that the Appellant''s refusal to accept the tender of the Delivery Order on April 23, was Appellant''s lack of readiness and willingness to perform that part of the contract to begin with and also their subsequent conduct and act as stated.

42. For the reasons stated above we dismiss the appeal with costs certified for two counsel.

43. The Appellant will satisfy the decree within three months from date.

Masud, J.

44. I agree.

