
(1958) 09 PAT CK 0007
In the Patna High Court
Case No : A.F.O.D. No. 315 of 1952

Union of India (UOI)	Vs	APPELLANT
Vasudeo Agarwal and Another		RESPONDENT

Date of Decision : 23-09-1958

Acts Referred:

Contract Act, 1872 — Section 73, 74, 9

Citation : AIR 1960 Patna 87

Hon'ble Judges : Raj Kishore Prasad, J

Bench : Single Bench

Advocate : P.K. Bose, for the Appellant; Ray Paras Nath and Umesh Chandra Sinha, for the Respondent

Judgement

Raj Kishore Prasad, J.—This appeal is by the defendant railway from the judgment dated the 17th May, 1952 of Mr. K. K. Bose, 6th Additiona Subordinate Judge, Patna, whereby the plaintiffs --respondents" suit has been decreed, and, the defendant -- appellant has been ordered to pay a certain sum of money.

2. The decision of tho appeal rests upon the construction of tho contracts between the parties -- Exts. A(1), A(2), A(5), A(7) and A(8).

3. The principal question, however is : Whether the agreement for payment of the penalty equal to half per cent per day on the value of the undelivered quantity of goods by the plaintiffs to the defendant was in the nature of a penalty?

4. There is another connected question also, namely, whether there was an implied agreement that the defendant railway would supply wagons to the plaintiffs for supply of the goods contracted for?

5. The above five contracts were made by execution of purchase orders, of different dates, for supply of different kinds of commodities. These Purchase Orders are printed forms of the defendant-railway in which such agreements are entered into. Terms and conditions are printed on the reverse of each Purchase

Order. Except Clause 13, which does not appear in some of the Purchase Orders, all the other terms and conditions, particularly els. 3 and 8, are the same in exactly similar terms in all the five agreements.

6. I will now reproduce the relevant terms from one of them, Ext. A(1). The date of completion of delivery of the commodity and the extended contract time of the delivery mentioned under condition No. 8, however, are not the same in all the agreements.

7. Ext. A(1) is Purchase Order No. 977 dated 28-7-1947, for supply of screened Zcra. On the front page of Ext. A''(1), the offers of the plaintiffs, which were accepted by the defendant, are mentioned. They are these :

"Description ana i et) Zeera (screened) 250 quantity Of commodity (Two hundred and fifty) as per Sample. maunds. Rate F O. R. Jamalpur Reserve Depot - Rupees seventy two annas fourteen and pies six Rs. 72/14/6 only per md. net weight * * * * * Place of delivery : F. O. R. Jamalpur Reserve Depot. * * * * * Date of completion of delivery : 31st August, 1947 Mode Of payment : Full payment on completion of delivery . Bills to be submitted :? To Dy. Chief Mech, Engineer, E I. Ry. Jamalpur with receipt returns. Terms and conditions on the reverse."

8. The relevant terms and conditions on the reverse of it, for the purpose of the present appeal, are Nos. 3, 8 and 13. They are these :

xx xx xx 3. The Railway Administration will not be liable to the merchants for anything that may happen to the supplier's commodities until the same pass into the physical possession of the Railway Administration as the buyer (and not as a carrier) at place of delivery noted in the Purchase Order.

xx xx xx 8. Time for completion of delivery should be deemed to be the essence of the contract. If th& quantities contracted through this purchase order are not supplied within the stipulated date or dates, the supplier is liable to a penalty equal to 1/2 per cent per day on the value of the quantities he has failed to deliver by the stipulated date or dates, but the Railway administration reserves the right to refuse to accept the undelivered portion of the contracted quantity after 7-9-47 (date) whereafter the Railway administration will be at liberty to purchase elsewhere on the account and the risk of tho suppliers the said undelivered quantity and to recover from the suppliers any extra cost that may be incurred from any money due to the supplier by the Railway administration and/or forfeit the security deposit in whole or in part at the discretion of the Railway administration.

xx xx xx

9. The above terms and conditions are to be found in all the other four agreements also, and, tho only difference is in respect of the commodity ordered, the place of the delivery, the date of completion of delivery, and the extended contract. time of delivery.

10. Ext. A(2) is Purchase Order No. 985 of the 28th July, 1947, for supply of Dal Moong, and, the place of delivery is "F. O. R. Gomoh Reserve Depot," but the date of completion of delivery and the final date of delivery under condition No. 8 are the same, namely, the 31st August, 1947 and the 7th September, 1947, respectively.

11. Ext. A(5) is Purchase Order No. 1116 of the 16th October 1947. This is also for supply of Dal Moong, but the place of delivery is "F. O. R. Bhagalpur Reserve Depot." and, the date of completion of delivery is the 20th November, 1947, and the final date of delivery under condition No. 8 is the 29th November, 1947.

12. Ext. A(7) is Purchase Order No. 1118 of the 16th October, 1947. This is also in respect of Dal Moong, and, the date of completion of delivery and the final date of delivery under condition No. 8 are the same, that is, the 20th November, 1947, and, the 29th November, 1947, respectively, but the place of delivery is "F. O. R. Madhu-pur Reserve Depot."

13. Ext. A(8) is Purchase Order No. 1119 dated the 16th October, 1947. This is also in respect of Dal Moong, and, the date of completion of delivery and the final date of delivery under condition No. 8 also are the same, namely, the 20th November, 1947, and the 29th November, 1947, respectively, but the place of delivery is "F. O. R. Gomoh Reserve Depot."

14. This is a case in which the plaintiffs, parties to these five agreements, have admittedly broken it. In that, the commodities contracted for under these agreements were not delivered in any of these cases within the time stipulated; and, admittedly on the plaint itself, there was delay in each case, and, the commodities were supplied and accepted in each case beyond even the extended date mentioned under condition No. 8 of each of these five agreements.

15. The case of the plaintiffs is to be found in paragraphs 5, 7 and 19 of their plaint. Their main case was that in condition No. 8 there was no penalty clause in any of the contracts, and, as no risk purchase had been made by the defendant-railway, as provided under condition No. 8, of any commodity mentioned in the Purchase Orders, the defendant was not authorised to make any deduction from the plaintiffs' bills on account of delayed delivery beyond the extended time provided in Clause 8 of the terms and conditions of the aforesaid five agreements.

The plaintiffs, therefore, claimed from the defendant a refund of the amount of deductions made, in accordance with condition No. 8 of the contract, by the defendant, from the plaintiffs' bills in respect of the commodities supplied by the plaintiffs and accepted by the defendant although delivered beyond the extended time stipulated in Clause 8 of the terms and conditions of each of the five contracts.

16. The suit was contested by the defendant. The main defence was that as there had been delay in giving delivery of the commodities contracted for, which

were delivered beyond even the extended final date mentioned in Clause 8 of each contract in each case, the plaintiffs were liable to pay the penalty at the stipulated rate under the terms and conditions of the purchase orders in question, and, therefore, the defendant was legally entitled to charge penalties and deduct the same from the plaintiffs' bills, and, as such the suit must fail.

17. The construction put by the learned Subordinate Judge on paragraph 8 of the contract, reproduced earlier, was to the following effect :

"The obvious meaning that can be gathered from the reading of para 8 of the contract is that the Railways were entitled to deduct penalty from the period beginning from the date given in the front up to the period given on the reverse and on which date alone the contract could be rescinded. If the goods were received after the date mentioned on the reverse, no penalty was chargeable and the only right that could have accrued under contract was to rescind it altogether and make a purchase from the market and realise the difference from other contracting party."

He, however, summarised his conclusions in the following words :

"From the above discussions, the following points are clear (i) that penalty could be imposed if a default occurred only for a limited period extending up to 7 days mentioned and apparent from the contracts themselves. The penalty clause was inserted in the contract to hold the clause in ter-norem and was not in the nature of liquidated damages in which case alone a deduction from the bills for indefinite period could be made, (ii) that there was an implied contract for supply of wagons and since time was made the essence of contract the supply of wagons was to be made in time in order to ensure timely fulfilment of the promise. Where, therefore, there was no timely supply of wagons, the penalty clause could not operate."

18. The learned Subordinate Judge, accordingly, decreed the plaintiffs' suit.

19. The main question, which has been canvassed by Mr. P. R. Bose, on the part of the defendant-appellant, is that the agreement, mentioned in Clause 8 of each of these five Purchase Orders --Exhibits A/1, A/2, A/5, A/7 and A/8 -- to pay a penalty equal to 1/2 per cent, per day on the value of the undelivered quantities was not simply a penalty to be held over the other party in terrorem, but it was in the nature of liquidated damages, and, it formed a genuine pre-estimate of the buyer's probable or possible interest in the due performance of the principal obligation by the seller.

20. Mr. Bose, in support of his contention, relied on *Clydebank Engineering and Shipbuilding Co., Ltd. v. Don Ramos Yzquiredo Y Castaneda* (1905) AC 6 and *Cellulose Acetate Silk Co., Ltd. v. Widnes Foundry* (1925) Ltd. (1933) AC 20.

21. The above contention of Mr. Bose was stoutly combated by Mr. Ray Paras Nath, Government Pleader, who argued, for the plaintiffs-respondents, that the above agreement to pay penalty was merely stipulated in terrorem, and, could

not possibly have formed a genuine pre-estimate of the purchaser's probable or possible interest in the due performance of the principal obligation by the seller, as contended by the appellant. He further submitted that u/s 74 of the Indian Contract Act, the defendant was not entitled to deduct the disputed sums, which the defendant admittedly deducted from the plaintiffs' bills, whether as penalty or liquidated damages, unless the defendant affirmatively proved the damages it had suffered, and, in the present case, there was no evidence of any loss, because admittedly the defendant did not make any risk purchase as contemplated by Clause 8 of the terms and conditions of the contract.

22. In support of his contention, the learned Government Pleader relied on a decision of the Privy Council in AIR 1929 179 (Privy Council) ; a Bench decision of this Court in Sasanka Sekhar Pal and Others Vs. Dinanath Gorain and Others, , and, a decision of the learned Judicial Commissioner, Middleton, J, C., in Acharaj Singh v. S. Sant Singh AIR 1935 Pes 57, in which the just mentioned Privy Council case, was relied upon.

23. The crux of the matter, therefore, is : Whether the agreement to pay penalty in the present case was by way of penalty or liquidated damages? In order to answer this question, it would be useful at first to know : What is meant by penalty? What is meant by liquidated damages?, and, what is the distinction between penalty and liquidated damages?

24. The above questions are well discussed in 10 Halsbury's Laws of England, 2nd Edition, Part IV, paragraphs 183-184, at pages 141-145. The above questions have also come up for decision before the different High Courts in India, but it is not necessary to mention them here. The result, however, of the consideration of the decided cases may be summarised as below :

25. Penalty : When a contract contains a term which, not being an integral part of the contract, is introduced only for the purpose of securing the performance of the contract, that term is penal, and, as such, a penalty is a term which is extraneous and collateral to the actual contract. A penal clause, therefore, must be one which imposes, some penalty for the default, that is to say, which puts the defaulter in a worse position than he would occupy if there were no penal clause.

26. The whole principle of the law of penalty is this : If in making provision for breach of contract, the promisee puts in a stipulation not by way of reasonable compensation to the promisee on the breach of contract but in order that by reason of its burdensome or oppressive character it "may operate in terrorem over the promisor so as to drive him to fulfil the contract, then the stipulation is one by way of penalty. The idea is very common that what is called a "penalty clause" in a contract is a mere brutum fulmen, an agreement that neither party has any intention of enforcing at all to any extent. Such a penalty clause merely fixes a maximum for damages which would be difficult to estimate in terms of money and anyhow does not deprive the aggrieved party of his right to damages

that can be so estimated.

27. Liquidated Damage : -- The parties to a contract may at the time of entering into it provide, that in case of breach the party in default is to pay to the other a sum certain specified in, or ascertainable from, the contract. This sum may be either liquidated damages, in which case it is not to be interfered with by the Court, or a penalty, which covers the loss if proved but does not assess it. If it is a sum which can be regarded as a genuine pre-estimate by the parties of the loss which they contemplated would flow from the breach, it is liquidated damages.

If on the other hand the sum does not attempt to assess the loss, but is imposed as security for the due performance of the contract it is a penalty. A liquidated damage, therefore, is pactional damage agreed to between the parties.

28. Therefore, the essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

29. How determined : It is well settled that the question whether a clause in a contract provides for liquidated damages or for a penalty strictly so called in the sense of punishment irrespective of the damage sustained, is a question not of words or forms of speech but of substance and of things. Therefore, whether the sum mentioned in such a clause is a penalty or liquidated damages in a given case is a question of construction for the Court alone. The Court must proceed according to what is the real nature of the transaction and the mere use of the word "penalty" on the one side or "damages" on the other would not be conclusive as to the rights of the parties. In deciding this question the Court must take into consideration the intention of the parties, as evidenced by their language and the circumstances of the case, which, however, must be taken as a whole and viewed as at the time the contract was made.

30. Distinction between Penalty and Liquidated Damages : The rules for distinguishing between a penalty and liquidated damages, as given in Halsbury's Laws of England referred to before, are as follows :

"1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages., Where the parties themselves, call the sum made payable a penalty, the onus lies on those who seek to show that it is liquidated damages to prove that such was the intention,

2. It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

3. It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to

have been paid.

4. There is a presumption (but no more) that it is a penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage". .

5. Where a contract contains a variety of stipulations, and the amount of damages for the breach of each stipulation is unascertainable, or not readily ascertainable, then the sum payable on the breach of any of the stipulations is liquidated damages. The fact that the stipulations are of different degrees of importance is not of itself sufficient to show that the sum payable is a penalty, except where some of the stipulations are of such a character that the damages which can possibly arise from a breach of any of them would be very insignificant compared with that fixed by the parties.

6. Where a contract contains only a single stipulation, on the breach of which a specified sum, whether large or small, is to become payable, such a sum is liquidated damages especially where there is no adequate means of ascertaining the precise damage which may result from the breach; but if the single stipulation is only of very trivial importance or can only give rise to nominal damages, and the sum payable is considerable, the disproportion between the two may be so great as to make it plain that the sum was fixed as a penalty."

31. On the above question, the law in India is to be found in Section 74 of the Indian Contract Act. Section 74, without its two Explanations and the Exception, which are not material here, is in the following terms :

"74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for".

32. This section boldly cuts the most troublesome knot in the Common Law doctrine of damages. It abolishes the distinction between penalty and liquidated damages even in case of contracts before 1899, when the old Section 74 was amended and the first paragraph and Explanations were substituted for the first paragraph of old Section 74 by the Indian Contract (Amendment) Act, 1899 (VI of 1899).

33. Section 74 does not overlap or extend Section 73 of the Indian Contract Act; and, for the application of Section 74, there must be something in the nature of a penalty. The apparent intention and effect, therefore, of Section 74 was to abolish the distinction which had theretofore been recognised by the courts between the compensations for breach of contract, known respectively as

liquidated damages and penalty.

34. The word "penalty" in Section 74 implies that there is a main contract and a subsidiary contract providing for some more drastic consequences in the event of the breach of the original contract. It is totally inapplicable to a term of the original contract or consequence of the original contract not owing to breach but owing to fulfilment.

35. But as observed by Lord Atkin of the Privy Council in AIR 1929 179 (Privy Council) , the effect of Section 74 is to disentitle the plaintiff to recover simpliciter the penal sum named in the agreement as due and payable on a breach of contract, whether as penalty or liquidated damages, unless he proves the damages he has suffered.

36. We come then to the question, what is the agreement, here? and whether this sum of money -- 1/2 per cent on the value of undelivered quantity -- is one which can be recovered as an agreed sum as damages, or whether, as has been contended, it is simply a penalty to be held over the other party in terrorem -- whether it is, what I think gave the jurisdiction to the court below to interfere at all in an agreement between the parties, unconscionable and extravagant, and one which no court ought to allow to be enforced.

37. As observed by Earl of Halsbury L. O. in (1905) AC 6. it

"is impossible to lay down any abstract rule as to what it may or it may not be extravagant or unconscionable to insist upon without reference to the particular facts and circumstances which are established in the individual case."

38. It seems to me, when one looks to see what was the nature of the transaction in this case, it is hopeless to contend that the parties did not only intend this as something in terrorem. Both parties recognised the fact of the importance of time; it is a case in which time is of the essence of the contract and so regarded by both parties.

38a. In this connection I like to read a passage from the learned address of Lord Watson, to the House of Lords, in Lord Elphinstone v. Monkland Iron and Coal Co. Ltd. (1886) 2 AC 332.

38b. In the above case the respondent Company undertook to level and soil the surface of the Peep-o"-day deposit, which was then an old slag hill, by a certain extended contract time, and, the agreement further provided in article 12, that, failing performance, within the period fixed for completion of the contract, the respondent Company shall pay to the appellant

"at the rate of 100 per imperial acre for all ground not so restored, together with legal interest thereon, from and after the date when the operations should have been completed until paid."

On failure of performance of the contract, the appellant asked for a decree for ? 1630, or such other sum as might be filed. The Second Division of the Court of

Session, Scotland, against which the appeal was brought, refused to give the appellant decree, on the ground, as expressed by Lord Young :

"The agreement to pay ? 100 per acre for ground unrestored at a particular date is clearly a penalty under which no more than the actual damage can be recovered."

The House of Lords reversed the said decision.

39. While dealing with the aforesaid Article 12 of the agreement in that case, Lord Watson at pages 342-343, observed :

"But the payments stipulated in the 12th article are, in my opinion, liquidated damages, and not penalties. When a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification. The payments stipulated in Article 12 are not of that character; they are made proportionate to the extent to which the respondent company may fail to implement their obligations, and they are to bear interest from the date of the failure. I can find neither principle nor authority for holding that payments so adjusted by the contracting parties with reference to the actual amount of damage ought to be regarded as penalties."

40. The reason why their Lordships, in the above case, held the stipulation contained in article 12 of the agreement not to be a penalty, but liquidated damages, in the words of Lord Herschell, L. C., at page 345, was this :

"The agreement does not provide for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance. It has reference to a single obligation, and the sum to be paid bears a strict proportion to the [extent to which that obligation is left unfulfilled. There is nothing whatever to show that the compensation is ordinate or extravagant in relation to the damage sustained. And provision is made that the payment is to bear interest from the date when the obligation is unfulfilled. I know of no authority for holding that a payment agreed to be made under such conditions as these is to be regarded as a penalty only; and I see no sound reason or principle or even convenience for so holding."

41. The above mentioned special circumstances in which, and the reasons, due to which, their Lordships held, in the above case, that the stipulation in Article 12 of the agreement of that case not to be a penalty, as I will show hereafter, are not present here.

42. The observation of Lord FitzGerald, in the just mentioned case, however, on the question under consideration, may usefully be reproduced here. The noble Lord, in his address to the House of Lords, at page 346-347; said :

" the parties to any contract may fix the damages to result from a breach at

a sum estimated as liquidated damages, or they may enforce the performance of the stipulations of the agreement by a penalty.

In the first instance the pursuer is, in case of a breach, entitled to recover the estimated sum as pactional damages irrespective of the actual loss sustained. In the other, the penalty is to cover all the damages actually sustained, but it does not estimate them, and the amount of loss (not, however, exceeding the penalty) is to be ascertained in the ordinary way. In determining the character of these stipulations we endeavour to ascertain what the parties must reasonably be presumed to have intended, having regard to the subject-matter, and certain rules have been laid down as judicial aids. Thus, in *Astley v. Weldon* (1801) 2 Bos. and P 346 (353), Mr. Justice Heath said : "Where articles of agreement contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do" or (I may add) omit to do a particular thing, "such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." Lord Eldon took part in the judgment in (1801) 2 Bos. and P. 346, which has always been considered, so far, to state the rule correctly."

43. Here, it is true, Clause 8 of the agreement in each case does not provide for the payment of a lump sum upon the non-performance of the single and sole obligation of the plaintiffs. It is also true that the payment stipulated in Clause 8 of the agreement is made proportionate to the extent to which the plaintiffs may fail to implement their obligations. Here, what Clause 8 of the agreement provides is for payment of a penalty equal to 1/2 per cent per day on the value of the undelivered quantities not delivered within the stipulated extended date of delivery mentioned in it.

44. But can it be said, in the instant case, as was the case in the just mentioned case of the House of Lords, either that the sum to be paid under Clause 8 bears a strict proportion to the extent to which that obligation is left unfulfilled, or, that the above compensation is not ordinate or extravagant in relation to the damage sustained?

45. On the facts of the present case, I entertain a clear opinion, for reasons to be stated presently, that the stipulation contained in Cl, 8 of the agreement was in the nature of a penalty to secure the performance of the contract, and, therefore, this stipulation was rightly named by the parties themselves as "penalty".

46. The reasons, which have weighed with me for coming to the conclusion that the agreement to pay the penalty in Clause 8 of each agreement was in truth a penalty, and not liquidated damages, are these :

1. The stipulation to. pay the penalty in Clause 8 was not an integral part of the main contract, it was extraneous and collateral to the actual contract for delivery of the commodity;

2. This term was ex facie introduced, on the terms of the agreement itself, only for the purpose of securing the due performance of the contract within the stipulated date of completion of delivery mentioned on the front of each agreement :

3. This penal clause, which imposes penalty for the default, is prima facie in the sense of punishment irrespective of the damage actually sustained, or likely to flow from the breach;

4. This term, put in Clause 8 apparently as a security for the due performance of the contract, puts the plaintiffs in a worse position than they would occupy if there was no penal clause, because, the plaintiffs' claim on delivery beyond the contract time, would be diminished by the amount of penalty;

5. The agreement in Clause 8, no doubt, does not provide for payment of a single lump sum upon the non-performance of the only obligation of the plaintiffs, and, it only provides a flat rate of 1/2 per cent per day on the undelivered quantity, and, the rate at which the penalty is to be calculated may appear to be very small and insignificant, and quite proportionate to the extent to which the plaintiffs may fail to implement their obligation; but when we take into consideration the fact, which, to my mind, is an important factor, that the amount of damages to be calculated at 1/2 per cent per day on the value of the undelivered quantity is to vary with the time of delivery, and, if the defendant chooses to accept the delivery whenever it is made beyond the contract time, the amount of penalty may be unlimited, increasing with the time of delivery, and, in such a case, it may become disproportionate may become so great as to make it plain that the payment stipulated in Clause 8 was as a penalty. Where a sum at a particular rate is made payable to secure performance of the contract, the damage for breach of which must be different, that sum is prima facie to be regarded as a penalty, and not as liquidated damages;

6. To take an example : Suppose, the delivery is made long, long after even the extended time mentioned in Clause 8, and, the defendant, although not bound under Clause 8, to take the delivery then, accepts, because it finds that at that date the amount of penalty comes to more than the price of the commodity delivered, and, therefore, the defendant would not get the commodity gratis, without paying a farthing for it, but it would also get in cash from the plaintiffs, as damages for delivery delayed, then in such a case, the plaintiffs will lose not only the commodity supplied and the price thereof, but will have also to pay, over and above the commodity, some money in cash to the defendant. This aspect clearly establishes the extravagant and unconscionable nature of the term in question. The amount of such penalty, in the given case, would be far greater than in comparison with even the greatest loss that could conceivably be proved to have followed from the breach;

7. If the defendant, as provided in Clause 8, makes a risk purchase after the expiry of the extended date of delivery, by which time only the defendant is to

accept the delivery, then the measure of damage would only be the difference between the contract price and the price paid by the defendant for the risk purchase on the failure of the plaintiffs to deliver within the extended contract time; and this amount of loss may even be nothing, if on the relevant date, the contract rate is equal to or less than the amount of penalty, even if the market rate is greater than the contract rate; but it is not at all likely, in the usual course of things, that the amount of loss would be more than the amount of penalty. The damages which can possibly arise on the breach of the agreement would be very insignificant compared with the amount of penalty. This consideration also establishes that as both parties recognised the fact of the importance of time, they regarded time to be the essence of the contract, and therefore, this stipulation was put in, not by way of reasonable compensation to the defendant on the plaintiffs' failure of the delivery within the contract time, but in order that by reason of its burdensome and oppressive character it may operate in terrorem over the plaintiffs to drive them to fulfil the contract.

8. The fact that the amount deducted by the defendant in each case is not much is, to my mind, not the test to determine whether the stipulation for payment of the penalty was in the nature of a penalty. Because, if, for instance, as stated in paragraph 5 above, the undelivered quantity is not delivered for an indefinite period, and, when so delivered the Railway-company accepts it, then at that time the amount of penalty may amount to more than the price of the undelivered quantity which the defendant could be liable to pay to the plaintiff; and, in such a case, if the defendant was held to be entitled to recover this penalty, then it may happen that the defendant may have to pay nothing to the plaintiffs, and, the liability of the plaintiffs to pay the damage may even exceed their obligation to receive from the defendant. The defendant, in such a case, would be in an enviable position. Such a situation may arise, and, it cannot be ruled out, if it be held that the agreement was not a penalty, but liquidated damages, as contended by the appellant. The fact that this event has not occurred is no ground for not taking into consideration all possible contingencies arising on the breach for determining if the payment stipulated was in the nature of a penalty or contractual damages. It should be borne in mind, as observed by Lord Davey in (1905) AC 6 relied upon by the appellant, that the question whether it is extravagant, exorbitant or unconscionable, is to be considered at the time when the stipulation is made, that is to say, in regard to any possible amount of damages or any kind of damage which may be concerned to have been within the contemplation of the parties when they made the contract : In the instant case, it cannot be said that the fact of the claim for penalty being of an exorbitant or of an unconscionable amount as compared with any possible damages could not have been within the contemplation of the parties, and, therefore, this is also a reason for holding it to be a penalty, and not to be liquidated damages.

9. The stipulation to pay the penalty, would mean that on plaintiffs' default in not observing the dates and in not giving the delivery even within the extended

time, but delivering after it, and on its acceptance by the defendant, their liability, at the rate at which the penalty is to be calculated, as mentioned in Clause 8, might be overwhelming in regard to the prospective profit provided out of the transaction to them. No prospective seller could possibly incur such a risk.

10. Lastly, though the mere use of the word "penalty" in Clause 8 is not conclusive as to the rights of the parties, still the fact that the parties to the contract themselves called this term a penalty, is a clear indication of the intention of the parties, and, therefore, the use of the word "penalty" by them may prima facie be supposed to mean what they said.

47. For the above reasons, and, after taking into consideration the intention of the parties, as evidenced by their language used in the agreement, and, the circumstances of the case taken as a whole, and, viewed as at the time the contract was made, in my judgment, there is no doubt, that the real nature of the transaction, and, the true meaning and construction of the agreement, in each case, was that the payment of penalty, stipulated in Clause 8 of each of the agreements, was in truth a penalty, and, not liquidated damages, as contended by the respondents.

This stipulation could not possibly have formed a genuine pre-estimate of the defendant's probable or possible interest in the due performance of the principal obligation by the plaintiffs, as contended by the appellant. This penalty clause, therefore, is a mere brutum fulmen, an agreement that neither party had any intention of enforcing at all to any extent. As the appellant wanted to seek to show that it is liquidated damages, the onus was on the appellant to prove that such was the intention. The appellant, in my opinion, has not succeeded in discharging its onus.

48. Mr. Bose placed strong reliance on the decision of the House of Lords in (1905) AC 6. But, in my opinion, it has no application here, although in that case also the terms were very much similar, in that, in that case, the contract contained the following clause :

"The penalty for later delivery shall be at the rate of 500 1. per week for each vessel not delivered by the contractors in the contract time".

49. Their Lordships upheld the judgments of the Courts below in that case by which the damages at the rate of 500 1. per week had been allowed. Their Lordships held the above clause, not to be by way of penalty, because the penalty at the rate of 500 1. per week was fixed upon as being the agreed amount of damages on the suggestion of the defendants themselves in that case, and, therefore, on the peculiar facts of that case, and, on looking at the correspondence between the parties there, this clause was held not to be a penalty, but liquidated damages.

50. In this connection, the noble and distinguished Lord Chancellor, Earl of Halsbury, at page 13 said :

"Both parties recognised the fact of the importance of time; it is a case in which time is of the essence of the contract and so regarded by both parties, and the particular sum fixed upon as being the agreed amount of damages was suggested by the defendants themselves, and to say that that can be unconscionable or something which the parties ought not to insist upon, that it was a mere holding out something in terrorcm, after looking at the correspondence between the parties is, to my mind, not a very plausible suggestion. I have, therefore, come to the conclusion that the judgments of the Courts in Scotland are perfectly right in this respect, and I think there is no ground for the contention that this is not pactitional damage agreed to between the parties -- and for very excellent reason agreed to between the parties -- at the time the contract was entered into."

51. In my opinion, therefore, the above case, so strongly relied upon by Mr. Bose, cannot be of any assistance here.

52. Similarly, the second case of the House of Lords in (1933) AC 20, also, in my opinion, has no application here. In that case also, there was a clause in the contract, very much similar to the clause here. In that case, Clause 10 provided that "if this period of 18 working weeks is exceeded you to pay by way of penalty the sum of 20 1. per working week for every week you exceed the 18 weeks"

53. The noble and distinguished Lord Atkin, who read the main opinion, held that :

"I entertain no doubt that what the parties meant was that in the event of delay the damages and the only damages were to be 20 1. a week, no less and no more".

54. In the above case, the question which arose before their Lordships was on a counter claim by the appellants, in an action in which they were sued by the respondents for the price agreed to be paid by the defendants for the installation of an acetone recovery plant supplied by the plaintiffs. Their claim was that the contract specified delivery and erection within eighteen months of the approval by them of the plaintiffs' drawings, but the time expired on July 27, 1929, and the plant was not delivered and erected until February 10, and, therefore, they claimed substantial damages for delay.

In that case, the defendants accepted no liability for failure to do so. The peculiar facts and circumstances, in which their Lordships upheld the judgment of the court below allowing damages at 20 1. for every week, will appear from the following passage at page 25. I, therefore, propose to read this passage from the judgment of Lord Atkin. The noble Lord said :

"The purchasers pressed for an earlier date; they got it, and getting it without more they would still only have a business firm's assurance of delivery by that date; they would still be unable to claim damages from them for breach. The sellers ask for an addition to the price in order to enable them to give the earlier

delivery; the buyers ask for some compensation if they do not get the delivery they want. It is agreed at 20 1. per week of delay. It appears to me that such sum is provided as compensation in place of no compensation at all which would otherwise have been the result. Except that it is called a penalty, which on the cases is far from conclusive, it appears to be an amount of compensation measured by the period of delay. I agree that it is not a pre-esti-mate of actual damage. I think it must have been obvious to both the parties that the actual damage would be much more than 20 1. a week, but it was intended to go towards the damage, and it was all that the sellers were prepared to pay. I find it impossible to believe that the sellers who were quoting for delivery at nine months without any liability, undertook delivery at eighteen weeks, and in so doing, when they engaged to pay 20 1. a week, in fact made themselves liable to pay full compensation for all loss".

55. It will, therefore, appear that, in the above mentioned case, the only result of ignoring the penalty, in the words of Lord Atkin at page 26, might be that the defendants would find themselves confronted with a contract which by condition 10 deprived them of any compensation at all. For these reasons, on the peculiar circumstances of that case, their Lordships held that the Silk Company were only entitled to recover 20 1. a week as agreed damages; and, therefore, they affirmed the decision of the Court of Appeal.

Their Lordships, in those circumstances, thought it unnecessary to consider what would be the position if this were a penalty. The further question raised before their Lordships, whether where a penalty is plainly less in amount than the prospective damages, there is any legal objection to suing on it, or in a suitable case ignoring it and suing for damages, was, therefore, left open,

56. On the facts stated above, therefore, it is plain that the above decision of the Mouse of Lords will also have no application here for the reasons given by Lord Atkin at page 25 reproduced in ex-tenso earlier in this judgment, which circumstances are not present here,

57. In the Sasanka Sekhar Pal and Others Vs. Dinanath Gorain and Others, , relied upon by the learned Government Pleader, it was held that if rights are created and obligations incurred under a contract to do or forbear from doing an act, and a further obligation is incurred under a stipulation for non-performance of the obligation primarily incurred under the contract, the stipulation giving rise to the second obligation is auxiliary or subsidiary to the primary contract and not independent of it.

58. In the above case, the stipulation for payment of interest in default of payment of mining royalty at the rate of 2 per cent per month from the beginning of the month till the final date of payment was held to be in the nature of a penalty, obviously because the stipulation for payment of interest was not from the date of default, but from the beginning of the month. It was further held that the stipulation to pay interest at 4 per cent per mensem was not

independent of the primary contract, but was in terrorem intended to secure regular payment of the royalty, and, therefore, the Court could give relief u/s 74 of the Indian Contract Act,

59. The principle laid down in the above case has not been disputed by Mr, Bose, and it could not possibly be disputed. As stated earlier, whether a particular contract and the stipulation in a contract is by way of a penalty or not depends on the facts and circumstances of each case to which the principles which have been mentioned earlier apply.

60. Mr. Bose also relied on a Bench decision of this Court in *Kanak Kumari Sahiba Vs. Chandan Lall Khattri and Another*, . In that case a lump sum of Rs. 25,000/- was mentioned, but it was a part of the consideration money which was left in deposit by the purchaser to be paid only on fulfilment of the obligation under the contract by the defendants and their Lordships, *Jamuar and Ahmad JJ.*, held that it was left as a security to discharge the obligation resting on the defendants under the contract; and this term was only inserted, as held by the trial court in that case, "so that by reason of its oppressive character it may operate in terrorem on the seller and drive him to fulfil the contract" and, therefore, the plaintiffs of that suit were held not entitled to receive from the defendants compensation exceeding the amount of Rs. 25,000/-, that is, more than the penalty stipulated for in the contract. The principles laid down are the same, but, as I have said before, whether in a given case a stipulation to pay a penalty is a penalty or pre-estimation or damages, depends on the facts and circumstances. of each individual case.

61. On a consideration, of the above cases, it is clear enough that the contract, in the instant case, to pay a penalty at 1/2 per cent on the value of the undelivered goods was by way of a penalty, not because it is so called which is far from being conclusive, but because of the natural implications, of this stipulation discussed earlier.

62. I would, therefore, answer the question, posed by me in the beginning, in the affirmative-by holding that the agreement to pay the penalty mentioned in Clause 8 of each of the five agreements was in truth a penalty, and, therefore, rightly so called by the parties, themselves, and, so held by the court below.

63. The next connected question is : if there was an obligation on the defendant-railway to supply the wagons, and, thereby an implied contract that the defendant would make wagons available to the plaintiffs for supply of the goods to it?

64. The learned Subordinate Judge found that it was difficult to say whether the case came under a reciprocal contract, within the meaning of Section 54, of the Contract Act, but he held that since time was made the essence of the contract, the supply of wagons was to be made in time in order to ensure timely fulfilment of the terms as there was an implied contract between the parties for supply of wagons by the defendant to the plaintiffs, and, therefore, when there was no

timely supply of wagons, as found by him, after discussing each Purchase Order separately, the penal clause could operate.

65. I have very carefully considered the judgment of the court below and the submissions made by the parties, and I cannot persuade myself to accept the finding of the court below on this question for the reasons given hereafter.

66. Much reliance was placed on the words "F.O.R." mentioned in each of the five agreements occurring after the place of delivery. Mr. Bose relying on *Dominion of India Vs. Raj Bahadur Seth Bhikhranj Jaipuria*, submitted that the fact that in each agreement "F. O.K." is mentioned after each place of delivery shows that it was the duty of the plaintiffs to deliver the quantity of the goods at the relevant station mentioned in each agreement. He further relied on Clause 3 in each of the agreements, quoted earlier, in which it was mentioned that the defendant will not be liable to the plaintiffs for anything that may happen to the goods until the same passed into the physical possession of the Railway Administration "as the buyer, and not as a carrier at place of delivery noted in the Purchase Order.

He submitted from this contract, it was clear that the two capacities of the defendant as a carrier and as a buyer were kept distinct and separate, and, therefore, one has not to be mixed up with the other in considering the contract in question, and, the rights and liabilities of the parties thereunder.

67. The learned Government pleader, however, relied upon the judgment under appeal and the reasons given therein for holding that there was an implied contract between the parties for the supply of wagons to the plaintiffs by the defendant.

68. Mr. Bose further contended that the real reason why there was delay in delivering the goods according to the terms of the contract was that the plaintiffs had not sufficient stock of the commodities with them, and, therefore, they could not supply in time, and, the delay was not due to non-supply of wagons by the defendant-railway, as contended by the plaintiffs. In this connection, he referred to the letters written by the plaintiffs to the Divisional Superintendent, Dinapore, on different dates, in some of which, for instance, in Ext. B (39) regarding Purchase Order (Ext. A/5), and Ext. B (4) Regarding Purchase Order (Ext. A/7), it is mentioned as below :

"We have to draw your kind attention to the fact that at the time of above supply, we had your multiple orders in hand. In view of the considerable quantities of dals involved and supplies that had to be made at various destinations, the loading of this particular consignment was delayed

69. Mr. Bose, therefore, submitted that the position of the defendant as buyer was entirely different from his position as carrier, and, if the defendant supplied the wagons, they supplied them ex gratia for its own benefit, and, therefore, from that fact no inference could be drawn that there was an implied contract between the parties due to which there was an obligation on the defendant to

supply wagons to the plaintiffs. - He very strongly relied on Dominion of India Vs. Raj Bahadur Seth Bhikhranj Jaipuria, , in which the position was similar.

70. The learned Government Pleader, however, relied on the evidence of D. W. 1 who stated that in 1947 there was prohibition of movement of food grains from one place to the other without permit, and, the plaintiffs had, he submitted no doubt, such a permit, as will appear from Ext. E dated 9-8-1947, still it was impossible to supply the goods without supply of wagons by the Railway. In this connection, he relied on Exts. B(8), B(9), B(24) and 5, which are letters written by the plaintiffs to the Divisional Superintendent, East Indian Railway, asking for supply of wagons or complaining of delay in the supply of wagons by the defendant.

The learned Government Pleader also relied on Exts. C(1), C(2) and C (3), which are copies of telegrams sent by the Divisional Superintendent, Dinapore, to the Railway Officers at different places in order to show that the Divisional Superintendent, Dinapore, was ordering allotment of wagons, but the matter was being delayed. He, therefore, submitted that taking these Exts. B series and C series into consideration, it would be obvious that due to non-allotment of wagons, the plaintiffs could not supply the commodities within the contract time or even within the extended contract time.

71. The above aspect of the case has very much influenced the learned Subordinate Judge in coming to the conclusion that if the goods were to be carried on Railway, then the wagons could be supplied only by the Railway, which alone was in control of the wagons, and, therefore, in these circumstances, an implied contract should be inferred between the parties by virtue of which the defendant was to supply wagons to the plaintiffs, and, on the defendant's failure to supply the wagons, it was not entitled to claim damages for any delay in the delivery.

72. I have very carefully considered the arguments of the learned Counsel for the parties, and, on a consideration of the contract and the evidence and the facts and circumstances in the case I have no doubt in my mind that the contention of Mr. Bose is well founded. The fact that in the contract, as will appear from Clause 3, it was clearly stated that the Railway Administration will not be liable for anything that may happen to the suppliers' commodities until the same passed into the physical possession of the Railway Administration as a buyer, and not as a carrier, at place of delivery noted in the Purchase Order is a clear indication that the parties intended to keep the liability of the defendant-railway as a carrier distinct and separate from its liability as a buyer.

Whatever may be the causes of the delay, the fact remains that in fact there was delay in each case in delivery of the commodities. If there has been delay in supply of wagons by the defendant to the plaintiffs, due to which alone, as contended, the plaintiffs could not supply the commodities to the defendant in time, the defendant may be liable in damages for the loss to the plaintiffs, but

such damages if any, could be recovered, by a separate suit and not in the present action, and, therefore, the liability of the defendant as a carrier cannot be taken into account in considering its rights as a buyer.

73. In the absence of any contract, express or implied, in any of the agreements themselves that the supply of wagons by the defendant would be a condition precedent to the supply of the commodities by the plaintiffs, on the basis of Exhibits 5, B series, C series, or the oral evidence, such an implied contract therefore, cannot be inferred.

74. Another question, which arises in this connection, is :

What is the significance of the use of the words "F. O. R." in each of the Purchase Orders after the place of delivery?

75. To answer this question, it is necessary, at first, to know what is meant by "F. O. R." contract. In Volume 29, of Halsbury's Laws of England, second Edition, in para 308, at page 228, the commercial nature of F. O. R. contracts is stated in the following words :

"Under a "free alongside" contract ("f. a. s.") the seller undertakes to deliver the goods alongside the ship at his own expense, and under a "free on rail" contract (f. o. r.) the seller undertakes to deliver the goods into railway wagons or at the station (depending on the practice of the particular railway) at his own expense. These contracts differ from the ordinary inland contract of sale only in respect of the place at which delivery is to be made, which puts on the seller an item of cost over and above that of the goods themselves, and also prima facie fixes the point at which the property passes and the risk falls upon the buyer and the price becomes payable."

76. From the above, it is plain that loading into the railway wagons is not one of the indispensable conditions of F. O. R. contracts. Under F. O. R. contracts delivery may be made at the railway station also. In a particular case, whether the seller undertook to deliver the goods into railway wagons, or at the station at his own expenses, would depend, in the absence of any specific stipulation in the agreement itself, on the practice of the particular railway.

In the present case, in each of the Purchase Orders the delivery of the commodities was to be made F. O. R. at the Railway Reserve Depot of the railway station mentioned specifically in each of these five purchase Orders. In my opinion, therefore, on the agreements in the present case, it was the duty of the plaintiffs to deliver the goods, in each case, at their own expenses, free on rail at the mentioned railway station's Reserve Depot Specified in each case.

77-78. A similar situation arose in the Patna case, referred to before.

79. There, as here, it was contended that f. o. r. contracts meant that there was an implied contract by the defendant railway to supply wagons. This contention was negated by their Lordships, Ramaswami C. J. and Kanhaiya Singh J., there.

80. In the above Patna case, the seller plaintiff had stipulated to deliver the goods F. O. R. under the first and third contracts at any station of the East Indian Railway in the State of Bihar, and, under the second contract, at any station of the aforesaid railway within the Dinapore division which extended from Jhajha to Moghal Sarai. There was no stipulation as to the dates or the time when the goods will be taken by the seller to the railway station.

In that case also there was no dispute that there was dearth of railway wagons in 1943 due to war conditions. But, Kanhaiya Singh, J., with whom Ramaswami C. J., agreed, held that paucity of wagons, was no ground for placing upon the railway an obligation to supply wagons, when there was no such condition in the contracts. It was further held that there is no invariable rule that in the case of all F. O. R. contracts, it is not sufficient to reach the goods to the railway station; but the goods must also be loaded into the wagons, and, that it was really a question of contract or of usage of the railway concerned. It was, therefore, held in that case that there was no obligation on the Railway Administration to supply wagons. I respectfully assent to the above view.

81. The case is very much similar to the present case; rather, I would say, the facts in the present case are much stronger, in that, here in each case the particular Reserve Depot of the Railway Station at which delivery is to be made F. O. R. is mentioned, and, therefore, on the contracts in the present case, it was the bounden duty of the plaintiffs to deliver the goods at their own expense at the place of delivery indicated in each case to the defendant.

On the five agreements in question it is manifest that there was no such implied contract, as contended by the respondents, and, as held by the court below, between the parties under which there was an obligation on the defendant to supply the wagons to the plaintiffs, and, that obligation of the defendant was a condition precedent to the performance of the contract by the plaintiffs.

82. For these considerations, I hold, in disagreement with the court below, that there was no implied agreement, nor, such an implied agreement can possibly be inferred from the five agreements in question, under which the defendant, as a buyer, was bound to supply the wagons to the plaintiffs for their supply of commodity to the defendant.

83. Admittedly, however, in each case the delivery was made beyond even the extended contract time of completion of delivery, but, notwithstanding the delayed delivery in each case it was accepted by the defendant. It is also admitted that although, under the contract, the defendant had the option, in terms of Clause 8 of the agreement, to (sic) delayed delivery after the ex- refuse to take (sic) tended contract time and to (sic) the Railway Administration, however, did not exercise that option, and did not rescind the contract and make any risk purchase, in any of the five cases under consideration, as contemplated by Clause 8 of the five agreements.

84. The question, then, arises : is the defendant in such circumstances, entitled

to any damage? and, if so, what is the crucial date for fixing it?

85. The plaintiffs, in effect, bought forbearance, and must pay for it, and, "the decisive date for fixing the loss in each case would be the date of delayed delivery of the commodity by the plaintiffs and accepted by the defendant". It is also well settled that the damage, which a party says he has suffered, must be affirmatively proved, as contended by the respondents. In the present case, however, this question was not gone into, and, therefore, there is no evidence to show if the defendant suffered any loss at all by accepting the delayed delivery and, if so, what was its extent.

86. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract. The Indian Law on the subject is enacted. in Section 73 of the Indian Contract Act, which provides that when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose "in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not given for any remote and indirect loss or damage sustained by reason of the breach.

87. I would, therefore, answer the second part of the above question posed by me by holding that the crucial date for fixing the damage in each case is the date of the delayed delivery and its accept-ance by the defendant.

88. The next question, then, is : How are the damages to be assessed? or, in other words, What is the measure of damages?

89. Generally, it is quite settled that on a con-tract to supply goods of a particular sort, which at the time of the breach can be obtained in the market, the measure of the damages is the difference between the contract price and the market price at the time of the breach. If, however, the market rate on the due date is not available, the Court may take into consideration the rate prevalent just before and just after that date.

But if the subject-matter of the contract is not marketable, in that case the value must be taken as fixed by the price which actually has to be paid for the best and nearest available substitute. But where no such substitute is available, then if there has been a contract to resell it the price at which the contract was made will be evidence of its value; but, if there has been no such contract, the market value may be estimated by adding to its price at the place where it was purchased, the costs and charges of getting it to its place of destination, and the usual importer's profits.

If the buyer, however, due to non-delivery of the goods within the stipulated time, finally has to go into the market and buy at an advanced price, he may recover the whole difference between the contract price and the price he actually

paid. The fact that the buyer sustains no actual loss from the seller's failure to deliver the goods is no ground for awarding merely nominal damage to the buyer.

The buyer is entitled, as indicated by illustration (a) to Section 73, of the Indian Contract Act, to receive from the seller by way of compensation the sum by which the contract price falls short of the price for which the buyer might have obtained goods of like quality at the time when they ought to have been delivered : Pollock and Mulla's Indian Contract Act, 1957 Edition, pages 442-443.

Therefore, where the seller delivers the goods later than the contract time and the buyer accepts them, the measure of damages is prima facie the difference between the value which the goods would have had at the place of delivery if they had been delivered in due time, and the value which they had at that place when they were delivered : Halsbury's Laws of England 2nd Edition, Vol. 29 para 265, page 198.

90. But, as observed by Jenkins L. J., in *Charter v. Sullivan* (1957) 1 All ER 809 , it is doubtful if there can be an available market for particular goods unless those goods are available for sale in the market at the market or current price in the sense of the price, whatever it may be, fixed by reference to supply and demand as the price at which a purchaser for the goods in question can be found, be it greater or less than or equal to the contract price.

91. The above considerations, therefore, would arise in fixing the damage, if any, to which the defendant may be entitled due to non-performance of the contract by the plaintiffs even by the last date to which the contract was extended.

92. It remains, therefore, to ascertain the loss, if any, naturally resulting, in the ordinary course of events", from the plaintiffs' breach of contract.

93. I would, therefore, answer the first part of the above mentioned question posed by me, by holding that the measure of the loss, if any, would be the amount, if any, of the loss which the defendant suffered by reason of the plaintiffs' failure. In other words, if, for example, the contract rate is found to be higher than the market rate, on the date of the delayed delivery which is also the date of its acceptance, then it is manifest that the defendant would be entitled to deduct the difference between the contract rate and the market rate from the bills submitted by the plaintiffs in terms of the agreement, notwithstanding that the defendant made no risk purchase, and, actually suffered no loss, and damages would be assessed accordingly.

94. For these reasons, it is necessary, therefore, that the suit be remitted to the court below to determine only the following two questions, namely :

1. Whether the defendant has suffered any loss by accepting the delayed delivery?; and,

2. If so, what is the amount of the loss?

95. On remand, therefore, the parties will be given an opportunity to adduce

such evidence as they like. If the court below, on the evidence already on the record and the further evidence adduced by the parties, finds that the defendant Buffered loss by acceptance of the delayed delivery, because the contract rate was greater than the market rate on the date of the delivery such amount of loss the defendant would be entitled to deduct from the bills of the plaintiffs in respect of the five agreements in question, and, as such after deducting such amount of loss from the plaintiffs' claim in the present suit, their suit will be decreed only for the balance, if any. If, however, on the other hand, it is found that, on the relevant dates, the defendant did not suffer any loss at all, either because the contract rate was equal to or, less than the market rate, then the plaintiffs' suit will be decreed for the entire amount of deductions made by the defendant from the plaintiffs' bills which are now claimed by the plaintiffs to be refundable to them, on the ground that the defendant not having suffered any loss, even if it had made risk purchases notwithstanding that no such risk purchase was made by it, it was not entitled to deduct the same from the plaintiffs' bills.

96. In the result, the appeal partly succeeds, the judgment and decree of the court below are set aside, and, the suit is remanded to the court below only for ascertainment of defendant's loss, if any, on the lines indicated above and for disposal in accordance with law. Costs of this appeal will abide the result of the suit in the court below.