
(1966) 07 GUJ CK 0005
In the Gujarat High Court
Case No : First Appeal No. 633 of 1960

Wasoo Enterpriser and Others	Vs	APPELLANT
J.J. Oil Mills		RESPONDENT

Date of Decision : 26-07-1966

Acts Referred:

Evidence Act, 1872 — Section 101 , 102, 103, 104
Sales of Goods Act, 1930 — Section 11, 15

Citation : AIR 1968 Guj 57 : (1968) GLR 376

Hon'ble Judges : P.N. Bhagwati, J;A.D. Desai, J

Bench : Division Bench

Advocate : N.V. Karlekar, for the Appellant; J.P. Joshi, for the Respondent

Judgement

Bhagwati, J.—This is an appeal against a decree passed by the Civil Judge, Senior Division, Bhavanagar, directing defendants Nos. 1, 3 and 4 to pay to the plaintiffs Rs. 12,879-7-0 as and by way of damages for breach of a contract dated 14th August 1954 alleged to have been committed by them. The plaintiffs are a partnership firm and they carry on business of manufacture and sale of groundnut oil in Bhavanagar. The first defendants are also a partnership firm on which the original defendant No. 2 and defendant No. 3 were at the material time partners. The fourth defendants are a Limited Company carrying on business in Hongkong. On or about 14th August 1954, as a result on negotiations which took place between Messrs. D. N. Marshall and Company acting as broker for the plaintiffs on the one hand and the first defendants on the other, a contract was entered into between the plaintiffs and the first defendants for sale of 50 tonnes of groundnut oil packed in sound second-hand 40/45 gallon drums at the price of lbs. 129/10-Per ton of 2240 lbs. C. And F. Hongkong on the terms and conditions recorded in a contract note bearing No. 320 dated 14th August 1954 executed by and between the plaintiffs and the first defendants. The contract contained the following term as regards shipment and it is on this term that the entire controversy between the parties has centered in this appeal;

"Shipment:-- To Hongkong during August 1954 per s.s. "Hakuyo Maru" on sellers export licence guaranteed in hand."

The price of lb. 129/10- per ton C. and F. Hongkong was inclusive of all duties and/or taxes, variations in duties and/or taxes being on the account of the plaintiffs and this price was to be paid by the first defendants to the plaintiffs by opening an irrevocable letter of credit in favour of the plaintiffs at Bhavanagar providing for payment against full set of documents. The contract stipulated that the first dependents should establish the letter of credit and send cable confirmation direct to the plaintiffs at Bhavanagar from Hongkong. The brokerage of half percent payable to Messrs. D. N. Marshall and Company in respect of the contract was payable by the plaintiffs. Pursuant to the contract the first defendants got a letter of credit opened by the fourth defendants through the Hongkong and Shanghai Banking Corporation and the letter of credit was received by the plaintiffs on 18th August 1954. The letter of credit contained a stipulation that the shipment must be effected not later than 31st August 1954 and it was valid for negotiation on or before 16th September 1954. (His Lordship then narrated the correspondence between the parties about the causes of delay in shipment and proceeded). The 1st defendants also addressed another letter dated 10th September 1954, Exhibit 31, to the plaintiffs in which, after reciting the telegrams exchanged between the parties, they pointed out that it was not possible for them to extend the time of shipment any further and they accordingly asked the plaintiffs to treat the contract as "null and void". The plaintiffs, on receipt of this letter from the first defendants, treated the contract as broken by the first defendants refusing to pay the same,, the plaintiffs filed the present suit to recover a sum of Rs. 13,004-7-0 as and by way of damages for breach of the contract committed by the first defendants. The plaintiffs impleaded in the suit defendants Nos. 2 and 3 as partners of the first defendants and they also joined the fourth defendants on the allegation that in the matter of the contract the first defendants had acted as agents of the fourth defendants and that the fourth defendants were also liable to pay damages to the plaintiffs.

(2) The defendants in their written statement took up various contentions of which there were three of a preliminary nature and they were: (1) that the Court had no jurisdiction to entertain the suit; (2) that there was no cause of action for the suit; and (3) that the plaintiffs' firm was not registered. On merits the defendants disputed the plaintiffs' allegation that defendants No. 1 had acted as agents of defendants No. 4 in respect of the contract and they alleged that the contract was between the plaintiffs and the first defendants as principal to principal and the fourth defendants had nothing to do with the same. The defendants also contended that the time of shipment mentioned the contract, namely, "shipment during August 1954". Was of the essence of the contract and was in fact a condition of the contract and the plaintiffs were not entitled to insist that the first defendants should take delivery of the goods even if they were shipped after 31st August 1954. The defendants stated that it was no doubt true that pursuant to the request of the plaintiffs, they extended the time of shipment

upto 10th September 1954 and the plaintiffs could have, therefore, effected shipment by that date but the plaintiffs failed to do so and the first defendants were thereafter not bound to extend the time of shipment or to amend the letter of credit providing for such extended time and the first defendants were, therefore, not guilty of breach of the contract when they refused to amend the letter of credit and treated the contract as at an end by their letter dated 10th September 1954. Exhibit 31.

(3) On these pleadings various issues were raised by the trial Court of which the first three issues embodied the preliminary contentions; the fourth issue raised the question whether the first defendants was acting as the agent of defendants No. 4; issues Nos. 5 and 6 related to the merits of the controversy, namely, whether the defendants had committed a breach of the contract and whether there was an agreement to ship the goods on a particular date and the seventh issue dealt with the question of damages to which the plaintiffs may be held entitled. Now when the matter reached hearing before the lower Court, a rather curious procedure was followed and the learned advocate appearing on behalf of the defendants was responsible for the same. He made an application to the trial Court for hearing issues Nos. 5 and 6 which related to the main controversy between the parties as preliminary issues and the trial Court strangely enough acceded to that request. It appears that some evidence was led on these two issues and the trial Court thereafter delivered a judgment dated 10th February 1958 which we must confess is even stranger than the decision to hear these two issues as preliminary issues. The trial Court decided the fifth issue in favour of the plaintiffs by holding that the defendants had committed a breach of the contract but so far as the sixth issue in regard to the time of shipment being of the essence of the contract was concerned, the trial Court reserved the decision of that issue. We must frankly confess our liability to perceive how the trial Court could give a finding on the issue as to breach of the contract without considering the question whether the time of shipment was of essence of the contract or not. But that is how the case progressed before the trial Court and after this judgment was delivered, the other issues were tried by the trial Court. Evidence of both parties was led and the trial Court by a further judgment dated 29th September 1959 found that time was not of the essence of the contract and that the first defendants were guilty of breach of the contract inasmuch as they repudiated the contract on 10th September 1954 by their letter, Exhibit 31. So far as the fourth issue relating to agency was concerned, the trial Court found that the first defendants were acting as agents of the fourth defendants and that the fourth defendants were also, therefore, liable for breach of the contract. The preliminary contentions embodied in the first three issues were decided in favour of the plaintiffs and since the plaintiffs succeeded on merits, the plaintiffs were held entitled to claim damages in the sum of Rupees 12,879-7-0 from the defendants. During the pendency of the suit, however, defendant No. 2 died and his heirs were not brought on record and a decree for Rs. 12,879-7-0 was therefore passed by the trial Court only against defendants Nos. , 3 and 4 and

that is the decree from which the present appeal is preferred.

(4) The same three preliminary contentions which were urged before the trial Court were repeated before us and though Mr. N. V. Karlekar, learned advocate appearing on behalf of the defendants stated that he did not wish to address any arguments in support of those contentions, he at the same time did not wish to give up the same. Since these contentions were urged before us and were not given up. It is necessary for us to deal with the same, briefly though it be. The contention as to the jurisdiction of the trial Court to entertain the suit clearly stands negatived by the term in the contract that payment of the price shall be made by the first defendants to the plaintiffs by means of an irrevocable letter of credit to be opened by the first defendants in favour of the plaintiffs at Bhavanagar providing for payment against full set of documents. The payment of the price against delivery of documents was, therefore, clearly to be made in Bhavanagar and the trial Court having jurisdiction in Bhavanagar was competent to entertain the suit. It is a little difficult to understand the second preliminary contention, namely, that there was no cause of action for the suit. If the allegations of the plaintiffs in the plaint were correct, the plaintiffs clearly had a cause of action against the defendants and this preliminary contention must, therefore, be rejected. So far as the third preliminary contention relating to registration of the plaintiffs' firm is concerned, the certificate of registration, Exhibit 158, affords a complete answer to this contention. However, on the question as to whether the first defendants were acting as agents of the fourth defendants in the matter of the contract, the defendants are on firmer ground and the finding of the trial Court on this issue appears to be plainly incorrect. The burden of proving that the first defendants were acting as agents of the fourth defendants in the matter of the contract rests on the plaintiffs and when we turn to the evidence, we find that this burden has not been discharged by the plaintiffs. Jadavji Shivji, a partner of the plaintiffs, gave evidence in support of the case of the plaintiffs, but at no place in his deposition, Exhibit 138, do we find any statement which would even remotely suggest that the first defendants were acting as agents of the fourth defendants in entering into the contract with the plaintiffs. As a matter of fact, according to Jadavi Shivji, the proprietors of the first defendants were Messrs. Wassiamal Asumal and Company and the fourth defendants were also their concern so that the first and the fourth defendants were both concerns of Messrs. Wassiamal Asumal and Company. There is no evidence at all to show that the first defendants were agents of the fourth defendants in the matter of the contract and the finding of the trial Court to that effect must, therefore, be set aside as wholly unsupported by evidence. The contract was on the face of it, according to its express language, a contract between the plaintiffs and the first defendants and the plaintiffs were described as sellers and the first defendants were buyers in the contract. The only question which really requires to be considered is as to whether the first defendants committed a breach of the contract.

(5) Now the contention of the plaintiffs was that though the contract provided

that shipment was to be made during August 1954, the time of shipment was not of the essence of the contract and that the plaintiffs were entitled to ship the goods on board S. S. Hakuyo Maru whenever she arrived in Bhavanagar and that the first defendants were, therefore, bound to amend the letter of credit so as to make it possible for the plaintiffs to receive payment of the price against delivery of the documents on making shipment of the goods on board S. S. Hakuyo Mary irrespective of the date when she arrived in Bhavanagar and since the first defendants declined to extend the letter of credit and treated the contract as null and void by their letter dated 10th September 1954, Exhibit 31, the first defendants committed a breach of the contract and were accordingly liable to pay damages to the plaintiffs. This contention was disputed on behalf of the first defendants and the answer which the first defendants made to this contention was that the time of shipment mentioned in the contract was of the essence and it was a condition of the contract that the goods be shipped during August 1954 and the first defendants were, therefore, entitled to reject the goods if they were shipped on board S. S. Hakuyo Maru after 31st August 1954. The time for shipment it was urged on behalf of the first defendants, was undoubtedly extended upto 10th September 1954 of the goods at any time upto 10th September 1954 but the plaintiffs were not entitled to insist that the first defendants should take delivery of the goods even if the goods were shipped subsequent to 10th September 1954 and the first defendants were, therefore, within their rights in treating the contract as at an end by their dated 10th September 1954, Exhibit 31, when they received the plaintiffs telegram insisting that the first defendants should amend the letter of credit by extending the time of shipment and take delivery of the goods even if shipment subsequent to 10th September 1954. These were the rival contentions of the parties and as will be apparent from what is stated above, they turned primarily on the determination of the question as to what was the nature of the stipulation in regard to shipment contained in the contract, whether it was of the essence of the contract or not.

(6) Section 11 of the Indian Sale of Goods Act deals with the question as to when a stipulation contained in a contract can be regarded as of the essence of the contract. That Section says:

"11. Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be the essence of the contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract."

Now it is well settled that ordinarily in commercial contracts, as regards stipulations other than such as relate to time of payment, time is the essence of the contract. There is considerable authority in support of this rule and it has been recognised and accepted by the highest Court in England in *Bowes v. Shand* (1877) 2 A. C. 455 where in a contract of sale of rice to be shipped at Madras during March and/or April, 1874, per *Rajah of Cochin*, the stipulation in regard to shipment was held to be a condition of the contract and the contract was held

not to have satisfied by shipments in February, Lord Cairns L. C. observed at page 463:

"It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulation to which they do not attach some value and importance, and that alone might be a sufficient answer. But if necessary, a further answer is obtained from two other considerations. It is quite obvious that merchants making contracts for the purchase of rice, contracts which oblige them to pay in a certain manner for the rice purchased, and to be ready with the funds for making that payment, may well be desirous both that the rice should be forthcoming to them not later than a certain time, and also that the rice shall not be forthcoming to them at a time earlier than it suits them to be ready with funds for its payment There is still another explanation these contracts were made for the purpose of satisfying and fulfilling other contracts made with other persons, and it is at least doubtful whether , .. a contract made in another form, or a contract made without this stipulation as to the shipment during these months, would have been a fulfillment of those other contracts which they desired to be in a position to fulfil."

And Lord Blackburn said at page 480:

"It was argued to tried to be argued, on one point, that it was enough that it was rice, immaterial when it was shipped. As far as the subject-matter of the contract went, its being shipped at another and different time being (it was said) only a breach of a stipulation which could be compensated for in damages. I think, to adopt an illustration which was used long time ago by Lord Abinger, and which always struck me as being a right one, that it is an utter fallacy, when an article is described, to say that is anything but a warranty it a condition precedent that it should be an article of that kind, and that another article might be substituted for it. As he said, if you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it. I thank in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras.... and probably equally good rice might have been shipped in February as was shipped in March or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice have been put aboard the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particularly region, at that particular ship, and before the defendants can ship, and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that article it is equally good, but that it is the same article as they have bargained for - otherwise they are not bound to take it."

A stipulation as to time of shipment, therefore, clearly forms part of the description of the goods sold, and as such, by S. 15 of the sale of Goods act, is a condition of the contract. But this stipulation actually much further than being a mere part of the description of the goods. It is a condition precedent which must

needs to be fulfilled in order to the performance of the contract. The decision of the Court of Appeal in *Ashmore and Son v. Cox & Co.* (1899) 1 QB 436, clearly establishes that the stipulation as to time of shipment is a condition of the contract. In that case the contract was for sale of 250 bales of Manila hemp c.i.f., shipment to be made from a port or ports in the Philippine Islands, by sailer or sailers, direct or indirect to London, between May 1 and July 31, 1898. Owing to war it was impracticable to ship hemp from the Philippines between the dates specified. On September 15, the sellers shipped hemp, which as regards quantity and quality was in accordance with the contract, on a steamer which was expected to arrive at the same time a the hemp would have arrived if shipped on a sailer within the specified dates. The sellers declared this hemp under this contract. The buyers refused to accept the declaration and claimed damages for breach of contract and Lord Russell of Killowen C. J. held that they were right. He said:

"No doubt, there are a number of cases, all turning upon the particular contract, in which the Courts have held that certain stipulation, which did not go to the essentials of the contract, are not conditions precedent. But those cases do not, in my judgment, apply to the dates of shipment in the present contract, and I am inclined to think also they do not apply to the provision that shipment is to be made by sailer or sailers, on this short grounds, that in the present contract the parties have chosen, by the very terms in which the stipulation appears, to make those events conditions precedent. They have said that the buyers shall not in sailer or sailers, or not made between May 1 and July 31. I, therefore hold that these stipulation are conditions precedent."

The decision of Justice McCardie in *Aron and Co. v. Comptoir Wegimont* (1921) 3 K. B. 435, also supports the conclusion that a stipulation as to time of shipment is a condition precedent. In that case a contract for sale of cocoa powder c.i.f. Antwerp provided for "shipment by steamer and/or steamers from U. S. A. Ports during October, 1919". The goods were not shipped until November and the question arose whether the buyers were right in rejecting the documents when tendered. McCardie J. upheld the action of the buyers in rejecting the tender, observing:

"I agree in one sense the time of shipment is part of the description of the goods. Indeed in 1877 2 AC 455 Lord Cairns said: "That is part of the description of the subject matter of what is sold". So it is , I agree, in one sense, but in my humble view the express requirement of a contract that goods shall be shipped at a particular period is a good deal more than a mere description of the goods within section 13 of the Sale of Goods Act, 1893; it is an express term of the contract independent of that which is generally known as the description of the goods. It is, I think, a condition precedent, as stated in the passage I have cited from Benjamin on Sale that the goods shall be shipped as required by the contract."

The Supreme Court in our country has also taken the same view in regard to

stipulations as to time of shipment contained in commercial contracts. In *China Cotton Exporters Vs. Beharilal Ramcharan Cotton Mills Ltd.*, there was a contract for sale of goods by the defendants to the plaintiffs and the contract was on a printed document with the terms regarding quantity, quality, price, shipment, payment, and the remarks column filled in manuscript. Against "Shipment" there was written "October/ November, 1950". In the remarks column the following was written: "1. In voice weight to be accepted. 2. This contract is subject to import licence and therefore the shipment date is not guaranteed". The question arose whether the shipment date was of the essence of the contract. The contention on behalf of the defendants was that by reason of remark No. 2, the shipment date was not of essence of the contract; but this contention was rejected by the Supreme Court. The Supreme Court observed that in commercial contracts time is ordinarily of the essence of the contract and the shipment date must, therefore, be regarded as of the essence and the only effect of remark No. 2 was that to the extent that the delay in obtaining import licence might stand in the way of keeping to the shipment date, the shipment date was not guaranteed but with this exception shipment during October/ November 1950 was guaranteed but with this exception shipment during October/ November 1950 was guaranteed. Das Gupta J., Speaking on behalf of the Supreme Court observed:

"Remembering, as we must, that in commercial contracts, time is ordinarily of the essence of the contract and giving the word "therefore" its natural, grammatical meaning, we must hold that what the parties intended was that to the extent that delay in shipment stands in the way of keeping to the shipment date October/November 1950, this shipment date was not grunted; but with this exception shipment October/November , 1950, was guaranteed. It has been strenuously contended by the learned Attorney-General, that the parties were mentioning only one of the many reasons which might cause delay in shipment and the conduction "therefore" was used only to show the connection between one of many reasons - by way of illustration and a general agreement that the shipment date was not guaranteed. We do not consider this explanation of the use of "therefore" acceptable. If the parties intended that quite apart from delay in obtaining import licence, shipment date was not guaranteed, the natural way of expressing such intention - an intention contrary to the usual intention in commercial contracts of treating time as the essence of the contract - would be to say: "This contract is subject to import licence and the shipment date is not guaranteed."

The clear and undoubted position therefore, is that a stipulation as to time of shipment contained in a commercial contract is a part of the description of the goods sold and is a condition precedent which must be fulfilled in order to the performance or the contract. Of course if the intention of the parties to the contract can be shown to be not to regard such a stipulation as of the essence of the contract, it would not be regarded as condition of the contract, but the burden of showing that such was the intention of the parties lies upon the party

asserting it and the burden would clearly be a heavy one. In the present case an attempt was made on behalf of the plaintiffs to show that the parties never intended that shipment during August 1954. Now it must be pointed out that it is settled law that when a contract is reduced to writing, it is not open to a party to the contract to show that the contract means something different from what its language says. The intention that a particular stipulation as to time of shipment was not to be a condition of the contract can undoubtedly be shown but that can be done only from the language of the contract. No evidence can be admitted to contradict or vary the terms of the contract. The contract must be construed as it stands subject of course to the rule that where it is ambiguous, surrounding circumstances can be looked at for the purpose of ascertaining what it means and if on a construction of the language of the contract it appears that the parties did not intend to regard the stipulation as to time of shipment as of the essence such intention would be given effect to and the stipulation would not be regarded as a condition of the contract. Keeping this principle in view, if we look at the difficult to find any indication in the contract which would go to suggest that the parties did not regard shipment during August 1954 as of the essence of the contract. The only circumstance on which Mr. J. P. Joshi, learned advocate appearing on behalf of the plaintiffs, relied was the stipulation that the shipment was to be made pre S. S. Hakuyo Maru was the only ship by which the parties intended to ship the goods and that being the predominant intention of the parties, the stipulation as regards the time shipment must be regarded as subordinate, and, therefore, not of the essence. But the contention is clearly futile and must be rejected. It proceeds on the hypothesis that where there is a condition as to shipment by a particular ship, such a condition cannot co-exist with condition as to time of shipment. The stipulation in regard to shipment in the contract was that the shipment shall be made during August 1954 S.S. Hakuyo Maru. This stipulation involved the fulfillment of two conditions, namely, that the goods must be shipped per S. S. Hakuyo Maru and that the shipment must be made during August 1954. Both the conditions were conditions as to shipment and they formed part of the description of the goods sold which the contract required, must be fulfilled. The case before us is no different from that in 1877 2 AC 455 (supra) where the stipulation as to shipment was that the rice should be shipped at Madras per Rajah of Cochin during March and /or April. The stipulation involved the fulfillment of a condition as to time of shipment as also of a condition as to the ship by which the shipment should take place and in reference to this stipulation Lord Blackburn said -- and here we are repeating what we have said before:--

"But the parties have chosen, for reasons best known to themselves, to say: "We bargain to take rice" "shipped in this particular region, at that particular time, on board that particular ship" and before the defendants can be compelled to take anything in fulfilment of that contract it must be shown not merely that it is equally good, by that it is the same article as they have bargained for - otherwise they are not bound to take it." (*Italics* (here in ".....") are ours).

Similarly in 1899-1 QB 436, also where the provision was for shipment by sailer or sailers between May 1 and July 31m 1898, Lord Russell of Killowen C. J. Said:

"But those cases do not, in my judgment, apply to the dates of shipment in the present contract, and I am inclined to think also they do not apply to the provision that shipment is to be made by sailer or sailers ..."

In *Nickoll & Knight v. Ashton, Edridge & Co.* (1902) 2 KB 126, the contract provided for sale of a cargo of cotton-seed, to be shipped per steamship Orlando at an Egyptian port during the month of January, 1900" and in reference to this stipulation in regard to shipment, A. L. Smith M. R. observed:--

"It is perfectly plain upon the parties deliberately agreed that the shipment of the signed should not be in any ship or ships, but in one particular named ship, for the words in print "ship or ships" are obliterated, and the words "per steamship Orlando" are inserted in writing in their place, and it is equally plain that the contract could only be performed by the defendants shipping the seed contracted for in the steamship Orlando during the month of January, 1900, and in no other ship."

It is, therefore, clear that the stipulation as to shipment contained in the contract provided for fulfilment of two conditions precedent, one being that the goods must be shipped per S. S. Hakuyo Maru and the second being that the goods must be put on board S. S. Hakuyo Maru in August 1954. Both these conditions were conditions precedent and if either condition was not fulfilled, the first defendants were entitled to reject the goods tendered by the plaintiffs.

(7) Now the condition as to time of shipment stipulated in the contract was that the goods shall be shipped on board S. S. Hakuyo Maru during August 1954 and this condition was admittedly not fulfilled since the plaintiffs failed to place the goods on board S. S. Hakuyo Maru during August 1954. But a question was raised before us whether the time for shipment was extended upto 10th September 1954 by mutual agreement between the parties. The case of the plaintiffs before the trial Court appeared to be that the time of shipment was extended upto 10th September 1954 but Mr. J. P. Joshi on behalf of the plaintiffs contended before us that there was no such extension of time of shipment by mutual agreement of parties since what the plaintiffs requested by their letter dated 26th August 1954, Exhibit 62, was to delete the provision in regard to time of shipment in the letter of credit whereas the first defendants, instead of accepting the proposal of the plaintiffs, extended the time of shipment upto 10th September 1954 which limited extension was not acceptable to the plaintiffs as stated by them in their letter dated 7th September 1954, Exhibit 15. But this contention does not appear to be correct for the letter dated 26th August 1954, Exhibit 62, by which the plaintiffs desired that the provision as regards time of shipment should be deleted altogether from the letter of credit was addressed to Messrs. D. N. Marshall and Company and not to the first defendants and when Messrs. D. N. Marshall and Company approached the first defendants pursuant to

this letter, the request made by Messrs. D. N. Marshall and Company was not for total deletion of the time for shipment in the letter of credit but for extension of the time for shipment "for a week or so" and it was in pursuance of this request made by Messrs. D. N. Marshall and Company on behalf of the plaintiffs that the first defendants extended the time for shipment upto 10th September 1954 and amended the letter of credit accordingly. The time of shipment, was, therefore, clearly extended upto 10th September 1954 by mutual agreement of parties, but the plaintiffs were still unable to effect shipment of the goods per S. S. Hakuyo Maru on or before 10th September 1954 and they, therefore, requested the first defendants to further extend the time of shipment and to effect the necessary amendment in the letter of credit and intimated to the first defendants that if the first defendants failed to do so, the plaintiffs would proceed to sell the goods on account and at the risk and costs of the first defendants. The first defendants on receipt of the telegram of the plaintiffs to this effect, pointed out that they were not bound to extend the time for shipment and to amend the letter of credit as demanded by the plaintiffs and since the plaintiffs intimated in clear and no uncertain terms that unless the first defendants extended the time for shipment and amended the letter of credit, the plaintiffs would proceed to sell the goods on account and at the risk and costs of the first defendants, the first defendants asked the plaintiffs by their letter dated 10th September 1954, Exhibit 31, to treat the contract as null and void. The trial Court held that this letter amounted to a repudiation of the contract by the first defendants and since the repudiation took place on 10th September 1954, at a time when the contract subsisted, the first defendants were guilty of breach of the contract, but this conclusion is patently wrong and for two very good reasons. In the first place the plaintiffs themselves repudiated the contract by expressing their inability to ship the goods on or before 10th September 1954 and putting forward the contention that under the contract they were entitled to ship the goods even after 10th September 1954 and that the first defendants were bound to accept the goods even if they were shipped subsequent to that date and the first defendants were entitled to treat this repudiation of the contract by the plaintiffs as a breach on the part of the plaintiffs and to regard the contract as at an end. Secondly, what the first defendants intimated to the plaintiffs in the letter dated 10th September 1954 Exhibit 31 was to treat the contract as null and void and this intimation reached the plaintiffs on 11th September 1954 and the repudiation, if any, of the contract on the part of the first defendants, therefore, took place on 11th September 1954. Now the condition as to time of shipment being that the goods shall be shipped per S. S. Hakuyo Maru on or before 10th September 1954, the first defendants were not bound to accept goods shipped per S. S. Hakuyo Maru subsequent to 10th September 1954 and, therefore, when the plaintiffs failed to effect shipment of the goods per S. S. Hakuyo Maru by 10th September 1954, the first defendants were entitled to rescind the contract and they were right in telling the plaintiffs on 11th September 1954 when the plaintiffs received the letter, that the contract was at an end. The first defendants did not, therefore, commit any breach of the contract by declining to extend the letter of credit or

by intimating to the plaintiffs in the letter dated 10th September 1954 Exhibit 31 that the contract be treated as null and void. Moreover it may be noted that even if the letter dated 10th September 1954, Exhibit 31, amounted to a repudiation of the contract by the first defendants on 10th September 1954 during the subsistence of the contract, the plaintiffs did not accept such repudiation and treat it as an anticipatory breach of the contract by the first defendants and the contract remained alive for performance upto the expiration of 10th September 1954 and the plaintiffs were, therefore, bound to ship the goods per S. S. Hakuyo Maru by 10th September 1954 and since they failed to do so, they were not entitled to treat the contract as broken by the first defendants and to claim damages from the first defendants as on a breach of contract.

(8) We, therefore, allow the appeal, set aside the decree passed by the trial Court and dismiss the suit with costs. The plaintiffs will pay the costs of the appeal to the appealing defendants.

(9) Appeal allowed.