

**(1969) 12 MAD CK 0031**  
**In the Madras High Court**

Wheels India Limited

APPELLANT

Vs

Khemchand Rajkumar and Another

RESPONDENT

---

**Date of Decision :** 31-12-1969

**Acts Referred:**

Contract Act, 1872 — Section 230

**Citation :** (1970) 2 MLJ 648

**Hon'ble Judges :** S. Ganesan, J

**Bench :** Division Bench

---

**Judgement**

S. Ganesan, J.—Suit for recovery of a sum of Rs. 2,07,168.95 against the defendants jointly or severally together with interest at 6 per cent. per annum from the date of plaint till date of recovery.

2. The material facts which have led to the institution of the suit may be briefly summarised. The plaintiff, Wheels India Limited is a Company Incorporated under the Indian Companies Act. The first defendant Messrs. K. Rajkumar is a firm carrying on business at Madras with Headquarters at Bombay. The second defendant M/s. National Steel Corporation is a firm carrying on business in Pittsburgh, Pennsylvania, United States of America. After some negotiations with the first defendant firm, which is the Indian representative of the second defendant firm of the United States the plaintiffs forwarded to the second defendant through the first defendant a purchase order Exhibit P-5 for supply of 2447 tons of steel plates the goods to be shipped by sea (60 per cent. by U.S. Vessels and 40 per cent. by Indian Vessels) to Madras at the rate of \$162.80 C. & F. Madras per long ton, earliest delivery preferred by first week of March, 1964. The order was placed against the plaintiff's import licence which was valid upto 30th April, 1964 and payment was to be by irrevocable letter of credit. An irrevocable letter of credit was accordingly issued on 29th January, 1964, by an American Bank at the instance of the United Bank of India, the plaintiff's bankers, but subsequently the plaintiffs agreed to a rise in the rate of \$6.72 per long ton and the letter of credit was accordingly modified. The goods were

shipped at the Port of Baltimore by a steamer S. S. Anji on 4th April, 1964 and the second defendant firm was paid the price on tendering the bill of lading No. 1i dated 4th April, 1964, to the American bank. The ship did not arrive at the Madras Harbour in six weeks as anticipated but was tied up at the Port of Saigon, South Vietnam, as the carrier had gone bankrupt and the goods were off loaded at the harbour. As the steel plates were required for immediate manufacture in March, 1964, the plaintiffs became worried about the delay and expressed their anxiety to the first defendant on 22nd June, 1964; whereupon the first defendant wrote a letter Exhibit D-10 to the second defendant conveying the plaintiff's anxiety and calling for information about the date of arrival of the ship and on 24th June, 1964, the plaintiffs wrote a letter Exhibit P-12 to the first defendant requesting the latter to take up the matter immediately with the second defendant and inform them about the then position of the steamer. On 28th June, 1964 the plaintiffs received a cable from the United States Embassy in New Delhi informing them that the ship had become bankrupt and that the goods were consequently off loaded at Saigon and asking them to make arrangements for transshipment of the goods from Saigon to Madras. On 30th June, 1964, the plaintiffs sent a cable to the second defendant with copy to the first defendant requesting the second defendant to make arrangements for transshipment of the goods, and followed it up with a letter of even date (Exhibit P-15) to the first defendant requesting the latter to intercede immediately with their principals at United States and arrange to get the materials as early as possible. On 1st July, 1964, the second defendant sent a cable Exhibit D-11 regretting their inability to make any arrangement for the transshipment of the goods from Saigon. On 1st July, 1964, the first defendant wrote a letter Exhibit D-12 to the second defendant requesting them to contact the forwarders and to have the goods transhipped by some other vessel. On 2nd July, 1964, the second defendant wrote a letter Exhibit D-13 to the plaintiff's regretting their inability to make arrangements for the transshipment and had indirectly hinted that the liability was not theirs because the title to the cargo had passed to the plaintiffs and that the plaintiffs were holding the original bill of lading. The first defendant continued to insist upon the second defendant making arrangements for transshipment but the second defendant had, by a lengthy letter Exhibit D-17, dated 7th July, 1964, repudiated their obligation to make any arrangements or for meeting the costs of transshipment by referring to the Export and Import Practice as published by the U. S. Department of Commerce and the book Incoterms 1953, a book published by the International Chamber of Commerce and suggested that the problems could be solved only by the plaintiffs sending an agent to Saigon for the purpose.

3. Ultimately, with the help of Denis Frores, Lloyds Agents at Saigon, the goods were transhipped from Saigon to Madras in two ships S. S. "Java Mail " and S. S. "American Mail" and paid freight charges of Rs. 1,37,087-69 to South Indian Export Co., Ltd., and a sum of Rs. 70,091-26 representing expenses and fees relating to unloading the goods and reloading them in the two ships as claimed by M/s. Denis Frores, Lloyds Agents at Saigon. As the defendants have

repudiated their liability to pay the charges incurred by the plaintiff's for the transshipment of the goods from Saigon to Madras, in spite of registered notice, the plaintiffs have come forward with the present suit to recover the aforesaid sum from both the defendants.

4. In the plaint, the plaintiffs pray for a joint or several decree against the defendants and the claim against the second defendant is based on the ground that, as the contract was C. & F. Madras rate per ton which includes freight charges, it would be the responsibility of the second defendant, if for any reason extra freight becomes due. It was the sole responsibility of the second defendant to deliver the materials at Madras and any incidental expenses incurred in transporting the materials to Madras and any additional freight that may have to be paid to the shippers will have to be borne by the second defendant. As regards the first defendant it is stated that the contract was one made by the first defendant as agent for the sale of goods for the second defendant, a merchant stationed abroad and that the first defendant accordingly is both entitled to personally enforce the contract against the plaintiffs and also personally bound by the contract to the plaintiffs. As an agent, the first defendant is personally liable and the second defendant is equally liable as the first defendant's principals.

5. In the written statement filed by the first defendant, he had denied that he acted as agent of the second defendant. His case is that he played the role of an intermediary between the plaintiffs and the second defendant. The purchase order which constituted the offer made in this case was made out in the name of the second defendant and the same was accepted by the second defendant. The purchase order as well as the connected correspondence should be referred to for ascertaining the terms, scope and effect thereof. The first defendant is not entitled personally to enforce the contract against the plaintiff; nor is he personally bound by the same to the plaintiffs. Even if it is held that the first defendant had acted as agent of the second defendant in relation to the contract, it was expressly or impliedly agreed that the first defendant would neither be personally bound by the said contract nor would be liable on the same.

6. It is further alleged that the goods in question were duly shipped by the second defendant not knowing or having reason to suspect the financial insecurity of the carrier. The second defendant duly loaded the goods on board the ship, paid the freight for shipment of the said goods from the Port of Baltimore to Madras and obtained inter alia clean ocean bills of lading. The second defendant also delivered the said clean bills of lading and other relevant shipping documents to the plaintiffs who accepted the same upon full payment of the price through a letter of Credit opened for the purpose. In the premises the second defendant fully performed all its obligations and duties under the said contract and the title to and the property in the said goods thereupon passed to the plaintiffs. None of the defendants had any further obligation or liability whatsoever to the plaintiffs or anybody else under the said contract or otherwise

in respect of any eventuality or contingency including that of transshipment. The goods were off loaded at Saigon from the vessel under instructions and directions from the Government of the United States of America upon the bankruptcy of the carrier and neither the first nor the second defendant was competent to or could effect transshipment of the goods.

7. In the alternative the first defendant states that a consideration of the terms of the said contract in the light of the circumstances existing when it was made shows unmistakably that the parties to the said contract never agreed to be bound in the situation which unexpectedly emerged, namely, the bankruptcy of the carrier and the off loading of the said goods at Saigon under the instructions and directions of the United States of America. Such a fundamentally different situation arose unexpectedly through no fault of any of the parties and could not be reasonably foreseen. The said contract in the premises ceased to bind the parties thereto and become incapable of being performed. The first defendant does not admit the particulars of alleged extra charges or freight charges or expenses or fees incurred by the plaintiffs at Saigon for the purpose of transshipment of the goods. Neither the first nor the second defendants are liable to meet the extra charges claimed or any portion thereof. Under the suit contract which is a C. & F. contract, the plaintiffs have to bear the cost of extra charges. The suit is in any event barred by limitation and this Court has no jurisdiction to entertain and try the suit.

8. The Written statement filed by the second defendant contains the following pleas: The first defendant was not an agent of the second defendant in respect of the suit transaction; he merely negotiated the purchase and the contract was one directly between the plaintiffs and the second defendant. The suit contract is a G. & F. contract as defined in the publications of the International Chamber of Commerce of which both the United States and India are members, i.e., International Trade Contracts and Incoterms 1953. Under Incoterms 1953, the buyer bears all risks of the goods from the time when they shall have effectively passed the ship's rails at the port of shipment and the buyer should receive the goods at the agreed port of destination and bear, with the exception of freight, all costs and charges incurred in respect of the goods in the course of the transit by sea until their arrival at the port of destination, as well as unloading costs including lighterage and wharfage charges, unless such costs and charges shall have been included in the freight or collected by the steamship company at the time the freight was paid. The publication "Trade Terms", G. & F. number 9, states that the buyer shall bear all costs or expenses, except freight properly so called, incurred in respect of the goods in the course of the carriage by sea by reason of emergencies arising during the voyage, such as: transshipment, deviations from the course, ports of call, warehousing surcharges, back freight to their arrival at the port of destination as well as demurrage, if any, at the port:

9. The American codification of the term G. & F. in the Uniform Commercial Code, Section 2.330 is as follows:

Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expenses and risk to

(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight had been paid or provided for;

(c) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(d) forward and tender with commercial promptness all the documents in due form and with an endorsement necessary to perfect the buyer's rights;

(e) unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as C.I.F. term except the obligation as to insurance.

10. The contract being one between an American National and an Indian National, the law prevailing in U.S.A. and the laws defined in Incoterms, as being the International Law applies to the suit contract. Further, the bill of lading used in this transaction includes the clause paramount under which COGSA shall apply and hence the transaction is covered by American Law. Even otherwise the law relating to G. I. & F. or G. & F. prevailing in India is the same. The Courts have followed the precedents of English Courts and under the provisions thereof and the mercantile usage relating to such contracts, the seller's obligation is no more than the production of good shipping documents, and if these documents are good shipping documents and valid at the time they are preferred to the buyer, then the seller has performed his obligation and is entitled to be paid for the property, the title in the goods having passed to the buyer.

11. The defendant has performed its obligations by putting the goods in the ship and the goods having effectively passed the ship's rail at the port of shipment, it is not liable for the claim made, as all the risks attending the goods thereafter have to be borne by the buyer, the plaintiffs herein. In any event, the second defendant having shipped the plates and having been issued a clean bill of lading from Georgelis line evidencing payment of freight by the seller and receipt of the plates by the carrier, and the bill of lading having been issued in favour of the plaintiffs, on negotiating the same with the Bank of America as per terms of the contract between the parties, and being transmitted by the said bank to the plaintiff, the second defendant had no further obligation in the matter and was not responsible for the subsequent happenings and the expenses incurred by the plaintiffs for getting the goods to Madras. It is further urged that the Bank of America is in law the agent of the plaintiffs and in handing over the bills of lading to the Bank of America the second defendant had performed all its obligations.

The Georgelis line who issued the bill of lading in the name of the plaintiffs is in law the plaintiff's agent and not the second defendant's agent.

12. The second defendant denied that it was at any time liable for delivering the goods at Madras or for having them transhipped from Saigon to Madras, having reference to the terms and conditions of the purchase order and the bill of lading and other documents relating to the transaction and especially to the facts that the insurance was agreed to be effected by the plaintiffs, the bill of lading was made out in the name of the plaintiffs and the shipping documents were all negotiated with the Bank of America. On such negotiation, the property and the risk as well as all liabilities thereon including any further expenses for transshipment, etc. had passed to the plaintiffs.

13. This Court has no jurisdiction in respect of the suit claim, as no part of the cause of action relating to this claim arose within its jurisdiction. The second defendant puts the plaintiffs to strict proof of the expenses alleged to have been incurred by the plaintiffs in transporting the goods from Saigon to Madras.

14. The following issues were framed by Ramaprasad Rao, J.:

- (1) Is the first defendant the agent of the second defendant?
- (2) Is the law applicable to the suit contract the law prevailing in U.S.A. and the laws defined as " Incoterms "?
- (3) In any event, has all the title in the goods passed to the buyer on the preferring of the shipping documents to the buyer?
- (4) Has not the second defendant performed all its obligations when goods effectively passed the ship's rails at the port of shipment and therefore all risks attending the goods should be borne by the buyer the plaintiff?
- (5) Is not the bank in America in law the agent of the plaintiff and by handing over the Bill of lading to the Bank of America has not the second defendant performed all his obligations?
- (6) Is not Georgelis Lines, Inc., who issued the bill of lading the agent of the plaintiff and is not delivery to the ship delivery to the plaintiff?
- (7) Has this Court jurisdiction to try the suit?
- (8) Is the suit not maintainable in India against the second defendant in its firm name?
- (9) Is there not an agreement that the first defendant would not be personally bound or liable?
- (10) Does not by the acceptance of the shipping documents by the plaintiff the second defendant had fully performed the obligations?
- (11) Do not the terms of the contract under the circumstances show that the

parties never agreed to be bound by any situation, namely insolvency of the carrier?

(12) Have the defendants any responsibility to bear any extra freight or has the plaintiff to bear the same?

(13) Is the plaintiff entitled to any interest?

(14) Is the suit barred by limitation?

15. No oral evidence was adduced by the parties and the plaintiffs have marked Exhibits P-1 to P-33 (a) and the defendants have marked Exhibits D-1 to D-26

16. Issues 1 and 9: The main point which arises for consideration under these two issues is whether the first defendant can be held personally liable for the suit claim.

17. The relevant provisions of Section 230 of the Indian Contract Act are these:

In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

18. Such a contract shall be presumed to exist in the following cases:

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad?

19. While construing the provisions of Section 230 aforesaid, a Division Bench of the Madras High Court has in V.R. Mohanakrishnan Vs. Chimanlal Desai and Co., , observed as follows:

...the vital words are "contracts entered into by him on behalf of his principal". It will be a question of fact in each case, whether the contract is between a principal here and the foreign principal directly, or whether the home agent of the foreign principal has entered into the contract. If he has, his personal liability is exempted under the general principle, unless there is a specific term of the contract stipulating such a liability.

But such a term of the contract will be presumed to exist, or, in other words, will be read into the contract, where the contract is made or entered into by the home agent on account of a merchant resident abroad. This term being a presumption, it is rebuttable, though the mode in which it can be rebutted remains unspecific. There are two complexities here, which may have to be examined. Firstly, are we to assume that, merely because the home agent of the foreign principal establishes the necessary contracts or is the route through which the transaction is effected, he enters into a contract himself or on behalf of his principal, within the scope of the section?

20. The learned Judges have further observed:

Confining ourselves, for the moment, to the strict language and import of our enacted law (Section 230 Sub-section (1)), it seems clear that, for the personal liability of the home agent to accrue, it must be shown that he entered into the contract by or on behalf of his principal, by signing on behalf of his principal, or in some other way proving the fact that the contract was one between the merchant here and home agent on behalf of a foreign principal. Where the contract is between two principals, in form and substance, the inconvenience of suing the foreign principal here, the fact that the merchant ordering the goods might not have looked to the credit or performance of the foreign principal but of the home agent, etc., would be extraneous and irrelevant. In such a context, Section 230 itself would not apply, and hence the liability under Sub-section (1) of Section 230 would not arise. This, of course, will be a question of fact in each case.

The law is thus clear that an agent cannot be personally bound by a contract entered into by him on behalf of his principal, in the absence of any provisions in the contract to that effect. But the law will presume such a contract in a case where the contract is by the agent for the sale of or purchase of goods from a merchant resident abroad. The presumption created by Section 230 (2) is merely a prima facie one and may be rebutted by the language or the provisions of the contract themselves.

21. A close scrutiny of the correspondence between the three parties inter se clearly establishes that the first defendant is not a mere broker or intermediary as understood in the commercial world. There can be no doubt whatsoever that he was acting as a representative or as a home agent of the second defendant, the merchant resident abroad during the negotiations.

22. I am, however, clear that there is no basis for the contention that the suit contract was entered into by the first defendant on behalf of the second defendant or that the plaintiffs looked to the 1st defendant also for the performance of the contract. It is no doubt seen that the first defendant had at the initial stage negotiated the contract with the plaintiffs and had discussions with them on behalf of the second defendant ; and there are also one or two passages in the first letter Exhibit P-1 between the parties which may lend some basis for the contrary view. Exhibit P-1 the copy of the letter written by the plaintiffs to the first defendant on 16th January, 1964, contains the following passages.

With reference to the telephone conversation the undersigned had with you we confirm that we are agreeable to place our orders on you for supply of steel plates....You have agreed to the above price and have promised to get confirmation from National Steel Corporation before 18th evening.

23. This was however at the preliminary stage of the negotiation and the subsequent correspondence leave no doubt in my mind that the suit transaction was merely routed through the first defendant and that the contract of sale in

question was concluded only between the plaintiffs and the second defendant. In Exhibit P-2 a letter written by the first defendant to the plaintiffs on 20th January, 1964, the first defendant had stated that he had cabled the price to the second defendant and that the latter had accepted the plaintiff's order. The first defendant had further requested the plaintiffs by that letter to intimate to them (the first defendant) the exact sizes and quantities required in order to enable them to forward the same to their principals. It is also seen that the first defendant had requested the plaintiffs to open a letter of credit only in favour of the second defendant, his principals, and not in his favour. Exhibit P-3 a letter written by the first defendant to the plaintiffs on 21st January, 1964, has, as an enclosure a cable received by the first defendant from the second defendant ; and the cable states that the second defendant had accepted the price and had agreed to despatch a portion of the goods by Indian vessels and relating to pre-payment of the freight.

24. The letter copy (Exhibit P-4) dated 24th January, 1964, written by the plaintiffs to the first defendant shows that the plaintiffs have enclosed along with that letter the purchase order Exhibit P-5 and a copy of the conditions for the first defendant's information and for being forwarded to the second defendant, their principals. The plaintiffs have agreed by that letter to open a letter of credit in favour of the second defendant against the order and had requested the first defendant to obtain a letter of acceptance of the order from the second defendant, their principals.... The Purchase Order (copy Exhibit P-5) was addressed by the plaintiffs directly to the second defendant and the plaintiffs had requested the latter to register the order and supply the articles and to forward the advance copies of shipping documents directly to them. The annexure to Exhibit P-5 states that the shippers (second defendant) should intimate to the plaintiffs by cable shipment details for insurance purposes.

25. It is true that the second defendant had, while asking for an extra charge of \$ 6.72 per long ton, conveyed the request to the plaintiffs but only through the first defendant, the letter Exhibit P-7 written by the first defendant to the plaintiffs on 10th February, 1964, makes it clear that the first defendant wanted the plaintiffs' acceptance in order to enable them to cable to the second defendant to go ahead with the execution of the order. When the necessary amendments to the letter of credit had been carried out, providing for an increase of the extra charges, the plaintiffs while conveying the news to the first defendant were particular that the latter should instruct the second defendant about the amendments (vide Exhibit P-8 (a)) dated 12th February, 1964, a copy of the letter written by the plaintiffs to the Agent, United Bank of India Limited, Madras. In Exhibit P-9 a copy of the letter dated 12th February, 1964, written by the first defendant to the plaintiffs, the first defendant had pointed out to the latter that the amendment was required by the second defendant as per their cable and that the first defendant had in turn cabled to the second defendant the plaintiffs' acceptance of the extra charges. By their letter Exhibit D-2 dated 12th February 1964 the first defendant had conveyed to the second defendant the

information that the plaintiffs have instructed their bankers to amend the letter of credit.

26. Admittedly there is very little direct correspondence between the plaintiffs and the second defendant at any stage, but the letters show that the first defendant has acted only as a means of communicating the views of the plaintiff and the second defendant to each other and that it was only at the last stage when the plaintiff found that the second defendant would not make arrangement for the transshipment of goods from Saigon to Madras, that they had thought of looking to the first defendant for the suit claim.

27. In Exhibit D-3 a letter dated 12th February, 1964, written by the second defendant to the first defendant, the former complained that the plaintiffs had not so far sent the letter of credit and requested the first defendant to obtain the immediate approval of the plaintiffs for the payment of the extra charges. When the Steamer was changed from A/J FAITH to S. S. ANJI, the second defendant had advised the first defendant by their letter Exhibit D-5 dated 28th February, 1964 to communicate the news to the plaintiffs. By their letter Exhibit P-10 dated 31st March, 1964, addressed by the plaintiffs to the first defendant, they had no doubt called for confirmation from the first defendant that the plates to be supplied against their purchase order were actually as per their specifications and not as per the tolerance mentioned in the mill orders, but it is obvious that the confirmation they expected was from the second defendant not of the first defendant. On 10th June, 1964, the second defendant had written a letter Exhibit D-8 to the first defendant requesting the latter to assure the plaintiffs that they need not be concerned regarding the tolerance, etc., and Exhibit D-9 a letter dated 21st April, 1964, shows that the first defendant had enclosed a copy of the letter Exhibit D-8 to the plaintiffs.

28. We then come to the last stage when the ship Anji did not arrive in the Madras Harbour within the time anticipated. The correspondence shows that the plaintiffs had expressed their anxiety over the delay in the arrival of the steamship and wanted information about the whereabouts of the vessel from the first defendant and that subsequently on coming to know that the goods have been off loaded at Saigon, they have been requesting the first defendant to intercede with the second defendant and to make arrangement for transshipment. By their letter Exhibit P-12 dated 24th June, 1964, the plaintiffs have requested the first defendant to take up the matter with the second defendant and to let them know the then position of the steamer, and Exhibit P-14 a copy of the cable shows that the cable was sent by the plaintiffs to the second defendant requesting the latter to contact their local agents at Saigon and to make arrangements for the transshipment immediately. It is significant that the plaintiffs looked only to the second defendant for transshipment and not the first defendant. Exhibit P-15 a letter written by the plaintiffs to the first defendant on 30th June, 1964, further shows that the plaintiffs had only requested the first defendant to take up the matter with the second defendant. By their letter

Exhibit P-15 dated 30th June, 1964, the plaintiffs had requested the first defendant to take immediate action with his principals at U.S.A. and arrange to get the materials as early as possible. It is urged by the learned Counsel for the plaintiffs that the plaintiffs have looked to the first defendant for making arrangements for the transshipment but then the request contained in the letter taken in conjunction with the other letters does not necessarily convey the said impression. The passage in this letter can only mean that the plaintiffs had requested the first defendant to take immediate action with the second defendant for the purpose of getting the materials transhipped as early as possible. By their letter Exhibit D-12, dated 1st July 1964, the first defendant had pointed out the difficult position of the plaintiffs because of the non-arrival of the goods in time and had pleaded with the second defendant to get into touch with the forwarders (Georgelis Lines) and instruct them to see that the materials were transhipped by some other vessel immediately from Saigon to Madras.

29. By their letter Exhibit D-13 dated 2nd July, 1964, the second defendant had made it clear that it was not possible for them to arrange for the transshipment and had also hinted that it was not also their legal responsibility. The cable Exhibit P-16 sent by the plaintiffs to the forwarders Georgelis Lines shows that the plaintiffs had requested the steamship agents to make arrangements for immediate transshipment Exhibit D-14 dated 3rd July, 1964, a letter written by the first defendant shows that they had pleaded with the second defendant to make arrangements for the transshipment. Exhibit D-15, dated 3rd July, 1964, is another such reminder.

30. The first defendant has written a letter Exhibit P-34, dated 13th July, 1964 to the plaintiffs enclosing therewith a copy of the letter Exhibit D-17 written by the second defendant to the first defendant and had expressed the hope that the plaintiffs would be satisfied with the explanation offered by the second defendant for their Inability to make arrangements for the transshipment.

31. It is seen that it was only after the plaintiffs had been obliged to make their own arrangements for the transshipment, they had thought of the first defendant as a target for recovery of the actual expenses to be incurred by them towards the transshipment. By their letter Exhibit P-25 dated 17th July, 1964 addressed by the plaintiffs to the first defendant, they had stated that the first defendant had quoted the rate of \$ 162.80 per long ton that the plaintiffs had placed a purchase order on the first defendant that the first defendant did not take any steps to tranship the goods from Saigon except that of contacting the second defendant, that, as the contract was C. and F. Madras it was the first defendant's sole responsibility to deliver the materials at Madras and that any expenses incurred by the plaintiffs in transporting the materials from Saigon to Madras will be to the first defendant's account. They have wound up the letter with the hope that the first defendant would see the reasonableness of the plaintiffs' claim for the actual expenses and agree to reimburse them with the expenses and would not drive them to the necessity of resorting to legal action. It is obvious that they

had thought of legal action at this stage and have thought of recourse to the first defendant only on legal advice. It is significant that the plaintiffs had so far treated the first defendant only as the home agent of the second defendant and had looked only to the second defendant for the performance of the contract and for making arrangements for the transshipment of the goods from Saigon to Madras. I therefore do not attach any significance to this letter, as the claim therein against the first defendant had evidently been inspired by legal advice.

32. To sum up : The evidence on record conclusively shows that the contract for the supply of goods was one between the plaintiffs on the one hand and the second defendant on the other and that the contract was not made by the first defendant on behalf of the principal. As I have already pointed out, the purchase order Exhibit P-5 placed by the plaintiffs constituting the offer was addressed directly to the second defendant in the latter's name and the purchase order was accepted directly by the second defendant themselves. As per the conditions of the contract, the plaintiffs had undertaken to open an irrevocable letter of credit for the purpose of payment of the sale price and indeed opened the same only in favour of the second defendant and the purchase order Exhibit P-5 shows that it was to the second defendant that the plaintiffs looked to for the performance of the entire contract. The invoices had to be made out by the second defendant in the manner set out in the annexure to the purchase order and it was the second defendant who had to ship the goods in the manner stipulated in the annexure to the purchase order and pay the ocean freight and supply the documents mentioned therein to the plaintiffs. The correspondence shows that the first defendant had played the role of only a negotiator on behalf of the second defendant in respect of the contract and have done nothing except bring the plaintiffs and the second defendant together into the contractual relationship. When there was delay in the arrival of the ship, the plaintiffs looked only to the second defendant for the transshipment of the goods from Saigon to Madras and not the first defendant. There is therefore absolutely no basis for upholding the plaintiffs' contention that the contract for the supply of goods was made by the first defendant on behalf of the second defendant. It necessarily follows that there is no room for invoking any presumption that there was any "contract to the contrary" i.e., a contract that the first defendant would be personally answerable for the supplies of the goods and would be personally liable for any consequence arising out of the breach of the contract. The terms of the contract also exclude by implication the personal liability of the first defendant.

33. For the foregoing reasons I find on Issue No. 1 that the first defendant was the home agent of the second defendant and not merely an intermediary and on Issue No. 9 that there is no agreement that the first defendant would be personally bound or liable.

34. Issue Nos. 3 to 6, 10, 11 and 12 : It is contended on behalf of the plaintiffs that under the terms of the contract, which is admittedly a C. and F contract, the second defendant was bound to bear the freight charges incurred by the plaintiffs

in transshipping the goods from Saigon to Madras apart from the freight already paid for the carriage from the Port of Baltimore to Madras. According to their learned Counsel, it is the duty of the second defendant to deliver the goods at the Port of Madras and that, consequently, they must bear all the ocean freight charges incurred for the transshipment of the goods till their delivery at Madras. On the other hand, the learned Counsel for the defendants contends that, under the C. and F. contract the responsibilities of the seller cease with shipment of the goods, the pre-payment of the freight and delivery of the bills of lading to the buyer or his agents, that on the performance of these three conditions the obligations of the seller under the contract had been completely fulfilled, that, on shipment of the goods and the delivery of the bills of lading, the title to the goods passes to the buyer, that the goods in the course of transit are at the risk of the buyers and that the sellers will not be liable for any charges like additional freight, wharfage, etc. incurred by the buyers after shipment.

35. The law is clear that it is open to the parties to stipulate any conditions which they choose while entering the contract for the sale of the goods, relating to the price, the time for its payment, the mode of delivery of the goods, the freight to be paid for the transport of the goods by sea, the insurance charges to be borne by the parties etc., and like matters. In the present (case the terms of the) contract are not elaborately set out anywhere and the contract is described in the purchase order as \$ 162.80 per long ton C and F. Madras and the terms thereof are in the purchase order. The contracts C.I. and F and C. and F. are well-known in commercial circles throughout the world and there is no dispute between the parties as to the scope and incidents of these contracts. The American Law as expressed in the Uniform Commercial Code has set out the scope and incidents of the C. I. F and C. and F. contracts thus. The terms C. and F. means that the price includes any lump sum, the cost of the goods and the insurance and freight to the named destination. The terms C. and F. means that the price so includes cost and freight to the named destination.

36. Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. requires the seller at his own expense and risk to-

(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination:

(b) load the goods and obtain a receipt from the carrier (which may be obtained in the bill of lading) showing that the freight had been paid or provided for:

(c) obtain a policy of insurance to cover the goods covered by the bill of lading and provide for payment of loss to the order of the buyer or for the account of whom it may concern:

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

37. Unless otherwise agreed, the term C. and F. has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. contract except the obligation as to insurance.

38. Under the C.I.F. or C. and F. contracts, unless otherwise agreed, the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution of the documents.

39. The C. and F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer with risk of subsequent loss or damage to the goods passing to the buyer upon shipment if the seller has properly performed all his obligations with respect to the goods. Delivery to the carrier is delivery to the buyer for purposes of risk and title. Delivery of possession of the goods is accomplished by delivery of the bill of lading and upon tender of the required documents the buyer must pay the agreed price without awaiting the arrival of the goods and if they have been lost or damaged after proper shipment he must seek his remedy against the carrier or insurer.

40. In *Madeironso Do Brazil S/A v. Stulman Earick Lumber Co.* 147 F 2 d. 399. (Circuit Court of Appeals 2nd Circuit) a Bench of three Circuit Judges of American have set out the meaning and scope of C and F. contracts in the following manner:

The term "C. and F." means that the price includes in a lump sum "cost" and "freight" to the named destination. The term "C. and F." thus either requires the seller to pre-pay the freight or permits the buyer after having paid the actual charges to deduct them from the price, in either case putting the seller under an ultimate obligation to pay for the transportation. Commercial usage, recognised by the Courts and text writers, is that under a C. and F. contract, the seller fulfils his duty on shipment of the goods, and that the risk thereafter is on the buyer unless other terms of the contract indicate a contrary intention.

Indeed, here the necessary inference is the same as that for a C.I.F. contract, since the documents showed that insurance was to be effected by the buyer... Hence the risk during transit is upon the buyer, thus indicating an intention that title is to pass upon shipment and, as in the C.I.F. contracts, requiring delivery to a carrier only.

41. To the same effect is another American decision *Amco Transworll, Inc. v. M/V. Bambi* United States District Court, S.D. Taxes. August 9, 1966--257 F (Supp). 215. It is repeated that under a C. and F. contract the seller fulfils his duty by delivery of the goods to the carrier and the prepayment of the freight charges. After delivery and payment of the charges, title to the goods passes to the

purchaser and the risk of loss is on him.

42. In *Phoenix Mills Ltd. Vs. M.H. Dinshaw and Co.*, Chagla, J., had observed that, under a C.I.F. contract, the seller can give symbolical delivery of the goods, by tendering to the buyer three documents, viz., a bill of lading, an invoice, and a policy of insurance. In law the tendering of these documents is tantamount to giving delivery of the goods covered by these documents and the buyer is bound to accept these documents and pay the price. The observations of Chagla, J. are based upon the decision on *Biddell Brothers v. E. Clemens Horst & Co.* L.R. (1911) 1 KB 214. In that case, the decision of the trial judge Hamilton; was, by a majority of the Court of Appeal, reversed, Kennedy, L.J., dissenting, but was finally approved by the House of Lords in *E. Clemens Horst Company v. Biddell Brothers* L.R. (1912) A.C. 18. The House of Lords reversed the decision of the Court of Appeal and upheld the view of Hamilton, J. that the sellers were entitled to payment upon shipping the goods and tendering to the buyer the bill of lading and insurance policy. The House of Lords had observed:

Delivery of the bill of lading when the goods are at sea can be treated as delivery of the goods themselves, this law being so old that I think it is quite unnecessary to refer to authority for it.

43. The House of Lords have also observed that the dissenting Judgment of Kennedy L.J. in the Court of Appeal was remarkable and illuminating the whole field of controversy. The reasons underlying the view that tender of the bill of lading and their acceptance by the buyers would be tantamount to delivery of the goods in a C.I.F. contract are ably summarised by Kennedy, L.J., in *Biddell Brothers v. E. Clemens Horst & Co.* L.R. (1911) 1 KB 214, thus:

The meaning of delivery under the (English) Sale of Goods Act is defined by Section 62 to be voluntary transfer of possession from one person to another. Such delivery may be either actual or contractive and, as Bowen, L.J. has pronounced, in the case of sea-borne goods, the delivery of the bill of lading operates as a symbolical delivery of the goods. The bill of lading in law and in fact represents the goods and possession of the bill of lading places the goods at the disposal of the purchaser.

44. It is thus clear there is no divergence between the Indian Law and the American and British Laws on this subject; and the law in India is as defined in incoterms.

45. The learned Counsel for the plaintiffs Sri V. K. Thiruvengkatachariar is not in a position to challenge the principles laid down by these authorities regarding the meaning scope and effect of the C. and F. contract, and I am clear that the principles underlying the C. and F. contract will not lend any support to the plaintiff's claim for the fresh shipment other charges occasioned by the defendants. It is true that the second defendant had undertaken as part of the bargain, to pay the entire freight charges payable for the transport of the goods on sea from Baltimore to Madras; but he had admittedly paid the due once. The

claim for a payment over again will arise only when the contract lays upon him an absolute obligation to deliver possession of the goods to the plaintiffs at the port of Madras. No doubt, under every contract of sale, a seller has got an obligation to delivery possession of the goods to the buyer; but delivery of possession under the Indian Contract Act may be actual or constructive; and the proposition that under the C.I.F. contract as well as under the G. and F. contract delivery of the bill of lading to the buyer would be tantamount to delivery of the goods to him is well established and is not challenged. C.I.F and C. and F. contracts are well known in commercial circles; and their meaning " and import were not open to any doubtful construction so far. The plaintiffs had with open eyes entered into a C and F contract as understood in commercial circles and it is now too late for them to contend that the defendants promised to deliver physical possession of the goods at the Madras Port.

46. It is usual for the parties entering into a contract for the purchase of goods from abroad to effect insurance over the goods for the purpose of covering loss or damage during transit across the seas; and it is usual in C.I. and F. contract to undertake at his costs the liability for insuring the safety of the goods during the transit across the seas for the benefit of the buyer. In the present instance the plaintiffs have, however, undertaken the insurance liability on their own shoulders clearly indicating thereby that the risk during the transit is upon them as buyer and also indicating a further intention that title will pass upon shipment, requiring delivery only to the carrier. If the intention of the parties was that delivery had to be made at the Madras Port Trust the second defendant as the seller would have taken the risk during the voyage by effecting an insurance in their own favour. The plaintiffs would . also in such an event, have not taken a letter of credit authorising the American Bank to pay the price to the second defendant in America on delivery of the bill of lading and would have normally deferred payment till the goods were delivered.

47. The crucial question is whether the parties intended that the second defendant (the seller) had undertaken to deliver physical possession of goods at the Madras Port and I have no doubt in my mind that the answer must be a clear "no". As I have already observed, the plaintiffs have chosen to describe the contract by adopting the well known and recognised form C. and F. and it is not suggested that they were not aware of the meaning, implications, conditions and terms of the contract which goes under the appellation C and F. contract. There is nothing in the evidence to indicate that the parties intended to depart from the well-known rule that in such contracts that the delivery of the goods contemplated was constructive delivery or as it is called symbolical delivery of the goods by delivery of the bill of lading to the buyers. In the absence of any evidence to indicate that the parties had contemplated physical as opposed to constructive delivery of the goods, it is clear that the second defendant had done all that is required under the contract in question by shipping the goods properly by payment of the normal freight charges and by delivery of the bill of lading and other connected documents to the American Bank.

48. Though Issues Nos. 5 and 6 which have been raised at the instance of the plaintiffs involve the question whether the Georgelis Lines Inc., the carriers who issued the bill of lading and the American Bank which received the bill of lading from the second defendant are the agents of the plaintiffs, but no arguments were advanced by the learned Counsel for the plaintiffs on these issues. The American Bank had issued the letter of credit only on behalf of the plaintiffs and it is evident that the bank had received the bill of lading from the second defendant as part of the duty when, paying the money to the second defendant on behalf of the plaintiffs. There can therefore be no doubt that the American Bank had acted as the agent of the plaintiffs in receiving the bill of lading from the second defendant and it necessarily follows that the delivery by the second defendant of the bill of lading to the American Bank would constitute delivery of the goods as understood by the Indian Contract Act to the plaintiffs. A bill of lading is a shipmaster's detailed receipt to the consignor and it necessarily follows that Georgelis Lines Inc. had acted on their own, not as the agent of either the plaintiffs or the second defendant when they issued the bill of lading in the first instance to the second defendant. There is no clear evidence as to who delivered the bill of lading to the carrier before actual sailing but : in the absence of any evidence it can be easily presumed that the American Bank which had received the bill of lading from the second defendant at the time of payment should have delivered the bill of lading to the carrier subsequently. The receipt of the bill of lading by the Georgelis Lines Inc., should therefore have been only as the agent of the plaintiffs and not as the agent of the second defendant. There is therefore no difficulty in concluding that the delivery of the bill of lading by the defendant to the American Bank would amount to delivery of the goods to the plaintiffs themselves.

49. A further contention had been raised by the defendants that the insolvency of the carrier was not in the contemplation of the parties at the time of the formation of the contract and had not been provided for in the contract and that the second defendant is not therefore bound to pay the extra shipment charges. I am inclined to accept the contention. I have already held that the title to the goods had passed to the plaintiffs upon the second defendant delivering the bill of lading and other documents to the American Bank which had acted as the agent of the plaintiffs and that the second defendant had performed all their obligations under the contract by putting the goods on board the ship, by paying the freight for the transport of the goods and by delivering the bill of lading to the American Bank; and I have also indicated that the plaintiffs had undertaken the task of insuring the safety of the goods during the transit across the seas. It is therefore obvious that the second defendant is not answerable for any loss or damage to the goods or for the freight or other charges paid by the plaintiffs after the ship had left for the Port of Baltimore.

50. It is urged on behalf of the plaintiffs that, in a case of this kind where both the plaintiffs and the defendants are free from blame, equity demands that the second defendant who had under the contract agreed to meet the freight charges

should meet also the extra charges which the plaintiffs had been forced to pay owing to circumstances beyond their control and not contemplated by the parties. Reference is made to the doctrine of equity enunciated in the well-known English decision in *Lickbarrow v. Mason* (1787) 2 Term Rep. 60, which is to the following effect. "Where one of the innocent parties must suffer by the act of a third party, he who enabled such third person to occasion the loss must sustain it." This doctrine had been severely criticised in some of the subsequent English decisions and Lord Lindley had observed in *Farquherson & Go. v. King & Co.* L.R. (1902) A.C. 325, that the dictum of Ashhurst, J., was too wide. The doctrine is really based upon estoppel and Lord Sumner has, in *Jones Limited v. Waring & Gillow Ltd.* L.R. (1926) A.C. 670, put the principle of estoppel as depending upon a duty. The Privy Council has, in AIR 1938 52 (Privy Council) had stated that the decision in *Lickbarrow v. Mason* (1787) 2 Term Rep. 60, was on the face of it, unsafe to follow and had laid down the true rule that estoppel is based on the existence of duty which the person estopped is owing to the person led into wrong belief or to the general public of whom the person is one and that there is a breach of duty if the party estopped has not used due precautions to avert the risk.

51. The question for consideration is whether the second defendant had enabled the carrier to cause the loss sustained by the plaintiffs in transshipping the goods from Saigon to Madras. It is not disputed that it is the second defendant who had chosen the carriers Anji for transporting the goods and that the carrier had subsequently become bankrupt, resulting in tying of the vessel at Saigon by the Government of United States and the off-loading of the goods therefrom. It is said on behalf of the plaintiffs that, by choosing the vessel carrier, the second defendant was responsible for the loss sustained by the plaintiffs. I am unable to subscribe to this contention. It is true that the second defendant, having undertaken the responsibility of shipping the goods was under a legal obligation to choose a carrier who would be in a position to transport the goods from Baltimore to Madras without any impediment; but there is no material on record for charging the second defendant with negligence in their choice of the carrier. It is not anybody's case that the carrier was bankrupt on the date when the second defendant entered into the contract of a freight sent with the carrier. Nor is there any shred of evidence for supporting the contention that the second defendant, could, by the exercise of due care and attention, have discovered before the shipment, that the carrier was in an unsound financial condition and was about to turn bankrupt. It is not alleged that there was even a rumour about the bad plight of the carrier. It is impossible to say on the evidence available that the second defendant and, in choosing the carrier, acted negligently and that they had, by his negligence brought about the loss.

52. Accordingly I find on Issue No. 3 that all the title in the goods had passed to the plaintiffs (the buyers) on the tender of the shipping documents to the buyer and on acceptance of the same. I find on Issue No. 4 that the second defendant had performed all his obligations under the contract in having shipped the goods

and that all the risk attending the goods after they passed the ship's rails at the Baltimore the port of shipment should be borne by the plaintiffs, the buyers. I find on Issue No. 5 that the American Bank was in law the agent of the plaintiffs and that the second defendant had performed all their obligations by handing over the said bill of lading to the said bank. I find on Issue No. 6 that the Georgelis Lines Inc., who issued the bill of lading were not the agent of the plaintiffs when they issued the bill of lading but that delivery of the bill of lading to the ship should be deemed to be delivery to the plaintiffs. I find on Issue No. 10 that once the second defendant had delivered the shipping documents to the plaintiffs and once the plaintiffs have accepted the same, the second defendant had fully performed their obligations. I find on Issue No. 11 that the terms of the contract do not show that the parties agreed to be bound by any situation, namely, the insolvency of the carrier. I find on Issue No. 12 that the defendants have no responsibility to bear the extra freight and other charges and that the plaintiffs have to bear the same.

53. On Issue No. 2 no arguments were advanced by both the learned Counsel and in view of my find that the Indian Law on the subject is identical with the law prevailing in the United States, it is unnecessary for the purpose of this case to give a definite finding as to whether the law in the United States will prevail in the present instance, because the second defendant is a subject of the United States.

54. Issue No. 14-No arguments were addressed by the learned Counsel for the defendants on the plea of limitation and I accordingly answer the issue in the negative and hold that the suit is not barred by limitation.

55. Issue No. 3-The question involved in this issue is whether the suit is not maintainable in India against the second defendant in its firm name. Here again no arguments were advanced by the learned Counsel for the defendants on this issue and I accordingly hold that the suit as framed is maintainable in India against the second defendant in its firm name.

56. Issue No. 13--This issue is evidently based on the misconception that the plaintiffs have claimed interest before the date of plaint on the extra charges which constitute the basis of the suit claim. The plaint clearly shows that the plaintiffs have given up their claim for interest before the date of plaint. It cannot be disputed that the plaintiffs will be entitled to interest at 6 per cent. per annum on the suit-claim from the date of plaint, if the suit claim is decreed. This issue is answered accordingly.

57. Issue No. 7.--The point for consideration is whether this Court has jurisdiction to try the suit. The second defendant is admittedly a foreign company carrying on business and having its office in the United States of America and is not in the usual course liable to the jurisdiction of the Madras High Court : but it is well-settled international law that, where a foreign company had chosen to appear before the Court of another Country and also to plead on the merits of

the case, the foreign company must be deemed to have voluntarily submitted to the jurisdiction of this Court, though the company had also raised a plea that the Court had no jurisdiction to entertain the suit against it. Venkataraman, J., has, in *Anant Narayan v. Massey Ferguson Ltd.* (1965) 1 Comp. L.J. 269 : (1965) 1 M.L.J. 550, had affirmed the said principle and had elaborately set out the relevant passages from the text books *Private International Law* by Cheshire and Dicey's *Conflict of Laws* and the various decisions both English and Indian on this aspect. Dicey has stated at page 171 of his book that the Court has jurisdiction in an action where any person who has by his conduct precluded himself from objecting to the jurisdiction of the Court and the rule is based on the principle of submission. This rule is recognised as stated above by the decision of Venkataraman, J., in *Anant Narayan v. Massey Ferguson Ltd.* (1965) 1 C. L.J. 269 : (1965) 1 M.L.J.550, as well as in the two earlier decisions of this Court : *Ramanathan Chettiar v. Kalimuthu Pillai* I.L.R.(1914) Mad. 163, and *Rama Aiyar died, Lakshmana Aiyar, Supplemental appellant and legal representative of the deceased Vs. Krishna Patter*, . Admittedly, in the present instance, the second defendant had appeared before this Court and pleaded on the merits and there is therefore no substance in the issue that this Court has no jurisdiction to entertain the suit. The issue is answered accordingly.

58. In the result, the suit is dismissed with costs one set.