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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 30th April, 2025
Pronounced on: 01st September, 2025

\+ RFA 131/2015, CM APPL. 3794/2015 & CM APPL. 1117/2016

M/S M I TEXTILES PTE LTD. .....Appellant

Through: Mr. J.H. Jafri and Mr. Rajesh Kumar, Advs.
M: 9990 856710

versus

M/S T T LTD. & ANR. .....Respondents

Through: Mr. Mukul Raao and Ms. Anju, Advs. for R-1
M: 9650640008
Email: whitecollaradv@gmail.com
Ms. Padmapriya, Mr. Shikhar Bhardwaj and Mr. Rishabh Sancheti, Advs. for R-2.
M: 9910531145
Email: 25rsoffice@gmail.com

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

JUDGMENT

MINI PUSHKARNA, J:

1. By way of this Regular First Appeal, the appellant/defendant no. 1/importer, has assailed the judgment and decree dated 22nd March, 2014 ("impugned judgment"), passed by the Additional District Judge-10 (Central), Tis Hazari Courts, Delhi in *Suit No. 144/2009*, titled as "*M/s. T.T. Limited Versus M/s. M. I. Textiles Pte. Ltd. and Anr.*". The said suit had been filed by the respondent no. 1/plaintiff/exporter, seeking recovery of Rs.

11,80,245/-, along with interest, jointly and severally from the appellant and respondent no. 2/defendant no. 2.

2. The Trial Court, *vide* the impugned judgment, decreed the suit in favour of the respondent no. 1 and against the appellant, for a sum of Rs. 7,89,840/-, with interest @ 12% per annum from 01st September, 2004 till the penultimate day of filing of the suit. Additionally, further interest was awarded in favour of respondent no. 1 on the aforesaid amount from the date of filing the suit till realization, @ 12% per annum. The suit was, however, dismissed against respondent no. 2.

3. During the pendency of the present appeal, the appellant also filed an application, being *CM APPL. 3794/2015* under Order XLI Rule 27, read with Section 151 of the Code of Civil Procedure, 1908 ("CPC"), seeking permission to produce additional evidence by recalling Shri Sunil Kumar Mahnot (PW 1) for his cross-examination. There is further prayer to permit the appellant to lead defence evidence.

4. In pursuance of the order dated 15th January, 2016 of this Court, wherein, it was directed that the application, being *CM APPL. 3794/2015*, would be taken up at the time of hearing of the appeal, the said application shall also be decided by way of the present judgment.

5. The facts, leading to filing of the present appeal, are as follows:

5.1 The appellant is a company incorporated under the laws of Singapore and is, *inter alia*, engaged in the business of international trading of cotton, textiles and other items. The respondent no. 1 is a company registered under the Companies Act, 1956, and is the owner of 100% export oriented spinning mills, carrying on the business of manufacturing, trading, exporting hosiery, yarn, fabrics, textiles, etc.

5.2 The appellant had placed an order for 20,000 kgs @US $ 3.20 per kg of 100% Cotton Fabric NE 26/1 Combed Hosiery Rib Fabric Dia 30 Inches, Gauge 18, Stitch Length 2.7' with respondent no. 1, with 10% plus/minus allowed in quantity and value. For the said order, the appellant got issued a Letter of Credit bearing No. LCF040162 ("LoC") dated 01st March, 2004, for a total value of US $55,890 from the Connaught Place, New Delhi branch of the respondent no. 2 bank, i.e., the Indian Overseas Bank/issuing bank.

5.3 An additional order was placed by a representative of the appellant on respondent no.1 for supply of 8500 kgs @US $3.52 per kg of '100% Cotton Fabric NE 38/1 Combed Hosiery Interlock Grey Knitted Fabric Dia 30" Gauge 23' and 1496.88 kg @US $3.22 per kg of 'NE 38/1 Combed Hosiery Waxed Cotton Yarn - 33 Cartons x 45.36 kg, Total - 1x20' FCL', with 10% plus/minus allowed in quantity and value. Accordingly, the LoC was amended to increase the amount of credit thereunder from US $55,890 to US $89,545.26 and the expiry date was extended to 15th April, 2004.

5.4 The appellant, thereafter, placed a further order on the respondent no. 1 for 18,000 kgs @US $3.20 per kg of '100% Cotton Fabric NE 26/1 Combed Hosiery Rib Fabric Dia 30" Gauge 18, Stitch Length 2.72', with 5% plus/minus allowed in quantity and value. Consequently, the LoC was amended for the second time, whereby, the shipment date and expiry date were extended upto 07th May, 2004 and 25th May, 2004, respectively and the credit amount was increased to US $145,345.26.

5.5 Out of the aforesaid three export orders, the first two orders were duly exported by respondent no. 1 and accepted by the appellant, without any demur and the payment for the said two orders was received by the

respondent no. 1. There is no dispute between the parties with respect to the first two export orders.

5.6 The respondent no. 1, in respect of the third order, exported 16,450 kgs of '100% Cotton Fabric NE 26/1 Combed Hosiery Rib Fabric Dia 30" Gauge 18, Stitch Length 2.72'. The said goods were shipped from Tuticorin, Chennai to Alexandria, Egypt.

5.7 Further, respondent no.1 through its bank, i.e., the Oriental Bank of Commerce/negotiating bank, negotiated shipping documents for the third order and the negotiating bank dispatched the shipping documents to the respondent no. 2, being the issuing bank, on 15th May, 2004 from Delhi. The said documents were delivered to the issuing bank on 17th May, 2004 in Singapore.

5.8 The issuing bank, *vide* communication dated 26th May, 2004 addressed to the aforesaid bank of respondent no. 1, i.e., the negotiating bank, raised certain discrepancies in the shipping documents, in terms of Article 14 of the Uniform Customs and Practice for Documentary Credits Publication No. 500 ("UCPDC Pub. No. 500") issued by the International Chamber of Commerce ("ICC"). The said discrepancies, as recorded in the communication dated 26th May, 2004, marked as *Exh. PW1/14*, before the Trial Court, are reproduced as follows:

> *"xxx xxx xxx*
>
> *1) Beneficiary's address differs from LC in all documents.*
> *2) Description of goods differs from LC in all documents.*
> *3) Invoice – amendment charges of USD284.00 not deducted from invoice value.*
> *4) Insurance policy – container number differs from B/L.*
> *5) B/L – alteration on issue date not authenticated.*
> *6) Courier receipt – sent after 3 days of date of B/L instead of within 3 days of date of B/L.*

7) Bene's cert. – certification not as per LC.

xxx xxx xxx"

5.9 Subsequently, the appellant, through its E-mail dated 30th June, 2004 addressed to respondent no.1, contended that due to the excessive delay in delivery of shipment by respondent no. 1, the appellant's customer had cancelled the order. The appellant further conveyed that they were trying to re-negotiate with its customer and other buyers, as well and only pursuant to the final feedback from their end, would they be able to take the delivery of the said shipment. Additionally, the appellant intimated respondent no. 1 that they may call back the documents/divert the shipment towards any alternate customer.

5.10 Pursuant thereto, respondent no. 1 and its bank, by way of various communications, requested the appellant and respondent no. 2-bank to remit the payment in its favour, on the ground that the discrepancies, as raised by respondent no. 2, were frivolous and insignificant. Further, that the same were raised on the 08th day from the receipt of shipping documents and therefore, it was not in terms of Article 14 of the UCPDC Pub. No. 500, which stipulates that discrepancies have to be raised within 07 days from the receipt of documents.

5.11 However, since no payment was forthcoming, the respondent no. 1 issued a notice dated 09th July, 2004 to the appellant and respondent no. 2, demanding remittance of payment within three days. A copy of the said notice dated 09th July, 2004 was also sent to the International Chamber of Commerce ("ICC").

5.12 Thereafter, *vide* communications dated 12th July, 2004 and 16th July, 2004, the respondent no. 2-bank returned the shipping documents drawn

under the LoC, on the ground that no disposal instructions were provided by the negotiating bank, as requested earlier.

5.13 The respondent no. 1, *vide* notice dated 14th July, 2004, intimated to the appellant as well as the respondent no. 2-bank, that if they were not willing to effect the payment and clear the goods, the shipping documents be returned by respondent no. 1. It was further stated that respondent no. 1 would recall the shipment, however, all the to and fro freight charges, wharfage, losses, interest and damages would be on account of the noticees.

5.14 On 19th August, 2004, another notice was issued by respondent no. 1 to the appellant and respondent no. 2, whereby, it intimated to the noticees that it had recalled the shipment and further, claimed the cost incurred amounting to US $24,550 with 15% interest, payable by the appellant and respondent no. 2, jointly and severally.

5.15 Thus, as no payment was received by the respondent no. 1, *Suit No. 144/2009* came to be filed on 20th August, 2005 by the respondent no. 1, seeking recovery of Rs. 11,80,245/-, along with interest, jointly and severally against the appellant and respondent no. 2-bank, alleging that it had suffered losses, as it had to recall its export shipment and sell the same to Indian buyers at a lesser price, due to dishonour of the LoC by respondent no. 2 bank, in collusion with the appellant company.

5.16 The said suit was contested by the appellant and respondent no. 2, by way of separate written statements, whereby, they denied their liability towards the payment, *inter alia*, on the grounds that in terms of the LoC, the shipment was to be sent only through the nominated line being DSR/UASC and that the time was of essence of the contract. Additionally, it was contended that the discrepancies raised by respondent no. 2-bank were

raised within the 07-day timeframe, as mandated under Article 14 of the UCPDC Pub. No. 500.

5.17 Subsequently, replication was filed by the respondent no. 1 which reiterated the contentions of the plaint and refuted those made in the written statements.

5.18 On behalf of the respondent no. 1, Shri Sunil Mahnot was examined as PW1 and the evidence of respondent no. 1 was closed on 08th April, 2008. However, the appellant, despite being afforded several opportunities, did not avail the opportunity to lead evidence and accordingly, the Trial Court closed the right of the appellant to lead evidence on 08th April, 2009.

5.19 Further, the evidence on behalf of respondent no. 2-bank was closed on 19th May, 2009, wherein, one Shri Arvind Kumar Jha, Manager at respondent no. 2's Defence Colony, New Delhi branch had deposed as D2W1.

5.20 The Trial Court ascertained a loss of Rs. 6,15,558/- in favour of the respondent no. 1, on account of sale of the export shipment to local Indian buyers at a lesser price. Further, the Trial Court held the respondent no. 1 to be entitled to recover the return freight amounting to Rs. 1,74,282/- from the appellant. Thus, *vide* the impugned judgment and decree dated 22nd March, 2014, the Trial Court decreed the suit in favour of the respondent no. 1 and against the appellant, for the total sum of Rs. 7,89,840/-, with interest @12% per annum from 01st September, 2004 till the penultimate day of filing of the suit. Additionally, further interest was awarded in favour of respondent no. 1 on the aforesaid amount from the date of filing the suit till realization, @ 12% per annum. The suit was, however, dismissed against respondent no. 2.

5.21 Hence, the present appeal has been preferred by the appellant.

6. The appellant, seeking to set aside the impugned judgment, has made the following submissions in appeal:

6.1 The entire reasoning of the Trial Court for holding the appellant liable is based upon the lapses of the counsel of the appellant before the Trial Court in cross-examination of respondent no. 1's witness and not upon any positive proof of compliance of the terms of contract between the appellant and respondent no. 1. Therefore, such lapses and gross negligence on part of appellant's counsel cannot take the place of positive proof.

6.2 No evidence was led on behalf of the appellant before the Trial Court due to the negligence of the counsel who had represented it before the Trial Court. The appellant had signed and sent the Evidence Affidavit. However, the same was neither attested nor filed by the said counsel. Further, the said counsel did not communicate the developments of the suit, including, the closure of right to lead evidence, to the appellant. Furthermore, the said counsel of the appellant before the Trial Court neither filed the *Vakalatnama* nor any required authority/resolution of the Board of Directors of the appellant company. Therefore, in light of the aforesaid instances of negligence, the Trial Court ought to have scrutinized the evidence before it with extra care.

6.3 The Trial Court erred in holding that the appellant was "*able to lay hands on the shipment of third order irrespective of rejection of the documents by defendant no. 2*", as the same is factually incorrect. The appellant never received the shipment sent by respondent no. 1 pursuant to the third order. Moreover, the Trial Court relied upon an E-mail communication marked as *Exh. PW1/15,* however, the same was not proved

in accordance with Section 65-B of the Indian Evidence Act, 1852 ("Evidence Act").

6.4 The Trial Court failed to appreciate that the respondent no. 1 would have received the payment under the LoC, had it complied with the terms and conditions of the LoC, irrespective of the defects and defaults on its part *qua* the contract with the appellant.

6.5 The shipping documents submitted by respondent no. 1 contained major discrepancies which justified rejection of the same by respondent no. 2-bank. Further, the Trial Court also absolved respondent no. 2 from the liability alleged by respondent no. 1, thus, establishing the said discrepancies.

6.6 It is an undisputed fact that the discrepancies raised by respondent no. 2-bank were accepted by the bank of respondent no. 1. Despite the said fact, the respondent no. 1 did not take any action against its bank for accepting the refusal of respondent no. 2.

6.7 The terms of the LoC were part of the contract between respondent no. 1 and the appellant, which respondent no. 1 was obliged to comply with in order to get the payment under the LoC. Therefore, respondent no. 1, having not submitted proper shipping documents, did not fulfill the terms of the contract with the appellant with regard to its export order.

6.8 The Trial Court has acted in a contradictory manner by holding that the shipping documents of respondent no. 1 contained major discrepancies and yet, not considering the same *qua* the contract between the appellant and respondent no. 1.

6.9 The discrepancies, as pointed out by the respondent no. 2-bank, were not minor and in fact, raised serious concerns and apprehensions about the

contents and quality of goods shipped by respondent no. 1. The said discrepancies have also been admitted by the witness of respondent no. 1, i.e., PW1 Shri Sunil Kumar Mahnot, who had further admitted that the respondent no. 1 had not filed any documents with the respondent no. 2-bank denying the said discrepancies.

6.10 The Trial Court failed to appreciate the fact that the appellant had made complete and full payment to respondent no. 1 for the first two export orders despite having suffered losses and embarrassment on account of delay in delivery and quality issues. The third export order was cancelled by the appellant only after the refusal of respondent no. 2-bank to honour the LoC. Thus, the respondent no. 1 company was itself responsible for the losses, if any, suffered by it due to the breach of terms of LoC by respondent no. 1.

6.11 The Trial Court ignored the fact that the date of shipment was tampered with by respondent no. 1, which is evident from the perusal of the Bill of Lading marked as *Exh. PW1/8* and the Bill of Lading marked as *Exh. PW1/90*, as both bills contain different shipment dates. In this regard, the Trial Court ought to have noticed the absence of authentication in the alteration on the issue date in the Bill of Lading and the same had been pointed out by D2W1 Shri Arvind Kumar Jha in paragraph 6 of document marked as *Exh. D2W1/A*.

6.12 The documents marked as *Exh. PW1/106* to *Exh. PW1/110*, being alleged E-mail communications exhibited by respondent no. 1 in order to prove that it had to recall the shipment due to non-availability of alternate buyer in Egypt, have not been proved in accordance with the mandatory requirement under Section 65-B of the Evidence Act. Furthermore,

respondent no. 1 has not led any other evidence to prove that it had tried to find alternate buyers in Egypt for the sale of its goods and that it was compelled to recall the shipment due to lack of said alternate buyers.

6.13 Further, the contention of respondent no. 1 company, which claims to be a 100% export-oriented spinning mill that it could not find alternate buyer in Egypt, is highly unlikely. Additionally, the said contention is further negated by the fact that one of the discrepancies found by the respondent no. 2-bank was with respect to the difference in description of the goods as mentioned in the shipping documents and the LoC. Thus, in light of said discrepancy, even the appellant could not have been certain of the goods shipped by respondent no. 1 company.

6.14 Thus, respondent no. 1 had failed to establish its case before the Trial Court as it could not prove that it had performed its part of the contract in entirety or that the appellant had breached the terms of the contract. Furthermore, the impugned judgment is also contrary to the settled law on confirmed irrevocable LoC.

7. *Per contra*, the following submissions have been put forth on behalf of the respondent no. 1:

7.1 The respondent no. 2-bank, in collusion with the appellant, had pointed certain insignificant and inconsequential discrepancies in the shipping documents of the third export order and thereby, attempted to escape its liability to make the payment under the LoC.

7.2 Moreover, the discrepancies that were raised by respondent no. 2 were not intimated within the stipulated time period of 07 days as per Article 14 of the UCPDC Pub. No. 500.

7.3 The appellant, by relying on the aforesaid alleged discrepancies, had tried to avoid performance of its contractual obligations by not accepting the delivery of goods. Despite the fact that respondent no. 1 had shipped the third export order on time, the appellant had *malafidely* not taken delivery of the shipment on the ground of delay.

7.4 The dispute between the parties was also referred to the ICC, wherein, it was confirmed that even if the respondent no. 2 was not in a position to make the payment in accordance with the LoC, it could have returned the shipping documents, however, all charges pertaining to freight, wharfage, or any other demurrage, were required to be paid by the respondent no. 2 to respondent no. 1.

7.5 The letter dated 30th June, 2004 of the appellant clearly stated that the appellant's buyer/customer had walked out and that the appellant was not in a position to clear the goods. Therefore, by not following the principle of '*uberrima fides*', the appellant had committed a breach of trust.

7.6 Even during the course of proceedings before the Trial Court, the appellant had filed its written statement which was duly contested by the respondent no. 1. Furthermore, the right of the appellant to lead evidence was closed *vide* order dated 08th April, 2009, as the appellant had failed to file any affidavit by way of evidence despite multiple opportunities. However, despite the said closure, no efforts were made by the appellant to revise the said order passed by the Trial Court.

8. On behalf of respondent no. 2, it was submitted that the contract between the buyer, i.e., appellant and the seller, i.e., respondent no. 1, was an independent contract. Similarly, the contract between the seller, i.e., respondent no.1 and the bank, was also an independent contract. Thus, the

contract between the appellant and respondent no. 1, being an independent contract, was not dependent or affected by the contract between the respondent no. 1 and respondent no. 2/bank. Further, there is no challenge by the appellant to the findings in favour of respondent no. 2/bank.

9. I have heard the counsels for the parties and perused the documents and evidence on record.

10. At the outset, it is to be noted that the appellant company had placed three export orders with the respondent no. 1, by opening an irrevocable confirmed LoC with the respondent no. 2-bank.

11. The first order was placed by the appellant company on 24th February, 2004 for which an irrevocable LoC dated 01st March, 2004 was issued from respondent no. 2-bank. Thereafter, the appellant company placed the second order on 25th February, 2004 under the same LoC, which was amended on 05th March, 2004 and the amount of credit was increased, and the expiry date extended.

12. The first two orders were duly executed by the respondent no. 1 and the goods were received by the appellant, for which payments were duly made to the respondent no. 1.

13. The appellant company placed a third order for goods with the respondent no. 1/company on 28th February, 2004 under the same LoC, which was amended on 08th April, 2004 to state the latest shipment date as 07th May, 2004 and the expiry date as 25th May, 2004. Though, the latest date of shipment of the third order was initially 10th April, 2004, it was further rescheduled to 07th May, 2004.

14. The respondent no. 2-bank which issued the LoC, found certain discrepancies in the shipping documents submitted by respondent no.1,

which were communicated to respondent no. 1 *vide* message dated 26th May, 2004. Having not received any clarification with respect to the discrepancies, the respondent no. 2-bank returned the shipping documents and refused to honour the LoC on the basis of the said discrepancies.

15. Thus, as regards the third export order placed by the appellant with the respondent no. 1, the appellant company did not take delivery of the goods at Egypt, on the ground that the goods sent by the respondent no. 1 were shipped later than the agreed latest date of shipment, and thus, the order for the export consignment was cancelled after rejection of the shipping documents by the respondent no. 2-bank, which had issued the LoC for the order.

16. Since the appellant company did not take delivery of the goods, and the respondent no. 2-bank did not honour the LoC, the respondent no. 1 company had to recall the consignment. Thus, a suit for recovery was filed by respondent no. 1.

17. Before the Trial Court, the respondent no. 1 claimed the following amounts on account of loss suffered by it, as encapsulated in paragraph 31 of the plaint:

> *"xxx xxx xxx*
>
> *31. The total loss suffered by the plaintiff on account of various acts of omission and commission on the part of the Defendant, which constitute breach of contract by the Defendant, is to the tune of Rs. 10, 26,300, the details thereof are as under:*

		AMOUNT
1.	Freight from Tuticorin to Alexandria	95, 790
2.	Freight from Alexandria to Tuticorin	1, 74, 282
3.	Container detention charges paid at Alexandria Port	79, 170

4.	Ground rent paid to Container Corporation Of India	61, 500
5.	Difference between sale price agreed with the defendant and amount realized on sale of goods in India resultant upon breach of contract by the Defendant	6, 15, 558
	Total	10,26,300

xxx xxx xxx"

18. By way of order dated 12th October, 2006, the following issues were framed by the Trial Court:

> *"1. Whether this court has no territorial jurisdiction to try the instant suit? OPD2*
>
> *2. Whether the plaintiff is entitled for the decree of Rs.11,80,245/- as prayed in the plaint? OPP*
>
> *3. Whether the plaintiff is entitled for pendentelite and future interest as prayed in the plaint, if yes, at what rate? OPP*
>
> *4. Relief."*

19. The appellant herein did not avail the opportunity of leading evidence, despite several opportunities by the Trial Court. Thus, the right of the appellant herein to lead evidence was closed on 08th April, 2009.

20. Subsequently, on the basis of evidence on record, the Trial Court decreed the suit in favour of respondent no. 1 and against the appellant herein, for a sum of Rs. 7,89,840/-, with interest @ 12% per annum from 01st September, 2004 till the penultimate day of filing of the suit. Further, interest @ 12% per annum was awarded on the cumulative amount, as aforesaid, from the date of filing of the suit, till its realization. Thus, the present appeal came to be filed on behalf of the appellant.

21. This Court notes that *vide* an *ex-parte ad-interim* order dated 02nd March, 2015, the execution of the impugned judgment and decree was directed to be stayed, subject to the deposit of 50% of the decretal amount

by the appellant in the form of a fixed deposit with the Registrar of this Court. The relevant portion of the said order, reads as under:

> *"xxx xxx xxx*
>
> ***Subject to the deposit of 50% of the decretal amount, including upto date interest by the appellant with the Registrar General of this Court by means of a fixed deposit receipt in the name of the Registrar General within four weeks, the execution of the impugned judgment and decree shall remain stayed till the next date of hearing**.*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

22. Subsequently, this Court by way of order dated 15th January, 2016, directed the appellant to deposit the entire decretal amount, as follows:

> *"xxx xxx xxx*
>
> *1. Vide ex-parte ad-interim order dated 2nd March, 2015, while issuing notice of the appeal, execution of the decree was stayed subject to deposit of 50% of the decretal amount.*
>
> *2. The counsel for the respondent No.1 is right in contending that this being a money decree, there can be no stay save on deposit of the entire decretal amount.*
>
> *3. **Accordingly, subject to the appellant within four weeks of today depositing the entire decretal amount i.e. with interest till the date of deposit, less the amount already deposited in this Court, there shall be stay of execution**.*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

23. Thereafter, as recorded in the Office Noting, the appellant deposited a Demand Draft dated 06th February, 2016 for Rs. 9,92,439/- towards the decretal amount, in compliance of this Court's directions dated 15th January, 2016.

24. It is pertinent to note that despite various directions of this Court to respondent no. 1 to furnish sufficient and satisfactory Corporate Guarantee, the same was not complied with and the security, as furnished by respondent

no. 1, was rejected by the Registrar General of this Court *vide* order dated 03rd March, 2016, in the following terms:

> *"xxx xxx xxx*
>
> *Respondent No.1 has furnished "Corporate Guarantee"dated 07.09.2015 executed by Shri Sunil Mahnot, Director (Finance) to the effect that in the event RFA No.131/2015 and CM No.3794/2015 being decided by the single bench of the Hon'ble High Court of Delhi against respondent and in favour of the appellant, the guarantor (i.e. respondent No.1 itself) shall pay forthwith a sum of Rs.9,99,622/- to the Registrar General of the Delhi High Court. In support of alleged "corporate guarantee", learned counsel for respondent No.1 relied upon its "annual report for the year 2014-2015" containing therein Profit and Loss Account and Balance Sheet as on 31.03.2015.*
>
> *It appears that it is not a "corporate guarantee" but a "self guarantee". The "self guarantee" furnished by the respondent No.1/company does not offer any specific movable or immovable property, as security. The respondent No. 1 does not propose to deposit any title deed of any of its assets to create charge on such property of this Hon'ble Court to release them the amount. The "self guarantee" styled as "corporate guarantee" by the respondent No.1 merely accompany its annual statement containing the Profit and Loss account and Balance Sheet. Moreover, the Balance Sheet of the respondent No.1/Company reflect its liabilities also, therefore, this alleged "corporate guarantee" offered by the respondent merely on the basis of Profit and Loss Account and Balance sheet, which is mere statement of the respondent No.1/Company, cannot be treated as "security", what to talk of "sufficient security", in order to release the decretal amount to the respondent No.1.*
>
> ***In view of the above, security sought to be furnished by the respondentNo.1/Company cannot be accepted and same is hereby rejected.***
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

25. Thus, the decretal amount, as deposited by the appellant, continues to remain deposited with this Court.

26. This Court notes that by its E-mail dated 30th June 2004, *Exh. PW 1/15*, the appellant raised the issue of delay in delivery of goods by the respondent no. 1 and stated that, as on date, the order stood cancelled. It is to

be noted that as per the facts and documents on record, the shipment for the third export order was shipped on board on 05th May, 2004 from Tuticorin, Chennai. The Bill of Lading, *Exh. PW1/8*, shows 05th May, 2004 as the date on which the goods were shipped on board.

27. A Bill of Lading is a legal document that is issued by a carrier to the shipper, which contains details about which goods are being shipped, where the shipment is coming from and going to, as well as the details of the shipper, carrier and consignee. Thus, Bill of Lading gives cogent evidence regarding contract of carriage and receipt of goods, i.e., an acknowledgment that the carrier has received the freight. Therefore, the date of shipment of the goods on board the carrier vessel by respondent no. 1, to be sent to the appellant, being 05th May, 2004, is established. Further, the respondent no. 1 filed the Bill of Lading with respect to the third order, along with additional documents, which was marked as *Exh. PW 1/90*. The Bill of Lading, *Exh. PW 1/90* showed the date of issuance of the Bill of Lading as 06th May, 2004. Thus, the goods, as exported by the respondent no. 1 from Tuticorin, Chennai, to Alexandria, Egypt were shipped on board on 05th May/06th May, 2004. It is pertinent to note that it is the appellant's own case that the consignment was shipped by respondent no. 1 herein from Tuticorin, Chennai on 09th May, 2004. In this regard, reference may be made to the written statement filed on behalf of the appellant before the learned Trial Court, where, in paragraph 11 of the written statement, it was stated as follows:

> *"xxx xxx xxx*
>
> *11. That due to the above lapses on the part of the Plaintiff, the Answering Defendant faced utter embarrassment before its customers and had to suffer huge losses in terms of tarnishing the reputation of*

the Answering Defendant. The Answering Defendant further had to spent huge amount in making up the above said discrepancies and for regaining its reputation. However, due to the previous delays, the customers of the answering Defendant asked for air shipment of 8000 kgs from next FCL of Rib fabric (i.e. from the Third Order) and in order to cover the earlier lapses of the Plaintiff, the Answering Defendant proposed for splitting into 2X20"Fcl but that was also not responded by the Plaintiff. ***Finally, the second Rib fabric was actually shipped on 9th May 2004 and arrived ALEX port on 17th June 2004****.*

xxx xxx xxx"

(Emphasis Supplied)

28. It is undisputed that the shipment of goods sent by respondent no. 1 reached Alexandria, Egypt on 17th June, 2004. However, the issue of delay was raised by the appellant only on 30th June, 2004 in its aforesaid E-mail, *Exh. PW1/15*, for the first time. Since, the appellant refused to accept the goods, the respondent no. 1 had to recall the goods. The Fax message dated 19th July, 2004, written by the respondent no. 1 to the shipping company in relation to the aforesaid, is on record, marked as *Exh. PW1/80*.

29. In this regard, it is to be noted that the appellant was aware of the delivery of the consignment in Egypt on 17th June, 2004. Since, some disputes arose between the appellant and his buyer with whom he had a contract with respect to the goods being shipped by respondent no. 1, the appellant raised the issue of purported delay by the respondent no. 1, in order to cover up its own contractual dispute with its buyer. Had the issue of delay in shipment been a material issue, the appellant would have raised the said issue immediately when the shipment was received in Egypt on 17th June, 2004. Rather, from the letter dated 30th June, 2004, it is apparent that on account of appellant's own dispute with its buyer, the appellant was trying to re-negotiate with its own buyer and was also trying to find another

buyer for the shipped goods. Letter dated 30th June, 2004, *Exh. PW1/15* written by the appellant to respondent no. 1, reads as under:

From: "M I Textiles Pte Ltd - India Office" <sales@mitextiles.com>
To: <export@ttextiles.com>; <ttltd@eth.net>; <ttlimited@bol.net.in>
Cc: <exports@ttlimited.com>; <export@ttlimited.com>
Sent: Wednesday, June 30, 2004 11:31 AM
Subject: Fw:

15

---- Original Message ----
From: M I Textiles Pte Ltd - India Office
To: ttlimited
Cc: mickyonline
Sent: Tuesday, June 29, 2004 5:37 PM
Subject: Re:

Kind attn Mr Sunil Mahnot

Dear Sir

Kindly note that due to excessive delay in shipment from your end the customer had demanded 8000 kgs of fabric by air freight. We had requested you to co-operate but nobody took the matter seriouly neither anybody cared to reply to the e-mails.

Since there was no positive response from our side except for mere assurances the customer cancelled the order & bought locally. Also at the sametime they have lodged a claim on us for non performance.
Thus as on date this order stands cancelled.

We are trying our best to re negotiate with the customer & at same time also trying with other buyers to salvadge the position. Infact Mr Amit Baid is currently travelling & is in Egypt & this matter is high on his agenda.

Only once we have a final feedback from customer we will be able to take delivery for the cntr. M/while if you have any alternate customer you can very well call back docs & divert the cntr to them.

Kind regards

Sandesh Saxena

Ex. PW1/15

---- Original Message ----
From: ttlimited
To: MI TEXTILE PTE (AB)
Sent: Tuesday, June 22, 2004 4:19 PM

REG: OUR INVOICE NO. FEX/003 DT.30.04.04 FOR USD 50995
YOUR L.C. NO.LCF040162 DT/01.03.04

OUR BANKER HAS INFORMED THAT PAYMENT AGAINST OUR CAPTIONED BILL HAS STILL NOT BEEN RECEIVED.

PLEASE LET US KNOW WHEN YOUR BANK HAS REMITTED PAYMENT AGAINST OUR CAPTIONED BILLS AND ALSO SEND US PAYMENT ADVICE COPY TO ENABLE US TO TRACE THE SAME FROM OUR BANKER.

30. Thus, if the appellant had contractual dispute with its own buyer, a third party, the same could not have been saddled upon the respondent no. 1 by refusing to accept the shipment. The contract of the appellant with its own buyer was an independent and distinct transaction from the contract which the appellant had with respondent no. 1. The plea of delay was not available with the appellant, as the appellant had waived its right to raise the issue of delay in delivery, by its conduct. Firstly, the appellant accepted the shipments of the first two orders, even though shipments of the first two

orders were delayed. With respect thereto, reference may be made to letter dated 01st July, 2004, i.e., *Exh. PW1/20*, written by the appellant to respondent no. 1, wherein, the appellant admitted that the shipment for the first order reached the destination after a delay of five weeks from the original schedule. Again, the second order was also accepted by the appellant, though as per clear statement in the aforesaid letter dated 01st July, 2004, *Exh. PW1/20*, it was shipped 20 days late. Submissions as made in the written statement related to the delay in the shipment of the first two orders, read as under:

> *"xxx xxx xxx*
>
> *8.* ***That considering time as an essence of the contract, it was assured by the Plaintiff that the First order and the Second Order would be shipped latest by 20.03.2004 and 31.03.2004 respectively, through nominated line only. On the contrary, the Plaintiff shipped the consignment after an inordinate delay of 22 days and it was not even shipped by nominated line, as a result, the consignment reached destination 5 weeks late from the original schedule. The First order and the Second order were actually shipped on 12.04.2004 by APL and Miracle Shipping Company****.*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

31. Thus, it is an undisputed fact that the appellant had taken delivery of the first two shipments/orders and payment thereto had been made to respondent no. 1 under the LoC, for both of those orders.

32. It is also pertinent to note that even though, as per the terms of the Sales Contract for the third export order, *Exh. PW1/7*, the shipment was to be sent latest by 10th April, 2004, the amended latest date of shipment as per LoC, i.e., *Exh. PW1/12*, was 07th May, 2004. Further, perusal of the record shows that there was no detailed contract, except the Sales Contract which stated the latest date of shipment.

33. The document pertaining to the Sales Contract for the third export order, *Exh. PW1/7* stipulating the latest date of shipment as 10th April, 2004 is reproduced as under:

REVISED PROFORMA INVOICE/SALES CONTRACT — QR/MKT/03

Exporter **T T LIMITED** 879, MASTER PRITHVI NATH MARG, OPP AJMAL KHAN PARK KAROL BAGH, NEW DELHI PHONE : 3536317 FAX 011 3632283, 3550903	Invoice No & date: DP/131 DT.28.02.2004 Exporter's ref Buyer's Order No & Date Other references
Consignee M/S M I TEXTILES PTE LTD SINGAPORE	Buyer (if other than consingee)
	Country of origin of goods: INDIA Country of Final Destination: EGYPT
Pre carriage By : Place of rcpt by pre carrier	Terms of delievery & payments
Vessel/Flight No : Port of loading: ANY INDIAN PORT	1 RATE IS CIF ALEXANDRIA, EGYPT 2 L.C. - AT SIGHT 3 SHIPMENT - BY 10TH APRIL 04
Port of discharge: ALEXANDRIA EGYPT Final Destination: ALEXANDRIA EGYPT	4 OUR CONTRACT STAND LAPSED IF L.C. IS NOT OPENED WITHIN SEVEN DAYS

Marks & Nos/ Container No	No & Kind of Pkgs	QUANTITY KG	RATE (USD) PER KG	AMOUNT CIF (USD)
100% COTTON FABRIC NE 26/1 COMBED HOSIERY RIB FABRIC DIA 30" GAUGE 18, STITCH LENGTH 2.72 5% + IN QUANTITY AND VALUE		18000.00	3.20	57600.00
NAME OF OUR BANKERS ORIENTAL BANK OF COMMERCE 85-A, RISHYAMOOK BUILDING PANCHKUIAN ROAD NEW DELHI 110001 (INDIA) TEL.NO. 0091 11 23362356/23361730 FAX NO.0091 11 23341769 OUR ACCOUNT NO.7635 SWIFT : ORBC INBB AOSP		LC SHOULD BE ADVISED THROUGH OUR BANK ONLY. IF IT IS ADVISED THROUGH ANY OTHER BANK, BANK ADVISING CHARGES WILL BE ON L.C.OPENER'S ACCOUNT		
			TOTAL	57,600.00

US DOLLAR FIFTY SEVEN THOUSAND SIX HUNDRED ONLY

Declaration:
We declare that this invoice shows the actual price of goods described that all particulars are true & correct.

FOR T T LIMITED

Sd/-
AUTHORISED SIGNATORY

34. The Invoice issued by the respondent no. 1 against the aforesaid Sales Contract for the third export order clearly stipulated that the "Terms of delivery & payments" would be in terms of the LoC dated 01st March, 2004. The said Invoice, marked as *Exh. PW 1/8,* is reproduced as under:

	Invoice No & date :	Exporter's ref:
T.T.LIMITED 879, MASTER PRITHVI NATH MARG OPP AJMAL KHAN PARK KAROL BAGH, NEW DELHI INDIA	FEX/003 30.04.2004	DT 000784
	Buyer's Order No & Date PROFORMA INVOICE NO. DP/131 DT. 28.02.2004	
	Other references 0588134724	
Consignee M/S [redacted] TEXTILES PTE LTD. 1 [redacted] ROAD, ++19-04/05 HIGH STREET CENTRE SINGAPORE 179094	Buyer (if other than consignee)	
	Country of origin of goods INDIA	Country of Final Destination EGYPT

Pre carriage By.:	Place of rcpt by pre carrier	Terms of delievery & payments
		CIF ALEXANDRIA
Vessel/Flight No.: M.V. X PRESS KAVERI V.501	Port of loading TUTICORIN (INDIA)	LC NO. LCF040162 DT. 01.03.2004 ISSUED BY INDIAN OVERSEAS BANK SINGAPORE
Port of discharge ALEXANDRIA EGYPT	Final Destination ALEXANDRIA EGYPT	

Marks & Nos/ Container No.	No & Kind of Pkgs		QUANTITY KGS	Rate (USD)	Amount USD
		652 ROLLS 100% COTTON FABRIC NE 26/1 COMBED HOSIERY RIB FABRIC DIA 30 INCHES, GAUGE 18, STITCH LENGTH 2.7 AS PER PROFORMA INVOICE NO. DP/131 DT. 28.02.2004 CERTIFIED THAT THE GOODS ARE OF INDIAN ORIGIN NET WEIGHT: 16450.00 KGS GROSS WEIGHT: 16528.24 KGS	16450.00	3.100	50995.00
				TOTAL	50995.00

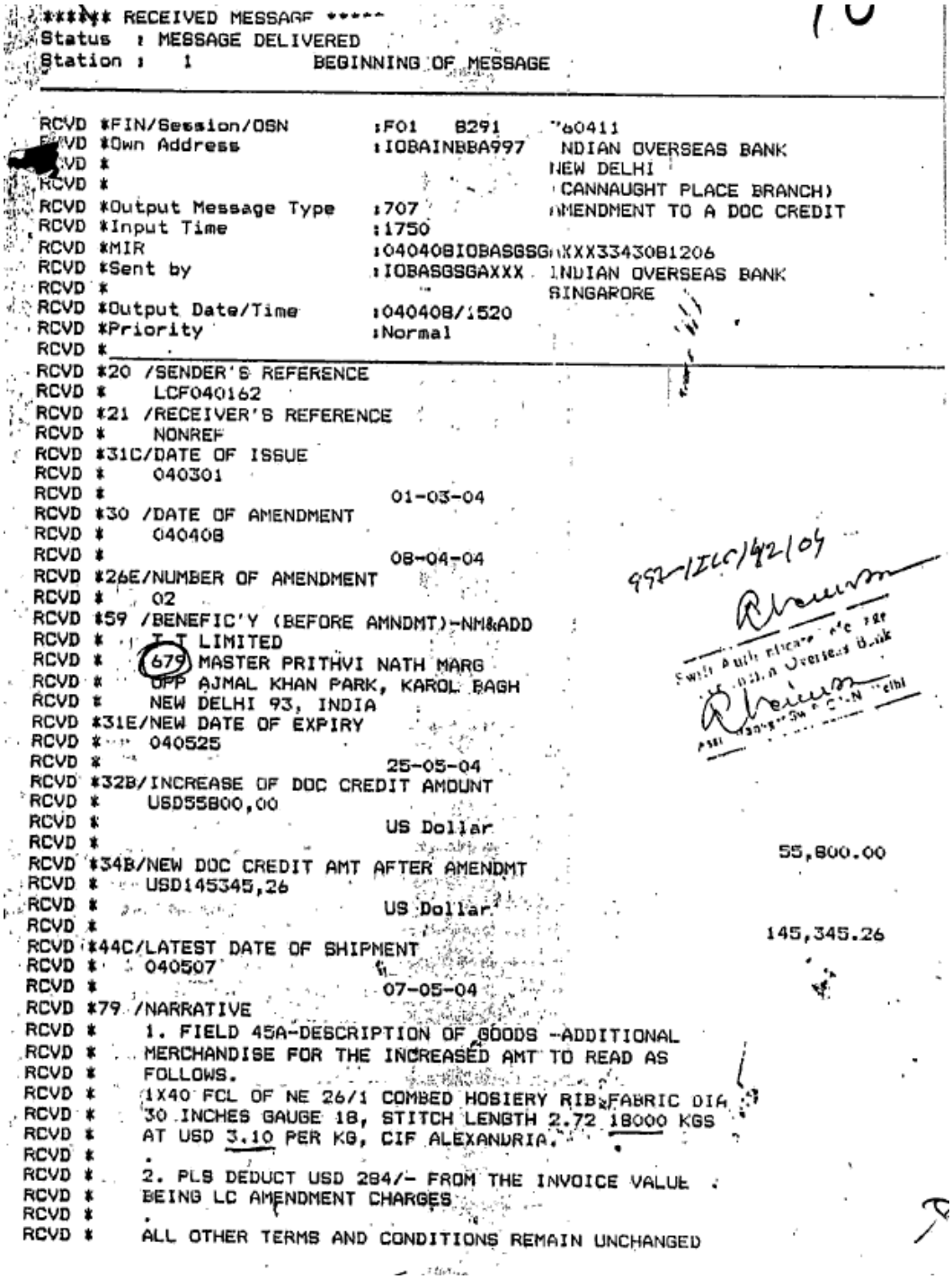
(US DOLLORS FIFTY THOUSAND NINE HUNDRED NINETY FIVE ONLY.)

Declaration:
We declare that this invoice shows the actual price of goods described that all particulars are true & correct.

FOR T T LIMITED

AUTHORISED SIGNATORY

35. The latest date of shipment was amended to be stipulated as 07th May, 2004, *Exh. PW1/12*. Thus, the amended LoC clearly stated the latest date of shipment as 07th May, 2004. As per the Invoice raised by the respondent no. 1 upon the appellant, the terms of delivery were governed by the LoC, meaning thereby, that the date of shipment as mentioned in the LoC, would be taken as the latest date of shipment. The amended LoC, *Exh. PW1/12*, is reproduced as under:



```
****** RECEIVED MESSAGE ******
Status  : MESSAGE DELIVERED
Station :   1          BEGINNING OF MESSAGE

RCVD *FIN/Session/OSN          :F01   8291    60411
RCVD *Own Address              :IOBAINBBA997   NDIAN OVERSEAS BANK
RCVD *                                        NEW DELHI
RCVD *                                        CANNAUGHT PLACE BRANCH)
RCVD *Output Message Type      :707           AMENDMENT TO A DOC CREDIT
RCVD *Input Time               :1750
RCVD *MIR                      :040408IOBASGSGXXX33430B1206
RCVD *Sent by                  :IOBASGSGAXXX  INDIAN OVERSEAS BANK
RCVD *                                        SINGAPORE
RCVD *Output Date/Time         :040408/1520
RCVD *Priority                 :Normal
RCVD *
RCVD *20 /SENDER'S REFERENCE
RCVD *    LCF040162
RCVD *21 /RECEIVER'S REFERENCE
RCVD *    NONREF
RCVD *31C/DATE OF ISSUE
RCVD *    040301
RCVD *                         01-03-04
RCVD *30 /DATE OF AMENDMENT
RCVD *    040408
RCVD *                         08-04-04
RCVD *26E/NUMBER OF AMENDMENT
RCVD *    02
RCVD *59 /BENEFIC'Y (BEFORE AMNDMT)-NM&ADD
RCVD *    I T LIMITED
RCVD *    (679) MASTER PRITHVI NATH MARG
RCVD *    OPP AJMAL KHAN PARK, KAROL BAGH
RCVD *    NEW DELHI 93, INDIA
RCVD *31E/NEW DATE OF EXPIRY
RCVD *    040525
RCVD *                         25-05-04
RCVD *32B/INCREASE OF DOC CREDIT AMOUNT
RCVD *    USD55800,00
RCVD *                         US Dollar
RCVD *                                                    55,800.00
RCVD *34B/NEW DOC CREDIT AMT AFTER AMENDMT
RCVD *    USD145345,26
RCVD *                         US Dollar
RCVD *                                                   145,345.26
RCVD *44C/LATEST DATE OF SHIPMENT
RCVD *    040507
RCVD *                         07-05-04
RCVD *79 /NARRATIVE
RCVD *    1. FIELD 45A-DESCRIPTION OF GOODS -ADDITIONAL
RCVD *    MERCHANDISE FOR THE INCREASED AMT TO READ AS
RCVD *    FOLLOWS.
RCVD *    1X40 FCL OF NE 26/1 COMBED HOSIERY RIB FABRIC DIA
RCVD *    30 INCHES GAUGE 18, STITCH LENGTH 2.72 18000 KGS
RCVD *    AT USD 3.10 PER KG, CIF ALEXANDRIA.
RCVD *    .
RCVD *    2. PLS DEDUCT USD 284/- FROM THE INVOICE VALUE
RCVD *    BEING LC AMENDMENT CHARGES
RCVD *    .
RCVD *    ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED
```

36. Thus, when the latest date of shipment stood amended to 07th May, 2004, the delivery of goods to the shipment carrier by the respondent no. 1 as per the Bill of Lading on 05th/06th May, 2004, was within time. Thus, even if the actual shipment was only on 09th May, 2004, the same was a

negligible delay of two days, which did not justify the cancellation of the contract by the appellant by refusing to accept the goods. The documents on record do not in any manner indicate that time was essence of the contract between the parties. The Sales Contract between the appellant and respondent no. 1 merely stipulated the latest date of shipment, which broadly indicated the latest date when the consignment was to be shipped to the appellant. However, by its own conduct, it is manifest that the said date was not considered to be sacrosanct by the appellant. The appellant itself accepted the first two orders, despite the undisputed fact that the delivery of the first two orders was delayed, and was beyond the latest stipulated date of shipment, in terms of the LoC, corresponding to the said orders.

37. As noted above, the Invoice issued by the respondent no. 1 categorically stipulated that the terms of delivery would be governed by the LoC and that the amended latest date of shipment as per the LoC was 07th May, 2004 for the third export order. Moreover, it is the appellant's own case that the third export order was shipped from Tuticorin, Chennai on 09th May, 2004 and, therefore, the issue of delay in delivery, as contended by the appellant, is not substantiated by the documents on record.

38. It has also come on record that the appellant herein was insisting upon allowing a period up to 15th August, 2004 to clear the goods/take delivery of the goods. Also, the appellant was demanding a discount of US $15,000 as the market had come down. All these facts are apparent from the notice dated 19th August, 2004, issued by the respondent no. 1, *Exh. PW1/64*. This notice, *Exh. PW1/64*, has not been rebutted by the appellant in the cross-examination of witness of respondent no. 1.

39. The aforesaid discussion clearly shows that the appellant had, by its own conduct, waived its right to raise the issue of delay in delivery of the shipment and that time was not the essence of the contract. The fact that the appellant itself had accepted the first two orders, even though received belatedly, clearly dilutes time being the essence of the contract. In this regard, reference may be made to the judgment in the case of ***Welspun Specialty Solutions Limited Versus Oil and Natural Gas Corporation Limited, (2022) 2 SCC 382***, wherein, it has been held as follows:

> *"xxx xxx xxx*
>
> ***32.*** *In order to examine whether the delayed execution of contract by the Remi Metals was liable for compensation, the Tribunal examined whether time was of the essence in the contract. In our considered opinion, "time not being the essence of the contract", as determined by the Arbitral Tribunal, was beyond reproach.* ***Reliance on the contractual conditions and conduct of parties to conclude that existence of extension clause dilutes time being the essence of the contract, was in accordance with rules of contractual interpretation.***
>
> ***33.*** *In this context, the award concludes that as time was not the essence, liquidated damages could not be granted, in the following manner:*
>
> > *"Since time was not the essence of the contract, the measure of damages specified under clause liquidated damages, which was the essence of the contract, cannot be regarded as appropriate for determining the loss sustained by ONGC."*
> >
> > *(Emphasis Supplied)*
>
> ***34.*** *In order to consider the relevancy of time conditioned obligations, we may observe some basic principles:*
>
> > *(a) Subject to the nature of contract, general rule is that promisor is bound to complete the obligation by the date for completion stated in the contract. [Refer to Percy Bilton Ltd. v. Greater London Council [Percy Bilton Ltd. v. Greater London Council, (1982) 1 WLR 794 (HL)]]*
> >
> > *(b) That is subject to the exception that the promisee is not entitled to liquidated damages, if by his act or omissions he has prevented the promisor from completing the work by the*

completion date. [Refer Holme v. Guppy [Holme v. Guppy, (1838) 3 M & W 387 : 150 ER 1195]]

(c) These general principles may be amended by the express terms of the contract as stipulated in this case.

35. It is now settled that "whether time is of the essence in a contract", has to be culled out from the reading of the entire contract as well as the surrounding circumstances. Merely having an explicit clause may not be sufficient to make time the essence of the contract. As the contract was spread over a long tenure, the intention of the parties to provide for extensions surely reinforces the fact that timely performance was necessary. The fact that such extensions were granted indicates ONGC's effort to uphold the integrity of the contract instead of repudiating the same.

xxx xxx xxx"

(Emphasis Supplied)

40. Further, the Supreme Court in the case of ***Hind Construction Contractors by its Sole Proprietor Bhikam-Chand Mulchand Jain (Dead) by LRs Versus State of Maharashtra, (1979) 2 SCC 70***, has held that whether time is of the essence of the contract, is a question of intention of the parties, which is to be gathered from the terms of the contract and in certain cases, can also be waived in view of the conduct of the parties. The relevant portion of the aforesaid judgment, reads as under:

"xxx xxx xxx

7. *... ... ... In the latest 4th Edn. of Halsbury's Laws of England in regard to building and engineering contracts the statement of law is to be found in Vol. 4, para 1179, which runs thus:*

*"**1179. Where time is of the essence of the contract.—The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim payment. The parties may expressly provide that time is of the essence of the contract and where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. Other provisions of the***

contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental: time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion.

Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed."

8. It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental*; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. The emphasised portion of the aforesaid statement of law is based on Lamprell v. Billericay Union [(1849) 3 Exch 283, 308], Webb v. Hughes [(1870) LR 10 Eq 281] and Charles Rickards Ltd. v. Oppenheim [(1950) 1 KB 616 : (1950) 1 All ER 420 (CA)] . It is in light of the aforesaid position in law that we will have to consider the several clauses of the contract Ext. 34 in the case. The material clauses in this behalf are clauses 2 and 6 of the "Conditions of Contract" which run as follows:*

> *"2. The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date on which the order to commence work is given to the contractor. The work shall throughout the stipulated period of the contract be proceeded with, with all due diligence (time being deemed to be of the essence of the contract on the part of the contractor) and the contractor shall pay as compensation an amount equal to one per cent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide, of the amount of the estimated cost of the whole work as shown by the tender for every day that the work remains uncommenced, or unfinished, after the proper dates. And further to*

ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds one month, to complete.

1/4 of the work in 1/4 of the time

1/2 — do — 1/2 — do—

3/4— do — 3/4— do—

6. If the contractor shall desire an extension of the time for completion of the work on the ground of his having been unavoidably hindered in its execution or on any other ground, he shall apply in writing to the Executive Engineer before the expiry of the period stipulated in the tender or before expiry of 30 days from the date on which he was hindered as aforesaid or on which the cause for asking for extension occurred, whichever is earlier, and the Executive Engineer, may if in his opinion there are reasonable grounds for granting an extension, grant such extension as he thinks necessary or proper. The decision of the Executive Engineer in this matter shall be final."

Two aspects emerge very clearly from the aforesaid two clauses. In the first place under clause 6 power was conferred upon the Executive Engineer to grant extension of time for completion of the work on reasonable grounds on an application being made by the contractor (appellant-plaintiff) in that behalf; in other words, ***in certain contingencies parties had contemplated that extension of time would be available to the contractor. Such a provision would clearly be inconsistent with parties intending to treat the stipulated period of 12 months in clause 2 as fundamental. Similarly, in clause 2 itself provision was made for levying and recovering penalty/compensation from the appellant-plaintiff at specified rates during the period the work shall remain unfinished after the expiry of the fixed date. Such provision also excludes the inference that time (12 months period) was intended to be of the essence of the contract.*** *Further with regard to the provision that is to be found in clause 2 whereunder a time schedule for proportionate work had been set out (namely 1/4 of the work in 1/4 of the time, 1/4 of the work in 1/4 of the time and 3/4 of the work in 3/4 of the time), the evidence of the Superintending Engineer, Pandit (DW 1) is very eloquent. In para 13 of his deposition this is what he has stated:*

"In the agreement (Ex. 34) the rate' of work is based on the valuation. One fourth time mentioned means one fourth in 12 months. The suit contract is for Rs 1,07,000. One fourth work means the work of about Rs 27,000 It is not possible to do the work of Rs 27,000 in one fourth time as the days were rainy. This was not reasonable."

The witness in para 12 of his deposition has also given the following admission:

> *"It is not specifically mentioned in the agreement (Ex. 34), that the suit work was urgent and that it was to be completed within 12 months. In this agreement (Ex. 34) there are the clauses of imposing a penalty and extension of time."*

9. *Having regard to the aforesaid material on record, particularly the clauses in the agreement pertaining to imposition of penalty and extension of time it seems to us clear that time (12 months period) was never intended by the parties to be of the essence of the contract.* ***Further from the correspondence on the record, particularly, the letter (Ex. 78) by which the contract was rescinded it does appear that the stipulation of 12 months' period was waived, the contractor having been allowed to do some more work after the expiry of the period****, albeit at his risk, by making the rescission effective from August 16, 1956.*

xxx xxx xxx"

(Emphasis Supplied)

41. Even otherwise, there is no specific stipulation in the contract between the appellant and respondent no. 1 specifying the consequences for non-delivery of the goods as per the latest date of shipment. Mere mention of a latest date of shipment would not be construed as the said date being essence of the contract, as the contractual terms between appellant and respondent no. 1 do not mention the date of actual delivery to the appellant. Besides, the conduct of appellant itself makes it evident that time was never the essence of the contract. Thus, in circumstances where time is not considered to be the essence of the contract, the delivery of goods under the contract is to be made within a reasonable time. In the present case, the latest date of shipment was stipulated as 07th May, 2004, while the actual date of shipment, as per the appellant's own case, was 09th May, 2004. Thus, shipment after two days of the latest date of shipment was within a reasonable time.

42. Holding that mere fixation of a period of delivery or a time in regard thereto, does not by itself make the time as the essence of the contract, Supreme Court in the case of ***Arosan Enterprises Ltd. Versus Union of India and Another, 1999 SCC Online SC 928***, has held as follows:

> *"xxx xxx xxx*
>
> *2. For effectual disposal of these two questions noticed above, reference to certain factual details in this judgment is inevitable and adverting thereto it appears that on 4-10-1989 the Union of India floated an invitation to tender for purchase of sugar to meet the urgent requirement of anticipated scarcity in the Indian market during the Dussehra and Diwali festivals in November 1989 which however, and without much of a factual narration, culminated in an agreement dated 24-10-1989/25-10-1989 with M/s Arosan Enterprises, being the appellants herein, for the supply of 58,000 metric tons of sugar. The contract as above, inter alia, contained the following terms:*
>
> > *"(a) That the claimant shall supply 58,000 MT of sugar (net weight plus/minus 5% at seller's option).*
> >
> > *(b)* ***<u>That the claimant shall arrange shipment of entire quantity of the contracted sugar so as to reach Indian ports not later than 31-10-1989; shipment within the contracted delivery period was to be the essence of the contract</u>****.*
> >
> > *In case of delay the seller was to be deemed to be in contractual default with a right to the buyer to cancel the contract. The buyer could however extend the delivery period at a discount as may be mutually agreed between the buyer and the seller.*
> >
> > *(c) That price payable was to be US $ 480 per metric ton.*
> >
> > *(d) That the seller had to establish an unconditional irrevocable performance guarantee in favour of the buyer by any Indian nationalised bank at New Delhi for 10% of the total contract value of the maximum guaranteed quantity to be shipped, within 7 days of the contract.*
> >
> > *(e) That the payment was to be made to the seller by irrevocable letter of credit (L/C) covering 100% value of the contract quantity. The L/C was to be established by the buyer within seven days of the receipt of an acceptable performance bank guarantee.*

(f) The performance bank guarantee (PBG) was to be by any Indian nationalised bank at New Delhi and was to be kept valid for a minimum period of ninety days beyond the last date of contract shipment period."

xxx xxx xxx

27. ***Mere fixation of a period of delivery or a time in regard thereto does not by itself make the time as the essence of the contract, but the agreement shall have to be considered in its entirety and on proper appreciation of the intent and purport of the clauses incorporated therein. The state of facts and the relevant terms of the agreement ought to be noticed in their proper perspective so as to assess the intent of the parties. The agreement must be read as a whole with corresponding obligations of the parties so as to ascertain the true intent of the parties.*** *In the instant case, as the port of discharge has not been named neither is the surveyor appointed — without whose certificate, question of any payment would not arise — can it still be said that time was the essence of the contract? In our view the answer cannot but be a positive "No".*

xxx xxx xxx

33. ***In the premises it would thus be safe to conclude that by reason of the non-fulfilment of the three conditions as noted above, question of time being the essence of the contract would not arise and as such delivery was to be expected within a reasonable time but before the expiry of the reasonable time****, diverse letters were sent asking for details but the buyer maintained total silence when there was a duty to speak as noted above. The appellate court's finding that the contract stood extended up to 14-10-1989/15-10-1989 does not have any factual support and as such is totally unwarranted and thus cannot be sustained. For the selfsame reason the finding of the appellate court as regards the issue of law, warranting intervention of the High Court vis-à-vis the award, cannot also be sustained. This is apart from the fact that it is a factual issue upon proper reading of the material documents on record. In any event upon coming to a conclusion that the facts detailed out in the judgment (under appeal) unmistakably record that a new date of delivery is available on record — question of the same being an issue of law does not arise in the facts of the matter under consideration. The letter of the Government of India dated 11-11-1989 stated that the matter has since been reconsidered and the letter of cancellation stands withdrawn though however, without prejudice to the rights and contentions of the Government but there was as a matter of fact, reconsideration of the entire issue and it is only on that basis that the letter of cancellation was withdrawn. The facts depict that on 15-11-1989, an intimation was sent by the appellants to FCI stating that due to the cancellation,*

> *the cargo already arranged for has gone out of control and a new cargo was being arranged. In the same letter the appellants further asked for fixation of a new date of delivery and to make consequential amendment for acceptance of documents under the letter of credit by the Bank but no reply was sent. Letters of reminders had been sent again on 20-11-1989, 24-11-1989 but without any response whatsoever and subsequently the cancellation came in January 1990 as noticed above, forfeiting the performance bank guarantee by FCI.* ***In that view of the matter, question of the time being the essence would not arise in the contextual facts. More so by reason of the fact that the cargo was a cargo afloat on the high seas****.*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

43. Likewise, holding that not providing consequences for breach of time may also lead to the conclusion that time is not the essence of contract, in the case of ***Mono Orion Foods India Limited Versus Syndicate Reality Infra Private Limited, 2021 SCC Online Cal 3064***, it has been held as follows:

> *"xxx xxx xxx*
>
> *21.* ***The development agreement does not envisage any consequences for not sticking to the time limit of 36 months as mentioned in Clause 8.1 and 5.3. That being the case, it is not correct to assume that the intention of the parties was to ensure that the work is completed within the deadline. In Clause 5.3 for mutual extension of time and the Clause 8.1 for development of the suit premises nowhere is it mentioned that failing to comply with the deadline will lead to certain consequence or revocation of the development agreement. In fact, there is no clause in the entire agreement to indicate the consequences for not complying with the prescribed time period. Thus, the intention of the parties has to be looked into in light of the above clauses.*** *The legal principle derived in Kalidas Ghosh (supra) with regard to intention and conduct of the parties is accordingly applicable to the facts of this case. Similarly, legal findings on the issue of time is of essence in the case of B. Santoshamma (supra) are relevant and applicable to the case in hand.*
>
> *xxx xxx xxx*
>
> *28. Upon examining the abovementioned judgments, the principles that emerge are delineated below:*

A. ***The terms of contract are to be looked into, specifically the one that prescribes time as the essence of contract****.*

B. ***Other provisions of contract may, on its construction, exclude an inference that completion of the works by a particular date is fundamental****.*

C. Certain clauses that provide for mutual extension of the contract may also lead to the conclusion that time in not the essence of contract.

D. ***Not providing consequences for breach of time may also lead to the conclusion that time is not the essence of contract****.*

E. ***Intention of the contracting parties should be ascertained not only from the written words of the contract, but the nature of the property which is the subject-matter of the contract, the nature of the contract itself and also from the surrounding circumstances****.*

F. ***The subsequent conduct of the parties would also throw some light on the original intention of the parties regarding the stipulated time limit of the agreement****.*

xxx xxx xxx"

(Emphasis Supplied)

44. Even if this Court were to consider the slight variation in the quantity of goods delivered by the respondent no. 1, the same also will not entitle the appellant to reject the goods, as such variation was part of the contractual conditions between the parties. Even otherwise, the said issue was never raised before the Trial Court and there is no communication on record in this regard from the appellant to the respondent no. 1. In this regard, reference may be made to the judgment in the case of ***Suresh Kumar Rajendra Kumar Versus K. Assan Koya & Sons, AIR 1990 KER 20***, wherein, it has been held as follows:

"xxx xxx xxx

14. *The learned Counsel for the respondent has advanced an argument that since the quantity of goods delivered was definitely less*

than the exact quantity contracted to be delivered his client was entitled to reject the entire goods as provided in S. 31(1) of the Sale of Goods Act. Section 37(1) of the Act is in the following terms:—

> *"Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate."*

Even though it is true that S. 37(1) of the Act provides for rejection of the goods when the seller delivers to the buyer a quantity of goods less than what was contracted for, we find that the said rule is subject to a general rule of law namely "de minimis non curat lex". It has been held so by Ahmadi, J. in a decision reported in Dudhia Forest Co-op. Socy. v. Mohamed & Co., 1980 Guj LR 272, where it was observed thus:

> *"It is the duty of the seller to deliver to the buyer the quantity of goods stipulated in the contract. However a slight deficiency in the quantity will not entitle the buyer to reject the goods or claim damages on the principle de minimis non curat lex, because some flexibility in such contracts of sale of goods in bulk is unavoidable and trivial shortfall in quantity must be overlooked. If the difference is, however, substantial, the buyer would be justified in resorting to S. 37(1) of the Sale of Goods Act."*

15. We also find that the scope, purpose and effect of the 'De minimis rule' as applied to the law of sale of goods have been succinctly explained in Benjamin's Sale of Goods thus:

> ***"A deficiency or excess in quantity which is "microscopic" and which is not capable of influencing the mind of the buyer will not entitle him to reject the goods, for de minimis non curat lex. Some slight elasticity in carrying out a commercial contract for the supply of goods in bulk is unavoidable, and the Courts will not allow the buyer to take advantage of a merely trivial difference in quantity if the delivery is substantially of the quantity named."***

(Benjamin's Sale of Goods — Second Edition (1981), para-623, page 298)

In view of the legal position explained above we are of the view that a shortage of 522 Kgs. out of a quantity of 16,000 Kgs. contracted to be supplied, is only a slight deficiency which comes within the "de minimis rule" and we hold that the defendant was not justified in rejecting the goods even under S. 37(1) of the Sale of Goods Act.

xxx xxx xxx"

(Emphasis Supplied)

45. The reliance of the appellant on the discrepancies raised by respondent no. 2-bank, to claim that it could refuse the delivery of shipment, is an afterthought. No such issue was raised by the appellant at the time of refusing to accept the shipment of respondent no. 1, as the only issue raised by the appellant, *vide* its communication dated 30th June, 2004, was regarding purported delay in the shipment.

46. The discrepancies were raised by the respondent no. 2-bank *vide* their message dated 26th May, 2004, *Exh. PW1/14*. However, it is to be noted that even in its communication dated 30th June, 2004, *Exh. PW1/15*, written by appellant to respondent no. 1, though appellant raised the issue of delay, no reliance has been placed by the appellant on the discrepancies raised by respondent no. 2-bank to reject the shipment.

47. Even otherwise, the contract between the buyer and seller is distinct and independent from the contract between the bank and the seller. The contract between the seller, i.e., the respondent no. 1 herein, and the issuing bank, i.e., the respondent no. 2 herein, in the form of LoC, is an independent contract, which is separate and distinct from the contract between the seller, i.e., respondent no. 1 and the buyer, i.e., the appellant, which in the present case is governed by the "*Terms of Payment and Delivery*" on the Proforma Invoice/Sales Contract. This issue has been dealt by the Trial Court, in the impugned judgment, in the following manner:

> *"xxx xxx xxx*
>
> *20(2) Before reverting to the facts, it would be pertinent to refer the relevant precedent in the context of UCPDC. The scope of an irrevocable letter of credit as explained in Halsbury's Laws of England has been quoted in M/s. Tarapore & Co. Vs. M/s V/O*

Tractoroexport Moscow & Anr., AIR 1970 SC 891 "It is often made a condition of a mercantile contract that the buyer shall pay for the goods by means of a confirmed credit, and it is then the duty of the buyer to procure his bank, known as the issuing or originating bank, to issue an irrevocable credit in favour of the seller by which the bank undertakes to the seller, either directly or through another bank in the seller's country known as the correspondent or negotiating bank, to accept drafts upon it for the price of the goods, against tender by the seller of the shipping documents. ***The contractual relationship between the issuing bank and the buyer is defined by the terms of agreement between them under which the letter opening the credit is issued; and as between the seller and the bank, the issue of the credit duly notified to the seller creates a new contractual nexus and renders the bank directly liable to the seller to pay the purchase price or to accept the bill of exchange upon tender of the documents. The contract thus created between the seller and the bank is separate from although anciliary to the original contract between the buyer and the seller, by reason of the bank's undertaking to the seller, which is absolute. Thus the bank is not entitled to rely upon terms of the contract between the buyer and the seller which might permit the buyer to reject the goods and to refuse payment therefore****; and conversely, the buyer is not entitled to an injunction restraining the seller from dealing with the letter of credit if the goods are defective". xxx xxx xxx"*

(Emphasis Supplied)

48. The appellant has not challenged the findings of the learned Trial Court in favour of respondent no. 2-bank, as regards the contract between the respondent no. 1 and respondent no. 2, being independent of the contract between the appellant and respondent no. 1. Once it has come to the fore that the contract between respondent nos. 1 and 2 was independent and separate contract, and the said finding has been accepted by the appellant, the appellant cannot seek to justify its refusal to accept goods on the basis of contract between respondent nos. 1 and 2, and the discrepancies raised by the respondent no. 2-bank on the basis of its independent and distinct contract with respondent no. 1.

49. Underscoring that credits by nature are separate transactions from the sales or other contracts, Supreme Court in the case of ***Arosan Enterprises Ltd. (Supra)*** has held as follows:

> *"xxx xxx xxx*
>
> *30. Reliance was also placed on The Law of Bankers' Commercial Credits by Gutteridge and Megrah wherein the authors stated that:*
>
> > *"**Banks issuing irrevocable credits subject to the Uniform Customs are not concerned with the sales contract or the goods; if it were otherwise credit business would be impossible. In law the credit contract stands by itself and is not to be interpreted to the point of amendment or augmentation by reference to the contract of sale or to any external document**."*
>
> *The authors further laid emphasis on the general provision (c) of the Uniform Customs which states that:*
>
> > *"(c) **Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts.**"*
>
> *Further emphasis was also laid by the authors on Article 8(a) which provides that:*
>
> > *"(a) In documentary credit operations all parties concerned deal in documents and not in goods."*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

50. Further, the contention of the appellant that the E-mail dated 22nd June, 2004, *Exh. PW1/15*, was not proved in accordance with Section 65-B of the Evidence Act, was not raised before the Trial Court. Neither any challenge was raised to this effect by the appellant before the Trial Court, nor questions to this effect, were put to the witness of respondent no. 1 herein, i.e. PW 1, during the course of cross examination. The issue with respect to the Exhibits has been raised for the first time before this Court. Respondent no. 1 has produced Section 65-B Certificate before this Court during the course of hearing, in order to cure the earlier defect.

51. It is to be noted that producing Section 65-B Certificate is a procedural requirement, and can be produced at any time during the course of the trial. Such objection having been raised by the appellant for the first time before this Court, producing the said Certificate by respondent no.1 before this Court cures the said procedural defect and would not make such evidence, as inadmissible. It is to be noted that a Regular First Appeal is continuation of the suit before the Trial Court, and this Court is not precluded from accepting such Certificate, when produced before this Court. In this regard, reference may be made to the case of ***State of Karnataka Versus T. Naseer alias Nasir, 2023 SCC Online SC 1447***, wherein it has been held as follows:

> *"xxx xxx xxx*
>
> *10. In State of Karnataka v. M.R. Hiremath, (2019) 7 SCC 515, this Court after referring to the earlier judgment in Anwar's case (supra) held that the* ***non-production of the Certificate under Section 65B of the Act is a curable defect****. Relevant paragraph '16' thereof is extracted below:*
>
> > *"16. The same view has been reiterated by a two-Judge Bench of this Court in Union of India v. Ravindra V. Desai, (2018) 16 SCC 273.* ***The Court emphasised that non-production of a certificate under Section 65-B on an earlier occasion is a curable defect****. The Court relied upon the earlier decision in Sonu v. State of Haryana, (2017) 8 SCC 570 in which it was held:*
> >
> > > *'32. ... The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the court could have given the prosecution an opportunity to rectify the deficiency.'*
> >
> > *(Emphasis added)*

11. ***Coming to the issue as to the stage of production of the certificate under Section 65-B of the Act is concerned, this Court in Arjun Panditrao Khotkar's case (supra) held that the certificate under 65-B of the Act can be produced at any stage if the trial is not over****. Relevant paragraphs are extracted below:*

> *"56. Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under Sections 91 or 311 CrPC or Section 165 of the Evidence Act. Depending on the facts of each case, and the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case — discretion to be exercised by the court in accordance with law.*
>
> *59. Subject to the caveat laid down in paras 52 and 56 above, the law laid down by these two High Courts has our concurrence.* ***So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted and relied upon in evidence.*** *"*
>
> *(Emphasis added)*

12. The courts below had gone on a wrong premise to opine that there was delay of six years in producing the certificate whereas there was none. The matter was still pending when the application to resummon M. Krishna (PW-189) and produce the certificate under Section 65-B of the Act was filed under Section 311 of the Cr. P.C.

xxx xxx xxx

15. Fair trial in a criminal case does not mean that it should be fair to one of the parties. Rather, the object is that no guilty should go scot-free and no innocent should be punished. ***A certificate under Section 65-B of the Act, which is sought to be produced by the prosecution is not an evidence which has been created now. It is meeting the requirement of law to prove a report on record****. By permitting the*

prosecution to produce the certificate under Section 65B of the Act at this stage will not result in any irreversible prejudice to the accused. The accused will have full opportunity to rebut the evidence led by the prosecution. This is the purpose for which Section 311 of the Cr. P.C. is there. The object of the Code is to arrive at truth. However, the power under Section 311 of the Cr. P.C. can be exercised to subserve the cause of justice and public interest. In the case in hand, this exercise of power is required to uphold the truth, as no prejudice as such is going to be caused to the accused.

xxx xxx xxx"

(Emphasis Supplied)

52. Thus, it is apparent that a Certificate under Section 65-B of the Evidence Act can be produced at any stage so long as the hearing in a trial is not yet over. It is settled position of law that an appeal is a continuation of the proceedings of the original Court. Therefore, there is no impediment in producing the Section 65-B Certificate before this Court at the time of hearing the appeal, which is continuation of the proceedings of the original Court. Reference in this regard may be made to the judgment in the case of ***Malluru Mallappa (Dead) through Legal Representatives Versus Kuruvathappa and Others, (2020) 4 SCC 313***, wherein, it has been held as follows:

"xxx xxx xxx

10. Section 96 CPC provides for filing of an appeal from the decree passed by any court exercising original jurisdiction to the court authorised to hear the appeals from the decisions of such courts. In the instant case, the appeal from the decree passed by the trial court lies to the High Court. The expression "appeal" has not been defined in CPC. Black's Law Dictionary (7th Edn.) defines an appeal as "a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority". It is a judicial examination of the decision by a higher court of the decision of a subordinate court to rectify any possible error in the order under appeal. The law provides the remedy of an appeal because of the recognition that those manning the judicial tiers too commit errors.

11. ***In Hari Shankar v. Rao Girdhari Lal Chowdhury [Hari Shankar v. Rao Girdhari Lal Chowdhury, AIR 1963 SC 698] it was held that***

a right of appeal carries with it a right of rehearing on law as well as on fact, unless the statute conferring a right of appeal limits the rehearing in some way as has been done in second appeal arising under CPC*.*

xxx xxx xxx

13. ***It is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a rehearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for reconsideration****. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons. The court of first appeal must record its findings only after dealing with all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions [see : Santosh Hazariv. Purushottam Tiwari [Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179] , Madhukar v. Sangram [Madhukar v. Sangram, (2001) 4 SCC 756] , B.M. Narayana Gowda v. Shanthamma [B.M. Narayana Gowda v. Shanthamma, (2011) 15 SCC 476 : (2014) 2 SCC (Civ) 619] , H.K.N. Swami v. Irshad Basith [H.K.N. Swami v. Irshad Basith, (2005) 10 SCC 243] and Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar [Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, (1980) 4 SCC 259].*

xxx xxx xxx"

(Emphasis Supplied)

53. It is to be noted that the appellant did not lead any evidence in the Trial Court and the right of the appellant to lead evidence, was ultimately closed. Thus, the appellant has filed an application before this Court seeking to produce additional evidence. The appellant has sought to contend that evidence was not led by it and that non-production of defence evidence has occurred not due to any lapse on part of the appellant, but on account of the negligence on the part of the counsels of the appellant before the Trial Court. Thus, the appellant has prayed for allowing production of additional evidence by recalling witness of respondent no. 1 herein, PW 1, for his cross

examination and to further, permit the appellant to lead defence evidence. The aforesaid contentions, as raised by the appellant, do not inspire any confidence and only vague submissions have been made on this account.

54. This Court notes that the appellant herein is a company incorporated under the laws of Singapore, having its office in New Delhi as well. The appellant is engaged, *inter alia,* in the business of importing and exporting hosiery, fabrics and yarn. Therefore, the appellant, being an established international company, would have a team of highly qualified employees, who are aware of their rights and remedies. The appellant is not some indigent or illiterate litigant, without access to legal resources. Therefore, the appellant cannot seek any indulgence from this Court, as the appellant is expected to be vigilant to pursue its case diligently. The Court would not come to the aid of a litigant who is negligent and derelict in pursuing its case. This is all the more relevant especially when such litigant is a company engaged in international trade, as the appellant herein. Thus, the appellant is not some illiterate person who is not aware of its legal right or unaware of the seriousness of court cases. Therefore, this Court rejects the submissions of the appellant in this regard.

55. Thus, no case has been made out by the appellant for production of additional evidence, at this stage. The general principle is that the Appellate Court ought not to travel outside of the Trial Court Record, unless there is an exceptional circumstance. However, no exceptional circumstance has been shown by the appellant in the present case. In this regard, reference may be made to the judgment in the case of ***Union of India Versus Ibrahim Uddin and Another, (2012) 8 SCC 148,*** wherein, it was held as follows:

> *"xxx xxx xxx*

36. <u>The general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables the appellate court to take additional evidence in exceptional circumstances. The appellate court may permit additional evidence only and only if the conditions laid down in this Rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of the evidence on record, the appellate court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself.</u> *(Vide K. Venkataramiah v. A. Seetharama Reddy [AIR 1963 SC 1526], Municipal Corpn. of Greater Bombay v. Lala Pancham [AIR 1965 SC 1008], Soonda Ram v. Rameshwarlal [(1975) 3 SCC 698: AIR 1975 SC 479] and Syed Abdul Khader v. Rami Reddy [(1979) 2 SCC 601 : AIR 1979 SC 553])*

xxx xxx xxx

38. <u>Under Order 41 Rule 27 CPC, the appellate court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence.</u> *(Vide Lala Pancham [AIR 1965 SC 1008])*

39. <u>It is not the business of the appellate court to supplement the evidence adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal.</u> *(Vide State of U.P. v. Manbodhan Lal Srivastava [AIR 1957 SC 912] and S. Rajagopal v. C.M. Armugam [AIR 1969 SC 101])*

40. <u>The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the</u>

> ***importance of a document does not constitute a "substantial cause" within the meaning of this Rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.***
>
> ***41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of the sentence, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this Rule will apply e.g. when evidence has been taken by the lower court so imperfectly that the appellate court cannot pass a satisfactory judgment.***
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

56. The Trial Court has given a cogent finding on the basis of the evidence on record. It is a settled position of law that once, the Trial Court has given findings on the basis of evidence on record, this Court, would not interfere with the plausible view taken by the Trial Court. Thus, in the case of ***Smt. Raj Rani Sharma & Ors. Versus Sh. Sumer Segal & Anr., 2017 SCC Online Del 9213***, it has been held as follows:

> *"xxx xxx xxx*
>
> ***9.*** *This Court hearing the first appeal under Section 96 CPC can interfere with the findings and conclusions of the trial court if findings and conclusions of the trial court are illegal and perverse.* ***Once the trial court has taken a view on the basis of the evidence on record, this Court is not entitled to interfere with one possible and plausible view taken by the trial court.***
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

57. Likewise, holding that merely because two views are possible, Court is not entitled to interfere with the impugned judgment and decree, unless the findings of the Trial Court are wholly illegal or perverse, this Court in the case of ***Dr. P. K. Chakravarty Versus Smt. Debika Banerjee, 2011 SCC Online Del 778***, has held as follows:

> *"xxx xxx xxx*

> *7. I do not find any illegality or perversity in the impugned judgment and decree which calls for interference by this Court.* ***Merely because two views are possible, this Court is not entitled to interfere with the impugned judgment and decree unless the findings of the trial Court are wholly illegal or perverse or cause grave injustice.*** *I do not find that any of the aforesaid ingredients exist to persuade to this Court to interfere with the impugned judgment and decree. The appeal being without merit is therefore dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.*
>
> *xxx xxx xxx"*
>
> *(Emphasis Supplied)*

58. Considering the detailed discussion made herein above, this Court finds no merit in the present appeal. Consequently, it is directed that the decretal amount, as deposited by the appellant before this Court, along with the accrued interest, shall be released in favour of respondent no. 1 herein.

59. Accordingly, the present appeal, along with the pending applications, is dismissed.

MINI PUSHKARNA
(JUDGE)

SEPTEMBER 01, 2025/ak/sk