

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : **28.08.2017**

DELIVERED ON : **13.10.2017**

Coram

The Honourable **Mr.Justice RAJIV SHAKDHER**

and

The Honourable **Mr.Justice ABDUL QUDDHOSE**

Original Side Appeal No.97 of 2012
and Cross Objection No.63 of 2012
and M.P.Nos.1 & 5 of 2012 & 1 of 2015

I.M.C. Ltd.,
(Company incorporated under Companies Act),
Office at No.39, (Old No.19),
Kasthuri Ranga Road,
Alwarpet,
Chennai – 600 018.

.. Appellant in O.S.A.No.97/12
& Respondent in Cross.Obj.63/12

सत्यमेव जयते
Vs.

Tamil Nadu Cooperative Sugar Federation Ltd.,
Represented by its Special Officer,
Office at Periyar EVR Building,
690, Anna Salai,
Chennai – 600 035.

... Respondent in O.S.A.No.97/12
& Cross Objector in Cross.Obj.63/12

Prayer in O.S.A.No.97 of 2012: Appeal filed under Order XXXVI Rule 11 of Original Side Rules read with Clause 15 of the Letters Patent, against the Judgement and Decree dated 19.12.2009 in C.S.No.709 of 2002, on the file of this Court.

Prayer in Cross. Obj. No.63 of 2012 : Cross Objections under Order XXXIV Rule 2 of Original Side Rules read with Order XL1 Rule 22 of the Code of Civil Procedure, 1908 praying to order its claim of pre-suit interest on the principal sum of Rs.93,02,000/- at 9% p.a. for the period from 30.12.1999 to 31.08.2002 amounting to Rs.22,32,480/- be included in the operative portion of the Judgement and in the decree and also set aside or delete the observation in the operative portion of the Judgement and Decree that "the earnest deposit amount paid by the Defendant" be given credit towards the principal sum of Rs.93,02,000/- decreed as principal amount in the suit amount.

For Appellant : Mr.P.S.Raman, Senior Advocate
for Mr.V.P.Raman

For Respondent : Mr.M.R.Narasimhan

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COMMON JUDGEMENT**RAJIV SHAKDHER,J.****Prefatory facts**

1. What is placed for adjudication before us, is an appeal, filed by the original defendant i.e. I.M.C.Ltd., (in short 'IMCL') and Cross Objections filed by the original plaintiff i.e. Tamil Nadu Co-operative Sugar Federation Ltd., (in short 'Federation')

1.1. The appeal preferred by IMCL is numbered as O.S.A.No.97 of 2012 while the Cross Objection filed by the Federation is numbered as Cross Objection 63 of 2012.

1.2. IMCL had filed a suit claiming a sum of Rs.1,31,39,075/- with interest at 15% p.a. from the date of the plaint till the date of realisation. In addition thereto, cost was also sought.

2. It is pertinent to note that the suit amount i.e. in the

sum of Rs.1,31,39,075/- is inclusive of two components.

2.1. Firstly, the difference between the contract price arrived at between the Federation and IMCL and the market price at which the Federation had to finally sell the molasses on account of failure on the part of IMCL to lift the contracted quantity. This difference in the price has been quantified at Rs.93,02,000/-.

2.2. Secondly, the interest calculated at the rate of 15% p.a. for the period spanning between 31.12.1999 to 31.08.2002. This is calculated on Rs.93,02,000/-. The interest has been quantified at Rs.38,37,075/-. Accordingly, the amount claimed in the suit which, as indicated above is a sum of Rs.1,31,39,075/- , and thus, includes interest calculated upto the date of the plaint i.e. the date of institution of the suit. In addition, Federation claims pendente lite and future interest at the rate of 15% p.a.

3. The learned Single Judge via the impugned judgement has decreed the suit in favour of the Federation for a sum of

Rs.93,02,000/- along with interest at the rate of 9% p.a. commencing from the date of institution of the suit till the date of realisation.

3.1. Furthermore, the learned Single Judge has also directed adjustment of Earnest Money Deposit (in short 'EMD') made over by IMCL towards the principal amount i.e. the sum of Rs.93,02,000/-.

4. The Cross Objections filed by the Federation pertain to two aspects. First the direction contained in the impugned judgement and decree with regard to adjustment of EMD. Second, with regard to non-grant of pre-suit interest at the rate of 9% p.a., on Rs.93,02,000/-, for the period spanning between 30.12.1999 to 31.08.2002.

4.1. Evidently, the Federation has accepted, the direction contained in the impugned Judgement, to the effect, that its claim for rate of interest shall stand reduced from 15% p.a. to

9% p.a.

5. In order to adjudicate upon the issues, which obtain between the parties, the following broad facts are required to be noticed.

Background Facts

5.1. The Federation is an apex body, which has taken within its fold, all co-operative and public sector sugar mills in the State of Tamil Nadu. The Federation appears to have been empowered to represent and act on behalf of its member mills for purchase and sale of goods and, to distribute commodities required for commercial activities by its members. It is also empowered to recover and receive amounts due from the transacting parties.

5.2. It is in this connection, that on 31.07.1999, an advertisement (Ex.P1) was taken out by the Federation inviting sealed tenders from parties interested in purchasing 62,000 MT of

molasses stored in sealed tanks by its member mills. The tender, specifically, stated that the bidder could purchase the molasses only for actual use, either within the State of Tamil Nadu or, for export to other States / Countries.

5.3. IMCL, among others, submitted its bid on 20.08.1999, (Ex.D1) for the entire quantity.

5.4. It appears that re-negotiations were carried out between the representatives of the Federation and IMCL. Thereupon, on 21.08.1999, a revised bid (Ex.P3 / D3) was submitted by IMCL. The revised bid submitted by IMCL was for purchase of 45,000 MT of molasses. The revised bid, however, offered to purchase molasses at a rate higher than that which was indicated by IMCL in its earlier bid. The important thing to note, is that, in terms of the tender, IMCL had opted for purchase of molasses for the purpose of having it exported.

5.5. As required under the terms of the tender, IMCL also

submitted a pay order dated 18.08.1999, in the sum of Rs.15,50,000/- in favour of the Federation, as required towards, EMD.

5.6. Further, it appears that since after renegotiation, IMCL was allotted only 40,000 MT of molasses, the EMD finally deposited was Rs.10,00,000/- calculated at the rate of Rs.25 per MT.

5.7. It appears that, immediately thereafter, vide letter dated 24.08.1999, the Special Officer of the Federation wrote to the Commissioner of Sugar and Government of Tamil Nadu (in short 'GOTN') for issuance of an allotment order vis-a-vis molasses which the Federation hoped to sell in pursuance of the aforementioned tender. Consequently, thereto, the Commissioner of Sugar vide communication dated 31.08.1999 (Ex.P.5), approved allotment of molasses to certain entities, which included amongst others IMCL, and another entity going by the name "Malladi Drugs and Pharmaceuticals Limited". This communication was, admittedly, received by the Federation on

01.09.1999.

5.8. Pertinently, the allotment order specifically made a reference not only to the member mills from whom the molasses had to be lifted, but also indicated therein the quantity of molasses to be lifted and the rate which would be applicable qua the given quantity.

5.9. Suffice it to say that in so far as IMCL was concerned, the Commissioner of Sugar approved allotment of a total quantity equivalent to 40,000 MT. The allotment, though, of this quantity by the Federation was spread over five (5) member Mills, albeit, at varying rates and quantities; the details of which are listed hereafter:

Name of the Allottee	Name of the Mills	Quantity allotted M.T.	Rate per M.T.(Rs.)
I.M.C. Ltd.,	Kallakurichi	10000	715/-
	Chengalrayan	10000	778/-
	N.P.K.R.R.	5000	649/-
	M.R.Krishanmurthy	10000	768/-
	Tiruttani	5000	843/-

6. Likewise, in respect of Malladi Drugs & Pharmaceuticals Ltd., (in short "Malladi Drugs"), the Commissioner of Sugar

allotted 1000 MT at the rate of Rs.850/- per MT. Malladi Drugs was required to lift the allotted quantity from a member mill located in Vellore.

6.1. Importantly, the allotment order issued to Malladi Drugs required the Federation to issue a sale order, which would specify that the allottee would lift the stock within a period of 30 days from the date of sale order, albeit, for the purpose of sale within the State of Tamil Nadu.

6.2. Crucially, the allotment order issued to IMCL also provided that the concerned member mills from which molasses was to be lifted, were not only required to collect an administrative fee (which was to be remitted to GOTN) at the rate of Rs.200/- per MT from it but were also required to verify that it had in its possession an export permit and M.L.5 licence before delivering, the allotted quantity to it.

6.3. It is important to bear in mind that the export permits

were required to be issued by the Commissioner of Prohibition and Excise (in short "Commissioner of P & E"), with M.L.5 licences being issued by the District Collector concerned with the district, where the member mill was located.

6.4. Based on the aforesaid allotment order, issued by the Commissioner of Sugar, the Federation issued a sale order No.41 dated 01.09.1999 (Exs.P.6 and D4) in favour of IMCL. The sale order was in consonance with the conditions stipulated in the allotment order issued by the Commissioner of Sugar. As required under the allotment order, the due date for lifting the molasses from the member mills named therein was fixed as 30.09.1999, which was exactly 30 days from the date mentioned in the sale order. There were several other conditions appended to the sale order to which we would be making reference during the course of our discussion.

6.5. Suffice it to say that on the very same date i.e. 01.09.1999, IMCL wrote two letters (Exs.D5 and D6), one to the

Commissioner of P & E and other to the Commissioner of Sugar. In the letter to the Commissioner of P & E, IMCL, requested for issuance of a general permit to enable it to export molasses allotted to it by the due date as indicated in the sale order No.41.

6.6. In so far as Commissioner of Sugar was concerned, IMCL on its own made an offer to lift the balance quantity of 4,000 MT of molasses from the Vellore CSM Sugar Mill. This offer was made by IMCL having regard to the fact that only 1000 MT had been allotted to Messrs Malladi Drugs. A copy of this letter was marked and despatched by IMCL to the Federation.

6.7. On 06.09.1999, the Commissioner of P & E passed an order in exercise of his powers under Rule 7(2)(b) of the Tamil Nadu Molasses Control and Regulation Rules, 1958 (in short '1958 Rules'). By virtue of this order, IMCL was granted a permit to lift, at that point in time only Rs.25,000 MT of molasses from the five mills referred to in the Sale Order No.41.

6.8. The reason given for restricting at that juncture, the

general export permit to 25,000 MT, was that while the GOTN vide letter dated 15.04.1999, had granted permission to export 1,50,000 MT of molasses to other countries by the co-operative and public sector sugar mills, Commissioner of P & E's office had already granted a general export permit for a quantity equivalent to 1,24,800 MT.

6.9. Since, IMCL required, as indicated above, M.L.5 licence from the District Collectors' who had jurisdiction qua the mills from which the allotted quantities of molasses had to be lifted, requisite applications were made. Upon applications being made, the necessary M.L.5 licences were issued in favour of IMCL.

7. The record would also show that not only the period of M.L.5 licence was extended beyond 30.09.1999, but also that the necessary extension was granted vis-a-vis the general export permit issued by the Commissioner of P & E. It appears that in the first instance, Commissioner of P & E extended the general export permit till 30.09.1999, and thereafter, at the proceeding

held on 11.11.1999, it was extended to 08.12.1999. The record would further show that the Commissioner of P & E via its Superintendent vide letter dated 21.09.1999 (Exs.P.26 and D.12) (which was signed on 22.09.1999), wrote to IMCL that its request for balance quantity of 15,000 MT, would be considered, on receipt of further orders from the GOTN.

7.1. This letter was obviously written in the background of the fact that the Commissioner of P & E vide its order dated 06.09.1999 (Exs.P.25 and D7), had issued a general export permit in favour of IMCL only to the extent of 25,000 MT. Pertinently, there was no rejection of the request for issuance of a general export permit to cover the balance quantity i.e. 15,000 MT.

7.2. The record shows that up until 28.09.1999 (Ex.D.14), IMCL had not lifted any molasses out of the quantity allotted to it. This is evident upon a perusal of the letter dated 01.09.1999 (Ex.D.5), addressed by IMCL to the Commissioner of Sugar. Via this letter, for reasons stated therein, IMCL indicated not only

that it would lift 16,000 MT of molasses by 05.10.1999, but that it would put in its best efforts to lift the balance quantity of molasses equivalent to 21,246.97 MT, at the earliest.

7.3. Accordingly, IMCL sought extension of the validity period vis-a-vis sale order No.41 by another 45 days.

7.4. Just prior to the aforementioned communication, the Federation, issued a second sale order i.e. sale order No.44, dated 25.09.1999 (Exs.P.7 and D.13) (in short "sale order No.44"), for sale of molasses to IMCL. This sale order was issued in the background of the request made by IMCL to Commissioner of Sugars vide communication dated 01.09.1999, and, the consequent order issued by Commissioner of Sugar dated 21.09.1999 (Ex.P.26 and D12). Resultantly, via, sale order No.44, 4000 MT of molasses was allotted in favour of IMCL at the rate of Rs.850 per MT, which was required to be lifted from Vellore CSM Sugar Mill. Inadvertently, it appears, as the record would show, the due date for lifting was indicated as 23.09.1999.

7.5. In the meanwhile, the GOTTN's, Prohibition and Excise Department, issued a communique dated 30.09.1999 (Ex.P.8), granting approval to the Commissioner of P & E to permit export of 1,00,000 MT of molasses by co-operative and public sector sugar mills and the further 50,000 MT of molasses from the private sector sugar mills. The export, according to the said communication, was required to be completed prior to 31.12.1999. A perusal of the said communication would show that it was based on a request initiated by the Commissioner of Sugar and Commissioner of P & E, via their letters dated 03.08.1999 and 07.09.1999 respectively.

7.6. In effect, as on 30.09.1999, the Commissioner of P & E had the necessary leeway available with him to issue a general export permit in favour of IMCL for the balance 15,000 MT allotted to it.

7.7. The record also shows that the Commissioner of Sugar based on the request of IMCL, made vide its letter dated

28.09.1999 (Ex.D.14), to extend the period for lifting the balance quantity of molasses equivalent to 21,246.97 MT, extended the time till 30.10.1999, vis-a-vis member mills referred to therein.

7.8. In the meanwhile, the Federation having realized that a typographical error had crept in its sale order No.44, (wherein, the time for lifting was indicated as 23.09.1999, when, the sale order itself was dated 25.09.1999), issued a clarification vide its communication dated 05.10.1999 (Ex.P.13 and D.17). In this communication, it corrected the error and indicated that the time for lifting 4000 MT of molasses from Vellore CSM Sugar Mill would expire on 24.10.1999 instead of 23.09.1999.

7.9. Based on the extension granted by the Commissioner of Sugar for lifting the molasses till 30.10.1999, request was made by IMCL on the very same date i.e. 05.10.1999 to Commissioner of P & E to extend the validity period of the general export permit in order to enable it to lift the balance quantity of molasses within the extended due date. Quite clearly

what was evident was that up until 05.10.1999, out of the 25,000 MT permitted to be lifted by IMCL vide sale order No.41, it had lifted 3753.025 MT of molasses leaving a balance quantity of 21,246.975 MT with the concerned mills.

8. As requested, the Commissioner of P & E vide its order dated 08.10.1999 extended the validity period of the general export permit qua the balance quantity 21,246.975 MT, till 30.10.1999. In consonance with the same, as alluded to above, the concerned District Collectors gave corresponding extensions qua M.L.5 transport permits till 30.10.1999, based on the request made vide communications dated 11.10.1999 (Ex.D.19 to D.22), addressed to the concerned District Collectors.

8.1. On record, is also a letter of IMCL dated 20.10.1999 (Ex.P.14 and D.23), addressed to the Joint Commissioner, Directorate of Sugar which indicates the state of affairs concerning lifting of molasses as on the said date, which was marginally better than the position which obtained on

05.10.1999. For the sake of convenience the details as set out in the letter dated 20.10.1999, are given hereafter:

S. No	Sugar Mill	Qty allotted by TNSF	Qty.allotted As per GP	Qty Lifted	Balance Qty to be lifted
1	NPKRR	5000	3500	3259.395	240.605
2	MRK	10000	6000	1753.045	4246.955
3	Tiruttani	5000	3500	1995.545	1504.455
4	Kallakurichi	10000	6000	--	6000.000
5	Chengalrayan	10000	6000	--	6000.000
	Total.....			7007.985	17992.015

8.2. As would be evident upon perusal of the data given in the table above, as on 20.10.1999, IMCL out of the total quantity of 40,000 Mt allotted to it, which was distributed amongst the five (5) mills referred to therein, had lifted only 7007.985 MT molasses, leaving a balance of 17,992.015 MT of molasses which, it hoped to lift, in the remaining part of the extended period.

8.3. However, this hope was belied as within six (6) days of the aforementioned letter, IMCL wrote two separate letters of even date i.e 26.09.1999 to the Joint Commissioner, Directorate of Sugar. The first letter pertained to sale order No.44, while the

second letter pertain to sale order No.41. By virtue of the first letter it surrendered 4,000 MT allotted to it, via sale order No.44. Likewise, via the second letter, IMCL, surrendered the balance 15,000 MT of molasses allotted to it, even while assuring the addressee(i.e. Joint Commissioner, Directorate of Sugar), that it would fulfill its commitment of lifting 25,000 MT out of 40,000 MT of molasses allotted to it vide sale order No.41.

8.4. This propelled the Commissioner of Sugar into writing a letter dated 9/10.11.1999 (Ex.P.17) to IMCL. Via, this letter IMCL was informed that it cannot be allowed to surrender allotted molasses equivalent to 19,000 MT. The figure of 19,000 MT included balance 15,000 MT of molasses which was to be lifted against sale order No.41 and 4000 MT of molasses which was available against sale order No.44. Furthermore, it was pointed out via the very same letter that IMCL had failed to lift even the entire assured quantity of 25,000 MT of molasses qua which permission to export had already been granted by the Commissioner of P & E.

8.5. In addition, IMCL was put to notice by Commissioner of Sugar that in case it failed to lift the entire allotted quantity, he would exercise his rights as available under the subject tender.

8.6. Resultantly, vide yet another letter of even date i.e. 09.11.1999 (Ex.P.18 and D.26), the Commissioner of Sugar, granted a further extension of 30 days to IMCL for lifting 17,992.015 MT of molasses from the concerned sugar mills referred to therein. This quantity was adverted to in the context of the initial allotment of 25,000 MT of molasses made in favour of IMCL.

8.7. Based on the aforesaid, the concerned District Collectors also extended the validity period of the M.L.5 licences till 08.12.1999.

8.8. Evidently, IMCL was not able to lift even the assured 25,000 MT of molasses by 08.12.1999, and therefore, it was

constrained to write to the Joint Commissioner, Directorate of Sugar on 10.12.1999 (Ex.D.29) to extend the validity period qua sale order No.41, in respect of the balance quantity of molasses which at that point in time remained to be lifted, i.e., 171.725 tonnes. Even as per IMCL, on that date the position with regard to upliftment of molasses from various factories in respect of sale order No.41 was as follows:

S. No	Sugar Mill	Qty allotted by TNSF	Qty allotted As per GP	Qty Lifted	Balance Qty to be lifted
		(In MTs)	(In MTs)	(In MTs)	(In Mts)
1	NPKRR	5,000	3,500	3500.000	---
2	MRK	10,000	6,000	6000.000	---
3	TIRUTTANI	5,000	3,500	3500.000	---
4	KALLAKURICHI-I	10,000	6,000	5828.275	171.725
5	CHENGALRAYAN	10,000	6,000	6000.000	---
	TOTAL....	40,000	25,000	24828.275	171.725

8.9. Consequently, the necessary extension, as sought, was granted by the Commissioner of Sugar vide his letter dated 24.12.1999 (Ex.D.30), by according leeway uptill 31.12.1999. Pertinently, the quantity involved which was 171.725 MT of molasses, was required to be lifted from Kallakurichi Coopeative

Sugar Mills.

9. In consonance with the extension granted by the Commissioner of Sugar, the Commissioner of P & E vide order dated 27.12.1999 (Ex.D.31), also extended the validity period of the general export permit for lifting the balance quantity of 171.725 MT of molasses upto 31.12.1999.

9.1. The record shows that further extension was sought by IMCL in this behalf; a fact, which is emerges upon a perusal of the Commissioner of Sugars letter dated 21.03.2000 (Ex.D.35), which makes a reference to IMCL letter dated 07.03.2000 (Ex.D.34). By virtue of this communication, the time for lifting was extended vis-a-vis 171.725 MT of molasses, till 31.03.2000. Consequently, Commissioner of P & E also extended time vide order dated 24.03.2000 till 31.03.2000 (Ex.D.36).

9.2. It appears that in the interregnum, the Federation via communication dated 04/05.01.2000 (Ex.P.22), put IMCL on

notice that its failure to lift the balance quantity of molasses, would result in forfeiture of Rs.10,00,000/- paid towards EMD, in terms of Clause 14 of the tender.

9.3. We may only note that in this communication, the Federation states that the quantity lifted by IMCL was 25,000 MT against the total allotted quantity of 44,000 MT, and that a balance quantity of 19,000 MT of molasses remained to be lifted.

9.4. The record, further shows, that not until March of 2000 was the entire quantity of 25,000 MT lifted by IMCL. As would be evident from our discussion above, extension qua balance quantity of 171.725 MT was sought and given by both the Commissioner of Sugar and the Commissioner of P & E vide their orders dated 21.03.2000 and 24.03.2000 (Exs.D.35 and D.36) respectively.

9.5. In sum, the Federation indicated that despite time for lifting the balance quantity of 171.725 MT of molasses being

extended till 31.03.2000, IMCL had not been able to lift the molasses and therefore, had sought further extension in that behalf.

9.6. This fact was apparent upon perusal of letter dated 29.05.2000 (Ex.D.37), addressed by IMCL to Joint Commissioner, Directorate of Sugar.

9.7. Given this background, vide communication dated 09.06.2000 (Ex.D.38), the Commissioner of Sugar rejected the request on the ground that nine (9) months had lapsed since issuance of sale order No.41 and that four (4) previous extensions had been granted for lifting the allotted quantity.

9.8. It appears, IMCL, however, persisted with its request and asked the Commissioner of Sugar vide letter dated 16.06.2000 (Ex.D.39), to reconsider the extension of time vis-a-vis the balance quantity of 171.725 MT of molasses.

9.9. There is nothing on record to show that this balance

quantity was actually lifted. Though, in the plaint, and in the notices issued by the Federation, there is no reference to this aspect of the matter, which is that, 171.725 MT of molasses out 25,000 MT of molasses remained to be lifted.

10. Furthermore, in so far as EMD is concerned, what is on record is a copy of a pay order dated 18.08.1999, to which we have made a reference above, issued by IMCL in favour of Federation amounting to Rs.15,50,000/-.

10.1. That having been said, IMCL vide its communication dated 13.01.2000, responded to the Federation's notice dated 04.01.2000 (Ex.P.22). The IMCL set out its stand as to why forfeiture of EMD could not be carried out.

10.2. Briefly, the reasons given by IMCL as to why forfeiture of EMD ought not to be directed were: that while it had applied to Commissioner of P & E for general export permit of molasses equivalent to 40,000 MT, it had been given permission

to lift only 25,000 MT, and therefore, by the time permission was given qua the remaining quantity, it was not able to take benefit of the price advantage prevailing in the market on account of the global recession in the molasses prices.

10.3. Furthermore, it also indicated that though extensions were given vis-a-vis the issuance of road permits for movement of molasses, there was a delay in the actual issuance of permits, causing a consequent delay in lifting molasses in time.

10.4. In other words, in sum and substance, the stand of IMCL was that as per Clause 9 of the tender conditions, the issuance of sale order was dependent on obtaining specific sale permission in that behalf from GOTN.

10.5. In another letter of even date, i.e., 13.01.2000 (Exs.P.23 and D.33) addressed to the same officer, IMCL also claimed opportunity lost cost to the extent of Rs.13,85,600/-.

10.6. In so far as Federation was concerned, it dispatched a

communication dated 19.04.2000 (Ex.P.27) to the Commissioner of Sugar in which it put forth its stand with regard to the case at hand.

10.7. This was followed by a spate of letters addressed by IMCL on the aspect of the opportunity lost cost incurred by it and why its EMD amounting to Rs.10,00,000/- ought to be refunded. This aspect of the matter emerges upon a perusal of two separate letters dated 24.01.2001 (Ex.D.41) and 25.01.2001 (Ex.D.42).

10.8. The Federation, on its part, vide notice dated 11.05.2001 (Ex.P.30 and D.43), finally, called upon IMCL to remit a sum of Rs.93,02,000/- to its member sugar mills being the difference between the contract price and the market price.

10.9. IMCL, as expected, resisted the claim vide its return communication dated 28.05.2001 (Ex.D.44). Furthermore, request for refund of EMD was made by IMCL to the Joint Commissioner of Directorate of Sugar, as well, vide letter dated 04.06.2001 (Ex.D.45), followed by another letter dated

27.07.2001 (Ex.D.46), addressed to the Federation.

11. By a letter dated 08.08.2001 (Ex.D.47), the Federation informed IMCL that its letter dated 27.07.2001, concerning refund of EMD had been forwarded to the Commissioner of Sugar. The aforesaid communication of the Federation was followed with a letter dated 23.11.2001 (Ex.P.31 and D.48), addressed to IMCL, wherein, it indicated that they had received an order from the Commissioner of Sugar which was indicative of the fact that its request for refund of EMD could not be accepted and that it had been directed to recover the loss sustained by member sugar mills on account of resale of that quantity of the molasses which IMCL had failed to lift.

11.1. The aforesaid resulted in the IMCL having its Advocate dispatch a notice dated 02.08.2002 (Ex.D.56), to not only the Federation but also to the Commissioner of Sugar. By this notice, it gave time till 15.08.2002, to refund the EMD, failing which, it threatened to seek recourse to Court for recovery of the

said amount along with interest and cost.

11.2. In the notice, a reference was also made to the fact that the demand made in the sum of Rs.93,02,000/- was both illegal and inequitable.

11.3. As a matter of fact, the letter dated 18.06.2002 (Ex.D.50), issued by IMCL would show that IMCL had not lifted the balance quantity of 171.725 MT, but was instead aggrieved by the fact that the balance sum of Rs.1,57,128.33/- was not refunded to it which was the amount deposited towards the cost of lifting the balance quantity of 171.725 MT, with respect to which extension sought was not granted. This aspect also emerges upon perusal of yet another letter dated 19.06.2002 (Ex.D.51), addressed by IMCL to the Federation whereby, it not only sought return of Rs.1,57,128.38 deposited towards the cost of the balance quantity of molasses i.e. 171.725 MT which was not lifted by it, but also for return of EMD amounting to Rs.34,08,304/-.

11.4. The Federation vide its letter dated 28.06.2002 (Ex.D.52), clarified its position with regard to both the allegations, that is, in respect of the sum of Rs.34,08,304/- paid towards EMD, which had been withheld, and also vis-a-vis the charge of withholding the sum of Rs.1,57,128.38, which was the cost deposited towards the balance quantity of molasses (i.e. 171.725 MT of molasses), which had not been lifted by IMCL. The explanation given with regard to these two aspects was as follows:

"(a) EMD amount of Rs.8/- lakhs remitted by you for the molasses tender held on 7.4.99 has been withheld against our claim of Rs.93.02 lakhs on account of Non-lifting 19000 MTs. of molasses as against the allotment of 44000 MTs.

(b) Earlier season EMD amount of Rs.4,44,224/- as per our Books of accounts has also been withheld for the above reason.

(c) An EMD of Rs.10/- lakhs remitted

by you for the allotment against our sale order dt:1.9.99 has been forfeited for your failure to fulfill the contract as per Commissioner of Sugar orders and passed on to concerned member Sugar Mills.

The above Earnest Money Deposits only are pertaining to M/s.IMC. In respect of the balance EMD of Rs.11,64,080/- stated to be belonging to your sister concern M/s.IMCOLA Exports Ltd., Federation is not at all responsible and the matter can be settled between you and the respective mills since we have passed on all the Earnest Money Deposits of every successful tenders to the respective sugar mills which may be refunded by the Mills only after due fulfillment of the contract. This has already been informed to the our letter No.1866/2001-2002/C dt:4.10.2001.

Regarding a sum of Rs.1,57,128.38 we wish to state that the same may be with any of our member mills for which you are requested to give details so that we can persuade the particular mills to settle the

same."

11.5. Taking cue from the aforesaid, IMCL wrote to the concerned sugar mill i.e. Kallakurichi Co-operative Sugar Mill Ltd for return of a sum of Rs.1,57,128.33. The said Co-operative Sugar Mill vide its letter dated 17.07.2002 (Ex.D.54), informed IMCL that since it had not remitted its share of the amount of the loss caused to it on account of its failure to lift the allotted quantity, it would await the instructions of the Federation before initiating any action qua refund sought by IMCL.

11.6. IMCL, thereupon, vide order dated 18.07.2002, wrote to the Federation seeking its intervention in the matter.

11.7. Since, there was no positive response to its entreaties, IMCL, once again, via its Advocates issued a notice dated 02.08.2002 (Ex.D.56), to the Federation calling upon it to refund the EMD amounting to Rs.7,50,000/- which was withheld by it against sale orders other than the subject sale orders. The

details provided in the notice read as follows :

<u>"Sale Order No.</u>	<u>E.M.D.</u>
1. 12/28.4.1999	Rs.5,00,000/-
2. 26/3.6.1999	Rs.1,25,000/-
3. 87/25.11.1998	Rs.1,25,000/-"

12. The record placed before us does not show whether or not the issue involving retention of EMDs and the withheld balance cost claimed by IMCL, in the sum of Rs.1,57,128.38, towards 171.725 MT of molasses, which was not lifted, got resolved. What did happen, though, was that given this background, the Federation, as indicated at the very outset, instituted a suit for recovery of moneys, which, in effect, reflected the difference between the contracted price and the market price of molasses that IMCL had failed to lift, along with interest.

12.1. After pleadings were completed, the trial Court framed the following issues in the action so instituted :

"1. Is the suit not maintainable for non-joinder of parties ?

2. Whether non-lifting of molasses was beyond the control of defendant or by the conduct of the plaintiff ?

3. Was the defendant entitled to suo moto rescind from the contract by not lifting the balance of 19,000 metric tonnes of molasses ?

4. Was not the defendant liable to pay the balance price to the plaintiff for the unlifted quantity of molasses by the defendant under the suit contract of sale or in the alternative was not the defendant liable to pay the differential price between contract price and market price for which the molasses were sold later for the unlifted quantity of molasses by the defendant ?

5. Do the plaintiff have locus standi or subrogative right from its member-mills to maintain the suit ?

6. Whether the plaintiff is entitled to claim interest at 15% p.a.?

7. To what relief the plaintiff is entitled ?”

12.2. As indicated at the very beginning, the learned Single Judge, decreed the suit in favour of the Federation for an amount, which reflected the difference between contracted price and the market price, at which the molasses, which IMCL had failed to lift was sold, along with interest at the rate of 9% p.a. from the date of suit till its realisation. Furthermore, a direction was also issued to adjust EMD made over by IMCL against the quantified difference between the contract price and market price, at which, molasses was sold by the Federation. In other words, the forfeited EMD of Rs.10,00,000/- was required to be adjusted against Rs.93,02,000/-, which was the quantified difference between contracted price and the market price.

13. It is this decision of the learned Single Judge, which has given rise to the captioned appeal preferred by IMCL and, cross objections, instituted by the Federation.

14. By virtue of the impugned judgement, the learned Single Judge has found all issues completely in favour of the Federation (i.e. plaintiff), save and except to the extent, issue No.6 is concerned. In so far as issue No.6 is concerned, both the rate as well as the period for which interest was claimed was truncated.

14.1. Accordingly, the learned Single Judge has awarded interest at the rate of 9% p.a. Likewise, as regards the period of interest is concerned, interest has been awarded from the date of the suit till the date of realisation. Furthermore, in so far as the principal amount of Rs.93,02,000/- is concerned, a direction stands issued, as alluded to above, that it would bear adjustment of EMD paid by IMCL to the Federation.

Finding of the Single Judge

15. Before, we proceed further, it would be useful, in the first instance, to record the findings of fact returned by the

learned Single Judge and thereafter to examine as to whether the said findings are in consonance with the evidence on record. The findings recorded are as follows :

(i) That, since, the tender for sale of molasses was floated by the Federation and bids filed in response thereto were accepted by the Federation, the suit was not bad in law.

(ii) The Federation had the necessary locus standi to maintain the suit, and that, no separate right of subrogation from member sugar mills was required to be conferred on it to file the suit. The suit could not be dismissed on the ground of non-joinder of necessary parties.

(iii) The permission required to export molasses had nothing to do with the quantities allotted being lifted. It was not open to IMCL to raise a defence that the subject contract was not a concluded contract after IMCL's bid for lifting 40,000 MT of molasses had been accepted, and a portion of the said quantity

had, in fact, been lifted.

(iv) The IMCL had partly performed its obligations under the contract and therefore could not have unilaterally rescinded the same. Neither the fall in international prices of molasses nor the quantitative ceiling limit on export of molasses put in place by the Government, which at the relevant time was pegged at 1,50,000 MT of molasses were reasons good enough to account for the delay caused in lifting of molasses by IMCL.

(v) Failure on the part of IMCL to act diligently and discharge its obligations under the contract could be construed only as breach of contract.

(vi) The failure to lift the molasses, despite extension of time limit had resulted in the members of the Federation incurring losses. Furthermore, lack of due diligence in prompt clearance of allotted molasses had not only created hazardous conditions, but also impeded the storage of fresh molasses, which

became necessary on account of onset of fresh crushing season.

(vii) The failure to lift molasses by IMCL was not beyond its control or was attributable to the conduct of the Federation.

(viii) Due to failure on the part of IMCL to fulfill its obligations and/or on account of breach of contract by it, the Federation had acquired not only a right under the tender, to forfeit the EMD but also to recover the losses incurred thereby.

(ix) Loss was caused, contrary to what was contended by IMCL, as the prices of molasses, which are fixed by the Government, were lower than those which were firmed up under the subject tender. Therefore, the loss sustained by the Federation on account of delay on the part of IMCL in lifting the molasses, could be recovered by way of damages.

(x) Since, the Federation entered into a contract on behalf of its member mills, it cannot be said that it cannot maintain a

suit, on their behalf, to claim damages.

(xi) The Federation had been able to establish, based on oral and documentary evidence that IMCL had breached the contract and that consequent loss had been incurred thereby.

16. These findings which were reached by the learned Single Judge were assailed on behalf of IMCL by Mr.P.S.Raman, learned senior counsel instructed by Mr.V.P.Raman, Advocate. The submissions made by Mr.P.S.Raman, however, were rebutted on behalf of the Federation by Mr.M.R.Narasimhan.

Submission of Counsels

17. Mr.P.S.Raman assailed the judgement, broadly, on the following grounds:

(i) First, that the learned Single Judge failed to take into account the fact that IMCL's obligation to lift 40,000 MT of molasses was pivoted on the permission granted in that behalf by GOTN. Since, the Commissioner of P & E vide its letter dated

06.09.1999, had granted general export permit only for 25,000 MT of molasses, it could not have exported the entire quantity of 40,000 MT by due date, i.e., 30.09.1999.

(ii) That the Federation ought not to have issued in favour of IMCL sale order for lifting 40,000 MT of molasses, when, it did not have permission from the GOTN for the entire quantity.

(iii) The order of the GOTN dated 30.09.1999 (Ex.P8), whereby, it permitted the Commissioner of P & E to permit export of additional 1,00,000 MT of molasses, obtained from co-operative and public sector sugar mills, albeit, on or before 31.12.1999, was a piece of information which was not passed on to IMCL.

(iv) Despite, the aforesaid situation obtaining, IMCL kept its promise and lifted 25,000 MT of molasses. The delay, in granting permission qua the balance quantity had resulted in IMCL losing the market edge, as in the meanwhile, international prices of

molasses had nose dived.

(v) Both the conduct of the parties and the terms of the Clause, thus, showed that the contract entered into between the parties was a contingent contract, and, should, therefore, be governed by the provisions of Section 32 of the Indian Contract Act, 1872.

(vi) It is because the necessary permission from the Commissioner of P & E was not issued in time, that IMCL had informed the Federation vide two separate letters dated 26.10.1999 (Ex.P15 & D25) and (Ex.P16 & D24), that it was wanting to surrender the balance quantity amounting to 15,000 MT adverted to in sale order No.41 and also 4,000 MT of molasses referred to in sale order No.44.

(vii) The learned Single Judge had failed to appreciate that 4,000 MT of molasses allotted to IMCL vide sale order No.44 could not be lifted as there was no corresponding permission in

favour of IMCL with respect to the said quantity.

(viii) The learned Single Judge had also failed to appreciate the difficulties faced by IMCL in lifting the molasses from the concerned mills and, therefore, erroneously, had decreed the suit instead of dismissing the same.

(ix) There being no stipulation vis-a-vis interest in the subject contract, the Federation was not entitled to claim any interest.

17.1. We may also indicate that though there is a reference in the grounds set out in the appeal with regard to the right of Federation to maintain the suit on behalf of its member mills as it was only their agent, no submissions were advanced in this behalf during the course of arguments. Be that as it may, the objection taken was sought to be supported by highlighting the fact that the value qua the molasses received from IMCL was remitted to the concerned sugar mill, and that, upon receipt of

the amounts, delivery was taken from the molasses stored in steel tanks of the concerned sugar mills. In other words, according to IMCL, the Federation had no independent cause of action and that the grievance, if any, could only that be of the concerned sugar mill, resulting from the alleged failure of IMCL to lift the molasses.

17.2. Thus, according to IMCL, the Federation could not maintain the suit with regard to the difference in the contracted price and the market price received by it by virtue of alleged failure on the part of IMCL to lift the allotted molasses.

17.3. In support of his submissions, the learned senior counsel relied upon the judgement of the Supreme Court rendered in ***Satyabrata Ghose Vs. Mugneeram Bangur & Co,*** ***AIR 1954 SC 44.***

18. Mr.M.R.Narasimhan on the other hand, largely, banked upon the impugned judgment in support of his submissions,

specially, with regard to the plea raised on behalf of IMCL that contract in issue was not a concluded contract. The learned counsel submitted that the contract between the parties got concluded upon the bid of IMCL being accepted. Learned counsel drew our attention to the fact that upon the tender being opened on 20.08.1999, there were renegotiations, whereupon, IMCL submitted its revised tender dated 21.08.1999 (Ex.P3 & D3). It was stressed that the Committee which scrutinised the tender and renegotiated the same submitted its report to the Commissioner of Sugar.

18.1. It was submitted that the Commissioner of Sugar, in turn vide its communication dated 31.08.1999, informed the Federation about the allotment of molasses made in favour of various entities including IMCL. The learned counsel further submitted the aforesaid allotment order resulted in sale order No.41 being issued in favour of IMCL on 01.09.1999 (Ex.P6 & D4). Thus, the contract between the parties according to the learned counsel, was firmed up on that date. Mr.Narasimhan,

highlighted the fact that the sale order was, inter alia, issued subject to the condition that the allotted quantity of molasses was exported out of the country. Therefore, IMCL in order to meet this condition, had on the very same date i.e. 01.09.1999, applied for issuance of a general export order to the Commissioner of P & E. In response thereto, the Commissioner of P & E vide order dated 06.09.1999 (Ex.P25 & D7), gave permission to IMCL to export a substantial quantity, i.e., 25,000 MT of molasses.

18.2. Learned counsel emphasized the fact that, since, molasses is a controlled commodity, it is governed by the 1958 Rules and, therefore, the Commissioner of P & E is empowered under Rule 7(2)(b) to issue, inter alia, general export permission to enable export to be made in installments.

18.3. According to the learned counsel, the mere fact that permission was required from GOTN for exporting the molasses would not make it a contingent contract as contended under

Section 32 of the Contract Act.

18.4. The learned counsel also drew our attention to evidence on record to demonstrate that despite having been issued the general export permission by the Commissioner of P & E and having been granted M.L.5 licence by the concerned District Collectors, IMCL was unable to even lift 25,000 MT of molasses within the allotted time.

18.5. Furthermore, our attention was also drawn to the documentary evidence on record to demonstrate that several extensions were sought in this behalf by IMCL.

18.6. In so far as the sale order No.44 was concerned, the learned counsel submitted that the said order was issued on the basis of the request made by IMCL on 01.09.1999.

18.7. According to Mr.Narasimhan, the subsequent turnaround by IMCL with regard to both sale order Nos.41 and

44, on 26.10.1999, was not on account of the fact that the requisite permission for export of balance quantity was not available, but was connected to the drop in international prices making the export of molasses unremunerative. It was, thus, contended by learned counsel that this was not good enough reason not to fulfill the obligation undertaken by IMCL to export the balance quantity of 19,000 MT of molasses under the aforementioned sale orders.

19. In so far as Cross objections were concerned, Mr.Narasimhan submitted that the learned Single Judge had erred in directing adjustment of EMD for the reason that there was no counter claim lodged by IMCL. Learned counsel emphasized the fact that in the written statement filed by IMCL, it has specifically averred that it reserves its right to seek refund of EMD together with interest, albeit, from respective sugar mills. It was, thus, submitted that without the plea for set off or counter claim, on which, necessarily, Court fee would have to be paid, the learned Single Judge could not have directed adjustment of EMD against the principal sum claimed, i.e.,

Rs.93,02,000/-

19.1. In so far as reduction in the rate of interest was concerned, Mr.Narasimhan submitted that while the Federation had no quarrel with the rate awarded by the learned Single Judge, it is aggrieved by the fact that no interest has been awarded for the pre-suit period. The learned trial Judge, according to the counsel, ought to have granted interest for the pre-suit period at the rate of 9% p.a. since, it was an action for recovery of balance price of goods and not for damages as is erroneously held by the trial Court. The Federation's claim for interest for pre-suit period was tennable under Section 61 of the Sale of Goods Act, 1930.

REASONS

20. We have heard the learned counsel for the parties and perused the records.

21. According to us, the aspects which require

determination in the appeal can be, broadly, put under the following heads:

(I) Is the Federation entitled to sue on behalf of its member mills ?

(II) Is the subject contract a concluded contract ?

(III) Was the subject contract contingent, upon IMCL obtaining general export permission ?

(IV) Did IMCL commit a breach of contract ?

(V) Has the learned Single Judge rightly come to the conclusion that the claim lodged by the Federation is a claim for damages ?

(VI) If, the answer to the issue No.(V) is in affirmative, has the learned Single Judge applied the correct measure in quantifying the damages ?

(VII) Was the learned Single Judge right in directing adjustment of EMD ?

(VIII) Was the learned Single Judge right in not granting interest for the pre-suit period, albeit, at the determined rate of 9 % p.a ?

(I): Is the Federation entitled to sue on behalf of its member mills ?

22. In so far as the first aspect is concerned, there is no difficulty in coming to the conclusion that the Federation could maintain action on behalf of its member mills.

22.1. In the plaint, the Federation has specifically averred that it is empowered to represent and act on behalf of its member mills for the purposes of transacting business with regard to purchase, sale and distribution of commodities and goods, manufactured and required for commercial activities. The Federation, goes on to aver that it is, thus, also empowered to recover and receive the amounts due from the transacting parties.

22.2. These averments are made in paragraph 3 of the plaint.

22.3. IMCL in its written statement, on the other hand, avers (even while conceding that the Federation is entitled to represent and act on behalf of its member mills), that it would have no locus standi to maintain the instant suit.

22.4. To our minds, once, IMCL has accepted the fact that the Federation can represent and act on behalf of its member mills, in that, it can undertake transactions, inter alia, for purchase and sale of goods manufactured by its member mills and also make recoveries, on that account, we see no reason why it cannot maintain an action of the instant nature. Furthermore, the evidence on record clearly shows and, in that respect there can be no dispute that: the advertisement dated 31.07.1999 (Ex.P1) was issued by the Federation, the tender (Ex.D1) was floated by the Federation and that in response to the tender, IMCL filed its bid to lift, initially with an EMD of Rs.15,50,000/-, 62,000 MT of molasses which was later on revised by reducing the quantity and, simultaneously, offering an enhanced rate upon renegotiation with the representatives of the Federation. These aspects come to fore upon a perusal of Ex.P2/D2 and Ex.P3/D3.

22.5. Furthermore, sale order No.41 (Ex.P6/D4) was issued by the Federation in favour of IMCL. Clearly, the privity of contract was between the Federation and IMCL. Clause 15 clearly

provides that in case, the purchaser, in this case IMCL, fails to remit the amount claimed as loss, the Federation will have the right to initiate action to recover the loss sustained by each member mill.

22.6. For the sake of convenience, not only Clause No.15 of the tender but also Clause 13 and 14 are extracted hereafter as, a clearer picture would emerge if, all three clauses are read together:

"13. The purchaser should remit the amount and lift the Steel Tank Molasses within the time permitted by the Tamilnadu Govt. If the successful tenderer fails to lift the Steel Tank Molasses within the stipulated time, the EMD remitted by him will be forfeited without notice and the quantity should will automatically lapse.

14. In case of failure to lift the Steel Tank Molasses on or before the due date specified in the Sale Order, the member factories shall have the right to dispose the same according to their choice and any loss incurred due to the differential cost will be recovered from the approved tenderers, who

failed to lift it.

15. In case of failure to remit the amount claimed towards loss on the part of the purchaser within one week from the date of receipt of the claim, the Federation will initiate action to recover the amount of loss sustained by each Member-mill. (emphasis is ours)

22.7. In our opinion a conjoint reading of the aforementioned Clauses would undoubtedly establish that the Federation has the right to maintain the instant action for the loss suffered by its member mills.

(II):Is the subject contract a concluded contract ?

23. According to us, the subject contract is a concluded contract, as after the tender was floated by the Federation, IMCL preferred a bid, which after re-negotiation, was accepted. IMCL, in fact, lifted a part of the allotted molasses. IMCL was allotted 40,000 MT of molasses, against which, it lifted 25,000 MT of molasses, though, beyond the time allotted for the said purpose. Thus, there is no doubt, in our minds, that the contract is a concluded contract.

III. Was the subject contract contingent, upon IMCL obtaining general export permission ?

24. As regards the contention advanced on behalf of the appellant that the subject contract was a contingent contract, because the general export permission had to be obtained, this contention is unmerited for the reason that the tender itself indicated that the bids were invited for molasses, which was required to be exported out of the country. IMCL was well aware, at the time of making the bid, that molasses had to be exported outside the country.

24.1. Therefore, in our view, the submission of IMCL that the contract was contingent, as general export permission had to be obtained, cannot be countenanced.

24.2. *De hors*, what we have stated above, if, we were to assume for a moment that the subject contract was contingent, because general export permission had to be obtained, once, the general export permission was, in fact, obtained, the subject contract became enforceable. In the first instance, general export

permission were obtained on 06.09.1999, albeit, for a quantity equivalent to 25,000 MT. In so far as the balance quantity was concerned, IMCL did not apply for issuance of a general export permission, even though, the GOTN as on 30.09.1999 (Ex.P.8) had granted approval to the Commissioner, P & E, to export an additional 1,00,000 MT of molasses by co-operative and public sector sugar mills.

24.3. Therefore, according to us, the argument advanced by Mr.P.S.Raman, on behalf of IMCL, that the subject contract could not be executed by IMCL, as the necessary general export permission was not available, is not sustainable. The reliance on the judgement of the Supreme Court rendered in **Satyabrata Ghose Vs. Mugneeram Bangur & Co, AIR 1954 SC 44** will not help the course of IMCL, as that case essentially dealt with Section 56 of the Contract Act. Section 32 was discussed in the passing, essentially to distinguish the provisions of Section 56 of the very same Act. In the instant case, we have held, based on the evidence on record, that the Contract was not contingent and, even if, one were to assume that it was, after necessary

permission, was given by the Government on 30.09.1999, the contract became enforceable.

(IV) Did IMCL commit a breach of contract ?

25. The record clearly shows that after sale order No.41 (Ex.P6/D4) was issued in favour of IMCL on 01.09.1999, it applied on the very same day to the Commissioner of Sugar for being allotted the balance quantity of 4,000 MT of molasses against the total quota of 5,000 MT of molasses allotted against Vellore CSM Sugar Mill, a member mill of the Federation.

25.1. In view of the fact that the other allottee, namely, Malladi Drugs had been allotted only 1,000 MT leaving an unused allocation of 4,000 MT of molasses with Vellore CSM Sugar Mills. The fact that molasses is a controlled commodity, and its allocation and sale is governed by the provisions of the 1958 Rules is neither in dispute and nor can it be said that the knowledge qua this aspect is not in public realm. Therefore, it cannot be said that the fact that an application had to be made to the Commissioner of P & E for issuance of a general export order,

was not known or came as a surprise. It is not the case of IMCL that it was not required to apply to the Commissioner of P & E or for that matter, to the District Collectors for issuance of M.L.5 licence to transport the molasses from the concerned mill to the Chennai Port for export.

25.2. Therefore, upon IMCL applying to the Commissioner of P & E for issuance of the general export order, the requisite order was passed on 06.09.1999 (Ex.P25/D7)

25.3. At that juncture, the general export order issued by the Commissioner of P & E, restricted the export of molasses by IMCL to 25,000 MT, having regard to the fact that the GOTN had granted permission for export of molasses to other countries lifted from the cooperative and public sector sugar mills to the extent of 1,50,000/- MT and that out of the said quantity, his office had already granted permission for export of a quantity equivalent to 1,24,800 MT.

25.4. Taking into this reality, at that point in time, the Commissioner of P & E thought it fit to confine the general export permission to a quantity which was as near as possible to the balance quota available with him. Resultantly, the concerned District Collectors in consonance with the permission granted by the Commissioner of P & E vide order dated 09.09.1999, granted corresponding M.L.5 licence (See Ex.D8 to D11).

25.5. As a matter of fact, the validity period of the general export permission was extended at least on four (4) occasions. The first time around it was extended upto 30.10.1999; thereafter upto 08.12.1999; then to 31.12.1999, and finally, till 31.03.2000. In the interregnum, on 30.09.1999 (Ex.P8), GOTN had granted permission to the Commissioner of P & E to permit export of additional 1,00,000 MT of molasses, albeit, from cooperative and public sector sugar mills.

25.6. Therefore, as on 30.09.1999, there was enough play available with the Commissioner of P & E to grant general export

permission to IMCL to export the balance quantity of 15,000 MT of molasses in terms of sale order No.41. However, disappointingly, IMCL, on the other hand, till 28.09.1999, had failed to export out of the quantity allotted to it a substantial quantity of the molasses, qua which it had been issued a general export permission by the Commissioner of P & E vide its order dated 06.09.1999. This aspect of the matter clearly emerges upon perusal of IMCL's letter dated 28.09.1999 (Ex.D14), addressed to the Commissioner, Directorate of Sugar. The relevant part of the letter is extracted hereunder:

*"We are pleased to inform you that even after all these hassles, **we have finalized a vessel for loading the molasses cargo of around 16000 MTs on October 05th, 99 and assure you that we shall take our best efforts to lift the balance quantity of 21246.97 MTs at the earliest.***

***Hence we request your goodselves to extend the validity period of the above mentioned order by 45 days and oblige.**" (emphasis is ours)*

25.7. Quite clearly, on the date when the said letter was shot off by IMCL, it had no grievance that, since, the Commissioner of P & E, vide his order dated 06.09.1999 had granted general export permission only for 25,000 MT molasses out of 40,000 MT of molasses allotted to it, it could not go ahead and discharge its obligations under the contract with respect to the balance 15,000 MT.

25.8. On the other hand, IMCL proceeded on the basis that in terms of sale order No.41, it would export the entire 40,000 MT of molasses. Based on this representation of IMCL, made vide letter dated 28.09.1999 (Ex.D14), which was two days prior to the deadline, given in the sale order No.41 for lifting of molasses, expired, the Commissioner of Sugar vide letter dated 05.10.1999 (Ex.P13/D14), extended the time for lifting the balance quantity of sugar i.e. 21,246.98 tonnes till 31.10.1999. Likewise, by another letter of even date i.e. 05.10.1999 (Ex.D15), the Federation clarified in so far as sale order No.44

was concerned, the last date for lifting of molasses was 24.10.1999 and not 23.09.1999, as was, inadvertently, communicated vide the said sale order.

25.9. Having received the green signal from the Commissioner of Sugar for extension of validity period of the sale order upto 30.10.1999, IMCL applied to the Commissioner of P & E on the same day i.e. 05.10.1999, to extend the validity period. The Commissioner of P & E in consonance with the order of the Commissioner of Sugar extended the validity period of the general export permit till 30.10.1999, in respect of the balance quantity equivalent to 21,246.97 MT.

26. The interesting aspect of the matter, is that, via letter dated 28.09.1999 (Ex.D14), IMCL, created an impression, with the Commissioner of Sugar, that out of the balance quantity of 40,000 MT of molasses allotted to it, it had zeroed down on a vessel, on which, it would load a part of the allotted quantity, while, in respect of the remaining quantity, it would require

extension of the period allotted to it for lifting the same from the concerned mills. Thus, in effect, IMCL conveyed to the Commissioner of Sugar that 16,000 MT of molasses will be loaded on to a designated vessel, on 05.10.1999, and that, the remaining quantity which was 21,246.975 MT of molasses would also be lifted by it, if the time for that purpose was extended by 45 days.

27. Thus, both Commissioner of Sugar and Commissioner of P & E carried a distinct impression that IMCL would export the entire allotted quantity of 40,000 MT of molasses. Pertinently, this representation was made by IMCL, at a time when the, initial deadline, which ended on 30.09.1999, had been reached and it had by that time lifted only 3753.025 MT of molasses out of a total quantity of 25000 MT of molasses, referred to in the Commissioner of P & E's order dated 06.09.1999. It is because IMCL sought extension of time to lift 21,246.975 MT of molasses that approvals were given by the Commissioner of Sugar and the Commissioner of P & E, to extend the validity period till

30.10.1999. IMCL, on its part, having received the approvals for first time vide two separate letters of even date i.e. 26.10.1999, i.e., (Ex.P15/D25) and (Ex.P16/D24), wrote to the Joint Commissioner, Directorate of Sugar that it wanted to surrender the balance quantity of 15,000 MT of molasses allotted to it vide sale order No.41 and 4,000 MT of molasses allotted to it vide sale order No.44. Crucially, between 5/8.10.1999 and 26.10.1999, no such assertion was made by IMCL.

27.1. The fact IMCL was aware that molasses was a controlled commodity, in respect of which, the GOTN issued orders from time to time and that it could only be exported upon receipt of requisite permission of the Commissioner of P & E and issuance of relevant licences in that behalf, emanates, from the deposition of D.W.1. For the sake of convenience, the relevant part of D.W.1's testimony is extracted hereafter:

".....Molasses is a commodity controlled by State Government. I do not know anything about the Molasses Control Act. Production, distribution,

sale, movement, export or import are all controlled and supervised by Government authorities. The regulation and orders or direction for the above said purposes are issued by Government from time to time. There is no ban on export of molasses. On permit only molasses can be exported. ML-2 license is issued for possession and sale of molasses. ML-5 license is issued for movement of molasses. In Ex.P2 we have enclosed ML-2 and ML-8 forms. ML-2 license is for sale and export of subject to the rules and regulation. Ex.P2 is valid for 31.03.2000. ML-5 will be issued by concerned District Collectors.

.....
To export molasses the permission will be obtained from Commissioner of Prohibition and Excise.

He will decide the issuing permit for the quantity with availability of quantum of molasses on approval by the Government. Permit will be issued by means of proceedings on the application by

the exporter. The application should be enclosed with sale order. The person who is holding ML-2 license is eligible to obtain ML-5 license. **Our company is dealing export business for the past 50 years. We know the rules and regulation and circulars internal and external regarding the export of molasses. We are leading exporters in India. Our company expected to know the rules and regulation and the company is having constant touch with Government departments regarding export of molasses.** After getting permission from the Government the Commissioner of Prohibition and Excise will issue permit....." (emphasis is ours)

27.2. Therefore, quite clearly not only was IMCL aware of the rules and regulations but was also aware of the fact that export of molasses which was a controlled commodity, over which no ban obtained at the relevant point of time, could be exported only upon an application being made in that behalf and relevant orders being passed by the Commissioner of P & E and

the concerned District Collectors.

27.3. Though D.W.1 did try and say that he was unaware of 1958 Rules, that part of the testimony, according to us, cannot be given any credence in view of the fact that on all other aspects the witness seems to have adequate knowledge. Moreover, the witness clearly stated that IMCL was in the business of export for 50 years and that it was aware of all rules and regulations which included internal and external circulars related to export of molasses. Given the extent of familiarity of the IMCL officers with the Government rules and regulations and export mechanism, one cannot accept the stance taken by D.W.1 on behalf of IMCL that he was unaware of the fact that GOTTN vide order dated 30.08.1999 (Ex.P8) had granted permission to the Commissioner of P & E to allow for export of additional 1,00,000 MT of molasses.

27.4. The fact that IMCL's request for surrender of 19000 MT of molasses was not accepted, is borne out from the letter

dated 09.11.1999 (Ex.P17), addressed to the Commissioner of Sugar. As a matter of fact, on the very same date, based on the request of IMCL made vide letter dated 16.10.1999, further time of 30 days was granted for lifting 17,992 tonnes of molasses, from the member mills, referred to therein, vide communication dated 09.11.1999 (Ex.P18/D26).

27.5. That, one of the mills i.e. Chengalrayan Cooperative Sugar Mill, was aggrieved by the fact that IMCL had not lifted the entire allotted quantity, also came through in the letter dated 09.11.1999, addressed by the said mill to IMCL (Ex.P19).

27.6. Furthermore, a perusal of Exs.D34, D35 and D36 would show that upon IMCL writing to the Commissioner of Sugar and the Commissioner of P & E both authorities extended time till 31.03.2000, to enable IMCL to lift 171.725 MT of molasses, which was the balance quantity out of 25,000 MT of molasses allotted to it until 31.03.2000. As a matter of fact, this was the quantity, which, even according to IMCL, was the balance quantity

relatable to 25,000 MT, that it had assured it would lift and export in consonance with the Commissioner of P & E's earlier order dated 06.09.1999.

27.7. The record shows that even this balance quantity, IMCL was unable to lift within the extended deadline, which ended on 31.03.2000, and thereupon led to the Commissioner of Sugar, rejecting IMCL's request vide communication dated 09.06.2000 (Ex.D38).

27.8. Thus, in sum, in our view, the evidence on record clearly establishes the following:

(i) First, after submission of a bid to lift 62,000 MT of molasses, IMCL engaged in renegotiations with the Federation, whereupon, it was allotted 45,000 MT of molasses, albeit, at enhanced rates.

(ii) Second, the Commissioner of Sugar vide order dated 31.08.1999, allotted only 40,000 MT in favour of IMCL for the

purposes of export, while another concern by the name of Malladi Drugs, was allowed to lift 1000 MT from Vellore CSM Sugar Mill, albeit, for export within the State of Tamil Nadu.

(iii) Third, in consonance with the order of the Commissioner of Sugar, the Federation issued sale order No.41 on 01.09.1999 (Ex.P6 & D4), for sale of 40,000 MT of molasses. The last date for lifting the allotted molasses, as per the sale order No.41, was 30.09.1999.

(iv) Fourth, even on the date when the bid was filed, IMCL had indicated against query raised in Clause 10 of the bid for that it was negotiating with the foreign buyers. In other words had not zeroed down on foreign buyer.

(v) Fifth, sale order No.41 which was issued in favour of IMCL, under Clause 4, clearly, required the purchaser (in this case IMCL) to produce a copy of a firm order from a foreign buyer, before it could commence lifting of molasses from the

concerned mill.

(vi) Sixth, by 30.09.1999, IMCL had only been able to lift 3753.025 MT of molasses. The evidence on record is, thus, suggestive of the fact that at that point in time IMCL was quite happy to get the validity period of the sale order No.41, extended.

(vii) Seventh, it is in this context, IMCL made two separate applications, albeit, of even date, i.e. 05.10.1999 to the Commissioner of Sugar and Commissioner of P & E.

(viii) Eight, based on the request made, extensions were granted, accordingly, to IMCL. In so far as the sale order No.44 was concerned, it was issued based on a specific request made by IMCL on 01.09.1999 (Ex.D6) against the quota of Vellore CSM Sugar Mill. Vellore CSM Sugar Mill had been allocated 5,000 MT of molasses against which an entity by the name of Malladi Drugs had been issued a sale order equivalent to only to 1000 MT.

(ix) Lastly, despite, IMCL being granted a series of extensions, it was unable to lift the balance quantity of 19,000 MT of molasses against the two sale orders, i.e., sale order No.41 and 44.

28. Therefore, according to us, the two letters of even date i.e., 26.10.1999 {(Ex.P15/D25) and Ex.P16/D24)}, were a cover for the inability on the part of IMCL to comply with the obligations undertaken by it under the contract. The reason for the same, perhaps, lay in the fact that, IMCL did not have a back to back export order available at hand. It appears, IMCL, had first secured for itself a sale order and, thereafter, commenced the exercise of looking for entities who would buy the molasses lifted by it. This is, perhaps, the reason why IMCL despite assurance that it would lift at least 25,000 MT of molasses, (qua which the Commissioner of P & E had granted its permission on 06.09.1999), could not, completely adhere to in spite of extensions being granted right up to 31.03.2000. Evidence on

record shows that IMCL, as indicated by us above, did not ever raise a contention that because the Commissioner of P & E had issued a general export permit dated 06.09.1999, only for 25,000 MT of molasses, it could not lift the balance 15,000 MT of molasses before the deadline date fixed initially i.e. 30.09.1999 was reached.

28.1. If the position on ground had been such, as claimed, in the ordinary and usual course, IMCL would have written to the Federation that it was ready to lift not only the 25,000 MT of molasses qua which permission had been received on 06.09.1999, but also the balance 15,000 MT of molasses, with respect to which it had at the relevant time no permission. Since, this was not the situation obtaining on the ground, IMCL clearly tarried along taking its chance right uptill 05.10.1999, when, it got extension for lifting the molasses both qua sale order No.41 and 44.

28.2. The unilateral surrender of 19,000 MT was occasioned

on account of fall in international prices and had nothing to do with the non-availability of permission from the Commissioner of P & E. Had IMCL's concern about falling in international price been genuine, it would have first fulfilled its obligation under the subject contract by lifting and exporting the allotted molasses and thereafter, if necessary, sued, the Federation for the loss caused on account of alleged delay in receiving the requisite permissions. IMCL could not have unilaterally rescinded contract. Clearly IMCL's approach in the matter resulted in breach of the terms of contract entered into with the Federation.

(V): Has the learned Single Judge rightly come to the conclusion that the claim lodged by the Federation is a claim for damages ?

29. According to us, the learned Single Judge, correctly came to the conclusion that the action of the Federation as framed was a claim for damages and not for price of goods. If, as contended on behalf of the Federation, it was a claim for price of goods, under the Sale of Goods Act, an unpaid seller has two rights: he can either exercise his right under Section 54(2) of the

Sale of Goods Act or sue under Section 55 of the very same Act for the price of the goods. If the unpaid seller choses to exercise his right under Section 55 of the Act, he should in that eventuality sue for price of goods leaving it to the buyer to take delivery of the goods, lying with him. In such an eventuality, the unpaid seller is required to sue for the entire price of the goods and not sue, as would be obvious, for the amount which remains to be recovered after he has deducted the amount received by him upon resale of goods.

29.1. In this case, as would be evident upon reading the plaint, the Federation sued for the difference between the contracted price and the market price which it obtained upon resale of the molasses, upon failure of IMCL to lift the same. The Federation did not make a claim for the price of goods, and therefore logically did not offer to deliver the goods to IMCL. On the other hand, if had, made a claim for price of goods, it ought to have offered to give delivery of the subject goods (i.e. molasses) to IMCL, which may or may not have lifted the same.

29.2. Clearly, molasses, which were subject matter of the contract, stand sold, and are not available with the Federation. Therefore, even if, IMCL was directed to pay the contracted price the Federation would not be in a position to offer delivery of the, subject goods (i.e. molasses) for taking delivery. Thus, quite correctly, the learned Single Judge has come to the conclusion that the instant action was in effect a claim for damages. Resultantly, the contention of the Federation, to the contrary, in our opinion, cannot be accepted and, is accordingly, rejected.

(VI): If, the answer to the issue No.(V) is in affirmative, has the learned Single Judge applied the correct measure in quantifying the damages ?

30. The learned Single Judge having come to the conclusion that it was a claim for damages, has, in our view, correctly applied the principle for quantifying the damages. The damages having been quantified based on the principle that had the

contract being performed as envisaged, what would then be the price the seller would have received as against which it received upon its breach by the buyer, i.e., IMCL.

30.1. There is evidence on record in the form of five (5) sale orders of even date issued to different entities i.e. 13.01.2000 (Ex.P34 to 38), which establish that the molasses that IMCL failed to lift was finally sold to other entities, albeit, at a lower rate causing a loss to the extent of Rs.93,02,000/-. Therefore, in our view, the learned Single Judge has correctly quantified the damages.

(VII): Was the learned Single Judge right in directing adjustment of EMD ?

31. In so far as this issue is concerned, Mr.M.R.Narasimhan is right in his contention that IMCL had in its written statement reserved its right with regard to the claim qua EMD. Therefore, quite clearly, the stand taken on behalf of the Federation that, in

the absence of a counter claim or even a set off no adjustment could have been directed by the learned Single Judge, has to be sustained.

31.1. We were told by Mr.P.S.Raman, senior counsel that an application under Section 152 of the Code of Civil Procedure, 1908 (in short "CPC") has been filed before the learned Single Judge, for the purpose of quantifying the amount of EMD which is to be adjusted against the principal amount awarded. Clearly, the correspondence between the parties to which we have made a reference above on the issue of EMD, it alludes to not only the EMD that is relatable to the subject contract, but also touches upon other EMDs qua which parties failed to reach a resolution.

31.2. This aspect of the matter is brought forth upon perusal of the Federation's letter dated 28.06.2002 (Ex.D52) addressed to IMCL and the notice dated 02.08.2002, addressed by IMCL's Advocate to the Federation.

31.3. The only aspect over which there is, in a sense,

consensus between the parties, is that, the Federation has forfeited a sum of Rs.10,00,000/- towards EMD qua the subject contract, and that the Federation has withheld EMD amounting to Rs.12,44,244/- pertaining to other transactions. Therefore, quite clearly in the instant action, without the relevant pleadings and evidence being placed on record by parties, the learned Single Judge could not have ordered adjustment of EMD. Thus, to that extent, the submission of Mr.M.R.Narasimhan, in our view, is correct and is, accordingly, sustained.

(VIII): Was the learned Single Judge right in not granting interest for the pre-suit period, albeit, at the determined rate of 9 % p.a ?

32. In so far as this aspect of the matter is concerned, the submission of Mr.M.R.Narasimhan is based on the provisions of Section 61 of the Sale of Goods Act. In this regard, it is relevant to extract Section 61:

"61. Interest by way of damages and special damages.—

(1) Nothing in this Act shall affect the

right of the seller or the buyer to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.

(2) In the absence of a contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of the price—

(a) to the seller in a suit by him for the amount of the price—from the date of the tender of the goods or from the date on which the price was payable;

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller—from the date on which the payment was made."

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32.1. A perusal of the aforementioned provision would show that Sub-section (1) of Section 61 preserves and protects the right of a seller to recover interest or special damages wherever by law interest or special damages are recoverable or in a case where recovery of money paid is sought on account of

consideration for payment having failed.

32.2. Sub-section (2) of Section 61 vests power in the Court, to award interest, in the absence of contract to the contrary, at such rate, as it thinks fit, on the amount of price.

32.3. In case of a seller, when he sues for the amount of price, albeit, from the date he/she tender the subject good or from the date when the price is payable. Likewise, where a buyer is involved, interest is claimable in a suit for refund of price upon breach of contract by the seller from the date, when, payment is made.

32.4. In the instant case, we are only dealing with the situation, concerning the seller (i.e the Federation). The Federation seeks grant of interest under Section 61 of the Sale of Goods Act. Clearly, the power vested in the Court to grant interest under Section 61 of the Sale of Goods Act, gets triggered only, when, the seller sues for the price of goods. In the instant case, as adverted to above by us, the action filed by the

Federation, in substance, is an action for damages and not for price of goods. Therefore, in our view, the provisions of Section 61 of the Sale of Goods Act will not be applicable. The submission made to the contrary is rejected.

33. We may also note, the record shows that during the pendency of the appeal interim protection was granted in the first instance via order dated 16.03.2012, which was continued by virtue of orders dated 27.04.2012 and 11.06.2012. However, vide order dated 15.06.2012, the interim protection granted uptill then, was continued on payment of one-half of the decretal amount. The amount was required to be deposited to the credit of the suit. The interim direction issued by the Court vide order dated 15.06.2012, was further modified, whereupon, IMCL was directed to deposit a sum of Rs.60,00,000/- to the credit of the suit and furnish a bank guarantee in the sum of Rs.25,00,000/- with a direction to keep the same alive for a period of three years. Furthermore, the Court declined to grant interim stay in respect of costs which were quantified at Rs.2,88,842.75 and

interest on costs amounting to Rs.8,665/-.

33.1. In the course of arguments Mr.P.S.Raman informed us that the bank guarantee was valid till 01.07.2018.

33.2. Accordingly, the Registry is directed to release the sum of Rs.60,00,000/- lying with it in favour of the Federation. Furthermore, the concerned bank will also release a sum of Rs.25,00,000/- as reflected by the subject bank guarantee upon being approached by the Federation in that behalf.

34. Thus, having regard to the foregoing discussion, we are of the view that the appeal numbered as O.S.A.No.97 of 2012, preferred by IMCL has no merit and will accordingly, have to be dismissed. It is ordered so.

34.1. In so far as Cross Objection No.63 of 2012 is concerned, according to us, the same would have to be allowed, to the extent the learned Single Judge via the impugned Judgement and decree has directed adjustment of an unascertained amount of EMD against the principal amount which is pegged at Rs.93,02,000/-.

34.2. In sum, the operative part of the impugned judgement and decree is modified to the extent that the Federation would be entitled to a decree in the sum of Rs.93,02,000/-, without adjustment qua EMD, with interest at the rate of 9% p.a. from the date of the suit till the date of realisation of payment.

35. Resultantly, the appeal is dismissed and the cross objection filed, is partly allowed. Consequently, the connected miscellaneous applications are disposed of as well. However, there shall be no order as to costs.

(R.S.A.,J)

(A.Q.,J)

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13.10.2017

Speaking Order/
Non-speaking order

Index : Yes/No

Internet : Yes

kk

RAJIV SHAKDHER,J.

AND

ABDUL QUDDHOSE,J.

kk

To

The Sub Assistant Registrar (Original Side),
High Court, Madras.



Pre-Delivery Judgement
in O.S.A.No.No.97 of 2012
and Cros. Obj. No.63 of 2012
and M.P.Nos.1 & 5 of 2012 & 1 of 2015

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