

HIGH COURT OF CHHATTISGARH, BILASPUR**FAM No. 182 of 2017**

1. State Of Chhattisgarh Through- Collector, Sarguja- Ambikapur, District Sarguja, Chhattisgarh., Chhattisgarh
2. The Collector, Sarguja- Ambikapur, District Sarguja, Chhattisgarh.
3. The Assistant Commissioner, Tribal Development, Ambikapur, District Sarguja, Chhattisgarh.

---- APPELLANTS/DEFENDANTS NO.1 To 3

Versus

- M/s Shree Krishna Industries Through Sh. Rakesh Bansal S/o Late Shri Ram Agrawal, Aged About 36 Years, Jawahar Market, Banaras Chowk, Ambikapur, District Sarguja, Chhattisgarh., Chhattisgarh

---- RESPONDENT/PLAINTIFF

For Appellant: Shri Ramakant Mishra, Dy.AG

For Respondent : Shri Manoj Paranjpe with Shri Prasoon Agrawal, Advocates

**D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava &
Hon'ble Shri Justice Gautam Chourdiya**

Order on Board

PER MANINDRA MOHAN SHRIVASTAVA, J.

18/09/2018

1. This appeal is directed against the impugned judgment and decree dated 04-08-2017 passed by the Judge, Commercial Court (District Level), Naya Raipur in Civil Suit No.3-A/2016, by which, respondent/plaintiff's suit for specific performance and damages has been partly decreed by directing the appellants/defendants to accept supply of 1,49,393 number of school bags from the plaintiff, upon payment of Rs.2,75,60,020.64 to the plaintiff firm along with simple interest @ 10% on annual basis from the date of filing of the suit till the date of recovery.

2. The respondent-plaintiff filed a suit seeking decree of specific performance of contract and in the alternative, for payment of damages of Rs.2,75,60,020.64 on the pleadings, inter alia, that pursuant to NIT dated 15-02-2011, Ex.P-2, tender was submitted for supply of school bags. Plaintiff's tender was accepted and work order was issued on 13-04-2011 with certain terms and conditions, which was not acceptable to the plaintiff, therefore, separate agreement was executed on that very date between the plaintiff and the defendant (Ex.P-8-C) in the matter of supply of 3,03,555 school bags. Plaintiff's case had been that the plaintiff, after entering into the said agreement, prepared school bags in required numbers, which was supplied from time to time. However, when the last lot was taken to the defendant's store for delivery, out of that, only 29,612 number of school bags were accepted and remaining 1,49,393 bags were not accepted and returned. The plaintiff approached the authorities for accepting balance quantity of school bags, which were not accepted and soon thereafter, another letter was issued by the respondent on 14-07-2011 reducing the quantity of supply of school bags from 3,03,555 to 1,54,162. This gave rise to dispute between the parties. A Legal notice was given for supply of remaining quantity of school bags, which was not accepted, resultantly, the plaintiff filed suit.

3. The defendants resisted the claim firstly, by taking stand that the conditions No.4 & 5, as stipulated in the work order dated 13-04-2011, Ex.P-10(C) always constituted the terms and conditions of supply under the agreement dated 13-04-2011, Ex.P-8(C) between the parties, under which, the defendants had a right to unilaterally alter the quantity of supply. Invoking this contractual right, the defendants reduced the quantity of supply and therefore, the plaintiff could not seek decree for specific performance for supply of remaining quantity of school bags. In reply to the plaintiff's specific averments regarding attempt made to supply entire balance quantity of school bags on 09-

07-2011, the defendants took a stand that no such supply was made and in fact, the plaintiff supplied only 29,612 number of school bags, in respect of which, payments have already been made to the plaintiff.

4. On the basis of the pleadings of the parties, learned Trial Court framed as many as 8 issues, which were as under:-

- “1. क्या प्रतिवादी क्र० 3 द्वारा जारी आदेश दिनांक 13/04/2011 में उल्लेखित शर्तों का, वादी एवं प्रतिवादी क्र० 3 के मध्य निष्पादित अनुबंध दिनांक 13/04/2011 में उल्लेखित शर्तों से नवीकरण हो गया था ?
2. क्या वादी आदेश दिनांक 13/04/2011 में दर्शित स्कूल बैग (बस्ता) मात्रा 303555 में से शेष 149393 नग स्कूल बैग विहित समयावधि में प्रदाय करने के लिए तैयार एवं तत्पर था ?
3. क्या प्रतिवादी क्र० 2 द्वारा जारी आदेश दिनांक 14/07/2011 वादी पर बंधनकारी नहीं है ?
4. क्या वादी को प्रतिवादी क्र० 2 द्वारा जारी आदेश दिनांक 14/07/2011 के द्वारा आदेश दिनांक 13/04/2011 एवं अनुबंध दिनांक 13/04/2011 में किये गये संशोधन से आर्थिक क्षति एवं नुकसान कारित हुआ ? यदि हाँ? तो प्रभाव ?
5. क्या वादी, प्रतिवादी क्र० 3 द्वारा जारी आदेश दिनांक 13/04/2011 एवं अनुबंध दिनांक 13/04/2011 का पालन प्रतिवादीगण से करा पाने का अधिकारी है?
6. क्या वादी प्रतिवादीगण से संशोधित आदेश दिनांक 14/07/2011 के कारण हुई क्षति एवं नुकसान प्रतिवादीगण से प्राप्त करने का अधिकारी है?
7. क्या वादी उक्त क्षति एवं नुकसान की रकम पर ब्याज पाने का अधिकारी है?
8. सहायता एवं व्यय ?”

5. After allowing the parties to lead oral as well as documentary evidence, learned trial Court partly decreed the suit of the plaintiff. Though, on Issue No.1, it was held that stipulations contained in Clause 4 & 5 of the Work Order dated 13-04-2011, Ex.P-10 were implicit in the agreement executed on the same date between the parties, it was also held that order dated 14-07-2011 was not binding on the plaintiff as the same was issued after expiry of period of 90 days. Learned trial Court further held in favour of the plaintiff on Issue No.2 that the plaintiff was always ready and willing to supply remaining quantity of 1,49,393 school bags in accordance with terms and conditions of the contract, but the defendants acted in breach of contract in not accepting the offered balance quantity of school bags. However, on Issue No.6, learned Trial Court was of the view that as the plaintiff has been held entitled to grant decree of specific

performance and further that no specific case for grant of damages is made out, refused to grant any decree for damages.

6. After notice of the appeal, the respondent-plaintiff filed a cross appeal aggrieved by the impugned judgment and decree to the extent it rejected the plaintiff's claim for award of damages.

7. Assailing the correctness and validity of the impugned judgment and decree passed by the learned trial Court, in so far as specific performance has been directed, learned Deputy Advocate General argued in extenso before us. He contended that the learned trial Court, having recorded a finding in favour of the appellant on Issue No.1 that Clause 4 & 5 of the Work Order dated 13-04-2011 was implicit in the agreement of supply between the parties, ought to have held that it was within the right of the appellants/defendants to alter the period as also the quantity of school bags. Learned Deputy Advocate General would submit that the tender submitted by the respondent/plaintiff was accepted along with terms and conditions stated in the Work Order dated 13-04-2011. The Plaintiff did not raise any dispute on the said work order, but he accepted it. According to him, the execution of separate agreement on 13-04-2011 was not intended to exclude Clause 4 & 5 of the Work Order, but only to make the terms and conditions of supply more specific so as to avoid any future dispute between the parties. Written Agreement dated 13-04-2011 does not contain any stipulation in express terms nor does it convey, by implication, that the parties intended to exclude from the terms and conditions of supply, conditions No.4 & 5 stipulated in the Work Order dated 13-04-2011. The plaintiff always knew that the defendant had the authority under the agreement to unilaterally alter the conditions with regard to time and quantity of supply of school bags and with that ad-idem between the parties, plaintiff proceeded to make supply of school bags from time to time and accepted payments. If the plaintiff had any objection, he ought not to have withdrawn the security amount. The very fact that the

plaintiff quietly accepted payments against the school bags actually supplied and withdrew security amount, proves that the plaintiff had completely acquiesced in the action of the defendants and therefore, after contractual transaction having come to an end, could not turn back to insist that remaining quantity of school bags should be accepted.

8. The other important submissions made by learned Deputy Advocate General is that the plaintiff has utterly failed to prove by leading reliable evidence, its readiness and willingness to perform his part of contract in the matter of supply of school bags in the quantity of 3,03,555 within the stipulated period of 90 days. It is argued that as the supply order was issued and agreement executed on 13-04-2011, the period of 90 days expired on 12-07-2011 and under the terms and conditions of the agreement, the plaintiff was required to supply complete quantity on or before 12-07-2011. But the plaintiff failed to supply the entire quantity till 12-07-2011. According to the stand taken by the defendants in the written statement, it is argued, on 09-07-2011, only 29,162 number of school bags were supplied and no other supply was made much less offered by the plaintiff or his agents in the stores of the defendants. The plaintiff has failed to prove that any such offer was made and refused. He would submit that if that was so, the plaintiff was required to immediately approach the authorities, but in the respondents records, there is no document prior to 12-07-2011 that on 09th, 10th & 11th, any application in writing was submitted by the plaintiff. The plaintiff's case is that he had sent 1,49,393 number of school bags on 09-07-2011 in the stores, is highly improbable and not based on any documentary evidence. The plaintiff's own oral evidence in this regard is not reliable, but it is a case of an afterthought because the plaintiff's letter dated 11-07-2011 does not bear any acknowledgment of receipt in the office of defendants. It was further contended that as far as Ravindra Tiwari, PW-3 is concerned, his evidence also is liable to

be disbelieved because the plaintiff has failed to produce any documentary evidence of payment of transportation charges to the said contractor. Learned State counsel then submitted that in fact, the plaintiff could not prove by clinching evidence that by 09-07-2011, entire quantity of school bags was prepared, inspected and duly certified by the authorized Inspecting Officer of the office of Indian Registrar of Shipping, Bhopal. The plaintiff's case is based on certificates of quality inspection, out of which, the certificates of quality inspection, Ex.P-19 and P-20 bear date 178/07/2011, meaning thereby that till 12-07-2011, the remaining quantity of 1,49,393 number of school bags were not even ready for supply. He would also submit that the plaintiff has failed to prove that at the time of delivery, the certificate was also submitted because supply of school bags were required to be made along with the certificates of quality inspection, whereas the plaintiff submitted quality inspection reports after 12-07-2011. On the aforesaid submissions, learned State counsel prayed that the impugned judgment and decree be set aside and the plaintiff's suit be dismissed.

9. Per contra, learned counsel appearing for the respondent-plaintiff argued that Clause 4 & 5 of the work order dated 13-04-2011 was not acceptable to the plaintiff and averment to this effect was specifically made in the plaint itself. The tender notice did not include those two conditions, but in the work order dated 13-04-2011, those two conditions No.4 & 5 were stipulated, therefore, the plaintiff raised an objection, then occasion arose for executing a separate agreement Ex.P-8-C signed by both the parties, which did not contain any such stipulation, as mentioned in Clause 4 & 5 of the Work Order dated 13-04-2011. The trial Court has not only misconstrued the agreement between the parties but has also ignored that where terms and conditions of supply are reduced in writing, no other terms and conditions, in addition to what has been stated specifically recited in the agreement, could be imposed unilaterally by one party

to the contract on the other.

According to the learned counsel for the respondent, even though, while filing cross appeal, specific cross objection on findings of Issue No.1 has not been taken in so many words, nothing deters this Court from examining the correctness of the said finding, in view of the powers vested in the appellate Court under Order 41 Rule 33 of CPC. In this connection, reliance has been placed on a decision of the Supreme Court in the case of ***Panna Lal vs. State of Bombay***¹ and ***Delhi Electric Supply Undertaking vs. Basanti Devi and another*** and a decision of the Division Bench of the High Court of Madhya Pradesh in the case of ***Bhawarlal vs. Mathura Prasad***². Placing reliance upon the provisions and the decisions referred to above, it is urged that this Court may also examine the correctness of the finding on Issue No.1 as framed by the trial Court. Learned counsel for the respondent would further argue that even if it were accepted for the sake of argument that the Clause 4 & 5 stipulated in the work order dated 13-04-2011 were implicit in the agreement between the parties, the same could not be invoked unilaterally after expiry of 90 days, within which, the supply was required to be and within which period, according to the plaintiff, the entire quantity of school bags as per the agreement were prepared and offered, part of which was returned without accepting. Next submission is that Clause 4 & 5 could not be invoked at the first option without offering the plaintiff, an opportunity in terms of Clause 6 of the agreement, because even if it is assumed, though not admitted that the plaintiff failed to supply within a period of 90 days, the plaintiff had an option to invoke clause 6, as the contract contained extension of period of supply, though with certain penalty, as time was not the essence of the contract.

It is then submitted that in fact, the only operative reason for the defendants to reduce the quantity of supply of school bags vide their letter dated

1 AIR 1963 SC 1516

2 AIR 1962 MP 141

14-07-2011 was government instructions issued earlier on 13-01-2011 and not that the plaintiff failed to supply the entire quantity of school bags. According to him, the defendant is the government establishment and no records have been produced to prove that the decision to reduce the quantity of supply was taken on any alleged failure on the part of the plaintiff to fulfill the terms and conditions of supply within the stipulated period of 90 days. Even in the reply to the legal notice given by the plaintiff, no such case was set up by the defendants and only when the suit was filed by the plaintiff, afterthought defence was raised regarding non-supply of entire quantity of school bags within the stipulated period of 90 days, only to defeat the legitimate claim of the plaintiff.

10. On the aspect of the readiness and willingness, learned counsel for the respondent-plaintiff argued that the plaintiff has not only specifically pleaded in the plaint, but also led reliable evidence of the plaintiff himself Rakesh Bansal, PW-1 and Ravindra Tiwari, PW-4 that the plaintiff had sent balance quantity of school bags to the store on 09-07-2011, but only 29,162 number of school bags were accepted and remaining were returned. The plaintiff has also proved from the evidence of Abhishek Sharma, PW-6 that entire quantity of school bags, prepared by the plaintiff, were inspected latest by 08-07-2011, which supports the plaintiff's claim that the entire quantity of school bags were prepared and after quality inspection, it was sent for delivery on the defendants store on 09-07-2011. Learned counsel for the respondent-plaintiff further submits that plaintiff also produced letter dated 11-07-2011 which was refused to be accepted, whereupon, it was sent through courier and followed by another letter dated 12-07-2011, receipt of which, has not been denied. The defendants have neither produced the Delivery Registers maintained in the store nor examined Store Chowkidar, who accepted 29,162 number of school bags, therefore, upon weighing the scales of probabilities, the learned trial Court has rightly concluded and held that the plaintiff was always ready and willing to perform his part of

contract and therefore, has granted decree. Learned counsel for the respondent-plaintiff has pressed into service his cross-appeal on the aspect of award of damages by submitting that as the defendants wrongly refused to accept supply of school bags, depriving the plaintiff cost of Rs.2,84,39,806/-, the trial Court ought to have granted consequential relief as proper damages to the plaintiff.

11. We have heard learned counsel for the parties and bestowed our anxious considerations to aforesaid submissions made by them and perused the records of the case.

12. Following points arise for determination in this appeal:

- (a) Whether without any cross-objection filed under Order 41 Rule 22 CPC, the respondent/plaintiff could assail the finding recorded on Issue No.1 in favour of the appellants/defendants?
- (b) If first point is answered in affirmative, whether clause 4 & 5 of the Work Order dated 13-04-2011 is impliedly included in the terms and conditions of agreement dated 13-04-2011 (Ex.P-8)?
- (c) If Clause 4 & 5 of Work Order dated 13-04-2011 formed part of the terms and conditions of the contract between the parties, is it enforceable under the law?
- (d) Even if it is held that clause 4 & 5 of the Work Order dated 13-04-2011 is enforceable under the law, could it be invoked by the appellant as the first option without compliance of penalty clause 6. In other words, whether alteration in the terms and conditions of supply under the agreement was in accordance with the agreement?
- (e) Whether the finding that the plaintiff was ready and willing to perform his part of contract is illegal?
- (f) Whether the plaintiff is entitled to damages along with the decree for specific performance of contract?

13. On the correctness of finding recorded by the trial Court on Issue No.1, learned Deputy Advocate General raised serious objection that the same may

not be gone into this appeal, as no such specific cross objection by the plaintiff in this regard has been raised in his cross-appeal and cross appeal is confined only in so far as refusal of claim for damages is concerned. For this purpose, learned State counsel has placed reliance on the provisions contained under Order 41 Rule 22 of CPC, wherein it has been provided that the respondent may, in whose favour, decree has been passed, nevertheless raise cross objection against any finding that may have been recorded against him while deciding the case.

In this regard, we may refer to the provisions contained under Order 41 Rule 22 CPC, which reads as under:-

Order XLI- Appeals from original decrees.

Rule 22- “Upon hearing respondent may object to decree as if he had preferred a separate appeal.- (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree ¹[but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellant Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

[Explanation—A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]

(2) Form of objection and provisions applicable thereto—Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

²[(3) Omitted]

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions-relating to appeal by indigent persons shall, so far as they can be made applicable apply to an objection under this rule.”

14. Though, number of judgments were cited before us, in view of what has

been authoritatively pronounced by Their Lordships in the Supreme Court in the case of ***Delhi Electric Supply Undertaking*** (supra), we conclude that even without such specific objection having been taken, this Court being the appellate Court, has all the power and jurisdiction to examine the correctness of finding recorded on Issue No.1. In the aforesaid decision, it was held-

17. "In our approach we can also draw strength from the provisions of rule 33 of Order 41 of the Code of Civil Procedure which is as under :

"33. Power of court of appeal. - The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees :

Provided that the appellate court shall not make any order under [section 35A](#), in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order."

18. This provision was explained by this court in [Mahant Dhangir v. Madan Mohan](#) 1987 Supp(SCC) 528 in the following words (page 534) :

"The sweep of the power under rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate court could also pass such other decree or order as the case may require. The words 'as the case may require' used in rule 33 of Order 41 have been put in wide terms to enable the appellate court to pass any order or decree to meet the ends of justice. What then should be the constraint ? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these : that the parties before the lower court should be there before the appellate court. The question raised must properly arise out of the judgment of the lower court. If these two requirements are there, the appellate court could consider any objection against any part of the judgment or decree of the lower court. It may be urged by any party to the appeal. It is true that the power of the appellate court under rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The court should not refuse to exercise that discretion on mere technicalities."

Therefore, even though, in the cross-appeal, the plaintiff may not have

specifically raised the issue regarding the correctness and legality of the trial Court's finding on Issue No.1, we are inclined to examine the correctness of the said finding.

15. The trial Court, in order to come to conclusion that the condition No.4 & 5 of Work Order dated 13-04-2011, Ex.P-10-C, was implicit in the agreement of supply between the parties, has relied upon the circumstances that the plaintiff did not raise any objection in writing to those conditions nor any steps were taken, but he accepted the same and proceeded to make supplies from time to time. Thus, on this conduct of the plaintiff, the learned trial Court has reached to the conclusion that the Clause 4 & 5 of the Work Order, Ex.P-10-C was implicit in the agreement of supply.

If we look into the Tender Notice Ex.P-2 and the terms and conditions stipulated therein, none of them mention clause 4 & 5 as contained in the Work Order dated 13-04-2011. It is not the case of the defendants nor borne out from any other reply, documentary evidence on record led by the defendants nor from the evidence, oral and documentary, led by the plaintiff that the plaintiff in its offer had agreed to such terms and conditions stated in Clause 4 & 5 of the Work Order.

16. Where notice inviting tender is issued, such notice does not constitute offer, but invitation to the offer. The tender submitted by the tenderer constitutes an offer. Ordinarily, in business transactions, either between the private parties or between a private party and any government institution, mode of acceptance of offer is by way of issuance of work order. However, if the work order contains certain terms and conditions, which are other than those contained in the offer, this partakes nature of conditional acceptance as envisaged under Section 7 of the Contract Act.

17. For ready reference, Section 7 of the Contract Act is reproduced as

under:-

7. Acceptance must be absolute.—“In order to convert a proposal into a promise the acceptance must—”

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.”

The provision, as aforesaid, in the first place, provides that in order to convert a proposal into promise, the acceptance must be absolute and unqualified. Sub clause(2) thereof provides that where the proposal prescribes the manner in which it is to be accepted and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance. Applying the said provision to the facts of the present case, work order issued by the defendants constituted a conditional acceptance, because clause 4 & 5 of work order did not form part of the offer made by the plaintiff while submitting his tender. Had the plaintiff not taken any exception to the same, but acted upon it, by proceeding to make supply, certainly it would have been a case of acceptance of the conditions of the work order by the plaintiff. But the present is not such a case. It is not only been specifically averred, but evidence has also led by the plaintiff that when he received the work order, conditions No.4 & 5 were not acceptable to him. In this regard, we may refer the specific pleadings made by the plaintiff in his plaint in para 10, which reads as under:-

“10. यह कि सामग्री प्रदाय आदेश दिनांक 13.04.2011 में निविदा शर्तों के विपरीत अचानक इन शर्तों को निहित करने पर वादी को आपत्ति हुई। फलतः दिनांक 13.04.2011 को उभयपक्ष ने एक करारनामा दिनांक 13.04.2011 निष्पादित किया जो श्रीकांत दुबे तत्कालीन सहायक आयुक्त एवं क्रेता अधिकारी, आदिवासी विकास, अम्बिकापुर एवं वादी द्वारा हस्ताक्षरित एवं निष्पादित थी। उक्त करार में सामग्री प्रदाय हेतु कुल 12 शर्त निर्धारित किये गये थे।”

In fact, in the Legal Notice, Ex.P-4, the plaintiff stated in para 10 thereof that upon receipt of work order dated 13-04-2011, the plaintiff had raised objection to the terms and conditions contained therein which led to execution of separate agreement in writing between the parties on the same date, containing specific terms and conditions of supply.

18. Rakesh Bansal, PW-1, the sole Proprietor of the plaintiff firm has also deposed in para 7 of his affidavit under Order 18 Rule 4 CPC that upon receipt of the Work Order dated 13-04-2011, he raised an objection on the terms and conditions thereof, due to which, separate agreement had to be executed between the parties on that date. In para 32 of his cross-examination also, this witness reiterates that he had raised an objection specifically against Clause 4 & 5 of the Work Order, Ex.P-10-C. The very fact that the despite issuance of work order, separate agreement was executed between the parties on the same date i.e. 13-04-2011 vide Ex.P-8-C, fortifies plaintiff's stand that upon plaintiff's objection, a separate agreement had to be executed between the parties. In the said agreement, Ex.P-8-C, it has been recited as below:-

“कलेक्टर (आदिवासी, विकास) अम्बिकापुर, द्वारा कार्यालयीन आदेश क्रमांक/2851/दिनांक 13.04.2011 के तहत स्कूल बैग (बस्ता) क्रय हेतु हमारी संस्थान को जो क्रय आदेश दिये गये हैं, उसके तहत मुझे निम्नांकित शर्तें मंजूर हैं :”

19. It says that “under the Work Order dated 13-04-2011, following conditions are acceptable”. Thereafter, as many as 12 terms and conditions of supply were expressly stipulated by way of written agreement and signed by both the parties. If the plaintiff had no objection to all the terms and conditions of the Work Order, there was no occasion for execution of separate agreement with such kind of stipulations. It is indeed highly improbable that in a business transaction, where a party is entering into agreement of supply of goods worth crores of rupees would surrender to the other party, a blanket authority to act

unilaterally to alter the terms and conditions of supply. The defendants have not come out with any other minutes of the meeting of negotiations between the parties signed by both the parties to lay credence to their submissions that the plaintiff accepted all the conditions of work order, including condition No.4 & 5. Therefore, the plaintiff's acceptance to the work order was not unconditional which ultimately led to a separate agreement for supply of goods. It therefore, cannot be accepted, as has been contended by the learned State counsel, that the plaintiff having accepted the conditional acceptance in the form of the work order was bound by the terms and conditions as contained in Clause 4 & 5 of the work order.

The learned trial Court has based its findings on the conduct of the plaintiff that he did not raise any objection in writing. However, there was no occasion for the plaintiff to raise further objection because the date on which work order was issued, as averred and deposed by the plaintiff, he had raised specific objection with regard to Conditions No.4 & 5 of the work order, which led to execution of separate agreement, that too on the same date itself.

If we read the agreement Ex.-8 as it is, it does not contain any express stipulation, much less, by implication, terms and conditions to infer that the parties had agreed to continue Conditions No.4 & 5 of the Work Order as one of the terms and conditions of supply. In fact, there was no occasion for the plaintiff to raise further objection, once the agreement in writing contains specific terms and conditions was executed by both the parties on that date itself.

20. In view of the aforesaid considerations, we are unable to uphold the finding recorded by the learned trial Court on Issue No.1 and reverse the same and hold that the Clause 4 & 5 of the Work Order did not constitute terms and conditions of supply under agreement Ex.P-8 either expressly or by way of implication.

21. Having held so, we consider it unnecessary to give our finding on Issue No.2, 3 & 4, because occasion would arise only in the event of holding that the clause 4 & 5 of the work order constituted terms and conditions of supply.

22. We shall now examine the correctness of the finding regarding readiness and willingness on the part of the plaintiff to perform his part of contract.

23. The work order, read along with agreement, required the plaintiff to supply 3,03,555 number of school bags within a period of 90 days. As we see from the conditions of the supply, Ex.P-8-C, school bags, required to be supplied, were to be prepared in accordance with the standards and specifications specified by the defendants. Moreover, Clause 11 required the plaintiff to submit quality certification from Indian Registrar of Shipping, Indrapuri, Bhopal (Madhya Pradesh).

24. It is well settled legal position that in order to claim decree of specific performance, the plaintiff is required to plead and prove that he was and is always ready and willing to perform his part of contract as mandated under Section 16(c) of the Specific Relief Act. Therefore, we have to first examine from the pleadings of the plaintiff as to whether the averments, required under the law, were made by him. In para 12 & 13 of the plaint, it has been averred that after receiving the purchase order, the plaintiff started making supply by 09-07-2011, the plaintiff had supplied 1,54,162 number of school bags. It has also been averred that after such supply, as per the work order, remaining quantity of school bags were also prepared. But, when the defendants started avoiding receipt of the balance quantity, the plaintiff approached the authority on 11-07-2011 along with the letter, which was refused to be accepted and thereafter, it was sent through courier. It had also been averred that on 12-07-2011, he submitted another letter in the office of the defendants, but supply of remaining school bags was refused. In para 14, it has been averred

that within 90 days, the defendants informed in writing that the plaintiff has not only prepared the required quantity of school bags, but has also got their qualities verified and is available with him, but the defendants did not accept and proceeded to issue modified work order dated 14-07-2011. Further, in para 17 & 18 of the plaint, it has been specifically averred that till 08-07-2011, 1,78,555 number of school bags, after physical verification, were delivered in the godown specified by the defendants. It has been further averred that on 08-07-2011, total 1,78,555 school bags were separately verified and taken before the defendants on 09-07-2011, out of which, in the lot of 30,000 school bags, only 29,162 number of school bags were accepted and remaining 838 school bags were refused. The remaining lot of 1,48,555 number of school bags was not accepted and refused by stating that school premises has been converted into temporary godown, which is actually hostel, as such, there is no sufficient space to accommodate bags, it could not be taken. It would thus be seen that the plaintiff has made very specific pleadings that he having already prepared school bags in required quantity as per the supply order, those school bags were got qualitatively tested and further that till 09-07-2011, entire remaining quantity was offered for delivery, out of which, only 29,162 school bags were accepted and remaining were returned. Not only that, specific averment is made to the effect that the plaintiff sought to contact the authorities with a letter in writing on 09-07-2011, which was refused, thereafter, the letter was sent through courier and lastly on 12-07-2011, a letter was again submitted in the office that plaintiff had prepared the bags and delivery of the same is being deliberately avoided. It be noted that the plaintiff were under an obligation to supply the entire quantity of school bags within a period of 90 days, which period was to expire on 12-07-2011.

25. Rakesh Bansal, PW-1, the plaintiff himself has proved his readiness and willingness by deposing in para 8, 9, 10, 15, 18 & 20 of his affidavit under Order

18 Rule 4 CPC that after receipt of work order and execution of agreement, substantial quantity of school bags i.e. 1,54,162 number of school bags were already supplied before 09-07-2011, it was averred that remaining quantity was not only prepared, but it was also got qualitatively tested. It was also stated on affidavit that on 09-07-2011, when balance quantity of school bags i.e. 1,78,555 was taken to the office of defendants, out of which, only 29,162 school bags were accepted and remaining bags were refused, whereafter the plaintiff submitted a letter on 11-07-2011 and upon being refused, it was sent through courier followed by another letter dated 12-07-2011, which was the last date for supply. As far as another letter dated 12-07-2011 is concerned, the same does bear acknowledgment of receipt and it was not disputed by the office of the defendants. This was the last date for the plaintiff to complete supply. In that letter dated 12-07-2011, Ex.P-23, it was clearly written that the plaintiff had not only supplied the school bags, but has also got the bags prepared, qualitatively tested and he himself had gone for supply.

26. In his cross-examination, the plaintiff has further averred in para 34 of his evidence that on 09-07-2011, in the afternoon, he himself had taken the bags for delivery to the godown in the premises of Girls School, where a Chowkidar was found and Store Keeper was not available and Chowkidar accepted only 29,162 number of school bags and remaining were returned. He has been given suggestion that at the time of delivery, except Chowkidar, no other person was present there. The plaintiff has, however, in para 35 to 37 of his cross-examination, averred that the Chowkidar had counted the bags and on 09-07-2011 itself, certifications was got done by the plaintiff, which were also handed over, but the Chowkidar did not give any acknowledgment. He has specifically averred that on 09-07-2011, delivery of 1,78,555 bags was sought to be effected, but only a part of it was accepted and remaining were returned. The plaintiff's statement in his evidence that he had taken the entire quantity of

1,78,555 bags for delivery in the godown on 09-07-2011 has remained uncontroverted.

27. The Transporter through which, school bags were sought to be supplied to godown on 09-07-2011 has also been examined by the plaintiff as Plaintiff Witness No.4, who has stated in his affidavit under Order 18 Rule 4 CPC that he had supplied school bags on different dates. In para 3 of his affidavit, it is stated that on 09-07-2011, 9 trucks, whose numbers have also been stated, approximately 1,78,755/- school bags were brought to the godown, out of which, only about 29,000 school bags were received and rest of the bags was not allowed to be unloaded, whereupon remaining school bags were brought back to the factory situated at Jawahar Market and unloaded. In his cross-examination, an attempt has been made to impeach his credibility by eliciting that he has not produced any register or any documentary evidence of receipt of transportation charges, if any, received from the plaintiff. The witness has, however, been given suggestion, in which, it is admitted that the transportation was made locally, therefore, entries have not been made in the register. However, to this witness also, no suggestion has been given. The statement of this witness that on 09-07-2011, he had brought 1,78,555 school bags for being unloaded in the godown of the defendants, has remained uncontroverted.

28. The plaintiff, Rakesh Bansal, PW-1 has very clearly deposed in his evidence that in the godown, where the remaining bags were taken for supply on 09-07-2011, Chowkidar was found present and upon delivery sought to be effected, he only accepted 29,162 bags and remaining were returned. Apart from this evidence, all other evidence remains uncontroverted. We find that the defendants have not examined the said Chowkidar in rebuttal of plaintiff's evidence and case that on 09-07-2011, balance quantity of school bags were sought to be delivered. Not only this, no register, maintained in the godown by the defendants, has been produced during trial. The defendants are government

functionary and conduct all business in the government offices/godown which ordinarily maintain records, note sheets, files and registers. The godown register of this case has also not been produced. Therefore, weighing on scales of probabilities, the plaintiff's case that though entire balance quantity of school bags i.e. 1,78,555 were sought to be delivered in the godown on 09-07-2011, but only 29,162 bags were accepted and remaining were returned without being unloaded, appears to be more probable as compared to the defendants version that the plaintiff neither approached the defendants nor their godown along with the balance quantity of the school bags.

29. The finding recorded by the trial Court with regard to readiness and willingness on the part of the plaintiff is also sought to be assailed by submitting that the plaintiff has failed to aver and establish by cogent evidence that the bags prepared by him were qualitatively tested and inspected on or before 08-07-2011. According to the State counsel, last two certificates of Indian Register of Shipping, Ex.P-19-C and P-20-C contained the dates as 178/- 07/2011 which means that the plaintiff did not have relevant certificates in his possession before 12-07-2011 and thus, plaintiff's case that he attempted to deliver the balance quantity of school bags on 09-07-2011 along with quality certificates is liable to be disbelieved.

We find that in the two certificates, Ex.P-19 and P-20, in the blank space for date, it has been typed as "178/07/2011. Certainly, this creates a doubt with regard to date, on which, this certificate was issued, because it neither bears 17th nor 8th of July as the date of issuance but then, in both the documents, a clear recital has been made that the material was inspected on 08-07-2011 and found satisfactory. In Ex.P-19, 30,000 Nos. of school bags have been certified as having been inspected on 08-07-2011 and found satisfactory. In the other certificate, Ex.P-20, the date of inspection has been written as 08-07-2011 and the quantity inspected and accepted having been found satisfactory as stated

1,78,555. The two documents are in fact, two certificates in respect of remaining quantities which were not accepted. There is no dispute between the parties that the quality testing was done by the Expert Officials based on random checking. Therefore, from these two documents, there being no dispute, with regard to the noting made therein that the certification/inspection was made on 08-07-2011 and found satisfactory the doubt, if any, is resolved in view of the categorical evidence of Abhishek Sharma, PW-6, a Private Auditor, engaged by the Indian Registrar of Shipping Company, Bhopal, the agency for quality inspection, fixed by the respondents themselves. In his evidence, he has deposed that for inspection of bags, he had come to Ambikapur and had issued Inspection Release Notes, Ex.P-16-C, Ex.P-17-C, Ex.P-18-C, Ex.P-19-C and Ex.P-20. He has proved his signatures in those documents. He has further deposed that he had come to Ambikapur on 07-06-2011, 20-06-2011 and 08-07-2011 and after inspection of bags, the notes were submitted before the Collector, Surguja. He has further deposed that bags are as per the standard parameters. He has also verified the number of bags tested by him in different lots. In his cross-examination, he states that the inspection was carried out on the basis of random selection of bags on different lots while in para 9 & 13, he admits that Ex.P-19-C and Ex.P-20 contain recital of 178/07/2011. In para 14 of his evidence, he denies that Ex.P-20 was issued on 17-07-2011. He reiterates that the same was issued only on 08-07-2011 and mentioning of 178/07/2011 could be typographical mistake. He has denied suggestion that by the influence of plaintiff's firm, he has wrongly mentioned the date as 08-07-2011. Abhishek Sharma, PW-6 is the authorized Inspector of the quality test agency fixed by the defendants. The defendants have not come out with any pleading, much less evidence, that they have rejected the quality testing certificates issued by Abhishek Sharma, PW-6. In any case, he has not been given any suggestion that no inspection was carried out on 08-07-2011. Thus, from the plaintiff's

reliable evidence, it is proved that the last inspection was done on 08-07-2011. Once Abhishek Sharma, PW-6 has emphatically stated in his evidence which is reliable, the doubt, if any, with regard to the date of issuance of certificates must be resolved in favour of the plaintiff and not the defendants that the certificates were actually issued on 08-07-2011.

30. In view of the above consideration, we did not find any error on the issue of finding recorded by the learned trial Court in favour of the plaintiff that he was ready and willing to perform his part of contract. Lastly, the claim of the plaintiff with regard to damages has been rejected by the Court below as the plaintiff has been granted a decree of specific performance along with interest @ 10% on the delayed payment upon supply of remaining school bags. The plaintiff sought decree of specific performance and also claimed damages only as alternative relief, if specific performance is not granted. Therefore, the Cross appeal of the plaintiff also deserves rejection/dismissal.

31. In the result, we do not find any ground to interfere with the impugned judgment and decree passed in favour of the respondent-plaintiff and against the appellant. Judgment and decree passed by the learned trial Court is affirmed. Accordingly, the appeal and cross appeal both are dismissed. The parties to bear their respective costs of appeal. Let appellate decree be drawn accordingly.

SD/-
(Manindra Mohan Shrivastava)
JUDGE

SD/-
(Gautam Chourdiya)
JUDGE