

**IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Sugato Majumdar

CS-COM/603/2024
[OLD NO CS/479/2000]

NIRANJAN PIPALIA
VS
HINDUSTAN STEEL WORKS CONSTRUCTION LTD.

For the Plaintiff : Mr. Anuj Singh, Adv.
Ms. Amrita Pandey, Adv.
Mr. Ghanshyam Pandey, Adv.

For the Defendant : Mr. Mohit Gupta, Adv.
Mr. Shashwat Nayak, Adv.
Mr. Santosh Kr. Ray, Adv.
Ms. Antalina Guha, Adv.

Hearing concluded on : 04.04.2024

Judgment on : 10.04.2024

Sugato Majumdar, J.:

This is suit for damages alleging breach of contract along with consequential reliefs.

Nutshell of the plaint case is that the Plaintiff is carrying on business of manufacture and dealing in scientific and process instruments as sole proprietor under the name and style of M/s Electro Scientific Industries having registered office at 54B, Harish Chatterjee Street, Kolkata – 700026, outside the jurisdiction of this Court. The Defendant is a public limited company, being an undertaking of Government of India, registered under the Companies' Act 1956, having registered office at 1, Shakespeare Sarani, Kolkata – 700071, within jurisdiction of this Court. The Defendant is engaged in construction of steel plant, sinter plant, raw material handling plant and other works and has a factory at Durgapur, West Bengal.

In the month of November 1991, the Defendant sought offers from different suppliers including the Plaintiff for supply of certain scientific and process instruments to the Defendant. Pursuant to a negotiation, held at the registered office of the Defendant, the Plaintiff made an offer in writing for supply of the following instruments:-

1. Calorific value meters
2. Ultrasonic level detectors and ultrasonic level transmitters
3. Nucleonic level measurement switch
4. Bulk flow detector
5. Moisture measurement nucleonic type moisture gauge for coke with density compensation
6. Two wire non-contact Thermometer

The said offer was contained in a letter dated 27.11.1991 issued by the Plaintiff. In terms of letter dated 19.11.1992, the Defendant placed order for supply of five out of the six instruments, abovementioned, on terms and conditions contained in the

purchase order. The Plaintiff accepted the terms and conditions of the purchase order contained in the letter dated 19.11.1992 in terms of its letter of acceptance dated 20.11.1992. Subsequently, by a letter dated 26.11.1992, the Defendant terminated the contract, so arrived at between the parties.

Aggrieved by such termination of contract, the Plaintiff filed an application under Article 226 of the Constitution of India before this Hon'ble Court. In terms of the judgment and order dated 08.09.1993 this Court quashed the termination of contract. However, while quashing the purported termination this Court was pleased to accept the revised offer made by the Plaintiff for supplying the said goods at a total price of Rs.3,50,00,000/-, after taking consideration the concessional import duty in respect of the ordered goods. An appeal was preferred by the Defendant against the said Order dated 08.09.1993 passed by the Single Bench. During pendency of the appeal it transpired that the Defendant wrongfully procured cancellation of the principal order placed on the Defendant by the Steel Authority of India Limited which, according to the Plaintiff was made in order to frustrate the writ application. By the order dated 27.11.2000, the Division Bench disposed of the appeal as the same has become infructuous with a liberty to the Plaintiff to institute the suit claiming loss and damages.

It is averred in the plaint that the Plaintiff has suffered loss and damage to the extent of Rs.2,29,58,598.80p. on account of termination of the contract, calculating on the basis of the original term. The Plaintiff made an alternative claim of damages to the extent of Rs.2,08,97,420/- calculating on the basis of the revised purchase order. The particulars of loss claimed by the Plaintiff in respect of initial purchase order:-

Particular

i)	Total value of Purchase order (exclusive of sales tax, packing and forwarding charges)	...	Rs.3,69,06,858.80
ii)	Total cost for procuring instruments also admitted by the Defendant in its pleading before this Hon'ble Court.	...	Rs.1,59,48,260.00
iii)	Loss of profit (I) – (II)	...	Rs.2,09,58,598.00
iv)	Additional expenses incurred by the Plaintiff	...	Rs.20,00,000.00
	Total (iii) + (iv)	...	Rs.2,29,58,598.00

The particulars of loss claimed by the Plaintiff in respect of the revised purchase order:-

Particular

i)	Total value of Purchase order	...	Rs.3,50,00,000.00
ii)	Total cost for procuring instruments on the basis of revised customs duty	...	Rs.1,18,32,580.00
iii)	Loss of profit (I) – (II)	...	Rs.1,88,97,420.00
iv)	Additional expenses incurred by the Plaintiff	...	Rs.20,00,000.00
	Total (iii) + (iv)	...	Rs.2,08,97,420.00

The Plaintiff, therefore, instituted the instant suit claiming for a decree of Rs.2,29,58,598.80p. or alternatively for Rs.2,08,97,420/-; alternatively an order for inquiry into loss and damage; interest at a rate of 25 % per annum along with other reliefs.

The Defendant contested the suit by filing written statement denying all material allegations. The standard defense taken by the Defendant is that the suit is barred by law of limitation, principles of acquiescence, waiver, estoppel and that the suit does not disclose any cause of action. The positive case made out by the Defendant is that the Plaintiff represented to be the sole local agent of one Land Infrared Limited, U.K. The Plaintiff also represented to the Defendant that the Plaintiff was the Indian agent of other foreign principals and was duly registered with concerned authorities in India. It subsequently transpired to the Defendant that the Plaintiff was not the sole local agent. The said M/s Land Infrared Limited, U.K. referred the name of one M/s Hozur Instruments at Madras to the Defendant. On further inquiries it transpired to the Defendant that the Plaintiff was charging exorbitantly high price in respect of the instruments and/or equipment. The Plaintiff, from the very beginning, had formed a cartel among the tenderers to enable the Plaintiff to quote such exorbitant price which was too high than the actual price of the instruments, tendered for. Offer given by the Plaintiff for two sets of Infrared Pyrometers was Rs.26.50 lakhs, whereas the quotation from M/s Hozur Instruments, at Madras who were the exclusive distributors of M/s Land Pyrometers, U.K. was for a sum of Rs.4.10 lakhs showing thereby that the Plaintiff had quoted more than five times of the actual price. Once the Defendant ascertained that the price quoted by the Plaintiff was exorbitantly high in respect of the items rejected the offer made by the Plaintiff. It was further informed by the Defendant that the Plaintiff did not have

requisite registration with the concerned authorities as had been represented by the Plaintiff to the Defendant. The Defendant made an enquiry in course of which the representatives of the Defendant left for Germany on 20th November, 1992 to find out actual price of the equipment. It came to the knowledge of the Defendant that the Plaintiff had made misrepresentation of the price of the instruments which were exorbitantly high and such instruments could have been procured by the Defendant at much lower rate from the foreign manufacturers. On getting such information the Defendant forthwith cancelled the contract. It came to the knowledge that the Plaintiff did not possess the requisite registration with the concerned authorities to act as Indian agents of foreign principals, contrary to the representation made by the Plaintiff. The Department of Expenditure, Ministry of Finance, Government of India by its letter dated 22nd December, 1992 informed the Defendant that the Plaintiff was not registered as Indian Agent of various foreign principals particularly, in terms of Clause 5 of Circular No. F.23 (1) – E2 (A)/89 dated 31st January, 1989. It is further stated in the written statement that the Defendant approached the Plaintiff several times to indicate the breakup of the original price to be paid by them to the foreign suppliers along with payable customs duty, agents commission in order to ascertain the reasonableness of price so that the Defendant would get benefit of the amount receivable from M/s Steel Authority of India Ltd., Durgapur Steel Plant. But the Plaintiff avoided the same. Thus, according to the Defendant, the Plaintiff made misrepresentation to the Defendant that he was registered Indian agent of foreign principal with an oblique and ulterior motive of by-passing the policy of the government not to appoint any middleman for procuring instrument from foreign principals. According to the Defendant, the contract between the parties where

vitiated by fraud and misrepresentation and the Defendant is justified in avoiding the contract. According to the Defendant, the suit should be liable to be dismissed.

On the basis of rival pleadings following issues were framed on 26.09.2002:-

- i. Is the suit maintainable?
- ii. Is the suit barred by limitation?
- iii. Was the Defendant justified in terminating the contract concluded on November 20, 1992 by its letter dated November 26, 1992 as alleged in paragraph 4(h) of the written statement?
- iv. Did the Defendant wrongfully and illegally terminate the contract as alleged by the Plaintiff?
- v. Was the purported contract concluded on November 20, 1992 vitiated by fraud and/or misrepresentation as alleged by the Defendant in paragraph 4(i) of the written statement?
- vi. Has the Defendant caused loss and damage to the Plaintiff by the wrongful and illegal termination of the agreement and thereafter procured cancellation of the parent contract by the Steel Authority of India Limited as alleged by the Plaintiff in paragraph 12 of the plaint?
- vii. Is the Plaintiff entitled to get a decree for Rs.2,29,58,598.80/- or in the alternative for Rs.2,08,97,420/- as claimed in the plaint?

viii. Is the Plaintiff entitled to get interest as claimed against the Defendant?

ix. To what other relief, if any, the Plaintiff is entitled?

Both the parties adduced oral and documentary evidences.

Issue no. 1 and 2 are taken up together.

It is argued by the Learned Counsel for the Defendant that the Plaintiff has claimed reliefs which are beyond the scope of liberty granted by the Division Bench in terms of the Order dated 27/11/2000 passed in A.P.O. No.909 of 1993. It is argued that the Plaintiff is bound to maintain the instant suit strictly in the light of the liberty granted by the Division Bench. Therefore, according to the Counsel for the Defendant, the question of correctness of termination cannot be called into question anymore; since propriety of cannot be tested, there is no question of awarding any damages to the Plaintiff. According to the Learned Counsel, finding of the Division Bench has become *res judicata* and/or *issue estoppel*. The only issue that can be decided by this Court is the issue of whether or not there was “procured termination” by the Steel Authority of India. If it is so, then only the question of awarding damages can be gone into, according to the Learned Counsel. It is argued that the suit is not maintainable.

Per contra, the Learned Counsel for the Plaintiff argued that it transpires from the Order passed by the Division Bench dated 27/11/2000 that the Division Bench did not have jurisdiction to adjudicate claims of damages or losses suffered by the Plaintiff, which requires taking of evidence. The Plaintiff was, therefore, granted liberty to institute the suit within time frame. While passing the Order dated

27/11/2000, the Division Bench did not limit any power of the suit court for adjudication of any claim. Since the suit is for damages for breach of contract, propriety of termination should be considered mandatorily in the adjudicatory process, as submitted by the Learned Counsel for the Plaintiff. Furthermore, according to the Learned Counsel for the Plaintiff, this point was neither raised in the written statement nor any suggestion was given in course of cross-examination of the plaintiff's witness. Hence, the contention could not be raised at the time or argument, according to the Learned Counsel for the Plaintiff.

The Division Bench, in terms of the Judgment dated 27/11/2000 observed that there is a debatable question whether S.A.I.L. had really revoked the order issued in favour of the present Defendant (Appellant therein). It is a matter of evidence. Whether cancellation of contract by S.A.I.L. at the instance of the present Defendant or not and whether the present Plaintiff has suffered any damages cannot be decided without evidence. Such exercise cannot be undertaken in extra ordinary writ jurisdiction. It was further observed that only civil court in a suit where both the parties can lead their evidence. The issues raised in the suit was neither restricted nor limited by the Division Bench. It is manifest that the Division Bench left it open to the civil court to decide the issues on the basis of evidence adduced by the parties. By no stretch of imagination, it can be said that the issues, raised herein, are barred by the principles of *res judicata* or *issue estoppel*, nor can it be said the instant suit is not maintainable in view of the Order of the Division Bench. I disagree with the arguments made by the Learned Counsel for the Defendant. In view of this Court, the suit is maintainable.

So far as, the issue of limitation is concerned, the Defendant terminated the contract in terms of a letter dated 26.11.1992. Following termination, the Plaintiff challenged the order of termination invoking writ jurisdiction of this Court by filing a writ petition for issuance of appropriate writ. Subsequently, the writ petition was disposed of in terms of order dated 08.09.1993. The Defendant preferred an appeal against the said order. The appeal was ultimately disposed of in terms of Order dated 27th November, 2000 observing that disputes raised by the Plaintiff requires evidence which could not be adduced before the High Court in exercise of writ jurisdiction. It was also made clear that the Plaintiff could file a suit for damages within three months from the date of passing the said order dated 27.11.2000. The suit was filed immediately thereafter within the time prescribe. Therefore, the suit is not barred by law of limitation.

These two issues are decided in favour of the Plaintiff.

Issue no. 3, 4, 5 & 6 are taken up together since they are inter-related.

As mentioned above, the plaint case is that the contract between the parties was terminated by the Defendant in terms of the letter dated 26.11.1992 (Ext.F). The Defendant took the plea of misrepresentation made by the Plaintiff, quoting exorbitantly high price as the grounds off cancellation/rescission of the contract.

Arguing on Issue no. 3, the Learned Counsel for the Plaintiff submitted that the plaintiff's witness referred to the documents that it was Defendant with whom prior to conclusion of contract dated 19.11.1992 one of the Plaintiff's foreign suppliers, namely, Laboratorium Prof. Dr. Berthold GmbH & Co. shared a commercial relationship. Accordingly, the Plaintiff was acting with the foreign

suppliers on principal to principal basis. Upon receipt of the purchase order from his customer, the Plaintiff called upon its foreign suppliers to supply the goods and after procuring the same, the Plaintiff would further supply the goods to the Defendant. There was no agency relationship. He further submitted that during cross-examination, when the defendant's witness was shown Ext.-C, being the purchase order dated 19.11.1992 and asked if it were apparent from the documents mentioned in Sl. No. 5 to 14 of the Judges' Brief of Document, the Plaintiff had indicated, while exchanging these documents whether the Plaintiff represented himself as an agent of the foreign companies; but the defendant's witness could not confirm allegation of fraud and misrepresentation against the Plaintiff. Hence, the allegations of fraud and misrepresentation are baseless, according to the Learned Counsel for the Plaintiff.

Next arguing on the Issue No.4 the Learned Counsel for the Plaintiff submitted that the Defendant terminated the contract on the ground of fraud and misrepresentation. But the termination letter dated 26.11.1992 does not contain these allegations. Nor these allegations were raised in the Writ Petition filed by the Plaintiff. Referring to **M/s Z. Plus Surakya Seva, Bhubaneswar Vs. State of Odisha & Ors. (AIR 2023 Or. 82)** the Learned Counsel submitted that where the concerned authority awarding the contract had terminated the contract without ascribing any reason assigning reason in subsequent pleading or explanation in subsequent pleading is not acceptable. A termination order of contract without reason is liable to be set aside. The Learned Counsel also referred to a decision **Shivenari Canteen Services Vs. State of Telengana (MANU/TL/0678/2023)** in support of his contention that order of termination of contract by an authority must contain reason, in absence off which the order of

termination is liable to be quashed. The Learned Counsel also referred to the decision of the Supreme Court of India in **Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors. [(1978) 1 SCC 405]** to buttress his argument.

Arguing on Issue No. 5 & 6, the Learned Counsel for the Plaintiff referred to the illustration (h) of Section 73 of the Indian Contract Act, 1872 which conceived a similar circumstance as in the present case. As submitted, the Plaintiff was to supply the Defendant goods at a consideration price of Rs.4,14,09,495.45p. which was apparently higher than that at which he could have procured the goods from his foreign suppliers. When the Defendant had wrongfully refused to receive the goods by terminating the contract, the Plaintiff became entitled to receive from the Defendant such sum being the difference between the contract price of goods, to be supplied, and the sum which the Plaintiff could have obtained on delivery. The Learned Counsel referred to the principle of law governing award of damages as adumbrated in **Kailash Nath & Associates Vs. D.D.A & Anr. [(2015) 4 SCC 136]** and **Excel Cardamom Company Vs. Spices Trading Corporation Ltd. [2007 (97) DRJ 257]**.

Next the Learned Counsel for the Plaintiff argued that under Section 56 of the Sales of Goods Act, 1930, the Plaintiff is entitled to claim damages for wrongful refusal to accept goods by the Defendant.

Per Contra, the Learned Counsel for the Defendant argued firstly, the Division Bench of this Court, in the order dated 27.11.2000 categorically held that the question of termination of the contract cannot be gone into in view of the fact that the same was become infructuous in light of the termination of the parent contract

between the Defendant and S.A.I.L. Termination of contract by S.A.I.L. is beyond the control of the Defendant. Termination of the parent contract by S.A.I.L. rendered the purpose, scope and performance of the present contract infructuous and frustrated under Section 56 of the Indian Contract Act, 1872 which does not entitle the Plaintiff to any damages.

Secondly, it was argued by the Learned Counsel for the Defendant that the concluded contract executed by the parties on 19.11.1992 was vitiated by fraud and misrepresentation. The requirement for obtaining and/or procuring instrument from a foreign supplier, being the subject matter of the contract, it is mandatory that the contractor must be an authorized agent of the foreign supplier. The Learned Counsel referred to an Office Memorandum dated 31.01.1989 issued by the Government of India. The Plaintiff at all material point of time represented himself to be an authorized agent of the foreign suppliers. Such representation being false, frivolous and misrepresentative, entitled to the Defendant to avoid the contract. It is further argued that although the Plaintiff took a plea of ignorance of such Office Memorandum dated 31.01.1989. The Plaintiff's defense is not tenable in view of the principle of *ignorantia juris non excusat*.

Thirdly, it is argued by the Learned Counsel for Defendant that the Plaintiff has not proved his case of "procured termination", though the Plaintiff has pleaded the same in Para.12 of the plaint. The Plaintiff has not posed a single question or suggestion in cross-examination of D.W. pertaining to "procured termination." On account of failure to cross-examine the D.W. on this issue, the Plaintiff has failed to prove his case. The Learned Counsel referred to the judgment passed by Division Bench of this Court in **A.E.G. Carapiet Vs. A.Y.Derderian (AIR 1961 Cal.**

359), to argue the effect of failure to cross-examine a witness on a particular point. It is argued that the Plaintiff must be taken to accept the Defendant's account in its entirety as an effect of failure to cross-examine.

Fourthly, it is argued by the Learned Counsel for the Defendant that the Plaintiff has not proved damages suffered. Referring to **Bharat Coking Coal Ltd. Vs. L.K. Ahuja [(2004) 5 SCC 109]**, it is argued that the Plaintiff claiming loss of profit has to prove that had he received the amount under the contract, he could have utilized the same for some other business in which he could have earned profit. No case is made out by the Plaintiff. Referring to **M/s Unibros Vs. All India Radio [2023 SCC OnLine SC 1366 (Para.9)]** it is submitted by the Learned Counsel for the Defendant that to prove loss of profit, the claimant, namely, the Plaintiff herein, has to prove that there has delay in completion of the contract; such delay is not attributable to the claimant; the claimant's status as an established contractor handling substantial projects and that credible evidence is to be adduced to substantiate the claim of loss of profitability. The Plaintiff, herein, has failed to prove any of the requisites. Neither any evidence was adduced, nor any argument was made on behalf of the Plaintiff resulting in frustration of his claim. Further argument was advanced that the contract was terminated within six days of its execution. Therefore, there was no delay in contract. The Learned Counsel also referred to the observations made in **Batliboi Environmental Engineers Ltd. Vs. Hindustan Petroleum Corporation Ltd. [2023 SCC OnLine SC 1208]** to fortify his argument.

Fifthly, it is argued by the Learned Counsel for the Plaintiff though argued that he is entitled to claim damages under Section 56 of the Sale of Goods Act, 1930,

such argument is beyond the scope of pleading, as no such case is pleaded in the plaint. Referring to the questions put in cross-examination to the Plaintiff, it was argued that the Plaintiff had merely placed orders for the instruments to the foreign suppliers, neither any money was paid by the Plaintiff to the foreign suppliers, nor were these physically procured by the Plaintiff, nor any letter of credit was opened. Goods were not ready to delivery. Therefore, according to the Learned Counsel, the Plaintiff is not entitled to any damages.

I have rival submissions.

The contract was terminated by letter dated 26.11.1992 which is Ext.F. The cause of action of the present suit is based on this termination and correspondences, negotiations preceding such terminations. In other words, formation of contract and its subsequent termination on 26.11.1992 as well as consequent damages, as averred, are the subject matter of the suit. Parent agreement between Steel Authority of India Limited and the Defendant came to an end at a later date which the Plaintiff described that procured termination. Whether procured or not that termination was not a cause of termination of contract between the present parties because the parent agreement came to an end at a later point of time. The Defendant's counsel argued that the contract of subject matter of the present suit is frustrated because of end of the parent contract but that argument is absolutely baseless since the present contract was terminated at much earlier point of time. In the present suit this Court is invited to consider, in exercise ordinary civil jurisdiction, whether the termination is justified or amounts to breach of contract and whether the Plaintiff is entitled to any damages for such breach of contract. This Court has no scope to consider specific performance of this one. Had specific performance of contract been the point

of consideration, then the fact of end of contract between S.A.I.L. and the Defendant would have been relevant. Neither specific performance of contract is a case herein nor the same is specifically enforceable in view of provisions of Section 14 of the Specific Relief Act, 1963. Therefore, there is no scope to consider arguments based on or related to termination of the parent contract between Steel Authority of India Limited and the present Defendant.

The Plaintiff alleged that the contract is wrongfully terminated whereas the Defendant alleged that the contract is vitiated by misrepresentation, therefore, avoided. Plaintiff's evidence established that there was quotation of price, offer made by the Defendant and subsequent acceptance of the offer by the Plaintiff. In terms of letter dated 19.11.1992 (Ext.C) the Defendant awarded the contract to the Plaintiff. In terms of letter dated 24.11.1992 (Ext.E) the Plaintiff conveyed formal acceptance of the offer. The terms and conditions as well as price were negotiated between the parties. It is also in evidence and not in dispute that the Defendant terminated the contract so concluded between the parties.

Once it is established that there is a concluded contract now it is for the Defendant to establish that the contract was vitiated with misrepresentation. Section 101 of the Indian Evidence Act, 1872 states:

Section 101. Burden of proof *Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 103 of the Indian Evidence Act, 1872 states:

Section 103. Burden of proof as to particular fact *The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless, it is provided by any law that proof of that fact shall lie on any particular person.*

In **Alva Aluminium Ltd. Vs. Gabriel India Ltd. [(2011) 1 SCC 167]** it is clarified that a heavy duty lies upon the party who seeks to avoid a contract on the ground of misrepresentation fraud or coercion to prove any such allegation. Section It is also observation of the Three Judges Bench of the Supreme Court India that onus is upon the person alleging misrepresentation to prove it in **Kuppuswami Chettiar Vs. A.S.P.A. Arumugam Chettair & Anr. (AIR 1967 SC 1395)**.

In order to discharge the burden of proof the Defendant relied upon evidence adduced by the Plaintiff as well as evidence adduced by the Defendant. The plaintiff's witness was cross-examined by the Defendant.

In the plaint itself the Plaintiff nowhere claimed that he was an agent of the foreign companies. In course of cross-examination, P.W. 1, namely, the Plaintiff stated that the Plaintiff is a dealer of instruments and importers of various scientific instruments. It is further stated by the P.W. that he never claimed that he was an agent nor did he say that the company is registered with any Government body. In course of cross-examination, suggestions were given by the Defendant that all along, in course of negotiations, the Plaintiff represented to be an agent or legal representative of a foreign principal which he denied. Again, in reply to the question put to Plaintiff, being question no. 180 is stated that he was working as their agent. Answers of the Plaintiff to cross-examination shows inconsistency. Once the Plaintiff stated that he was an agent whereas on the other breath he stated he was not. Writ

Petition filed by the Plaintiff is marked as Ext.H. In paragraph 3, it is stated that the Plaintiff was carrying out business as local representative or agent of several companies who are market leaders in their respective fields of manufacture and dealers of scientific instruments for example, Fluid Data Ltd. Crayford, Kent England; B.G. & G. Berthold, Germany and Endress Jauser GmbH, Germany. The word foreign principal was used in the writ petition itself. It was stated in the Writ Petition:

“Your petitioner in its aforesaid business is also the local representative/agent of several foreign companies who are market leaders in their respective fields of manufacture and dealers of scientific instruments. For example, Fluid Data Ltd., Crayford, Kent England; B.G & G. Berthold, Germany and Endress Jausar GmbH, Germany.”

Specific question was put in cross-examination on this averment made in para.3 of the Writ Petition. The Plaintiff answered affirmatively that he did represent before this Court that he carried on business as a local representative or agent. Defendant's witness, in course of examination-of- chief, stated that as far as his recollection goes it was the case of the department that the Plaintiff all through represented that they were sole agent for the import of equipment in India and based on that consideration, arrangements were made by the Defendant company. In course of cross-examination, the Defendant's witness referred to various correspondences made between the parties where the Plaintiff referred to foreign companies as principal. It was further stated by the Defendant's witness that Plaintiff represented himself to be an agent of the principal foreign suppliers. Ext. R is a letter dated 27.01.1992 written by M/S Electro Scientific Industries to the Defendant wherein it is

specifically mentioned in respect of inspection that the Plaintiff will furnish guarantee papers received from 'our principal in Germany'. Ext.G is also used the word "our foreign principal".

Evidence shows that on various occasions and even before this Court, the Plaintiff represented himself as an agent of the foreign suppliers. The correspondences with the Defendant bear testimonies that the Plaintiff represented himself as an agent of a foreign principal. Deposition of the Plaintiff and cross-examination reveals a contradictory stand as stated above. The Defendant's witness very clearly stated that he could remember that the Plaintiff represented himself as an agent. No specific question was put or suggestions were given challenging the said instrument which, according to the principal laid down in **Carapiet's** case is deemed to be admitted. It is manifest from evidence adduced by the Defendant as well as the evidences of the Plaintiff himself that the Plaintiff represented himself or his business concern as agent/representative of the foreign companies which he later on denied. On appreciation of evidence this Court is known that the Defendant is able to discharge the burden of proof that the Plaintiff represented itself as an agent of foreign principal from whom he will procure instrument as agent and supply to the Defendant. The issue, therefore, is whether this representation is tantamount to misrepresentation or innocent misrepresentation and whether such representation initiated the contract.

It is the policy of the company, as deposed by Defendant's witness to procure for instruments from the agents of the foreign principals. The Plaintiff, on the basis of representation that it is an agent of foreign principal, charged exorbitant price. When verified from the foreign principal, the said foreign companies referred to

some other concern who quoted a lesser price. The tender of the Plaintiff was accepted as the lowest and in course of negotiation the Plaintiff represented as an agent of foreign principal. This affected consideration of price. The Defendant's witness, in course of cross-examination produced a notification by way of Office Memorandum and another letter, in continuation of the former, dated 10/12/1990, issued by the concerned ministry of Government of India prescribing norms to be followed one of which is for import of articles manufactured abroad which needs to be specially imported. In that case preference should be given to India based establishments specially "authorized Indian agents". These documents were marked as Ext.1. The Defendant's witness was cross-examined on these documents but no question was put to the effect that the Plaintiff was not aware of or apprised of the documents. It cannot be heard, therefore, that the Plaintiff was not aware of the documents containing norms of import of foreign made machineries. The Defendant relied upon the representation of the Plaintiff, as evidence shows, to place order in terms of the norms. This is not innocent misrepresentation which could be ignored. It is not the provision of Indian Contract Act that once a concluded contract is formed it cannot be rescinded if vitiated by misrepresentation. It is also not in the Indian Contract Act that very strong reasons are necessary for rescission of contract in the instance circumstance the Defendant exercises right to rescission of contract and avoided the same. Only thing which a complaining party may get if a contract is wrongfully terminated or there is a breach of contract, damages for such breach in a civil suit. Citations made by the Learned Counsel for the Plaintiff regarding reason for the termination of contract were decided on its own facts and circumstances and under different law and is not applicable here.

Section 18 of the Indian Contract Act 1872 defines misrepresentation in the following words:

“18. “Misrepresentation” defined.— *“Misrepresentation” means and includes—*

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage of the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.”

Clause (1) is very clearly applicable in the instant case. The Plaintiff made representation that the later is agent of foreign companies, as established from evidences discussed above, which is positive assertion not warranted by the information of the person making it and the same is not true, as emanates from testimony of the Plaintiff. Once a contract is found to be vitiated by misrepresentation, it is voidable at the option of the innocent party in terms of section 19 of the Indian Contract Act, 1872.

For reasons stated above, this Court comes to the conclusion that the concluded contract was vitiated by misrepresentation made by the Plaintiff and Defendant had rightly rescinded the same, the contract being voidable. There is no breach of contract or wrongful termination of the same on the part of the Defendant. The Plaintiff is not entitled to any damages therefore.

Issue no. 3, 4, 5 and 6 are decided against the Plaintiff.

It is finding of the Court that this Court, as discussed above that the Defendant had not wrongfully that the contract is vitiated by misrepresentation on the part of the Plaintiff and the Defendant had rightly rescinded the contract. In view of such finding the Plaintiff is not entitled to get any decree as prayed for.

Issue no. 7, 8 and 9 are decided against the Plaintiff.

In nutshell, the instant suit fails.

It is ordered that the suit is dismissed on merit without any costs along with pending applications, if any.

(Sugato Majumdar, J.)