

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

BEFORE:

The Hon'ble Justice Soumen Sen
and
The Hon'ble Justice Biswaroop Chowdhury

AD-COM/5/2024
With
CS/634/2001
I.A. No. GA (Com.) 03 of 2025

PRAKASH KUMAR THAKER
VS
THE JHARKHAND STATE CO-OPERATIVE LAC MARKETING AND
PROCUREMENT FEDERATION LIMITED

For the Appellant : Mr. Suvasish Sengupta, Adv.,
Mr. Balarko Sen, Adv.,
Mr. Avijit Dey, Adv.

For the Respondent/
Defendant : Mr. Sakya Sen, Sr. Adv.,
Mr. Chanchal Kumar Dutt, Adv.,
Ms. Krishna Mullick, Adv.,
Mr. Sunil Das, Adv.,
Ms. Pallavi Chatterjee, Adv.

Hearing concluded on : 10th June, 2025

Judgment on : 3rd July, 2025

Soumen Sen, J.

1. The appeal is arising out of the judgement and decree dated 11th December, 2023 passed by the learned Single Judge in a suit for recovery of damages due to breach of contract.

2. The suit was dismissed on a finding that the contract between the parties stands frustrated.

3. The plaintiff/appellant carries on the business, inter alia, as an exporter and trader in Shellac. The defendant/respondent is a co-operative society having its office at Ranchi, Jharkhand.

4. The parties have a long-standing business relationship.

5. The case of the plaintiff in a nutshell is that pursuant to the negotiations between the parties, the plaintiff agreed to purchase and the defendant agreed to sell 24 metric ton shellac of specified grade confirmed by the latter in terms of a letter dated 15th April 2000.

6. In terms of agreement, the plaintiff deposited 10 percent of the contract value as the earnest money by a demand draft dated 17th April 2000, drawn on Indian Overseas Bank, amounting to Rs.2,73,600/-. The acknowledgement for the same was made on 18th April 2000 by the defendant.

7. On 17th April 2000 the plaintiff inquired regarding supply of the first lot of 12 metric ton shellac so that the plaintiff's representative may collect the same and deposit the balance consideration money.

8. The plaintiff entered into contract to purchase shellac for supplying the same to Egyptian buyers.

9. There was a contractual obligation on the defendant to supply the shellac within 20th May 2000 and since the stipulated supply was not made, the plaintiff by a letter dated 16th May 2000 inquired as to when the goods would be ready for delivery.

10. The defendant by a communication dated 26th July, 2000 terminated the contract on the pretext of labour problem and also returned the earnest money, previously deposited by the plaintiff.

11. It is the contention of the plaintiff that in spite of extension of delivery date till 1st September 2000, the defendant neglected, failed and refused to deliver the said shellac and the plaintiff had made known to the defendant that the former is an exporter and needed goods for export. To meet his contractual obligations, the plaintiff had to purchase shellac at an enhanced rate and suffered loss and loss of profit to the tune of Rs.14,23,920/- being the difference between the market price and contract price as on 1st September 2000.

12. The suit is essentially for recovery of damages claimed to have been suffered by the plaintiff by reason of failure on the part of the defendant to supply 24 MT shellac of specified quality.

13. The defendant in the written statement has denied any concluded contract entered into between the parties. The defendant further alleged that proposal of the plaintiff for purchase of T.N. Shellac from the defendant did not materialise inasmuch as immediately after such proposal was given and the same was "provisionally accepted" by the defendant; the chimney of the defendant's factory was damaged which "physically affected" the production of T.N. Shellac. At an about the same time, there was some labour trouble in the defendant's factory. Tender was invited for repairing of the chimney. In view of such development, namely, labour trouble and the defect in chimney beyond the control of the defendant, the 'Force Majeure' clause is applicable and in view thereof, the defendant expressed its inability to give effect to the proposal which was purchase of T.N. Shellac by the plaintiff.

14. On the basis of the pleadings, the learned Single Judge has framed the following issues:

- 1) Is the suit barred under the provision of section 57 read with bye-law of Jharkhand Co-operative Societies Act 1935 and therefore, not maintainable?
- 2) Did the plaintiff and the defendant entered into any agreement on 15th April 2000?
- 3) Did the defendant commit any breach of agreement for sale with regard to claim a sum of Rs.14,23,920/-?
- 4) Is the plaintiff entitled to claim a sum of Rs.14,23,920/-?
- 5) Has the plaintiff suffered any loss or damage?
- 6) To what further or other relief is the plaintiff entitled?

15. On the basis of oral and documentary evidence, the learned Single Judge answered issue nos. 1 and 2 in favour of the plaintiff. However, issue no. 3 was decided against the plaintiff with the following observation: *“Break down of machineries are included in force majeure. It is neither alleged nor in evidence that break down of machineries was a ploy of the defendant to avoid contractual obligation. Therefore, from the facts and circumstances of the case and material evidences, it is clear that the defendants were prevented from supplying stipulated T.N. Shellac by supervening circumstances beyond control. This is a case of frustration of contract, as contemplated in section 56 of the Indian Contract Act, 1872 and not a case of breach of contract”*. As a corollary to the aforesaid finding, the issue nos. 4,5 and 6 were decided against the plaintiff.

16. Hence, this appeal.

17. The defendant however has not filed any cross appeal against the finding in issue no. 1 and 2.

Submissions on behalf of the plaintiff/appellant

18. Mr. Suvasish Sengupta, the Learned Counsel appearing on behalf of the appellant submits with regard to issue no 3 framed in trial relating to the breach of contract, that in spite of there being an agreement, the defendant delayed the delivery and on 23rd June, 2000 purportedly raised two grounds being lack of productivity and rise in price by the Board and thereafter on 26th July, 2000 terminated the agreement on the plea of acute labour problem and strike and returned the 10% earnest money deposited by plaintiff. Hence, it was argued that the defendant had breached the contract.

19. The learned counsel submits that the defendant claimed that the failure in performance was due to circumstances beyond its control, primarily the damage to a chimney, citing documents marked as **Exhibits-J, K and N**. However, this claim of frustration due to chimney damage was raised for the first time only in paragraph 8 of the Written Statement. Mr. Sengupta argued that even if the chimney was damaged or there was a strike, the defendant had a duty to inform the plaintiff, which they failed to do. The plaintiff was only informed by a letter dated 26th June 2000 and along with the letter the defendant refunded the earnest money. The defendant's prolonged silence of over three months was presented as indicative of suspicious conduct and malafide intent.

20. The learned counsel draws our attention to the petition of Employees/Workers dated 17th April, 2000, in respect of damage to the

chimney. It is argued that the above petition was generated as an afterthought by the management of the Defendant despite having full knowledge of the damaged chimney by issuing a so-called Tender Notice for repair of the chimney by an Advertisement in a Ranchi Newspaper on 17th February, 2000.

21. Mr. Sengupta while arguing has referred to the evidence of the defendant's witness, Mr. Rabindra Kumar to show that the oral evidence of Rabindra is contrary to the documentary evidence and the relevant portions on which reliance is placed is set out below:-

Examination-in-chief of Rabindra Kumar

“Q21. Please see Ext. K (26th July, 2000) and tell Milord what is this document about. Why was this document issued?

Ans. In this letter it was stated that due to break down of the chimney and the boiler in the factory, production work came to a standstill and, therefore, negotiations could not take place and 10 per cent of the earnest money deposited by the plaintiff would be refunded.

Q31. Do you accept the plaintiff's contention as contained in this letter that the reason for cancellation is rise in market price of contracted goods as appearing from your letter no. 86 dated 23rd June, 2000 to the Chairman of Shellac Export Promotion Council?

Ans. I do not accept the contention of the plaintiff as mentioned in this letter.

Q35. Did the plaintiff ever inform you before refund of the earnest money that they had already entered into a contract with a foreign

buyer for sale of the shellac on the basis of the defendant's letter of 15th April, 2000?

Ans. *No. Till then the samples were yet to be approved. Due to break down of the chimney and the boiler as I have already stated earlier, the production in the factory had stopped."*

22. Mr. Sengupta while setting out the relevant portions submits that analysis of the letter dated 26th July, 2000 (**Exhibit-K**) shows that the issue of breakdown of the chimney was never mentioned; in the letter dated 23rd June, 2000 (**Exhibit.-J**) issued by Bihar State Co-operative Lac Marketing Federation Ltd., the subject was "sudden rise in lac market price" and in the letter dated 26th July, 2000 (**Exhibit. K**), the defendant mentioned that the production work of shellac has been stopped due to acute labour problem and strike. The reason has been reiterated in the reply dated 22nd September, 2000. Hence, the oral evidence is contrary to the documentary evidence.

23. With regards to issue nos. 4, 5 and 6, the Learned Counsel of the plaintiff has submitted that the plaintiff has suffered loss and damage due to non-delivery of the aforesaid goods. During 23rd May 2000 and 1st August 2000, the plaintiff exported goods but could not get the said machine-made T.N. Shellac at the rate of Rs.114/- per kg as agreed between the plaintiff and the defendant thereto.

24. Mr. Sengupta has drawn our attention to the letters dated 16th August, 2000 and 12th September, 2000 respectively, wherein the plaintiff demanded a sum of Rs.14, 23,920/- as damages being the difference in market price and the contract price. In reply, the defendant, by letter dated

22nd September, 2000 disputed the existence of a concluded contract. The plaintiff vide letter dated 26th September, 2000, reiterated his stand.

25. Mr. Sengupta has relied on the Calcutta Shellac Market Report published by the Shellac Export Promotion Council dated 26th July, 2000 [**Exhibit-U & U/1**] and 6th September, 2000 (**Exhibit-Q**) to justify the claim towards damages. He submitted that the market price of machine-made T.N. Shellac increased from Rs.148/- per Kg. to Rs.173.33/- per Kg. during this period. The said report of 6th September, 2000 is binding between the parties. The Shellac Export Promotion Council is the Registering Authority for all export sales of Lac Products as per the Exim Policy of the Govt. of India.

26. Mr. Sengupta has claimed a sum of Rs.14, 23,920/- as damages by way of loss of profit. The breakup of such claim being the difference between the market price and contract price being (Rs.173.33 - Rs.114.00) = Rs.59.33 per Kg. Therefore, in terms of the contract for 24MT equivalent to 24,000 Kg, the plaintiff would be entitled to Rs.14,23,920/- (Rs.59.33 X 24,000kg).

27. The learned counsel has referred to section 57 of the Sales of Goods Act which deals with justification of damages due to non-delivery. It is submitted that the said section recognises that where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

28. The learned counsel goes on to place reliance on the case of **Firm H. Sham Sunder and Sons -vs. - Ram Chand Spinning and**

Weaving Mills¹ wherein the Hon'ble High Court held that the contract was governed by Section 57 of the Sales of Goods Act, 1930 and that the difference in the market price is the measure of damages for the purpose of determining the amount of compensation payable to the buyer.

29. In furtherance of the aforesaid proposition reliance has been placed on **Vishwanath vs. Amarlal²**. In this case, reference was made to **Erroll Mackay vs. Kameshwar Singh³**, and **Ismail Sait and Sons vs. Wilson & Co.,⁴** wherein it was held that it is not necessary for the plaintiff to prove that he purchased the item from other sources at a price exceeding the contract price and sustained a loss. According to these decisions, the fact that the buyer sustained no actual loss from the seller's failure to deliver the goods is no ground for awarding nominal damages to the buyer. The illustration (a) to Section 73 of the Contract Act indicates that the buyer is entitled to receive from the seller by way of compensation the sum by which the contract price falls short of the price for which the buyer might have obtained goods of like quality at the time when they ought to have been delivered.

30. Reliance is also placed by the learned counsel on the case of **The Standard Chemicals Company (P) Ltd, Fort Bombay vs. The Palakol Co-Operative Sugars Ltd.⁵** The relevant paragraphs have been reproduced below:-

“8. In view of this correspondence, the legal position urged by the learned counsel relying on Ramayya v. Firm of Gulfarosh

¹ AIR 1957 P&H 90

² AIR 1957 MB 190:1956 SCC Online MP 76

³ AIR 1932 PC 196

⁴ AIR 1919 Mad 1053

⁵ (1988) 2 ALT 405: 1987 SCC Online AP 380

Mohideen [(1958) 2 An. W.R. 384.] that there is a fundamental change in the position since the contract was entered into and the doctrine of frustration can be invoked cannot be accepted and hence I am of the opinion that the trial Court is right in holding that the defendant-Company agreed to supply the contractual quantity of sulphur making the plaintiff to believe that they would supply from the existing stock and that the agreement has not become impossible of the performance by virtue of the events that took place subsequent to entering into the contract and the frustration did not take place in view of the change in the import policy of the Government and accordingly I confirm the finding on issues 3, 4 and 6.

10. *Let me examine the legal position on this question. Section 57 of the Sale of Goods Act, (Act III of 30) simply declare.*

"Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damage for non-delivery."

14. *The principle embodied in Section 51(3) of the English Sale of Goods Act is also deduced from the Illustration given in Sec. 73 of the Contract Act. It is well known that the market price rule was laid down in the celebrated case in *Hadley v. Baxendale* [156 E.R. 156.] . See *Union of India v. Commercial Metal Copn.* [A.I.R. 1982 Delhi, 267.] . It is also approved by the Privy Council in *India Jamal v. Moola Dawood & Sons* [A.I.R. 1915 P.C. 47.] . Whether this rule of market price should depend upon the actual loss sustained by the buyer was examined in detail by the earliest judgment of the Madras High Court in *Ismail Sait & Sons v. Wilson & Co.* [A.I.R. 1919 Madras, 1053.] - The Division Bench consisting of Wallis, C.J., and Sadasiva Aiyar, J., allowed the appeal where the trial Court awarded only nominal damages for the breach of damages to deliver goods when the plaintiff could not*

show the actual loss. It was ruled that the fact that the buyer sustained no actual loss when the seller failed to deliver the goods is no ground for awarding nominal damages to the buyer. The buyer is entitled, as indicated in the Illustration (a) to the section, to receive from the seller by way of compensation the sum by which the contract price falls short of the price for which the buyer might have obtained goods of like quality at the time when they ought to have been delivered. Even though the learned Judges delivered separate judgments, they made it clear that the question is clearly governed by the illustration (a) to Section 73 when there is breach of contract due to non-delivery. This case is followed by a Division Bench of Madhya Bharat High Court in Vishwanath v. Amarlal [A.I.R. 1957 Madhya Bharat, 190.] holding that it is not necessary for the plaintiff to prove that he purchased the goods from other sources at a price exceeding the contract price and sustained a loss. Further, the Privy Council in Erroll Mackay v. Maharaja Dhiraj Kameshwar Singh [A.I.R. 1932 Privy Council, 196.] indicated clearly the difference in price between the contract price and the market price is the sole test for claiming damages. However, a dissenting note was struck in Union of India v. Tribhuwan Das Lalji Patel [A.I.R. 1971 Delhi, 120.] by a single Judge with the Madras High Court and Madhya Bharat High Court holding that the Government who sustained loss for the non-supply of goods can succeed only by proving the actual loss of non-supply. This view was again dissented twice by the same High Court in All India Institute of Medical Sciences v. American Refrigeration Co. Ltd. [A.I.R. 1982 Delhi, 275.] and Saraya Distillery v. Union of India [A.I.R. 1984 Delhi, 360.] . On this question we have got the pronouncement of the Supreme Court in Muralidhar Chiranjilal v. Harishchandra Dwarakadas [A.I.R. 1962 S.C., 366.] . K.N. Wanchoo, J., while reiterating the principle of rule of market price in the case of non-delivery held:

“Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvse prevalent in Kanpur on the date of breach if that rate was above the contracted rate resulting in loss to it.”

16. Mc Gregor on Damages, Fourteenth Edition, states at Page 424 at Paragraph 583 that the buyer is entitled to such damages even if he does not choose to rebuy them in the market, his loss will remain the same.

17. Thus, these judicial pronouncements make clear that on a reading of Section 73 read with the Illustration the crucial test is the market price on the date of breach. The damages shall be the difference of market rate and the contract rate. Once the breach of non-delivery is established, it is not essential for the purchaser to prove that he actually repurchased the goods and sustained loss. The law does not penalise the purchaser's inaction in not making the repurchase. The object of damage is only to place the purchaser in the same situation with respect to damages as if the contract has been performed.” (emphasis supplied)

31. Mr. Sengupta while submitting that the plaintiff is entitled to 18% interest on the awarded sum on and from May, 2000 till its actual realization argues that as per Section 34 of the Code of Civil Procedure, 1908, the interest should not exceed 6% per annum but proviso to Section 34 is clear that where the liability in relation to sum so adjudged had arisen out of a commercial transaction, the rate of such interest may exceed 6% per annum but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which the monies are lent

and advanced by a nationalized bank in relation to a commercial transaction.

Submissions on behalf of the defendant/respondent

32. Per contra, Mr. Sakya Sen, the learned Senior Counsel appearing on behalf of the defendant submits that there was no concluded or binding contract existing between the parties, as essential terms such as the specification of goods, delivery schedule, and payment terms had not been finalized as would be evident from **Exhibits- A, B, C, D** and **E**. The said exhibit would show that there is only a provisional confirmation of the offer and is dependent upon the finalisation of the terms and conditions offer deposit of the earnest money. Moreover **Exhibit-F** would show that the essential terms and conditions of the contract were yet to be finalised.

33. There was no agreement with regard to mode and manner of delivery vis-à-vis whether delivery would be in one go or in batches. Exact specifications of Shellac were not settled. Plaintiff for the first time suggested a new condition, namely, sending of samples by the defendant so that suggestions can be given for improving quality.

34. The learned Senior Counsel has also referred to **Exhibits-I** and **H** to show that essentials were not finalised and that the contract between the plaintiff /appellant and the defendant was not concluded.

35. The learned counsel has argued that the plaintiff's reliance on money receipt (**Exhibit-G**) as a final acceptance is erroneous. Plaintiff's claim that it assumed there was a concluded contract on the basis of use of the word "advance" is not tenable because the said amount was admittedly

an earnest money deposit. The term “advance” written in receipt was a mere typographical mistake and does not conclude contract.

36. Mr. Sen submits that since there was no concluded contract, there is no question of termination. The proposal of the plaintiff was not materialized because chimney of defendant’s factory was damaged and there was labour strike which affected the production from 17th April 2000.

37. Mr. Sen further submits that the alleged export contracts entered into by the plaintiff with foreign buyers are irrelevant and not binding on the defendant, as they were made without a final concluded contract between the parties. He also pointed out that the plaintiff has himself deposed that the defendant was not the sole source of supply for fulfilling those export obligations and being a trader engaged in continuous business, the plaintiff covers his business requirements from various suppliers from the market. Therefore, the plaintiff’s claim that he has suffered damages by way of loss of profit due to failure of defendant to supply the Shellac is untenable as the plaintiff has failed to prove exclusive reliance on the defendant’s supply for meeting its foreign obligations. Even assuming the existence of a binding contract, the alleged damages are merely indirect and remote consequences, not legally attributable to the defendant. Furthermore, it was argued that the earnest money was deposited on 18th April 2000 and the contracts with the foreign buyers were entered on 18th April 2000 and 19th April 2000 indicating that the plaintiff had not depended upon the defendant’s supplies for fulfilling those obligations.

38. The learned counsel further submits that the plaintiff had not informed the defendant that the purchase was intended for export purposes. The first proforma invoice dated 18th April 2000 is before receipt of money received by plaintiff. Thus, in the absence of a final and concluded contract prior to 18th and 19th April 2000, the plaintiff alone is responsible for its commitments under those proforma invoices.

39. The Learned Counsel submits that due to supervening impossibilities, namely, a labour strike and boiler breakdown, the performance of the contract became impossible, rendering it void under Section 56 of the Indian Contract Act, 1872. The defendant, by letter dated 26th July 2000, expressed its inability to perform the contract and returned the earnest money. As these events occurred after the date of the alleged contract and were not foreseeable with reasonable diligence, the requirements of the 3rd paragraph of Section 56 are not satisfied, and thus, the defendant bears no liability to pay compensation.

40. To buttress his submissions, Mr. Sen places reliance on ***Satyabrata Ghose v. Mugneeram Bangur & Co***⁶ (Para-9, 10 & 15) for the proposition that supervening impossibility discharges the contract and ***Markapur Municipality vs. Dodda Rarairreddy***⁷ (Para 4) to argue that in case of the sale of future goods and frustration of contract, no damage can be awarded if contract is not concluded.

41. He further submits that the plaintiff's claim is erroneous because plaintiff's claim is on account of loss of profits which does not arise naturally in the course of things in view of Sec.73 of Indian Contract Act,

⁶ AIR 1954 SC 44

⁷ AIR 1972 AP 299

1872. The plaintiff has not suffered any actual loss. The plaintiff has not proved that he delivered the goods to purchaser at the price prevailing on 6th September 2000 or that he has been monetarily penalised by purchaser as consequence of cancellation under Section 73. To strengthen his submission Mr. Sen has placed reliance on ***Karsandas H. Thacker v. M/s The Saran Engineering Co. Ltd.***⁸ (Paragraphs 13 & 14) for the proposition that loss of profit does not arise naturally in course of things.

42. Mr. Sen submits that the three situations as contemplated under Section 73 has not been established by the plaintiff as they have not shown any fax message wherein the foreign contract was cancelled and deposed that defendant was one of the various suppliers.

43. The Learned Counsel has placed reliance on the case of ***Murlidhar Chiranjilal vs. Harishchandra Dwarkadas and Anr.***⁹ wherein the Hon'ble Supreme Court has stated that the quantum of damages for a breach of contract has to be determined under Section 73 of the Contract Act, 1872. It has also stated the following two principles upon which the damages in such cases are calculated:

“9. The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps : (British

⁸ AIR 1965 SC 1981

⁹ 1961 SCC OnLine SC 100: AIR 1962 SC 366

Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London [(1912) AC 673, 689]). These two principles also follow from the law as laid down in Section 73 read with the Explanation thereof. If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be re-imbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.

13. *We may in this connection refer to the following observations in Chao v. British Traders and Shippers Ltd. [(1954) 1 All ER 779, 797] which are apposite to the facts of the present case:*

“It is true that the defendants knew that the plaintiffs were merchants and, therefore, had bought for resale, but every one who sells to a merchant knows that he has bought for resale, and it does not, as I understand it, make any difference to the ordinary measure of damages where there is a market. What is contemplated is that the merchant buys for resale, but, if the goods are not delivered to him, he will go out into the market and buy similar goods and honour his contract in that way. If the market has fallen he has not suffered any damage, if the market has risen the measure of damages is the difference in the market price.”

In these circumstances this is not a case where it can be said that the parties when they made the contract knew that the likely result

of breach would be that the buyer would not be able to make profit in Calcutta. This is a simple case of purchase of goods for resale anywhere and therefore the measure of damages has to be calculated as they would naturally arise in the usual course of things from such breach. That means that the respondent had to prove the market rate at Kanpur on the date of breach for similar goods and that would fix the amount of damages, in case that rate had gone about the contract rate on the date of breach. We are therefore of opinion that this is not a case of the special type to which the words "which the parties knew, when they made the contract, to be likely to result from the breach of it" appearing in Section 73 of the Contract Act apply. This is an ordinary case of contract between traders which is covered by the words "which naturally arose in the usual course of things from such breach" appearing in Section 73. As the respondent had failed to prove the rate for similar canvas in Kanpur on the date of breach it is not entitled to any damages in the circumstances. The appeal is therefore allowed, the decree of the High Court set aside and of the trial court restored with costs to the appellant throughout." (emphasis supplied)

44. Mr. Sen has placed reliance on the case of **Karsandas H. Thacker** (*supra*) in which, the Hon'ble Supreme Court while dealing with the quantum of damages stated that the appellant claimed damages at an amount equal to the difference between the price paid by the Export Corporation and the price he would have paid to the respondent for 200 tons of scrap iron. It was held that the appellant is not entitled to calculate damages on such basis, unless he had entered into contract with the respondent after informing the latter that he was purchasing the scarp for export. There is nothing on record to show that the respondent was told

before the contract was entered into that the appellant was purchasing scrap for export. The first indirect indication of scrap required for being exported was made late in October 1952 which the respondent could have possibly inferred. Such information was belated. Its liability to damages for breach of contract on the basis of market price of scrap for export would not depend on its belated knowledge but would depend on its knowledge of the fact at the time it entered into the contract. Therefore, it upheld the High Court's view that the defendant/respondent did not know that the appellant was purchasing the scrap iron for export. Reference is also made to Illustration (k) to Section 73 of Contract Act. The relevant paragraphs of the said judgment are reproduced below:

“14. We are therefore of opinion that the High Court was right in coming to the conclusion that the defendant respondent did not know that the appellant was purchasing scrap iron for export. The appellant, on the breach of contract by the respondent, was entitled, under S. 73 of the Contract Act, to receive compensation for any loss by the damage caused to him which naturally arose in the usual course of business from such breach or which the parties knew when they made the contract to be likely to result from the breach of it. Under S. 73 of the Contract Act, such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Now, the loss which could have naturally arisen in the usual course of things from the breach of contract by the respondent in the present case would be nil, The appellant agreed to purchase scrap iron from the respondent at Rs. 100 per ton. It may be presumed that he was paying Rs. 70, the controlled price, and Rs. 30, the balance, for other incidental charges. On account of the non-delivery of scrap iron, he could have purchased the scrap iron from the market at the same controlled price and similar incidental charges. This

means that he did not stand to pay a higher price than what he was to pay to the respondent and there fore he could not have suffered any loss on account of the breach of contract by the respondent. The actual loss, which, according to the appellant, he suffered on account of the breach of contract by the respondent was the result of his contracting to sell 200 tons of scrap iron for export to the Export Corporation. It may be assumed that, as stated, the market price of scrap iron for export on January 30, 1953, was the price paid by the Export Corporation for the purchase of scrap iron that day. As the parties did not know and could not have known when the contrtet was made in July 1952 that the scrap iron would be ultimately sold by the appellant to the Export Corporation, the parties could not have known of the likelihood of the loss actually suffered by the appellant, according to him, on account of the failure of the respondent to fulfil the contract.

15. Illustration (k) to S. 73 of the Contract Act is apt for the purpose of this case. According to that illustration, the person committing breach of contract has to pay to the other party the difference between the contract price of the articles agreed to be sold and the sum paid by the other party for purchasing another article on account of the default of the first party, but the first party has not to pay the compensation which the second party had to pay to third parties as he had not been told at the time of the contract that the second party was making the purchase of the article for delivery to such third parties.” (emphasis supplied)

45. The Learned Counsel cites the case of **M. Lachita Settu and Sons Ltd. Vs. Coffee Board Bangalore and Giri Coffee Works vs. Coffee Board, Bangalore**¹⁰ where the Hon’ble Supreme Court has held that the

¹⁰ (1980) 4 SCC 636

principle of mitigation of loss does not give any right to the party who is in breach of the contract but it is a concept that has to be borne in mind by the court while awarding damages. The non-defaulting party is not expected to take steps which would injure innocent persons and as such the steps taken by him in performance or discharge of his statutory duty also cannot be weighed against him. In substance, the question in each case would be one of the reasonableness of action taken by the non-defaulting party. The relevant paragraphs are reproduced below:

“14. At the outset it must be observed that the principle of mitigation of loss does not give any right to the party who is in breach of the contract but it is a concept that has to be borne in mind by the court while awarding damages. The correct statement of law in this behalf is to be found in HALSBURY’S LAWS OF ENGLAND (4th Edn.) Vol. 12, para 1193 at page 477 which runs thus:

“1193. Plaintiff’s duty to mitigate loss.—The plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant’s wrong, and, if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided.”

Again, in para 1194 at p. 478 the following statement occurs under the heading *Standard of conduct required of the plaintiff*:

“The plaintiff is only required to act reasonably, and whether he has done so is a question of fact in the circumstances of each particular case, and not a question of law. He must act not only in his own interests but also in the interests of the defendant and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter... In cases of breach of contract the plaintiff is under no obligation to do anything other than in the ordinary course of business, and where he

has been placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the defendant whose breach of contract has occasioned the difficulty....”

The plaintiff is under no obligation to destroy his own property, or to injure himself or his commercial reputation, to reduce the damages payable by the defendant. Furthermore, the plaintiff need not take steps which would injure innocent persons.

In *Banco De Portugal v. Waterlow & Sons Ltd.* [1932 All ER Rep 181 : 1932 AC 452] , Lord Shankey, L.C., quoted with approval the statement of law enunciated in *James Finlay & Co. v. N.V. Kwik Hoo Tong, Handel Maatchappij* [(1929) 1 KB 400] , to the effect: “In England the law is that a person is not obliged to minimise damages on behalf of another who has broken a contract if by doing so he would have injured his commercial reputation by getting a bad name in the trade”. In *AMERICAN JURISPRUDENCE*, 2d, Vol. 22, para 33 at pp. 55-56 contains the following statement of law:

“33. The general doctrine of avoidable consequences applies to the measure of damages in actions for breach of contract. Thus, the damages awarded to the non-defaulting party to a contract will be determined and measured as though that party had made reasonable efforts to avoid the losses resulting from the default. Some courts have stated this doctrine in terms of a duty owing by the innocent party to the one in default; that is, that the person who is seeking damages for breach of contract has a duty to minimise those damages. However, on analysis, it is clear that in contract cases as well as generally, there is no duty to minimise damages, because no one has a right of action against the non-defaulting party if he does not reasonably avoid certain consequences arising from the default. Such a failure does not make the non-defaulting party liable to suit; it

only indicates that the damages actually suffered are greater than the law will compensate. Therefore, in contract actions, the doctrine of avoidable consequences is only a statement about how damages will be measured,”

From the above statement of law it will appear clear that the non-defaulting party is not expected to take steps which would injure innocent persons. If so, then steps taken by him in performance or discharge of his statutory duty also cannot be weighed against him. In substance the question in each case would be one of the reasonableness of action taken by the non-defaulting party.” (emphasis supplied)

46. Further our attention is drawn to the case of **Pannalal Jugatmal v. State of Madhya Pradesh**¹¹, which also states that the one who has suffered loss from breach of contract must take reasonable steps that is available to him to mitigate the extent of damages caused by breach. The relevant paragraphs of the judgment are set out hereunder:

“21. Now, the rule is that damages are compensatory and not penal and that one who has suffered loss from breach of contract must take every reasonable step that is available to him to mitigate the extent of damages caused by the breach. He cannot claim to be compensated by the party in default for loss which is really due not to the breach but to his own failure to behave reasonably after the breach. This rule is incorporated in the explanation to Section 73 of the Contract Act. It runs thus:

“In estimating the loss or damage arising from the breach of a contract the means which exist of remedying the inconvenience caused by the non-performance of the contract must be taken into account.”

¹¹ 1953 SCC OnLine MP 1: AIR 1963 MP 242

22. In *Frost v. Knight*, (1872) 7 Ex. 111 (115), Cockburn, C.J., observed:

“In assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.”

23. This rule was exemplified in *Brace v. Calder*, 1895-2 QB 253. Again Lord Haldane said in *British Westing House Electric and Manufacturing Co. Ltd. v. Under Ground Electric Rly.* 1912 AC 673 (689):

“The fundamental basis is thus compensation for pecuniary loss, naturally flowing from the Breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps.”

24. The explanation to Section 73 of the Contract Act casts a burden upon the person complaining of breach of the contract to show that he did not possess means of remedying the inconvenience caused by the non-performance of the contract. See also *Jamal v. Moola Dawood Sons and Co.*, AIR 1915 PC 48; *Foley Brothers v. James A. Mcilwee*, AIR 1917 PC 255, and *Karim Bux v. Debi*, AIR 1933 All 511. The law, for wise reasons, imposes upon a party subjected to injury from a breach of a contract the active duty of making reasonable exertions to render the injury as light as possible.

25. In this case, the Government could have and, in all events, should have, reauctioned the contracts since Pannalal intimated to the Deputy Commissioner on December 15, 1951, of his having rescinded the contract. It must be recalled that the Deputy Commissioner had asked the contractor to appear before him on the 17th December to execute an agreement. He having received the

intimation of rescinding of the contract on the 15th December, the date of the breach can be safely fixed as the 17th December, 1951. If on that date, or soon thereafter, the Government could do something to mitigate the damage, the defaulting contractor is entitled to the benefit of it.” (emphasis supplied)

47. The Learned Counsel lastly places reliance on the case of ***Mackay vs. Maharajadhiraj Kameshwar Singh***¹² wherein the Privy Council has held that if there is an available market for the goods at the date of breach the damages must be based on the difference between that market price and the contract price. A contract of resale becomes immaterial, because if there was a market, the law presumes that the buyer can minimise his damages by procuring substituted goods in the market, so that he is thus in the same position, apart from the price difference, as if the seller had not made default. Hence, the difference in price, if the market price exceeds the contract price, is the sole damage that is generally recoverable.

Our Observations

48. Although six issues were framed in the trial of the suit, it has been fairly conceded by the learned Senior Counsel for the defendant that the appeal is required to be heard on the claim on account of damages if the plaintiff at all succeeds in establishing that the contract is not frustrated. Even without the concession of the learned Counsel for the defendant it is well evident from the documentary evidence as well as oral evidence that a concluded contract was entered into by and between the parties. The revised

¹² 1932 SCC OnLine PC 34: ILR (1932) 11 Pat 600

offer of the plaintiff dated 13th April 2000 was accepted on 15th April 2000 and the plaintiff was asked to deposit 10% of the earnest money as a condition precedent for the acceptance of the offer. In terms of the said communication, the plaintiff had deposited 10% of the contract value by way of earnest money on 17th April, 2000. The earnest money in the form of demand draft has been acknowledged by the defendant on 18th April 2000. Therefore, the acceptance of the earnest money is not in dispute. Moreover, the subsequent communication refers to the contract.

49. Section 8 of the Contract Act provides for the acceptance of the proposal by conduct as against other modes of acceptance. It can be divided in two parts: (1) performance of the conditions of a proposal; and (2) acceptance of any consideration for a reciprocal promise which may be offered with a proposal. The latter corresponds to general division of proposals into those which offer a promise in exchange for an act or acts and those which offer a promise for exchange for a promise. The promise on the part of the appellant was acted upon by the respondents (see ***Bharat Sanchar Nigam Limited & Anr. Vs. BPL Mobile Cellular Ltd & Ors.***).¹³

50. A definite price is an essential element of a binding agreement. A definite price although need not be stated in the contract but assertion thereof either expressly or impliedly is imperative and it must be worked out on some premise as was laid down in the contract. A contract cannot be uncertain. It must not be vague. As per the provisions of Section 29 of the Contract Act, 1872 a contract must be construed so as to lead to a

¹³ (2008) 13 SCC 597

conclusion that the parties understood the meaning thereof (see **DDA v. Joint Action Committee, Allottee of SFS Flats**).¹⁴

51. The formation and conclusion of the contract would show that the parties were ad idem with regard to the price and both the parties have understood the meaning of the contract as would be evident from the exchange of correspondence. The parties have understood that it is the contract for sale of the item mentioned therein.

52. The argument of Mr. Sen is that the 10 per cent of the contract value paid was only in form of an earnest money and subject to further negotiation are not acceptable. The earnest money is part of the purchase price when the transaction goes forward and it is forfeited when the transaction falls through, by reason of the fault or failure of the purchaser. (see **Chiranjit Singh v. Har Swarup**)¹⁵)

53. "Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get double the amount, if it is so stipulated". It is also the law that part-payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part-payment of consideration and not intended as earnest money then the forfeiture clause will not apply." (Emphasis supplied) (see **Satish Batra v. Sudhir Rawal**)¹⁶.

¹⁴ (2008) 2 SCC 672

¹⁵ (1926) 23 LW 172 : AIR 1926 PC 1).

¹⁶ (2013) 1 SCC 345 : 2012 SCC Online SC 1244

54. The difference between earnest and advance money was recently considered by the Hon'ble Supreme Court in **K. R. Suresh V. R. Poornima & Ors.**¹⁷ in which this finer distinction has been explained.

55. The letter of termination of the contract would show that the defendant had acknowledged a concluded contract and terminated it "under force majeure situation". Price is the most essential term in a contract. Initially, there was some disagreement on the price, however, subsequently the revised offer has been accepted by the respondent. The parties have agreed on the price. The delivery schedule also was accepted but subsequently, the contract was rescinded due to "force majeure situation."

56. The jurisdiction of the Civil Court to try and decide the suit has not been disputed at all in the appeal as the respondent has realised that, there is no merit in the said challenge and we also agreed with the learned Single Judge that the suit is not barred under Section 57 of the Jharkhand Co-operative Societies Act, 1935. The said Act has no manner of application in so far as the present dispute is concerned.

57. Therefore, the first two issues as decided by the Learned Single Judge does not require any intervention and are affirmed.

58. In order to show that the contract is frustrated the defendant has relied upon the following six documents:

- a) A copy of letter dated 26th July 2000 issued by the defendant to M/s. Parwati Lac Udyog Kunti, another buyer. **(Exhibit-1 collectively)**

¹⁷ (2025) SCC Online SC 1014

- b) A copy of letter dated 26th July 2000 issued by the defendant to M/s. Tolaram Overseas Corporation, another buyer. **(Exhibit-1 collectively)**
- c) Tender notice dated 17th February 2002 inviting tender applications in respect of repairing chimney and other machines published in “PRABHAT KHABAR”. **(Exhibit-2)**
- d) A Hindi document dated 17th April, 2000 in photocopy alongwith an official translation **(Marked for identification ‘X’)**
- e) The executed portion of Hindi words and a date and signature of Hindi photocopy of the document marked as **Exhibit ‘X’** were marked as **Exhibit-3A and 3** respectively.
- f) Letter dated 20th March 2002 regarding inauguration of Alluretic Acid Plant and starting of production in the presence of the Chief Minister marked as **DD-6** which has not been exhibited.

59. While addressing the issue no. 3, the Learned Single Judge has placed reliance on the case of **Satyabrata Ghose** (*supra*). However, what seems to have been overlooked is the principle stated in the following paragraph:

“17. It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstances, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in Matthey v. Curling [Matthey v. Curling, (1922) 2 AC 180 (HL)] : (AC p. 234)

“... a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or the King's enemies ... or vis major.”

This being the legal position, a contention in the extreme form that the doctrine of frustration as recognised in English law does not come at all within the purview of Section 56 of the Contract Act cannot be accepted.”

60. Under the Indian Contract Law, the consequences of a Force Majeure event are stated in Section 56 of the Indian Contract Act which states that on the occurrence of an event which renders the performance impossible, the contract becomes void thereafter. In contrast to the English Law where frustration of contract is decided on the true intention of the parties on construction of the contract the statutory provision in Section 56 lays down a positive law and is exhaustive on the subject.

61. In the Indian context, it has been settled by a long catena of decisions that when the parties have not provided for what would happen when an event which renders the performance of the contract impossible, Section 56 of the Contract Act comes into play as it excuses parties from further performance due to impossibility and renders a contract void. The expression ‘Force Majeure’ is not a mere French version of the Latin expression ‘vis major’. It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could be legitimately being included in Force Majeure. Judges have agreed that strikes, breakdown of machinery, which though normally not included in ‘vis major’ are included in Force Majeure. An analysis of rulings on the subjects shows that where references

are made in Force Majeure, the intention is to save the performing party from any consequences over which he has no control. This is the widest meaning which can be given to Force Majeure. (see ***Dharanjmal Govindram v. Shanchi Kalidas & Co.***¹⁸ considered in ***Nabha Power Limited v. Punjab SPCL***¹⁹).

62. In ***Northern Indiana Public Service Co. v. Carbon County Coal Co.***²⁰, the Court of Appeals for the 7th Circuit in addressing the issue of impossibility said that "the proper question in impossibility cases is whether the promisor's non-performance would be excused because the parties, if they had thought about the matter, would have warned to assign the risk of the contingency that made performance impossible or uneconomical to the promisor or to the promisee: if to the latter, the promisor is excused." Impossibility is thus, a doctrine for shifting risk to the better able to bear it either because he is in a better position to prevent the risk from materializing or because he can better reduce the dis-utility of the risk.

63. The contracts are discharged by frustration in accordance with the general law of contract where a change of circumstance subsequent to the formation of the contract results in such a fundamental and radical difference between the circumstances as envisaged by the contract and the reality that the interests of justice demand that the parties are released from

¹⁸ AIR 1961 SC 1285

¹⁹ 2018 (11) SCC508

²⁰ 799 F. 2d 265 (7th Cir. 1986)

their bargain.(see **Davis Contractors Ltd v Fareham UDC**²¹; **National Carriers Ltd v. Panalpina (Northern) Ltd**²²;

64. In **National Carriers** (*supra*) Lord Simon has aptly summarised the principle:-

“Frustration of a contract takes place when there supervenes an event (without fault of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense of onerousness) of the outstanding rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.” (Ibid., at p 700. F-G)

65. There is, however, no general doctrine of commercial impossibility whereby a party can invoke frustration simply because it has become unexpectedly costly to perform, even to the point where what would have been a profitable contract has been rendered a losing contract. (**Tenants (Lancashire) Ltd v. CS Wilson & Co Ltd**²³).

66. In the present case, the defendant could have easily contemplated that the possibility of the contract not being able to be fulfilled as the defendant had the knowledge as the defendant claimed now that the chimney of the boiler had been damaged and there were many holes in the chimney and same could endanger the life of the workers before they

²¹ [1956] A.C. 696 at 728-9

²² [1981] A.C. 675 esp. At 700-1, 717

²³ [1917] A.C. 495 at 510

acknowledged the receipt of the 10 per cent of the contract amount as the earnest money which is evident from **Exhibits-3A** and **H**, respectively. Therefore, the contract cannot be avoided on the basis of “force majeure situation” as there was a possibility of the performance of the contract and its performance was not impossible to make it a void contract. If the defendant had entered into the contract conscious of the condition of the boiler and chimney, they were quite confident that they would be in a position to execute the contract. Moreover, the poor condition of the chimney is not the ground on which the contract was cancelled. The defendant has prevaricated in their defence. They have been avoiding the truth.

67. The learned single judge has also cited the case of **Naihati Jute Mills Ltd. V. Khyaliram Jagannath**²⁴ which stated as envisaged by section 56, impossibility of a contract would be inferred by the courts from the nature of the contract and the surrounding circumstances in which it was made that the parties must have made their bargain upon the basis that a particular thing or state of things would continue to exist and because of the altered circumstances the bargain should no longer be held binding. It was also stated that –

“.....But the common law rule of contract is that a man is bound to perform the obligation which he has undertaken and cannot claim to be excused by the mere fact that performance has subsequently become impossible.”
(emphasis supplied)

²⁴ (AIR 1968 SC 522)

68. The principal defence to the claim of the plaintiff is frustration of contract. The plea of impossibility of performance is based on shut down of the chimney of the defendant on 17th April, 2000 which makes it impossible for the defendant to manufacture and supply the specified quality and quantity of shellac to the plaintiff. In this regard the defendant has placed reliance on a communication dated 17th April, 2000 (**Exhibit-3A**).

69. However, the said letter being **Exhibit-3A** appears to be an internal communication from the Boiler-in-Charge to the Managing Director of the respondent as would appear from the said letter itself disclosed to show that the chimney of the boiler has been damaged and there are many holes in the chimney and the condition of the said boiler is such that it may fall any time and it can cause serious life threat to the worker. It was never communicated to the plaintiff. The basis of the claim however appears to be a communication dated 26th July, 2000 (**Exhibit-K**). For better appreciation the said letter is reproduced below:

“Dear sir,

Referring the above it is to remind you that the sale acceptance decided by our Business Sub Committee in your favour for the delivery on your demand of 24.00M.T. of T.N. shellac by BISCOLAMF and your subsequent deposit of 10% of earnest money in the Federation exhibited our mutual sincerity to accomplish the deal. However, further it is to intimate you that unfortunately since then production work of shellac has been stopped due to acute labour

problem & strike. You must be aware of this fact as it was a burning topic in the daily newspaper.

Therefore, as per the decision taken by the authorised committee, under this force major situation your deposited 10% of Earnest money in BISCOLAMF, regretfully, is being returned to you vide D.D.NO.287457 for Rs. 273600 Kindly acknowledge the receipt. Besides under the prevailing situation and with lapse of delivery schedule our sale of shellac is not possible.”

70. Expressing inability to supply, the Managing Director in the said communication to the plaintiff has stated that subsequent to the said acceptance of supply, production work of shellac has been stopped due to acute labour problem and strike and it has received wide publicity in the daily newspaper. The defendant offered to return the earnest money and forwarded a demand draft for Rs. 2,73,600/- to the plaintiff towards refund of the 10% earnest money.

71. The labour problem and strike subsequent to the contract was claimed to be force majeure situation for avoidance of the said contract. However, no evidence was adduced on behalf of the defendant to show that by reason of any strike or labour problem the defendant is unable to perform the contract. The doctrine of frustration or impossibility of performance has to be a supervening impossibility which makes it impossible for one of the contracting parties to perform the contract. There is no evidence on record to show that the chimney was broken beyond repair or that there has been acute labour problem or strike for which the defendant is unable to perform the contract. There has to be a specific

pleading and proof to sustain a claim of impossibility of performance. The onus of frustration of contract is on the defendant and the defendant has failed to discharge the said onus thereof.

72. In the instant case, the contract was made keeping in mind the conditions of the chimney in the boiler, and therefore, at a later stage, the contract cannot be left unfulfilled for the reason that was already allegedly known to it. At the time of terminating the contract, the truth about the boiler conditions had been concealed by the defendants, and the same was disclosed at a later stage in the written statement of the defendants. The contemporaneous evidence suggests that due to rise in price of shellac and labour trouble the contract could not be performed.

73. Lastly, reliance was placed on the case of ***Dhanrajamal Gobindram v. Shamji Kalidas & Co.***,²⁵ by the learned single judge wherein it was stated that breakdown of machineries is included in “force majeure”.

74. Force Majeure is a principle of law which is applied as a defence to performance and discharge of contractual duties and obligations, and entitles a party to refuse liability for damages caused arising out of such non-performance by reason of an unforeseeable or unpreventable event which has rendered the performance of an obligation impossible.

75. The learned Single Judge has relied upon the evidence which is unreliable and unsubstantiated. There is no evidence establishing that the contract is frustrated or it was impossible for the defendant to manufacture the said shellac. The doctrine of frustration or impossibility of performance has been lucidly explained in ***South East Asia Marine Engineering and***

²⁵ (AIR 1961 SC 1285)

Constructions Limited vs. Oil India Limited,²⁶ where it has been held by the Hon'ble Supreme Court that under the Indian Contract Law, the consequences of a force majeure event are provided for under Section 56 of the Contract Act, which states that on the occurrence of an event which renders the performance of the contract impossible, the contract becomes void thereafter. When the act contracted for becomes impossible, then under Section 56, the parties are exempted from further performance, and the contract becomes void. However, there is no doubt that the parties may instead choose the consequences that would flow on the happening of an uncertain future event, under Section 32 of the Contract Act. In India, the Contract Act had already recognised the harsh consequences of frustration of contract to some extent and had provided for a limited mechanism to ameliorate the same under Section 65 of the Contract Act.

76. A letter dated 26th July 2000 addressed to another buyer by the defendant was also disclosed where the non-performance of the contract was on similar ground. The tenor of the said letter is the same.

77. A further letter addressed to another buyer of the same date with the same tenor and reason for non-supply has also been disclosed. The newspaper report showing labour problem and strike has been relied upon during evidence. An invitation to tender dated 17th February 2002 has been relied upon to show that tenders are invited for repairing of different machines and chimney of JASCOLAMPF factory situated at Sidroll followed by inauguration of Alluretic Acid Plant and resuming production at the factory in the presence of the Chief Minister has been disclosed. The said documents have been marked as **Exhibit 2 and DD-6** respectively. However,

²⁶ (2020) 5 SCC 164

the letter dated 17th April 2000 written in Hindi and claimed to have been written by the employees and workers of the factory was not proved and marked for identification as **Exhibit-3A** and the signature of Buchuwa Oraon was separately marked as **Exhibit-3** on 15th July 2014 during his evidence.

78. Buchuwa Oraon one of the witnesses for the defendant during cross-examination has deposed that between April 2000 and the time for which boilers were ready sometime in 2002 the chimney and the side patti borders were prepared. He has deposed that the boilers stopped working from 17th April 2000 and then the work stopped. According to the witness, the last date of manufacturing the goods for supply was 17th April 2000 and thereafter no goods were produced. If the said witness is to be believed, then at the time when the contract was entered into the boiler was not working. Then the defendant could not have entered into the said contract for supply of 24 MT TN Shellac. When the plaintiff reminded the defendant by fax dated 16th May 2000 that the plaintiff would require the said quantity for export on or before 20th May, 2000, the defendant in its communication dated 26th July, 2000 has expressed its inability to perform the contract due to acute labour problem and strike.

79. However, the plaintiff has disclosed the document dated 23rd June, 2000 and 26th July, 2000 wherefrom it would appear that due to unbelievable rise in market price of shellac and labour problem and strike the contract could not be performed. However, the fax dated 23rd June, 2000 is an internal document that refers to unbelievable price rise which has not been exhibited. The only ground for rescinding the contract is labour

problem and strike as would appear for the letter of the defendant dated 26th July, 2000 (**Exhibit-K**).

80. Rabindra Kumar, the other witness for the defendant however in his cross-examination agreed to the fact that the defendant after having failed to deliver the said shellac came up with the flimsy excuse of labour problem and strike.

81. It is well settled that rise or fall of a price of a commodity forming the subject matter of a contract would not be a ground to avoid performance of the contract. In the decision in ***Energy Watchdog v. CERC***²⁷, it is stated that as the force majeure occurs dehors the contract, it is dealt with by a rule of positive law under section 56 of the Contract Act. The word "impossible" does not mean physical or literal impossibility. It may not be literally impossible but may be impracticable and useless from the point of view of the object and the purpose of the parties. If an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement, it can be said that the promisor finds it impossible to do the act which he had promised to do. In the context of a defence of frustration of the ground of rise in freight charges and price escalation in coal it was held that mere incidence of expense or delay or onerous is not sufficient and there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances. The court applying the "radically different" test has observed that since the subject matter of the doctrine of frustration is contract and contracts are about the allocation of risk and since the allocation and assumption of risk is not simply a matter of express or

²⁷ 2017 (14) SCC 80

implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine could be a difficult one. The possibility of rise in the prices of fuel was a risk known to the parties.

82. The application of the concept of "radically difficult" test in frustration of the contract has been explained by Lord Radcliffe in **Davis Contractors Ltd.** (supra) in the following words: (AC pp.728-29)

"... frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. ...

There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

83. The High Court at Calcutta in **Ram Kumar v. P.C Roy & Co. (India) Ltd.**²⁸ in the context of knowledge of the parties with regard to the restriction imposed by the government on the supply of wagons held that

"22. Frustration depends on what has actually happened and its effect on the possibility of performing the contract. Where one party claims that there has been frustration and the other party contests it, the Court has got to decide the issue "ex post facto" on the actual circumstances of the case.

'The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred. It is the court which has to decide what is the true position between the parties.'

²⁸ 1949 SCC OnLine Cal 48 : AIR 1952 Cal 335

23. *Denny, Mott case [Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd., 1944 AC 265 (HL)] . Lord Sumner observed in Hirji Mulji [Hirji Mulji v. Cheong Yue Steamship Co. Ltd., 1926 AC 497 (PC)] that the legal effect of the frustration of the contract does not depend on the intention of the parties or their opinions or even knowledge as to the events which brought about the frustration but upon its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure. In my view, this principle is applicable in this case.”*

84. In a fairly recent decision in **National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.**²⁹ on a review of decisions on frustration of contract the Hon’ble Supreme Court has observed that frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or the obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such a case the law declares the parties to be discharged from further performance. The provisions of Section 56 of Contract Act could not apply to self-induced frustrations.

85. In the aforesaid case, in Clause 14 of the Agreement, it was contemplated that during the contract if there is any prohibition of the export or any other executive or legislative act by or on behalf of the Government of the country of origin, the unfulfilled part of the contract shall be cancelled. The parties had agreed to the said term.

²⁹ (2020) 19 SCC 260

86. In view thereof, the finding with regard to the issue no.3 framed by the Trial Court relating to breach of contract is set aside. We are of the view that the contract is not frustrated and that there has been a breach of contract by the defendant.

87. The plaintiff claimed damages of Rs. 14,23,920, calculated as the difference between the contract price and the market price on the date of breach. Section 73 of the Contract Act and Section 57 of the Sale of Goods Act provide for such compensation. In ***Hadley v. Baxendale***³⁰, it was held that damages are recoverable only if they were within the contemplation of both parties at the time the contract was entered into.

88. The claim for damages has to be proved by the plaintiff. The pleadings as well as the evidence would unmistakeably show that the contract was entered into for foreign export and in this regard two invoices dated 12th May, 2000 and 30th May, 2000 disclosed in the application for additional evidence having proforma invoice dated 19th April, 2000 and 25th April, 2000 (**Exhibit-P** Collectively) respectively been relied upon by the plaintiff. Although the said invoices are subsequent to the contract but they are very close to the date when the contract was concluded. Moreover, in the communication dated 17th April, 2000 there was specific reference of foreign supply to be affected for which the plaintiff has requested to supply samples to ensure that it matches the quality of the exporter's requirement. In view thereof, we are not inclined to accept the submission of Mr. Sakya Sen, learned Senior Counsel appearing on behalf of the defendant that at the time of contract, it was not disclosed that the said procurement would be for the purpose of export to a named foreign buyer. It is not denied that the

³⁰ [1854] EWHC J70

plaintiff and defendant had a long-standing business relationship and it can be safely presumed that the said contract was entered into for the purpose of trading in shellac be it domestic or overseas.

89. Consequently, the defendant could have reasonably contemplated losses arising from the plaintiff's export commitments. The Supreme Court in **Karsandas H. Thacker** (*supra*) referred to illustration (K) to Section 73 of Contract Act. However in the present case, the defendant's knowledge of the plaintiff's export business distinguishes the facts and brings the loss within the contemplation of the parties

90. The plaintiff has alleged to have supplied 24MT to its overseas buyers in terms of the invoices dated 12th May, 2000 and 30th May, 2000 having proforma invoice dated 19th April, 2000 and 26th April, 2000 respectively. The invoices were disclosed by the plaintiff at the appellate stage through an application for additional evidence. The proforma invoices however, have been marked as **Exhibit-P** Collectively during trial. We are inclined to accept these invoices as they are required for proper adjudication of the dispute and to establish a proper chain of events.

91. In the case of **Sri Gopal Krushna Panda @ Gopal Krishna Panda v. Manager, Utkal Grameen Bank & Anr.**³¹, the issue of whether the appellate court can take into account the application filed under Order 41 Rule 27 CPC for admitting additional evidence before hearing the appeal was taken into consideration. The Court cited an earlier ruling in **Sankar Pradhan v. Premananda Pradhan (dead) & Ors.**³² in which it was stated

³¹ 2019 SCC Online Ori 34

³² 2015 SCC Online Ori 308; 2016 AIR CC 1169; 2016 (3) SCC 40

that under clause (1)(b) of Rule 27, additional evidence can only be admitted where the appellate court "requires" it (i.e., finds it necessary). Therefore, the court requires such documents, namely, the invoices dated 12th May, 2000 and 30th May, 2000 for deciding the issues raised in the appeal.

92. It is well settled that in a situation like this the buyer would be entitled to damages which shall be the difference between the contract price and the market price of the commodity prevailing on the date of the purchase.

93. It is a settled principle of law that a party claiming damages for breach of contract is under a duty to take all reasonable steps to mitigate the loss consequent upon such breach as held in **Pannalal Jugatmal** (*supra*). This principle is expressly embodied in the explanation to Section 73 of the Indian Contract Act, 1872, which states:

"The person who suffers by the breach of a contract is bound to take all reasonable steps to mitigate the loss consequent on the breach, and cannot claim as damages any sum which he could have avoided by the exercise of reasonable diligence."

94. The law on this subject has been clearly enunciated by the House of Lords in **British Westinghouse Electric Co. v. Underground Electric Railways**³³, wherein it was observed that the claimant is required only to take reasonable steps to mitigate the loss. The duty is not to take every conceivable step, but only those which a reasonable and prudent person would take in the circumstances.

95. The Supreme Court of India, in the case of **M/s. Murlidhar Chiranjilal** (*supra*), clarified the well-established principles governing the

³³ [1912] AC 673

assessment of damages in breach of contract cases. The first principle is that a party who has established a breach of contract is entitled, as far as monetary compensation can achieve, to be placed in the position he would have occupied had the contract been duly performed. However, this entitlement is subject to a second, equally important principle: the aggrieved party has a duty to take all reasonable steps to mitigate the loss resulting from the breach, and cannot recover any portion of the damages which could have been avoided by exercising such reasonable diligence.

96. In ***Union of India v. M/s. Commercial Metal Corporation & Ors.***³⁴, where it was held:

“9. The object of an award of damages for breach of contract is to place the plaintiff, so far as money can do it, in the same situation, with respect to damages, as if the contract had been performed. He is thus enabled to recover damages in respect of the loss of gains of which he has been deprived by the breach. He is entitled to sue for the loss of this bargain, that is to say, for the loss of the particular benefit which he expected to receive by the contract which has been broken. This is the benefit which the buyer expects from the promised performance. With the amount of money, that is, the difference between the contract price and the market price the buyer should therefore be in the same financial position as he would have been if the seller had performed this contractual obligation to deliver the goods. In other words, the plaintiff is entitled to compensation for the loss of his bargain, so that his expectations arising out of or created by contract are protected. This protection of expectations is the distinguishing mark of an action for damages for breach of contract.” (emphasis supplied)

11. On cancellation of the contract the transaction is repudiated. The bargain is rescinded. The buyer is entitled to claim damages. The

³⁴ AIR 1982 Del 267

normal measure of damages when the seller fails to deliver the goods is the difference between (a) market price of the contracted goods at the time fixed for delivery and at the place fixed for delivery, and (b) the contract price.

This market price rule was laid down in 1854 in the most celebrated case in the field for contract damages namely Hadley vs. Baxendale (1854) 9 Ex 341. In India Jamal v. Moolla Dawood Sons, (1915) 43 Ind Apps 6 (8) remains unimpaired as the classic authority on the topic. (emphasis supplied)

97. In **Mackay** (*supra*) it was further clarified that if a market is available, the buyer can minimise his loss by procuring goods from the market so that he is put in the same position as if the seller had not made any default and the sole damage would be the difference in the price if the market price exceeds the contract price.

98. In the present case, the plaintiff made timely inquiries regarding delivery and attempted to secure alternatives.

99. In order to meet its contractual obligations with the foreign buyers, the appellant procured the goods from the market available and was able to fulfil only two of its export orders being **Exhibit-P** collectively and the other two contracts were cancelled being **Exhibit-S** collectively vide cancellation letter dated 15th September, 2000 being **Exhibit-T** for orders under proforma invoice dated 18th April, 2000 and 19th April, 2000. It is quite evident that the appellant made genuine efforts to mitigate its loss by sourcing goods from the open market. Given the circumstances, procuring goods from the market was the only viable option available to the appellant.

100. The plaintiff's claim for damages, arising from a breach of contract governed by Section 57 of the Sale of Goods Act, 1930, must be

assessed in light of established legal principles and the facts at hand. Section 57 entitles the aggrieved party to recover the difference between the contract price and the market price at the date of breach, a principle affirmed in the judgments of **Firm H. Sham Sunder & Sons** (*supra*), **Vishwanath** (*supra*), and **The Standard Chemicals Company (P) Ltd.** (*supra*). In these cases, the courts have consistently held that damages must be calculated based on the prevailing market price on the date the breach occurred, and that reliable, contemporaneous evidence of such price is essential.

101. In the instant case, the breach occurred on 26th July, 2000, as evidenced by the letter of termination (**Exhibit-K**) and therefore, the market price of the machine made TN shellac of that day will be taken into consideration for calculating the loss or damage suffered by the plaintiff. Although, the plaintiff initially sought to substantiate his loss of Rs.14,23,920/- using the market price of TN Shellac as on 6th September, 2000 (**Exhibit-Q**), this approach is flawed, as the relevant date for calculating damages is the date of breach. Reliance can be placed on the Calcutta Shellac Market Report published by the Shellac Export Promotion Council on 26th July, 2000 (**Exhibit U and U/1**), which indicated the market price of 75 kg of TN Shellac at Rs.11,100/-, or Rs.148 per kg. The court also noted that **Exhibits Q** and (**U and U/1**) were issued by the same authority, thus overruling objections to the admissibility of **Exhibit U and U/1**.

102. The plaintiff has claimed a sum of Rs.14,23,920 towards damages allegedly suffered as a consequence of the defendant's failure to perform its contractual obligations. The said amount has been computed on

the basis of the difference between the contract price and the prevailing market price of TN Shellac subsequent to the breach. Additionally, reliance has been placed on the cancellation of a corresponding export order by a foreign buyer, as evidenced by **Exhibit-T**, on account of the non-supply of the contracted goods. The plaintiff contends that the cancellation directly resulted in commercial losses for which the defendant must be held liable for damages.

103. The plaintiff's calculation of damages is substantiated by the market price of shellac as on 6th September, 2000 as per the Shellac Export Promotion Council's report (**Exhibit Q**).

104. Applying the correct market price, the difference between the market rate and the contract price (Rs.148 - Rs.114 = Rs.34 per kg) was established. For the contracted quantity of 24 MT equivalent to 24,000 kg, the plaintiff is thus entitled to damages amounting to Rs.8,16,000/- (Rs.34 X 24000Kg). Issues No. 4 and 5 stand resolved in favour of the plaintiff. There shall be a decree for a sum of Rs.8,16,000/-. If the said amount is paid within the period of four weeks from date it shall not attract interest, failing which, it shall attract interest @ 7% per annum till payment.

105. With respect to Issue No. 6, it is in evidence and an admitted fact that the earnest money of Rs. 2,73,600/- which was deposited by the plaintiff vide demand draft dated 17th April, 2000 (**Exhibit-G**) was returned to the plaintiff by the defendant at the time of terminating the contract on 26th July, 2000 (**Exhibit-K**). The advantage derived under the contract was returned to the plaintiff. Therefore, the plaintiff is not entitled to any further or other relief prayed for reasons stated above.

106. The judgment of the learned Single Judge is set aside.

107. The appeal and the application are thus disposed of.

108. There shall be no order as to costs.

I agree

(Soumen Sen, J.)

(Biswaroop Chowdhury, J.)