
**M/s. Baldev Steel Ltd. Vs M/s. The Empire Dyeing and Manufacturing
Company Ltd. and another**

Suit No. 622 of 1977

Court: Delhi High Court

Date of Decision: May 1, 2001

Citation: (2001) 6 AD 719 : AIR 2001 Delhi 391 : (2001) 92 DLT 471

Hon'ble Judges: Manmohan Sarin, J

Bench: Single Bench

Advocate: Mr. Rajiv Garg, for the Appellant; Mr. Hardev Singh and Mr. Mahinder Ruppal, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Manmohan Sarin, J.

The plaintiff has instituted this suit, seeking a decree of specific performance of agreement/order dated

12.6.1973/9.8.1973, directing the defendants to deliver 30/8 ton class-3 crane and 15 ton class-3 crane, after accepting the sum of Rs.6,85,000/-

(Rs.six lacs eighty five thousand only), being the balance of price agreed. In the alternative, the plaintiff prays for a decree to be passed in favor of

the plaintiff and against the defendants in the sum of Rs.8,02,925/- (Rs.eight lacs two thousand nine hundred twenty five only) together with

pendente lite interest at 18% or such rate as the court deems fit. The sum of Rs.8,02,925/- includes: (i) Rs.5,50,000/- being the difference in

market price of the cranes ordered and the agreed price between the parties, (ii) Rs.50,000/- on account of loss/damage to the plaintiff by non-

delivery, (iii) Rs.1,25,000/- being advance amount paid by the plaintiff to the defendants and (iv) Rs.77,925/- interest @ 18% p.a. on the above

amount of Rs.1,25,000/- till the date of filing of the suit.

2. During the course of proceeding in the suit, amendment of plaint was permitted. An application for filing of additional documents under Order

XIII Rule 2 CPC of defendant was rejected. An application for amendment of written statement, seeking to introduce a plea based on a

document, production of which had been disallowed under Order XIII Rule 2 CPC, was also dismissed.

3. The following issues were framed based on the pleadings of the parties:

1. Whether the plaintiff is a duly incorporated company and the plaint has been signed and verified and the suit instituted by a duly authorised

person? OPP

2. Whether the suit has been instituted so far as defendant No.2 is concerned against a wrong person? OPD

3. Whether the plaintiff has committed any breach of the contract? If so, its effect? OPD

4. Whether the plaintiff has made the payment towards advance in Installments as per the mutual concurrence of the parties in furtherance of the

contracts for the purchase of cranes? OPP

5. Whether the defendants did not allow inspection of the working of the cranes which was a condition precedent for taking delivery of the cranes?

If so, what is its effect? OPP

6. Whether the plaintiff was always ready and willing to perform its part of the contract? OPP

7. What amount of damages, if any, is the plaintiff entitled to recover? OPP

8. Whether the suit so far as specific performance of the agreement is concerned is maintainable? OPP

9. Whether the defendants have suffered any damages on account of the default of the plaintiff in the performance of its part of the contract and are

entitled to adjust their amount against the plaintiff's claim? If so, in what amount? OPD

10. Whether the claim referred to in issue No.9 can be maintained without payment of requisite court fee?

11. Is the plaintiff entitled to any interest? If so, in what amount? OPP

12. Whether or not the suit is within time? O.P. Parties

13. Whether this court has no jurisdiction to entertain and try this suit? OPD

14. Relief.

4. The plaintiff's case is that despite substantial amounts having been paid to the defendants by way of advance, defendants committed breach of

the contract by not delivering the cranes ordered and wrongfully cancelled the order. The defendants did this despite plaintiff having agreed to an

increase in price, to which the defendants were not entitled. The case of the defendants on the other hand is that although plaintiff failed to make the

payment of advance as agreed, the defendants duly offered the manufactured cranes for inspection and called upon the plaintiff to make the

balance payment of purchase price. The plaintiff failed to do on account of financial problems. The manufactured cranes could not on account of

space constraints be kept in assembled condition and were got dismantled. Defendants performance cancelled the order. Defendants claim a sum

of Rs.25,000/- as due to them after adjustment/setting off the advance paid on account of the losses suffered.

5. The plaintiff in support of its case examined its Managing Director Mr.Megh Kumar Jain. plaintiff also examined Ms.Lalita Chadha, Secretary of

the Company to prove its incorporation and suit being properly instituted. The defendants examined its senior Sales Engineer and Mr.G.S.Iyer,

Engineer in charge of the Quality Control Department of its works at Ambernath.

6. Having heard the counsel for the parties, perused the pleadings of the parties, evidence as recorded with documents as proved and the written

submissions, as filed, my findings on the issues framed are as under :-

7. Issue No. 1

Whether the plaintiff is a duly incorporated company and the plaint has been signed and verified and the suit instituted by a duly authorised person?

OPP

plaintiff examined its Managing Director Mr.Megh Kumar Jain (Mr.M.K.Jain), who deposed on oath that the plaint has been signed and verified

by him. Further, that he has empowered under the Memorandum and Article of Association Ex.P-31, to institute and prosecute the suit. plaintiff

also examined its Secretary, who is a Chartered Accountant, who proved the copy of resolution of the Board of Directors dated 9.7.1977

Ex.PW.2/1, authorising Mr.M.K.Jain to institute the suit. The Minute Book was also produced, certificate of incorporation Ex.P-32 of the plaintiff

was tendered in Court. plaintiff has duly proved its incorporation and the plaint being signed and verified and suit instituted by a duly authorised

person. Issue no.1 is, accordingly, decided in favor of the plaintiff.

8. Issue No.2.

Whether the suit has been instituted so far as defendant No.2 is concerned against a wrong person? OPD

plaintiff has in the amended plaint imp leaded M/s.The Empire Industries Ltd. (Garlic Engineering Division) as defendant No.1. While the Empire

Dyeing and Manufacturing Company Ltd., is imp leaded as defendant No.2 and Mr. Garlic Engineering as defendant No.3. The objection raised

by the defendants is that the suit instituted against defendant No.2 is against a wrong person. Defendant No.3 is also stated to be a division of

erstwhile defendant No.2, now defendant No.1. The averment in the plaint is that prior to 1971, defendant No.1 was named and styled as

defendant No.2. It is for this reason that suit had been initially instituted against defendant No.2 and defendant No.3, who was a division of

defendant No.2. It is simply, a case of change of name of defendant No.2. The name of defendant No.2 has been admittedly changed to defendant

No.1. The impleadment of defendant No.2 is of no consequence and is a mere surplusage. Similarly, defendant No.3 being a division of erstwhile

defendant No.2, now defendant No.1, has no separate legal entity and need not have been imp leaded. This is also a surplusage. The suit is,

however, not liable to fail on account of impleadment of defendant Nos.2 and 3, which is merely a surplusage. Issue No.2 stands disposed of

accordingly.

9. Issue No.12

Whether or not the suit is within time? OPP.

Defendants have pleaded that the suit filed is barred by limitation. It is urged that the scheduled delivery date was June, 1974. plaintiff failed to lift

the manufactured cranes. The present suit instituted on 1.8.1977 was, Therefore, barred by limitation. The plea of limitation raised by the

defendants is without merit. The defendants vide their letter of 17.7.1974, Ex.P-22 informed that 15 ton crane had been dismantled after an

internal inspection. While 30 ton crane could be inspected by 29.7.1974 after which the same would also be dismantled. plaintiff's case in

evidence is that the delivery date had been extended up to February-March, 1975. Even if the plaintiff's version of delivery date being February-

March, 1975 was not to be accepted, admittedly, the defendants' own case is that they cancelled the order vide Ex.P-25 i.e. letter dated

4.11.1974. plaintiff clearly had a cause of action on 4.11.1974 when the defendant cancelled the order. The suit has been instituted within three

years of such cancellation. The suit is, Therefore, held to be within time. Issue No.12 is decided in favor of the plaintiff and against the defendants.

10. Issue No.13.

Whether this Court has no jurisdiction to entertain and try this suit? OPD

Defendants have objected to the jurisdiction of this Court to entertain and try the suit. It is claimed that the order of the plaintiff for supply of cranes

was accepted by the defendants at Bombay. The cranes were to be delivered to the defendants at Ambarnath, the works of the defendants were

within the jurisdiction of Bombay Court. The price was also to be paid by the plaintiff to the defendants at Bombay. It is further claimed that the

order of the plaintiff for supply of cranes was subject to the conditions mentioned in the quotation of the defendants i.e., of being subject to

Bombay Jurisdiction".

11. On a perusal of the correspondence, as proved on record, it is seen that defendant No.3 i.e. M/s. Garlick Engineering, division of defendant

No.1, submitted its quotation on 25.4.1975, from the Delhi office. Defendant No.1 had a branch office in Delhi. Negotiations and discussions took

place in Delhi. The order dated 12.6.1973 was placed by the plaintiff on the defendants in Delhi. The said order had also been accepted by

defendant No.3 having its office at Delhi from Delhi. The payments to the defendants were made at Delhi. From the foregoing, it would be seen

that the cause of action for suit had arisen in Delhi. Merely, because one of the standard printed terms of the quotation, mentioned, subject to

Bombay Jurisdiction", it cannot exclude the Delhi Jurisdiction. It was not an exclusionary clause. As noticed earlier, the entire negotiations,

placement of order and further correspondence was through the defendants" office at Delhi. Keeping in mind the Explanation to Section 20(c)

CPC, as also interpreted by the Apex Court in M/s. Patel Roadways Limited, Bombay Vs. M/s. Prasad Trading Company, , it is clear that the

Courts at Delhi would have jurisdiction being a place where the defendant Corporation was having its divisional or subordinate office and the place

where the cause of action arose. Issue No.13 is decided in favor of the plaintiff and against the defendants. It is held that the Courts at Delhi have

the jurisdiction to try and entertain the suit.

12. Issue Nos. 3, 4, 5, 6, 7, 8, 9 and 10.

The text of these issues has been given in para No.3 and the same is not being repeated.

These issues relate inter alias to the terms and conditions of the contract, determination of the party, who was in breach, readiness and willingness

of the respective parties to perform their part under the contract. These issues also relate to the entitlement of plaintiff to specific performance or in

the alternative to damages for the losses suffered and the claim of the defendant of the defendant for damages and their right to adjust the same

against advance received from plaintiff. These issues are inter-dependant and are being grouped together for convenience of disposal.

13. The facts as they emerge from the pleadings, evidence recorded and documents proved on record may be noted:-

(i) The plaintiff company was setting up a mini steel plant at its works at Bahadurgarh. Defendants claim to be manufacturers of high class cranes

for use by mini steel plants. Defendants offered to supply the required cranes as per Indian Standard Specifications. plaintiff in response to the

quotation and subsequent discussions held with the defendants" officials agreed to purchase two cranes, namely, (i) 30/8, Class-III, Cabin

operated crane with master controllers and (ii) 15 ton, Class-III, Cabin operated drum controlled crane. The agreed price was Rs.4,40,000/- for

30/8 crane and Rs.3,00,000/- for 15 ton crane. The plaintiff intimated that it required the delivery of both the cranes by June, 1974, with exact

time to be intimated three months prior to the final date of dispatch. plaintiff paid a sum of Rs.5,000/- as token advance. The balance advance of

Rs.2,17,000/- to be paid after inspection of crane, being manufactured for installation of another customer at Ghaziabad. plaintiff also reserved the

right to revoke the contract if performance of the above crane, to be inspected, was; not found to be satisfactory. plaintiff appointed

M/s.W.S.Atkins Pvt.Ltd. as its Engineers and Management Consultants, for approving the general plans and technical diagrams of the cranes and

for inspection and approval prior to dispatch and delivery to the plaintiff. The defendants confirmed the acceptance of the plaintiff"s order vide

letter bearing No.73/CRN/72/JRG/2059 dated 9.8.1973. plaintiff further paid a sum of Rs.70,000/-, leaving balance advance of Rs.1,47,000/- as

advance vide cheque No.27.10.1973.

(ii) The plaintiff company had been seeking the plans and diagrams of the cranes ordered from the defendants. The defendants vide letter of

29.1.1974, Ex.P-14 sought revision of price. Defendants represented that at the agreed price, they were not even able to meet the direct material

cost. There had been a steep escalation in the material costs in the last 6 months. The prevailing price of the ordered cranes was Rs.11,50,000/-

(Rs.Eleven lacs fifty thousand only). However, with a view to accommodate the plaintiff, they would agree to a price revision to Rs.8,50,000/-

(Rs.eight lacs fifty thousand only). It may also be noted that earlier the defendants vide Ex.P-6 i.e. letter dated 22.8.1973, had informed the

plaintiff that there was a delay in the delivery of cranes ordered by the customer at Ghaziabad due to power shortage at the end of the customer.

The crane could, Therefore, be inspected at their works at Ambernath by the plaintiff. Defendants also notified that on receipt of the balance

payment of the advance, they would start making the G.A.Drawings etc. for the cranes ordered. The plaintiff requested its Consultants to check

the crane, manufactured for Ghaziabad customer at the works of the defendants, so that the final go-head to be given for the cranes ordered by

plaintiff. In the event on 15.10.1973, defendants vide-letter Ex.P-8 submitted its G.A.Drawings for both the cranes requesting for its approval.

plaintiff further remitted a sum of Rs.70,000/- as further advance. The G.A.drawings were also corrected and certain additional features, as were

recommended by the Consultants, were sought. plaintiff's Consultant had been visiting the defendants for approval and confirmation of the

specifications of the parts and design thereof. plaintiff sought the incorporation of a cable drum as advised by the Consultants. Certain additional

features, as suggested by the Consultants and required for proper functioning of the cranes were also asked for.

(iii) plaintiff vide its letter dated 1.3.1974 accepted increase in price of the cranes to Rs.8,10,000/- (Rs.eight lacs ten thousand only). It was further

stated that the above price would include the amendments suggested by the plaintiff in letter bearing No.73/CRN/3135/JRJ/G320 dated

13.12.1973 and letter bearing No.CRN/3135/73/JJT/775 dated 26.2.1974, except the cable rearing drum. Defendants vide their letter bearing

No.7.3.1974 Ex.P-16 thanked the plaintiff for finalising the specifications and increase in price though a marginal one. Defendants informed that

work on both the cranes was in full swing and that the first crane would be ready by end of May and the second crane by June, 1974. Defendants

again confirmed that the cranes were being slated for production in May, 1974, and plaintiff should take their delivery. plaintiff vide its letter dated

27.5.1974 sent a cheque bearing No.308721 for Rs.1,00,000/- as further advance. It may be noted that this cheque was dishonored and the

plaintiff thereafter gave a cheque of Rs.50,000/- in lieu thereof.

(iv) Defendants vide their letter dated 19.6.1974, Ex.P-20, notified the plaintiff that the 15 ton crane was almost ready and that the same be

inspected between 25th to 30th of the month. plaintiff was also informed that they would not be able to keep the crane in an assembled condition,

since assembled crane required a large volume of space in the factory shed. plaintiff was asked to intimate the date of visit of the inspector.

Defendants followed this up with letter dated 17.7.1974, Ex.P.-22. plaintiff was informed that in view of the monsoon conditions and the large

space occupied, it had been decided to dismantle the 15 ton crane after internal inspection by the Inspection Department. plaintiff was also

informed that 30/8 ton crane was being kept in assembled condition ready for testing till the 29th July, 1974. In the event plaintiff's representative

did not come for inspection the same would also be dismantled.

(v) Parties are at variance and have conflicting versions with regard to the inspection of 15 ton and 30/8 ton cranes, to which I shall advert later.

Defendants claim that the plaintiff failed to make the balance payment of price and lift the cranes and they were constrained to cancel the order

vide letter dated 4.11.1974 Ex.P-26. plaintiff was duly notified that since it was not in a position to lift the cranes, which were lying ready for past

six months, the order stood cancelled. In case, plaintiff desired to re-instate the order, price applicable would be the one prevailing at the time of

the supply. plaintiff protested vide letter dated 18.11.1974, Ex.P-47, claiming that when the increase in the price of the cranes was agreed, it was

clearly understood that the cranes would be lifted sometime in February-March, 1975. plaintiff considered the said cancellation as a betrayal of

trust reposed by it in defendant. Defendants again vide letter dated 5.12.1974, Ex.P.-27 recorded that it would not be possible to retain the cranes

since the same had not been lifted for over five months and alternate arrangements were being made for their disposal.

(vi) plaintiff vide its letter Ex.P.-50, claimed that only one crane had been offered for inspection. Defendants vide letter dated 13.12.1974 Ex.P-28

reiterated their position that there was no pending order and if plaintiff wanted the defendants to quote for 15 ton and 30 ton cranes, further

details be furnished, as per questionnaire. plaintiff vide letter dated 2.1.1975, Ex.P-51 called upon the defendants to execute the order and claimed

that the contract was to be executed not in part but as a whole and both the cranes had not been offered for inspection. Defendants vide letter

dated 14.1.1975 Ex.P-29, reiterated their stand. Defendants also notified the plaintiff that the order stood cancelled and asked them to send them

official intimation so that the defendants could raise a bill towards design and inventory cost. plaintiff kept on asserting its stand vide letter Ex.P-52

and Ex.P-30 to which the defendants responded vide Ex.P-30.

14. Learned counsel for the plaintiff, Mr. Rajiv Garg, argued that the defendants were new in the business and the plaintiff trusted them. It was

evident from the quotation itself that plaintiff was not having experience in the manufacture of the ordered cranes. Learned counsel submitted that

as per the order placed vide Ex. P-16, 30% advance was to be paid on inspection of the cranes being manufactured from Rath Steel for installation

at Ghaziabad. Learned counsel submits that the defendants failed to manufacture and supply the crane. It is plaintiff's apprehension that the said

order was never executed. Despite this, plaintiff made payment of Rs. 70,000/- and further sum of Rs. 50,000/-, by way of advance. Defendants

did not object to the same and accepted the same. Defendants cannot now make any grievance with regard to the non-payment of the entire

advance amount. Learned counsel submits that from the correspondence exchanged and referred to earlier, it is clear that defendants did not

commence manufacturing the machines till 16.6.1974. Only discussion with regard to the approval of drawings and change in specifications were

going on between the plaintiff's Consultants and defendants. The defendants never made non-payment of full advance as an issue.

15. Defendants contrary to the agreed terms demanded an increase in price on the ground that there was a steep escalation in the cost of the

materials. plaintiff had accommodated the defendants though not legally obliged by accepting a price increase to Rs. 8,10,000/-. Defendants even

appreciated and thanked the plaintiff for giving the price increase and stated that the work was being carried out in full swing. Learned counsel

submits that it is the plaintiff's apprehension that defendants could not have manufactured in just three months, the cranes ordered. As regards the

inspection, learned counsel submits that as deposed by Mr. M.K. Jain, Managing Director, he had gone to Bombay on 26.6.1974, when the 15

ton crane was offered for inspection. It was in assembled condition but was not working. Defendants NO. 3 did not demonstrate its working and

said that they would call after it was put in working order. No crane of 30/9 ton was shown at that time. Defendants' case is that as the plaintiff

representative did not visit the works at Ambarnath, the said crane was dismantled and plaintiff was notified on 17.7.1974 that 30/8 ton crane

would also be kept in assembled condition only up to 29.7.1974. plaintiff's version of its Managing Director having inspected the crane on

26.7.1974 and pointing out defects is not credible.

16. The deposition is only to the effect of visiting Bombay and not the works at Ambarnath. Accordingly, there was no question of the said 15 ton

crane, being not found in working order and defects being pointed out. In this connection, the following extract from the letter dated 3.2.1975 Ex.-

52 is contrary to the deposition as made. "Regarding para 5 of your letter, you offered one 15 ton crane for inspection and our Director Mr. M.K.

Jain reached Bombay on 26th June when he called on your office. He had a talk with you Mr. Tahiliani. In the discussion with Mr. Tahiliani, it was

pointed out that the inspection time should be longer because within 3/4 days inspection could not be arranged and secondly both cranes should

be offered for inspection together as per contract. Mr. Tahiliani pointed out his difficulty that they cannot keep crane in assembled condition

because the same occupy more space and assured the undersigned the workmanship and guaranteed the same. He suggested that when the next

crane will be ready, this crane will again be assembled and will be offered for inspection along with second crane. This is wrong to say that

because of lack of information from our side you dismantled our crane. When we contracted you in Bombay on 26th June or 27th June, you

dismantled it because of lack of space at your end and rainy season in Bombay.

17. As regards second crane the defendants version is that time for inspection was extended up to 5.8.1974 and the plaintiff was finally notified on

31.7.1974 that in case the inspection was still not carried out, they would dismantle the same. Both parties are agreed that 30/8 ton crane was

inspected while plaintiff maintains that the report of Mr. Ghosh, Engineer of the Consultant was not favorable and he had pointed out certain

defects, which the defendants failed to rectify. The defendants claim that no defect was pointed out by Mr. Ghosh and it was one Mr. S.G. Ghosh,

who had given the Inspection Report. The production of the inspection report as an additional document was denied to the defendants and

defendants were also not allowed an amendment in the written statement, which would have enabled them to introduce the said report by way of

amendment in the written statement.

18. Learned counsel for the plaintiff argued that the defendants were in breach of the agreement terms in insisting on inspection and delivery by

June-July, 1974. This is because at the time of price increase, the delivery date had been deferred to February-March, 1975. Besides, it is urged

that the defendants wanted to extract more money by still a further increase, and were Therefore, resorting to these tactics. Learned counsel

argued that the defendants had turned dis-honest because of the steep escalation in prices. It was claimed that the plaintiff had suffered a loss of

Rs. 5,50,000/- as it could not operate the mini steel plant in the absence of cranes. plaintiff has not proved report of any inspection carried out by

Mr. S.G. Ghose, pointing out any defects in the 30/8 ton crane. As noted earlier, defendants have not been permitting to prove the inspection

report dated 31.7.1974, signed by Mr. S.G. Ghose, since its production had been disallowed under Order XIII Rule 2 CPC.

19. From an analysis of the deposition and the correspondence on record, as proved, the position which clearly emerges is that the defendants

duly notified the plaintiff for carrying out the inspection of 15 ton crane as also of 30/8 ton crane thereafter. There was no response to the same

and after waiting for considerable period, the defendants had no option but to dismantle the said crane of 15 ton on account of space constraints

and the failure of the plaintiff to have the inspection carried out. A significant factor is that the plaintiff has produced nothing on record to show that

any defects whatsoever were pointed out in 30/8 ton crane on account of inspection by Mr. S.G. Ghose. plaintiff's representatives neither

produced Mr. S.G. Ghose nor proved the inspection report showing defects. Secondly there is not even a communication from the plaintiff form

July, 1974 till termination of contract in November, 1974 with regard to any defects having been found on inspection of 30/8 ton crane.

Defendants" case on the other hand is that the plaintiff was facing a financial crisis. It was on account of this that they were unable to pay the

balance price and lift the cranes. As regards the plaintiff's plea that there was failure on the part of the defendants in not offering the cranes for

Rathi Steel. Ghaziabad, for inspection, it may be noted that the defendants had duly informed the plaintiff that the said crane was not being

dispatched to Ghaziabad at customer site on account of letter's power problem. Further, that plaintiff could inspect the same at their works at

Ambarnath. plaintiff itself failed to take steps to have the inspection carried out of the said crane. In any case, the same is a non issue inasmuch as

the plaintiff did not exercise its option to revoke the contract as per the terms of its order on account of non-inspection of the crane to be

manufactured for M/s. Rathi Steels, Ghaziabad. Moreover, defendants on their part also did not seek to terminate the contract on account of the

failure of the plaintiff to make the payment of full 30% advance, as agreed. This plea, Therefore can be of no avail to the plaintiff.

20. Regarding plaintiff's plea that as per the terms of the contract, in the event of failure to inspect, the defendants had the right to dispatch the

crane within 10 days and the defendants had failed to act in accordance with the said provision, it may be noted that this was a case where the

plaintiff had failed even to pay the advance amount, as agreed. The G.A. Plans and Drawings had all been approved by the Consultants and it is

clearly established from evidence on record that the cranes were duly manufactured. Not only this, a cheque of Rs. 1 lakh, issued by the plaintiff,

had been dishonoured. In lieu thereof, the plaintiff could send only a sum of Rs. 50,000/-, thus making a total sum of Rs. 1,25,000/-, as advance

as against Rs. 2,40,000/- approx. required on the basis of 30% of the revised price.

21. The plaintiff's Managing Director claimed in examination-in-chief that the plaintiff had enough arrangements of finances to pay for the balance

price of cranes. The said statement does not inspire any confidence in view of the subsequent admissions and the documents on record. plaintiff's

Managing Director had stated that he had no knowledge if 30/8 ton crane was inspected by Mr. Ghose. plaintiff's Managing Director in his cross-

examination had admitted that machinery from M/s. General Electric for the Mini Steel Plant had not been received till 1976-77, though some

machinery had come in 1975-76. plaintiff at the relevant time had not even obtained a license to carry on the business of mini steel plant. plaintiff's

Managing Director also admitted that they did not negotiate or enter into a fresh contract with any concern for the supply of cranes. He also

admitted having written to the defendants that because of the credit squeeze, defendants that because of the credit squeeze, defendants should

supply the cranes against the guarantee of IDBI. He, however, claimed that it was written at the suggestion of the defendant themselves who had

mentioned that the money could be got from IDBI. He claimed that plaintiff had arrangements for the money. In cross-examination he admits that

the same would have entailed conversion of money No. 2 into money number one and it would have taken sometime. Later on, Managing Director

of the plaintiff wished to withdraw the statement by purported clarification that by money No. 2 he meant money obtained from loan and money

No. 1 he meant plaintiff's own money. It is apparent from the documents on record, including the balance sheet and letter Ex.P-4 and the evidence

as recorded that during the relevant time, plaintiff was not possessed of and did not have requisite funds with them for payment of balance

purchase price. The Managing Director of plaintiff admitted that plaintiff did not have Rs. 7,50,000/- in its bank account during June-July, 1974. It

is claimed that since the plaintiff had deposits with other firms, it was not necessary to keep the amounts in its accounts.

22. From the foregoing, the conclusion is inescapable that the plaintiff on account of credit squeeze and other financial crisis was not possessed of

sufficient funds during the period June-July, 1994 when the cranes were offered for delivery. It is significant that earlier the plaintiff did not request

for a revised delivery schedule despite communication from the defendants, informing that cranes would be ready for inspection and delivery in

May, 1974. It is only for the first time after the defendants notified the plaintiff of cancellation of the order that plaintiff took the plea in November,

1974 that the delivery was to be in February-March, 1975. In my view, the plaintiff has failed to establish any breach of the contractual terms on

the part of the defendants. Rather it is the plaintiff, who has been in default in not making the payment of the balance prices. the defendants cannot

be faulted with for not dispatching the cranes in accordance with the contractual provision, specially, when even the full advance had not been paid,

a cheque of Rs. 1,00,000/- had been dis-honoured in lieu whereof only a sum of Rs. 50,000/- was paid. The plaintiff had not been forthcoming

with the payment of the balance price. In these circumstances, the defendants cannot be faulted with for not dispatching the cranes or cancelling the

order after a wait of nearly 5 months.

23. As regards the plaintiff's claim for specific performance, specific performance can be granted on the basis that the contract is sub-sitting and

that the plaintiff is entitled to relief notwithstanding the repudiation of the contract by the defendant. This equitable relief is founded on the basis that

the plaintiff had performed its a part of the contract and was always willing and ready to perform the essential part of the contract. In the instant

case, plaintiff itself has been found to be in breach. plaintiff in the alternate is seeking relief of damages. Section 14 of the Specific Relief Act

provides that a contract breach of which can be adequately compensated by payment of money it dis-entitles the plaintiff from seeking specific

performance. Section 16 further provides a bar to specific performance where compensation is adequate relief for breach of contract and where

plaintiff violates any essential terms of the contract. Section 20 provides for the manner in which discretion is to be exercised by the court while

deciding specific performance. Section 21 enables the Court to award compensation if so pleaded in the plaint as an alternative to specific

performance. The plaint filed in the present suit is for specific performance. It does not make a specific averment that the plaintiff has complied with

all the terms of the contract and that it was ready and willing to perform by payment of full money. The cranes though offered to be lifted in June-

July, 1974 were never lifted from the defendants on payment of entire balance consideration for a period of six months. There was complete

silence on the part of the plaintiff to lift the cranes. In view of the finding reached that it was the plaintiff, who was in default and was not ready and

willing to perform the contract, plaintiff is clearly dis-entitled to the relief of specific performance. Moreover, the suit itself was filed after a delay of

nearly three years from the date of delivery of the equipment for which specific performance is sought. The claim would even be barred by delay

and laches.

As regards Issue No. 9, the defendants in the written statement have averred that they have suffered loss of Rs. 60,000/- on account of storage

charges. A further sum of Rs. 60,000/- is claimed as loss of interest on the unpaid purchase price. The defendants have also averred that they

incurred expense of Rs. 30,000/- towards cost of modification in the design of the cranes for meeting the requirements of further prospective

customers. The aforesaid amounts totalled Rs. 1.50 lacs. The defendants claimed that even if the amount of advance of Rs. 1,25,000/- was set off

against the aforesaid claims, they would still be entitled to a sum of Rs. 25,000/-. None of the witnesses of the defendants has stated a word in

their deposition by way of evidence to support the aforesaid claims. There is no documentary evidence either produced on record in support of the

said claims. These remain mere pleadings.

On the other hand, defendants' own case is that the market price of crane that were ordered by the plaintiff were in the range of Rs. 11,50,000/-

and that they modified these cranes for other customers. The substantial increase in price would more than off-set any alleged loss on account of

interest, storage and modification expenses. Accordingly, it is held that defendants are not entitled to any amount on this account.

In view of the foregoing discussion, Issue No. 3 is answered in the affirmative. It is decided in favor of the defendant and against the plaintiff. Issue

No. 4 is decided against the plaintiff and in favor of the defendants as it has been found that plaintiff till the date of cancellation had failed to make

the payment of the agreed amount of 30% of advance and one of the cheques issued had been dis-honoured. Issue No. 5 is decided against the

plaintiff. plaintiff has failed to prove that cranes were neither manufactured nor offered for inspection by defendants. Issue No. 6 is answered in the

negative and decided against the plaintiff. The plaintiff was not ready and willing to take delivery of cranes on payment of balance price. Issue No.

7 is answered in the negative and decided against the plaintiff as it is not the plaintiff's case that any order for cranes has been placed on any

alternative source or the same were acquired at a higher price. Besides, plaintiff itself has been found to be in breach. Issue No. 8 is answered in

the negative in view of the reasons recorded. plaintiff is held not entitled to the specific performance.

Issue No. 9 is decided against the defendants. In view of the finding on Issue No. 9, no separate finding is called for on Issue No 10.

Issue No. 11.

plaintiff has been held to be not entitled to the various amounts claimed in the suit except the amount given ""by way of advance"". plaintiff's

entitlement to return of advance and interest thereon is separately dealt with under "Relief". Since plaintiff has been held not to be entitled to any

amounts, there is no question of any interest thereon.

Relief:

plaintiff had advanced a sum of Rs. 1,25,000/- to the defendants. The said sum was advanced as part payment towards the agreed price for sale

of cranes, to be adjusted at the time of final payment. Admittedly, there is no forfeiture clause in the agreement between the parties. It is well-

settled that in case the buyer defaults to carry out his part of the contract, he would lose the earnest money, but may recover the part payment

given by way of advance, leaving untouched the seller's right to recover damages. The buyer is not dis-entitled to recover advance even if he is the

party in breach because breach of contract on the part of the buyer would only entitle the seller to sue for damages, but not forfeit the advance.

This legal position can be altered a special forfeiture clause, which may defeat the right to recover even an advance amount.

Reference may be usefully made to the decision of the Calcutta High Court in Colles Cranes of India Ltd. Vs. Speedeo Spares Corporation, ,

wherein it is held that when price is paid in advance to the supplier, it is ""in the nature of a trust or quasi trust, earmarked for payment of price for

the good to be supplied, which could not be diverted or forfeited for other purposes, including for an alleged breach of contract by the buyer.

In the instant case, there is no forfeiture clause in the agreement between the parties. Accordingly, plaintiff is entitled to refund of the sum

advanced towards part payment of purchase price of cranes i.e. Rs. 1,25,000/-. The advance amount of Rs. 1.25 lacs has been lying with the

defendants for considerably long time. It has also been held that defendants have not suffered any loss, rather they would have benefitted on

account of the steep escalation in the price of the equipment. In these facts, I hold that plaintiff is entitled to received from the defendants the

amount advanced by it, viz. Rs. 1,25,000/-, together with interest at the rate of 9% per annum from 26th July, 1974 till the date of payment. A

decree in the sum of Rs. 1,25,000/- (Rs. one lac twenty five thousand only) together with interest at the rate of 9% per annum from 26.7.1974

with proportionate costs is passed in favor of plaintiff and against the defendants.

The suit stands decreed in the above terms.