Tata Iron and Steel Company Ltd. Vs Ramanlal Kandoi

Court: Calcutta High Court

Date of Decision: May 20, 1970

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 8 Rule 3, Order 8 Rule 4, Order 8 Rule 5
Supreme Court Rules, 1966 â€" Rule 2

Citation: (1971) 2 ILR (Cal) 493

Hon'ble Judges: S.K. Mukherjea, J; B.C. Mitra, J

Bench: Division Bench

Advocate: Subrata Roy Chowdhury and B. Gupta, for the Appellant;M.M. Sen and S.N. Saraf, for the Respondent

Final Decision: Allowed

Judgement

B.C. Mitra, J.
The Appellant instituted a suit for recovery of Rs. 98,538-11 np. in the alternative an enquiry into damages and other

reliefÃ¯Â¿Â½s. This suit was dismissed by a judgment and decree dated May 3 and 4, 1965, and this appeal is directed against this judgment and

decree.

2. On or about April 26, 1956, the Appellant placed an order with the Respondent for supply of sal wood sleepers valued at- Rs. 4,76,707.

According to the Appellant, time was of the essence of the contract, and as the Respondent failed to deliver the materials in accordance with the

time schedule fixed in the contract, the time for delivery was extended until November 30, 1956. This, extension was agreed to by the parties. As

the Respondent failed to deliver the materials even on the extended dates, the Appellant cancelled the order and purchased the balance of the

materials in the open market at the risk of the Respondent in terms of the contract. The Appellant''s claim in the suit for damages is the difference

between the agreed price in the contract and the price which the Appellant paid in making the purchase in the open market.

3. The contract contained various terms and conditions. The terms and conditions which are material for the purpose of this appeal are as follows:

(i) Items in group ''A'' of the specification to be delivered within three months from the date of receipt of the Appellant''s letter WCB/

RA05136/11418E/3487 of March 2, 1956, by the Respondent, remaining materials to be supplied within twelve months from the date of the

Plaintiff"s said letter at the rate of 25 % by the end of every third month.

(ii) All sleepers shall be of well seasoned first class sal wood free from sapwood, cracks, heart rot, loose knots, holes, fillings etc.

(iii) If on inspection at the final destination the Appellant discovers any loss in the goods supplied or that they are received in damaged or broken

condition or in the opinion of the Appellant they are not of the contract quality or specification, the Appellant shall be entitled to refuse acceptance

of or reject the goods altogether and claim damages or cancel the contract and buy its requirements in the open market against the Respondent and

recover the loss, if any, from the Respondent reserving always to itself the right to forfeit the deposit placed by the Respondent for the due

fulfillment of the contract.

4. It is alleged in the plaint that the Respondent should have completed delivery of all items in group "A" by the first week of June 1956, but

delivered only 21 % of these goods. It is further alleged that the Respondent should have delivered 60 % of the materials in group "C by October

25, 1956, but in fact delivered only 3 % of the same. According to the Appellant, it called upon the Respondent to make up the deficits by

November 30, 1956, being the extended date, but as the Respondent failed to make the deliveries even on the extended date, the Appellant claims

to have cancelled the contract in exercise of its option and to purchase the materials in the open market at the Respondent"s risk.

5. In the written statement filed on behalf of the Respondent it is denied that any breach of the contract was committed. It is further denied that

there was any failure on the part of the Respondent to deliver the goods in terms of the contract. There is also a denial of the Appellant"s purchase

of materials in the open market and a further denial that the Appellant suffered any damages.

6. The following issues were framed at the trial of the suit:

(i) Was time of the essence of the contract for supply of sleepers as alleged in para. 3 of the plaint ?

(ii) Were 39 sleepers out of the quantities supplied by the Defendant not in accordance with the contract quality and defective as alleged in para. 4

of the plaint ?

(iii) Did the Defendant fail to deliver the balance of the goods in terms of the contract as alleged in para. 5 of the plaint ?

(iv) Did the Plaintiff wrongfully prevent the Defendant from supplying the goods by reason of facts stated in para. 5 of the written statement ?

(v) Was the time for delivery extended till November 30, 1956, with the consent of the Defendant as" alleged in para. 6 of the plaint ?

(vi) Was the cancellation of the contract by the Plaintiff wrongful ?

(vii) Did the Plaintiff purchase the materials in the open market as alleged in para. 7 of the plaint ?

(viii) Has the Plaintiff suffered loss and damage for a sum of Rs. 98,538-11 np. ?

(ix) To what relief, if any, is the Plaintiff entitled ?

7. The questions involved in this appeal are mainly questions of fact. Certain questions of law, however, have been raised relating to the measure of

damages, open market for the purpose of risk purchase and rules of pleading to which I will refer later in this judgment. The first of the questions of

fact to be adjudicated upon is whether time was of the essence of the contract. The next question to be determined is whether the Respondent

failed to deliver the balance of the timber in terms of* the contract. The third"" question to be determined is whether the cancellation of the contract

by the Appellant was wrongful, the fourth question is whether the Appellant"s purchase of the materials was justified and the last question is

whether the sleepers were purchased in the open market.

8. The first witness on behalf of the Appellant was Pestonji Nowraji Dubash. This witness was at the material time Superintendent, Civil

Engineering Department of the Appellant and, as such, his duties were inspection of work and materials, passing of materials and dealing with bills

of contractors. According to this witness, the first wagon carrying 110 sleepers was received on May 15, 1956. The sleepers were unloaded at the

Appellant"s yard and were inspected by this witness personally. Upon inspection the witness found that the sleepers were unseasoned, full of

defects and were therefore not first class sleepers. On May 23, 1956,, he sent a telegram to the Respondent pointing out that the sleepers were

rejected as they were defective. This telegram is at p. 281 of the Paper Book. It says that the sleepers were full of sap-wood, dry rot and

unseasoned and, therefore, the entire lot was rejected. The Respondent was further asked by this telegram to stop dispatching such sleepers, and

to ensure that the sleepers were supplied strictly according to specification. Subsequently, two other wagons arrived on June 6 and 8, 1956,

carrying further lots of sleepers and on June 26, 1956, three wagon-loads of sleepers were also received. The total number of sleepers so far

received by the Appellant was 641.

9. A representative of the Respondent saw the witness at his office at Tatanagar on June 26, 1956, and requested a joint inspection of the

materials which the witness fixed for June 27, 1956. On that date a joint inspection took place as arranged. At this joint inspection the witness

(Dubash) and one Hayles, Controller of Purchase of the Appellant, represented the Appellant and the Respondent was represented by Bonwari

Lal Kandoi and one Chatterjee. The Respondent, however, disputes that Hayles was present at the joint inspection. I shall refer to this question

later in this judgment. According to Dubash, at the joint inspection of the 641 sleepers then received, the Respondent''s representatives were

convinced that the sleepers supplied were not first class, according to the contract as they suffered from several defects, viz. that the ends were

spilt there were cracks and other defects such as sapwood and dry rot. According to this witness again the Respondent was in default in keeping

to the time schedule of the supplies as the goods in group ''A'' were to be supplied by June 4, 1956. But, in fact upto June 27, 1956, the

Respondent had supplied only 21 % of the timber in group ''A'' and 3 % of the timber in group ''C. In terms of the contract the Respondent was to

supply 33 % of the timber in group ''C by June 27, 1956. The witness further said in answer to Q. 53 that there was great worry arising out of the

slow delivery of timber as time was the essence of the two million ton project. The question of extension of time also came up for discussion and,

according to this witness, it was agreed that reasonable extension would be granted to the Respondent, and in answer to Q. 57 he said that the

Respondent requested extension of time till the end of November 1956 within which time the deficit was to be made up. Thereafter, towards the

end of August 1956 a further lot of 164 sleepers arrived. These sleepers were in fairly good condition except that they contained box heart or

centre heart and these would become acceptable if they were double clamped at the end. The double clamping was provided by the Respondent''s

agents and, as soon as this was done in the beginning of December 1956, this lot of 164 sleepers were again inspected by the witness who passed

161 sleepers but rejected 3. These 3 rejected sleepers suffered from other defects which could not be cured by double clamping, and hence they

were rejected. With regard to the lot of 641 sleepers the evidence of this witness was that the Respondent''s representatives agreed to modify the

sleepers by chopping off the ends and by providing clamps. These modifications were carried out by the Respondent''s agents and the witness was

advised accordingly in the middle of August 1956. On being so advised the witness examined the lot of 641 sleepers once again and tie passed for

acceptance 487 sleepers but rejected 154. The acceptance of 487 sleepers and the rejection of 154 were communicated to the Respondent by a

letter marked Ex. M which is to be found at p. 287 of the Paper Book. By this letter the Respondent was requested to remove the 154 rejected

sleepers at an early date. With regard to these 154 sleepers which were rejected, the witness said that the Respondent requested that some

indulgence should be shown and these rejected sleepers would be further modified. This further modification was carried out and another

inspection took place in January 1957. In answer to Q. 92 he said that out of 154 sleepers 118 were accepted by way of grace and 36 were

rejected. The 36 sleepers which were rejected were according to the witness rotten sleepers, and in passing the 118 sleepers after the second

modification thereto the witness said that he was very lenient. The total number of sleepers rejected by the witness was therefore 39, viz. 36 from

the lot of 641 sleepers and 3 from the lot of 164 sleepers.

10. As to the deficiency in the supply of sleepers the evidence of this witness was that upto October 25, 1956, the Respondent had supplied only

21 % against 100 % of the sleepers in group ''A'' and 3 % against 60 % of the sleepers in group ''C. The total quantity of sleepers in group ''C to

be supplied by the end of October 1956 was 60 % and, therefore, the deficit according to this witness was 57 %. By reason of non-delivery of the

entire lot of the goods the Respondent''s contract was cancelled and fresh tenders were invited from Martin Burn, Himatsingka and M. C. Paul.

Orders were placed on two of these firms, viz. Himatsingka and M. C. Paul and the'' deficit in the supply was fully made up by these two firms.

11. On the question of quality of timber supplied the evidence of Dubash was that the timber was not according to the contract and that the

sleepers suffered from certain specific defects. These defects were in part rectified by modifications carried out by the Respondent and it was only

thereafter that he could pass such of the timber as he found to be acceptable. On the question of time being the essence of the contract, his

evidence was that the supply of timber was required for a two million ton project, and that time was the essence of the contract. On the question of

extension his evidence was that there was extension of time till the end of November 1956.

12. On the question of extension of time till November 30, 1956, the Respondent had applied for and had obtained particulars of the extension

pleaded in the"" plaint. The particulars were furnished by a letter by the Appellant''s Solicitor, which is marked Ex. OO and is to be found at p. 394

of the Paper Book. It is stated in this letter that extension took place both orally and in writing, orally on June 27, 1956, when joint inspection took

place and Hayles and Dubash represented the Appellant at the joint inspection and Banwari Lai Kandoi and one Chatterjee represented the

Respondent. It is also stated in the letter that extension would be evidenced by the Appellant''s letter dated October 25, 1956, and the

Respondent''s letter to the Appellant dated November 6, 1956. I shall revert to the question of sufficiency of pleading in the written statement

regarding extension later in this judgment.

13. As to oral evidence on this question we have no hesitation in accepting the testimony of Dubash. His evidence was that at the joint inspection,

at which he and Hayles represented the Appellant and Bonwari Lal and Chatterjee represented the Respondent, the latter said that if time was

given to them till the end of November they would try to make up the deficit, and to this verbal request both he and Hayles agreed. As against this

evidence Chatterjee said that there was no request for extension at the joint inspection of June 27, 1956, when there was only talk of rejection.

Raman Lal Kandoi in his evidence also said in answer to Q. 63 that he could not ask for any extension of time until the trouble in respect of the

passing of the goods was cleared ; and again in answer to Order 136 he said that Bonwari and Chatterjee could not ask for extension of time

without consulting him and so also in answer to Q- 290.

14. What appears to us to be decisive on the question of extension of time is contemporaneous documentary evidence on the question. On

October 31, 1956, the Appellant addressed a letter to the Martin Burn Ltd. which is at p. 294 of the Paper Book. At the foot of the letter there

was a departmental note as follows:

Risk purchase if materials not supplied dt. 30.11.56. This copy of the letter with the note was forwarded by the purchasing officer to another

department of the Appellant and this was done in connection with the risk purchase of the materials. The note quite clearly says that risk purchase

was to be made if the materials were not supplied by November 30, 1956. Quite apart from the fact that Dubash''s oral testimony appears to us to

be convincing on the question, and that we cannot accept the testimony of either Raman Lal or Chatterjee, the note mentioned above, in our view,

conclusively proves that there was extension of time till November 30, 1956. There was no reason why one department of the Appellant should

have written to another department not to make a risk purchase until November 30, 1956, unless there was an agreement for extension of time

upto that date.

15. Two other letters, one written by the Appellant to the Respondent dated October 25, 1956 (Ex. N), which is to be found at p. 289 of the

Paper Book and the answer to that letter which is dated November 6, 1956 (Ex. 15), which is to be found at p. 462 of the Paper Book, throw a

flood of light on the question whether there was extension of time until November 30, 1956. In the letter dated October 25, 1956, the Appellant

stated that unless deficits were made up within November 30, 1956, it would have no other option but to make risk purchase against the

Respondent for all the outstanding balances that would be due on that date without any further reference. This statement in the letter has been dealt

with by the Respondent in para. 3 of its answer dated November 6, 1956. There is no denial in the answer that time was extended till November

30, 1956, or that deficiency in supply was to be made up by that date. On the other hand, the Respondent stated that he admitted that the

Appellant"s necessity was urgent and accordingly made special arrangement for prompt supply. The Appellant in its said letter made" it clear, that

deficiency in supply was to be made up by November 30, 1956, that being the date of extension for performance of the contract. There is no

denial of this statement. The oral evidence of the Respondent"s witnesses that there was no extension of time is completely at variance with the

documentary evidence, and therefore we have no hesitation in rejecting the oral testimony adduced on behalf of the Respondent and accepting the

Appellant"s case that the time for performance of the contract was extended till November 30, 1956.

16. The next question to be considered is if time was the essence of the contract. It is clear to us that the sleepers were required by the Appellant

in connection with a two million ton project. It is also equally clear to us that there was great, urgency in the matter of supply of timber as the

programme of the project was dependent upon timely supply of the timber.

17. So far as documentary evidence is concerned the first matter to be referred to is the terms of conditions of tender (Ex. B) which is to be found

at p. 218 of the Paper Book. Clause 7 of these terms provides that the supplier should as far as possible arrange to supply materials according to

deliveries specified by the buyer, and if this was not possible the supplier should clearly specify the time of delivery and such time must be strictly

adhered to. The next document to be referred to is the confirmatory order (purchase order) which is at p. 8 of the Paper Book. Clause 9 of this

document provides that the materials must be dispatched within the time and subject to the condition specified in the order and that otherwise the

Steel Company will be at liberty to cancel the order and/or purchase the materials in the open market, against the suppliers. In the acceptance of

tender (Ex. D), which is at p. 229 of the Paper Book, it is stated that the materials should be dispatched as they are urgently required by the

Appellant and delivery of items in group "A" to be made within three months from the date of the receipt of the letter and the remaining materials

within 12 months at the rate of 25 % by the end of every third month. In the letter dated March 7, 1956 (Ex. E), which is at p. 231 of the Paper

Book, the Respondent stated that every endeavour would be made for timely supply of the stores provided there was no wagon scarcity. In the

letter dated October 25, 1956, addressed by the Appellant to the Respondent (Ex. M), which is at p. 289 of the Paper Book, it is stated that the

sleepers are required for the work under two million ton project and that the Appellant can hardly afford to wait for indefinite supplies any more.

The last document to be referred to is a letter dated November 6, 1956 (Ex. 15)", which is to be found at p. 462 of the Paper Book. In para. 3 of

this letter the Respondent stated as follows:

We admit that your necessity in this case stands urgent and accordingly we have made all sorts of special arrangements for prompt supply and

advanced to our under-suppliers a big sum for the purpose and our money is lying blocked with them.

18. The documentary evidence mentioned above makes it quite clear that the timber was urgently required by the Appellant for a very large

expansion project, which is referred to as a two million ton project. Secondly, it is clear that the Appellant impressed upon the Respondent that

time was of the essence of the contract and that the time schedule for deliveries must be strictly adhered to. Thirdly, it is clear that the Appellant

informed the Respondent that, if deliveries were not made in time, risk purchase would be made in the market and the contract was liable to be

cancelled in the event of failure to adhere to the time schedule. Lastly, it is clear that the Respondent knew that the timber was urgently required by

the Appellant in connection with the expansion project, and it agreed to adhere to the time schedule, but added a condition, viz. availability of

wagons, though such a condition was no part of the bargain between the parties.

19. Turning now to the oral testimony, the evidence of Dubash was that the Appellant was very much worried about slow delivery and time was

the essence of the two million ton programme (Q. 53). He repeated the same answer in cross-examination in answer to Q. 149. Raman Lal

Kandoi in his oral evidence on the other hand stated that it did not matter if supply was delayed by a few days, and that in the past he made

supplies beyond time (Q. 7). In cross-examination in answer to Qs. 292-295 he said that he did not know that the Appellant needed the goods

urgently.

20. The Court below in coming to the conclusion that the time was not the essence of the contract appears to have laid good deal of emphasis on

the fact that though the contract was dated March 2, 1956, the purchase order was not issued until April 26, 1956. It appears to us, however, that

the delay in placing the purchase order was not due to any default or laches on the part of the Appellant. In the letter of acceptance dated March

2, 1956 (Ex. D), which is to be found at p. 229 of the Paper Book, the Appellant asked the Respondent to furnish security deposit of Rs. 47,670.

Bu the letter of acceptance itself the Respondent was asked to despatch the materials pending deposit of security. But instead of commencing

supply the Respondent appears to have carried on correspondences on the question of furnishing of security and contended that no security should

be demanded from him. In the letter dated March 7, 1956, (Ex. E) which is at p. 231 of the Paper Book, the Respondent stated that he had a

permanent security of Rs. 5,000 and, therefore, further security, deposit was not necessary. By its letter dated March 16, 1956, (Ex. F) which is at

p. 233 of the Paper Book, the Appellant informed the Respondent that the standing deposit of Rs. 5,000 was not sufficient to cover the order, the

value of which was Rs. 4,76,707, but that as a special case the Appellant would accept an additional deposit of Rs. 5,000. This letter was

followed by another from the Respondent dated March 20, 1956, (Ex. 15) which is at p. 430 of the Paper Book, by which the Respondent

contended that if a further deposit of Rs. 5,000 was demanded it would hamper the supply of timber and therefore the Respondent should be

allowed to start supply with security already deposited. On March 26, 1956, the Appellant wrote back in answer (Ex G) a letter which is to be

found at p. 235 of the Paper Book, by which the Respondent was informed that he must send a cheque for Rs. 5,000 as further deposit, as the

amount of Rs. 5,000 already deposited was meant to cover normal requirements and not the order involving Rs. 4,76,000. Again on April 8,

1956, the Respondent wrote to the Appellant (Ex. 15) a letter which is to be found at p. 432 of the Paper Book expressing his unwillingness to

furnish further deposit of Rs. 5,000 and that Rs. 5,000 already deposited should be enough for the purpose. This was followed by a letter dated

April 16, 1956, from the Appellant which is to be found at p. 234 of the Paper Book, by which the Appellant informed the Respondent that it

agreed, as a special case, to deduct the additional amount of Rs. 5,000 from the Respondent''s first one or two bills which he might submit for

supplies. This series of correspondences, therefore, came to an end on April 16, 1956, and the purchase order was issued by the Appellant on

April 26, 1956. The delay in the issue of the purchase order was entirely due to the conduct of the Respondent in refusing to furnish the security

deposit, which it had agreed to furnish, under the terms of the tender and the letter of acceptance. But even then it cannot be overlooked that the

Respondent was required, as I have noted earlier, to go on with the > supplies pending deposit of security. In these facts, in our view, the learned

judge was in error in holding that because of the delay in issuing the purchase order by the Appellant after the letter of acceptance dated March 2,

1956,-time was not the essence of the contract. In our view, the delay in the issue of the purchase order was occasioned entirely by the

unwillingness and recalcitrance of the Respondent in furnishing the security deposit which it agreed to do. But even then, though the security deposit

was not furnished, the Respondent was by no means debarred from supplying the materials in terms of the con-, tract, and indeed he was required

to make the supplies pending deposit of security.

21. It appears that the trial Court took into consideration the question whether the availability of wagons was a term of the contract, and it came to

the conclusion that though the contract did ""not contain an express clause that the Appellant was to arrange for wagons, the correspondence

showed that the Respondent made it clear that the question of supplies depended on the availability of wagons. The trial Court on that basis came

to the conclusion that the question of availability of wagons indicated the intention of the parties, viz. that time was not the essence of-the contract.

22. The only letter in which the Respondent referred to the requirement of wagons is the letter dated March 7, 1956 (Ex. E), which is to be found

at p. 231 of the Paper Book.- This letter was written after the receipt of the acceptance letter issued by the Appellant. The Respondent stated that

he was taking the order in hand and would make every endeavour for timely supply of the materials provided there was no wagon scarcity. It is to

be noticed that there was nothing in the contract regarding availability of wagons or stipulating that supplies would depend upon the availability of

wagons. On the other hand in the tender submitted by the Respondent (Ex. C), which is to be found at pp. 224-227 of the Paper Book, the

Respondent unequivocally stated, with regard to each different class of timber, that delivery would be given by the time as mentioned in - the

enquiry. In the acceptance of tender (Ex. D), which is at p. 229 of the Paper Book, it is clearly stated that items in group ''A'' were to he delivered

within three months from the date of the receipt of the letter of acceptance and the remaining materials within 12 months at the rate of 25 % by the

end of every third month. The Respondent''s tender and the Appellant''s acceptance of the tender read together can leave no room for doubt that

time was the essence of the contract and that the Appellant required the goods within clearly specified time. I have no doubt also that the

Respondent clearly understood that time was of the essence of the contract and that deliveries would have to be made within the agreed dates. The

letter written by the Respondent to the Appellant dated November 6, 1956, (Ex. 15) which is to be found at pp. 462464 of the Paper Book,

makes it clear that the Respondent understood that the Appellant stood in urgent need of theÃ¯Â¿Â½ sleepers and for that purpose had made all sorts

of special arrangements for prompt supply and advanced to our under-suppliers a big sum for the purpose. That being the position, so far as the

bargain between the parties is concerned, I cannot hold that the reference to the availability of wagons in the letter mentioned above, makes such

availability a term of the contract between the parties. It is true that the Appellant did assist the Respondent in securing wagons for the supply of

timber, because it was in a position to do so having regard to its claim for priority being an iron and steel factory. But that by itself did not impose

an obligation upon the Appellant to secure wagons to enable the Respondent to deliver the goods. The terms of a written contract cannot be

unilaterally changed by one party to the bargain by making demands on the other party which the contract did not contemplate. The bargain

between the parties is concluded as soon as the letter of acceptance was received by the Respondent. Except by consent of parties fresh terms

cannot be incorporated into the bargain. It is to be remembered that it is not the Respondent''s case that the availability of wagons was an implied

term of the contract between the parties. No such case has been pleaded in the written statement nor has it been suggested either in the

correspondences or in the oral evidence. In these facts, in our view, the trial Court was in error in holding that the availability of wagons became

part of the contract. The trial Court was also in error in holding that because the supply of timber depended upon the availability of wagons, time

was not of the essence of the contract.

23. Upon a careful consideration of the documentary evidence and also the oral'' testimony adduced on behalf of the parties we have no hesitation

in holding that time was of the essence of the contract.

24. I shall now proceed to deal with the question of quality of the timber supplied by the Respondent. But before doing so, I should point out

however that out of the entire lots of sleepers supplied,, the Appellant had ultimately rejected ''only 39 pieces and had accepted the rest, though

after modification carried out by the Respondent. It is also to be noted that the contract was cancelled by the letter dated December 12, 1956,

(Ex. O) which is at p. 292 of the Paper Book, and in that letter it is clearly stated that the contract was being cancelled and the risk purchase made

in terms of Clause 9 of the terms and conditions of the contract. Clause 9 of these terms and conditions is as follows:

Materials must be dispatched within the time and subject to the condition specified in the order otherwise the Steel Company will be at liberty to

cancel the order and/or purchase the materials in the open market against the suppliers.

It is clear, therefore, that the contract was cancelled and the risk purchase made because of the failure of the Respondent to supply the goods

within the time specified in the contract.

25. In taking into consideration the question of quality of the timber a reference must be made to the stipulation as to quality in the contract itself

which is as follows:

All sleepers shall be well seasoned first class sal wood free from sap-wood cracks, heart rot, loose knots, holes, fillings etc. as per our enquiry.

The clause as to quality in the contract was not the usual printed clause, but it was a special clause which was type-written in the body of the terms

and conditions of the contract. The Respondent himself stated in answer to Q. 251 that the clause quoted above was type-written and not a

printed clause. From the clause quoted above it. is clear that what the Appellant agreed to purchase, and the Respondent agreed to supply, was

first class seasoned ml wood sleepers free from sap-wood cracks, heart rot, loose knots etc. But when the Appellant raised its objection to the

quality of the timber supplied, on the ground that it was not according to the quality specified in the contract, the Respondent contended that

sleepers without sap-wood were inconceivable and there must be some sap-wood in the sleepers. In answer to Qs. 252-256 Raman Lai stated

that he supplied the goods according to Railway''s specification and that sleepers without sap-wood would be inconceivable. He reaffirmed in his

oral testimony the statement made by him in his letter dated November 26, 1956, to which I have referred earlier, that defects like sap-wood

cracks etc. could not be avoided in timber. He further went on to say that the Appellant''s specification and the Railway''s specification were the

same. When pressed that the timber supplied by him was not in accordance with the specification contained in the contract his answer was that he

supplied goods according to the specification in the contract, but certain defects must creep into the sleepers (see Q. 257). When pressed further

he said in answer to Q. 259 that there were no defects in all the sleepers and, even if there were, such defects were curable.

26. Mr. Subrata Roy Chowdhury, counsel for the Appellant, contended, and we think rightly, that the Respondent''s attention was particularly

drawn to the qualify of the goods to be supplied, inasmuch as the clause relating to quality was type-written. He also referred to the Respondent''s

letter dated November 6, 1956, (Ex. 15, p. 462 of the Paper Book) in support of his contention that the Respondent well knew that it had to

supply timber of a particular quality, viz. timber which was free from sap-wood, dry rot, severe cracks and similar defects. He further submitted

that the Respondent in its letter dated November 6, 1956, which was in answer to the Appellant''s letter dated October 25, 1956, took up the

position that although the contract was for the supply of goods free from various defects mentioned above, these defects could not be avoided in

timber. In other words, it was contended that the Respondent, after entering into a contract for the supply of goods free from the various defects

mentioned above, was pleading its inability to supply the goods in conformity with the contract, as quality of the timber prescribed in the contract

did not exist. It was argued that both by the oral evidence adduced on behalf of the Respondent and by correspondence the Respondent made it

abundantly clear that it was unable to perform the contract.

27. It seems to us that there is good deal of force in this contention of counsel for the Appellant. There can be hardly any doubt that the

Respondent knew that the sleepers to be supplied by it should be free from sap-wood, cracks, heart rot, loose knots etc.; but it was contending,

not that the goods supplied by it were free from the defects mentioned above, but that there was no timber in existence free from such defects. In

our opinion, the Respondent''s contention - cannot be sustained. If timber free from the defects mentioned above did not exist, the Respondent

should not have entered into the contract at all; but having entered into the contract to supply the goods of a particular quality it cannot be heard to

say that the goods of the quality specified in the contract cannot be supplied because such goods do not exist or cannot be conceived of.

28. Mr. M. M. Sen, counsel for the Respondent, sought to repel the Appellant''s contention regarding inferior quality of the goods supplied by

arguing that the Respondent had supplied 805 sleepers altogether and out of these the Appellant accepted as many as 766 sleepers and rejected

only 39 pieces. He further argued that out of 766 pieces accepted by the Appellant, clamping was done only in 117 pieces, and the remaining 649

pieces were accepted as they were. Therefore, it was submitted that most of the sleepers were found to be of sufficiently good quality to be

acceptable, and it was only in -117 pieces that clamping had to be done before they were accepted. Counsel for the Respondent also referred to

the receipt reports (Ex. 15, pp. 442-449, 451-454, 468471, 475482 and 483-486 of the Paper Book) and submitted that the receipt reports

indicated that there were no defects whatsoever in the goods as there was no remark under the column heading ''discrepancies if any''. It was

argued that if the goods were defective, remarks would undoubtedly have appeared under this column, and the absence of such remarks proved

that the timber supplied was in no wayÃ¯Â¿Â½ defective. We cannot, however, accept this contention of the counsel for the Respondent. Shortly after

the receipt of the very first consignment of 110 sleepers, which was received by the Appellant on May 15, 1956, the Appellant sent telegram

dated May 23, 1956 (Ex. J, p. 281 of the Paper Book). It was pointed out that the sleepers were full of sap-wood dry rot and unseasoned. These

sleepers were rejected and the Respondent was asked to supply timber in accordance with the specification. Dubash in his oral evidence stated

that on June 27, 1956, a joint inspection of the sleepers took place, and at this inspection the Appellant was represented by Hayles and Dubash

and the Respondent was represented by Bonwari Lai and Chatterjee. He further stated that at this joint inspection 641 sleepers were inspected,

and the Respondent''s representatives were convinced that the sleepers suffered from the defects, viz. ends were split, cracks, sap-wood and dry

rot. (Qs. 3544). There is a good deal of dispute as to whether Hayles was present at the joint inspection when extension of time was granted until

November 30, 1956. Chatterjee in his evidence said that on receipt of the telegram he went to Jamshedpur and met Dubash, but the latter said that

he had no time and asked Chatterjee to come sometime later. Thereupon Chatterjee returned to Calcutta and reported to Raman Lai that the

sleepers were of first class quality and should not have been rejected owing to any defect (Chatterjee, Qs. 21-27). Thereafter he went back to

Jamshedpur and saw Hayles and told him that the sleepers were first class and he did not know why Dubash rejected them. According to

Chatterjee, Hayles thereupon telephoned Dubash in his presence, and after talking to Dubash told Chatterjee that he had spoken to Dubash to do

the right thing, and thereafter in August 1956 he obtained the inspection memo, that a lot of sleepers had been passed for acceptance. A good deal

of comment was made for Hayles not being called to give evidence, and the learned Judge also appears to have drawn an adverse inference for

not calling Hayles as a witness. But in our opinion no such inference ought to be drawn against the Appellant for not calling Hayles as witness. The

case made out by Chatterjee in his oral evidence about the interview with Hayles and the latter''s telephone talk with Dubash was not put to

Dubash in course of his cross-examination. Dubash, it is to be remembered, was the first witness on behalf of the Appellant and was examined de

bene esse. The Respondent''s case that the timber was passed by Dubash after Hayles had spoken to him on the telephone in the presence of

Chatterjee should have been put to Dubash in order to make it necessary for Hayles to be called as a witness to controvert this case. But no such

suggestion was made to Dubash, and not having done so it cannot now be complained that Hayles was not called as a witness and, therefore, an

adverse inference. should be drawn against the Appellant. Regarding the presence of Hayles at the joint inspection it is to be noticed that in the

letter dated October 25, 1956, (Ex. N, p. 289 of the Paper Book) written by Hayles to the Respondent, it was stated that Hayles was present at

the joint inspection. This letter was answered by the Respondent oh November 6, 1956 (Ex. 15, p. 462 of the Paper Book). There is not a word

in this answer that Hayles was not present. Indeed if Respondent''s case that Hayles was not present at the joint inspection and, therefore, there

could be no extension of time was true, it should have reacted sharply to the statement in the letter dated October 25, 1956, that Hayles was

present at the joint inspection along with Dubash. In these facts the contention of the counsel for the Respondent that Hayles was not present ''at

the joint inspection and, therefore, there could be no extension of time and the contention that an adverse inference ought to be drawn against the

Appellant because Hayles was not called as a witness, cannot be accepted.

29,. According to Raman Lai Kandoi, the principal witness of the Respondent, certain defects in sal wood even of first class quality is permissible,

viz. sap-wood upto 25 % and cracks- upto 1"" or 1Ã¯Â¿Â½"". He further said that the Railways specification permitted defects to a certain extent and

goods with defects upto a certain percentage would still be called first class goods and then he went on to say that Tata''s specification and

Railways specification ate one and the same (P,aman Lai, Q. 246). He added that sleepers without sap-wood are inconceivable. When his

attention was drawn to the terms of the contract he said that in the contract such things, viz.. free from sap-wood were written, but in practice

goods were accepted by all parties with such defects. He then affirmed that defects like sap-wood, cracks etc. could not be avoided in timber

(Qs. 246-257). The evidence of this witness that the Appellant''s specification in the contract was the same as the Railways specification cannot be

accepted. He admitted that in a type-written clause of the contract it was provided that sleepers would be seasoned, first class, free from sap-

wood, cracks, heart rot etc. But then he said that the Railways allowed certain percentage of sap-wood and cracks in the sleepers which they

purchased. Quite clearly he was claiming a right to supply inferior quality of timber by introducing the question of practice of the Railways in the

matter of acceptance of sleepers with -some percentage of sap-wood, cracks and other defects. It is clear that, according to this witness, the

sleepers supplied by the Respondent did suffer from the defects complained of by the Appellant, but all he ''intended to convey by his evidence

was that even though the sleepers suffered from these defects, and even though the contract provided that sleepers to be supplied should be free

from the defects, the sleepers ought to have been accepted by the Appellant, because sleepers even of the best quality would not be free from

such defects. He further made it clear that it was not possible for him to supply better quality of timber. Chatterjee''s evidence was also to the same

effect, viz. that sleepers were first class. In answer to Qs. 233-244 he re-affirmed what his master Raman Lai said that the defects mentioned

above could not be avoided and that they were common in first class sleepers and the defects, such as sap-wood, dry rot etc., must be there even

in first class timber. Bonwari Lai Kandoi, the other witness on behalf of the Respondent, said that in 1956 he had just come into business and he

depended on Chatterjee in deciding question of quality of timber. He further said in answer to Q, 23 that there was no difference between goods

supplied by the Respondent and those supplied by the other parties. The other contention raised on behalf of the Respondent for non-acceptance

of timber by the Appellant was that the Appellant did not follow the right method in passing the timber for acceptance. This point was made in the

letter dated November 6, 1956 (Ex. 15, p. 462 of the Paper Book). In that letter, however, it is not stated as to what the right method is or should

be in passing timber for acceptance. The Respondent''s contention that even first class sleepers cannot be free from defects such as dry rot, sap-

wood, cracks etc. was countered by the Appellant by the letter dated December 12, 1956, (Ex. O, p. 292 of the Paper Book) in which it was

categorically stated that the Appellant had received sleepers from other suppliers and did not notice therein the defects that existed in the timber

supplied by the Respondent. In the letter in answer, which is dated January 31, 1957, (Ex. 15, p. 487 of the Paper Book) the Respondent did not

deny the Appellant''s contention regarding sleepers supplied by other contractors on the ground that sleepers free from those defects could not be

supplied as such sleepers did not exist. It seems to us that the Respondent''s contention that sal wood sleepers cannot be free from such defects as

sap-wood, cracks and heart rot cannot be accepted. The Respondent''s witnesses stated that Railways and Government accepted sleepers with

such defects upto a certain extent (Ghosal, Qs. 69, 77-86). According to Ghosal, the defect called sap-wood is curable and unseasoned timber

can also be seasoned (Qs. 50-53). He also said in answer to Qs. 83-86 that if the contract provided that there should be no cracks and no sap-

wood, he would not accept timber which suffered from these defects.

30. In the letter dated October 25, 1956, (Ex. N) to which ''i have referred earlier the Appellant clearly pointed out that a large number of sleepers

had to be rejected due to sap-wood, dry rot, severe cracks and other defects. In its answer to that letter which is dated November 6, 1956, to

which also I have referred earlier, the Respondent did not contend that the timber was free from the defects alleged, but the point urged was that

these defects could not be avoided in timber. Even then the Respondent in its said letter only referred to sap, cracks, etc But no mention was made

of the other complaint, viz. dry rot. It appears that the Respondent avoided answering the allegation that the timber suffered from dry rot-. Counsel

for the Respondent conceded before us that the timber which suffered from dry rot could not be accepted by a party as that was a very serious

defect.

31. Turning now to the contention of counsel for the respondent that out of entire lot of sleepers accepted by the Appellant, only 117 sleepers had

to be double-clamped and the remaining 649 sleepers were accepted without any modification, it is to be seen if this contention of the Respondent

is consistent with the evidence on record. The evidence of Dubash is that on June 27, 1956, a joint inspection of 641 sleepers took place and that

the representatives of the Respondent, who were present at the joint inspection, agreed to modify the sleepers by chopping off the ends and by

providing clamps. These modifications were carried out by the Respondent by the middle of August and thereafter Dubash inspected 641 sleepers

on August 17, 1956, and upon such inspection he rejected 154 sleepers and accepted: the rest (Dubash, Qs. 66-69). Again in answer to Q. 108

Dubash said that at. the joint inspection held on June 27, 1956, the contractor was convinced that the sleepers were not first class as they suffered

from various defects. We see no reason to disbelieve Dubash on the question of modification carried out by the Respondent with regard to 641

sleepers. If the 641 sleepers were such as could be accepted without any modification, there was no reason why these sleepers should be rejected

in the first instance and thereafter accepted without any modification whatsoever. We cannot, therefore, accept the contention of counsel for the

Respondent that only 117 sleepers were modified by double clamping, and all the other sleepers accepted by the Appellant were free from any

defects and were first class sleepers in accordance with the quality specified in the contract.

32. Before leaving this question it is necessary to refer to another matter which seems to me to have a large bearing on this question. After entering

into the contract with the Appellant, the Respondent in its turn entered into contracts in writing with four different parties, viz. N. Panda &

Company, P. N. Patel & Company, Lakshmi Narayana Shaw, Raghu Nath Shaw & Company and Ramdeo Prosad Sharma. The written

contracts with these parties were tendered and were marked Exs. 4, 5, 6 and 7 and are to be found at pp. 405-412 of the Paper Book. It

''appears from these contracts that there was no stipulation or provision that the sleepers should be seasoned, first class, free from sap-wood,

cracks, heart rot, loose knots, holes, fillings etc: which was stipulated for in the contract between the Appellant and the Respondent. The only

provisions regarding quality in the four contracts mentioned above was that the sleepers should be first class as per standard specification of the

Sleeper Control (Western Group). Quite plainly the Respondent did not ensure that its sub-contractors would supply sleepers of the quality which

it had undertaken to supply to. the Appellant. The Respondent did not adduce any evidence that the quality prescribed by the Sleeper Control

(Western Group) corresponded to the quality prescribed in the contract between the Appellant and the Respondent. Nor is there any evidence

that the quality prescribed by the Sleeper Control (Western Group) is the same as the quality prescribed by the Railway authorities. It seems to us

that the Respondent did not think it necessary to include in the contracts with its sub-contractors the specification regarding high quality of sleepers

required by the Appellant, hoping that at least some of the sleepers to be supplied by its sub-contractors would meet the high and rigid quality test

imposed by the Appellant in its contract with the Respondent. The sub-contractors under the four contracts mentioned above were not bound and

could not be called upon to supply sleepers of the quality which the Respondent had agreed to supply to the Appellant. It seems to us that this is

the reason why the sleepers supplied on behalf of the Respondent to the Appellant met with the fate they did.

33. On a careful consideration of the oral and documentary evidence we cannot but hold that the sleepers supplied by the Respondent were not

according to the quality specified in the contract. It is to be remembered that the Respondent''s contention was that the defects were there, and that

such defects should always be there in timber, and secondly, that notwithstanding such defects the Appellant should have accepted them as the

Railways and the Government accept such sleepers. Having regard to the terms of the contract regarding quality, to which I have referred earlier, it

must be held that the Appellant was not bound to accept sleepers which suffered from any of the defects mentioned in the contract. This takes us

to the question as to why, although the sleepers suffered from the defects mentioned in the contract, the Appellant accepted the entire lot of

sleepers supplied except 39 pieces which were ultimately rejected.

34. According to the terms of the contract sleepers in group ''A'' were to be fully supplied by June 4, 1956, and upto June 27, 1956, on which

date joint inspection took place, according to the Appellant, only 21 % of the goods in group ''A'' had been supplied. So far as timber in group ''C

is concerned, the Respondent was to supply 33 % of the timber in this group by June 27, 1956, but had in fact supplied only 3 % of the same. On

August 17 and 18, 1956, the Appellant accepted 487 sleepers supplied by the Respondent but rejected 154 pieces. The 154 pieces rejected

were inspected by Dubash once again in January 1957 and 118 pieces were ultimately accepted, finally rejecting 36 pieces out of the lot of 641

sleepers supplied upto June 26, 1956. According to Dubash, he reinserted the 154 sleepers as the Respondent asked for certain indulgence and

by reason of the request from the Respondent and as an act of grace, He passed 118 sleepers out of the lot of 154 pieces. But so far as 117

pieces of sleepers which arrived in the end of August 1956 it is conceded on behalf of the Respondent that they had to be double clamped before

they were accepted by the Appellant.

35. Counsel for the Respondent contended that 649 sleepers were accepted without any modification and 117 pieces after double clamping, and

that the Appellant wrongfully rejected the sleepers supplied. He argued that the acceptance of the sleepers showed that they were in good order

and that defects were not such as to make them liable to be rejected outright; and that being so the Appellant, it was argued, should not have

delayed the passing of the goods until January 1957, thereby making it impossible for the Respondent to supply the goods within the time specified

by the contract. We cannot accept this contention of counsel for the Respondent. In our view, the timber was not of the quality prescribed by the

contract and the Appellant was not bound to accept them. Such of the sleepers as were accepted had to be modified either by clamping or by

chopping of the ends before acceptance. If the Appellant showed indulgence to the Respondent in accepting 118 defective sleepers out of the lot

of 154 as a matter of grace (Dubash, Q. 92), which we think it did, it is not open to the Respondent to contend that the quality of the goods were

according to the specification in the contract. From the evidence, oral and documentary, which have been analyzed earlier, there can be no doubt

that the quality of the timber was not according to the specification in the contract. The acceptance of 118 defective sleepers by the Appellant by

way of indulgence and as an act of grace did not give a right to the Respondent to compel the Appellant to accept goods which were defective

having regard to the quality prescribed by the contract.

36. The next question to be considered is whether the Respondent failed to deliver the balance of the goods in terms of the contract. Connected

with this question is the other question, viz. whether the cancellation of the contract by the Appellant was wrongful. In dealing with this question it is

necessary to refer to the telegram dated May 23, 1956, (Ex. J) from the Appellant to the Respondent. By this telegram the Respondent was

informed that the sleepers were full of sap-wood, dry, rot and were unseasoned and, therefore, the entire lot was rejected. The Respondent was

further asked to stop dispatching such sleepers and to ensure that sleepers supplied were strictly in accordance with the specification. The oral

evidence on behalf of the Respondent is that after arrival of the first consignment of timber the passing officer of the Appellant had informed the

Respondent''s representatives that the goods that had arrived could not be passed, and that if subsequent consignments were better then they

would be taken into consideration. Thereupon Raman Lai Kandoi asked Chatterjee to stop the parties with whom the Respondent had placed the

order for supplying timber. According to Raman Lai the instruction to stop supplies was given by him to both Bonwari and Chatterjee (Raman Lai,

Qs. 43-46). It is, therefore, clear that the Respondent took prompt steps to stop further supplies after the Defendant''s representatives were told

that the goods were defective and that such goods would not be accepted and also that goods to be sent in future should be free from the defects.

The Respondent''s case is, as I have noticed earlier, that the goods were in accordance with the. specification in the contract and that such defects,

as there were, could not be avoided and must always be there in sal wood sleepers. It is, therefore, claimed that the. Respondent stopped

supplying timber apprehending that it would be rejected by the Appellant. Counsel for the Respondent contended that clamping was done only in

117 sleepers and that the remaining 649 sleepers were accepted by the Appellant without any modification, and therefore they were according to

the contract quality. Assuming that the Respondent''s version regarding the quality of the goods to be correct, admittedly it stopped supply of the

timber. If the quality of the timber was in accordance with the quality prescribed by the contract the Respondent was by no means justified in

stopping the supply of the sleepers. It is not the Respondent''s case that it kept up the supply of the sleepers in accordance with the contract. On

the other hand, its case is that having regard to the rejection of the first consignment of sleepers and the subsequent interview which its

representatives had with the passing officer of the Appellant, it instructed its sub-contractors to stop further supply of timber. On this evidence it

cannot but be held that the Respondent failed to deliver the balance of the goods in terms of the contract. There is nothing on record to show that

even after acceptance of lots of sleepers by the Appellant on August 17 and 18, 1956 and December 4, 1956 and January 24, 1957, any efforts

were made by the Respondent to renew or to continue the supplies of the sleepers. The Respondent just stopped further supplies and there is

nothing either in the correspondences or in oral testimony to show that it was eager or willing to continue the sup plies in terms of the contract.

37. Turning now to the question of Appellant''s cancellation of the contract reference should be made to the Appellant''s letter dated December 12,

1956 (Ex. O, p. 292 of the Paper Book). It is by this letter that the Appellant informed the Respondent that in the latter''s letter dated November

6, 1956, (Ex. 15, p. 462 of the Paper Book) it was made clear that unless a lenient method in passing sleepers was adopted it would not be

possible for the Respondent to perform the contract. It was further stated by the Appellant that in view of this there was no other alternative for the

Appellant but to buy its requirements from other sources at the Respondent''s risk in terms of Clause 9 of the terms and conditions of the contract.

There can be no doubt that the Appellant urgently needed the timber in connection with a large expansion programme. In executing this programme

the Appellant was faced with a situation of total stoppage of supply of sleepers. The Respondent''s refusal to supply the timber, strictly in

accordance with the quality stipulated in the contract, was unequivocal. In this state of things, the Appellant had no other alternative but to seek

supplies from other sources. But, before obtaining such supplies the Appellant wanted to be rid of obligation under the contract With the

Respondent, and it is for that reason that by the letter December 12, 1956, it put an end to the contract in order to obtain supplies from other

sources. The cancellation of the contract by the Appellant by the said letter was inevitably the effect of the refusal by the Respondent to supply the

sleepers in terms of the contract. The Respondent advanced pleas of indulgence, of methodical inspection, timely passing and Railways

specification. All these pleas advanced by the Respondent were aimed at persuading the Appellant to accept sleepers of quality inferior to that

prescribed by the contract. The Appellant declined to modify the quality prescribed by the contract and to accept goods below the quality

stipulated in the bargain. In these facts we cannot but hold that the Appellant was justified in cancelling the contract and thereby terminating its

obligation to accept goods from the Respondent, who had clearly expressed its inability to supply timber of the contract quality.

38. I now proceed to deal with the question of risk purchase by the Appellant. Clause 9 of the terms and conditions of the contract, to which I

have referred earlier, provides that the materials were to be dispatched within time and subject to the conditions specified in the order otherwise

the Appellant would be at liberty to cancel the order and/or purchase the materials in the open market against the suppliers. I have already held

that time was. of the essence of the contract and also that the Respondent failed to supply the goods within the time and in accordance with the

quality prescribed by the contract. That being so and having regard to the fact that the sleepers were urgently required by the Appellant in

connection with its two million ton expansion project, it must be held that the Appellant was justified in purchasing the balance materials. The

question is whether the Appellant was justified in purchasing the materials from two of the parties, viz. Himatsingka Timber Ltd. and M. C. Paul

and Company

39. Counsel for the Respondent strenuously argued that the stipulation in the contract was that the -risk purchase would be made in the open

market and, therefore, even assuming that there was a breach of contract on the part of the Respondent, the Appellant was bound to purchase the

balance of sleepers from the open market. It was argued that instead of making the purchase from the open market the Appellant purchased the

sleepers from two of the suppliers on its panel. It was submitted that, as the Appellant did not purchase the sleepers from the open market, it

committed a breach of contract and was not therefore entitled to recover any damages at all. Open market, it was argued, was a market where all

buyers and sellers could buy and sell. On the question of what is open market, reliance was placed by both parties on several decisions to which I

shall refer later.

40. Counsel for the Appellant, on the other hand, contended that open market in the facts of this case did not mean the market in the forest where

timber was felled. It was argued that the Appellant needed sleepers of very high quality, as would appear from the quality prescribed in the

contract, and for that reason it agreed to pay to the Respondent very high price. It was contended further that the select quality of timber required

by the Appellant could be obtained from the open market only after rejecting large number of sleepers which would inevitably fail to reach the

standard of quality required by the Appellant. Besides, it was argued there were other terms such as security deposit of large sums of money which

would not be acceptable to sellers in the open market. It was next argued that the original enquiry of the Appellant for the sleepers was addressed

to six parties who were on the Appellant''s panel of approved suppliers. This enquiry is marked Ex. B and is to be found at p. 216 of the Paper

Book. Of these six parties tenders were submitted by four parties, viz. Martin Burn Ltd., Himatsingka Timber Ltd., M. C. Paul & Company and

the Respondent and, therefore, the enquiry for risk purchase was addressed only to three parties, viz. Martin Burn Ltd., M. C. Paul & Company

and Himatsingka Timber Ltd. It was argued that the open market in this case must be held to be the market confined to these three parties who

had already submitted the tender for supply of sleepers of the quality required by the Appellant.

41. Counsel for the Appellant next referred to the rates quoted by the sub-contractors and the rates which the Appellant agreed to pay and

submitted that the considerable difference between the two rates was due to the fact that the Appellant needed selected goods of high quality and

that is why it agreed to pay a much higher price than what was charged by the sub-contractors

42. The contention of counsel for the Respondent relating to risk purchase in the open market was directed against the rate at which payment was

made to the two suppliers, viz. Himatsingka Timber Ltd. and M C. Paul & Company The argument was that the price paid to these parties, on the

basis of which damages were claimed by the Appellant, was much higher than the market price of sleepers and that if the purchase was made from

the open market the Appellant would have suffered no damage at all. It was, therefore, argued that having regard to the- market rate of sleepers at

the material time the Appellant''s claim for damages could not be sustained.

43. The contention of counsel for the Appellant, on the other hand, was that the price quoted by Himatsingka Timber Ltd. on November 21,

1956, (Ex. U, p. 301 of the Paper Book) and by M. C. Paul and Company on November 10, 1956, (Ex. S, p. 297 of the Paper Book) was the

market rate of sleepers of the contract quality. The third quotation obtained by the Appellant was from Martin Burn Ltd. dated November 10,

1956 (Ex. T, p. 299 of the Paper Book)." It was argued that these three dealers of sleepers obviously quoted the market rate and could not have

quoted a rate which was higher than the market rate. It was submitted that the reason for confining the enquiry for risk purchase to these three

parties was, firstly, that they were on the approved panel of suppliers of the Appellant and, secondly, that they had submitted tenders for supply of

sleepers when the original invitation to tender was issued by the Appellant. Of the three parties the quotation of Himatsingka Timber Ltd. and M.

C. Paul being lower than that of Martin Burn Ltd., it was contended, that these tenders were accepted by the Appellant for supply of the balance

of sleepers. It was next submitted that the sleepers were purchased F.O.R. Tatanagar and it could not, therefore, be argued that the Appellant

should have gone to the source of supply at Badampahar, Rairampur, Bangri Posi and Balasore as it could have obtained the supply at the sal

forest at these places at cheaper rates.

44. To turn now to the oral testimony regarding the market rate of timber to determine if there is evidence of a lower market rate to support the

Respondent''s contention that the Appellant would have suffered no damage if goods were purchased from the open market. The Appellant''s

witness Ramaier, who at the material time was a senior assistant in charge of purchase of the Civil Engineering Section of the Appellant, said with

regard to the system followed by the Appellant that, when indents were received from various departments,* tenders were invited from approved

suppliers on the panel. These tenders were opened on the day following the due date and were forwarded to the Indenting Department for scrutiny

and remarks.

The Indenting Department forwarded its recommendation in favour of the selected party, and on receipt of such recommendation, the Purchase

Department asked the selected suppliers to furnish security deposit and, after such security deposit was furnished, a formal purchase order was

issued. According to this witness the panel of suppliers was prepared after looking into the details of registration and also a report from the Bank.

If satisfied with the merits of a dealer, he was registered. According to this witness only selected dealers with a sound background were put on the

list after careful enquiries and, whenever supplies were needed, enquiries were directed to these selected parties only. He also said that the

Appellant did not follow the system of issuing advertisements in the papers and instead issued enquiries to selected parties (Ramaiya, Qs. 150-

152). It was also his evidence that the Appellant never went to the source of supply of sal sleepers at Badampahar, Bangri Posi or Mayurbhanj. It

follows from this evidence that the Appellant had a particular system of directing enquiries for supplies to selected parties who were traders in the

market. Following this system the Appellant directed its enquiries for risk purchase to three of the selected suppliers mentioned above and

ultimately obtained its supplies from two of them.

45. Evidence of market rate was given on behalf of the Respondent by two witnesses, viz. Durga Prosad Sahana and Profulla Ranjan Ghosal.

Sahana was a timber merchant and, according to him, in 1956 he sold sleepers to Himatsingka and Company at Rs. 6-3 0 or Rs. 6-4-0 for 8"" x 8

per eft., Rs. 20 for 10 x 10 x 5, Rs. 22 for 11 x 10 x 5, and Rs. 17 for 9 x 10 x 5. For sleepers of 11 ft. and 10 x 5 he said that he probably

charged Rs. 22 and for sleepers for lift, and for 12 ft. he probably charged Rs. 21 and Rs. 22, for 12 ft., 13 ft., 14 ft., 15 ft., or 16 ft., the rate

according to him was Rs. 6-4-0 (Qs. 4-8). In answer to Q. 9, he produced duplicate bills for sale of sleepers of 10 x 10x5, 11 x 10x5 at Rs. 17

for broad gauge...and Rs, 8-8-0 for meter gauge and Rs. 20 for 10 x 10 x 5 and Rs. 22 for 11 x 10 x 5. It is significant that although this witness

was giving evidence in February 1965 with regard to transactions that took place in 1956, he did not produce the books of account in which the

transactions were recorded, nor were such books tendered in support of the rates which according to him he charged. In the absence of such

books the evidence of rates of timber of different sizes sold at different rates nine years ago cannot be relied upon. With regard to the rates given

by him in answer to Q. 9 it is clear that he read out the rates from a duplicate bill, but the duplicate bill however was not tendered; what was

actually tendered Was the reverse of the bill which was marked Ex. 1A and is to be found at p. 399 of the Paper Book. The reverse of the bill

which was tendered is a mere sales tax declaration by Himatsingka Timber Ltd. The entries in the duplicate bill which were read out by witness

cannot, therefore, be treated as evidence. Quite plainly the witness was giving evidence of the contents of written documents which were not

tendered, and therefore such evidence must be excluded from consideration. So far as this witness is concerned there is therefore no evidence with

regard to the market rate of sal sleepers in 1956. This witness, according to the Respondent, supplied the sleepers to Himatsingka Timber Ltd

from whom the Appellant made the risk purchase. But the evidence given by him with regard to the market rate cannot be accepted or relied upon

for the reasons mentioned above.

46. The oral evidence of Profulla Ranjan Ghosal, the next witness called by the Respondent, on the question of market rate was that he was the

Sleeper Control Officer, South Eastern Railway, and as such his duties were to procure sleepers from several States for the South Eastern

Railway. This witness was served with a sub-poena (Ex. MM, which is to be found at p. 389 of the Paper Book), to produce contracts regarding

purchase of sal sleepers of various sizes mentioned in the subpoena, tie was not required according to the subpoena to give oral evidence. He was,

however, tendered as a witness and in fact gave oral evidence. He was asked about rates of sleepers in 1956 of size 10 x 8 x 8 and he said that

out of 56 contracts he could lay his hands on only one contract and rate was Rs. 26-10-8. He also gave the rate of size 10x10x5 and the rate was

Rs. 24 (Qs\ 22, 28). In answer to Q. 30 he mentioned the rates of various other sizes of sleepers with regard to the contract which was entered

into on May 20, 1956. The written contracts from which the rates were read out by this witness were, however, not tendered although this witness

was, as I have noticed earlier, served with a sub-poena for producing contracts. The written contracts being not before the Court oral testimony

regarding the contents of these contracts is not admissible and, so far as this witness is concerned, the evidence that he gave with regard to the

rates of sleepers can neither be accepted nor relied on. There is, however, another matter on which the evidence of this witness is of some

consequence, namely with regard to the quality of the goods. He said in answer to Qs. 83-86 that if the contract provided that there should be no

crack, sap-wood or dry rot and the goods suffered from these defects, such goods cannot be accepted. It appears from the oral evidence

mentioned above that the Respondent failed to prove the prevailing market rates of the sleepers either in June or in November 1956.

47. The question, therefore, remains if the Appellant''s purchase of the sleepers from Himatsingka Timber Company Ltd. and M. C. Paul &

Company was purchase in the open market, and secondly, if the- Appellant is entitled to the damages it has claimed on the basis of the difference

between the contract rate and the rate paid to these two parties. Hiniatsingka limber Company Ltd. and M. C Paul and Company are two of the

parties who were on the panel of approved suppliers of the Appellant, and they had earlier submitted a tender for supply of the sleepers, but their

tender was not accepted by the Appellant and the tender of the Respondent was accepted. These two parties were traders in the market, and

according to the system followed by the Appellant they were put on the panel after necessary enquiries regarding their commercial reputation and

stability. We see no reason to accept the Respondent''s contention that the rates quoted by Himatsingka Timber Company Ltd. and M. C. Paul &

Company were not rates of the open market. The Respondent in our view singularly failed to adduee any evidence whatsoever of the market rate

at the material time. It is true that the Appellant might have obtained sleepers at cheaper rates if they sent their representatives, to the different

forests mentioned earlier where timber was felled. But the Appellant was not bound to follow that course as it was entitled under the contract to

obtain sleepers F.O.R. Tatanagar. For these reasons we hold that the purchase made by the Appellant from Himatsingka Timber Company Ltd.

and M. C. Paul & Company were purchases made in the open market and the rates paid by the Appellant were also the prevailing market rates in

the end of November 1956.

48. Before proceeding to deal with the various decisions to which counsel for the parties referred, there is one other question to be disposed of,

viz. if the Appellant prevented the Respondent from supplying the goods by reason of the facts pleaded in para. 5 of the written statement. The

material allegations, so far as this aspect of the case is concerned, in para. 5 of the written statement, are that the Respondent received a telegram

in the first week of June 1956 from the Appellant complaining about the inferior quality of the goods and intimating that the entire lot of sleepers

had been rejected. It is further alleged that pursuant to this telegram the Respondent stopped all further dispatches until later and that the rejection

of the goods and the sending of the telegram were wrongful and unjustified as the entitle of goods dispatched under Railway receipt No. M48274;

were ultimately passed and accepted by the Appellant. The next allegation is that the Appellant failed and neglected to pay the price of the goods

in terms of the contract and caused unnecessary delay in passing the goods. It is also alleged that the manner of passing was unmethodical.

49. So far as the telegram of June 1956 is concerned, to which reference has been made in the written statement, the reference obviously is to the

telegram of May 23, 1956, which is Ex. J at p. 281 of the Paper Book., Having regard to what we have held regarding the quality of the goods,

the Appellant was justified in sending the telegram and calling upon the Respondent to supply sleepers strictly according to the specification. The

rejection of the goods by the Appellant was justified as the sleepers were not according to the quality agreed to be supplied. With regard to the

allegation that the Appellant failed to pay the price in terms of the contract the evidence is that the Respondent submitted altogether three bills. Of

these three the first bill was duly paid after making certain deduction for security deposit, overpayment etc. and was accepted by the Respondent.

The other two bills were admittedly withheld by the Appellant because of its claim against the Respondent arising out of the risk purchase. The

second bill is bill No. 26/248 dated December 11, 1956, and the amount of the bill is Rs. 5,516-12 0 From this bill Rs. 633-6-0 was deducted as

that was the amount of freight paid by the Appellant which was payable by the Respondent. The third bill is a bill dated January 31, 1957, and is a

bill for Rs. 4,251-8 0. The total amount withheld by the Appellant on the second and the third bill together was therefore only Rs. 9,134-14-0.

There is nothing, however, in the evidence of either Raman Lai or Chatterjee or Bonwari Lai to show that by reason of non-payment of the sum of

Rs. 9,134-14-0, the Respondent was put to financial difficulties which prevented it from supplying the sleepers to the Appellant. It is to be

remembered that the total value of the contract was Rs. 4,76,707 and, even if there was evidence that by reason of non-payment of a sum of Rs.

9,134-14-0 the Respondent was put to financial difficulties in supplying the balance of timber, we would have no hesitation in rejecting such

contention. We are, therefore, unable to accept the Respondent''s case that by reason of non-payment of two of the bills mentioned above the

Respondent was prevented from supplying the goods. So far as the delay in passing the goods and the unmethodical manner of passing them are

concerned, we do not think that there was any unnecessary or unreasonable delay in passing the goods or that the manner adopted was in any way

unmethodical. So far as rejection of the goods covered by Railway receipt No. M482742 is concerned, we cannot hold that the rejection was

wrongful having regard to the quality of sleepers specified by the contract. It is true the sleepers covered by the Railway receipt were later

accepted, but such acceptance took place only after certain modifications were carried out by the Respondent and not before. This disposes the

Respondent''s contention that the Appellant wrongfully prevented the Respondent from supplying the goods.

50. I will now proceed to deal with the various decisions on which counsel for the parties relied in support of their rival contention.

51. Counsel for the Appellant relied upon two decisions in support of his contention that as the Respondent did not specifically traverse the

allegations in the petition and also the particulars furnished, regarding extension of time, the Appellant''s case regarding extension should be deemed

to be admitted. The first of these two decisions is a decision of the Supreme Court, Badat and Co. Vs. East India Trading Co., . In that case

Subba Rao J. (as he, then was) after referring to Rules 3, 4 and 5 of Order 8 of the CPC held that the three Rules formed an integrated Code ''in

which allegations of fact in the plaint were to be traversed and that the written statement must specifically deal with each allegation of fact and,

further, that if a denial of fact was not specified such fact should be taken to be admitted. His Lordship then referred to the pleadings in mofussil''s

Courts and held that since such pleadings were not precisely drawn, the proviso to r. 5 of Order 8 was inserted to relieve the parties in a

mofussil''s litigation of the rigor of the Rules of pleadings. His Lordship also held that in Bombay pleadings were drafted by trained lawyers and,

therefore, the proviso could be invoked only exceptionally. It is true that Subba Rao J. was in a minority in the decision mentioned above. But the

majority did not dissent from the views of Subba Rao J. on this aspect of this case though they differed in other respects which are not material for

the purpose of this case. The next case relied upon by counsel for the Appellant is an English decision in Thorp v. Holdsworth (1876) 3 Ch.D.

637. In that case, the Plaintiff alleged that tire Defendant had agreed to take a lease of certain premises and to enter into a partnership ; the

partnership agreement was approved at an interview between the parties subject to being finally revised by the Defendant''s Solicitor, but the draft

agreement had neither been revised nor executed; it was also alleged that though the agreement was settled subject to revision, the terms of the

agreement were agreed upon between the parties and that the Defendant had not intimated any objection to the terms of the agreement. In the

statement of defence the Defendant admitted that he had agreed to enter into partnership as alleged and added-- the Defendant denies that the

terms of the arrangement between himself and the Plaintiffs were definitely agreed upon as alleged.

It was held that the denial was evasive within the meaning of p. XIX,- Rule 22 of the Supreme Court Rules. In delivering judgment Jessel M.R.

held that the whole object of pleadings was to bring the parties to an issue and the object of the Rules of pleadings was to prevent the issue being

enlarged.

52. On this point counsel for the Respondent firstly referred to a decision of the Supreme Court in Nagubai Ammal and Others Vs. B. Shama Rao

and Others, . In that case, a suit was filed for a declaration of title to a building site. There were numerous proceedings, and one of the questions

was that as no plea of lis pendent was taken in the pleading, the evidence bearing on that question could not be looked into and no decision could

be given based on such evidence. It was held that the true scope of the Rule relied on was that evidence let in on issues on which the parties

actually went to trial should not be made the foundation for a decision of another different issue which was not present in the mind of the parties

and on which they had no opportunity of adducing evidence. This decision in our mind is hardly of any assistance in this case, as the question with

which we are concerned in this case, is non-compliance with the Rules of pleading in Rules 3, 4 and 5 of Order 8 of the Code of Civil Procedure.

The question in this case is not failure or omission to take a plea in the pleading but the failure or omission to traverse an allegation in the plaint

which were later clarified by particulars furnished by the Plaintiff to the Defendant. The next case relied on by counsel for the Respondent was also

a decision of the Supreme Court in Keshavlal Lallubhai Patel and Others Vs. Lalbhai Trikumlal Mills Ltd., for the proposition that even though a

plea was not taken at the trial or in the grounds of appeal, if the plea was to be raised and no objection was taken to such a plea such a plea ought

to be allowed to be raised even for the first time in appeal.

53. In this case, it is pleaded in para. 6 of the plaint that time for delivery was extended till November 30, 1956, by the Appellant will the consent

of the Respondent. By a letter dated January 8, 1958, (Ex. NN, p. 392 of the Paper Book) the Respondent''s Solicitor asked for particulars of the

extension, viz. whether it was oral or in writing and if oral when and between whom the agreement was made and the persons who represented the

parties. These particulars were furnished by the Appellant''s Solicitor by a letter dated May 23/26, 1958 (Ex. OO, p. 394 of the Paper Book). It

was stated in this letter that the extension took place both orally and in writing, orally on June 27, 1956, when a joint inspection took place at

Jamshedpur. Mr. Hayles and Mr. Dubash represented the Plaintiff and Mr. Bonwari Lai Kandoi and one Mr. Chatterjee represented the

Defendant. It was further stated that extension would be evidenced by the Plaintiff''s letter of October 25, 1956, and that consent was given orally

by Mr. Bonwari Lai Kandoi representing the Defendant to Mr. Hayles in the presence of Mr. Dubash and Mr. Chatterjee. Paragraph 5 of the

written statement (which was filed after the particulars were obtained) deals with paras. 5 and 6 of the plaint and also the particulars -mentioned

above. The allegation in the1 plaint regarding extension and also the facts disclosed in the particulars have not been specifically traversed in the

written statement, but all that is stated isÃ¯Â¿Â½

Save as aforesaid the Defendant denied each and every allegation contained in the said paragraph.

In these facts the trial Court held that the Appellant''s allegation as to extension had been sufficiently and adequately denied by the Defendant. We

are of the opinion that the trial Court was in error in coming to this conclusion and in holding that the Appellant''s allegation of extension had been

sufficiently denied by the Respondent. In our view, there was no denial at all of the allegation regarding extension and on the pleadings issue No. 5

regarding extension of time ought not to have been raised. But, since the trial Court might have invoked the proviso to Rule 5 of Order 8 of the

Code of Civil Procedure, it is not necessary for us to say anything more on this question since we have already held on the facts that there was an

extension of time till November 30, 1956.

54. The next case relied upon by counsel for the Appellant was the decision in Maple Flock Company Ltd. v. Universal Furniture Products

(Wembley) Ltd. (1954) 1 K.B. 148. In that case a contract was entered into for the sale by the Plaintiff to the Defendant of i,000 tons of rag flock

to be delivered in three lots of 1J tons each per week, weekly deliveries to be separately paid for. By statute the proportion of chlorine and flock

was fixed and it was made a penal offence to use flock not conforming to the specified standards. After 16 lots were delivered the Defendant

informed the Plaintiff that sample drawn from the 16th lot showed a violation of the proportion of chlorine fixed by the statute. Negotiations took

place between the parties and the Defendant refused to accept, any further deliveries. The Plaintiff brought an action against the Defendant for

damages for breach of contract by the Defendant. The Defendant alleged in the defence that the Plaintiff had repudiated the contract and,

therefore, the Defendant was not obliged to accept further deliveries.- It was held that the Plaintiff''s breach of contract was not a repudiation of

the whole contract and that the Defendant''s refusal to accept further deliveries was a breach by them of the contract. Reliance was placed on the

observation to the effect that if a seller delivers goods differing from the specification in the contract, in such circumstances as to lead to the

inference that he could not or would not deliver any other kind of goods in future, the other contracting party would be under no obligation to see

what might happen and could at-once cancel the contract. On the same point reliance was also placed on a decision of this Court in Chhedilal

Hariniwas v. Britover Ltd. (1947) 52 C.W.N. 45 in which it was held that in the case of a contract involving instalment delivery, if a breach with

regard to one instalment took place in such circumstances as to lead to the inference that similar breach would be committed in relation to

subsequent deliveries the whole contract might be regarded as repudiated and might there be rescinded. Relying on these two decisions it was

argued that the Respondent had made it clear that he would not be in ""a position to supply sleepers of the quality prescribed by the contract and

that in its view such sleepers did not exist. It was also argued that the Respondent had stopped its sub-contractors from supplying sleepers

altogether. In these facts it was submitted that the Appellant was justified in cancelling the contract. In our view, the contention of the Appellant on

this aspect of the case must be upheld.

55. The next case relied on by counsel for the Appellant was a decision in Jugmohandas Vurjiwandas v. Nusserwanji Jehangir Khambatta AIR

1964 Pat. 250 on the question of measure of damages. In that case the contract was to deliver 1,000 tons of Powell Duffryn coal, January to May

shipment, 200 tons to be supplied each month. The first shipment was due in the middle of February, but the seller failed to deliver any coal and

the buyer did not purchase any coal against the seller''s contract but sued the seller for damages for breach of contract. The only question was the

mode of assessing the measure of damages and it was found that there was no coal in Bombay of the quality stipulated in the contract and,

therefore, no market rate could be proved. The buyer, however, produced a statement showing the rates at which he had during the contract

period settled certain contracts for Powell Duffryn coal with another party. It was held that under the special circumstances of the case and in the

absence of evidence as to market rate the figures given in the statement produced by the buyer might properly be received as evidence for the

purpose of fixing the actual value of coal at the date of breach. The next case relied upon by counsel, for the Appellant on the same question was a

Bench decision of the Patna High Court in Firm Rampratap Mahadeo Prasad v. S and sansa Sugar Works Ltd. I.L.R.(1902) Bom. 744. In that

case there was a contract for sale of gunny bags manufactured by a particular mill. At the time when the agreement was entered into, it was known

to the parties that the mills were closed during the relevant period due to a labour strike. On the question of measure of damages it was held that in

a breach of contract to supply goods the measure of damages is ordinarily the difference between the contract price and the market price of the

goods at the time when they should have been settled, but in the absence of any evidence to show some other market rate, the prevailing rate at

which goods were actually purchased during that period at the place where the goods should have been supplied, should be taken to be the

prevailing market rate. The next case relied on by counsel for the Appellant on this question was a decision of this Court in Gambhirmull

Mahabirprasad v. Indian Bank Ltd AIR 1965 Cal. 163 in which it. was held that lack of relevant evident might make it impossible to assess

damages and in such case nominal damages only might be awarded, but where it was established that damages hadÃ¯Â¿Â½ been suffered for which the

Defendant should be held liable, the Plaintiff might be accorded the benefit of every reasonable presumption as to loss suffered. These

observations, in my view, are not relevant for the purpose of this appeal inasmuch as in this case there is evidence of the loss suffered by the

Appellant in making the risk purchase.

56. Counsel for the Respondent, however, relied upon a decision of the Supreme Court in Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas

and Another, to repel the Appellant"s contentions regarding measure of damages. In that case there was a contract for the sale of canvas at Re. 1

per yard. The delivery was to be through Railway receipt F.O.R. Kanpur. The Railway receipt was to be delivered on August 5, 1957, and as that

was not done the buyer brought a suit against the seller for breach of contract. The buyer claimed that the rate of canvas in Calcutta at the time of

the breach was Rs. 1-8-3 per yard and, therefore, he was entitled to damages at the rate of Re. 0-8-3 per yard. It was held that no inference

could be drawn that the goods were to be re-sold in Calcutta only, and that it was open to the buyer to sell them anywhere he liked, and therefore

it could not be said that the parties knew when they made the contract that the goods were meant for sale in Calcutta alone. It was held that the

measure of damages was what would actually arise in. the usual course of things from such breach, and therefore the buyer had to prove the

market rate at Kanpur, on the date of breach, for similar goods and damages could be fixed on that basis, and since the buyer failed to prove the

rate of similar canvas in Kanpur it was not entitled to any damages. This decision to our mind is of no assistance to the Respondent because the

delivery in that case was F.O.R. Kanpur and there was no evidence at all of the market rate at Kanpur on the date of delivery, and damages were

claimed on the basis of the higher market rate at Calcutta and there was nothing to prove that the goods were intended for re-sale in Calcutta. In

the appeal now before us, on the other hand, delivery was F.O.R. Tatanagar and there is evidence of the rate of sleepers sold F.O.R. Tatanagar at

the material time and, therefore, it cannot be said that there was no evidence of market rate of goods to be delivered at a particular time and place.

57. The next case relied on by counsel for the Appellant was Inland Revenue Commissioners v. Clay, Inland Revenue Commissioners v. Buchanan

(1914) 3 K.B. 466. In that case the term "open market" came up for consideration. Under the English Finance Act gross value of land was

defined to mean the amount which it would fetch if sold in the open market by a willing seller. The fee simple of the house was worth not more than

& 750, but the house adjoined a nurse"s home the trustees of which purchased it for Ã¯Â¿Â½1,000. It was held that open market included sales by

auction but was not confined to that, and that the facts that the property was so situated that to one _ or more persons it presented greater

attraction than to others should not be excluded from consideration. It was further held that the offer of a higher price by an adjoining land-owner

could not be disregarded. This decision to my mind is not of any assistance in this appeal, because it was the case of sale of real property and

consideration of special attraction to an adjoining owner were taken into account. The next case relied on by counsel *for the Appellant was

Charrington & Company Ltd. v. Wooder (1914) A.C. 71. In that Case a brewing company demised a public house to a tenant who agreed to

deal exclusively with the laserÃ¯Â¿Â½s beer provided it was supplied at a fair market price. The great bulk of London brewers" trade was done with

tied houses and discount was allowed at certain recognised rates, but in the case of free tenants discount was the subject of special bargain and

these free tenants obtained a. higher rate of discount. It was held that the term market was to be construed with reference to surrounding

circumstances and that the lessee of a tied house was to be charged the fair market price as applying to tenants of tied houses and was not entitled

to discount beyond the. recognised rates. Relying on this decision it was argued that the surrounding circumstances in this case made it clear that

the price paid to Himatsingka & Company Ltd. and M. C. Paul was the rate prevailing in try open market as these two parties were recognised

dealers in the. open market and as the Respondent failed to adduce any evidence of market rate or to prove that the rate in the open market was

lower than the rate quoted by these two parties. It seems to me that this contention of the Appellant is well-founded.

58. Counsel for the Appellant next relied on a decision in Lesters Leather and Skin Company Ltd. v. Home and Overseas Brokers Ltd. ILR 64

(1948) 569 in support of his contention that the Appellant was not bound to go to the forests where sal trees were felled to buy the sleeper. That

was a case of sale of snake skins. The skins supplied were found to be un-saleable. Damages were awarded to the buyer after deducting a certain

sum in the seller''s favour as it was found that there was a market in snake skins available to buyers in. India. A plea by the seller for higher

reduction was turned down on the ground that the buyer was not bound to enter into contracts with unknown sellers in India to obtain goods in

England eight Or nine months after the delivery date in the original contract. This decision is of no assistance to the Appellant in this case, firstly,

because the commodity involved was a rare commodity like snake skin, the market for which was strictly limited. Secondly, the contract in this

case was F.O.R. Tatanagar and the Appellant''s case was that it was not bound to seek the sleepers in different forests.

59. The last case relied on by counsel for the Appellant was a decision of the Judicial Committee in Erie County Natural Gas & Feul Company

Ltd. v. Samuel S. Carroll (1911) A.C. 105. In that case, under a gas lease there was a clause to supply gas for a plant. In breach of this clause

supply of gas was cut off. The lessee thereupon procured gas from independent sources. In an action by the lessee for damages it was held that the

damages recoverable was the cost incurred by the lessee in procuring the gas and not the price at which the substituted gas when procured could

have been sold. This decision is an authority for the proposition that when a breach of contract to supply goods has been committed by the seller,

the buyer is entitled to recover as damages whatever costs have been incurred by him in procuring same or similar goods. Counsel for the

Appellant contended, and I think rightly, that the Appellant having procured similar sleepers was entitled to recover as damages the difference

between the contract price and the price actually paid.

60. In support of the contention that the Appellant was not bound to go to the sal forest to obtain the sleepers, reliance was placed by counsel for

the Appellant on a passage in Mayne & Mcgregor on Damages (12th ed., p. 337) quoting with approval the dictum of Lord Goddard C.J. in the

case to which I have referred earlier (13) that the buyers were not bound to go hunting the globe to find out where they can get skins.

Counsel for the Appellant also relied on the statement of the law regarding prevention of performance in Chitty on Contract (23rd ed., p. 316,

para. 698). There it is stated that the Court will rightly imply into any contract a term that neither party will, by his own act or default, prevent

performance of the contract and that where a party enters into a contract which can only take effect by the continuance of existing state of things,

there is an implied engagement on his part that he will not of his own initiative do anything to put an end to that state of things under which alone the

agreement can be operative. Relying on these observations counsel for the Appellant submitted that the existing state of things in this case

contemplated that the Respondent would continue to supply sleepers of the approved quality. I do not think that the statement in Chitty on

Contract mentioned above has"" any application to the facts in this case.

61. I will now proceed to deal with the other cases relied on by counsel for the Respondent. Reliance was placed on a decision of the English

Court of Appeal in William Cory & Son Ltd. v. City of London Corporation (1951) 2 All E.R. 85. In that case, the London Corporation as the

sanitary authority entered into a contract for the removal of refuse from the city of London. The contractors undertook to use lighters and barges

fitted with temporary coamings and coverings to be secured to the permanent coamings. While the contract was still subsisting the Corporation as

the port health authority made new bye-laws which required every vessel transporting refuse to be provided with permanent coamings and close-

fitting hatches to such coamings, capable of completely covering the refuse and...waterproof sheeting for covering such hatches.

There was no dispute that when the new bye-laws came into force additional burden would be imposed on the contractors which would entitle

them to treat the contract as having been frustrated, but it was contended on behalf of the contractors that the making of the bye-laws was an

anticipatory breach of contract entitling them to treat the contract as repudiated. It was held that though it was an implied term of any contract that

one party would not do anything to disable the other from performing the contract, this implication in a contract would not make the bye-laws of

the nature now in dispute impose an unwarrantable fetter on the Corporation in exercise of its duties under the Public Health Act and that such a

term would be ultra vires the Corporation and, therefore, the making of the bye-Laws was hot a breach of a valid term of a contract and did not

entitle the contractors to treat the contract as repudiated. The question raised in this case is the same as has been dealt with by Chitty on Contract

to which I have referred earlier. I did not see how this decision is of any assistance to the Respondent. In the first place, the question of preventing

a party to the contract from performing its part arose out of exercise of the statutory powers under the Public Health Act. Secondly, the contractor

in that case was willing to perform his obligation under the contract upon conditions which existed before the bye-law was made. In the instant

case now before us there has been no change in the conditions and circumstances under which the obligations are to be performed by the

Respondent. All that the Appellant insisted on was that sleepers should be supplied in conformity with the quality prescribed by the contract. The

Respondent on its part contended that the sleepers of the quality prescribed by the contract did not exist and, therefore, it could not supply such

sleepers at all and had stopped the supply of sleepers-altogether. The decision mentioned above, therefore, has no application Ã¯Â¿Â½to the facts in

this case or the question of law involved. Reliance was next placed by counsel for the Respondent on Halsbury, Laws of England (3rd ed.; vol. 8,

p. 179, Article 309), for the proposition that impossibility of performance brought about by the conduct of one of the parties amounted to a breach

of the contract by him, and that where the conduct of the promise has rendered performance impossible the promissory is released from his

obligation to perform his promise. I do not see how this statement of the law helps the Respondent as this is not a case where impossibility of

performance was brought about by the conduct of the Appellant. The Appellant had entered into a contract for the purchase of sleepers of a

certain quality and the Respondent had promised to supply such sleepers in certain stated installments. The Appellant insisted that the supply of

sleepers should be of the specified quality. The Respondent declared that the sleepers of the specified quality could not be supplied by it and

further stopped supply of sleepers altogether. In these facts it cannot be said that the impossibility of performance was brought about by the

conduct of the Appellant.

62. The next case relied upon by counsel for the Respondent was a Bench decision of this Court in Pratabmull v. Manick Chand Durga Prosad

(1960) 64 C.W.N. 992 . This case was relied upon in support of the contentions that the oral testimony of Ghosal and Sahana should be accepted

and relied on, although they purported to give oral evidence with regard to rates, which were recorded in written documents which were not

tendered. In that case the question of acceptance of the evidence of an under-broker came up for consideration. It was found that it was part of

the duty of the witness as an under-broker to collect rates and to inquire both from buyers and sellers the rates they were willing to offer and

accept and to bring them together. But what is of importance is that in that case the witness not only gave the oral evidence of the rates but he also

proved the firm''s office quotation which was circularized to all branches and mills in Calcutta. This quotation was a printed document containing

the rates and was tendered and marked as an exhibit. This decision therefore is of no assistance to counsel for the Respondent in support of his

contention that the* oral evidence of Ghosal and Sahana ought to be accepted although the documents from which the rates were given in evidence

were themselves not tendered. Learned Counsel for the Respondent also relied on the case of Holme v. Guppy (18fc) 3 M.& W. 387. In that

case, a written contract was entered into to execute certain works in a brewery within a specified time. The contract provided that in default of

completing the work within the specified time the contractor would forfeit to the owner Ã¯Â¿Â½40 per week for each week that the completion of the

work was delayed beyond the specified time. The owner failed to give possession for four weeks in consequence whereof the contractor could not

begin the work. Thereafter work was delayed by one week by the default of the contractor''s workmen and a further four weeks by the default of

the masons employed by the contractor. In consequence of all these the work was not completed till five weeks after the specified time. It was

held that the owner was not entitled to deduct any sum in respect of the delay. The facts in this case to my mind are entirely different from the facts

in the present appeal. There was no delay or default on the part of the Appellant in passing or accepting the sleepers. The delay in passing such, as

it was, was occasioned by the Respondent''s failure to supply goods according to the contract and the Appellant cannot be held responsible for

such delay.

63. This disposes of reference to the cases relied on by counsel for both the parties.

64. In our view, the Court below was in error in its appreciation of the oral and the documentary evidence adduced by the parties in support of

their rival contentions. I have discussed and analyzed such evidence and also the rival contentions advanced by the counsel for the parties, and I

am of the opinion that the Appellant''s claim should have been allowed.

65. In our view, issues Nos. 1, 3, 5, 7 and 8 should have been answered in the affirmative. Issue No. 2 does not arise and need not be answered

as the Respondent has accepted the rejection of 39 sleepers by the Appellant. Issues Nos. 4 and 6 should have'' been answered in the negative.

Issue No: 9 is a general issue as to the relief to which the Appellant is entitled, and the answer to this issue should be that the Appellant''s claim

ought to be allowed.

66. For the reasons mentioned above this appeal is allowed. The judgment and decree of the Court below are set aside. There will be a decree in.

favour of the Appellant for Rs. 98,538-11. The Respondent is to pay to the Appellant the costs of the Court below as also the costs of this appeal.

Certified that it is a fit case for employment of two counsel.

S.K. Mukherjea, J.

67. I agree.