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Calcutta High Court

Case No: Suit No. 3942 of 1951

Sm. Durga Devi Bhagat and Another		APPELLANT
	Vs	
J.B. Advani and Co. Ltd.		RESPONDENT

Date of Decision: Dec. 24, 1970

Acts Referred:

- Contract Act, 1872 - Section 31, 32, 56
- Partnership Act, 1932 - Section 46, 48

Citation: 76 CWN 528

Hon'ble Judges: S.C. Deb, J

Bench: Single Bench

Judgement

S.C. Deb, J.

This suit was filed on September 5, 1951 by Mr. Baijnath Bhagat, since deceased, describing himself as carrying on business under the name and style of Bhagat Oil Mill and claiming Rs. 43,219-7-3p as damages from the defendant on the plea that the defendant has committed a breach of a contract in writing dated March 17, 1951 entered into with this Mill by refusing to take delivery of 170 tons of raw linseed oil being the subject-matter of this contract. The defendant has admitted this contract with this mill but has pleaded that this mill belongs not to Mr. Bhagat but to Messrs. Banshidhar Baijnath which is either to partnership firm or a Hindu joint family business. The defence, on the merits, pleaded is the frustration of the said contract on the plea that it was entered into on the basis that those goods were to be exported by defendant to its foreign buyers of Finland but exportation of linseed oil was totally prohibited after the contract was entered into and no export licence was granted to the defendant for exporting those goods. An alternative plea of an implied agreement and or an oral collateral agreement to the above effect and their frustration are also set up as further defence including the denial of any liability to pay any damages as claimed by the plaintiff.

2. Mr. Bhagat was examined on commission in 1956 and, after his death his evidence was tendered during trial. His sole widow and only son brought themselves on the record as the executrix and the executor of his estate but probate was granted only to the son and, so, the widow cannot represent Mr. Bhagat in this suit the trial of which continued for more than 40 days on the following agreed issues :

1. (a) Is Bhagat Oil Mill a proprietary concern of the plaintiff as alleged in the plaint or it belongs to the joint family and or the partnership firm as alleged in the written statement ?

(b) If Bhagat Oil Mill belongs to the joint family or to the partnership firm whether the suit as framed is maintainable ?

2(a) Did the plaintiff and or its representatives know at the time of entering into the said contract dated 17th March 1951 that the defendant entered into the said contract for the purpose of exporting the said goods to their Helsinki customers ?

(b) If so, was it the basis of the contract ?

3. Was there any implied and or collateral oral agreement between the parties to the said contract that the goods contracted for were to be shipped outside India for the defendant''s Helsinki customers ?

4. Did the plaintiff allow several extensions to the defendant to perform the said contract for the purpose of enabling the defendant to obtain export licence or permit from the Government of India ?

5. (a) Did the Government of India refuse to issue licence in favour of the defendant to export the goods in suit to Helsinki ?

(b) If so was the contract in suit rendered void or illegal or became impossible of performance ?

6. Did the plaintiff suffer any loss or damages as alleged in para 5 of the plaint ? Is the plaintiff entitled to any damages whatsoever ?

7. What was the market price of the said goods on or about 31st of July 1951 ?

8. To what relief, if any, the plaintiff is entitled ?

3. Many years ago Mr. Bhagat and his three brothers Ghanshyamdas, Durgadut and Premsukdas, who is no longer alive, started several partnership businesses. Mr. Bhagat has said that he became the sole proprietor of the Mill and of Messrs. Bansidhar Baijnath on January 1, 1950 under an oral agreement with his the then partners and, to corroborate his oral testimony, 3 account opening forms of the Banks signed by him were produced from the custody of those Banks and were tendered. They show that he, as the sole proprietor of those two businesses, opened three banking accounts on January 28, May 15 and June 12, 1950

respectively. He, however, did not prove the signature and writings on a certificate issued by an Income Tax Officer and therefore this document (Ext. D) cannot be looked into. His books of accounts were disclosed long after his death to prove that he became the sole proprietor of those two businesses with effect from January 1, 1950, but I am unable to act on them because the accountant Mr. Kalanoria has totally failed to explain a number of mistakes and irregularities committed by him and the other writers in writing those books and I do not wish to go into their genuineness though it was questioned on behalf of the defendant.

4. Mr. Bhagat said nothing about the registration of those firms but 3 certified copies relating to those firms issued by the Registrar of Firms were tendered in court. Two of those exhibits show that Mr. Bhagat and his 3 brothers were the partners of Bhagat Oil Mill and of M/s. Bansidhar Durgadutt and so far as the later firm is concerned Ghanshyamdas has long retired from it and, on the death of Premsukdas, his widow Sm. Kamala Debi became a partner and his minor son was admitted to the benefits of the said partnership and then on January 14, 1950 it was recorded that Mr. Bhagat has retired from this firm. The other exhibit shows that Mr. Bhagat, Durgadutt and Premsukdas were the partners of Bansidhar Baijnath and on the death of Premsukdas his widow became a partner and his minor son was admitted to the benefits of the said partnership and on August 14, 1952 it was recorded that this firm was dissolved on January 1, 1950 by Mr. Bhagat becoming its sole proprietor but this entry was made after the filing of the written statement and therefore no importance can be attached to it.

5. Mr. Bhagat was wholly silent on an arbitration agreement (Ext. R) signed by him and his the then partners on January 7, 1950 and of an unfiled award (Ext. S) dated June 10, 1950 signed by him and them and the arbitrators and their signatures on these two documents were proved by Mr. Kalanoria The solicitor Mr. S. C. Bose, since deceased, has signed these two documents as an attesting witness whose writings and signatures were proved by Mr. Roy of Messrs. Khaitan & Co. where they were prepared and were recorded in their day books and, therefore, I over-rule the objection as to their genuineness raised by the learned advocate Mr. Dutt appearing for the defendant.

6. By Ext. R Mr. Bhagat, Durgadutt and Sm. Kamala Devi for self and as representing her minor son referred their subsisting differences and disputes, in relation to those three partnership businesses including the assets and properties appertaining to those businesses and their other joint properties by declaring that they were entitled to them in equal one-third shares, to three named arbitrators, one of whom was Mr. Ghanashyamdas Bhagat and they empowered those arbitrators to declare in their award from which date the said partnership businesses should stand dissolved. The arbitrators, by their award, allotted to Mr. Bhagat amongst other properties, businesses of this Mill and of Bansidhar Baijnath as going concerns including the properties and assets of those two businesses and their goodwill and

the immovable properties where those two businesses were carried on as his share of all those firms with effect from January 19, 1950 and in the same way they allotted other properties and businesses to his other partners. These two documents nullify the oral agreement spoken of by Mr. Bhagat including the first two account opening forms of these banks, the entries in those books of accounts and the evidence of the employee-witnesses of the plaintiffs and I hold that Mr. Bhagat did not become the sole owner of those two businesses on the 1st January 1950.

7. According to Mr. Dutt, this award cannot be received in evidence due to its non-registration but here the question is whether the provisions of the Transfer of Property Act and the Registration Act can have any application because those immovable properties which were allotted to Mr. Bhagat formed part of the trading assets of those firms. In (1) Addanki Narayanappa and Another Vs. Bhaskara Krishtappa and Others, the Supreme Court upheld the defence of the Bhaskara family which was based on an unregistered karar recording the dissolution of the firm and the relinquishment of the rights of the Addanki family in the partnership assets including the immovable properties of the firm in favour of the Bhaskara family by expressly holding that it did not require registration. It is true that by that document no immovable property was transferred as it was done here but Mudholkar J., speaking for the Supreme Court, at page 1303 of the report laid down the law on the subject in the following terms :

Whatever may be the character of of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of this property, and upon dissolution of the partnership to a share in the money representing the value of the property. No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership however, no partner can deal with any portion of the property as his own. Nor can he assign his interest in a specific item of the partnership property to anyone. His right is to obtain such profits, if any, as fall to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities set out in Cl. (a) and sub-cls. (i), (ii) and (iii) of Cl. (b) of S. 48 of our Partnership Act.

8. There a number of English decisions on the subject were examined and the Supreme Court expressly approved what Kindersley V. C has said in (2) Darby v. Darby reported in 61 E.R. 922, a portion of which, is quoted below:

Now it appears to me that, irrespective of authority and looking at the matter with reference to principles well established in this Court, if partners purchase land merely for the purpose of their trade, and pay for it out of the partnership property,

that transaction makes the property personality and effects a conversion out and out.

(emphasis supplied)

9. The Supreme Court also expressly approved the views of the Madras High Court in (3) Venkataratnam v. Subba Rao reported in ILR 49 Mad 738, where it was held that an unregistered deed of release by a partner of his share in the partnership business was admissible in evidence even though the firm owned immovable properties of the value of more than Rs. 100/-. Again, at page 1304 of the report it was said :

The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the exclusive property of the person who brought if in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership. ***** It is true that even during the subsistence of the partnership a partner may assign his share to another. In that case what the assignee would get would be only that which is permitted by S. 29 (1), that is to say, the right to receive the share of profits of the assignor and accept the amount of profits agreed to by the partners.

10. This being the law there cannot be any doubt that an immovable property loses its charter when it forms part of the trading assets of a firm as between the partners and therefore if a firm, as a going concern, is allotted to a partner with all its trading assets as his share of the partnership business the provisions of the Transfer of Property Act and the Registration Act relating to the transfer and of acquisition of immovable property cannot apply as between the partners. In (4) Pannalal Paul and Others Vs. Sm. Padmabati Paul and Others, the arbitrators allotted two partnership businesses including their assets to the appellants and, speaking for our Court of Appeal, Bachawat, J. at pp. 819, 821 and 822 of the report said ;

By force of the award the appellants have become the co-owners of the two businesses and all the business assets ****. In a suit for dissolution of a firm, sale of the assets of the dissolved firm is the general rule. But the Court has the power to mould the relief in accordance with the circumstances of the case. If the equities of the case so require, the Court has the power to direct that the properties be allotted to the partner who is willing to take them at a valuation fixed by the court and that the proceeds be applied for the purposes mentioned in Section 46 of the Indian Partnership Act. * * * Similarly on a reference of disputes in a suit for dissolution of

a firm the arbitrator has full power to make an allotment of the assets and properties of the dissolved firm to one of the partners at a valuation fixed by the arbitrator.

(emphasis supplied).

11. Mr. Ghanshyamdas Bhagat was not a partner of Bansidhar Baijnath and, he, as one of the arbitrators, has allotted these two businesses and therefore it can be reasonably inferred that he had retired from Bhagat Oil Mill at least prior to his appointment as an arbitrator. Several immovable properties were allotted to Mr. Bhagat but they were allotted to him as his share in the assets of those partnership businesses as going concerns. This award was signed by the parties to the reference and they are bound by it. Vide, (5) Satish Kumar and Others Vs. Surinder Kumar and Others, . The appellants, in Pannalal''s case, became the joint owners, of those businesses including the assets appertaining to them without a conveyance "by force of the award" and a similar thing having happened here Mr. Bhagat became the sole owner of the mill and the business of Bansidhar Baijnath "by the force of the award" as going concerns including their assets.

12. The Supreme Court, in Civil Appeal No. 1201 of 1966 (6) Khushal Khengar Shah and ors. v. Mrs. Khorshedbanu Dadiba Boatwalla and anr., in its unreported judgment dated February 12, 1970, has laid down : "The goodwill of a business is however an intangible asset being the whole advantage of the reputation and connections formed with the customers together with the circumstances which make the connection durable. It is that component of the total value of the undertaking which is attributable to the ability of the concern to earn profits over a course of years because of its reputation, location and other features." And in (7) Dulaldas Mullick and Others Vs. Ganesh Das Damani and Others, , though the shoproom of which the appellant was a monthly tenant was not expressly sold in execution proceedings but his business as a going concern including its goodwill was sold and our Court of Appeal rejected his contention that the shop-room was not sold in the following terms at page 283 of the report:

To sell the ordinary dealer''s business as a going concern and then to say that it does not include the very basic right to occupy the shop room from where the business is carried on will be to dislocate and destroy the business and not to sell it as a going concern for the present business cannot go on except from that shop and it is a business where locality is a significant part of the goodwill sold.

13. In (7) Dulaldas''s case the shop room went with the business and its goodwill and here those two businesses as going concerns, and their goodwill having been allotted to Mr. Bhagat they carried with them the immovable properties where those two businesses were carried on. No registered document is required to transfer a goodwill of a business and assuming that this award required registration so far as the immovable properties allotted to Mr. Bhagat were concerned still those

allotments being severable from the allotments relating to those businesses allotted to him this award is admissible in evidence in proving the ownership of Mr. Bhagat in those two businesses for which this award required no registration.

14. Mr. Dutt, then, contended that as the record of the Registrar of Firms relating to the Mill (Exhibit 41) do not show that this firm was dissolved it must be held that Mr. Bhagat did not become its sole proprietor but our Court of Appeal, in (8) Durga Prosad Sarawagi and Others Vs. Registrar of Firms and Another, at page 932 of the report, has said that the Registrar of Firm "has no power ****** to make an entry that a firm is dissolved." Therefore, this contention of Mr. Dutt is overruled. I hold that Mr. Bhagat became the sole owner of the businesses of the mill and of Bansidhar Baijnath with effect from January 19, 1950 "by force of the said award" and my answers to issue Nos. 1 (a) and (b) are that Mr. Bhagat was the sole proprietor of those two businesses at the time the contract in suit was entered into and these two businesses did not belong to any partnership firm nor to any joint family as stated in the written statement and the suit, as framed, is maintainable.

15. On March 13, 1951 Messrs. Soren Barner & Company, (hereinafter referred to as Soren Barner) a firm of brokers of Finland, by a telegram (Ext. 4) despatched from Helsinki requested the defendant to quote the rate of 200 tons of linseed oil and the following writings appear in blue pencil on this cable :

Rs. 80/4 per md. F.A.S. packed, in second hand 45 gallons drums-delivery April.

16. The Mill, in its letter of March 14, 1951 admitting that there was a discussion with the representative of the defendant, offered to sell 200 tons of linseed oil to the defendant @ Rs. 80/4/- per maund F.A.S. Calcutta Port, packed in second-hand 40/45 gallon drums to be delivered in April 1951 and stated that this offer was to remain open till March 17, 1951. On the same day the defendant by a cable and a letter informed Soren Barner that C.F. rate of those goods in secondhand drums was £ 184 per ton and requested Soren Barner to communicate their reply by the 17th March 1951 and in reply Soren Barner, by a cable (Exhibit 3) to the defendant, on March 15, made an offer to buy 170 tons of linseed oil to be shipped in April and May in new drums.

17. Then, on March 17, the contract in suit was entered into and by this contract the Mill agreed to sell and the defendant agreed to buy 170 tons of raw linseed oil in new 40/45 gallon-drums @ Rs. 80/8/- per maund F.A.S. Calcutta, out of which 100 tons were to be delivered in April and the remaining 70 tons in May 1951 and the payments were to be made cash against delivery and the drums were to be marked with the shipping marks. And on the very same day the defendant by a telegram (Ext. 22) and a letter accepted the offer of Soren Barner and requested Soren Barner to open a letter of credit in favour of the defendant and repeated this request by its letter of 19th March 1951 on which date Soren Barner, on behalf of the foreign buyers A/B Schildt Hollbarg, Dickersby, sent an order from Helsinki which was

received by the defendant on March 26 for exporting those goods to Finland against an irrevocable letter of credit to be issued by the foreign buyers and the defendant was to pay a commission of 2% to Soren Barner for securing this order.

18. On November 14, 1949 a notice (part of Exhibit N) was issued by our export authorities stating therein amongst other things that in future licences for export of linseed oil would be issued "only at the time of shipment on first-come first-serve principle" and all sales were to be promptly reported to the Export authorities with the particulars of "the country of consignment, the name of consignee and the period of consignment" and further intimating to the traders that "a timely warning" would be given "not to enter into further commitments which may be shut out on account of the quotas limitation." This notice was abruptly superseded by a further notice dated March 27, 1951 (Part of Exhibit N) whereby the issuance of export licence for linseed oil was discontinued with immediate effect with the result that no linseed oil could at all be exported in future.

19. The defendant''s manager Mr. Raman came to know of this prohibition on the same day and he met the Controller of Export as stated by him in Exhibit 38 and thereafter on March 30, he deposited Rs. 100/- as licence fee and then on March 31, made an application for a licence to export those goods to its foreign buyers enclosing therewith the original order of March 19, 1951 and the contract in suit but this application was rejected by the Export authorities on April 11, 1951. Then, at the request of the defendant, the Government of Finland through its Legation took up the matter with our Government for issuing an export licence to the defendant and in expectation that a licence might be granted the defendant booked the shipping space for April and then the Mill on April 28, requested the defendant to send shipping instructions but the defendant remained silent and on May 4, again booked shipping space for the 9th May and then the said Legation by its letter of 9th May 1951 informed the defendant that no licence would be granted by the export authorities as the application of the defendant was submitted after four days from the date of the said prohibition.

20. Mr. Narsirighdas Bhalla had died a few years ago and he was the manager of Mr. Bhagat during the relevant period. Ramji is a son of Narsinghdas and Ramji has signed the contract in suit as a broker of Mr. Bhagat. Mr. H. Gupta was the secretary of Mr. Bhagat but he was deliberately withheld from the witness-stand by the plaintiffs though he took a leading part in the dispute that followed later on. Mr. Bhagat has denied that he had any knowledge about the negotiations between the defendant and Soren Barner. He has further denied that any representative of the defendant ever met him in connection with the contract in suit which he said was entered into on his behalf by Narsinghdas. He said that those blue pencil writings on Ext. 4 "might be in the handwriting of Mr. Narsinghdas Bhalla" and then in answer to Q. 286 he said that he would not call Narsinghdas to give evidence and on the following day he voluntarily said that he would not call Narsinghdas to give evidence

in that commission for which no comment is at all necessary.

21. Mr. Bossi, an employee of the Mill, in answer to Q. 189 has admitted that one of the employees of Mr. Bhagat was the writer of those blue pencil writings on Ext. 4. Mr. Raman and Mr. Srinivasan of the defendant have said that they went to Mr. Bhagat, Mr. Gupta, Mr. Bossi and Narsinghdas on March 14, with that cable and, while telling them that the defendant was negotiating with the foreign party for selling linseed oil, Mr. Raman gave that cable to Mr. Bhagat who agreed to supply those goods and asked Narsinghdas to quote the rate which Narsinghdas did by writing in blue pencil on that cable on the basis that those goods were to be supplied in second-hand drums. Mr. Raman has said that he was the representative mentioned in exhibit 5 and met Mr. Bhagat at least on four occasions and these facts were admitted by Mr. Bossi who has said that he was present on all those occasions. Mr. Raman has further said that after receiving the cable of Soren Barner to supply those goods in new drums he met Mr. Bhagat who in the presence of those employees of the Mill agreed to supply those goods in new drums at an increased price of -|4|- annas per maund because the earlier rate was quoted on the basis of second-hand drums.

22. Mr. Bhagat has said that no "big contract" could be entered into by any one on his behalf without his permission and he had admitted that contract in suit was a "big contract." His munib Mr. Agarwalla had admitted (QQ. 176-180) that the representatives of the defendant along with Narsinghdas, Mr. Bossi and Mr. Gupta met Mr. Bhagat and they have told Mr. Bhagat that those goods were intended to be purchased by the defendant for exporting them to Finland which he came to know later on from Narsinghdas. Furthermore, Mr. Bossi had admitted that the contract in suit was made F.A.S. Calcutta on the basis that the defendant would export those goods. (B. QQ. 54, 67, 250, 252, 568).

23. By its letter of 18th May the Mill asked the defendant to take delivery of the entire quantity of those goods within May and, in reply, the defendant in its letter of 30th May wrote to the Mill that the defendant''s further application for export licence for exporting those goods to Finland was still pending before the export authorities and the Mill would be informed as soon as the matter was intimated by the said authorities but the Mill did not give a reply to this letter.

24. Mr. Raman has said that on June 15, he met Mr. Bhagat, Narsinghdas, Mr. Gupta and told them that the defendant''s further application for an export licence was still pending and, in his letter of 19th June, Mr. Raman confirmed this call and wrote to the Mill that he had on several occasions informed the Mill that the application for export licence for sending those goods to Finland was still under consideration and as soon as the decision of the authorities would be known he would immediately get in touch with the Mill and requested the Mill to wait till July 31, 1951 as requested by him personally. Mr. Gupta, in his letter of 23rd June admitting the visit of Mr. Raman, inter alia, wrote "we agree to extend the time till the 30th instant. The goods must

therefore be taken delivery of by you against payment by the said date. We are not concerned with your licence affairs". Mr. Raman immediately replied by saying in his letter of 30th June : "You are no doubt fully aware that the contract for the purchase of 170 tons of linseed oil was entered into for export to Finland. It is not possible to take delivery of the goods now as this was meant for export and the contract was entered into on F.A.S. terms only for this purpose which is known to you. If a delay has been caused it is not due to any reason on our part but for the Government of India''s ban on export which are beyond our control. In the interest of business and mutual good relationship we request you to kindly keep the matter pending till 31.7.51 as already requested by our letter dated 19th instant by which time a decision will be arrived at."

25. In reply, Mr. Gupta, in his letter of July 3, said that they never knew that the contract was entered into for exporting those goods to Finland and as a special case he extended the time upto 31st July for taking delivery of those goods on conditions that in case of failure by the defendant to send shipping instructions or in taking delivery by that dale the defendant would be treated as committing a breach of the contract and would be held liable for all losses that the mill might suffer in consequence thereof. And Mr. Raman in his letter of July 13, said that it was absolutely untrue to say that the mill did not know that the contract was made for exporting those goods to Finland and further said that Ext. 4 was shown to the mill and the rate was quoted by the mill on the Ctelegram itself so as to enable the defendant to make a counter-offer to the foreign buyers and thereafter the foreign buyers wanted to make a change in the terms and the same was also brought to the notice of the mill and the contract in suit was made F.A.S. on that basis and for the purposes of exporting those goods to Finland which was an implied term of the contract. He further wrote that in view of those restrictions on exportation of linseed oil the performance of the contract had become illegal or impossible and there being no chance of getting an export licence the contract between them should be treated as cancelled. These statements were denied by Mr. Gupta in his reply dated July, 23 and in his letter of July, 31 he made a demand for payment of the sum claimed in the suit as damages from the defendant. I do not propose to discuss the subsequent correspondence between the parties as they do not touch the merits of the case.

26. Mr. Gupta is alive and he is the owner of a house at Barasat. Mr. Agarwalla has told me that Mr. Gupta is a well-known man of Barasat. He was not called to give evidence and Mr. Agarwalla and Mr. Kalanoria have told me that he could not be traced at Barasat but I am unable to accept it. They have contradicted their own evidence and have contradicted each other not less than hundred times on this aspect. Their companion was not called to explain those contradictions nor to corroborate their evidence. I have totally disbelieved them and have rejected their evidence as to their alleged visit to Barasat.

27. On April 22, 1969 Mr. Samarchand Bhagat, an employee of the plaintiffs, instructed Mr. Ghose to obtain an adjournment of the suit on the ground'' that Ramji was a material witness for the plaintiffs for disproving the blue pencil writings on Ext. 4 were written by Narsinghdas but, due to illness, Ramji could not come to Court. This prayer was opposed by Mr. Datta and the suit was bound to fail if no adjournment was granted by me because not a single witness of the plaintiffs were present in court on that day but at the request of Mr. Ghose I issued a writ of Commission for examination of Ramji and adjourned the hearing of the suit for a month directing the commissioner and all parties to act immediately on the signed copy of the minutes.

28. Not a single letter was written to the Commissioner informing him about his appointment by the plaintiff''s attorneys and in the same way not a single letter was written to the defendant''s Solicitor to make the Commission effective. Mr. Agarwalla has deliberately suppressed from the court the fact that he and Mr. Kalanoria had abandoned this Commission without even consulting their masters. Mr. Kalanoria has said that Ramji wanted a large bribe for giving evidence on Commission from him and Sumerchand but Sumerchand who was personally instructing Mr. Ghose all through in this Court did not come to support this false evidence of Mr. Kalanoria though I was told that Sumerchand would come to the witness-stand and furthermore Mr. Agarwalla did not venture to open his mouth on this aspect. Mr. Bhagat was afraid to call Narsinghdas, and no step was taken to record his evidence during his life time. These employees of the plaintiffs have followed their master''s path and after their object was fulfilled they have abandoned the Commission and did not even call Ramji to give evidence in the Court. Not a single letter was written to Ramji recording this serious allegation and I do not wish to pursue this matter any further and reject this evidence of Mr. Kalanoria.

29. The materials on the record conclusively show that after Soren Barner requested the defendant to quote the rate of 200 tons of those goods there was a personal discussion between the parties and the mill offered to sell those goods to the defendant but the contract was not immediately concluded and the defendant was given time to accept the offer of the mill by the 17th March and the same time was given by the defendant to Soren Barner. Prices were changed as the drums were changed. In the same way the quantities and the period of delivery were changed simultaneously and they became same in both the contracts and the mill was to place those goods free alongside the steamer. I accept the evidence of Mr. Raman and Srinivasan and reject the untrue evidence of Mr. Bhagat. I hold that the cable (Ext. 4) was shown by Mr. Raman to Mr. Bhagat who directed Narsinghdas to quote the rate which Narsinghdas did by writing in blue pencil on that cable. I hold that the contract in suit was entered into to enable the defendant to enter into the contract with its foreign buyers and their whole object purpose and basis of entering into the contract in suit were to enable the defendant to export those goods to its foreign buyers and my answers to issue Nos. 2(a) and 2(b) are "yes".

30. The defendant was not a trader in oil and had never exported any oil. Its very first attempt in the oil trade are the transactions in suit and were entered on its behalf by Mr. Raman and Mr. Srinivasan. They had no occasion to know and had no knowledge of the Notification of November 1949 issued by the Export authorities until Mr. Raman came to know of it on March 27, 1951 as stated by him in Exhibit 38. When these two agreements were entered into Mr. Raman and Mr. Srinivasan had a wrong impression that those goods could be exported without any impediment under an open general licence and Mr. Bossi, who was deep-rooted in the oil trade, had also said so. It is true that there was no such open general licence but that does not mean that they have, given untrue evidence as contended by Mr. Ghose merely because their impression was wholly wrong.

31. Mr. Gupta, who was the secretary of Mr. Bhagat, did not say anything about the Notification of November 1949 in any of his letters even after the disputes were started. He drew attention of Narsinghdas to the letter of 30th May written by the defendant which is revealed by an endorsement made by him on that letter itself and this fact conclusively establishes the fact that he had consulted Narsinghdas before writing all these letters. Mr. Bhagat had never exported any oil and remained wholly silent on the Notification of November 1949 because he and his employees had no occasion to come across with it and I hold it specially in view of the wrong impression of Mr. Bossi mentioned earlier and the facts stated above. I further hold that the parties to the suit have entered into their bargain without knowing the existence of the Notification of November 1949 but on the basis of a wrong impression that those goods could be exported by the defendant to its foreign buyers without any impediment under an open general licence. I also hold that the parties to these two contracts at the time of entering into their respective bargains had no idea that a total ban on exportation of linseed oil would be imposed by the Export authorities in such an abrupt manner as was done on March 27, 1951.

32. Nothing was said by any one of the witnesses on the oral collateral contract and its terms pleaded in the written statement and therefore the best way that I can think of in overruling this plea is to set out below what Lord Moulton had said in (9) Heilbut Symonsteo v. Buckleton reported in L.R. 1913 A.C. 30 at page 47 of the report:

They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shown. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter * * * * and * * * there is in the present case an entire absence of any evidence to support the existence of such a collateral contract.

33. It was contended by Mr. Ghose that the parties to the suit not having expressly stated in their written contract that those goods were to be exported by the defendant to Finland for its foreign buyers to imply an agreement or a term to that effect is to make a new contract for them but it is well established by a long catena of decisions too well-known to be cited here that where the facts and circumstances lead to an irresistible conclusion that the parties must have agreed to do a thing on a particular footing though they may not have expressed it in their contract, be it written or oral, the Court should imply an agreement and/or a term to that effect and in so doing the Court does not make a new contract for them but it only gives effect to their presumed intention as if they have expressly said to each other that "this is the agreement between us or a term of our bargain". Here the facts and circumstances leading to the formation of the contract in suit and the conduct of the parties to the suit sufficiently reveal their common intention and therefore I am unable to accept the contention of Mr. Ghose and accordingly my answer to Issue No. 3 is that Mr. Bhagat the defendant had impliedly agreed that those goods when placed by Mr. Bhagat alongside the Steamers were to be shipped by the defendant for the use of its Helsinki customers but there was no such collateral agreement as pleaded in the written statement.

34. Various theories are still being propounded on the doctrine of frustration of contracts but the pith and substance of the whole matter is that if without any default of the party pleading frustration the very object and purpose for which they have entered into their bargain are totally upset by a wholly uncontemplated turn of events after they have entered into their contract they are immediately absolved from performing their future obligations because their contract is then and there automatically dissolved and in dealing with a case of frustration of a commercial adventure like the present one I "must look primarily to the law as embodied in Sections 32 and 56 of the Indian Contract Act 1872" as laid down by Fazl Ali J. while speaking for our Supreme Court, in (10) Ganga Saran v. Ram Charan reported in 1952 S.C.R. 36 at page 52 of the report and was again reminded by Mukherjea, J. in (11) Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, which is the leading authority on this subject.

35. Section 32 of our Contract Act stands on a different footing from Section 56 of the Act and the main distinguishing feature between them is that Section 32 will come into play when the contract is dissolved by its own force whereas Section 56 will occupy its field when the contract crumbles down due to an impact of a violent nature with an outside force. In (11) Satyabrata''s case at page 48 of the report Mukherjee, J., speaking for our Supreme Court, laid down the test for determining the question as to which of these two sections is to govern a particular case in the following terms :

Section 56 lays down a rule of positive law and does not leave the matter to the intention of the parties. * * * * * where the Court gathers as a matter of

construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56 altogether. Although in English law these cases are treated as cases of frustration, in India they would be dealt with u/s 32 of the Indian Contract Act which deals with contingent contracts or similar other provisions contained in the Act.

36. These pronouncements were repeated again, recently, by the Supreme Court in (12) The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath, of the report and this brings me immediately to the question whether Section 32 of our Contract Act has any application in this case which says : "Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event happens. If the event becomes impossible such contracts becomes void". Section 32 speaks of "contingent contracts" and takes us back to Section 31 of the Act which defines a "contingent contract" as a contract "to do or not to do something, if some event, collateral to such contract does or does not happen." The very first thing to be ascertained is whether the parties have provided for or have contemplated the events that have happened here either expressly or by necessary implications before going into any other question because if they were not provided for nor were contemplated by them Section 32 of the Act would automatically be out of the picture.

37. There being no express term in the contract in suit providing for its automatic discharge in the event of exportation of those goods being totally prohibited by the Export authorities and refusal to grant an export licence to the defendant making it either illegal or impossible for the defendant in sending those goods to Finland, Mr. Dutt contended that those events were impliedly agreed upon by the parties and a term to that effect should be spelt out by construing their contract in the light of the facts and surrounding circumstances existing at the time their bargain was concluded but the facts and circumstances conclusively show that they had no knowledge of the notice of November 1949 and their wrong impression was that those goods could be exported without any hindrance as stated earlier and furthermore they did not contemplate that the ban would be imposed and therefore no term providing for discharge of their contract can be implied. Assuming however that they were aware of the notification of 1949 but it expressly says that the "trade may get a timely warning not to enter into further commitments which may be shut out on account of quotas limitation" and therefore no ban was to come without a "timely warning."

38. Exportation of linseed oil continued as before and no "warning" was ever given to the traders to stop future engagements at the time the contract in suit was entered into. Even if they knew of the Notification of November 1949 still at the time of entering into their bargain they were not even in a position to contemplate that

such a total embargo would be laid in the manner it was done on March 27 and therefore the "question of finding out an implied term agreed to by the parties embodying the provision for discharge" of the contract can never arise "because the parties did not think about the matter at all nor could possibly have any intention regarding it" as said by Mukherjea, J. in Satyabrata''s case at page 48 of the report and repeated by Shelat, J. in Naihati Jute Mill''s case at page 527 of the report and I overrule the contention of Mr. Dutt and hold that section 32 of our Contract Act has no application in this case.

39. The second paragraph of Section 56 of the Act makes a contract void under two independent circumstances and they are: (1) when an act agreed to be performed has become impossible of performance; and (2) when the performance of the act has become unlawful by reason of some event which the promisor could not prevent. In both the cases, however, the contract is at an end the moment the act becomes impossible of performance or is rendered unlawful but the frustrating events must take place after the contract is made. In (11) Satyabrata''s case, Mukherjea, J. at p. 48 of the report explained this provision of the law in the following terms :

The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement * * * * When such an event or change of circumstances occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The Court * * * has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and as such comes within the purview of section 56 of the Indian Contract Act.

40. Before going to the question of frustration of the contract in suit it is necessary to dispose of two decisions of the Supreme Court cited by Mr. Ghose. In Naihati Jute Mill''s case (supra) the appellants by the contract having taken upon "themselves absolutely the burden of furnishing the licence" for importing jute from Pakistan and having expressly agreeing to pay damages in default of securing the licence "the defence of impossibility of performance or of the contract being void" for not being able to secure it was not available to them and therefore this decision relied on by Mr. Ghose has no application in the facts and circumstances of the present case before me. In (13) Alopi Parshad and Sons Ltd. Vs. Union of India (UOI), Shah J., speaking for the Supreme Court, at page 593 of the report said :

There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to

which recourse may be had as contended by Mr. Chatterjee relying upon which a party may ignore the express covenants on account of an uncontemplated turn of events since the date of the contract.

(underlines supplied)

41. The portions underlined by me are alone sufficient in overruling the contention of Mr. Ghose that the Supreme Court has laid down a different law from what was laid down in Satyabrata''s case. He then contended that the contract in suit was an absolute contract for the reason that the defendant had undertaken to take delivery of those goods and therefore there was no frustration because the defendant could have taken delivery of those goods for home consumption but almost every contract, in general terms enjoins the parties to perform their mutual obligations and that does not mean that they have thereby entered into an absolute contract to perform their mutual undertakings irrespective of an uncontemplated turn of events of a grave nature totally destroying the very foundation upon which they have rested their bargain.

42. No doubt, the defendant, by the general words of the written contract had agreed to accept delivery of those goods but it must be understood in the light of the existing facts and the surrounding circumstances prevailing at the time of entering into their bargain. There is no express term which can be construed as an absolute undertaking on the part of the dependant to accept delivery of those goods in all circumstances or to pay damages in lieu thereof and therefore it is not an absolute contract as contended by Mr. Ghose and furthermore their whole object and purpose of entering into their bargain was that those goods were to be exported by the defendant to Finland and therefore to hold that the defendant should have taken delivery of those goods for home consumption is to make a new foundation of their contract which the Court is not competent to do.

43. The word ''impossible'' in relation to a contract between two commercial people should be understood in its commercial and practical sense and Mukherjea J. in (11) Satyabrata''s case at pp. 46, 48 of the report said:

This much is clear that the word ''impossible'' has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally unsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.

* * * * * * *

In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act

taking the word ''impossible'' in its practical and not literal sense.

44. Total prohibition on exportation of linseed oil and the rejection of the defendant''s application for export license were untoward events of such a grave nature that they had completely altered the existing circumstances prevailing at the time their contract was entered into and had totally "upset the very foundation upon which the parties rested their bargain" and it became wholly ''impracticable and useless for the defendant to take delivery of those goods from the point of view of the object and purpose" they "had in view". Mr. Ghose has said that the defendant could have accepted delivery of those goods for home consumption but the defendant in reply is entitled to say what Lord Radcliffe has said in (14) Davis Contractor Ltd. v. Farhem Urban District Council reported in 1956 A.C. 696 at p. 729 of the report:

Non Haec in foedera veni⁄It was not this that I promised to do.

45. The principles laid down by the Supreme Court in (13) Alopi Prosad & Sons Ltd. v. Union of India and in Naihati Jute Mills Ltd. v. Khyaliram Jagannath have no application in the instant case firstly because the contract in suit is not an absolute contract in the sense it is understood in law and secondly because the uncontemplated governmental actions have made it "impossible" for the defendant to perform its obligation in its practical and not literal sense as laid down by Mukherjea J. There cannot be any doubt that these frustrating events have automatically dissolved the contract between the defendant and its foreign buyers under sec. 56 of our Contract Act and this contract was the very foundation upon which the contract in suit was built up. In (15) F. A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd. reported in 1916. 2 A.C. 397 Viscount Haldane said : "Although the words of the stipulation may be such that mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract is vanished with that foundation", (Underlines are for emphasis), and the same thing was said by Goddard J. (as he then was) in (16) W. J. Totem Ltd. v. Gamboa reported in 1939 1 K.B. 132 at p. 139: "If the foundation of the contract goes * * * the performance of the contract is to be regarded as frustrated."

46. Same principle but in different words was laid down in a number of well-known decisions including (17) Dahl v. Nelson Donkin & Co. reported in 6 A.C. 38, in (18) Hirji Mulji v. Cheong Yhe Steamship Co. Ltd. reported in 1926 A.C. 497, in (19) Joseph Constantine Steamship Co. Ltd. v. Imperial Smelting Corporation Ltd. reported in 1942 A.C. 154, in (20) Denny Mott and Dickinson v. James B. Fraser & Co. Ltd. reported in 1944 A.C. 256, in (21) Cricklewood Property & Investment Trust Ltd. & ors. v. Leighton''s Investment Trust Ltd., reported in 1945 A.C. 221, in (22) Sir Landsay Par Kinson and Co. Ltd. v. Commissioners of Works and Public Buildings reported in 1950 1 All E.R. 208 at p. 227, in (23) British Movietonews Ltd. v. London

and District Cinemas Ltd. reported in 1952 A.C. 166 and in Davis Contractor''s case (supra). Some of these decisions including many other well-known decisions of the English Courts were thoroughly considered by our Supreme Court in those cases on frustration discussed earlier and the principles laid down therein were accepted as of great persuasive value. And though most of the eminent judges and jurists of England, with the exception of Lord Write and Lord Radcliffe and to some extent Lord Blackburn and Lord Sumner, approached this question by spelling out an implied term in the contract providing for its automatic discharge on the happening of an uncontemplated turn of events making it impossible for the parties to perform their obligations by imputing in them as if they as fair and reasonable men would have said "it is all over between us", but, we the judges in India, should primarily look to Section 56 of our Contract Act which "lays down a rule of positive law" as laid down by the Supreme Court and "the issue has got to be decided ex post facto on the actual circumstances of the case" as stated by Lord Write and repeated by Mukherjea, J. in (11) Satyabrata''s case at page 49 of the report.

The foundation on which the contract in suit rested was that the defendant would export those very goods to Finland but this foundation was totally destroyed by the catastrophic events mentioned earlier. Those uncontemplated governmental actions, over which the defendant had no control, have struck at the very root of the whole object and purpose for which the parties had entered into the contract in suit and completely swept them away. These two contracts were so linked up with each other that they must either stand or fall together and when one is killed its counter-part cannot survive alone. Not only the foundation of the contract in suit was wholly swept away by those frustrating events but also the very object and purpose of the contract in suit were also vanished with it and therefore I hold the contract in suit was automatically dissolved u/s 56 of the Act.

47. Contention of Mr. Ghose that even after the happening of those frustrating events the parties have treated the contract as alive by extending the period of delivery upto 31st July is neither true in fact nor in law. The defendant''s request to extend the time upto 31st July was made solely for the purpose of ''ascertaining'' how the authorities are going to deal with its further application for export licence but the mill on its own accord extended the time by imposing the conditions as stated earlier as the basis of extending the time but those conditions were not accepted by the defendant which is clearly borne out by its letter of July 13 and therefore there was no extension of time either in fact or in law: Vide (24) Keshavlal Lallubhai Patel and Others Vs. Lalbhai Trikumlal Mills Ltd., . Furthermore, the contract in suit was no longer alive and as admitted by Mr. Ghose no new contract was entered into after the happening of those frustrating events and it is well established by (18) Hirji Mulji''s case (supra) that frustration doss not depend on the choice, election or even the conduct and knowledge of the parties and therefore the contentions of Mr. Ghose are over-ruled.

48. As a last resort Mr. Ghose fell back upon the principle of "self induced frustration" by saying that as Mr. Raman knew that the ban would be coming the defendant should have registered the foreign contract before the exportation was prohibited and not having done so comes within the principle laid down by Lord Write in (25) Maritime National Fish Co. Ltd. v. Ocean Trawells Ltd. reported in 1935 A.C. 524. where the appellants in exercise of an option given by the Canadian ministry selected three trawlers but not the trawler which was the subject-matter of the charterparty with the result she was no longer available for fishing purpose under the Canadian law but claimed the hire charges for that trawler. Lord Write said : "The essence of ''frustration'' is that it should not be due to act or election of the party" and quoted with approval from the speeches of Lord Sumner in (26) Bank Line Ltd. v. Arthur Chapel & Co. (1919) A.C. 435 where it was said by the learned Law Lord that "I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self induced frustration, indeed, such conduct might give the other party the option to treat the contract as repudiated". And in dismissing the appeal, at the end of his speech, Lord Write said "it cannot in their Lordships'' judgment be predicted that what is here claimed to be a frustration, that is by reason of withholding of the license, was a matter for which the appellants were not responsible or which happened without any default on their part. In truth, it happened in consequence of their election. If it be assumed that the performance of a contract was dependent on a licence being granted, it was that election which prevented performance, and on that assumption it was the appellants'' own default which frustrated the adventure. The appellants cannot rely on their own default to excuse them from liability under the contract."

49. What Lord Write has said was approved by our Supreme Court in (27) Boothalinga Agencies Vs. V.T.C. Poriaswami Nadar, and was distinguished at pp. 117-8 of the report by Ramaswami J. in the following terms:

We think the principle of this case applies to the Indian law and the provisions of section 56 of the Indian Contract Act cannot apply to a case of ''self induced frustration.'' In other words, the doctrine of frustration of contract cannot apply where the event which is alleged to have frustrated the contract arises from the act or election of a party. But for the reasons already given, we hold that this principle cannot be applied to the present case for there was no choice or election left to the appellant to supply chicory other than under the terms of the contract. On the other hand, there was a positive prohibition imposed by the licence upon the appellant not to sell the imported chicory to any other party but he was permitted to utilise it only for consumption as raw material in his own factory.

50. The appellants in trawler case acted against the faith of the contract and were therefore debarred from taking advantage of their own creation but not the appellant in the chicory case who did nothing of that kind. There the sale of chicory

became unlawful and here the exportation of linseed oil was abruptly banned. There the frustrating event did not flow from any act or election of the chicory seller and here it was not caused by the defendant. A mere inaction or a mere negligence on the part of a contracting party is not alone sufficient to bring him within the mischief of "self induced frustration" and before this doctrine can be invoked against him he must do some positive and deliberate act against the faith of the contract solely with a view to get rid of the bargain as laid down by the House of Lords in (19) Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corpn, Ltd. (supra) in which Lord Write also explained his views expressed in trawler''s case and of Lord Sumner in (26) Bank Line''s case (supra).

51. Two essential conditions were required to be fulfilled by the defendant for getting an export licence and those conditions were that the contract with its foreign buyers must be reported to the Expert authorities before March 26, 1951 because the ban was imposed with effect from the very next day and the name of the consignee must be given along with it as provided by the notice of November 1949. The defendant knew that the ban would be coming but without knowing from which date it would be enforced. The ban was abruptly imposed without giving any warning to the traders. Name of the foreign buyers who were the consignees of those goods was for the first time supplied by Soren Barner in the order of 19th March and it was received by the defendant on the 26th March and furthermore acceptance of the condition imposed by the defendant for opening a letter of credit was intimated to the defendant by a cable (Ex. 13) which was received from Helsinki in Calcutta on March 26 as revealed by the postal seal.

52. These facts lead to an irresistible conclusion that the defendant was not in a position to report the foreign contract both in fact and in law before March 26, and the delay for a single day, because the ban was imposed on March 27, cannot debar the defendant from taking up the plea of frustration. Furthermore, there was no deliberate nor any positive act on the part of the defendant to get rid of the contract in suit. On the other hand, the defendant made all possible endeavours to secure the licence even after its application for export licence was rejected and went out of its way to get the help of the Finish Legation and failed in its honest attempt and therefore I overrule the contention of Mr. Ghose. Having disposed of all the points urged on Issues Nos. 4, 5(a) and 5(b) my answer is - ''No'' to Issue No. 4 and ''Yes'' to Issues Nos. 5(a) and 5(b).

53. I will now discuss the question of damages on the unjustified assumption that the defendant had committed a breach of the contract by not taking delivery of those goods. On April 28. 1951, the mill called upon the defendant to furnish shipping instructions for April-delivery and the defendant having failed to do so the mill waived this breach and called upon the defendant by its letter of 18th May to take delivery of 170 tons of the contracted goods within that month which was not complied with by the defendant. There was no extension of the period of delivery as

held earlier, and therefore the plaintiffs could only succeed by proving the market price of 31st May but no attempt was made by them to do so. Mr. Bhagat had claimed Rs. 43,219 as damages on the plea that this sum was the difference between the contract price and the market price on July 31 and to prove it the plaintiffs ralled Mr. Harendra Nath Ghose of the defunct Hooghly Oil Mills, but he had no personal knowledge of the market price on July 31, and no transaction was effected by his mill on that day and Harendra Nath had never visited the market for ascertaining the price of linseed oil. In these circumstances I hold that the plaintiffs have failed to prove that Mr. Bhagat had suffered any damages.

54. Entry of 1st August was read out by Harendra Nath from a book of his mill which shows that the price of linseed oil was Rs. 68-8 as per maund but this entry has no evidential value because he had no personal knowledge about this transaction and furthermore, this rate was fixed by the Directors of this mill after considering various factors as said by him in QQ. 183-6 and therefore this entry cannot be the market price as laid down by our Court of Appeal in (28) Pratabmall Rameswar v. Manick Chand Durgaprosad reported in 64 C.W.N. 1006 of the report. The plaintiffs did not even make any attempt to prove any transaction from the books of Mr. Bhagat on this aspect of the case and in my opinion the plaintiffs have miserably failed to prove that Mr. Bhagat had suffered any damages and my answer to Issue No. 6 is "No" and so far as Issue No. 7 is concerned my answer is that there is nothing on the record from which the market price of 31st July, 1951 can be ascertained. Having disposed of all the contentions of the parties my answer to Issue No. 8 is that the plaintiffs are not entitled to any relief and the suit is dismissed with costs. The defendant will also get all reserved costs, if any, from the plaintiffs. Certified for two counsel.