

(2007) 07 DEL CK 0257

Delhi High Court

Case No: CS (OS) No. 399 of 1992

Excel Cardamom Company

APPELLANT

Vs

The Spices Trading Corporation
Ltd. and Another

RESPONDENT

Date of Decision: July 18, 2007

Acts Referred:

- Contract Act, 1872 - Section 74

Citation: (2007) 4 BC 419 : (2007) 97 DRJ 257 : (2008) 149 PLR 44

Hon'ble Judges: Sanjay Kishan Kaul, J

Bench: Single Bench

Advocate: A.S. Chandhioke, D.S. Narula, Mahesh Chibber and Yashodhara, for the Appellant; Sanjiv Puri and Rohit Puri, for the Respondent

Judgement

Sanjay Kishan Kaul, J.

The plaintiff has filed a suit for recovery of Rs. 30,22,000/- for recovery of principal amount, interest and damages. The plaintiff claims to be a registered partnership firm engaged in the business of wholesale kirana merchant and commission agents dealing in various kinds of spices. The suit has been instituted through its partner Sh. S.K. Gupta. Defendant No. 1 is a Government of India undertaking while defendant No. 2 is its Assistant Marketing Manager.

2. In the beginning of January, 1989 the plaintiff claims to have learned that the defendants were looking for a purchaser of cloves and an offer was thus made vide letter dated 03.01.1989 to the defendants for purchase of the entire quantity of cloves available with the State Trading Corporation of India (STC) at the price to be charged by the STC plus a commission of Rs. 2 per kg for the defendants. This amount of Rs. 2 was in addition to the expenses on account of sales tax, octroi and transport. In pursuance to the offer, the defendants are stated to have agreed to sell to the plaintiff 82 metric tons of cloves in terms of its letter dated 06.01.1989

with terms and conditions set out in the letter.

3. The STC is stated to be a canalizing agent in whose name the import was carried out and the STC was to retain/receive a nominal commission towards such canalizing charges. It is in view thereof that a letter dated 06.01.1989 was exchanged between the STC and the defendants, a copy of which was handed over to the plaintiff. The STC was to be paid by the defendants a sum of Rs. 135/- per kg ex-Delhi price.

4. In terms of the contract with the defendants of 06.01.1989 an amount of Rs. 10,00,000/- is stated to have been deposited with the defendants as security. The plaintiff has also paid a further sum of Rs. 20,00,000/- towards the first installment against the supplies to be made. It is the case of the plaintiff that though the defendants were required to supply the first installment of cloves within a week it failed to do so and the first installment was thus sent only on 01.02.1989. The plaintiff in turn had contracted to sell 80 metric tonnes of clove to M/s Jagdish Persad Mirdul Kumar at the rate of 155 per kg. The plaintiff claims to have suffered a loss on account of the delayed delivery of goods.

5. The plaintiff alleges that out of the total initial advance of Rs. 20 lakh on supply of goods, balance of Rs. 5,16,084.50/- still remained with the defendants and on account of the delayed supply, the contract between the plaintiff and its purchaser was cancelled causing loss to the plaintiff. The plaintiff in fact is stated to have acceded to the request of the defendants for further advance. Once again on supplies being made a balance advance of Rs. 5,45,351.40/- remained with the defendants. The plaintiff also alleges that on inspection several bags were found to be containing inferior quality of cloves. The plaintiff refused to make further advance payment to the defendants till such time as cloves worth the balance amount were supplied. In the meantime the prices of cloves in the market dropped to Rs. 125 per kg as compared to Rs. 165/- during the period when the defendants were required to supply the goods. The plaintiff claims to have been ready and willing to lift the balance quantity of goods against the advance but the defendants wanted further advance. The defendants issued a letter dated 27.02.1989 extending the time for performance of contract by 3 weeks up to 17.03.1989 but again instead of supplying the goods the defendants started demanding advance payment. The disputes between the parties resulted in a communication dated 23.03.1989 of the defendants forfeiting the security amount.

6. The parties discussed further settlement and it is alleged that in view of the amounts of the plaintiff being blocked, the plaintiff was forced to sign a letter dated 25.04.1989 in terms whereof it was agreed that the plaintiff was to accept as full and final settlement of the contract cloves worth Rs. 5,45,351.40/- and the plaintiff was made to state that no claim whatsoever arose against the defendants. The plaintiff confirmed having given all the ST 35 forms. The threat was stated to be that if the said letter was not issued, the goods would not be released against the balance

advance. The goods were consequently released by the defendants on 25.04.1989 itself. The plaintiff sent a telegram dated 27.04.1989 refuting the letter dated 25.04.1989 on account of coercive action. The forfeiture of Rs. 10 lakh is thus stated to be illegal.

7. The plaintiff has also set out in para 25 the reasons why such forfeiture was illegal where inter alia it has been stated that in case of performance of the contract, the defendants would have gained at Rs. 2 per kg amounting to Rs. 1,64,000 for 82 metric tons. The forfeiture of Rs. 10 lakh was thus stated to be not justified. The compensation is stated to be not one which could be reasonable within the provisions of Section 74 of the Contract Act, 1872 (hereinafter referred to as "the Contract Act") It has also been pointed out that part of the goods was already lifted amounting to more than 20 metric tons and thus the balance quantity of approximately 62 tons (equivalent to 62,000 kg) would at best have caused a loss to the defendants of Rs. 1,24,000/-. Thus even if the plaintiff is deemed to have been in default, that the maximum amount which could have been recovered from the plaintiff. The plaintiff's claim is for refund of Rs. 10 lakh as security, profits on the balance quantity of goods not delivered. There is also an allegation of loss of reputation in business circles. The claims have been set out in para 29 as under:

That the suit is valued at Rs. 30,22,000/- for purposes of Court fees and jurisdiction on which Court fees of Rs. 31,868.00 has been paid. The plaintiff is, Therefore, entitled to recover the following amounts:

1. Recovery of security deposit	Rs.10,00,000.00
2. Interest @ 18% p.a. on security deposit wrongly forfeited from the date of forfeiture? 23.03.1989 till the date of the suit.	Rs. 4,95,000.00
3. Damages on account of late delivery and non-delivery of cloves	Rs.14,76,000.00
4. Damages on account of loss of business reputation and credibility on account of wrongful termination of contract.	Rs.51,000.00
Total	Rs.30,22,000.00

8. The defendants have resisted the suit. The main defense is that the parties had settled their disputes fully and finally in terms of the letter dated 25.04.1989 in pursuance where to even supplies were made by the defendant to the plaintiff. The plaintiff only after three days (after having received supplies in pursuance to letter dated 25.04.1989) sought to rake up the issue of undue pressure while signing the letter dated 25.04.1989.

9. The defendants have taken the stand that this Court does not have the jurisdiction to entertain the present matter as defendant No. 1, which is a

corporation fully owned by the Government of India, has its registered office at Bangalore, the offer was made by the plaintiff by way of telegram dated 30.12.1988 and the letter dated 03.01.1989 was also received by the defendant at Bangalore.

10. It is also the stand of the defendants that under Clause 7 of the agreement dated 06.01.1989, inter alias failure on the part of the plaintiff to make advance payments for the goods would amount to default whereby the security deposit of the plaintiff would be liable to be forfeited. It is averred that the plaintiff had defaulted and committed breach of the contract dated 06.01.1989 and had paid a sum of Rs. 20 lakh after a delay of 5 days i.e. on 11.1.1989 as against 06.01.1989 on which date the agreement was signed and accepted by the plaintiff and on which the aforesaid amount had become payable. It is also averred that the plaintiff was required in terms of the agreement to pay an installment of Rs. 20 lakhs weekly which was not complied with. The plaintiff paid an advance of Rs. 5,45,351.50 only on 27.02.1989 after taking delivery of two consignments and thereafter no advance was paid. Also, the plaintiff in the letter dated 24.02.1989 confirmed that it did not lift the stock due to the depressed market condition and requested for an extension of time of three weeks for taking the delivery of the balance stocks. There has also been no complaint in writing/otherwise by the plaintiff that the defendant has not delivered the quantity. It is claimed that the defendants were entitled to rescind the contract due to the breaches committed by the plaintiff. The defendants claim that the entire stock was to be lifted by the plaintiff within 40 days from the date of acceptance of the agreement.

11. The defendants have further averred that there is no term in the agreement that required them to supply the first installment of cloves within a week. The defendants have denied any inordinate delay in the supply of cloves to the plaintiff and the holding back of goods worth 5 lakhs for two months. It is claimed that various reminders were sent by the defendants by telegrams and letters requesting the plaintiff to pay the advance and take delivery of the stocks. The plaintiff having failed to pay the advance, the defendants issued a letter dated 23.03.1989 that the plaintiff has committed default of the conditions of the contract and breach of the contract and Therefore the security deposit is being forfeited.

12. The defendants have averred that any business loss, loss of goodwill and credibility incurred by the defendants are higher than the forfeited amount which was accepted by the plaintiff vide the letter dated 24.02.1989.

13. Learned Counsel for the plaintiff states that since defendant No. 2 is only the Assistant Marketing Manager of defendant No. 1, relief is pressed only against defendant No. 1.

14. Issues were framed on 08.07.1997 which are as under:

1. Whether this Hon"ble Court does not have territorial jurisdiction to try the suit?

2. Whether the suit has been filed by a duly authorised person?
3. Whether the defendants failed to deliver the cloves as per the terms of the Agreement dated 6th January 1989?
4. Whether the defendants were entitled to anything more than a commission of Rs.2.00 per kg. on the cloves sold?
5. Whether there was any default on the part of the plaintiff in making payment as per the agreement?
6. Whether there was any default on the part of the defendants in making the supplies as per the schedule indicated in agreement dated 6th January 1989?
7. Whether letter dated 25th April 1989 was got written/signed from the plaintiff forcibly?
8. If answer to issue No. 7 is in the negative whether the plaintiff had agreed for forfeiture of the security deposit?
9. Whether the plaintiff is entitled to refund of security deposit?
10. Whether the plaintiff is entitled for damages as claimed?
11. Whether the plaintiff is entitled for interest?
12. Relief.?

15. On behalf of the plaintiff two witnesses Sh. Jagdish Barathi (PW 1) and Sh. Brij Bhushan (PW 2) have been cross examined while the defendants have examined Mr. Devraj Gowda as DW 1. DW1 also filed an additional affidavit (Ex. DW 1/A) 28.02.2006.

16. PW 1 is the sole proprietor of M/s Jagdish Pershad Mirdul Kumar who has stated in his affidavit that he had entered into a contract with the plaintiff in January 1989 for the purchase of 80 metric tonnes of cloves in 50 Kg packaging at the rate of Rs. 155/- per kg. The terms of the said contract were reduced to writing on 07.01.1989. A basic condition of the contract was receipt of 15 MT of cloves every week, of which the first consignment was to be delivered by 25.01.1989. PW 1 has stated that as the plaintiff had informed him of its inability to procure the consignment from the defendant and inability to supply the same before the stipulated date, the said contract was cancelled.

17. PW 2 is a partner of the plaintiff firm. PW 2 has taken the stand that the defendant was to supply the first consignment within one week of the payment made which it failed to do. The defendant in its letter dated 24.02.1989, sought extension of time to make deliveries. It is also stated that vide a letter dated 28.02.1989, the defendant had informed the plaintiff that the STC had granted extension of the contract to the defendant. The said witness has further stated that

the loss caused to the plaintiff due to the cancellation of the contract by M/s Jagdish Pershad Mirdul Kumar is Rs. 14,76,000.00

18. Sh. Deveraje Gowda, DW 1, at the time of filing of the affidavit was the finance manager of defendant No. 1 and has proved the telegram dated 30.12.1988 sent by the plaintiff (Ex. D-1) the letter dated 24.02.1989 (Ex. D-2) of the plaintiff; consignment and letters dated 01.02.1989 (Ex. D-3) and 06.02.1989 (Ex. D-4) and invoices (Ex. D-5 and D-6). DW 1 has also stated that various telegrams and letters of different dates in February and March 1989 (Ex. D-7 to D-11) were sent informing the plaintiff about the dispatch of cloves from Bombay and requesting the plaintiff to make advance payments to enable the delivery of goods. Ex. D-12 is a letter dated 23.3.1989 whereby the defendants informed the plaintiff of the forfeiture of the security deposit due to the default of the plaintiff. DW 1 has further proved the invoice dated 25.04.1989 (Ex. D-13) in respect of the delivery of cloves worth Rs. 5,45,351.40.

19. I have heard the submissions of the learned Counsels for the parties.

20. The findings on the issues are as under. Issue 1 : Whether this Hon"ble Court does not have territorial jurisdiction to try the suit?

21. The defendants have averred in their written statement that this Court does not have jurisdiction in the present matter as defendant No. 1 corporation has its registered office at Bangalore and that the offer was made by the plaintiff by way of a telegram dated 30.12.1988 and the letter dated 03.01.1989 was received by the defendant at Bangalore and also accepted at Bangalore. The defendants thus averred that the cause of action arose at Bangalore and it is the Bangalore Courts which have jurisdiction in the present matter.

22. The plaintiff, on the other hand, has taken the stand that the defendant has its office at 117, Gadodia Market, Khadi baoli Delhi; that the offer was made and received at Delhi and that the receipt was also issued by defendant No. 1's Delhi office. The goods were to be supplied at the Delhi and the delivery challans and other correspondence was issue at Delhi and thus it is this Court that would have jurisdiction.

23. The defendant had sent the offer dated 06.01.1989 (Ex. P-2) to the plaintiff. This offer was sent in pursuance to the telegram of the plaintiff dated 03.01.1989. This was the invitation to offer and the offer was made vide the letter dated 06.01.1989 as is apparent from the phraseology of the said letter. This letter was received by the plaintiff at its Delhi address where it was accepted and concluded. The letter bears the endorsement accepted and concluded the above deal". Further, the invoice dated 07.02.1989 (Ex. D-22) with regard to the first consignment of cloves supplied to the plaintiff as also the invoice dated 25.04.1989 (Ex. P-10) of the supply of cloves worth Rs. 5,45,350.42 bear the address " No. 63, 1st Floor, Gadodia Market, Khadi Baoli, Delhi 110006" i.e. Address of Defendant No. 1 Corporation at Delhi. The

receipt issued by Defendant No. 1 (Ex. P-4) in respect of the security deposit paid by the plaintiff is also stamped with the aforementioned Address at Delhi. Thus, Defendant No. 1 corporation had an office at Delhi from which the invoices, receipts etc in respect of the goods supplied to the plaintiff were being issued.

24. The aforesaid facts show that the Delhi would certainly be one of the Courts which would have the jurisdiction in respect of the dispute. It is trite to say that if more than one court has jurisdiction, exclusive jurisdiction can be conferred on any of the courts which would have jurisdiction. No such exclusive jurisdiction has been conferred in the present case and thus in view of the facts mentioned aforesaid, Delhi Courts would have jurisdiction. The issue is answered accordingly. Issue 2 : Whether the suit has been filed by a duly authorised person

25. The suit has been filed by the plaintiff firm through Sh. Suresh Kumar Gupta, who is stated to be the partner of the firm. The defendants in the written statement has taken the stand that Sh. Gupta is not a partner of the plaintiff firm.

26. A certified copy of the certificate of registration (Ex. PX) has been filed by the plaintiff which shows that the plaintiff firm was registered on 06.07.1989. The said certificate mentions three partners including Sh. Brij Bhushan (PW2) and Sh. Suresh Gupta. Thus, the plaintiff firm is registered and the suit has been filed through one of the registered partners. This issue is thus decided in favor of the plaintiff and against the defendants.

Issue 3 : Whether the defendants failed to deliver the cloves as per the terms of the Agreement dated 6th January 1989?

Issue 4 : Whether the defendants were entitled to anything more than a commission of Rs. 2.00 per kg. on the cloves sold?

Issue 5 : Whether there was any default on the part of the plaintiff in making payment as per the agreement?

Issue 6 : Whether there was any default on the part of the defendants in making the supplies as per the schedule indicated in agreement dated 6th January 1989?

27. Insofar as the aforesaid issues are concerned, the case of the plaintiff is that on 11.01.1989, the plaintiff paid the first installment and was to receive the first installment of the consignment within one week as per the contract. However the first installment of 235 bags was received only on 01.02.1989. The delivery challan in respect of the same was received on 02.02.1989 leaving a balance of Rs. 5,16,084.50. The contract of M/s Jagdish Pershad Mirdul Kumar was cancelled as the first installment of the consignment was not received within the stipulated time.

28. The plaintiff claims that although there was some balance amount with defendant No. 1, the plaintiff paid a further sum of Rs. 2,50,000.00 on 02.02.1989 and Rs. 35,000.00 on 04.02.1989. The plaintiff received 5516.300 kg of cloves on

06.02.1989 leaving a balance of Rs. 45,351.40. A further amount of Rs. 5,00,000.00 was paid on 25.02.1989 taking the total balance with defendant No. 1 to Rs. 5,45,351.40. Thereafter on 25.04.1989, 3,980.660 kgs of cloves for the balance value are stated to have been supplied to the plaintiff.

29. Learned Counsel for the defendants contended that Clause 6(b) of the contract which laid down that the goods were to be lifted by the plaintiff within forty days was a very important term of the contract and that the plaintiff was to pay Rs. 20 lakhs in advance was the very essence of the contract.

30. It is the contention of the defendants that the total payment received by the defendant No. 1 as on 06.02.1989 was only Rs. 22.85 lakhs and the plaintiff was already in breach as it had not paid the second installment of Rs. 20,00,000.00. The defendants further contend that against this as on 06.02.1989 goods worth Rs. 22.39 lakhs had been supplied. The plaintiff had sought extension of time for lifting the goods vide the letter dated 24.02.1989 (Ex. D- 4) expressing its inability to lift the goods due to the depression in the market. It was contended that the plaintiff had only paid a sum of Rs. 5,45,351.40 while the sum required to be paid was Rs. 20 lakhs.

31. In this regard, it may be noticed that PW 2 in his cross examination has admitted that the plaintiff was required to pay Rs. 20,00,000.00 every week, the stand taken is that the said amount was not paid as goods worth Rs. 20,00,000.00 against the first installment were not delivered by the defendant and the defendant supplied goods worth about Rs. 14 lakhs. PW 2 has stated that the defendants delivered goods worth about Rs. 22 lakhs against the agreement and also goods worth about Rs. 5.45 lakh at the time of settlement. PW 2 has also stated that he had protested against the failure of the defendant to supply goods in time vide a telegram (Ex. DW 1/P2).

32. DW 1, the witness examined on behalf of the defendants has not disputed the payment of the first installment of Rs. 20,00,000.00 on 11.01.1989 by the plaintiff pursuant to which goods worth Rs. 14,83,915 were delivered on 01.02.1989. DW 1 has admitted that the balance with defendant No. 1 after the supply was Rs. 5,16,084.50 and has also admitted the further payments made by the plaintiff of Rs. 2,50,000.00 on 02.02.1989; Rs. 35,000 on 04.02.1989 and Rs. 5,00,000.00 on 27.02.1989.

33. As regards the date of supply of goods to the plaintiff, the stand of DW 1 was that after receipt of the payment of Rs. 20,00,000.00, defendant No. 1 was not under any obligation to deliver the cloves to the plaintiff within any specific time but the plaintiff was under an obligation to continue to make weekly payments of Rs. 20,00,000.00 irrespective of delivery of the cloves. The entire goods were however to be supplied within forty days of the date of the agreement. The defendants also claim to have sent various telegrams to the plaintiff (EX. D-7- D 11, D16, D-19)

requesting it to make advance payments and take delivery of cloves.

34. It is the contention of the defendants that the plaintiff did not raise the issue of non delivery at any point of time and the same has been raised for the first time in the plaint, three years after the full and final settlement was signed.

35. It may be noticed that in the letter dated 24.02.1989 (Ex. D-4), defendant No. 1 corporation has been requested on behalf of the plaintiff to extend the contract by three weeks to enable the plaintiff to lift the material and the reason stated for the same is depression in the market for cloves. The said letter also contains the assurance that the plaintiff would not ask for further extension. The request was accepted by defendant No. 1 by its letter dated 27.02.1989 (Ex. D-7). As regards this aspect, the stand taken by the plaintiff in para 9 of the replication is that "The defendant on 24.02.1989 had suggested to the plaintiff to ask for extension of time". PW 2, in his cross examination has admitted that after they had entered into agreement with the defendant, the market came down.

36. In order to appreciate the contentions of the parties it may be useful to reproduce the letter/agreement dated 06.01.1989 (Ex. P-2) entered into between the parties. The same is as under:

Dear Sir,

1. Please refer to your telegram and letter dated 3-1-1989 regarding sale of Cloves. We offer to sell the Cloves of app.82 Metric tons purchased from State Trading Corporation of India in as it is where it is basis. The price for the cloves will be the rate at which State Trading Corporation will sell to Spices Trading Corporation Ltd. plus a commission of Rs. 2/- per kg.

2. The Sales Tax, Octroi and other local levies will be charged extra or applicable Sales Tax forms.

3. The Clearing, forwarding, Transport, Insurance, demurrage, wharfage and other expenses will be paid by you.

4. The goods should be taken delivery from wagons/containers/trucks as and when they arrive without incurring any demurrage/wharfage charges.

5. An amount of Rs. 10/- lakhs (Rs. Ten lakhs only) shall be deposited with the Corporation as security deposit immediately.

6. Payment for the goods should be made in advance, the schedule of which is as follows:

a) Immediately on acceptance of this letter an amount of Rs.20 lakhs (Rupees Twenty lakhs only).

b) And thereafter the balance amounts shall be paid on every week at Rs. 20 lakhs approximately (Rupees Twenty lakhs only) for each installment till the entire goods

are lifted by you or within Forty days from the date of this letter.

7. Any failure on your part to make advance payments for the goods or failure to take delivery of the goods or to supply necessary Sales Tax declaration forms will amount to default and your security deposit will be forfeited.

8. The Spices Trading Corporation will not be responsible for delivery of goods if State Trading Corporation does not supply the goods to us or any Government action in respect of the above goods.

9. If you are agreeable to the above terms, please sign and return the duplicate copy of this letter accepting the offer. 10. The security deposit will be adjusted in the last consignment subject to para No. 7 above.

37. A perusal of the aforesaid agreement (Ex. P-2) shows that the same does not provide a schedule for the delivery of the goods as such. Clause 6 of the said agreement (Ex. P-2/Ex. D-3) provides a schedule for payment for the goods. The clause required payment of Rs. 20,00,000.00 "immediately" followed by the balance amounts of "approximately" Rs. 20,00,000.00 to be paid weekly for each installment till the entire goods are lifted by or within forty days from the date of the letter. The agreement thus did not expressly require defendant No. 1 to make deliveries of cloves every week. The payments by the plaintiff were however to be made in advance and the same have not been made subject to the delivery of goods by defendant No. 1. Also, Ex. P-2 does not specify any quantity of cloves which was to be supplied in any/each consignment though the total quantity of cloves to be supplied of about 82 metric tonnes has been mentioned.

38. It is not disputed that the plaintiff paid the first installment of Rs. 20,00,000.00 on 11.01.1989 or that thereafter the plaintiff only paid a sum of Rs. 2,85,000.00 by 04.02.1989 and a further amount of Rs. 5,00,000.00 on 29.02.1989. No other amounts were paid by the plaintiff to defendant No. 1 towards advance payments for the delivery of cloves. Thus, subsequent weekly installments of Rs. 20,00,000.00 were not paid by the plaintiff.

39. Insofar as the quantity of cloves delivered by defendant No. 1 as against the first installment paid, the said defendant delivered 10831.500 kgs of cloves on 01.02.1989. Thereafter, another consignment of cloves of 5516.300 kgs was delivered to the plaintiff. Finally a consignment of 3,980.660 kgs was delivered at the time of the settlement.

40. The arrangement between the parties thus envisaged advance payments to be made by the plaintiff in terms of the agreement and the supplies to be made from time to time within a period of forty days. The purpose of the weekly advance of Rs. 20 lakh was to ensure that there were sufficient funds available to adjust against the price of the goods to be supplied. The plaintiff failed to maintain this advance though it cannot be disputed that even at the stage when the disputes arose there

was some advance of the plaintiff available with defendant No. 1 though not sufficient advance.

41. It is the plaintiff who sought time inter alias vide letter dated 24.02.1989. This was on account of the prevalent market conditions. It is quite apparent that since the prices of cloves fell in the market, the plaintiff was trying to make some arrangements possibly to mitigate the losses or to see as to whether the market conditions would improve. In such a situation it can hardly be stated that there was any default on the part of the defendant. The plaintiff, however, was in default to the extent that it failed to maintain advance payments stipulated by the agreement.

42. As far as the commission to which defendant No. was entitled is concerned, Clause 1 of Ex. P-2 expressly states that the price of the cloves to be the price charged by the STC plus a commission of Rs. 2/- per kg. Thus, the commission to which defendant No. 1 was entitled is Rs. 2 per kg of cloves.

43. The issues are thus decided accordingly. Issue 7 : Whether letter dated 25th April 1989 was got written/signed from the plaintiff forcibly?

44. Insofar as this issue is concerned, the submission of the defendants is that the plaintiff had signed the full and final settlement and had also acted upon the same, lifting material worth Rs. 5,45,351.40/-. However, the plaintiff thereafter retracted from the same. The contention of the defendants is that the settlement could not have been forcible as it was signed at Delhi where the plaintiff resides and work for gain while the defendant has only a temporary camp in Delhi. The plaintiff had received material worth the entire amount and then made attempts to retract from the settlement.

45. It was also contended that the settlement was made keeping in view the loss of business suffered by the defendant from the STC on account of the non performance of the contract by the plaintiff. The plaintiff did not make any complaint that the said settlement was forcible and the suit has been filed three years after the settlement which indicates that the same is an afterthought. In the evidence also, there is nothing to show that the settlement was forcible.

46. PW 2 (Sh. Brij Bhushan) in his cross examination has taken the stand that the blank letterheads of the plaintiff had been kept by the officers of defendant No. 1 and officials of defendant No. 1 company typed the letter Ex. PW1/D2 and pressurized him to sign the same. He has stated that he signed the same as the defendants were withholding the amount of Rs. 5,45,351.40 with them and that he gave telegram to the defendant on the very next day or the same day. PW 2 has stated that he had written in the telegram that his signatures were obtained under pressure. He has identified the photocopy of the telegram sent by him to the defendants as the document bearing mark "I". The said witness had admitted that no FIR was filed nor was any letter written to the chairman of defendant No. 1 with regard to his signatures being obtained under pressure.

47. DW 1 in his cross examination has denied that the defendants refused delivery of goods unless and until the plaintiff agreed to a full and final settlement.

48. In this behalf, it may also be noticed that in a telegram dated 15.04.1989 (Ex. DW 1/P3) sent on behalf of the plaintiff to defendants, reference has been made to discussions between the managers etc of defendant No. 1, and it has been stated that approximately 4 tons of cloves was offered against the money advanced. Further reference has been made to the condition of forfeiture of the sum of Rs. 10,00,000.00.

49. The settlement letter dated 25.04.1989(Ex. PW 2/D2) is as under:

Sirs,

Sub : Purchase of 82 MTs of Cloves from you.

With reference to the contract dated 6.1.89 and the subsequent extension letter dated 27.2.89 for the purchase of 82 MTs of Cloves from you, I agree to accept as full and final settlement of the above contract, if you give the cloves at Rs.137/- per kg for the amount of Rs. 5,45,351.40 deposited with you.

Further in confirmation of your letter dated 23.3.89 I have no other claims whatsoever from SPICES TRADING CORPORATION LIMITED nor SPICES TRADING CORPORATION LIMITED has any claims on this account. I have given all the S.T. 35 forms, Sale pattis and "F" forms pending from me to your corporation.

50. An appraisal of the evidence shows that defendant was detaining not only the security amount of the plaintiff but even the advance receipt of Rs. 5,45,351.40/-. The plaintiff is wanting goods against the advance and was further wanting refund of the security. There is no evidence on record to show any direct duress or pressure other than the pressure on the plaintiff of the amounts being withheld by the defendant No. 1. It appears that in order to get goods against the advance which the plaintiff would in any case be entitled to, the plaintiff entered into a settlement whereby the goods were supplied by the defendant to the plaintiff at the original agreed rate. I am however unable to accept the contention of the learned senior counsel for the plaintiff that while entering into such a settlement on 25.04.1989 there was no discussion on the aspect of Rs. 10 lakh and that the security did form part of the said settlement. This is also apparent from the subsequent telegram (Ex. D-5) sent after about three days itself talks about alleged force and coercion. I am thus of the considered view that there was no forcible signature taken of the plaintiff on the letter dated 25.04.1989 though undoubtedly the plaintiff was under pressure on account of the detention of security along with the amount of balance advance of Rs. 5,45,351.40/- against which goods had not been delivered. The issue is thus decided accordingly.

Issue 8 : If answer to issue No. 7 is in the negative whether the plaintiff had agreed for forfeiture of the security deposit?

Issue 9: Whether the plaintiff is entitled to refund of security deposit?

51. The plaintiff paid the security deposit of Rs. 10,00,000.00 to defendant No. 1 along with a letter dated 06.01.1989 (Ex. P-3) and receipt as regards the same was issued on the said date (Ex. P-4).

52. Learned Counsel for the defendants pointed out that the forfeiture of the security deposit under the letter dated 23.03.1989 (Ex. P-9) was admitted by the plaintiff in the settlement i.e. the letter dated 25.04.1989.

53. The defendants submitted that since the plaintiff neither paid the advance amount as per the agreement nor lifted the material despite the grant of the extension of three weeks, the plaintiff was in breach and the defendant No. 1 was entitled to forfeit the security deposit.

54. In support of his submission learned Counsel for the defendants placed reliance on the judgment of the Apex Court in [State of Gujarat Vs. Dahyabhai Zaverbhai](#), wherein the court found that the provisions of the contract contemplated the liability of the contractor to pay compensation amounting to the whole of his security in case of abandonment of work due to serious illness or death of the contractor or any other cause and empowered the Executive Engineer in such circumstances to have the contract rescinded as well as in such a case the security deposit would be forfeited. It was observed that in consequence, forfeiture of security deposit on account of abandonment of work by the appellant was perfectly valid. Learned Counsel for the defendants thus contended that the forfeiture of the security deposit due to breaches committed by the plaintiff is lawful.

55. DW 1 in his cross examination has admitted that the defendant would have made a profit of only Rs. 1,64,000/- from its contract with the plaintiff and has taken the stand that defendant No. 1 was justified in forfeiting the security deposit on account of the claim made against it by the STC and loss of credibility due to non purchase of cloves from the STC.

56. It has already been observed while discussing issue No. 7 that the issue of security was certainly in the mind of the parties while entering into the settlement. This is obvious from the subsequent communications to show that even the plaintiff understood it to be so and that is why the plea of force and coercion was raised. The preceding communication dated 23.03.1989 of the defendant had also said that the amount of security was being forfeited. The "suggestion" of forfeiture of the security deposit had been objected to by the plaintiff vide telegram dated 15.04.1989. Thus whether the period prior to the settlement or post the settlement is taken into account, the parties were fully aware that the defendant wanted to forfeit this amount while the plaintiff was protesting about the same.

57. The question however remains whether the defendant is entitled to forfeit the whole amount. The plea of the plaintiff is that this is not permissible in law on

account of Section 74 of the Contract Act. The said provision is as under:

74. Compensation of breach of contract where penalty stipulated for When a contract has been broken, if a sum is named in the contract as the amount be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss or proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation : A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Explanation : When any person enters into any bail bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

58. The aforesaid provision forms subject matter of the adjudication by a learned senior judge of this Court in Geep Batteries (India) Pvt. Ltd. v. Gillette India Ltd. 2005 (2) Arb. LR. 316, in which it was observed that the duty not to impose penalty but to award compensation is imposed on the court by Section 74 of the Contract Act and where the terms of the contract stipulate in the nature of penalty for forfeiture of the amount deposited in pursuance of the terms of the contract, the court has the jurisdiction to award such amount as it considers reasonable. Para 10 of the judgment is as under:

10. The duty not to enforce the penalty clause but only to award compensation is statutorily imposed on the Courts by Section 74 of the Contract Act. In all cases where there is a stipulation in the nature of penalty for the forfeiture of the amount deposited in pursuance of the terms of the contract, which expressly provides for forfeiture, the Court has jurisdiction to award such sums as it considers reasonable. Reference in this regard can be made to the decision of the Supreme Court in [Fateh Chand Vs. Balkishan Das](#), It was held:

11. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether Section 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under

the contract is sought to be forfeited. In our Judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by Section 74. In all cases, Therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considered reasonable, but not exceeding the amount specified in the contract as liable to forfeiture.

59. A reading of the aforesaid shows that the present case is not one where the parties have agreed to a predetermined amount as a reasonable and fair amount of compensation for any breach. The amount of Rs. 10 lakh is actually a security deposit. If loss is caused to the defendant, the amount can certainly be forfeited - but to the extent of the damages.

60. The evidence on record shows that the defendant did not take delivery of the balance amount of goods out of the eighty two metric tons. There could be thus no question of the defendant being left with any unsold goods which may have been sold at a lower price. Not only that there was no further dealing with STC in this behalf nor did the STC visit the defendant with any damages on account of not lifting the balance quantity of goods. The loss thus caused to the defendant is only to the extent of what the defendant would have profited from the sale of the balance quantity. The contract between the parties is clear that the defendant has to get only Rs. 2 per kg over and above what the STC charges. Thus the loss of profit to the defendant is only to the extent of Rs. 2 per kg for the balance goods not lifted or sold. The allegation of general loss of reputation or otherwise is very vague and cannot be accepted.

61. The quantity of cloves actually supplied by defendant No. 1 to the plaintiff is not in dispute. The said defendant supplied 10831.500 kg on 01.02.1989; 5516.300 kg invoiced on 26.02.1989 and finally 3,980.660 kg on 25.04.1989. thus the total amount of goods actually supplied was about 20328.46 kg. Payments had been made for the entire amount delivered. Thus, the balance quantity of cloves that were not delivered to the plaintiff would be approximately 61,671.54 kg and the profit that would have been earned from the same would be about Rs. 1,23,343.08. Thus, the loss caused to defendant No. 1 due to non performance of the contract was to the tune of Rs. 1,23,343.08.

62. The loss actually caused to defendant No. 1 was thus about Rs. 1,23,343.08, and the plaintiff is thus entitled to refund of Rs. 8,76,656.92.

63. The issues are thus decided accordingly. Issue 10 : Whether the plaintiff is entitled for damages as claimed?

64. In the plaint, as set out above, besides refund of the security deposit, the plaintiff had claimed damages on account of late delivery quantified at Rs. 14,76,000.00 and damages on account of loss of business reputation and credibility on account of wrongful termination of contract quantified at Rs. 51,000.

65. Learned Counsel for the plaintiff has restricted his claim to the refund of the amount of security deposit. Even otherwise, it the plaintiff who was in default by not making the payments stipulated by the agreement Ex. P-2 and the plaintiff cannot really claim damages on account of non delivery as the payments were to be made in advance. The issue is decided accordingly. Issue 11 : Whether the plaintiff is entitled for interest?

66. Insofar as the aspect of interest is concerned, the plaintiff, has claimed pendente lite interest @ 24 per cent per annum as also future interest at the market rate, costs and legal expenses.

67. The interest rate was initially high but subsequently interest rates have reduced. I am of the view that interest at the rate of 9 per cent per annum on the amount of Rs. 8,76,656.92 would be reasonable.

68. It cannot be lost sight of that the security deposit had been forfeited by defendant No. 1 vide letter dated 23.03.1989. The plaintiff had objected to the alleged force and coercion in the telegram send on 27.04.1989 (Ex. D-5). The security amount, after deduction of the losses actually caused to defendant No. 1 could have been refunded within a reasonable period of one month. I am thus of the view that the plaintiff is entitled to interest on the said sum of Rs. 8,76,656.92 @ 9 per cent per annum from 01.06.1989 till the date of realization.

69. The issue is decided accordingly.

Issue 12 : Relief

70. In view of the aforesaid, the plaintiffs are entitled to a sum of Rs. 8,76,656.92 with interest on the same @ 9 percent per annum from 01.06.1989 till the date of realization.

71. A decree is passed in the aforesaid terms in favor of the plaintiff and against defendant No. 1

72. A decree sheet be drawn up in the aforesaid terms.