IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present :- Hon'ble Mr. Justice I. P. Mukerji
Hon'ble Mr. Justice Aniruddha Roy

APD 101 of 2017
with
CS No. 145 of 2006

Vijai Shree Pvt. Ltd.
Vs.
Union of India and Ors.

For the Appellant	**:-**	**Mr. Dhruba Ghosh, Sr. Adv.** **Ms. Vineeta Meharia,** **Ms. Pritha Bhaumik,** **Mr. Aniruddha Sinha,** **Mr. Sanjay Bose, Advs.**
For the respondent No.6	**:-**	**Mr. Aniruddha Mitra,** **Mr. Sudhakar Prasad, Advs.**
For the respondent No.9	**:-**	**Ms. Aparna Banerjee**
Judgment On	**:-**	**07.09.2021**

ANIRUDDHA ROY, J.:

1. This is an appeal from the impugned judgment and order dated January 10, 2017 passed by the learned Judge whereby and whereunder the Civil Suit ***C. S. No. 145 of 2006 (Vijai Shree Limited vs. Union of India & Ors.)*** was decreed.

2. The scope of the present appeal is very limited. The plaintiff/appellant is principally aggrieved to the extent the impugned judgment was held against it that, it would have to replace 288 numbers of damaged gunny Bales in favour of the sixth defendant at its own cost in terms of the warranty within a period of three months of the date of the impugned judgment and only on fulfilling the same it would be entitled to a decree for payment of money withheld by the sixth defendant. Considering the scope of this appeal, as stated above, the relevant facts are stated hereinafter which are not much disputed by the parties as recorded in the impugned judgment.

PLAINT CASE:

3. The plaintiff carries on business of manufactur ing and trading in various jute products having its jute mill situated at Shibpur, Howrah, West Bengal. At the relevant point of time the jute mill was being run and operated under a scheme sanctioned and approved by the Board For Industrial And Financial Reconstruction (for short, B.I.F.R.)

4. The plaintiff received orders from the office of the second defendant for manufacturing B-Twill Bags as per the government orders. The procedure normally followed is that, various government organizations all over India, to place their respective orders on the fifth defendant, who in turn request the office of the second defendant to place orders on various jute manufacturers. As per the production control orders the jute manufacturers supply the said B-Twill Bags to the designated government organizations.

5. On or about June 2, 2003 the third defendant issued an order that, the plaintiff to produce 780 Bales of B-Twill Bags. Subsequent thereto on June 3, 2003 the Deputy Director of Supply and Disposals, Kolkata issued an order that, the plaintiff to sell the said 780 Bales B-Twill Bags to the Punjab State Cooperative Supply and Marketing Federation Ltd., the sixth defendant, through the Governor of Punjab. On or about June 3, 2003 the seventh defendant issued the purchase order upon the plaintiff to supply the consignment where the price, specifications, terms and conditions were mentioned.

6. Pursuant and in terms of the said order, the plaintiff manufactured the necessary bags and despatched them by Railway wagon to Sangrur, Punjab under **Free on Rail** (for short, **'FOR"**) contract. On or about June 23, 2003 the plaintiff informed the sixth defendant that it had despatched 390 Bales to Sangrur, Punjab under the relevant Railway Receipts which were mentioned in the said letter. The said goods and receipts were collected by Punjab State Cooperative Supply and Marketing federation Ltd., the sixth defendant, (for short, the consumer)

at Sangrur, Punjab and the goods were duly taken delivery and consumed.

7. The plaintiff then sent Railway receipt, mills specification against the discharge of goods along with the Quality Assurance Certificate to the consignee, the sixth defendant and the bills for the said consignment were sent to the eighth defendant.

8. Sometime in August, 2003 the plaintiff received a letter dated July 18/28, 2003 written by the Acting Director, Quality Assurance to the Chief Manager (Food grains), Punjab State Cooperative Supply and Marketing Federation Ltd. and with the said letter, a copy of the letter dated July 9, 2003 written by the Chief Manager (Food grains), Punjab State Cooperative Supply and Marketing Federation Ltd. to the Director of Supplies and Disposals was also attached. It was alleged in the said letter that 390 Bales which were received by the consignee were badly affected by rain and the Railway Authority did not accept any remark on the delivery of the goods. These Bales were lifted by the consignee to avoid further damages and kept separately. The consignee requested the Director of Supplies and Disposals to stop payment of the price equivalent to 390 Bales and further requested the plaintiff to depute there their representative for a joint inspection.

9. From the letters written for and on behalf of the Director, Quality Assurance to the consignee it appears that, the Bales got wet during transit. According to the plaintiff this is not a quality complaint as the complaint of Gunny Bales getting wet during transit on the wagon, as the period of supply was during the monsoon. The consignee was advised by Acting Director (Quality Assurance), Director of Supply and Disposals to file a claim on the carrier.

10. On or about September 19, 2003 the plaintiff received a letter dated August 20, 2003 written by the Assistant Director of Supplies Disposals to the Controller of Accounts, whereby the Controller of Accounts was

requested to withhold the value equivalent to 390 Bales from the bills raised by the plaintiff.

11. The plaintiff by its letter dated September 5, 2003 informed the seventh defendant that, the consignment was wet during transit to Sangrur, could not be the responsibility of the plaintiff in absence of any Railway Certificate, and, therefore, the claim was untenable. It was also pointed that, Acting Director, Quality Assurance also suggested that the claims should have been made on the carrier.

12. By a letter dated September 12, 2003 the Pay and Accounts Officer informed the plaintiff that a sum of Rs. 35,85,447/- was withheld from a subsequent bill of a subsequent contract being Bill No. L/78 pending finalization of the case of the recovery of due from the plaintiff.

13. The plaintiff received the full payment against the supply of 390 Bales and the sixth defendant had withheld payment from the subsequent contract in which Bill No. L/78 was raised, which was illegal on the part of the concerned defendants.

14. The plaintiff was directed to supply 780 Bales of jute bags in view of the Contract No. C-III/2980/VSL (FW)/204 dated June 3, 2003. The plaintiff supplied these goods in four lots each containing 130 Bales, 390 Bales, 130 Bales and 130 Bales respectively aggregating to 780 Bales and those supplies were made in June, 2003 and four numbers of bills were raised for supply of 780 Bales. The particulars of such bills are stated in paragraph 15 of the plaint. The plaintiff had received full payment against the aforesaid 780 Bales which were the subject matter of Order No. C-III/2980/VSL (FW)/204 dated June 3, 2003.

15. On the basis of the alleged complaint of the consignee, according to the plaintiff and without Railway Damage Certificate that the Bales were rain damaged for which Quality Assurance People requested the consignee to file a claim with the Railways, the sixth defendant had withheld a sum of Rs. 35,85,447/- from a subsequent and separate contract dated August 1, 2003 under which the plaintiff was asked to supply 910 Bales. Such

supplies were made by the plaintiff without any complaint. The details of supply are summarized in paragraph 17 of the plaint.

16. The Director of Supply and Disposals had advised the sixth defendant consignee to lodge its claim against the Railway Authority since the goods got wet by rain during transit through wagon and the same according to the plaintiff is not a quality complaint. Till dated the sixth defendant failed to obtain any certificate from the Railway Authorities that the goods delivered by the plaintiff and placed at the Railway wagon were rain damaged nor the Railways had confirmed that the goods were rain damaged at the time of delivery/despatch.

17. According to the plaintiff in the purported joint inspection the defendant stated that 65 per cent of the goods out of total 390 Bales allegedly were in a damaged condition. The sixth defendant by its writing dated November 16/22, 2005 requested the plaintiff to remove 390 Bales of rejected stock. The plaintiff contended that there was no joint inspection and the plaintiff did not authorize any person to attend such joint inspection. The plaintiff supplied goods strictly in terms of the agreement and the quality was as per the order placed, therefore, the sum of Rs. 35,85,447/- which was deducted from the subsequent contract by the sixth defendant was illegal and wrongful.

18. By a letter dated September 24, 2003 the plaintiff raised a demand upon the fifth defendant to release the sum of Rs. 35,85,447/-.

19. In November 2003, the plaintiff filed a writ petition before this Court challenging the said decision of withholding of payment by the fifth defendant at the behest of the sixth defendant from the account of the subsequent contract awarded to the plaintiff. However, the claim of the plaintiff in the said writ petition was ultimately relegated to civil suit. Hence, this civil suit.

20. The reliefs claimed in the plaint are set out herein below:

> *"(a) Declaration that the alleged joint Inspection Report dated 18th October, 2003 is bad in law and null and void;*

(b) Decree for Rs. 53,55,381.00;

(c) Alternatively, an enquiry be held into the damages suffered by the plaintiff and a decree be passed against the defendant for such loss as this Hon'ble Court may deem fit and proper.

(d) Interests, interim interest and interest on judgment';

(e) Accounts

(f) Receiver;

(g) Injunction;

(h) Attachment

(i) Costs;

(j) Further or other reliefs".

CASE IN THE WRITTEN STATEMENT FILED ON BEHALF OF THE SIXTH DEFENDANT:

21. The sixth defendant states that it had placed an indent for 50 kg Gunny Bales for Kharif 2003-04 through the Government of Punjab for its procurement agency in Punjab and for itself to the Director General, Supplies and Disposals, Kolkata, by virtue of an indent dated April 21, 2003.

22. Pursuant to the subsequent placement of the aforesaid indent, the plaintiff had sent 780 Gunny Bales by virtue of six Nos. of Railway receipts which are mentioned under paragraph 1 (VIII) of the written statement.

23. After the delivery of the aforesaid Gunny Bales the sixth defendant, by a letter dated July 9, 2003 intimated the fifth defendant that 390 Gunny Bales of 50 kg, which were supplied by the plaintiff after being packed on July 2, 2003 against the Railway Receipt No. 078405207 dated June 22, 2003 were badly affected by rain and the Railway Authorities did nor accept any remark on the delivery book. By virtue of the said letter the sixth defendant also intimated that the said Bales were lifted to avoid further damage and were stagged separately. By the said letter, the sixth defendant requested the fifth defendant to stop payment with regard to

the 390 Gunny Bales supplied by the plaintiff and also to stop payment of any other charges connected therewith. The fifth defendant was further requested to direct the plaintiff to depute their representative for joint inspection of the rain affected Gunny Bales.

24. The sixth defendant by virtue of another letter dated July 18, 2003 intimated the fifth defendant that the Railway Receipt No. 079405207 as mentioned in the said previous letter dated July 9, 2003 was wrong and the same should be read as Railway Receipt No. 074405207 dated June 22, 2003.

25. Pursuant to the aforesaid indent the fifth defendant by virtue of a letter dated August 20, 2003 intimated the Deputy Controller of Accounts, Ministry of Commerce, Kolkata, that since the consignee had received 390 Bales in a damaged condition as they were affected by rain, the payment with regard to the 390 Bales should be withheld. A copy of the said letter was also sent to the fifth defendant requesting to keep the damaged material separately for inspection by the representatives of the plaintiff.

26. The plaintiff by a letter dated October 17, 2003, requested the District Manager of the sixth defendant to make an arrangement for the inspection of the said Gunny Bales after segregation of the damaged one. According to the sixth defendant the plaintiff agreed that the unused and rejected Gunny Bales would be replaced by them. The plaintiff further agreed even to pay all the expenses including labour charges, transport charges, etc., in connection with the wet Gunny Bales, which were supplied.

27. Subsequently, when a Joint inspection with regard to the damaged Gunny Bales was held on October 18, 2013, it was found that 65 per cent of the Bales were in a damaged condition. The inspection report with regard to the inspection was signed by the representative of the plaintiff one Mr. R. S. Pandey. The sixth defendant further contented that out of 780 Gunny Bales supplied by the plaintiff 395 Gunny Bales

were found to be in damaged condition, since they were affected by rains. Thus, the said 395 Gunny Bales were segregated out of the said 780 Gunny Bales for the purpose of inspection. A joint inspection in connection with the said 395 rain affected Gunny Bales was held on November 15, 2003, when, it was found that 107 Gunny Bales were fit for consumption and 288 Gunny Bales were found to be damaged and not fit for consumption. The sixth defendant further contended that Mr. R. S. Pandey was present at the said joint inspection on behalf of the plaintiff, acknowledged the said fact at the said inspection by signing an inspection report dated November 15, 2003.

28. Since damaged Gunny Bales were supplied by the plaintiff and found to be defective, the sixth defendant took immediate steps to intimate the relevant authority for withholding payment on account of the plaintiff.

29. The sixth defendant further contended that the said suit was barred under the principles of waiver, acquiescence and estoppels.

CASE IN THE WRITTEN STATEMENT FILED ON BEHALF OF THE RAILWAYS/THE NINTH DEFENDANT:

30. The Railways acted as a carrier of the consignment. The regulations, terms and conditions are also mentioned in the relevant Railway manuals for carriage of goods through railways. The Railway Authority maintains the relevant records and documents pursuant to Section 62 of the Railways Act, 1989, which are also available for inspection. The Railways contended that, the subject Gunny Bales had already been consumed by the sixth defendant, and hence whatever claims of the plaintiff, had to be and should be against the sixth defendant, the consumer of the material and not against the railways who was merely a carrier. In as much as, the plaintiff's claim was withheld by or at the behest of the sixth defendant and not by the Railways. Hence, the Railway has no liability to make any payment to the plaintiff. The Railways carried the consignments in a water tight wagon. The

possibilities of the consignments getting wet due to percolation of water or seepage and/or leakage of water did not arise.

31. The Railways further contended that, the consignment was delivered to the consignee at the destination at Sangrur, Punjab by the Railways after obtaining due delivery with clear Railway receipts. The Railways had mentioned the particulars of the wagon numbers and the relevant invoices numbers all dated June 22, 2003 in paragraph 7 of its written statement which were unloaded at Sangrur on July 2, 2003 and the consignee took delivery on the same day i.e. July 2, 2003 without any remark/objection.

32. The Chief Goods Supervisor, Sangrur, categorically stated that Invoice No. 5/074405 dated June 22, 2003 ex-Howrah to Sangrur was unloaded from the wagon: SC/BCX-27042/54.1 on June 2, 2003 against the said invoice and railway receipt and the consignee received 130 HG Bales on July 2, 2003 without any remark as per delivery book. It was specifically stated that no DDN or damage certificate was issued against the said consignments. Similarly, in case of other two consignments relating to Invoice No. 6/RR 074406 dated June 22, 2003 and Invoice No. 7/RR No. 074407 dated June 22, 2003 no DDN or damage certificate was issued. The Chief Goods Supervisor categorically informed the Chief Commercial Manager, Eastern Railway, Kolkata, that, the three consignments against Invoice Nos. 5, 6 and 7 all dated June 22, 2003 were unloaded at Sangrur on July 2, 2003 properly and the consignee had received the said three consignments on July 2, 2003 without any remark/objection. It was also stated that, against the said three nos. of invoices no DDN or damage certificate was issued.

33. When the consignment reached the destination at Sangrur, with everything perfect and the consignee took delivery of the consignment to his full satisfaction, then the delivery was given with clean receipt obtained from the consignee and the consignee accepted the delivery of said consignment without any remark or objection. If any damage and/or

short delivery or non-delivery would have caused during the carriage to the consignment, the consignee should have lodged his objection in the concerned delivery receipt at the destination station at Sangrur, as per the norms, practice, procedure and usages of the trade. In the instant case, the consignee took delivery of the consignment without any objection in the delivery register or otherwise. So the railways had no obligation or liability towards any damage or non-payment of any amount to the plaintiff.

34. The Railways obtained clear Railway receipts and no damage certificate was issued in respect of the consignment. The Railways thus, specifically denied that the consignment was damaged during transit. The Railways further denied the statement in the joint inspection report that, 65 per cent of the consignment out of total 390 Bales was damaged. The Railways further stated that, the consignee took delivery of the consignment on July 2, 2003 without any objection and consumed the goods. The Railways further denied the alleged joint inspection.

35. Except the sixth defendant and the ninth defendant no other defendant, had filed written statement and contested the suit. Hence the impugned judgment and order was passed against the sixth and ninth defendant on contest and ex parte against the rest.

36. The present appeal was preferred by the plaintiff and the sixth defendant was essentially the sole contestant. Though the Railway was represented but since no decree was passed against the Railways they chose to be silent on the merit of the appeal in assailing the impugned judgment and order.

37. Mr. Dhruba Ghosh, Learned Senior Counsel, being ably assisted by Ms. Vineeta Meharia, Advocate, appearing for the plaintiff appellant, at the threshold as his principle and foremost argument in support of his appeal submitted that, the Learned Court while pronouncing the impugned judgment had erred in proceeding on the basis that, in view of the warranty clause contained in ***Exhibit H, the Certificate of***

Warranty **(At page 36, Volume-I of the Paper-Book)**, such warranty continued until and unless the consignee being the sixth defendant received the consignment in a perfect condition in terms of the contractual specifications. Mr. Dhruba Ghosh, Learned Senior Counsel, further submitted that, under the contract the plaintiff being the manufacturer of the consignment despatched and sent the same through Railway wagons on **"FOR"** basis and under such modality and contract the obligation of the plaintiff survived till the consignment was placed and/ or put into the Railway wagon where the title of the consignment passed from the plaintiff to the sixth defendant, the buyer and not a single moment thereafter. Mr. Ghosh, then referred to diverse exhibits namely ***Exhibit-C, Exhibit-D, Exhibit-E, Exhibit-F, Exhibit-G, Exhibit-H, Exhibit-I, Exhibit-J,*** and submitted that, a concluded contract was executed and entered into by and between the parties whereunder the plaintiff was obliged to supply 780 nos. of B-Twill Bags (for short, the consignment) for the ultimate consumption of the sixth defendant at Sangrur, Punjab. The plaintiff under Railway receipts on or about June 23, 2003 despatched 390 Bales of consignment of agreed and contractual specifications in all respect under the relevant Railway receipts and such consignment was ultimately received and collected by the sixth defendant at Sangrur, Punjab without any objection. At the time of despatched at Howrah Station in the wagons the relevant Railway receipts were obtained from the Railway authority, which do not mention that the consignment of 390 Bales were found to be wet and thus, defective. The sixth defendant also received the said consignment at Sangrur, from the Railways without raising any objection. On July 9, 2003 being ***Exhibit-K***, by a letter the sixth defendant for the first time recorded his objection as to the supply of the 390 Bales of wet consignment by the plaintiff. The letter was written to the fifth defendant. Mr. Ghosh, submitted that, the sixth defendant then requested the Controller of Accounts to withhold the value equivalent to 390 Bales of

consignment from the bills raised by the plaintiff and such equivalent amount was ultimately deducted from the plaintiff's bill raised under a subsequent contract.

38. Mr. Ghosh referring to ***Exhibit-F*** submitted that, from the Railway Receipts it would appear that some of the Bales were found to be torn but none of such found to be water damaged or in a wet condition.

39. Mr. Ghosh, Learned Senior Counsel, then referred to ***Exhibit V-I to V-IV*** **(Page 249 of Paper Book, Volume III);** ***Exhibit XI and XII*** **(Page 251 Paper Book, Volume III);** ***Exhibit W*** **(Page 250 of Paper Book, Volume III)** and submitted that, the alleged Mr. R.S. Pandey was never authorized by the plaintiff to cause any joint inspection of the consignment and as such he did not represent the plaintiff at the time of any joint inspection as alleged by the sixth defendant. The witness of the plaintiff also deposed that the said R.S. Pandey was never authorized by the plaintiff to attend any alleged inspection. He submitted that, the relevant documents which were related to the alleged joint inspection of the consignment were not proved in accordance with the law of evidence. The sixth defendant used an affidavit-in-opposition in the summary judgment proceeding, specifically stated that, out of the 385 Bales, 107 Bales were in order and alleged that, the rest 280 Bales were found to be damaged by water.

40. The Learned Senior Counsel on behalf of the plaintiff, referred to various paragraphs from the written statement and the relevant oral evidence of the witness of the sixth defendant and submitted that, the said sixth defendant did not plead that the consignments were rain affected or got wet in Howrah Station at Kolkata prior to or at the time of loading the same at or putting it into the Railway wagon. The onus was always with the sixth defendant to prove that the subject consignment got wet or water affected before it was put into the Railway wagon, to establish the breach on the part of the plaintiff under the said FOR contract and thereby to get the benefit of the agreed warranty clause. Such had not

happened in the instant case and on the contrary the sixth defendant had failed to prove the same.

41. Mr. Ghosh then, referred to the relevant pleadings from the written statement filed by the Railways and the relevant documentary and oral evidences in connection therewith and submitted that, it was contended by the Railways there was no chance of water seepage in transit in the water tight Railway wagon. He further submitted that, it was the consistent stand of the Railways that the consignment was taken delivery by or on behalf of the sixth defendant at Sangrur, Punjab, at the destination point under the FOR contract without recording any objection whatsoever. This contentions of and the case made out by the Railways were never challenged by the sixth defendant by way of cross examination or otherwise. Thus, the sixth defendant had accepted the same.

42. Mr. Ghosh, on behalf of the plaintiff had relied upon certain provisions from the Railway Commercial Manual, which are set out hereinbelow:

> ***"2125 Prevention of damage by wet.***
>
> *(3) Before acceptance, consignment of grains, pulses, seeds, etc. should be thoroughly examined to see that the contents are not wet or damped, and if these are not tendered in good and dry condition suitable remarks must be obtained on the forwarding notes and reproduced on all the foils of the invoice vide para 1418.*
>
> *(4) Goods liable to be damaged by rain water should be loaded in water-tight wagons, the leaks or holes, if any, found in a wagon being plugged before loading, assistance of Train Examiner being obtained where necessary (para 1509).*
>
> *(5) When non-water-tight wagons are used, goods must be properly covered by tarpaulins (para 1509).*
>
> *(6) Floors of wagons must be thoroughly cleaned before loading.*
>
> *(7) Damageable consignments must be loaded 18" (46 cms) away from wagon doors on both sides. Door crevices should be plugged with gunny strips (para 1507).*
>
> *(8) All Manholes and ventilators must be closed and secured before loading consignments damageable by rain.*

> *(9) While unloading consignments like grain and pulses, sugar, piece-goods, etc, which are ordinarily susceptible to damage by weight, the outward condition of the bags and bales should be carefully noted.*
>
> *(10) If inward consignments are found to have been wet, a certificate should be obtained from the carriage and wagon staff, where available, about the condition of the wagon or wagons in which the damaged goods were received. Where the carriage and wagons staff are not available, the wagon should be examined for water-tightness by the unloading clerk by closing the door and seeing whether rays of light are coming. A certificate as to whether the wagon was water-tight or not should be carefully noted in the unloading tally book.*
>
> *(11) While unloading, the position of the damaged packages inside the wagon shall also be carefully noted in the uploading tally book."*

43. It was further submitted that, after the writ petition was relegated to suit, the present civil suit was filed inter alia claiming a money decree for a sum of Rs. 53,55,381/-. Out of the said claim the plaintiff had already received a summary decree for a sum of Rs. 9,83,700/- with interest in the said civil suit and such summary decree dated February 28, 2008 had already been crystallized in favour of the plaintiff. Hence, the said civil suit had survived and was tried for the balance amount, on which the impugned judgment was pronounced.

LEGAL SUBMISSIONS:

44. Mr. Dhruba Ghosh, Learned Senior Counsel for the plaintiff submitted that, the learned Judge in pronouncing the impugned judgment had erred in not appreciating the warranty clause mentioned in ***Exhibit-H*** has a limited application in this case. As the title of the consignment had passed under the provisions of the Sale of Goods Act, 1930, when such consignment is transmitted on FOR basis through the Railway wagon, the moment it was loaded in and/or put into the Railway wagon and not thereafter. In this regard he placed reliance on Section 26 of the Sale of Goods Act, 1930 and submitted that, unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but where the property therein is transferred to the buyer the

goods are at the buyer's risk whether delivery has been made or not. In support of his contention Mr. Ghosh had placed reliance on a judgment of the Hon'ble Supreme Court ***in the matter of: M/s Marwar Tent Factory vs. Union of India & Ors., reported at (1990) 1 Supreme Court Cases 71.***

45. The second fold of legal submissions made on behalf of the plaintiff that, the sixth defendant by taking a decision and ultimately withholding the price equivalent to 390 Bales of the consignment from the subsequent contract of the plaintiff, acted not only unilaterally but also in an illegal, arbitrary and wrongful manner. The sixth defendant could not have acted as the judge of its own cause. In support of such contention the Learned Senior Counsel placed reliance on the following two decisions of the Hon'ble Supreme Court:

(a) In the matter of: General Manager, North East Frontier Railway & Ors. vs. Dinabandhu Chakraborty, reported at 1971 (3) Supreme Court Cases 883;

(b) In the matter of: State of Karnataka vs. Shree Rameshwara Rice Mills Thirthahalli, reported at (1987) 2 Supreme Court Cases 160.

46. Mr. Aniruddha Mitra, Learned Counsel appearing with Mr. Sudhakar Prasad, advocate for the sixth defendant opposed the appeal. To support the impugned judgment and decree Mr. Mitra submitted that, the warranty clause contained in ***Exhibit-H*** still binds the plaintiff. He submitted that, even though the consignment was carried through the Railway wagon under FOR Contract, the obligation of the plaintiff continued till the time the sixth defendant consignee received the consignment in perfect condition as per the contractual terms, at the destination at Sangrur, Punjab. Till then the warranty clause was operative and the plaintiff was bound by it. Thus, he supported the impugned judgment and submitted that, it was the obligation of the plaintiff to replace damaged Bales at its own cost in a perfect condition as per the contractual terms to the sixth defendant and only thereupon

the plaintiff would be entitled to receive the money under the impugned judgment. Mr. Mitra further submitted that, the decision of the sixth defendant to withhold the price equivalent to 390 Bales of consignment from the bills of the plaintiff under the subsequent contract was lawful and justified, as the same was already paid to the plaintiff earlier.

47. Mr. Mitra, learned Counsel for the sixth defendant then referred to ***Exhibits-F*** and submitted that, while despatching the consignment and putting the same into wagon by the plaintiff at Howrah Station, the Railway Authority refused to note the water damage on part of the consignment as stated above and he contended that the consignment got wet during transit from plaintiffs jute mill to Howrah Station before the same was loaded into the wagon. He submitted that, the carriage of consignment from the plaintiff's jute mill to the Railway wagon at Howrah Station was done by a third party contractor and not by the plaintiff itself neither under the actual supervision of the plaintiff. The season was monsoon so the Bales got damaged by water before the same was despatched at and put into and boarded on the Railway wagon. Mr. Mitra then referred to ***Exhibits-FF*** and drew attention of this Court to the oral testimony of the relevant witness of the Railways, to establish that the Railway wagon was a water tight compartment and there could be no chance of water seepage by which the Bales would have been damaged. Thus, he submitted that, it is only before the consignment was placed into and boarded on the Railway wagon for despatch at Howrah Station, the consignments got wet and the plaintiff cannot avoid its obligation under the subject warranty clause, as the goods were not despatched in a perfect condition as per the contractual terms. Mr. Mitra, then drew the attention of this Court to the warranty clause and submitted that, there was no restrictive covenant in the warranty to the extent that the warranty would bind the plaintiff till the time the consignment is despatched and put into the Railway wagon. According to Mr. Mitra, the property in the consignment had passed to the sixth

defendant at Sangrur, Punjab, at the destination point where the sixth defendant had received the consignment and took delivery thereof.

48. Mr. Mitra, Learned Counsel further referred to the ***Exhibit-K; Exhibits-V1 to V4; and Exhibit- 6 to 15*** and submitted that, the plaintiff through its authorized representative namely one Mr. R.S. Pandey consciously and knowingly agreed for a joint inspection of the water damaged Bales. Such inspection was held, when the plaintiff through its said authorize representative duly agreed either to replace the damaged Bales or to compensate the sixth defendant accordingly. He submitted that, this being thoroughly a commercial transaction, the plaintiff could not and cannot contend anything to the contrary at a belated stage as was done by the plaintiff denying the authority of the said Mr. R.S. Pandey who participated in the joint inspection or by denying the same and its purport and content thereof. The said joint inspection report binds the plaintiff. According to Mr. Mitra, the documents relating to such joint inspection had duly been proved and the oral testimony of the relevant witnesses had also proved the same in accordance with the law of evidence.

49. The learned Counsel for the sixth defendant then submitted that, though the sixth defendant had received the entire consignment at Sangrur, Punjab but subsequently within in a short while recorded its objection in respect of the water damaged consignment before the appropriate authority and the plaintiff was also made aware of that. Referring to the necessary Exhibits in this regard namely ***Exhibits- V series and W*** and referring to the oral testimonies of the relevant witnesses, he submitted that, such contemporaneous objection was duly raised by the sixth defendant and the plaintiff was known of the same. The plaintiff, thus, cannot contend anything to the contrary at a belated stage or otherwise.

LEGAL SUBMISSIONS:

50. Mr. Mitra, learned Counsel for the sixth defendant placed reliance on Section 12 of Sale of Goods Act, 1930 and submitted that, a stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty. A warranty is a stipulation collateral to the many purposes of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. In support of such contention he referred a passage from the ***Halsbury's Laws of England,*** **3rd Edition, Volume-34, Paragraph-66 at page 42.**

51. He then placed reliance on Section 19 of the Sale of Goods Act and submitted that, where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Unless a different intention appears, the rules contained in Section 20 to 24 of the said Act are the rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

52. Referring to the above statutory provisions Mr. Mitra, submitted that, it was all along the intention and agreed between the buyer and the seller in the present case that the property in the consignment would transfer in favour of the consignee i.e. the sixth defendant at Sangrur, Punjab when it received the consignment. Therefore, the warranty clause binds the plaintiff till then.

53. Per contra, Mr. Dhruba Ghosh, Learned Counsel for the plaintiff appellant, in reply, submitted that, the sixth defendant had not made out any case alleging breach against the plaintiff in its written statement, therefore, the sixth defendant could not travel beyond its written statement and argue a third case at this appellate stage. Mr. Ghosh, further referred to the letter dated July 18, 2003 being ***Exhibit-J*** **(Page-40 of Paper Book, Volume I)** and submitted that, the plaintiff specifically contended that the Bales got wet during the transit and the

same was not a quality complaint. The sixth defendant was also advised to lodge a claim against the Railways carrier.

54. Ms. Aparna Banerjee, Learned Advocate, appeared for the Railways, the ninth defendant, in this appeal. On instruction from her client she submitted that, since the impugned judgment or any part of it is not against the Railways, she has no submissions to offer to this Court on merit of the appeal.

55. After hearing the submissions made by the learned counsels for the parties and on perusal of the records before this Court including the short notes filed on behalf of the parties, it appears to this Court that, the basic facts like the formation and execution of a concluded contract between the parties and the performance thereof were admitted by the concerned parties. It was admitted that, the contract was, that the plaintiff was to supply 780 Bales of B-Twill Bags from its Jute Mill at Shibpur, Howrah to the sixth defendant for its consumption at an agreed destination point at Sangrur, Punjab. It was also admitted that, the entire lot of 390 Bales were despatched by plaintiff and were received by the sixth defendant at Sangrur, which were transmitted through Railway wagon under FOR Contract and according to the sixth defendant were found to be wet and water damaged. Such contention of the sixth defendant was denied by the plaintiff and the plaintiff claims the price of the said 390 Bales which had been illegally withheld by the sixth defendant, hence this suit. It is also admitted by and between the parties that the parties agreed that the consignment sent through Railway wagon on FOR basis and the same was so transmitted through Railway wagons by the plaintiff.

56. The issues thus, fall for consideration in the instant appeal are essentially three folds, namely;

(i) Whether the obligation of the plaintiff came to an end immediately after loading the consignments into the Railway wagons while transmitting the same on FOR basis to Sangrur,

Punjab or such obligation continued till the sixth defendant received the consignment at Sangrur;

(ii) Whether the warranty clause contained in ***Exhibit-H*** was consequential and was binding upon the plaintiff till the consignment was despatched and placed into the wagon at Howrah Station or did it exist till the consignment was received by the sixth defendant at Sangrur, Punjab;

(iii) Whether the withholding of payment by the sixth defendant of the price equivalent to 390 Bales from the bills of the plaintiff raised in a subsequent contract was just and lawful.

57. The impugned judgment and decree needs to be assessed in the light of the aforesaid three issues.

58. The documentary evidence being ***Exhibit-E, Exhibit-F, Exhibit-K/ Exhibit-2, Exhibit-I, Exhibit-M,*** if read with the question nos. 29 to 110 from the examination-in-chief of the plaintiff's witness, it would be clear that such documentary evidence were duly proved in accordance with the law of evidence. The same would further clearly show that, the consignment was manufactured at the jute mill of the plaintiff at Shibpur, Howrah and then the same was duly despatched for the sixth defendant by putting the same into the Railway wagon at Howrah Station by the plaintiff. The relevant Railway Receipts would also suggest that, the consignment was never wet or water damaged and the same was transmitted to Sangrur, Punjab for the consumption of the sixth defendant. ***Exhibit-FF*** **(Page 80 Paperbook, Volume III)** is the water tight certificate dated June 21, 2003 if read with question no. 152 and 153 of the examination-in-chief of the witness of the sixth defendant, the same would prove that, the Railway wagon was a water tight compartment and there was no scope for water seepage on the consignment during transit. The said documentary evidence was also proved by the defendant's witness in accordance with the law of evidence.

59. After the consignment had arrived at Sangrur, Punjab, it is an admitted position that, the sixth defendant received the same on July 2, 2003 without recording any objection. Such fact would also appear from ***"Exhibit-GG"*** and ***"Exhibit-JJ"***. The sixth defendant thereafter on or about July 9, 2003 for the first time being ***Exhibit-K*** lodged an objection that, the consignment was damaged by rain water.

60. In the written statement filed by the sixth defendant, it was not pleaded that, the consignment was rain affected or wet or found to be same when the consignment was despatched or boarded and put into the Railway wagon at Howrah or prior thereto. The sixth defendant had not been able to prove such contention also as would be evident from the oral testimony of the witness of the sixth defendant.

61. The plea raised by the sixth defendant, in so far as, the joint inspection was concerned that, the plaintiff's authorized representatives namely Mr. R.S. Pandey had attended the said joint inspection and acknowledged the defects in the consignments and the same was found to be water damaged. The plaintiff specifically denied that. The said Mr. R.S. Pandey was never authorized by the plaintiff to cause the joint inspection. The plaintiff also denied the purport and content of the joint inspection report. If ***Exhibit-V1 to V4***, ***Exhibit-W, Exhibit-X1, Exhibit-X2; Exhibit-12*** are examined in the light of the statement of the plaintiff's witness and the defendants witness read with their respective oral evidence, namely, question nos. 174 to 184 of the plaintiff's witness in examination-in-chief; Question Nos. 185 to 188 of the examination-in-chief of the plaintiff's witness; Question Nos. 185 to 188 of the examination-in-chief of the plaintiff's witness; Question Nos. 190 to 193 of the examination-in-chief plaintiff's witness and question no. 43 to 47 of the examination-in-chief of the defendant's witness, it would be clear that, the said fact of joint inspection by an authorized respective of the plaintiff or that the plaintiff had agreed for the same was not proved.

62. On a close scrutiny of the warranty clause in ***Exhibit-H,*** it appears that, the consignment while was sent by the plaintiff was dry and in conformity in all other respects and the same was duly certified and despatched under the Railway Receipt mentioned in the document. It is also clear from the said document and the concerned Railway Receipts that, at the time of despatch by boarding the consignment on the Railway wagon the consignment was never reported to be water damaged.

63. In a Free on Rail Contract, the seller is required to deliver the goods on board the rail. Thus, the obligation of the seller is to bear all expenses upto and including shipment of goods on behalf of the buyer in a perfect condition and as per contractual specification. According to the contractual specifications once the goods are put on board on rail, the property in the goods passes to the buyer and they are at the risk of the buyer, who is responsible for their freight, insurance and subsequent expenses. The principle of FOR is similar with that of the free on board contracts (FOB), which relieve the seller of responsibility once the goods are shipped. After the goods had been loaded, technically, "passed the ship's rail", they are considered to be delivered into the control of the buyer when the voyage begins, the buyer then assumes all liability attached with the goods. The buyer may enter into and negotiate on whatever terms with a forwarder of its choice.

64. On a true and proper construction of Section 26 of the Sale of Goods Act, 1930, speaks of the same legal proposition unless otherwise agreed the goods at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods at the buyer's risk, whether the delivery has been made or not. Hence, on a true construction of Section 26 of the said Act the plaintiff was required to deliver the goods on board on rail in the instant case. It was an admitted position by the parties that for transportation of the consignment it was agreed that the same would be transported from

Howrah Station to Sangrur, Punjab through Railway wagons on FOR basis, thus, the plaintiff being the seller was responsible to bear till shipment of goods and board the same on the wagon on behalf of the buyer in perfect condition as per the contractual specifications and no further or thereafter. In the instant case it is already proved from the documentary and also oral evidences, as discussed above, that, the consignment was despatched and boarded on the Railway wagon without any water damage and the sixth defendant could not prove anything to the contrary or could not dislodge the case of the plaintiff to this extent.

65. ***In the matter of: M/s Marwar Tent Factory (supra),*** the Hon'ble Supreme Court was pleased to observe as under:

> *"11. In order to decide and fix the responsibility for passing of the decree in respect of the sum of Rs. 51,912 being the full price of 224 tents inclusive of sales tax deducted from the amount due to the appellant under another contract by respondent 5, it is pertinent to consider the question when the property in goods passed from the seller to the buyer at Jodhpur when the goods were loaded in railway wagons for delivery to the consignee at Kanpur. The learned counsel for the appellant drew our attention to condition No.11 of the schedule of acceptance of tender dated February 29, 1968. It has been mentioned therein that the terms of delivery was FOR, Jodhpur i.e. free on rail at Jodhpur railway station. It has also been mentioned that before the goods are loaded on railway wagons for delivery to respondent 5 at Kanpur, the Inspector, I.G.S. North India will inspect the same at form's premises at Jodhpur and after approval the said goods will be despatched to its destination by placing them in the railway wagons at Jodhpur railway station and the railway receipt has to be sent to the consignee under registered cover immediately after despatch of the stores with full details. It is also stipulated that 95 per cent of the price of the goods will be paid by respondent 5 on receipt of the railway receipt and the inspection note and the balance 5 per cent will be paid after the same reached at the destination in good condition. Referring to this term for delivery under clause 11 of the schedule of acceptance of tender, it has been urged by the learned counsel for the appellant that the delivery was complete at Jodhpur when the goods were loaded in the goods train for delivery to respondent 5 at Kanpur and property in the goods passed to the buyer as soon as the goods were despatched by railway at Jodhpur. Thereafter, the risk in respect of the goods despatched remained with the consignee. The appellant, consigner is entitled to get the entire price of the 224 tents which were short delivery by respondents 3 and 4 to respondent 5 at Kanpur in view of the clear finding by trial court that though the entire consignment of 1500 tents was actually loaded in the railway wagons for despatch to the consignee, respondent*

5. Respondent 5 duly filed a claim to the railways, respondents 3 and 4 for the short delivery to the tune of 224 tents immediately after taking delivery of the goods. In order decide the question as to whether the rights in the goods passed from the seller to the buyer i.e. from the appellant to respondent 5 as soon as the goods were loaded in railway wagons at Jodhpur and the railway receipt was sent to the consignee, it is pertinent to refer to the meaning of the words, f.o.r. Jodhpur. In Halsbury's Laws of England, 4th Edition (Volume 41) at page 800, para 940 it has been mentioned that:

> *"Under a free on rail contract (f.o.r.) the seller undertakes to deliver the goods into railway wagons or at the station (depending) on the practice of the railway) at his own expense, and (commonly) to make such contract with the railway on behalf of the buyer as is reasonable in the circumstances. Prima facie the time of delivery f.o.r. fixes the point at which property and risk pass to the buyer and the price becomes payable."*

12. In Benjamin's Sale of Goods (2nd edn), at para 1799 it is stated as under:

> *"Stipulations as to time of "delivery". Provisions as to the time of delivery in an f.o.b. contract are taken to refer to the time of shipment and not to the time of arrival of the goods; and this may be so even though the provision in question contemplates the arrival of the goods by certain time. Thus n Frebold and Sturznickel (Trading as Panda O.H.D.) v. Circle Products Ltd. German sellers sold toys to English buyers f.o.b. Continental port in the terms that the goods were to be delivered in time to catch the Christmas trade. The goods were shipped from Rotterdam and reached London in November 13; but because of an oversight for which the sellers were not responsible the buyers were not notified of the arrival of the goods until the following January 17. It was held that the sellers were not in breach as they had delivered the goods in accordance with the requirements of the contract by shipping them in such a way as would normally have resulted in their arrival in time for the Christmas trade."*

13. The question as to the meaning of f.o.r. contract fell for consideration in the case of Girija Proshad Pal v. national Coal Co. Ltd. P.B. Mukharji, J. as His Lordship then was observed in para 11 as follows:

> *"The words f.o.r. are well known words in commercial contracts. In my judgment they mean when used to qualify the place of delivery, that the seller's liability is to place the goods free on the rail as the place of delivery. Once that is done the risk belongs to the buyer."*

20. On a conspectus of all the decisions referred to before as well as the provisions of Section 61 (2) of the Sale of Goods Act, we are constrained to hold that the plaintiff is entitled to get a decree of interest on the unpaid price from January 1, 1969 to December 1, 1971@ 6 per cent per

> *annum which is considered to be a reasonable rate of interest, as claimed by the plaintiff-appellant.*
>
> *21. In the premises aforesaid the appeal is allowed and the judgments and the decree of the courts below insofar as then rejected the claims regarding the price of 224 tents and interest thereon are set aside. The plaintiff-appellant's claim for the price of the said goods as well as interest thereon @ 6 per cent for the period from January 1, 1969 to December 1, 1971 is hereby decreed. The appeal is thus allowed with costs quantified at Rs. 4000. The claim for interest @ 6 per cent per annum for the period from January 1, 1972 till date of payment of amount unpaid is allowed."*

66. From the provisions laid down in clause ***2125 (9 and 10)*** of the Railway Commercial Manual, as set out in paragraph 41 above, it appears that while unloading the consignments, the outward condition of the bags and Bales should be carefully noted. It further states that, if inward consignments are found to have been wet, a certificate should be obtained from the carriage and wagon staff, where available, about the condition of the wagon or wagons in which the damaged goods were received. Where the carriage and wagon staffs are not available, the wagon should be examined for water tightness and a certificate as to whether the wagon was watertight or not should be carefully noted in the unloading tally book. From ***Exhibit-GG*** it appears that, the sixth defendant took delivery of the 390 Bales at Sangrur, Punjab, without any objection or remark. ***Exhibit-FF*** is the water tight certificate issued by the Railways on June 21, 2003 confirming that, the relevant wagon was water tight and there was no chance of water seepage within the wagon, so that, the Bales could be damaged by water. In as much as, such facts are duly proved and the sixth defendant could not demonstrate anything to the contrary or to dislodge the purport and content of the said two Exhibits**.** In as much as, the case of the sixth defendant was consistent that, the consignments got wet while being carriage from the jute mill of the plaintiff to Howrah Station to board on the wagon and also that, the sixth defendant received the consignments

and accepted the same without any objection or produce at Sangrur, Punjab and lodged their complaint after about seven days.

67. In the instant case, the sixth defendant had failed to prove that, the consignments got wet and water damaged during its transit from the jute mill of the plaintiff to Howrah Station where it was loaded on the Railway Wagon. On the contrary the plaintiff had been able to prove that, the consignment was loaded and boarded on the Railway wagon in a perfect condition as per the contractual terms. Under a free on rail contract (FOR) the seller undertakes to deliver the consignments/goods into Railway wagons or at the station depending upon the practice of the concerned Railways at its own expense and risk and to execute such contract with the Railways on behalf of the buyer as is reasonable in the circumstances. Prima facie time of delivery in FOR contract fixes the point at which property and risk pass to the buyer and the price becomes payable. FOR is a commercial contract when such contract is executed between the parties, it means it fixed the place of delivery where the title in the consignments/goods passes from the seller to the buyer and the price thereof becomes due and payable by the buyer to the seller. Once the consignment/goods are boarded in the Railway wagon on the basis of FOR contract the risk passes and belongs to the buyer.

68. In so far as the plaintiff's other contention is concerned that, the withholding, of price equivalent to 390 nos. of Bales from the subsequent contract is arbitrary and illegal, the learned counsel for the plaintiff relied upon *General Manager, North East Frontier Railway (supra).* The said judgment arose from a writ petition where the action of the State authority was challenged. There is a difference in adjudication between a writ petition and a regular civil suit. A regular civil suit involves a detailed trial and a detailed fact finding enquiry on the issues involved. The documentary evidence are required to be proved by oral testimony by the witnesses of the parties. Every fact pleaded or denied by the parties in their respective pleadings necessarily to be proved either to support

their case or to dislodge the case of the adversary. Whereas while adjudicating a writ petition in a normal course, the same is done on the basis of affidavit evidence and the documentary evidence attached therewith. In the facts which are identical to the instant case in so far as the illegal withholding of price is concerned only, the decision making process of the erring authority is to be examined by the constitutional Court on the existing material in its writ jurisdiction and the detailed fact finding enquiry is not necessary. As such the ratio decided in the said judgment ***General Manager, North East, Frontier Railway (supra)*** has no relevance in the facts and circumstances of this case.

69. ***In the matter of: State of Karnataka (supra),*** the ratio decided therein has no relevance in the facts and circumstances of this case. In the instant case the plaintiff had been able prove that there was no breach of contract on its part.

70. In so far as, the submission of Mr. Mitra, learned counsel for the sixth defendant that, the warranty executed by the plaintiff being ***Exhibit-H*** was subsisting and binding upon the plaintiff till the sixth defendant received and accepted the consignment in Sangrur, Punjab, is wholly misconceived and without any legal basis. Once the parties agreed for the shipment of the consignment under FOR contract the obligation of the plaintiff ceased immediately when the consignment was boarded on Railway wagon in a perfect condition as per the contractual terms and no further.

71. In view of our foregoing discussions, this Court holds that, the obligation of the plaintiff came to an end immediately after loading the consignment into the Railway wagon at Howrah Station. While transmitting the same under the FOR contract the property in the consignment had passed from the plaintiff to the sixth defendant immediately when the consignment was boarded on the wagon at Howrah Station. Consequently we further hold that, the warranty clause contained in ***Exhibit-H*** ceased immediately the consignment was boarded on the

Railway wagon by the plaintiff at Howrah Station and was not binding upon the plaintiff till the time the consignment was received and accepted by the sixth defendant at Sangrur, Punjab. Thus, the two issues mentioned in paragraph 55 (i) and (ii) are answered accordingly.

72. In view of what this Court has held in the preceding paragraph, this Court affirms the part of the impugned judgment and order, directing the sixth defendant to release the withheld payment with interest forthwith as expeditiously possible. Thus the issue mentioned in paragraph 55(iii) is answered accordingly.

73. Thus, the portion of the impugned judgment and order directing the plaintiff to replace the 390 nos. of alleged wet Gunny Bales at its own cost, stands set aside and reversed. Rest of the impugned judgment and order stands affirmed.

74. In view of the above **APD 101 of 2007 with CS No. 145 of 2006** stands disposed of.

75. There shall, however, be no order as to costs.

76. Let the appellate decree along with the decree passed by the learned single judge be drawn up and completed, as expeditiously as possible.

(Aniruddha Roy, J.)

I. P. MUKERJI, J.:-

I have had the privilege of going through the judgment prepared by my brother, Mr. Justice Aniruddha Roy. I am in full concurrence with the reasoning adopted by his lordship, the ultimate conclusion reached by him and the order prepared to be passed. I would like to add a few observations of my own.

The terms and conditions of carriage are similar for goods “free on board” and “free on rail”. Black’s Law Dictionary, 10th Edition defines “free on board” thus:-

"This is a mercantile-contract term allocating the rights and duties of the buyer and the seller of goods with respect to delivery, payment, and risk of loss, whereby the seller must clear the goods for export, and the buyer must arrange for transportation. The seller's delivery is complete (and the risk of loss passes to the buyer) when the goods pass into the transporter's possession. The buyer is responsible for all costs of carriage."

In **M/s. Marwar Tent Factory Vs. Union of India & Ors.** reported in **(1990) 1 SCC 71** the Supreme Court said:

"In order to decide the question as to whether the rights in the goods passed from the seller to the buyer i.e. from the appellant to respondent 5 as soon as the goods were loaded in railway wagons at Jodhpur and the railway receipt was sent to the consignee, it is pertinent to refer to the meaning of the words, f.o.r. Jodhpur. In Halsbury's Laws of England, 4th Edition (Volume 41) at page 800, para 940 it has been mentioned that:

"Under a free on rail contract (f.o.r.) the seller undertakes to deliver the goods into railway wagons or at the station (depending on the practice of the railway) at his own expense, and (commonly) to make such contract with the railway on behalf of the buyer as is reasonable in the circumstances. Prima facie the time of delivery f.o.r. fixes the point at which property and risk pass to the buyer and the price becomes payable."

12. *In Benjamin's Sale of Goods (2nd edn.), at para 1799 it is stated as under:*

"Stipulations as to time of "delivery". Provisions as to the time of delivery in an f.o.b. contract are taken to refer to the time of shipment and not to the time of arrival of the goods; and this may be so even though the provision in question contemplates the arrival of the goods by a certain time. Thus in Frebold and Sturznickel (Trading as Panda O.H.D.) v. Circle Products Ltd. German sellers sold toys to English buyers f.o.b. Continental Port on the terms that

the goods were to be delivered in time to catch the Christmas trade. The goods were shipped from Rotterdam and reached London on November 13; but because of an oversight for which the sellers were not responsible the buyers were not notified of the arrival of the goods until the following January 17. It was held that the sellers were not in breach as they had delivered the goods in accordance with the requirements of the contract by shipping them in such a way as would normally have resulted in their arrival in time for the Christmas trade."

13. *The question as to the meaning of f.o.r. contract fell for consideration in the case of Girija Proshad Pal v. National Coal Co. Ltd. P.B. Mukharji, J. as His Lordship then was observed in para 11 as follows:*

"The words f.o.r. are well known words in commercial contracts. In my judgment they mean when used to qualify the place of delivery, that the seller's liability is to place the goods free on the rail as the place of delivery. Once that is done the risk belongs to the buyer."

It follows that the seller must give the buyer sufficient notice to enable him to insure against loss during transit of the goods. When the goods are delivered “on board” the property in them passes to the buyer.

When the railway receipts were issued by the railway administration the goods were deemed to be in its possession. Hence, upon issuance of those receipts the risk in the property passed to the respondent buyer.

We only have to examine the condition of the goods when the railway receipts were issued.

Now comes the question of proof.

Which party had the burden of proof? What kind of proof had to be adduced by the appellant/plaintiff?

The burden of proof is very important in this matter. Two principles are very fundamental. The first is that he who alleges a fact must prove it (Sections 101 and 103 of the Evidence Act, 1872). The second is that the burden of proof lies on that person who would fail if no evidence at all were given on either side (Section 102).

In such a situation, the following passage from Phipson on Evidence is very relevant:-

> *"Again, the general rule is that the party who asserts must prove. Where a party seeks to rely on a particular piece of evidence, and there is a dispute as to its admissibility, he has the burden of proving that it is admissible……..So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. This is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.*
>
> *This rule is adopted principally because it is just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting.*
>
> *In deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form; the latter the pleader can frequently vary at will. Moreover, a negative allegation must not be confused with the mere*

> *traverse of an affirmative one. The true meaning of the rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him. An alternative test, in this connection, is to strike out of the record the particular allegation in question, the onus lying upon the party who would fail if such a course were pursued."*

The issues arose in this way. The appellant/plaintiff as seller claimed price of the goods from the respondent buyer where the conditions of carriage were free on rail (FOR). The defence of the respondent buyer was that the goods in question were badly damaged by water. Hence, they were not obliged to pay the price.

The Railway receipts only mentioned that a very few bags were torn. Otherwise, they were clean receipts. The quality assurance certificate issued between 17th and 19th June, 2003 by the Director, Quality Assurance of the central government in Kolkata bore the remark "accepted."

The payment for 288 bales was deducted by the respondent buyer from monies payable to the appellant/plaintiff in other contracts with the buyer on the ground that those bales were badly damaged by water.

The essential fact in issue was: whether the goods were damaged by water or not?

In my opinion, the appellant/plaintiff did not have the burden to prove the negative fact that the goods which were entrusted with the Railways were free from rain damage. Delivery of the goods is admitted by the respondent/defendant. On the above essential fact, the burden was on the respondent/defendant to prove that the goods when entrusted with the Railways were rain damaged. It had to prove such condition at that point of time. That the goods were rain damaged at a later point of time,

would not suffice as immediately on entrusting of the goods with the railways, the risk in the property had passed to the respondent/buyer.

The appellant/plaintiff has been able to produce as proof of delivery of goods railway receipts which only contained the remark that an insignificant number of bags were torn. In other words, apart from this, there were no complaints whatsoever that the consignment or any part of it was rain damaged. Secondly, the quality assurance certificate issued two or three days before the loading of the goods into the wagon showed that the goods were accepted by the respondent/buyer. The production of this quantity of evidence was, in my opinion, sufficient for the appellant/plaintiff, to prove that the goods were indeed entrusted in good condition to the Railway authority.

The evidence led on behalf of the respondent/buyer that the goods became water damaged in transit did not prove its case at all because wetness of the bags at the time of its delivery to the railways was material and not damage by water during transit.

The goods were at Sangrur on 2nd July, 2003. On 9th July, 2003 the respondent buyer wrote to the Director, Supplies and Disposals with a copy to the appellant/plaintiff complaining that the goods were badly damaged by water. By that time one week from the date of arrival of the goods at Sangrur had elapsed. The inspection report is signed on 18th October, 2003. This inspection more than three months after arrival of the goods does not in any way show that they were rain damaged at the said point of time.

So, in my opinion, the respondent/defendant had hopelessly failed to prove their case and discharge their burden of proof.

Hence, the appellant/plaintiff became entitled to recovery of the price of the goods sold. In that view of the matter, there was no question of the

appellant/plaintiff replacing any goods as they were entitled to the price of the goods actually supplied.

I would allow the appeal on the same terms as my learned brother.

Certified photocopy of this judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(I. P. MUKERJI, J.)