

REPORTABLE**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION****CIVIL APPEAL NO.7469 OF 2008**

M/s. Padia Timber Company(P) Ltd. ...Appellant

versus

The Board of Trustees of Visakhapatnam
Port Trust Through its Secretary ...Respondent

J U D G M E N T**Indira Banerjee, J.**

The short question involved in this appeal is, whether the acceptance of a conditional offer with a further condition results in a concluded contract, irrespective of whether the offerer accepts the further condition proposed by the acceptor. This question does not appear to have been addressed by the High Court or the Court below.

2. This appeal is against a common Judgment and Order dated 10.10.2006 passed by the High Court of Judicature at Hyderabad in Appeal Nos.2196 and 2197 of 2000 confirming a Judgment and Order dated 31.3.2000 of the Additional Senior Civil Judge, Visakhapatnam

allowing the suit being O.S. No.106 of 1993 filed by the Respondent-Port Trust against the Appellant for damages, and dismissing O.S. No.450 of 1994 filed by the Appellant for refund of earnest deposit.

3. On or about 17.7.1990, the Respondent-Port Trust floated a tender for supply of Wooden Sleepers. The tenders were due to be opened on 01.08.1990.

4. Clauses 15 and 16 of the tender are extracted hereinbelow:-

“15. The purchaser will not pay separately for transit insurance and the supplier will be responsible till the entire stores contracted for arrive in good condition at destination. The consignee will as soon as but not later than 30 days of the date of arrival of stores at destination notify the supplier of any loss, or damage to the stores that may have occurred during transit.

16. In the event of the supplies being found defective in any matter the right to reject such materials and return the same to the supplier and recover the freight by the Port is reserved.”

5. Pursuant to the aforesaid tender, the Appellant submitted its offer on or about 01.08.1990. It was a specific condition of the offer of the Appellant that inspection of the Sleepers, as per the requirement of the Respondent-Port Trust, would have to be conducted only at the depot of the Appellant. The Appellant did not accept Clauses 15 and 16 of the Tender and rather made a counter proposal. In accordance with the terms and conditions of the tender, the Appellant deposited Rs.75,000/- towards earnest deposit, along with its quotation.

6. On or about 02.08.1990, the Controller of Stores of the Respondent-Port Trust informed the tenderers that the opening of the tenders had been postponed to 08.08.1990.

7. On 08.08.1990, the Appellant submitted its revised quotation and/or offer, reiterating that inspection as per the requirement of the Respondent-Port Trust would have to be conducted only at the depot of the Appellant. After the tenders were opened certain discussions took place between the Appellant and the Tender Committee of the Respondent-Port Trust.

8. By a letter dated 11.10.1990, the Appellant agreed to supply wooden sleepers to the Respondent-Port Trust on the terms and conditions stipulated in the said letter. The Appellant reiterated that the Respondent-Port Trust could inspect the goods to be supplied, at the factory site of the Appellant at Vepagunta, Visakhapatnam, as this would facilitate re-transit of rejected goods to the depot of the Appellant, without additional financial burden.

9. The Appellant made it clear to the Respondent-Port Trust, that if the Respondent-Port Trust still required inspection at the site of the Respondent-Port Trust, the Appellant would charge 25% above the rate quoted by the Appellant for the supply of wooden sleepers. The said letter is extracted hereinbelow for convenience:-

1. "We are agreeable to supply the B.G Track Indian sale wood sleepers F.D.R V.P.T site by our own transportation.

2. *With regard to inspection clause you can inspect the material at our factory site at Vepagunta, Visakhapatnam. This will facilitate us to retransist the rejected materials if any to our the depot without any additional financial commitment. If you still require inspection, at your site we will charge 25% extra in our rate.*

3. *As the tender committee had mentioned during the discussion on 10.10.90, we are agreeable to the condition for the 100 % payment a weekday, after acceptance of the materials.*

4. *We charge 24 % interest on all belated payments.*

5. *We can immediately supply two thousand of BG Tracks sleepers and the supply can be completed as per your requirement.*

6. *We are regular supplier of sleepers to Indian Railways. We wish to extend our transaction with the V.P.T.*

7. *We will execute 10% of security deposit as on bank guarantee and also you have refund to our E.M.D amount of Rs 75,000/- awaiting your favourable order."*

10. Thereafter, further correspondence ensued between the parties. By another letter dated 20.10.1990 addressed to the Controller of stores of the Respondent-Port Trust, the Appellant reiterated that it had not agreed to inspection at the General Stores of the Respondent-Port Trust. The Appellant made it clear that, in the event the Respondent-Port Trust insisted on inspection at the General Stores of the Respondent-Port Trust, the Appellant would charge 24% extra instead of 25% as mentioned in its earlier letter. The said letter dated 20.10.1990 was duly received by the Respondent-Port Trust.

11. By a letter dated 29.10.1990, written in response to the quotations dated 1.8.1990, 8.8.1990 and the letter dated 20.10.1990

of the Appellant, the Respondent-Port Trust informed the Appellant that the Respondent-Port Trust had accepted the offer of the Appellant for supply of wooden sleepers at the rate quoted by the Appellant. Though the Respondent-Port Trust agreed that the Inspection Committee would inspect the Wooden Sleepers at the site of the Appellant, the Respondent-Port Trust imposed the further condition that the Appellant would have to transport the Wooden Sleepers to the General Stores of the Respondent-Port Trust by road, at the cost of the Appellant and the final inspection would be made at the General Stores of the Respondent-Port Trust. The Respondent-Port Trust also requested the Appellant to extend the delivery period of the sleepers until 15.11.1990.

12. By a letter dated 30.10.1990 written in response to the letter dated 29.10.1990, the Appellant informed the Controller of Stores of the Respondent-Port Trust that the Appellant was not accepting the terms and conditions stipulated in the said letter dated 29.10.1990, which were not as per the Appellant's offer. The Appellant also declined to extend the validity of its offer, since prices had gone up.

13. By the aforesaid letter dated 30.10.1990, the Appellant rejected the proposal of the Respondent-Port Trust and requested that the earnest money deposited by the Appellant be returned to the Appellant.

14. It appears that on the same day, i.e. 30.10.1990, the

Controller of Stores of the Respondent-Port Trust put up an Office Note, seeking sanction of the Chairman of the Respondent-Port Trust for placing orders on the Appellant for supply of 10,596 Broad Gauge Track Sleepers and 761 Broad Gauge special size sleepers, at a total cost of Rs.67,96,764 odd, for which a Letter of intent cum purchase order dated 29.10.1990 had been issued by the Respondent-Port Trust.

15. A purchase order No. G 101126 90-91 dated 31.10.1990 was issued to the Appellant from the office of the Controller of Stores of the Respondent-Port Trust, requesting the Appellant to supply 10596 Broad Gauge Track Sleepers and 761 Broad Gauge Special Sleepers of 1st Class Salwood as per the latest Indian Railway Standards, on the terms and conditions specified in the Purchase Order and the Special Conditions of purchase appended thereto, according to the specifications and at the rates mentioned in the Purchase Order.

16. The Letter of intent and the purchase order were followed by a letter dated 12.11.1990, written in response to the letter dated 30.10.1990 of the Appellant. By the aforesaid letter, the Respondent-Port Trust requested the Appellant to supply the materials ordered as per the purchase order, *inter alia*, contending that the purchase order had duly been placed on the Appellant within the period of validity of the price quoted by the Appellant, after issuing a letter of intent to the Appellant, accepting its offer. The Appellant was warned that if

supply was not made as per the purchase order, risk purchase would be made at the cost of the Appellant and the Earnest Deposit of Rs.75,000 would be forfeited. The Respondent-Port Trust also noted that the Appellant had not made the security deposit, to which the purchase order was subject.

17. By another letter dated 19.11.1990, the Respondent-Port Trust requested the Appellant to commence supply of materials. In response to the said letter, the Appellant wrote a letter dated 27.11.1990 to the Respondent-Port Trust, contending that there was no concluded contract between the Appellant and the Respondent-Port Trust and once again requested that the earnest money deposited by the Appellant with the Respondent-Port Trust be refunded to the Appellant.

18. On or about 03.9.1991, that is, after ten months, the Respondent-Port Trust placed an order for supply of wooden sleepers on M/s. Chhawohharia Machine Tools Corporation, for supply of wooden sleepers at a much higher rate.

19. The Respondent-Port Trust has contended that, by reason of refusal of the Appellant to discharge its obligation of supplying the requisite number of sleepers, as required by the Respondent-Port Trust, to the Respondent-Port Trust, in terms of the contract, at the rate quoted by the Appellant in its revised bid, the Respondent-Port

Trust had been constrained to invoke the risk purchase clause as contained in Paragraph 16 of the Special Conditions of purchase, appended to the purchase order dated 31.10.1990 and purchase the wooden sleepers at a higher rate from a third party, incurring losses, for which the Respondent-Port Trust was entitled to claim damages. It is the case of the Respondent-Port Trust that the conditions stipulated in the purchase order, including the Special Conditions of Purchase constitute the terms of a binding contract.

20. According to the Appellant the negotiations between the Appellant and the Respondent-Port Trust did not fructify into a concluded contract, since the Respondent-Port Trust did not accept the conditions of the offer of the Appellant fully and the Appellant did not agree to the terms and conditions on which the Respondent-Port Trust insisted, particularly the condition of final inspection at the General Stores of the Appellant.

21. On or about 10.4.1992, the Respondent-Port Trust filed the suit being O.S. No.106 of 1993 in the Court of II Additional Subordinate Judge, Visakhapatnam against the Appellant, seeking damages for breach of contract to the tune of Rs.33,19,991/- along with interest thereon. The Appellant duly filed its written statement in the said suit on or about 23.3.1994.

22. In or about June, 1994, the Appellant filed the suit being O.S.

No.450 of 1994 in the Court of Subordinate Judge, Visakhapatnam claiming refund of earnest money deposited by the Appellant with the Respondent-Port Trust along with interest @ 24% per annum from 24.4.1991 to 23.4.1993, costs and other consequential reliefs. The Respondent-Port Trust filed a written statement denying its liability to refund the earnest deposit.

23. The two suits being O.S. No.106/1993 and O.S. No.450/1994 were clubbed together and heard by the First Additional Senior Civil Judge, Visakhapatnam. In the first suit, the following issues were framed for trial:-

- (i) Whether the Appellant committed breach of contract?
- (ii) Whether the Respondent-Port Trust was entitled to recover the suit amount from the defendant?
- (iii) To what relief was the Respondent-Port Trust entitled?

24. In O.S. 450/1994 (the second suit), the issues were:-

- (i) Whether the Appellant was entitled to refund of earnest money with interest as claimed from the Respondent-Port Trust.
- (ii) Whether the suit (second suit) was barred by limitation?
- (iii) To what relief, if any, was the Appellant entitled?

25. Since the two suits were clubbed together and the issues in the two suits were interlinked, common evidence was recorded for the two suits. While one V. Adinarayana, who had been working in the Stores Department of the Respondent-Port Trust at the material time, was examined on behalf of the Respondent-Port Trust, Shri G. C. Padia, who was the Director of the Appellant was examined on behalf of the Appellant.

26. The two suits were disposed of together, by a common judgment and order dated 31.3.2000. While the first suit was decreed in favour of the Respondent-Port Trust, the second suit filed by the Appellant was dismissed.

27. After discussing the pleadings and the contentions of the respective parties, the Trial Court found that it had been admitted that the Respondent-Port Trust had invited tenders for supply of wooden sleepers, pursuant to which the Appellant had submitted its bid.

28. The Trial Court held that the Respondent-Port Trust had accepted the offer of the Appellant and issued a letter of intent cum purchase order on 29.10.1990, that is, within the period of validity of the price quoted by the Appellant. The price quoted by the Appellant was valid till 31.10.1990.

29. The Trial Court rejected the contention of the Appellant that the Appellant had revoked its offer before acceptance thereof by the Respondent-Port Trust, and held that there was a concluded contract between the Appellant and the Respondent-Port Trust, since the Respondent-Port Trust had accepted the tender submitted by the Appellant on 29.10.1990, while the price quoted by Appellant was still valid. The Trial Court held that the contract was concluded on

29.10.1990 when the letter of intent was issued by the Respondent-Port Trust.

30. The Trial Court observed that, in order to determine whether or not there was a concluded contract between the Appellant and the Respondent-Port Trust, the crucial question was whether the tender submitted by the Appellant had been accepted by the Respondent-Port Trust within 31st October, 1990, being the stipulated period of validity of the quotation given by the Appellant. The Trial Court found that acceptance of the purchase order was completed as against the Appellant, when the letter of intent cum purchase order was dispatched from the end of the Respondent-Port Trust.

31. In arriving at the finding that there was a concluded contract between the Respondent-Port Trust and the Appellant, the Trial Court relied on Section 4 of the Indian Contract Act, 1872, which is set out hereinbelow for convenience:

“4. Communication when complete.—*The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.*

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.”

32. The Trial Court found that it had been proved that there was a concluded contract between the Appellant and the Respondent-Port Trust, but the Appellant had admittedly not supplied the wooden sleepers to the Respondent-Port Trust. Once it was proved that there was a concluded contract and the defendant that is, the Appellant before this Court, had admittedly not supplied the goods as per the terms of the purchase order, it had to be held that the defendant had committed breach of contract. The Trial Court, in effect, held that the fact that the Appellant had received the letter of intent and endorsed the receipt thereof within 31st October, 1990, established the case of the Respondent that the contract had been concluded.

33. The Trial Court held that the Appellant having committed breach of its obligations under a concluded contract with the Respondent-Port Trust, the Respondent Port Trust was entitled to damages as claimed in the suit being O.S. No.106 of 1993. In awarding damages to the Respondent-Port Trust, the Trial Court took note of Section 73 of the Contract Act which is set out hereinbelow for convenience:

“73. Compensation for loss or damage caused by breach of contract.—*When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to*

result from the breach of it.”

34. The Trial Court held that in case of breach of a contract for supply of goods, the Port could claim the difference between the contracted price and the market price of such goods at the place of delivery, as damages. If there was no available market price at the nearest place, the price prevailing in the controlling market could be considered.

35. The Trial Court considered the judgments in ***Rajasthan State Electricity Board and Others v. Dayal Wood Works¹***; ***Fateh Chand v. Balkishan Das²***; ***G.M.T.A.P. Co-op. Mkts. Ltd. v. Dy. Registrar, Co-op Societies, Raichur³***; ***Marimuthu Gounder v. Ramaswamy Gounder and Ors.⁴*** cited by the Appellant and the judgments in ***A.K.A.S. Jamal v. Moola Dawood Sons & Co.⁵***; ***M/s Saraya Distillery, Sardarbaggar v. Union of India and Anr.⁶***; ***Murlidhar Chiranjilal v. M/s Harishchandra Dwarkadas and Anr.⁷***; ***State of Maharashtra and Anr. v. Digambar Balwant Kulkarni⁸*** cited by the Respondent-Port Trust.

36. Relying on the judgment of the Division Bench of Delhi High Court in ***M/s Saraya Distillery, Sardarbaggar v. Union of India***

1. AIR 1998 AP 381
2. AIR 1963 SC 1405
3. AIR 1998 Karnataka 354
4. AIR 1979 Madras 189
5. AIR 1915 Privy Council 48
6. AIR 1984 Delhi 360
7. AIR 1962 SC 366 (V49 C57)
8. AIR 1979 SC 1339

and Anr. (supra), the Trial Court held that proof of actual repurchase was not necessary for claiming damages.

37. The Trial Court rejected the contention of the Appellant of delay in calling for tenders from a third party, on the ground that the Respondent-Port Trust being a statutory authority and not being a private individual, was required to follow its rules and procedures in calling for tenders and accepting the tender of a third party.

38. The Trial Court found that the contract was enforceable till its completion or its abandonment. The rescission of the contract and consequential forfeiture of security deposit was proper and within the terms of the contract.

39. In **Rajasthan State Electricity Board and others v. Dayal Woods Works** (supra), cited on behalf of the Appellant before the Trial Court, the High Court had found on facts that there was no concluded contract for supply of sleepers and consequently the plaintiff was entitled to refund of security deposit.

40. In **Fateh Chand** (supra), cited on behalf of the Appellant before the Trial Court, a five-Judge Bench of this Court held:-

“10*In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section*

undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

11.*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 considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture."*

41. In **Marimuthu Gounder** (supra), also cited by the Appellant, before the Trial Court, a Division Bench of Madras High Court held that proof of actual damage was a sine qua non to seek damages and in **G.M.T.A.P. Co-op. Mkts. Ltd. v. Dy. Registrar, Co-op Societies, Raichur** (supra) a Single Bench of Karnataka High Court held that penalty could not be imposed on a milling agent for default in supply of rice, in the absence of pre-estimation of the loss suffered on account of the default, even though the contract may have provided for imposition of penalty.

42. In **Murlidhar Chiranjilal** (supra), cited on behalf of the Respondent-Port Trust this Court held:-

"9. *The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he*

contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps: (British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London [(1912) AC 673, 689]). These two principles also follow from the law as laid down in Section 73 read with the Explanation thereof. If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be re-imbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things."

43. In ***State of Maharashtra and Anr. v. Digambar Balwant Kulkarni*** (supra), cited on behalf of the Respondent-Port Trust this Court held that a contract could not be rescinded after the expiry of the due date for the purpose thereof. Abandonment of the contract work after expiry of the due date for the purpose would amount to breach, giving rise to a claim for damages against the party in breach.

44. In ***A.K.A.S. Jamal v. Moola Dawood Sons & Co.*** (supra), the Privy Council held that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent

upon the breach and cannot claim as damages any sum which is incurred due to his own neglect.

45. The High Court has dismissed the appeals filed by the Appellant, holding that the Trial Court had, on consideration of the entire evidence and materials available on record decreed the suit filed by the Respondent-Port Trust and dismissed the claim of the Appellant.

46. Observing that the main submission made on behalf of the respective parties before the High Court swirled around whether there was any concluded contract or not, the High Court noted the following judgments cited on behalf of the Appellant in this regard:-

(i) Visakhapatnam Port Trust, Visakhapatnam and Anr. v. Bihar Alloy Steels Ltd. And Ors.⁹

(ii) Raghunandhan Reddy v. The State of Hyderabad thr. The Secretary to Government Revenue Department¹⁰

(iii) Mahesh Transport Co. v. T. & D. Workers' Union¹¹

(iv) M.V. Shankar Bhat and Anr. v. Claude Pinto since (D) by Lrs. and Ors.¹²

(v) Jawahar Lal Burman v. Union of India¹³

(iv) U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd. And Ors.¹⁴

9. 1991 (1) A.L.T. 582

10. AIR 1963 AP 110

11. AIR 1974 SC 868

12. (2003) 4 SCC 86

13. AIR 1962 SC 378

14. AIR 1996 SC 1373

47. In the judgment and order under appeal, the High Court has not discussed any of the judgments referred to above. The High Court simply recorded the contention of the Appellant that there was no previous approval of the Board of Trustees as contemplated under Section 34(1) of the Major Port Trusts Act, 1963, and therefore, no enforceable contract.

48. In ***Visakhapatnam Port Trust, Visakhapatnam and Anr. v. Bihar Alloy Steels Ltd. and Ors.*** (supra) a Division Bench of the High Court held:

“17. In the instant case the provisions of S. 34 prescribe the manner in which a contract is to be made on behalf of the Board of Trustees and further sub-section (3) contains a prohibition that a contract not made in accordance with the earlier portions of Section shall not be binding on the Board. It has been held by the Supreme Court in its decision reported in H.S. Rokhy v. New Delhi Municipality AIR 1962 SC 554 that the effect of such a prohibition as is contained in sub-sec. (3) of S. 34 renders the contract itself void and unenforceable. In that case the controversy was about estoppel against New Delhi Municipal Corporation which was governed by the Punjab Municipal Act, 1911, which contains a similar provision viz., S. 47.”

49. In ***Visakhapatnam Port Trust, Visakhapatnam and Anr. v. Bihar Alloy Steels Ltd. and Ors.*** (supra) this Court held that the promise as contained in the letter of Traffic Manager to lease an area of port trust was void and unenforceable against the Board of Trustees, there being no contract made in accordance with Section 34 of the Major Port Trusts Act.

50. In ***Raghunandhan Reddy v. The State of Hyderabad thr.***

The Secretary to Government Revenue Department (supra), a Division Bench of the High Court held:

“8. It is a well-established principle of law that only when an offer is accepted that the contract is concluded and binds the parties. It is equally well-settled that before an offer is accepted, the offerer can withdraw his offer, but if the acceptance is conditional or is not final, then there is no concluded contract.”

51. The judgment of this Court in **Mahesh Transport Co. v. Transport and Dock Workers’ Union** (supra), which relates to the validity and propriety of the reference of an industrial dispute under Section 10(1) of the Industrial Disputes Act, 1947, apparently has no relevance to the issues involved in this case. In **M.V. Shankar Bhat and Anr. v. Claude Pinto since (D) by Lrs. and Ors.** (supra), this Court held that an agreement which was subject to ratification by heirs under a will who were not parties to the agreement did not create a conclusive contract. The relevance of the judgment is unexplained.

52. In **U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd. And Ors.** (supra) this Court held that a contract by a Government Notification is not binding unless it is executed in accordance with its Articles of Association.

53. The High Court found that there was no dispute that tenders had been called for and that it was the case of the Respondent Port Trust that the offer of the Appellant had in fact been accepted and purchase order issued on 31st October, 1990 under registered Post

that had been acknowledged but refused by the Appellant. The High Court also recorded the contention of the Appellant that in the absence of previous approval from the Board of Trustees of the Respondent-Port Trust, under the proviso to Section 34(1) of the Major Port Trust Act 1963, there could be no enforceable contract. Even though the High Court referred to the submission of the Appellant that the letter of intent was subject to ratification by the Board and the only witness of the Respondent-Port Trust had admitted that no contract had been concluded, the High Court did not deal with the same. The High Court observed:

"....The main reliance placed by the Visakhapatnam Port Trust under Clause 16 of the tender conditions in Ex.A.1, was that in the event of non-supply of the material, the Port Trust has right to cancel the contract itself whereas the case of the Company was that there was no contract at all. Therefore, one has to see whether there was really any concluded or enforceable contract before one could blame the other. There has been a quite re-assertion through the evidence on behalf of the Port Trust by P.W.1. There is a reference to a mention in Ex.A.8 as to the ratification by the Board, which according to the M/s Padia Timber Company Pvt. Ltd., nothing is forthcoming. Further, P.W.1 during his cross-examination, stated that it is true that the contract was not concluded. However, that itself cannot be a reflection on the nature of intent, which could follow the facts and circumstances in the documents, which are staring at. It is to be seen that even according to the M/s Padia Timber Company Pvt. Ltd., and as per its letter dated 27.11.1990 ex.A.10, the M/s Padia Timber Company Pvt., Ltd., admitted about the receipt of the letter dated 29.10.1990 and the acceptance of tender which is valid for three months. Therefore, having regard to the letter in Ex.A.10 mentioning about the acceptance of the tender on 29.10.1990, it is not open to the M/s Padia Timber Company Pvt. Ltd., to fall back and say that there was no acceptance at all nor there was any concluded contract. The Court below was rightly held that the tender of the defendant was duly accepted on 29.10.1990 which was followed by the purchaser order on 31.10.1990 and that itself is more enough to show that there was concluded and enforceable contract. Thus,

nothing lies in the mouth of the M/s Padia Timber Company Pvt. Ltd., to say that there was no concluded contract. Further, having regard to facts and circumstances and admittedly there being no steps at all in terms of such acceptance, the breach squarely falls only on the M/s Padia Timber Company Pvt. Ltd. and therefore, the Visakhapatnam Port Trust has rightly forfeited the amount and the Court below was rightly held that the said plaintiff namely the Visakhapatnam Port Trust is entitled for the amounts as claimed. Following the same and consequently to the said findings which go to the very root of the case itself, the claim as made by the M/s Padia Timber Company Pvt. Ltd., for refund in the other suit also squarely falls to ground with the self-same reasons. Hence, we do not find any merits in these appeals..."

54. With the greatest of respect, the High Court has cursorily dealt with the contentions of the Appellant and has not even discussed the cases that had been cited on behalf of the Appellant.

55. The Trial Court relied on Section 4 of the Contract Act, but completely overlooked Section 7. Section 7 of the Indian Contract Act, 1872 is set out hereinbelow for convenience:-

"7. Acceptance must be absolute.—In order to convert a proposal into a promise the acceptance must— —In order to convert a proposal into a promise the acceptance must—"

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance."

56. It is a cardinal principle of the law of contract that the offer and acceptance of an offer must be absolute. It can give no room for

doubt. The offer and acceptance must be based or founded on three components, that is, certainty, commitment and communication. However, when the acceptor puts in a new condition while accepting the contract already signed by the proposer, the contract is not complete until the proposer accepts that condition, as held by this Court in ***Haridwar Singh v. Bagun Sumbrui and Ors.***¹⁵ An acceptance with a variation is no acceptance. It is, in effect and substance, simply a counter proposal which must be accepted fully by the original proposer, before a contract is made.

57. In ***Union of India v. Bhim Sen Walaiti Ram***¹⁶, a three-Judge Bench of this Court held that acceptance of an offer may be either absolute or conditional. If the acceptance is conditional, offer can be withdrawn at any moment until absolute acceptance has taken place.

58. In ***Jawahar Lal Burman v. Union of India*** (supra), referred to by the High Court, this Court held that under Section 7 of the Contract Act acceptance of the offer must be absolute and unqualified and it cannot be conditional. However, in the facts and circumstances of that case, on a reading of the letter of acceptance as a whole, the Appellant's argument that the letter was intended to make a substantial variation in the contract, by making the deposit of security a condition precedent instead of a condition

15 AIR 1972 SC 1242

16 (1969) 3 SCC 146

subsequent, was not accepted.

59. The High Court also overlooked Section 7 of the Contract Act. Both the Trial Court and the High Court over-looked the main point that, in the response to the tender floated by the Respondent-Port Trust, the Appellant had submitted its offer conditionally subject to inspection being held at the Depot of the Appellant. This condition was not accepted by the Respondent-Port Trust unconditionally. The Respondent-Port Trust agreed to inspection at the Depot of the Appellant, but imposed a further condition that the goods would be finally inspected at the showroom of the Respondent-Port Trust. This Condition was not accepted by the Appellant. It could not, therefore, be said that there was a concluded contract. There being no concluded contract, there could be no question of any breach on the part of the Appellant or of damages or any risk purchase at the cost of the Appellant. The earnest deposit of the Appellant is liable to be refunded.

60. Since we hold that the Appellant was neither in breach nor liable to damages, it is not necessary for us to examine the questions of whether the compensation and/or damages claimed by the Respondent Port Trust was reasonable or excessive, whether claim for damages could only be maintained subject to proof of the actual damages suffered, and whether the Respondent Port Trust had taken steps to mitigate losses. We also need not embark upon the academic exercise of deciding whether prior approval of the Board of

Trustees is a condition precedent for creation of a valid contract for supply of goods, or whether post facto ratification by the Board would suffice.

61. The Appellant was entitled to refund of earnest money deposited with the Respondent-Port Trust. The earnest money shall be refunded within four weeks with interest @ 6% per annum from the date of institution of suit No.450 of 1994 till the date of refund thereof.

62. The appeal is, accordingly, allowed. The Judgment and order of the High Court under appeal as also the common judgment and order of the Trial Court in O.S. No.106 of 1993 and O.S. No.450 of 1994 are set aside. There will be no order as to costs.

.....J
(NAVIN SINHA)

.....J
(INDIRA BANERJEE)

JANUARY 05, 2021
NEW DELHI