

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.07.2010

CS(OS) No. 401/1998

MS SHOES EAST LTD

..... PLAINTIFF

Vs

MUNAK CHEMICALS LTD.

..... DEFENDANT

Advocates who appeared in this case:

For the Plaintiffs : Mr Pavan Sachdeva, Managing Director and Authorized Representative of the Plaintiff.
For the Defendant: Mr M.G. Dhingra & Ms Gita Dhingra, Advocates

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. | To be referred to Reporters or not ? | Yes |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

RAJIV SHAKDHER, J

1. This is a suit instituted for recovery of monies advanced by the plaintiff towards supply of Granulated Single Super Phosphate (hereinafter referred to as 'GSSP') with interest at the rate of 18% per annum from 01.04.1995.

2. The facts in this case fall in a narrow compass. In brief the plaintiff's case is as follows:

2.1 The plaintiff had secured, it appears, a contract for supply of 3200 metric tons (MT) of GSSP to a buyer at Bangladesh. For this purpose a Letter of Credit (hereinafter referred to as 'LC') was opened by the buyer at Bangladesh in favour of the plaintiff. It appears that the terms of the LC required the goods to reach the Darshana station, Bangladesh by 31.12.1994. There is some evidence in the matter, the details of which I will discuss in the later part of my judgment, which seems to suggest that an amended LC was drawn which, extended the date of shipment as well as the validity of the LC.

2.2 The plaintiff, who was not a manufacturer of GSSP, entered into a Memorandum of Understanding dated 17.01.1995 (Ex. P1) (hereinafter referred to as 'MOU') with the defendant for purchase of GSSP. The broad terms of the MOU in so far as they are relevant for the purposes of the present suit were as follows:

(i) The plaintiff agreed to purchase 3200 MT ($\pm 5\%$) of GSSP as per the following specifications:

(a) GSSP would be of gray or white colour and would be water soluble P205 14% (minimum) by weight, as per norms of Bangladeshi Government's specifications.

(b) The defendant would manufacture GSSP on behalf of the plaintiff for export to Bangladesh, which would be duly packed in yellow bags with name of the plaintiff printed upon them. The net weight of each bag would be 50 kg.

(c) The defendant would supply GSSP at the rate of Rs 2850 PMT F.O.R. Darshana via Gede or Singhabad F.O.R. Rohanpur. The price would be inclusive of all loading, freight, insurance and other related expenses towards rail booking etc.

(d) The total quantity of 3200 MT GSSP would be supplied on a trial basis in two (2) rake loads of 1600 MT ($\pm 5\%$).

(e) Inspection of the material would be conducted by SGS inspection or any equivalent inspection agency in India at the time of loading.

(To be noted, I have deliberately not dwelled on all other specifications of the GSSP such as colour, moisture etc., as they are not relevant for the purposes of adjudication of the suit).

(ii) The total consideration for supply of 3200 MT of GSSP was fixed at Rs 91,20,000/-, which was to be paid in the following manner:

(a) the first instalment of 25% equivalent to Rs 22,80,000/- was to be paid in advance, at the time of signing of the MOU, and after receipt of the buyer's LC;

(b) the second instalment, once again an advance for the second rake load, equivalent to Rs 22,80,000/-, was to be paid at the time of completion of packing of the first rake at the defendant's workshop at Bhatinda;

(c) the third instalment of 25%, equivalent to Rs 22,80,000/- was to be paid to the defendant on receipt of RRs of first rake load;

(d) the last, and the fourth instalment of 25%, i.e., Rs 22,80,000/- was to be paid as and when RRs of the second rake load were handed over to the plaintiff.

2.3 The plaintiff along with its letter dated 21.01.1995 (Ex. D1) (hereinafter referred to as "addendum") remitted an advance sum of Rs 22,80,000/- in the form of a cheque towards first instalment to the defendant. There is no dispute that the said cheque was received by the defendant, and that it was credited to the account of the defendant in and around 23.01.1995.

2.4 What is of importance is that by the aforesaid letter it was indicated to the defendant that it could supply the first rake load by first week of February, 1995, and the second rake load of GSSP by 18.02.1995; after due inspection by the SGS or any other competent Inspection agency. A request was also made by the plaintiff that the defendant should positively place an indent with the Railways by 23.01.1995 with regard to both rakes in CRT and BCX wagons. The two indents were to be made out separately in the plaintiff's name; one for Gede F.O.R. Darshana, and second for Singhabad F.O.R. Rohanpur.

2.5 What is of significance is that in the addendum there is a reference to a discussion with the defendant, on the aspect that the defendant was required to manufacture 1600 MT of GSSP in off-white colour from 21.01.1995, so that it would be in a position to dispatch the goods to the mentioned destinations by 08.02.1995. Significantly, the addendum bears the signatures of the representative of the defendant. It is, therefore, more in the nature of a supplement to the MOU executed on 17.01.1995 (Ex P1) between the plaintiff and the defendant.

2.6 From hereon the plaintiff of course says that the defendant failed to adhere its obligations to supply the agreed quantity of GSSP, and resultantly, the plaintiff in turn could not execute its export obligations. The plaintiff, it is alleged, lost out on its contract to export GSSP to the buyer in Bangladesh, and therefore, suffered a loss to the extent of Rs 50 lacs. There is, however, no claim lodged by the plaintiff for alleged loss suffered in that regard.

2.7 The plaintiff has further averred that since April, 1995 it sought refund of the advance amount, and as a matter of fact, offered that the defendant deducts the cost of 3200 MT bags with the plaintiff's name printed on them. In this regard, plaintiff avers that it had sent communications dated 25.04.1995, 22.05.1995, 03.06.1995, 07.06.1995, 12.06.1995, 02.08.1995, 14.08.1995 and 30.08.1995.

2.8 To be noted that communications dated 02.08.1995 and 30.08.1995 were not filed by the plaintiff. What is placed on record are only photocopies.

2.9 The plaintiff, it is averred, thereafter issued a legal notice dated 24.07.1995. Once again the original was not filed. This legal notice was followed by yet another legal notice dated 08.10.1997 (Ex. PW1/19). Even though a photocopy of this document was filed the defendant has accepted the receipt of the document; which the defendant is said to have been replied, vide letter dated 10.11.1997 (Ex. D2). The receipt of the reply is admitted by the plaintiff.

3. Having not received a favourable response from the defendant, the plaintiff instituted a suit for recovery of the amount paid as advance alongwith claim for interest at the rate of 18% per annum.

3.1 To be noted that in the plaint even though interest on Rs 22,80,000/- is actually calculated at the rate of 18% per annum, it is incorrectly shown to have been calculated at the rate of 24% per annum from 01.04.1995 to 28.02.1998 in paragraph 18 of the plaint. This fact was accepted during the course of oral submissions made on behalf of the plaintiff. The rate of interest should thus read as 18% per annum.

3.2 The suit was moved in court on 03.03.1998.

3.3 The defendant has refuted the claim of the plaintiff on various grounds, which are as follows:

- (i) The plaint has not been signed and verified by duly authorized person.
- (ii) The claim of the plaintiff is barred by limitation. The MOU (Ex. P1) was executed on 17.01.1995, whereunder a cheque dated 21.01.1995 in the sum of Rs 22,80,000/- was handed over to the defendant. The suit having been filed on 28.02.1998, is barred by limitation.
- (iii) Even though the plaintiff had paid, the first instalment of 25% of the total consideration, equivalent to Rs 22,80,000/-; the second instalment also equivalent to 25%, i.e., a sum of Rs 22,80,000/-, which was to be paid at the time of completion of the packing of the first rake; was not paid. This fact was intimated to the plaintiff through letter bearing No. MCL/DLI/Export/95 dated 14.02.1995. In support of this contention reference was made to the indent dated 02.02.1995 placed with the Railways, at Bhatinda; for the purposes of transporting the material manufactured and packed by it, for export to Bangladesh. Similarly, it was contended that the defendant in due discharge of its obligations had made requisite contact with the inspection agency, to carry out inspection of GSSP manufactured by it in terms of the MOU.
- (iv) The defendant averred that in view of the fact that the existing LC mandated supplies to reach the Darshana railway station in Bangladesh latest by 31.12.1994, (which was an impossibility) by a letter dated 25.01.1995 the plaintiff was requested to make suitable amendments to the LC, in particular clause 16, which referred to the aforementioned date, by which, supplies had to reach Bangladesh. In this connection, reference is also made to another letter dated 17.02.1995 whereby, the plaintiff was called upon to make suitable amendments to the LC, and pay as agreed the second instalment of Rs 22,80,000/-. The defendant has averred that even though it had manufactured one rake load of GSSP weighing 1600 MT, in accordance with its obligations under the MOU, the plaintiff breached the terms of the MOU by failing to: firstly, secure an amended LC; secondly, to obtain an export licence, and; lastly, to pay the second

instalment of Rs 22,80,000/-. These infractions, the defendant alleges, happened despite repeated communications of the defendant to the plaintiff. Reference in this regard is made to letters dated 25.01.1995, 14.02.1995, 17.02.1995 and 23.03.1995.

(v) The defendant has further averred that even though it had manufactured 50% of the quantity agreed to between the parties, which was valued at Rs 45,60,000/- it could sell none of it, as it was largely (approximately 1000 MT) damaged due to moisture. Since the material manufactured was specific to the contract executed between the parties, which required that the GSSP in issue, should be water soluble P205 14% (minimum) by weight, the remaining quantity could not be off loaded in the Indian market as, the then prevailing Fertilizer Control Order, 1985 issued by the Indian Government, barred manufacture and sale of GSSP of “less than 16% water soluble P205”.

4. Based on the aforesaid stand taken by the parties, the court vide its order dated 07.03.2003 framed the following issues:

- (i) Whether the suit is barred by limitation? OPD
- (ii) Whether the plaint is duly signed, verified and instituted by duly authorized person? OPP
- (iii) Whether the defendant committed breach of terms of MOU dated 17th January, 1975 (s.i.c. 1995)? OPP
- (iv) Whether the plaintiff wrongfully rescinded the contract as claimed in para 3 of preliminary objection of written statement? OPD
- (v) Whether the plaintiff is entitled to the suit amount claimed?
- (vi) Whether the plaintiff is entitled to interest? If so, at what rate and what period?
- (vii) Relief.

SUBMISSIONS:

5. In the background of the aforesaid facts and circumstances and the stand taken by parties the plaintiff's case was argued by Mr Sachdeva, Managing Director and

authorized representative of the plaintiff, while the submissions on behalf of defendant were made by Mr Dhingra, Advocate.

5.1 Mr Sachdeva, apart from reiterating the stand taken in the plaint, laid stress on the following:

(i) The defendant ought not to have been concerned about the plaintiff's export obligation.

(ii) The defendant's privity of contract was with the plaintiff, and not with the overseas buyer. Therefore, the entire argument raised in the written statement about failure to amend the LC or to obtain export licence is of no significance, in so far as the contract which subsisted between the plaintiff and the defendant was concerned.

(iii) The defendant never manufactured 1600 MT of GSSP, i.e., the first rake as contended by it. Therefore, there was no occasion for the plaintiff to pay the second instalment as contended by the defendant.

(iv) There is a contradiction in the stand of the defendant as is evident from the evidence on record, in as much as, while the defendant's witness DW1 admits to the effect that the amended LC was to expire on 31.03.1995; whereunder shipment had to be made by 31.01.1995, it purportedly booked a wagon with the Railways on 02.02.1995. This could not have been done unless it was possible to negotiate the supplies till end of March, 1995. For this purpose, reliance was placed on the fact that what was executed was "Stale RRs".

(v) The defendant's witness has contradicted himself, in as much as, while on the one hand he says that a railway wagon could not be booked without the export licence or the LC in place, on the other hand, he went on to book railway wagon on 02.02.1995. Therefore, the stand of the plaintiff's witness to the effect that the export licence had been handed over to the defendant, ought to be accepted.

(vi) The addendum, i.e., letter dated 21.01.1995 (Ex D1), which is countersigned by the defendant, clearly mentions the fact that it had been agreed that the defendant would supply 1600 MT of GSSP in "*off-white*" colour. The defendant, on its own showing, is

in breach when it seeks to place reliance on its communication dated 25.01.1995 (EX. DW-A) wherein, amongst others, it clearly states that it is unable to supply GSSP of off-white colour.

(vii) On the aspect of limitation, it was submitted that it was the defendant who had in fact rescinded the contract obtaining between the parties, on its own showing, as is demonstrable from the letter dated 21.03.1995 filed by the defendant. To be noted this letter is neither exhibited in the examination-in-chief of the defendant's witness DW1 nor has the original of this letter been filed by the defendant. Based on the aforesaid, it was contended that the cause of action, if any, arose for seeking refund at the earliest on 21.03.1995, and thereafter in April, 1995 when the plaintiff sought refund of the monies advanced to the defendant. It was submitted that the defendant's action of withholding the advance was a continuing wrong and hence, the provisions of Section 22 of the Limitation Act, 1963 (hereinafter referred to as 'Limitation Act') being applicable, the suit was within limitation. In this regard, recourse was also had to the provisions of Section 39 of the Contract Act, 1872 (hereinafter referred to as the "Contract Act").

(viii) It was further contended that the defendant never offered to supply what was purportedly manufactured by the defendant. The falsity of the defendant's stand was sought to be stressed upon by alluding to the fact that it never applied for inspection of the goods, as mandated under the MOU (Ex. P1), by SGS or any other competent inspection agency.

6. In rebuttal Mr Dhingra, apart from reiterating the stand taken in the written statement, laid stress on the following:

(i) The cause of action for claim for refund could only commence from: either the date of MOU, or latest by the date on which the cheque was issued and/or credited. It was contended that the cheque was admittedly credited in the defendant's account on 23.01.1995. Even if the said date is taken as the date on which the cause of action would commence, the suit is barred by limitation.

(ii) The plaintiff's stand that the defendant had not manufactured one rake load of GSSP, is false. It was submitted that if that was the situation which obtained where was the occasion for the plaintiff to offer adjustment of the cost incurred by the defendant, towards bags, in which the goods had to be packed. In this regard the defendant sought to place reliance on the letter dated 25.04.1995 (Ex. PW1/6) filed by the plaintiff. To be noted, the receipt of this document has been denied by the defendant.

(iii) The plaintiff's claim for recovery of advance has to be seen in the background of the following: The plaintiff had lost its export contract with the buyer in Bangladesh. For this purpose reliance is placed on the averments made in paragraph 12 to 13 of the plaint. It was contended that, as was evident from the letter dated 21.01.1995 (Ex. D1), the first rake load was required to be put on board by 08.02.1995, while the second rake load was to be put on board by 18.02.1995. Since, the back to back contract with the exporter had come to an end, the plaintiff was not interested in going through with the transaction and hence, aborted the contract; and did not, consequently, pay the second instalment.

(iv) In none of the communications; on which the plaintiff has placed reliance, is there any assertion of the fact that the defendant had not manufactured the first rake load of GSSP. In order to support this submission Mr Dhingra relied upon the contents of plaintiff's legal notice dated 08.10.1997 (Ex. PW1/19), in which, there is a specific reference (in paragraph 5 of the said notice) to the fact that the contract could not be executed as the shipment was not made. It was stressed that there was no allegation that the goods were not manufactured, as is now sought to be alleged by the plaintiff. It was contended that shipment was not made, since the second instalment, which the plaintiff was required to pay in terms of the MOU (Ex. P1), had not been paid.

(v) To demonstrate that the first rake load of 1600 MT of GSSP had been manufactured, reliance was placed on the following extract of the letter dated 21.01.1995 (Ex. D1). "*.....As discussed, you are also requested to start **further** manufacturing for 1600 MT GSSP in off-white colour from 23rd Jan, 95....*". Reliance was also placed on

the evidence of DW1 to demonstrate that on 06.02.1995, defendant had sent a communication (Ex. DW1/5) to SGS for the purposes of getting the goods in issue inspected.

REASONS

7. I have heard both Mr Sachdeva, Managing Director and authorized representative of the plaintiff as well as Mr Dhingra, Advocate appearing for the defendant, and also considered the pleadings, as well as the evidence on record. Before I proceed further, let me advert to that part of the evidence which, in my view, is relevant for determination of issues raised in the suit.

8. The plaintiff on its part examined only one witness, i.e., its own Managing Director, i.e., Mr Sachdeva (PW1), who, incidentally, as noticed hereinabove, has also argued the matter before me. PW1 in the examination-in-chief has basically replicated the stand taken in the plaint. In the cross-examination, however, of PW1 it has come through that after the MOU (Ex. P1) was executed on 17.01.1995 between the plaintiff and the defendant, an addendum in the form of letter dated 21.01.1995 (Ex. D1) was executed between the parties. PW1 also accepted the fact that the defendant had issued a letter dated 25.01.1995 (Ex. DWA). PW1 further accepted the fact that he was called upon by the defendant to furnish an amended LC as the original LC had expired in December, 1994. PW1, however, asserted in his cross-examination that an amended LC was provided to the defendant; and that as per the amended LC the shipment was to be made by 31.01.1995 while, its validity expired on 02.03.1995. PW1 also asserted that *“no amended LC was given having a date after 31.03.1995 as it was not required”*. PW1 also asserted the fact that he had handed over an export licence to the defendant, though he did not remember the exact date of delivery nor had he placed on record, any document to that effect. PW1 specifically, refuted the suggestion that the defendant had manufactured the requisite quantity of GSSP, and kept it packed as required under the MOU. PW1 also asserted that he had written letters to the defendant in April, 1995 asserting that they had not manufactured the articles; though from the record he was not

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able to show any such document to that effect. He refuted the suggestion in his testimony that after August, 1995 he had not personally written any letters to the defendant; even while asserting that Mr U.K. Neogy, who was the representative of the plaintiff had, had correspondence with the defendant on this aspect. He accepted the fact that apart from letter dated 21.01.1995 (Ex. D1) there was no other letter which was countersigned by the defendant or, issued in the form of an acknowledgement, or duly received by the defendant. He accepted the fact that the plaintiff was not maintaining any dispatch or receipt register. He also accepted the fact that “*defendant had spent a lot of money in procuring bags in which fertilizers were to be packed*”. In this connection, he further went on to accept that he had asked the defendant to refund the money “*after deducting the payments made for purchase of bags in which fertilizers were to be packed*”. He further asserted that the plaintiff was required to pay a sum of Rs 22.80 lacs to the defendant once the goods were packed in the bags. He denied that the defendant had informed the plaintiff that “*one rail rake had been packed*”. He accepted the fact that the defendant had sought the payment of the second instalment of Rs 22.80 lacs vide its reply dated 10.11.1997 (Ex. D2) to the legal notice dated 08.10.1997 (Ex. 1/19) issued by the plaintiff. PW1 denied the fact that the defendant had suffered a loss of Rs 24 lacs as alleged, or that the goods could not have been sold in the market since they were of perishable nature. He emphasized the fact that he had obtained an export licence for GSSP in January, 1995 which was valid till April, 1995. To be noted, PW1 was directed to produce the licence in court. He denied the suggestion that he had reneged on his obligations under the contract since his contract with the Bangladesh purchaser stood cancelled.

9. Mr P.D. Sharma (DW1) in his testimony accepted the fact that the MOU was signed in January, 1995 and that he had not seen any document before signing the said MOU. He deposed that the defendant had been in past involved in exports, and in that connection in 1994 had exported GSSP to Bangladesh. He also claimed knowledge with respect to the documentation required for the purposes of export. DW1 also accepted the

receipt of first instalment from the plaintiff in January, 1995. He also accepted the fact that railway wagon was booked by the defendant on 02.02.1995 as they had already “manufactured 1600 MT fertilizers by the time plaintiff wrote this letter”. To be noted this letter could only have reference to letter dated 21.01.1995 (Ex. D1) since this was also the stand of Mr Dhingra before me in the course of arguments. DW1, however, while asserting that a railway wagon could not be booked without “letter of credit and export licence”, curiously asserted that the station wagon was booked when they were not in possession of the LC. DW1 went on to say in his testimony, that the railway wagon booked by the defendant was cancelled somewhere in March, 1995. DW1 also made reference to the fact that neither did the plaintiff ask for return of the bags, which had plaintiff’s name printed on it, nor did the defendant offer to return the bags to the plaintiff; the bags were retained by the defendant. DW1 further stated that the bags were not available with the defendant since they were perishable commodity and, consequently, the bags had been destroyed. DW1 also accepted the fact that the fertilizers manufactured by it were “grey” somewhat “off-white”. He accepted the fact that “*defendant was asked to manufacture off-white fertilizers, but which cannot be manufactured*”. The witness went on to say that he was not informed that the colour of the fertilizer was to be off-white. He accepted the fact that he had signed letter dated 21.01.1995 (Ex. D1). He also accepted the contents of paragraph 2 of the said letter. The witness (DW1) went on to say that he had received money in furtherance of the letter dated 21.01.1995 (Ex. D1). He accepted the fact that cheque, mentioned in the said letter, was received by him on 23.01.1995, and that the funds referred to therein, had been appropriated by the defendant by depositing the said cheque with its banker.

9.1 Interestingly, as regards the amended LC, DW1 at first stated that no amended LC was given to him; on being shown the following extract from his affidavit of evidence, i.e.:

“.....Another L/C dated 4.1.1995 received by telex by plaintiff-company copy of which was supplied to defendant-company and marked Ex. D-3 only

shows amendment of L/C No. 1162/092/29/94 dated 20.11.1994 regarding extension of shipment date as 31.1.1995 and negotiation within 02.03.1995 i.e., 30 days from the date of shipment with no other changes in terms and conditions of L/C dated 20.11.1994.....”

he answered as follows:

“It is correct that the LC where date was amended upto 31st January, 1995, copy thereof was given by the plaintiff-company to the defendant.

*It is incorrect to suggest that under this LC, the shipment could be done till 31st March, 1995. The LC was valid upto 31st March, 1995. **However, the date for shipment was 31st January, 1995.** Reservation for the railway wagon was cancelled by me because we could not have shipped the goods by 31st January, 1995, though the date of validity was upto 31st March, 1995. **I had applied for reservation of the railway wagons on 2nd February, 1995.** It is incorrect to suggest that shipment could be done till 2nd March, 1995.” (Emphasis is mine)*

9.2 On the aspect of inspection the DW1 stated as follows:

*“It is correct that a certificate is issued by the inspection agency. **However, in the present case inspection was not done.** Inspection is done at the time of shipment. It is correct that inspection was done when the goods were ready or at the time when the railway wagon was loaded.”*

(Emphasis is mine)

9.3 On the aspect of correspondence exchanged with the plaintiff the DW1 deposed as follows:

“The defendant company maintained dispatch and receipt register. I have not brought that register. I can produce it if so directed. I do not have any receipts for sending the letters dated 7th February, 14th February and 21st March, 1995. I have dispatched those letters. I did not receive the letters dated 25th April, 3rd June and 7th June, 1995.”

9.4 Finally, on a specific question being asked, as to whether the defendant had manufactured the requisite fertilizers in off-white colour, the DW1 stated as follows:

*“It is correct that I **did not manufacture** the requisite fertilizer in **off-white colour**” (emphasis is mine)*

9.5 On the court putting a specific question with regard to why railway wagons had been booked after the date of shipment had expired, the DW1 responded by saying that *“this was done in pursuance to the Memorandum of Understanding”*.

10. What is apparent from the pleadings, submissions made before me and the evidence on record, is as follows:

10.1 That there is no denying that a MOU (Ex. P1) was executed which, required the defendant to supply 3200 MT ($\pm 5\%$) of GSSP at the rate of 2850 per MT to the plaintiff in two rake loads. The MOU required that the colour of the GSSP would be grey/black, and amongst others specifications would be the water soluble P205 14% (minimum) by weight.

10.2 The MOU (Ex. P1) was amended by way of an addendum dated 21.01.1995 (Ex. D1), whereby the defendant was handed over a cheque in respect of the first instalment in the sum of Rs 22.80 lacs. The communication dated 21.01.1995 (Ex. D1) is countersigned by DW1. This fact has been accepted by DW1 in his testimony. In this context the testimony of DW1 attain importance. By virtue of the said communication dated 21.01.1995 (Ex. D1) it was specifically provided that the first rake load would be supplied by the first week of February and, similarly, the second rake load on 18.02.1995; after it was duly inspected by SGS or any other “equivalent” competent inspection agency. The defendant was required to place its indent with the Railways Authority by 21.01.1995.

10.3 It is obvious that by this time the defendant had not manufactured the required quantum of GSSP, i.e., first rake load; a fact which is quite evident from the content of second paragraph of letter dated 21.01.1995 (Ex. D1) when read in totality. The relevant extract of communication dated 21.01.1995 (Ex. D1) reads as follows:

“As discussed, you are also requested to start further manufacturing for 1600 MT GSSP in off-white colour from 23rd Jan. 95 so that you would be able to send the goods to any of the above destinations by rake by 8th Feb. 95.”
(emphasis is mine)

10.4 Even though Mr Dhingra had sought to argue the word “further” is indicative of the fact that one rake load had already been manufactured, in my view, the contrary is established. The reason for that is: on a holistic reading of the entire paragraph, it is quite clear that it alludes to the manufacture of first rake load, as there is a reference to the date of 08.02.1995 by which time, the goods had to be sent to its destination. The reference to the date 08.02.1995 can be easily co-related to what is stated in the first paragraph of the letter, wherein parties had agreed that the first rake load should be supplied by first week of February.

10.5 The other fact which comes through in the evidence is that an amended LC was in existence; which was handed over to the defendant. DW1 has categorically accepted this fact in his testimony. The fact that defendant had not manufactured the first rake of GSSP, equivalent to 1600 MT, as required, in “off-white” colour, is also accepted by DW1 in his testimony. Therefore, the stand of the defendant that the plaintiff was in breach of its obligations under the contract in as much as it did not pay the second instalment, even though the first rake load had been manufactured and packed by it, cannot be accepted.

10.6 There is another reason I am not persuaded to accept the defendant’s stand that they had manufactured the first rake load of GSSP. In terms of the MOU (Ex. P1) and addendum (Ex. D1) the defendant was admittedly required to obtain inspection of the GSSP, i.e., goods in issue, once they were manufactured. The defendant has not been able to place any credible evidence on record that such an arrangement had been made with SGS or any other equivalent competent “inspection authority”. The reliance by the defendant on letter dated 06.02.1995 (Ex. D1/5) along with the visiting card would, in my view, be no avail. The reason for this is that: a perusal of the document would show that it is in the nature of a general communiqué whereby, the defendant sought to introduce itself as an exporter of GSSP to Bangladesh, which was interested in appointing SGS as an inspecting agency. Towards this end, quotation was sought from SGS. Even if the said document is accepted as true (even though the plaintiff has denied any knowledge of

the said communication) there is nothing to show by way of a return correspondence that they were actually appointed for the job at hand. The lack of urgency is implicit in the communication of 06.02.1995 when it is seen in the light of the fact that the first rake load of 1600 MT of GSSP had to be dispatched by 08.02.1995 in terms of the addendum dated 21.01.1995 (Ex. D1). The defendant also relied upon a communication dated 02.02.1995 (Ex. DW1/5) evidently sent by one J.B. Boda Surveyors Pvt. Ltd. (hereinafter referred to as 'JB Boda') calling upon them to carry out pre-shipment supervision of "Single Super Phosphate" at defendant's factory in Bhatinda, Punjab. There is a reference to the defendant's letter dated 01.02.1995, in response to which the said letter was purportedly sent by JB Boda. The letter of JB Boda dated 02.02.1995 (Ex. DW1/5) specifically asked for a confirmation of the rates indicated therein. Assuming that this letter is accepted as correct, it is quite apparent that JB Boda was not appointed as the inspecting agency, since there is no letter placed on record showing the confirmation of the terms offered by the JB Boda. As per the terms of the MOU the defendant was required to get the goods inspected, and thereafter packed; and it was only thereafter that a legitimate demand for payment of the second instalment could be made from the plaintiff. The fact that inspection had not been conducted has also been accepted by DW1 in his testimony, referred to hereinabove.

10.7 The defendant's other objection that since the amended LC and the export licence had not been furnished the shipment of GSSP could not be made, also appears to be without merit. DW1's testimony on which much reliance was placed that GSSP could be exported only if amended LC and export licence were furnished is belied by the following: Firstly, as noticed above, an amended LC had been supplied; a fact which has been accepted by DW1. Secondly, PW1 asserted in his testimony that he had supplied the export licence. Thirdly, though the defendant contended to the contrary its witness DW1 accepted the fact that the wagon was booked on 02.02.1995; which as per the same witness (DW1) could not have been booked in the absence of either the LC or the export

licence. On appreciation of evidence, PW1's testimony seems more credible. The defendant's contention to the contrary will have to be rejected.

10.8 The other submission of the defendant that even the amended LC could not have served the cause of the plaintiff, in as much as, the shipment was to be made by 31.01.1995 seems tenuous to say the very least. The reason being that: even though according to DW1, as per the amended LC, the date of shipment was 31.01.1995, and LC itself had expired on 31.03.1995, the defendant curiously chose to book the wagon for trans-shipment of GSSP, on 02.02.1995. The plaintiff's witness PW1, on the other hand, strongly asserted that it was possible to negotiate shipment till 31.03.1995. There was no reasonable explanation offered either at the stage of examination by DW1, (even though this issue was squarely raised by the court, except to state that the wagon was booked 02.02.1995 to discharge the obligations under the MOU) or by Mr Dhingra, at the stage of arguments.

10.9 Therefore, on a consideration of material before me, it appears that the issues put forth by the defendant as the main causes which impeded trans-shipment of GSSP, were contrived, and not genuine.

10.10 Based on the evidence on record, and specially, the explanation given by DW1 the plaintiff's version seems more persuasive.

11. Dehors the above, what is of significance, in the context of the obligations undertaken by the defendant, is that while the defendant was made aware of the fact that GSSP manufactured by it, was meant for export to Bangladesh, the defendant's obligation was only to the plaintiff. The defendant was required to discharge its obligation in terms of the MOU (Ex. P1), and the addendum (Ex. D1). The defendant ought not to have been concerned as to whether the requisite LC and the export licence was available with the plaintiff. The defendant's obligation ended on manufacture of GSSP, in terms of the specifications provided in the MOU read with addendum (Ex. D1); and having the same inspected by SGS, or any other competent inspecting agency, with due intimation to the plaintiff. After these obligations were discharged, the first rake was

to be put on board for dispatch on or before 08.02.1995. It was only after the defendant, had packed the first rake load – would have been entitled to call upon the plaintiff to pay the second instalment. The stand taken by the defendant that the absence of the amended LC and the export licence, had impeded trans-shipment, it appears from the evidence on record, that this was an excuse contrived by the defendant as it was not ready with the GSSP of agreed specifications. This is quite evident from the following: First, the testimony of DW1 in which, in response to a query raised by the court as to why a railway wagon was booked when shipment date according to him expired on 31.01.1995, he answered that it was done to comply with its obligations under the MOU. This in my view clearly sustains the plea of the plaintiff that the alleged absence of the amended LC and the export licence was red herring, and the fact was, that the defendant was not ready with the specified GSSP. Here I may only note that DW1, who claimed in his testimony that he had the requisite experience with regard to export of goods, in particular, GSSP to Bangladesh and was familiar with the documentation required, accepted the fact that railway wagons could not have been booked without the LC and the export licence. PW1, on the other hand, has asserted in his testimony that the LC and the export licence was handed over to the defendant. As noticed above, in so far as the LC is concerned, the defendant has accepted the fact that it had received the amended LC, but there is a denial with respect to the export licence. The court had directed the plaintiff, during the course of cross-examination, to produce the export licence. Even though the same has not been produced; the fact that the defendant booked the railway wagon clearly shows that either it was not a material for booking of a wagon, and in that sense it was not necessary for the purpose of enabling the defendant to discharge its obligation, or that the same had been supplied. Either way the absence of the export licence would not persuade me to hold that the plaintiff had breached its obligations under the contract, thereby preventing the defendant from discharging its obligations under the MOU. Second, the specified GSSP was of “off-white” colour. The defendant had accepted the consideration, based on the said specifications provided in the addendum, and credited the money to its

account. The defendant admittedly did not manufacture the specified GSSP; a fact which clearly emerges from the testimony of DW1. As a matter of fact there is no evidence on record that the defendant manufactured even first rake of grey/black GSSP. The defendant's stand in this regard being in the nature of an affirmative defence, the burden to prove the same lay on the defendant. It would have to be borne in mind that the evidence in this regard would be completely in the possession of the defendant, the defendant ought to have produced relevant evidence to show that it had manufactured first rake of 1600 MT of GSSP. The defendant, in my view, miserably failed to discharge the burden placed on it. Therefore, the submission of Mr Dhingra that there was no assertion in the purported communications of the plaintiff to the defendant (assuming that they had been received by the defendant) that it had not manufactured the GSSP, is, in my view, of no relevance. The defendant being in possession of relevant evidence ought to have placed the material in that regard before the court, to demonstrate that it had, as a matter of fact, manufactured the first rake of 1600 MT of GSSP.

12. The other objection of the defendant that the plaint had not been duly signed, verified and instituted by an authorized person is also without merit. The plaintiff in its evidence has placed on record a certified copy of the Board of Directors Resolution dated 24.02.1998. In the examination-in-chief PW1 asserted that he is the Chairman-cum-Managing Director of the plaintiff, who was authorized by the Board of Directors (B.O.D.) resolution dated 24.02.1998 to institute the instant suit. He further asserted in his evidence that he was personally present in the said B.O.D. meeting, and the certified copy of the B.O.D. resolution dated 24.02.1998 is a reflection of what transpired at the said meeting. There is no confrontation on these aspects in the cross-examination of PW1 carried out by the counsel for the defendant. Therefore, for the defendant to contend that the plaintiff has not been able to prove that PW1 was the Chairman-cum-Managing Director of the company or was authorized to institute the suit for claiming refund of the amount advanced, i.e., a sum of Rs 22.80 lacs along with interest, would be futile. The ancillary objection of the defendant that the plaint has not been duly signed

and verified by an authorized person is, in my view, also without merit. PW1 being the Managing Director of the plaintiff-company cannot be said to be a person not authorized to sign and verify the pleadings in respect of the reliefs claimed in the suit. PW1 is proved to be the Chairman-cum-Managing Director of the plaintiff. In terms of Order XXIX of the Code of Civil Procedure, 1908 he would be the principal officer of the plaintiff and hence, recognized as the person who could sign and verify pleadings on behalf of the plaintiff. [See *United Bank of India vs Naresh Kumar & Ors (1996) 6 SCC 660*]

13. This brings me to the last aspect of the matter which is whether the claim of the plaintiff is barred by limitation. The defendant's stand that limitation would commence from the date when the MOU was executed i.e., 17.01.1995 or, latest by the date, the cheque in the sum of Rs 22.80 lacs was credited, is, in my view, untenable. The reason being that: from the evidence on record, it is clear that the parties intended to discharge their respective obligations even in the month of February, 1995. It is for this reason that DW1 booked a railway wagon on 02.02.1995. The plaintiff's assertion that the shipment could have been made till 31.03.1995 cannot be disregarded for the reason that the defendant has not been able to place anything on record which would demonstrate, as contended by it, that as per the amended LC the shipment could not have been made till 31.03.1995. The defendant has on the other hand itself placed on record a copy of the letter dated 21.03.1995 which seems to suggest, that for reasons given in the said letter, the defendant called off the transaction as according to it, it had become an "unsuccessful deal". The reasons given in the letter were briefly those which I have already dealt with, i.e., it had not received the amended LC, and that it had not been paid the second instalment as contemplated under the MOU. Interestingly there is no reference whatsoever to the export licence. As far as the amended LC was concerned, I have already indicated that it has come in the evidence that an amended LC had been received by the defendant. In so far as payment of second instalment was concerned, it was dependent on the defendant demonstrating manufacture of the first rake load of 1600 MT

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GSSP, and having the same inspected and packed. Therefore, on 21.03.1995 for the defendant to have termed the transaction as having become an “unsuccessful deal”, if at all, supplied a cause of action to the plaintiff on that date or thereafter for seeking a return of the monies advanced. In my view, the cause of action would only commence on or after 21.03.1995. Therefore, the suit instituted on 28.02.1998 or, as contended by the defendant during the course of argument on 03.03.1998, is well within the prescribed period of limitation. In these circumstances, the submission of the plaintiff that provisions of Section 22 of the Limitation Act would apply, in my view, do not require discussion or even the judgments cited in that regard by the plaintiff.

17. In the background of aforesaid discussion my opinion in respect of each of the issues framed is as follows:

Issue No. 1: The suit is within limitation. This issue is found against the defendant and in favour of the plaintiff.

Issue No. 2: The plaint has been signed, verified and instituted by a duly authorized person, i.e., PW1. This issue is also found in favour of the plaintiff and against the defendant.

Issue No. 3: The defendant had committed breach of terms of MOU in so far as it failed to supply the first rake load of 1600 MT GSSP as required under the MOU. This issue is found against the defendant and in favour of the plaintiff.

Issue No. 4: This issue is found in favour of the plaintiff and against the defendant, in as much as, the defendant has failed to establish a case of wrongful rescission of the contract by the plaintiff. It was the defendant, as observed above, which breached its obligation under the MOU (Ex. P1) read with the addendum (Ex. D1). Accordingly, this issue is found against the defendant and in favour of the plaintiff.

Issue Nos. 5, 6 & 7: These issues are also found in favour of the plaintiff. The plaintiff is entitled to refund of Rs 22.80 lacs paid in the form of first instalment in terms of the MOU (Ex. P1) and the addendum (Ex. D1). The plaintiff, however, has not been able to produce any evidence as regards what was the rate of interest prior to the institution of

the suit, i.e., between 1995-98, or during the pendency of the suit. However, given the fact that the transaction was decidedly commercial in nature, and on taking into account the entirety of the facts and circumstances of the case, simple interest at the rate of 9% per annum throughout from 01.04.1995 till the date of payment would sub-serve the interest of justice.

18. Accordingly, the suit is decreed in favour of the plaintiff and against the defendant. The plaintiff will be entitled to a decree in the sum of Rs 22.80 lacs with simple interest at the rate of 9% per annum from 01.04.1995 till the date of payment, along with costs. The suit is, accordingly, consigned to the record.

RAJIV SHAKDHER, J

JULY 01, 2010
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