Reserved On : 29/04/2026
Pronounced On : 17/07/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 531 of 1986

With

R/FIRST APPEAL NO. 1093 of 1987

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

and
HONOURABLE MR.JUSTICE L. S. PIRZADA

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Approved for Reporting	Yes	No
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HOUSE OF DUBARY & ORS.
Versus
THE OFFICER LIQUIDATOR OF HANSPA KNIT (P) LTD., & ORS.
==
Appearance:
ADVOCATE NOTICE NOT RECD BACK for the Appellant(s) No. 2
MR C B UPADHYAYA(3508) for the Appellant(s) No. 3,4
MR ND NANAVATI(507) for the Appellant(s) No. 1
MR ABHIJIT P JOSHI(1330) for the Defendant(s) No. 1
MR PRANAV G DESAI(290) for the Defendant(s) No. 6
MR SH SANJANWALA(729) for the Defendant(s) No. 7
MS PJ DAVAWALA(240) for the Defendant(s) No. 1
NOTICE NOT RECD BACK for the Defendant(s) No. 2,3
NOTICE SERVED for the Defendant(s) No. 4,5,8
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CORAM:**HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR.JUSTICE L. S. PIRZADA

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1) Introduction

1. Heard learned advocate Mr.C.B. Upadhyaya for the appellants and learned advocate Mr.Abhijit Joshi for the respective respondent.

2. These matters are cross appeals and for the sake of convenience, facts are recorded from First Appeal No.531 of 1986.

3. First Appeal No.531 of 1986 is filed by the defendant nos. 1 to 4 being aggrieved by Judgment and Order dated 31.01.1986 passed by

Civil Judge (Senior Division) Kutchh at Bhuj in Special Civil Suit No.120 of 1979 partly allowing the suit in favour of the plaintiff - respondent no.1 – M/s. Hanspa Knit (P) Ltd. (Under Liquidation) represented through Official Liquidator for decree of sum of Rs.49,81,336/- from the appellants- defendant nos. 1 to 4 with running interest at the rate of 12% per annum from the date of the suit till realisation. Counter claim filed by the appellants is rejected.

4. First Appeal No.1093 of 1987 is filed by plaintiff M/s. Hanspa Knit (P) Ltd. (in liquidation) being aggrieved by Judgment and Order dated 31.01.1986 passed by Civil Judge (Senior Division) Kutchh at Bhuj in Special Civil Suit No.120 of 1979 so far as not allowing freight and other charges and dismissing the suit qua defendant nos. 5 and 6.

5. Since both the appeals are cross appeals arising out of a common Judgment, First Appeal No.531 of 1986 is treated as a lead matter. For the sake of convenience, appellant nos. 1 to 4 are referred to as the defendant nos. 1 to 4 and respondent no.1 is referred to as the plaintiff whereas respondent nos. 7 and 8 are referred to as defendant nos. 5 and 6. Respondent nos. 2 and 3 are ordered to be deleted vide order dated 24.07.1995 whereas respondent nos. 4 to 6 are joined as defendant nos. 4,5 and 6 in the counter claim filed by the appellants.

2)Facts

a) Plaint

6. The plaintiff was a private limited company registered under the provisions of Companies Act, 1956 (For short “the Companies Act”) and was engaged in assembling and manufacturing of radio, transistors, car radios, cassettes, transistors etc. having its factory at Gandhidham, Kandla in Kandla Free Trade Zone District Kutch, Gujarat designated under the provisions of the Customs Act, 1962 (For short “the Customs Act”).

7. The plaintiff was holding license under the provisions of the Customs Act to carry out its business in Sector-1, Kandla Free Trade Zone. The plaintiff was importing semi finished components technically known as SKDs in Semi Knocked Down Form from abroad and thereafter assembled the same for export and the plaintiff was not entitled to make any domestic sales in India.

8. The defendant nos. 2, 3 and 4 are brothers who were carrying on the business of export of various items in the name and style of “House of Dubary” -defendant no.1. Defendant nos.2, 3 and 4 are also the partners of defendant no.1 firm as averred in the plaint. Defendant no.5 M/s. Airfreight (P) Ltd. is a company registered under the Companies Act and carrying out its business at Mumbai as Clearing and Forwarding Agent. Defendant no.6-New Bank of India is a Scheduled Bank situated at Delhi and had issued Irrevocable Letters of Credit (LCs) in favour of the plaintiff at the request and on account of defendant no.1-firm.

9. The plaintiff filed Special Civil Suit No. 120 of 1979 to recover a sum of Rs.62,91,245.18 from the defendants jointly and severally.

10. It is averred in the plaint that in December, 1977, 6 Yugoslavian buyers were brought by defendant no.2 at the factory of the plaintiff for negotiation regarding export of electronic goods to Yugoslavia.

Thereafter, pursuant to further negotiation at Bombay, Delhi and Hongkong, defendant nos. 1 to 4 agreed to act as Export House and placed orders in their own name for reason of expediency subject to goods being exported to Yugoslavia. On 04.10.1978, defendant nos. 1 to 4 placed an order with the plaintiff for supply of goods amounting to US$ 781521.14 equivalent to Rs.62,91,245.10. Thereafter on 05.10.1978, four confirmed Irrevocable Letters of Credit (LCs) were opened by defendant no.6 -New Bank of India, Delhi in favour of the plaintiff. As per the LCs, the plaintiff was to complete the shipment by 10.10.1978 and negotiation by 30.10.1978 and goods were to be shipped from Kandla Port. Thereafter, LCs were amended by letter dated 09.10.1978 by defendant no.6 -New Bank of India by correcting the last date of shipment as 01.12.1978 and last date for negotiation to be 30.12.1978. Thereafter, New Bank of

India - defendant no.6 further amended LCs by letters dated 14.10.1978, 20.10.1978 and 18.11.1978 by amending the shipment by air from Bombay Airport to Theossaloniki (Greece) Airport.

11. The plaintiff through its Forwarding Agent namely M/s. Dawn India made first consignment of following shipments from Kandla:

Inv. No.	Date	Qnty (Sets)	Model	Amount U.S. $	A.R.4 Forms
HK/01	22/11/78	12,900 sets	SITTAR	98,040.00	Hans/Exp/ 01/78-79
HK/02	22/11/78	5000 sets	PANASIA	40,000.00	Hans/Exp/ 02/78-79
HK/03	25/11/78	4995 sets	“	39,960.00	Hans/Exp/ 03/78-79
HK/04	25/11/78	1906 sets	“	14,485.60	Hans/Exp/ 04/78-79
HK/05	2/12/78	8000 sets	SITAR	60,800.00	Hans/Exp/ 05/78-79
HK/06	3/12/78	10000 sets	PANASIA	80,000.00	Hans/Exp/ 06/78-79
Total				**3,33,285.60**	

12. Aggregate value of the aforesaid consignment was US $333,285.60 equivalent to Rs.26,80,327.55. The plaintiff received the said amount from defendant no.6 for and on behalf of defendant no.1.

13. The plaintiff thereafter dispatched the second consignment from Kandla Free Trade Zone to defendant no.5 - M/s. Airfreight (P) Ltd. for export at Bombay through M/s. Vijay Transport Co. for export by air.

14. The aggregate value of second consignment was US$ 2,60,863.00 equivalent to Rs.20,99,947.01.

15. The plaintiff dispatched the goods in part for third consignment to defendant no.5 M/s. Airfreight (P) Ltd. through M/s. Vijay Transport Co. from Kandla Free Trade Zone to Bombay.

16. Aggregate value of the third consignment is US$ 4,30,510.14 equivalent to Rs.34,65,606.60.

17. As the defendants did not pay the amount of second and third consignment, the plaintiff filed the suit on 21.05.1979 for recovery of Rs.62,91,245.18 together with interest at the rate of 15% from 17.12.1978 to 05.05.1979 and running interest at the rate of 15% per annum till realisation.

18. It is the case of the plaintiff that after the plaintiff exported the first consignment from Kandla by ship to Yugoslavia through the Clearing and Forwarding Agent M/s. Dawn India, defendant nos. 1 to 4 persuaded the plaintiff to export the goods by air through defendant no.5 as defendant no.5 was giving 30 days credit for payment of freight to defendant nos. 1 to 4 as the goods were to be exported on FOB basis.

19. The plaintiff agreed to the suggestion to export the goods by air through defendant no.5 - M/s. Airfreight (P) Ltd. who was Clearing and Forwarding agent of defendant nos. 1 to 4 from Bombay airport to Greece airport. Accordingly, plaintiff sent the second consignment after removing the goods from Kandla Free Trade Zone under Form A.R.4 issued by Customs Department to M/s. Vijay Transport Co. to Bombay to defendant no.5 so as to export to Yugoslavia by air.

20. It is the case of the plaintiff that though defendant no.5 was required to send the goods for and on behalf of the plaintiff by air but it did not forward the Airway bill to the plaintiff but the same was forwarded to defendant no.1 which shows the collusion between defendant nos. 1 to 4 and defendant no. 5. It is also the case of the plaintiff that in the Airway bill in the column of shippers, name of defendant no.1 “House of

Dubary" was mentioned by defendant no.5. Because of such collusion between defendant nos. 1 to 4 and defendant no. 5, defendant no. 6 made the payment received from the negotiating bank of Yugoslavia in the account of defendant no.1 "House of Dubary".

21. It is also the case of the plaintiff that the goods sent by the plaintiff was entitled to exemption from duty only if the exporter is having factory within Kandla Free Trade Zone and it would amount to an offence to mention the name of defendant no.1 under the column of shippers name and address in the airway bill.

22. It is a normal trade practice in a case where a manufacturer is exporting the goods at the instance of an Export House, the foreign buyer would give Letter of Credit from his banker in favour of the Export House in India and the bankers of the Export House would give Letter of Credit in favor of the manufacturer and hence, the Airway Bill in a case where the goods are exported by air and Bill of Lading in case where the goods are exported by the ship are the most important documents of title. The Airway Bill or the Bill of Lading, as the case may be, is therefore, required by the manufacturer exporting the goods to be produced through the negotiating bank to the LC opening Bank along with the bank draft and documents drawn on the LC opening bank through the negotiating bank. The LC opening bank on receipt of Airway Bill, bank draft and the documents would make payment to the manufacturer of the value of the goods exported.

23. However, it is the case of the plaintiff that in facts of the case, the LC opening bank i.e. defendant no.6 as well as the plaintiff who had manufactured the goods for export and defendant no.1 Export House through whom the export was made were required to follow the prescribed procedure. Therefore, defendant no.6 received Letters of Credit drawn in its favour by the bankers of Yugoslavian buyers i.e. "Manufacturer Hanover Trust", a leading American Bank of International repute. Defendant no.6-New Bank of India had drawn LCs in favour of the plaintiff and was expected to honour the LCs and pay the amount thereof to the plaintiff on production of bank draft and the documents to the defendant no.6 through negotiating bank i.e. State Bank of India at Kandla.

24. It is the case of the plaintiff that though defendant no.6 being in full knowledge of true facts and after having received the original Airway Bill showing the name of the plaintiff in the column of shippers, should not have paid the entire amount received from the bankers of Yugoslavian buyers to defendant no.1. The plaintiff has therefore, alleged that defendant nos. 1 to 4 as well as defendant no.6 New Bank of India are liable to pay the amount covered by LCs drawn by defendant no.6 in favour of the plaintiff insofar as the value of the second consignment exported by defendant no.5 to the Yugoslavian buyers through Air on 27.12.1978 amounting to US $ 2,60,863=00 equivalent to Rs.20,99,947.01.

25. It is the case of the plaintiff that defendant nos. 1 to 4 and defendant no.6 has thus committed a fraud on the plaintiff by appropriating the credit of the entire amount received from the bankers of Yugoslavian buyers in the account of defendant no.1-“House of Dubary”. The plaintiff therefore, insisted from defendant nos.1 to 4 to agree and assure that payment due to the plaintiff would be made latest by March or April, 1979 but the defendant nos. 1 to 4 failed to keep their assurance and did not pay the amount of US$ 2,60,863=00 equivalent to Rs.20,99,947.01.

26. Regarding the third consignment forwarded by the plaintiff between December 30, 1978 to January 11, 1979 comprising of 6 parcels through M/s. Vijay Transport Co. to defendant no.5 Air Freight Pvt. Ltd. as a Clearing and Forwarding Agent of the plaintiff, same were exported after delay of more than four to five months by defendant nos. 1 to 4, and as such defendant nos. 1 to 5 are jointly and severally liable for the amount of the third consignment.

27. It is the case of the plaintiff that defendant no.5 ought to have sent the original airway bill to the plaintiff but deliberately forwarded the same to defendant nos. 1 to 4 and hence defendant no.5 is guilty of conversion and misappropriation of the goods sent by the plaintiff for export purpose to defendant no.5 at Mumbai.

28. It is the case of the plaintiff that between January 13, 1979 to May 3, 1979, plaintiff as well as the custom authorities of Kandla Free Trade Zone addressed several communication to the defendant no.5. M/s. Airfreight (P) Ltd. calling upon the information for withholding the goods by defendant no.5. The plaintiff also called back the third consignment to Kandla from Mumbai. However no response was given by defendant nos. 1 to 5.

29. The plaintiff by letter dated 27.04.1979 also requested the Assistant Collector of Customs International Area Cargo Complex, Export department, Mumbai putting on record that defendant no.5 inspite of repeated requests failed to advise the plaintiff of dispatch of the cargo under AR-6 to 11 and AR-12 to 20 regarding second and third consignment respectively.

30. The plaintiff by another letter dated 14.04.1979 placed on record that defendant no.5 was warned of the legal liability of its action in keeping cargo and preparing false documents and also informed the customs authority that the defendant no.5 is called upon to return cargo under AR-12 to 20 along with relevant documents. By letter dated 24.04.1979, the plaintiff informed the Assistant Collector of Custom ,Kandla Free Trade Zone giving details of AR-4 Form from AR-12 to 20 regarding the third consignment that the goods have been sent to defendant no.5 but the same were not exported till that date and further steps are required to take back the goods from the defendant no.5.

31. The Assistant Collector of Customs Kandla Free Trade Zone by letter dated 03.05.1979 also informed the defendant no.5 that goods are kept in an unauthorised manner for a period of more than four months since the goods were under customs export bonds and threatened the defendant no.5 for action under the provisions of the Customs Act and called upon defendant no.5 to deliver the consignments back to the plaintiff since the goods were not exported and the plaintiff being the owner of the goods did not wish to export the goods and intended to bring them back to Kandla Free Trade Zone. The customs authorities also warned defendant no.5 for holding the bonded goods illegally. However, in spite of such communication from the plaintiff and the customs authorities, defendant no.5 exported the goods by air to Yugoslavian buyers but did not send the airway bills to the plaintiff nor returned the AR-4 Forms showing the proof of export to the plaintiff. It is the case of the plaintiff that amount of the sale consideration of goods of the third consignment was received in the account of defendant no.1.

b) Written statement of defendant nos. 1 to 4

32. The defendant nos. 1 to 4 filed the written statement at Exh.29 raising various preliminary objections as under:

1) The plaint has not been signed and verified by a duly authorised person.

2) The Trial Court did not have territorial

jurisdiction to try the suit or entertain it or grant any relief thereunder.

3) No notice of demand was ever served by the plaintiff upon the defendants, hence the suit is premature.

4) That the plaint suppresses material facts as well as relevant details and as such, is mala fide, false and frivolous to the knowledge of the plaintiff and is liable to be dismissed outright with special costs and exemplary cost as provided under section 35 of the Code of Civil Procedure, 1908.

5) The suit is bad for mis-joinder of parties inasmuch as the plaintiff cannot claim any amount collectively, jointly and severally and for that matter alternatively from defendant nos. 1 to 4 representing one group and defendant nos. 5 to 6 as separate

entities.

6) On ex-facie reading of para no. 14(i) to (v) of the plaint, total aggregate of the figures does not tally with the claim made of Rs.62,91,245.18.

7) The suit amount has not been properly valued for purposes of Court fees and jurisdiction.

33. Apart from preliminary objections, it was contended by the defendant nos. 1 to 4 that there was no evidence of any privity of contract whereby the plaintiff was entitled to receive the alleged amount from defendant nos. 1 to 4.

34. It was contended that the suit is liable to be stayed under section 10 of the Code of Civil Procedure, 1908 as separate suit for declaration negating the claim of the plaintiff had already been filed by the defendants in the Courts at Delhi which was pending for trial.

35. It was contended that the plaintiff did not come to the Court with clean hands and there is no equity in his favour.

36. It was contended that as per section 20 of the Code of Civil Procedure, 1908, place of suing shall be where the defendants actually and voluntarily reside and carry on the business and work for gain or where the cause of action wholly or in part arose and therefore, the Court at Kuchchh at Bhuj has no territorial jurisdiction as negotiation between the parties took place only at three places i.e. Bombay, Delhi and Hongkong.

37. It was also contended that plaintiff has no *locus standi* to institute the suit on his own volition or free will at Bhuj as the plaintiff has failed to show as to how defendant nos. 5 and 6 could be impleaded as party.

38. It was also contended that though it is an admitted position that amount of Rs.26,80,327.50 pertaining to first consignment has already been received by the plaintiff then how that amount can be again claimed by the plaintiff.

39. It was further contended on behalf of defendant nos. 1 to 4 that the plaintiff is not entitled to claim any amount as LCs have expired on 30.12.1978. It was also contended that the terms and conditions of LCs was contract between the parties and in absence of any LCs, defendants are not liable to pay any amount to the plaintiff.

40. It was also contended that defendant no.5 was only Clearing and Forwarding Agent of defendant nos. 1 to 4 therefore, there was no obligation or moral duty to handover the airway bill to the plaintiff and plaintiff has no *locus standi* to ask for such documents.

41. It was also the case of the defendants that plaintiff has committed gross violation of terms and conditions of the back to back LCs and realising that default and lapses have been made, have dumped the unsalable goods with defendant no.5 and on the contrary defendants have incurred freight charges and demurrage and filed counter claim claiming that the defendants have suffered loss to the tune of US$ 13,60,644.17 equivalent to Rs. 1,08,85,152.00.

42. It was contended that the defendants are not liable for the claimed amount as total value claimed by the plaintiff is CIF value which come into operation without costs, insurance and freight. Since the plaintiff has not paid freight/ chartered charges or insurance charges nor there is any averment in the plaint to that effect and therefore, such amount cannot be claimed by the plaintiff. It was further contended that the defendants have held the plaintiff to export the goods but the amount of freight, demurrage etc. paid by defendant no.1 was required to be adjusted and the Managing Director of the plaintiff Mr. Hasmukh Khatri, has flown out of country due to indebtedness as there were liabilities of the banks and Gujarat Financial Corporation, State Bank and other institutions with which the plaintiff was associated in the course of its business.

43. It was therefore, claimed that when the Letter of Credits have expired on 30.12.1978 there was no contract between the parties and the goods were exported at the cost and risk of the plaintiff by defendant no.5 directly and defendant nos. 1 to 4 only helped the plaintiff to clear the goods as the plaintiff did not have enough finance to pay the freight and other charges. It was therefore, contended that all the matters prior to 30.03.1979 stand waived of by doctrine of estoppel, waiver, forfeiture and acquiescence.

c) Counter claim

44. The defendant nos. 1 to 4 filed their suit in form of counter claim under the provisions of Order VIII Rule 6 (a) and (b) read with section 151 of Code of Civil Procedure. In the counter claim, defendant nos. 1 to 4 are plaintiffs and Hasmukh Brothers (HK) Hongkong, M/s. Hanspa Knit(P) Ltd., Shree Hasmukh C Khatri, Shree P.U.Oza, Shree A.C. Pota and State Bank of India, Kandla Free Trade Zone, Gandhidham-Kutch were joined as defendant nos. 1 to 6 respectively.

45. In para no.5 of the counter claim, it was averred that various irrevocable Letters of Credit opened in their favour by a Government Enterprise “SOLUN” Import-Export, Gevgelija, Yugoslavia of US$ 2,284,465.00 equivalent to Rs.2,27,31,800/-. It is further averred that Hasmukh Brothers (HK) assured and agreed to assemble the items as per the order in factories located in Hongkong and accordingly, irrevocable Letters of Credit dated 20.06.1978 and 21.06.1978 in favour of the said firm were opened and in turn Letters of Credit were opened by the defendant no.1 firm “House of Dubary” as stated in para no.9

of the counter claim. However, Hasmukh Brothers (HK) failed to supply the goods but assured to execute the orders under the said Letters of Credit through sister concern plaintiff M/s. Hanspa Knit (P) Ltd. located at Kandla.

46. It is further averred that upon assurance given by the plaintiff M/s. Hanspa Knit (P) Ltd., 7 Letters of Credit in favour of Hasmukh Brothers (HK) were withdrawn and three Letters of Credits were opened in favour of Hasmukh Brothers (HK) and 4 Letters of Credit were opened in favour of M/s. Hanspa Knit (P) Ltd. stipulating the period of supply upto 20.12.1978.

47. Regarding the first consignment sent on 22.11.1978, it was claimed that there was violation of the implied terms and conditions agreed upon of sending the consignment through charter aircraft and therefore, there was a loss of Rs.51,013 (US$ 6,376.66 approximately). A claim for refund was also made for Rs.1,44,846.90 on the ground of failure to supply total quantity of goods.

48. Regarding the second consignment as per details given in para no.15 of the counter claim, M/s. Hansa Knit (P) Ltd. sent the goods to clearing agent M/s. Air Freight (P) Ltd. at Bombay on 27.12.1978 on its own which was exported to SOLUN Import-Export after great persuasion in the month of May, 1979.

49. The third consignment was also exported in May,1979 after paying airfreight and incurring other miscellaneous expenses. By letters dated 22.05.1979, 24.05.1979 and 19.06.1979 SOLUN Import-Export raised dispute regarding the shortage in quantity and defect in quality of the goods as stated in para 19 and 20 of the counter claim. Therefore, a claim of US$ 59,375.00 equivalent to Rs.4,75,000/- in respect of second consignment and US$ 56,250.00 equivalent to Rs.4,50,000/- in respect of third consignment for making various correspondence and contacting SOLUN Import-Export personally and other necessary miscellaneous expenses during the course of transaction was raised. Claim for demurrage of US$ 7,500(Rs.60,000) and payment made to clearing and forwarding agent M/s Dawn India for US$ 7500 (Rs.60,000) and US$ 5,250 respectively was also raised. Interest claim at the rate of 18% per annum on US$ 21,754.60 i.e. US$ 93,915.03 (Rs. 7,51,326.64 approximately) was raised. Further claim for loss of goodwill, reputation and future business due to negligence and misconduct of M/s. Hanspa Knit (P) Ltd. and others was raised at the rate of 20% on US$ 1,440,960 amounting to US$

288,192.0 (Rs.23,05,536 approx) further claim of demurrage of Rs. 432,288.00 (Rs.35,27,680/- approx.) was raised. Thus total claim of US$ 13,60,644.17 (Rs.1,08,85,152) was made.

50. It was also claimed that as the CCIE did not grant license to "House of Dubary", it had to transfer the Letter of Credit for about Rs. 82 Lacs issued by Yugoslavian buyers in the name of its sister concern Dubary Exports sustaining heavy loss of Rs. 22 Lacs.

51. It was therefore, prayed that Suit no. 120 of 1979 should be dismissed and counter claim of Rs.1,08,85,152 together with interest at the rate of 18% per annum should be decreed. The declaratory suit filed before Delhi High Court is placed on record at Exh. 442.

52. The plaintiff also filed the written statement to the counter claim denying the facts stated therein and reiterated the facts stated in the plaint and also denied that M/s. Hasmukh Brothers (HK) has any connection with the 2^{nd} and 3^{rd} consignment which were admittedly exported for which payment has been received from the Yugoslavian buyers. The other defendants in the counter claim also filed their written statement denying the claim made in the counter claim.

d) Written statements of defendant nos.5 and 6

53. Defendant no.5 filed its reply at Exh.35 wherein similar contention has been raised as raised by defendant nos. 1 to 4.

54. Defendant no.6 also filed its written statement at Exh.38 contending that draft drawn by the plaintiff on defendant no.1 was submitted through State Bank of India, Kandla along with papers and the details of the same are narrated in paragraph no.9 of the written statement. It was contended that plaintiff is not entitled to any relief and requested the suit be dismissed with cost.

e)Written submissions of Appellant no.2

55. Appellant no.2 – defendant no.2 Shakar Darbari has filed written submission vide email dated 09.06.2026 through his power of attorney holder Ms.Raj Darbari. It was submitted in the written statement that chronology of events narrated therein from 1979 onwards reveal a systematic pattern of fraud, suppression and abuse of process that has resulted in appellant no.2 - defendant no.2 Shakar Darbari and others being deprived of property.

56. It was further contended that there is no Official Liquidator who is appointed for the plaintiff company which is under liquidation and therefore, notice issued by the Registry was upon a non-existent entity as the plaintiff company was ordered to be wound up on 10.07.2000.

57. Reliance was placed on the decision in cases of (i) **S.P. Chengalvaraya Naidu v. Jagannath** reported in (1994) 1 SCC 1, (ii) **A.V. Papayya Sastry v. Government Of A.P.** reported in (2007) 4 SCC 221 and (iii) **Ram Chandra Singh v. Savitri Devi** reported in (2003) 8 SCC 319. Relying upon the aforesaid decisions, it was submitted that the alleged fraud is not curable by subsequent event including actual appointment of Official Liquidator in 2000. It was also pointed out that the plaintiff company had become a defunct company in 1983 and therefore, such company cannot sue as it is equivalent to deceased natural person. In support of such submission, reliance was placed on the following decisions:

(i) **Purtabpore Co. Ltd. v. Cane Commissioner of Bihar** reported in (1969) 1 SCC 308.

(ii) **Cotton Corporation of India Ltd. v. United Industrial Bank Ltd.** reported in (1983) 4 SCC 625.

(iii) **Dale & Carrington Invt. (P) Ltd. v. P.K. Prathapan** reported in (2005) 1 SCC 212.

58. It was further alleged that decree dated 31.01.1986 was passed ex-parte in favour of the company that had ceased to exist in law since 1983 and the Trial Court was misled into believing that a living company was prosecuting its claims. Reliance was placed on the following decisions:

i) **Sushil Kumar Sabharwal v. Gurpreet Singh** reported in (2002) 5 SCC 377.

ii) **State Bank of Travancore v. Kingston Computers** reported in (2011) 11 SCC 524.

iii) **A.R. Antulay v. R.S. Nayak** reported in (1988) 2 SCC 602.

59. It was alleged that advocates appearing for the plaintiff were not authorised. It was also pointed out that in 2019, a statement was made before the Court that appellant no.2 - defendant no.2 Shakar Darbari had expired which was a false statement and thereafter on an application being filed on 20.12.2024, vide order dated 09.07.2025, the abatement order was recalled, resulting into deprivation of right to access justice for six years which constitute a grave violation of Article 21 of the Constitution of India.

60. Reference was also made to the background of the appellants-defendants and the respondent-plaintiff vis-a-vis national character of the family of “House of Dubary” and the plaintiff company and its Director.

61. Thereafter reference is made to medical emergency of Shakar Darbari aged 76 years who was diagnosed with pancreatic cancer and had undergone major surgical procedure lasting for 10 hours and requires immediate access to funds for continuous treatment. Reliance was placed on decision in case of **Paschim Banga Khet Mazdoor Samity v. State of West Bengal** reported in (1996) 4 SCC 37.

62. Referring to above submissions, following summary was made of legal propositions:

“a) A decree obtained by a defunct, non-existent company is void ab initio and a nullity: Sushil Kumar Sabharwal (supra).

(b) Notice issued to a non-existent Official Liquidator confers no jurisdiction: A. V. Papayya Sastry (supra).

(c) Fraud on the court vitiates all proceedings: S.P. Chengalvaraya Naidu (supra); A. V. Papayya Sastry (supra); Ram Chandra Singh (supra).

(d) A company without a Board of Directors cannot authorise litigation: Dale & Carrington (supra); State Bank of Travancore (supra); Patel Roadways (supra).

(e) The ROC's failure under mandatory Section 560(3) is a breach of statutory duty: Purtabpore Co. Ltd. (supra). Winding up of a defunct company is futile: Cotton Corporation (supra).

(f) Deprivation of property for 47 years without authority of law violates Article 300A. Restitution mandatory: Southeastern Coalfields (supra).

(g) A 40-year pendency violates Article 21: Hussainara Khatoon (supra). Denial of livelihood violates right to life: Olga Tellis (supra).

(h) Abatement without a death certificate violates Order XXII Rule

> 4 CPC and Article 21.
>
> (i) The Court must correct its own errors ex debito justitiae: A.R. Antulay (supra).
>
> (j) Courts must refuse assistance to economic offenders: Tapas D. Neogy (supra). Right to emergency medical care is fundamental: Paschim Banga Khet Mazdoor Samity (supra).”

63. It was therefore, prayed to set aside the Judgment and Decree dated 31.01.1986 passed in Special Civil Suit No.120 of 1979 and further prayed for immediate release of money deposited in Fixed Deposits with State Bank of India with interest.

64. It is also prayed to dismiss the Cross appeal and initiate proceedings under section 340 of the Code of Criminal Procedure, 1973 for fraud practiced upon the Court and award compensation of Rs. 50 crores with exemplary cost of Rs. 10 crore and further pass strictures against the advocates who appeared for the company in liquidation without sanction under section 446 of the Companies Act, 1956.

65. Considering the order passed by this Court dismissing Civil application filed by the Appellant No.2 contending similar averments , these submissions are not required to be dealt with as the appeal filed by the defendant nos. 1 to 4 was heard at length and is hereby decided considering submissions made by the learned advocates of both the sides.

3)Issues framed by the Trial Court and summary of findings

66. The Trial Court framed following issues at Exh. 218 and findings on the issues are also recorded in para no.48 of the judgment which are summarised as under:

Issue No.	ISSUES	FINDINGS
1)	Whether the def. Nos. 1	In the

	to 4 prove that the plaintiff Hanspa Knit (P) Ltd., has been committed the breach of contract ? If so, they are entitled to recover the amount as claimed in the counter claim ?	negative
2)	Whether the plaintiff M/s. Hanspa Knit (P) Ltd., is entitled to all or any reliefs on basis of the allegations as made in the plaint?	Yes. As per order
	2-(A) Whether this court has jurisdiction to entertain the suit of the plaintiff Hanspa (P) Ltd., against the defts.?	In the affirmative
	(2-B) Whether it is proved that the deft.Nos. 5 & 6 of the suit are not necessary or proper parties and that the suit is bad?	Defendant no.5 and 6 are necessary and proper parties as the nature of the suit.
	(2-C) Whether the deft. Nos. 1 to 4 prove that there was no privity of contract between the parties ?	In the negative.
	(2-D) Whether the deft. Nos. 1 to 4 prove that the contract in question is void on the ground of the violation law and regulation.	No
	(2-E) Whether the deft.	No

	Nos. 1 to 4 prove that the plaintiff M/s. Hanspa Knit (P) Ltd., is estopped in view of the letter dated 16-3-79 from recovery of the suit amount?	
	(2-F) Whether the plaint signed and verified by Shree A.C. Pota is legal and valid? If, not, what effects?	Yes. In the affirmative
	(2-G) Whether the suit is maintainable in the present form?	In the affirmative
3)	What order and decree regarding to the suit and counter claim?”	As per order

4)Oral Evidence

67. Both the sides produced documentary evidence and examined witnesses who were cross examined during the trial.

68. The plaintiff has examined Anilbhai Chandubhai Pota at Exh. 276, the then Director who is also cross examined on behalf of the defendants.

69. In his examination-in-chief, Anilbhai Chandubhai Pota has produced the orders placed by the defendant nos. 1 to 4 which were exhibited as Exh. 278 to Exh.281. Letter of confirmation of those orders is produced at Exh.282. Letters of Credit are produced at Exh.283 to 289 and 290 to 309. Invoices and documents of the second consignment at Exh. 310 to Exh.315. Documents of third consignment are at Exh. 316 to 317. Amount of sale consideration received by the defendant nos. 1 to 4 in their bank account which is kept in Fixed Deposit in Sundry account and bank statement thereof is produced at Exh. 318 which is received in two parts. First with regard to goods of standard quality and second part when dispute of standard quality was given up by the buyers and entire amount was received. Copies of AR-4 Forms are produced from Exh. 319 to 322. Fixed Deposit Receipts of the amount received by defendant no.1 are produced at Exh. 323. Copies of letter of the State Bank of India along with documents returned to defendant no.6 being Exh. 324 and 325. Telex messages are produced from Exh. 326 to 333 regarding communication for confirmation. Notice issued by the customs authorities to defendant nos. 1 to 5 on 08.10.1979 and its reply is given by defendant nos. 1 to 4 at Exh.334 to Exh. 336. Order of penalty dated 02.01.1981 passed by Special Officer of the Customs Department upon defendant nos. 1 to 4 at Exh. 337. Telex Message of defendant nos. 1 to 4 accepting the mistake and agreement for payment at Exh.338. Copies of communication between the plaintiff and defendant no.5 is produced at Exh. 339 to 348. Copy of communication between customs officer and defendant no.5 at Exh. 349. Telex message from the defendants at Exh.350. Freight bill of spare part sent by the plaintiff to Yugoslavian buyer regarding 2nd and 3rd consignment at Exh.352. Details of letter dated 26.10.1978 of the defendants having agreed to extend the period for delivery of goods received by the plaintiff on 17.12.1978 at Exh.353. Telex messages between the parties from 12.12.1978 to 30.04.1979 at Exh.354 to 368. Letter written by Customs authority to defendant no.5 at Exh. 369.

70. In the cross examination and re-examination, witness of the plaintiff denied that the plaintiff was liable to pay the airfreight. It was also denied that due to financial crisis, defendant nos. 1 to 4 paid the airfreight.

71. The witness of the plaintiff also placed on record letter dated 10.03.1979 addressed to defendant no.5 to return the goods which is exhibited as Exh. 450. Various documents containing the communication by the plaintiff for export of third consignment were exhibited from Exh. 453 to Exh. 461.

72. Witness of the plaintiff denied the contentions of the defendants whereby it was proposed that counter claim placed by defendant nos. 1 to 4 was part of the letter at Exh. 205.

73. It was contended on behalf of the plaintiff that though defendant nos. 1 to 4 have received the payment from Yugoslavian buyers, same was not paid to the plaintiff, inspite of the fact that it was known to the defendants that the manufacturer who exported the goods was the plaintiff and therefore, by collusion, the defendants have deprived the plaintiff of its legitimate dues, inspite of having full knowledge of the true facts and having received original airway bill showing the name of the plaintiff in column of shippers and therefore, the defendants could not have retained the entire amount received from Yugoslavian buyers and as such, all the defendants are jointly and severally liable for the amount claimed by the plaintiff of Rs.62,91,245.18.

74. The defendants have examined one witness defendant no.4 Deepak Durbari. In his examination in chief, he reiterated the contentions in the written statement and has placed the original partnership deed at Exh. 416, letter dated 19.06.1979 at Exh. 417, Letter received from Yugoslavian buyers at Exh.418, Copies of certificate of export at Exh. 420 to 425, Copies of airway bill of 1st consignment at Exh.426, copies of invoice of 2nd consignment at Exh. 427 to 428, Copies of telegram and telex message of the transaction entered into by Hasmukh Brothers (HK) from

Exh. 429 to Exh. 435.

75. In the cross examination made on behalf of the plaintiff, defendant no.4 has accepted the documents with counter claim which are exhibited at Exh. 437 to 441.

5) Orders passed by the Trial Court and orders in appeals

76. The Trial Court after considering oral and documentary evidence led by both the sides partly allowed the suit in favour of the Plaintiff as under:

"ORDER

The documents mark-202/6, mark413/32, mark-413/33, mark-413/45 and mark-466/ (1) are hereby permitted and allowed to be exhibited.

The Special Civil Suit No 120 of 1979 is hereby partly allowed and decreed.

The plaintiff M/s Hanspa Knit (P) Ltd., Kandla, Gandhidham Kachchh is entitled to recover the sum of Rs. 49,81,336-00 (Rupees forty nine lac, eighty one thousand three hundred thirty six only.) from the defendant Nos. 1 to 4 with running interest at rate of twelve per cent per annum from the date of the suit till realization.

It is therefore ordered that the defendant Nos. 1 to 4 shall pay the amount of Rs. 49,81,33 with running interest at rate of twelve percent per annum from the date of the suit till date of the payment to the plaintiff.

The rest of the claim and that suit against the defendant Nos. 5 & 6 stand to be dismissed.

It is hereby ordered that the defendant Nos. 1 to 4 are restrained to take money from standing sundry account in New Bank of India Ltd., D-47 Defence Colony., New Delhi and be directed to be deposited the entire amount lying in such sundary account of New Bank of India Ltd., New Delhi, in the court for payment and satisfaction of the decree passed against them in Special Civil Suit No. 120 of 1979.

It is further ordered that the sixth defendant New Bank of India Ltd., D-47, Defence Colony, New Delhi is prohibited to pay any money standing and lying in sundry account to the defendant Nos. 1 to 4 and be directed to be deposited all money lying in such sundry account, into court within three months from the date of this order for the payment and satisfied decree passed against the defendant Nos.1 to 4.

The defendant Nos. 1 to 4 shall bear their own costs and costs of the plaintiff and that the defendant Nos 5 & 6 shall bear their own costs.

Decree will be draw accordingly in favour of the plaintiff in Special Civil Suit No. 120 of 1979.

The counter claim by way of the cross suit which being filed by House of Dubary and partners thereof is liable to be dismissed and it is hereby dismissed.

The plaintiffs in the counter claim by way of the cross-suit shall bear their own costs and costs of the defendants.

Decree will be drawn accordingly."

77. Being aggrieved by the Judgment and Decree, First Appeal No.531 of 1986 is filed by the original defendant nos. 1 to 4 challenging the Judgment and Decree dated 31.01.1986 passed by the Trial Court and First Appeal 1093/1987 was filed by plaintiff company under liquidation.

78. The appeal was admitted by order dated 11.04.1986 [Coram : Hon'ble Mr. Justice M.B. Shah and Hon'ble Mr. Justice R.A. Mehta (As their Lordships Were Then)].

79. Thereafter by order dated 02.11.2006, notice was issued to the Official Liquidator. It appears that the matter was thereafter taken for regular final hearing from 2018 onwards and the matter was adjourned from time to time on one ground or the another, either time was being sought by the appellants-defendants or by the respondent.

80. It appears that Civil Application No.1094 of 1986 was filed for stay wherein interim order was passed by the Division Bench on 28.04.1986 calling upon the New Bank of India, Delhi to transfer an amount of Rs. 37.5 Lacs to the State Bank of India, Main Branch, Ahmedabad to be invested in the name of the Additional Registrar, High Court of Gujarat which was transferred on 17.06.1986. Civil Application No.2256/1986 was filed by the plaintiff with a prayer to permit the withdrawal of the amount of Rs. 37.5 Lacs which was standing in the name of Additional Registrar, High Court of Gujarat, pursuant to the order dated 28.04.1986 or in the alternative to invest the amount of Rs.37,67,420/- in any nationalised bank for a period as may be specified by the Court. It was also prayed to direct the New Bank of India, to transfer Rs. 30 Lacs standing in the Fixed Deposit account of the defendant nos. 1 to 4 together with interest or in the alternative to issue injunction against the bank from operating and/or withdrawing any amount from the Fixed Deposit account.

81. This Court (Coram: Hon’ble Mr. Justice I.C. Bhatt and Hon’ble Mr. Justice J.P. Desai, As their Lordships were then) by order dated 23.09.1988 directed to deposit the amount received by the Additional Registrar with the Bank of Baroda, Navrangpura branch, Ahmedabad for a period of three months which was renewed from time to time.

82. It is reported that as per the latest status report obtained from State Bank of India, GHCC Branch, Sola, if fixed deposit is encashed prematurely, the payment amount will be about Rs.7,14,70,627/- approximately [(P)1,91,04,323/- + (I)5,23,66,304/-)

6)Submissions of appellants-defendants

83. Learned advocate Mr. C.B. Upadhyaya on behalf of the appellants- original defendant nos. 1 to 4 submitted that the Trial Court lacked territorial jurisdiction under section 20 of the Code of Civil Procedure, 1908 and that the most fundamental and threshold challenge to the impugned judgment is that the learned Trial Court at Bhuj lacked territorial jurisdiction to entertain and try the suit. The entire proceedings are therefore, a nullity and the decree is void *ab initio*. It was submitted that Section 20 of the Code of Civil Procedure provides that a suit may be instituted in a Court within whose local limits the defendant resides, carries on business, or personally works for gain; or any of the defendants resides, carries on business, or personally works for gain; or the cause of action, wholly or in part, arises. It was submitted that in the present case, neither the Appellants-defendants who are at New Delhi nor the cause of action which took place at Delhi/Bombay had any connection with Bhuj as the Place of Contract Formation was Delhi and not Kandla. However, the Trial court held that the contract was formed at Kandla, relying upon the letter dated 18.11.1978 (Ex. 205) written by the Plaintiff which is erroneous finding. It was submitted that the Trial court gave the reason that on 04.10.1978, the orders were placed by Defendants No. 1 to 4, which constituted the 'proposal' within the meaning of the Indian Contract Act, 1872, and that the letter dated 18.11.1978 stipulating various conditions constituted the 'acceptance' by the Plaintiff, thereby forming the contract at Kandla.

84. It was submitted that this reasoning is fundamentally misconceived because as per Sections 2, 3 and 4 of the Indian Contract Act, 1872, a proposal is accepted either expressly or impliedly by the acceptor. It was submitted that in the present case, there was no separate contract between the parties with regards to the sale of goods and it is an admitted position in the plaint itself that the sale of goods was to take place on the terms of the Letters of Credit which were to be opened by Defendants No. 1 to 4 in favour of the Plaintiff. The precondition for the execution of the confirmed order was the opening of the Letters of Credit in favour of the Plaintiff and the Letters of credit were opened on 05.10.1978 in Delhi by New Bank of India at the request of Defendants No. 1 to 4. It was submitted that when the plaintiff accepted the Letters of Credit as the beneficiary, the proposal of Defendants No. 1 to 4 was accepted. It was further submitted that admittedly, the Letters of Credit were opened in Delhi and therefore, the place of contract was Delhi and not Kandla and the Trial Court's conclusion that the place of contract was Kandla is erroneous and misconceived.

85. It was submitted that before the first shipment was made on 27.11.1978, the Letters of Credit (which were the only terms of the contract between the parties) were amended and modified on 09.10.1978, 14.10.1978, 20.10.1978, and 18.11.1978, all of which were communicated to the Plaintiff with sufficient knowledge. Therefore, the letter dated 18.11.1978 at Exh.205 written by the Plaintiff, which the Trial Court relied upon as the ‘acceptance’, was written after the contract had already been concluded through the Letters of credit and therefore, reliance on this letter to determine the place of contract is, therefore, legally untenable.

86. Learned advocate Mr. Upadhyaya for the appellants- defendant nos. 1 to 4 submitted that place of performance of the contract was Bombay and not Kandla and the finding of the Trial Court that the place of delivery of goods was Kandla, relying upon Sections 36 and 39 of the Sale of Goods Act, 1930 is erroneous as the Letters of credit were amended to permit shipment by air from Bombay Airport to Greece Airport. It was submitted that this condition was stipulated in the Letters of Credit and was made aware to the Plaintiff and therefore, the place of performance of the contract, as per the conditions of the Letters of Credit, was Bombay and not Kandla. Furthermore, it is an admitted position in the plaint that Defendant no.5-M/s. Airfreight (P) Ltd. acted in its capacity as the agent of the Plaintiff and was holding the goods as an agent of the Plaintiff and the delivery of goods would only be effected when the goods were airlifted from Bombay, and not at Kandla and therefore, the place of performance was Bombay.

87. It was further submitted that Sections 36 and 39 of the Sale of Goods Act can only be pressed into service in the absence of any express contract with regards to the delivery of goods whereas in the present case, the

Plaintiff himself admitted that the delivery of goods was to be handed over at Bombay. It was therefore submitted that the benefit of Sections 36 and 39 of the Sale of Goods Act is not available to the Plaintiff. It was submitted that however, the Trial Court ignored that the goods were transported to Defendant no.5-M/s. Airfreight (P) Ltd. in terms of the conditions of the Letter of Credit so as to export the goods from Bombay which would be the final proof of delivery. Therefore, the provisions of Sections 36 and 39 of the Sale of Goods Act cannot be pressed into service to conclude that the goods were delivered at Kandla.

88. Learned advocate Mr. Upadhyaya for the appellants-defendants submitted that the place of payment of consideration was Delhi and not Kandla. However, the Trial Court committed an error in holding that since the negotiating bank was to make payment in favour of the Plaintiff at Kandla, the performance of the contract had taken place at Kandla.

89. It was submitted that the privity of contract between the negotiating bank and the Plaintiff is entirely different from the privity of contract between the Plaintiff and the Defendants. It was submitted that the negotiating bank acts as an agent of the LC Opening Bank (New Bank of India, Delhi) and the LC Opening Bank is the party primarily liable to the beneficiary under the LCs. Therefore, the place of payment under the contract was Delhi, where the LC Opening Bank was located.

90. Learned advocate Mr. Upadhyaya for the appellants-defendants submitted that, the cause of action, in its entirety, arose in

Delhi (contract formation and payment) and Bombay (performance). Therefore, the Trial Court at Bhuj had no jurisdiction whatsoever to entertain the suit and therefore, the entire proceedings are void and the decree is a nullity.

91. In support of his submission, reliance was placed on the following decisions:

1) **Bhagwandas Goverdhandas Kedia v. Girdharilal parshottamdas & Co.** reported in AIR 1966 SC 543.

2) **A.b.C. Laminart Pvt. Ltd. v. A.P. Agencies** reported in AIR 1989 SC 1239.

3) **Union of India v. Ladulal Jain** reported in AIR 1963 SC 1681.

4) **Patel Roadways ltd. v. Prasad Trading Co.**

reported in AIR 1991 SC 1514.

92. Learned advocate Mr. Upadhyaya for the appellants-defendants submitted that the Trial Court erred in holding that the contract was independent of the Letters of Credit. It was submitted that the Letters of Credit are individual contracts independent of the terms and conditions of the underlying contract of sale. However, in the present case, the only terms and conditions of the contract which have been placed into service by the Plaintiff were the terms and conditions of the Letters of Credit. No other contract was executed between the parties. It was submitted that as per the Letters of Credit, the goods were to be delivered from Bombay Airport to Greece Airport and this condition was stipulated in the Letters of Credit and was made aware to the Plaintiff. Therefore, the terms of the Letters of Credit were the terms of the contract between the parties, and the Trial Court's finding that the contract was independent of the Letters of Credit is erroneous. It was submitted tha the Letters of Credit, as amended, had a specific expiry date for shipment being 01.12.1978 and for negotiation of documents being 30.12.1978. The Plaintiff dispatched the second consignment on 27.12.1978, after the Letters of Credit had expired and the third consignment was dispatched in January-April 1979, months after the Letters of Credit had expired. It was therefore, submitted that there was, no valid contract under which the Plaintiff could claim payment for the second and third consignments.

93. Learned advocate for the appellants-defendants submitted that the counter-claim filed by the defendants was wrongly held to be barred under section 69 of the Indian

Partnership Act, 1932 and the Trial Court had wrongly dismissed the defendants' counter-claim of Rs.1,08,85,152/- solely on the ground that M/s. “House of Dubary” was not a registered partnership firm, invoking the bar under Section 69(3) of the Indian Partnership Act, 1932.

94. It was further submitted that the bar under Section 69 does not apply to the counter-claim as the counter-claim is not a 'suit' within the meaning of Section 69(1) and (2) of the Indian Partnership Act because it is a proceeding incidental to the main suit. It was submitted that the appellants-defendants were not instituting a separate suit, they were defending the Plaintiff's claim and asserting their own rights arising from the Plaintiff's breach in the same proceedings. It was submitted that the counter-claim is covered under sub-section

(4) of Section 69 of the Indian Partnership Act as an exception and Sub-section (4)(b) provides that the section shall not apply to any suit or claim of set off not exceeding one hundred rupees in value. It was submitted that though the amount exceeds Rs. 100, the counter-claim is in the nature of a defensive claim arising from the same transaction, and the spirit of the exception should be applied. Learned advocate Mr. Upadhyaya for the appellants-defendants submitted that the Trial Court's interpretation is inconsistent as the Plaintiff sued the Appellant-firm as a legal entity under Order XXX of the CPC and the Trial Court passed a decree against the firm and its partners, however, it is legally untenable to recognize the firm for the purpose of being sued but to de-recognize it for the purpose of its own claim in the very same suit. It was submitted that if the firm can be a defendant, it can also be a claimant

in a counter-claim. It was further submitted that, the right to defend a suit is a fundamental right and to deny the appellants-defendants the right to prosecute their counter-claim, which arises from the very same transaction and is intrinsically linked to the Plaintiff's claim, amounts to denying them an effective right to defend. It was submitted that the bar under Section 69 of the Partnership Act was not intended to be used as a sword by the Plaintiff to unjustly enrich itself. It was submitted that though the Trial Court relied upon the case of **Babulal Dhandhania v. Gautam and Co.** reported in AIR 1950 Cal. 391 and in case of **Ajit Kumar Maity v. Naranarainath Jana** reported in AIR 1955 Cal. 224 to hold that the counter-claim is barred, however, learned advocate for the appellants-defendants submitted that these cases do not apply to the facts of the present case and that the counter-claim is not a proceeding to enforce a right arising from the contract in the same manner as a suit but it is a defensive claim arising from the plaintiff's own breach of contract. Referring to the decision in case of **Vishwanath Lohia v. Allahabad Bank (AIR 1979 All. 12)** relied upon by the Trial Court to hold that a counter-claim has the same effect as a cross-suit, learned advocate Mr. Upadhyaya for the appellants-defendants submitted that even if the counter-claim is treated as a cross-suit, it is still maintainable because the cause of action for the counter-claim is the plaintiff's breach of contract, which is different from the cause of action in the main suit and the counter-claim is intrinsically linked to the main suit and cannot be separated from it.

95. In support of his submissions, reliance was placed on the following decisions:

1) **Raptakos Brett & Co. ltd. v. Ganesh Property** reported in AIR 1998 SC 3085.

2) **Haldiram Bhujiawala v. Anand Kumar Deepak Kumar** reported in AIR 2000 SC 1287.

3) **Jagdish Chandra Gupta v. Kajaria Traders (India) Ltd.** reported in AIR 1964 SC 1882.

4) **M/s. Shreeram Finance Corporation v. Yasin Khan** reported in AIR 1989 SC 1769.

5) **Babulal Dhandhania v. Gautam and Co.** reported in AIR 1950 Cal 391.

96. Learned advocate Mr. Upadhyaya for the appellants-defendants submitted that it was the plaintiff and not the defendants, who was in breach of contract. It was submitted that the Trial Court erred in law in holding that the defendants committed breach of the contract by not getting the Letters of Credit extended and by diverting the airway bills. It was submitted that this finding of Trial Court is perverse and contrary to the evidence on record as the breach was committed by the plaintiff, and not the defendants, as the plaintiff dispatched the second and third consignments after the Letters of Credit had expired, without any valid contractual basis. It was submitted that the plaintiff also changed its clearing and forwarding agent from M/s. Dawn India (its own agent) to Defendant no.5-M/s. Airfreight (P) Ltd.(the appellants' agent) without the defendants' consent and the plaintiff also failed to ensure that the goods were exported in compliance with the terms of the Letters of Credit. It was therefore, submitted that the appellants-defendants were under no obligation to accept or pay for goods shipped in violation of the fundamental terms of the contract hence, the Trial Court's finding that the appellants-defendants were liable, tantamount to creating a new contract for the parties, which is impermissible in law.

97. Learned advocate Mr. Upadhyaya for the appellants-defendants submitted that the Trial Court has erred in holding that the defendants committed fraud by submitting forged airway bills and exporting goods in their own name as this finding is not supported by the evidence on record. It was submitted that Section 17 of the Indian Contract Act, 1872, defines ‘fraud’ as the suggestion as to a fact of that which is not true by one who does not believe it to be true, the active concealment of a fact by one having knowledge or belief of the fact, a promise made without any intention of performing it, any other act fitted to deceive or any such act or omission as the law specially declares to be fraudulent. It was further submitted that, the Trial Court itself has held in Para 65-66 of the impugned Judgment that the defendants were not in a position to dominate the will of the plaintiff and that the transaction cannot be considered unconscionable. It was submitted that the Trial Court further found that the plaintiff had come forward on its own accord to send the goods through M/s. Vijay Transport Co. from Kandla to Bombay and delivered the same to Defendant no.5-M/s. Airfreight (P) Ltd. and there was no inducement from the defendants. Therefore, the allegation of fraud is not proved. It was submitted that the appellants-defendants acted in good faith to carry out the export of goods as per the contract, however, the dispute arose because the plaintiff was unable to pay the air freight charges in advance, which was a requirement under the Letters of Credit and the appellants-defendants permitted defendant No. 5 to take delivery of the airway bill on payment of freight which was a commercial arrangement and not fraud.

98. Learned advocate Mr. Upadhyaya for the appellants-defendants submitted that the decreed amount is arbitrary and based on manifest errors as the Trial Court decreed a sum of Rs.49,81,336/- with 12% interest which is arbitrary and based on manifest errors of calculation and law as the Trial Court failed to account for the fact that no valid contract existed for the second and third consignments, as the Letters of Credit had expired. It was submitted that the Trial Court also did not consider the costs borne by the defendants in connection with the export of goods or the losses suffered by the appellants-defendants due to the plaintiff's breach of contract or the payments already made by the defendants to the plaintiff for the first consignment. It was further submitted that the decreed amount includes amounts for the third consignment for which there was no clear evidence of delivery or acceptance in accordance with any valid contract and therefore, the Trial Court's calculation is, arbitrary and unsupported by evidence.

99. Learned advocate Mr. Upadhyaya for the appellants-defendants submitted that the Trial Court has incorrectly fastened joint and several liability as the plaintiff's suit alleged that the appellants - Defendant nos. 1 to 4 were jointly and severally liable along with the clearing agent -Defendant 5 and the New Bank of India -Defendant 6. It was submitted that the Trial Court could not have exonerated defendant nos. 5 and 6 from any liability in its findings. It was submitted that there is a logical and legal contradiction because when the agents through whom the alleged fraud or breach was committed are not liable, the principal cannot be held liable on the same cause of action and therefore, the findings of the Trial Court are not tenable on this issue.

100. Learned advocate Mr. Upadhyaya therefore, prayed to quash and set aside the impugned Judgment and Decree dated 31.01.1986 and dismiss the Civil Suit No. 120 of 1979 filed by the original plaintiff- respondent no.1 as being without jurisdiction and without merits. It was also prayed to allow the counter claim filed by the appellants-defendants and pass a decree in their favour. In the alternative, it was prayed to reduce the decreed amount to the extent of legitimate claims and set-offs of the appellants-defendants.

7)Submissions of the respondent-plaintiff

101. Learned advocate Mr. Abhijit Joshi for plaintiff – respondent no.1 submitted that the question of jurisdiction has arisen on the basis of the averments made in the plaint, written statement, counter claim, rejoinders and the correspondence which took place between the parties. It was submitted that the place of suing in the suit arising out of a contract is governed by Section 20 of Code of Civil Procedure, which states that suits to be instituted where cause of action arises wholly or partly, in other words, the bundle of essential facts which are necessary for the plaintiff to prove, before the plaintiff can succeed in the suit, refers entirely to the grounds set-forth in the plaint as cause of action. It was submitted that clause (c) of Section 20 of Code of Civil Procedure makes it clear that a suit may be instituted within the local limits of whose jurisdiction the cause of action wholly or in part arises. It was therefore, submitted that the making of the contract, itself is part of the cause of action and the determination of the place where the contract was made is part of cause of action. It was further submitted that as set out in the plaint, the contract was finally concluded on accepting the orders by the plaintiff at Kandla, Gandhidham, Kuchchh and admittedly, there was a contract between the parties that the delivery of the goods would take place by shipment from Kandla and therefore, in such circumstances, the admitted position is that the goods were to be lifted by shipment from Kandla but subsequently, on the request of the defendants, the goods were lifted by Air from Bombay and even the plaintiff had agreed to lift the goods by Air from Bombay on the same terms and conditions of the contract. It was therefore, submitted that the whole cause of action arose at Kandla. It was submitted that there is another aspect of the matter, that the defendants, requested the plaintiff to deliver the goods at Bombay by Air, hence, it is clear that the defendants had requested to lift the goods by Air from the Bombay.

102. It was submitted that in the present case, there is nothing to show that the terms and conditions of the contract were altered for the payment of the goods as the terms of the contract were that the price of the goods should have been paid by LC Opening bank to State Bank of India at Kandla, therefore, the place of payment was certainly at Kandla and not at Bombay. It was submitted that there were preliminary negotiations at Bombay, Delhi and Hongkong and then the

Letters of Credit were opened and orders were placed by the defendants and these orders were accepted by the plaintiff at Kandla. It was submitted that this would show that the acceptance of the offer was made at Kandla. It was submitted that this being so, it is clear that the cause of action had arisen at Kandla and therefore, Court at Bhuj would also have jurisdiction to entertain the suit filed by the plaintiff.

103. Learned advocate Mr. Joshi for the respondent no. 1 submitted that the suit is based upon the breach of the contract for recovery of the price of the second and the third consignments from the defendants Nos.1 to 4. It was submitted that the suit is based on two counts, first, the breach of contract and second, the damage resulting from the tort have been mentioned in the plaint. It was submitted that admittedly, the goods of third consignment were sent from Kandla to Bombay for the purpose of the export to the defendant No.5, through M/s. Vijay Transport Co. therefore, the Civil Judge (S.D.) at Bhuj would have jurisdiction to try and decide the suit on all counts, and hence issue No.2-A is rightly decided in the affirmative.

104. Learned advocate Mr. Joshi submitted that the contract was entered between the plaintiff and the defendants Nos.1 to 4 and under the contract, the components of electronic goods which were being imported, were to be exported after assembling to six Yugoslavian buyers and the goods relating to third consignment were sent through M/s. Vijay Transport Co. from Kandla to Bombay by the plaintiff as the name of the consignor and the name of defendant No.5 was mentioned as consignee in the consignment note. It was submitted that nowhere in goods consignment note of M/s. Vijay Transport Co., the name of the defendant No.1 was mentioned as consignee. Thus, the defendant No.5 received the goods from M/s. Vijay Transport Co. for and on behalf of the plaintiff as the agent of the plaintiff but the defendant Nos.1 to 5 acted in collusion with each other because the defendant No.5 deliberately did not send the Airway bill to the plaintiff but sent the said Airway bill to the defendant No.1, and thereby defrauded the plaintiff. It was further submitted that the defendant No.5, ought not to have mentioned the “House of Dubary”, New Delhi in the Column of "Shipper", in the Airway bill as the defendant No.5 was well aware that the goods were forwarded by the plaintiff from Kandla Free Trade Zone which were exempted from Custom duty, as the plaintiff was having license and the goods were lying within the vicinity of the Free Trade Zone Kandla.

Learned advocate Mr. Joshi further submitted that the witness on behalf of the respondent -original plaintiff- namely Shree Anilbhai Chandubhai Pota who was examined at Ex.276, has stated that the factory of the plaintiff company was situated within the limits of Free Trade Zone of Kandla, and all the benefits of the Free Trade Zone Kandla were availed and plaintiff was not liable to pay customs duty for imports and exports of the goods. It was submitted that Shree Anilbhai Chandubhai Pota had also stated that the defendants Nos.2 to 4 had placed four orders in name of the defendant No. 1 who opened the said Letters of Credit produced at Ex.278 to 281 which bears the signature of the defendant No.3. It was further deposed by the said witness that the defendants Nos.1 to 4 also gave confirmation of those orders and the letter of confirmation of the orders is produced at Ex.282. It was submitted that the said witness has also stated that the Yugoslavian buyers were supposed to open the Letters of Credit in favour of the defendant No.1, in the Bank of Defendant No.1 i.e. New Bank of India, New Delhi -Defendant No.6. It was further deposed that out of those seven orders, relating to the Letters of Credit, the defendant No.1 opened four letters of credit in favour of the plaintiff's bank – i.e. State Bank of India, Kandla which are produced at Exh.290 to Exh.309, along with other papers. It was also deposed that the goods relating to the second and third consignments were supplied through the defendant No.5 and the defendant No.5 was supposed to send the Airway bills for the second and third consignments to the plaintiff, however, the defendant No.5 did not send those Airway bills and sent to defendants Nos.1 to 4. It is also stated in the deposition that the defendants Nos.1 to 4 had then submitted those Airway bills directly to the defendant No.6 New Bank of India, New Delhi and the Airway bills were forged and goods were exported on the basis of the fabricated documents. It was also submitted that, the custom authorities had issued notice to the defendants Nos.1 to 4 and recorded their statements which are produced at Exh.334 to Exh. 336. The witness of the plaintiff has also said that the defendants Nos.1 to 4 were also prosecuted for the breach of the provisions of the Customs Act and were held guilty for the same and the Judgment thereof is produced at Exh.337, thereafter the defendants Nos.1 to 4 had preferred the appeal before Board of Revenue at New Delhi and the said appeal was allowed and the order of punishment against the defendants Nos.1 to 4 was set aside. It was further submitted that the defendant No.5 was bound to export the goods relating to third consignment within one month and if it was not possible then the goods should have been returned at Kandla. However, the goods of third consignment were detained for about five months and were not exported within the stipulated time limits, therefore, various letters were written to the defendant No.5 asking to return the goods of the third consignment at Kandla, but defendant No.5 did not give any heed to the said letters which are produced at Exh.339 to Exh.347. It was submitted that the plaintiff company also wrote a letter to Assistant Customs Collector at Bombay and at Kandla which is placed at Exh.348, and therefore the Assistant Customs Collector at Kandla wrote the letter at Exh.349 to the defendant No.5 and informed the defendant No.5 to return the goods at Kandla. The witness has also stated that therefore the defendant No.5 sent telex message and thereby gave threat, that they would cancel other orders. Copies of correspondence took place between the plaintiff and the defendants Nos.1 to 5 are produced at Exhs.450 to 460.

105. Learned advocate for the plaintiff - respondent no. 1 submitted that the documents produced at Exhs. 328, 335, 336, 339 to 349, 357 to 358, 369, 443, 451 to 456 and 459 460 clearly proves that the respondent-original plaintiff was not liable to pay the Air Freight relating for second and third consignments but the defendant No.1, had to make the payments thereof. It was submitted that the Letters of Credit were amended on F.O.B. basis and Air Freight was to be paid by “House of Dubary” - appellant No.1 Company. In this regard, reliance was placed on the Telex message at Exh.357 dated 4.12.1978 to show that the defendant No.1 agreed to pay airfreight on F.O.B. basis and therefore, there was no question to pay the airfreight by the respondent-plaintiff for the second and third consignments. It was therefore, submitted that the respondent-plaintiff was not liable to pay airfreight when goods were handed over to the defendant No.5, for the purpose of the export as the carriers.

106. It was further submitted that the goods relating to third consignment were sent through M/s. Vijay Transport Co., Gandhidham, via Truck bearing registration No. GTY 3883 from Kandla to Bombay on 9.12.1978 showing plaintiff as "Consignor" in goods consignment note and showing the name of M/s. Dawn India as consignee and therefore, M/s. Dawn India as the representative of the plaintiff handed over the goods to the defendant No.5, on 27.12.1978 for the purpose of exporting those goods to Yugoslavian buyers. It was submitted that the defendant No.5 was the carrier and the plaintiff was the owner of the goods and the goods were handed over for shipment, subject to the payment of airfreight by the defendant No.1 and the goods were to be exported to Yugoslavia via Athens (Greece) on behalf of the plaintiff.

107. It was submitted that the plaintiff wrote the letter vide Exh.339 dated 13.1.1979 to the defendant No.5 to remit all the documents to the plaintiff and also informed the defendant No.5 that the defendant No.5 would be responsible for all payments and would be answerable to the customs authorities. It was submitted that thereafter the plaintiff wrote another letter at Exh. 342 dated 3.3.1979 to the defendant No.5 and requested him to call upon the documents from the defendant No.1 and requested to hand over the same to the plaintiff so as to enable the plaintiff to negotiate with the Bank. It was submitted that both the plaintiff and the Customs Authorities intimated by writing several letters and by Telex messages to the defendant No.5, and requested to return the goods at Kandla, however, the goods were lifted and exported to Yugoslavia by using the name of the defendant No.1, as the consignor in the Airway bill at Exh. 317 of the third consignment.

108. It was therefore, submitted that in view of the facts emerging from the record and documentary evidence produced before the learned Trial Court, it is not in dispute that the name of the defendant No.1, has been shown in the airway bill at Exh.317 in the column "shipper's name and address" as “House of Dubary” New Delhi, India, and the cargo was lifted from Bombay on 4.5.1979 whereas the Airway bill at Exh.315 which is in-respect of second consignment has shown in the column "shipper's name and address" of M/s. Hanspa Knit (P) Ltd., “House of Dubary”, Kandla Free Trade Zone, Gandhidham Kachchh, New Delhi India and the second cargo was lifted on 27.12.1978 and it is also not in dispute that the Airway bill was delivered to the defendant No.1, by the defendant No.5, and it was not sent to the plaintiff.

109. It was further submitted that the goods relating to the third consignment were exported by the defendant No.5 from Bombay to Yugoslavia via Ethens (Greece) and those goods were intended to be exported to Yugoslavian buyers under the orders as placed by the defendant No.1, being the agent of the said foreign purchasers, accordingly, those goods were delivered to the defendant No.5, on 27.12.1978 by the plaintiff through its own clearing and forwarding agent M/s. Dawn

India, but the defendant No.5 deliberately and in collusion with the defendants Nos.1 to 4 did not do so. It was therefore, submitted that the plaintiff demanded back the possession of the goods from the defendants Nos.1 to 5 in terms of the letter at Exh.369, however, subsequently on 4.5.1979, the said goods were exported and delivered to Yugoslavian buyers.

110. It was also submitted that the defendant No.6 i.e. New Bank of India was also liable to make the payments of the second and third consignments under the Letters of Credit on receipt of the actual amounts from the Bank of the Yugoslavian buyers, however, the defendant No.6 failed to do so and supported the defendant No.1, in releasing the payment in personal account of the defendant No.1, which is nothing but collusive fraud on the part of the defendants. It was submitted that the Yugoslavian buyers opened seven irrevocable Letters of Credit towards the payments of the goods as the photocopies of such Letters of Credit are produced at Exh. 283 to Exh.289, however, in turn, the defendant No.6 - New Bank of India opened four Letters of Credit in favour of the plaintiff in the State Bank of India, Branch office Kandla. It was submitted that the photocopies of such Letters of Credit along with the documents produced at Exh. 290 to Exh.309 clearly shows that the defendant No.1, opened four Letters of Credit valued at US$ 18,67,488-75 equivalent to Rs. 1,49,47,909-00 in favour of the plaintiff for supply of the goods as mentioned in the said Letters of Credit namely, Radio Cassette, Transistor Radio, Car Radio, Cassettes etc. It was pointed out that the Letters of Credit at Exh. 290, Exh.295, Exh.300 and Exh.305 were issued on 5.10.1978 and price was fixed on C.I.F. basis for export from Kandla to THESSALONIKI (Greece), but subsequently, the date and the time was extended up to 14th December, 1978 and 30th December, 1978, respectively without altering the terms and conditions of the Letters of Credit. It was submitted that the documents relating to this amendment are produced at Exh.294, Exh.299, Exh.302 and Exh.307 and after the said amendment which was carried out on 14.10.1978, further amendment was carried out on 28.10.1978 with regard to mode of shipment and amended mode of shipment was by Air from Bombay Airport to THESSALONIKI (Greece) Airport.

111. Learned advocate Mr. Joshi for the respondent submitted the plaintiff has filed the suit to recover the price of the second and third consignments from the defendants Nos.1 to 4 on the ground that the defendants

Nos.1 to 4 were working as the agents of the Yugoslavian buyers and worked as the export house for the plaintiff and therefore, the Yugoslavian buyers opened the Letters of Credit in the name and in favour of the defendant No.1, which are on record at Exh. 283 to Exh.289 dated 20.6.1978 and 21.6.1978 and after that the defendant No.1 placed four orders with the plaintiff at Exh. 278 to Exh.281 on 4.10.1978 and not only that, but the defendant No.1, also opened four Letters of Credit in favour of the plaintiff through the defendants No.6 - New Bank of India Ltd., New Delhi which are also placed at Exh. 290, Exh.292, Exh.295, Exh.298, Exh.300, Exh.301, Exh.305 and Exh.306. It was further reiterated that the defendant No.1 asked the confirmation of those orders and the plaintiff in turn made the confirmation in terms of the letter at Exh. 282, hence, the contract was concluded as per the Letter of

Credit which is produced at Exhs. 282. It was submitted that it has been specifically stated by the plaintiff that the original Letters of Credit which were opened by Yugoslavian buyers in favour of “House of Dubary” New Delhi, and defendant No.1 in turn opened seven Letters of Credit in the name and in favour of M/s. Hasmukh Brothers (HK), Hongkong as per at Exh. 374 to Exh.380 on 4.9.1978 ,however, M/s. Hasmukh Brothers (HK) Ltd., was unable to perform the entire contract work, hence as per mutual consent of all the parties, it was decided to open three Letters of Credit in the name and in favour of M/s. Hasmukh Brothers (HK), Hongkong and four Letters of Credit to be opened in the name and in favour of the respondent/plaintiff – i.e. M/s. Hanspa Knit (P) Ltd., therefore, the Letters of Credit at Exh. 381, Exh.383 and Exh.386 were opened in name and in favour of M/s. Hasmukh Brothers

(HK) on 5.10.1978 and four Letters of Credit at Exh.290, Exh.295, Exh.300 and Exh.305 were opened in the name and in favour of the plaintiff.

112. It was further submitted that it was not possible to supply the entire goods of the orders, within specified time and therefore, the plaintiff requested to extend the time limit up to 20.12.1978 for the shipment and such time limit was extended by the letter at Exh. 253 dated 26.10.1978, accordingly, the plaintiff supplied the goods in three parts on 22.11.1978, 25.11.1978 and on 12.12.1978 relating to the first consignment and that the amount in Indian Rs.26,80,327.50 was paid by the defendants Nos. 1 to 4 on the payments received from Yugoslavian buyers under the Letters of Credit as per the contract, however, the plaintiff did not receive its payment of second and third consignments and therefore the present suit is filed.

113. Learned advocate Mr. Joshi for the respondent no. 1 submitted that the claim has been setup in Para No.10 of the plaint for an amount of US$ 64,80,50-00 for the second consignment and has relied upon the invoices which are at Exh. 310 to Exh.312 and the Airway bill which is at Exh. 315. It was submitted that it is an admitted position that the defendant No.1, has already received the payment of goods from Yugoslavian buyers and agreed to pay such amounts of the second consignment to the plaintiff in March, 1979 or latest by first week of April, 1979 in terms of letter at Exh. 205, but the payments were avoided even after the assurances were given by the defendants Nos.1 to 4. In respect of the third consignment, it was submitted that the defendant No.1 sent the goods to Yugoslavian buyers as per the Airway bill at Exh.317 dated 4.5.1979 and while sending the goods, the defendants deliberately and willfully omitted to mention the name of the plaintiff in shipper's column of the Airway bill and mentioned the name of defendant No.1 in the shipment sent by the defendant No.1, therefore, the plaintiff has set up the claim of the total amount of US$ 1,79,157-82, by giving the details in Para No.13 of the plaint in respect of third consignment and has relied upon the documents produced at Exh. 317 and Exh.325 i.e. the Invoice, Packing List, Inspection Certificates, Certificate of Origin and AirWay Bill. It was submitted that though the defendant No.1 had already received the entire amount of third consignment from Yugoslavian buyers during the pendency of the suit, but no payment was made to the plaintiff and thereby committed the breach of the contract.

114. Learned advocate Mr. Joshi in reply to the contention of the defendants that the plaintiff failed to supply the goods within the specified time limit and even after extending the time limits and therefore, there was a breach of the contract on the part of the plaintiff and the defendants are not liable for any loss to the plaintiff or not liable to pay any money/dues as claimed in the suit, referred to deposition of Mr. Deepak Darbari on behalf of the defendants Nos.1 to 4, at Exh. 415 wherein he has admitted that Mr. Deepak Darbari was the partner in year the 1978 but retired from the partnership as a partner, and it was admitted that the partnership firm is being registered for the purpose of the Income Tax and not registered under the Partnership Act. It was alleged that the plaintiff failed to supply the goods relating to second and third consignments within stipulated time limit and defendants have not renewed the Letters of Credit either in favour of the plaintiff or in favour of M/s. Hashmukh Brothers (HK) to submit that Deepak Darbari has falsely contended the appellants/original defendants has not intimated the respondent/plaintiff to send the goods of second and third consignments and not made any fresh contract thereof and did not give any consent even after sending the goods of second and third consignment and that the defendant No.1 has paid the freight, insurance premium and borne the expenses of handling the goods for the second and third consignments and also paid the demurrage of the goods. It was therefore, submitted that except deposition of the defendant no.2 there is no other documentary evidence on record to prove such allegations.

115. Learned advocate Mr. Joshi further submitted that the contentions which are put forth by the appellants/defendants are required to be examined in relation to and in respect of the evidence available on the record and as a matter of fact, there is voluminous evidence which proves that the second and third consignments were exported to Yugoslavian buyers under the contract and not exported at the personal risk of the plaintiff.

116. It was submitted that the defense put forth by the appellants/defendants is totally against the documentary evidence and it is with a view to avoid the liability thereof, and the entire correspondence which took place between the parties clearly shows that the goods were sent under F.O.B. to the defendant No.5 for the purpose of export to Yugoslavian buyers and the Yugoslavian buyers accepted those goods under the contract and under the Letters of Credit, the amount was paid to the defendant No.1. It was submitted that it is also clear from the correspondence that the defendant No.1, entered in to an agreement with the defendant No.5, for the arrangement of the charter on basis of F.O.B. contract as intimated and it is also clear from the evidence that the plaintiff was repeatedly asking the defendant No.5 to export the goods of third consignment, but defendant No.1 delayed to export the same because Yugoslavian buyers wanted to re-validate their license and due to that reason there was delay in exporting the goods.

117. It was submitted that it is further clear from the correspondence that the Yugoslavian buyers had intimated to the defendant No.1, to pay the price of the second consignment and the defendant No.1, promised the Yugoslavian buyers to pay such amount to the plaintiff immediately, accordingly the defendant No.1, gave the assurance to the plaintiff that they would make the payment of the second consignment at end of March or first week of April 1979. It was pointed out from the evidence that under the terms of the contract, the defendant No.1, has to make the payment of the goods to the plaintiff on receiving the same from Yugoslavian buyers though Bank to Bank, but the defendant No.1 did not make the payment of the second consignment even after receiving the payment from Yugoslavian buyers and kept in its own account of the partnership firm, hence it was submitted that the entire correspondence as well as the oral evidence on the record leave no doubt that the plaintiff was ready and willing to act as per the terms of the contract and accordingly acted upon it also. It was submitted that oral evidences of the witness Deepak Darbari is self-contradictory against the correspondence which took place between the parties to the contract, therefore, the defendants Nos.1 to 4 only with a view to avoid their liabilities got up such defense, evidence and arguments which is nothing but an afterthought.

118. It was therefore submitted that the learned Trial Court has rightly come to the conclusion that the defendants Nos.1 to 4 committed default in making payments, and it is also quite clear that the defendant No.1, was not having any grievance about the delay in performance of the contract when it was agreed with the consultant of the Yugoslavian buyers to extend the time limits of the contract and that extension was made voluntarily. It was submitted that the defendants agreed to take the delivery of goods of the second and third consignments even after the expiration of the time limit and not complained at any time for the delay in the correspondence and accepted the delivery even after expiry of time limit.

119. It was therefore submitted that keeping in view the documentary evidences, it is impossible to accept the version of Mr. Deepak Darbary that there is no such breach of the contract by the defendants and defendants are not liable to make any payment to the plaintiff.

120. It was further submitted that, the plaintiff has properly and sufficiently explained about the outstanding amount which is payable by the defendants to the plaintiff under writing which is on record at Exh. 205 and that cogent evidence at Exh.205 is duly supported by other documentary evidence and the oral evidence, hence there was no reason for the learned Trial Court to discard such cogent and reliable evidence against the absurd, vague and baseless oral statement of Mr. Deepak Darbari.

121. It was submitted that the documentary evidence produced by the plaintiff clearly establishes that the defendants committed breach of the contract and committed default and they were trying to avoid the legitimate dues of the plaintiff under the contract though admittedly the appellants/defendants have received the entire money of the consignments from Yugoslavian buyers. Therefore, the learned Trial Court has rightly given the findings that the defendants Nos.1 to 4 has committed the breach of the contract and the plaintiff is entitled to recover the payment of second and third consignments from the defendants Nos. 1 to 4.

122. Learned advocate Mr. Joshi submitted that the defendant No.1 firm namely “House of Dubary” and the partners thereof have filed the counter claim by way of a cross-suit for recovery of the sum as damages from the plaintiff, however from the oral evidence of Mr. Deepak Durbari, it is evident that firm namely, “House of Dubary” is only registered for the purpose of Income Tax Act and not registered under the provisions of the Indian Partnership Act. It was submitted that the plaintiff has taken the plea that the cross-suit is barred by the Section 69 of the Indian Partnership Act for the want of the registration of the partnership firm namely, “House of Dubary”.

123. It was submitted that the provision of Section 69 of the Indian Partnership Act is mandatory which provides that the unregistered firm shall not be entitled to institute any suit or in form of the Counter Claim or the cross suit to enforce the right arising from the contract. It was therefore submitted that the effect of the Section 69 is that the suit by the unregistered firm is bad in law and not tenable at its inception as Section 69 does not confer any right and debars the unregistered firm from filing the suit.

124. It was submitted that once the Court is satisfied that the firm is not registered, the Court must treat the suit or cross-suit as if it has not been filed and Court should proceed to dismiss it and in the present case the firm namely, “House of Dubary” is not registered under the provisions of the Indian Partnership Act then the counter claim by way of the cross suit is not maintainable. It was therefore submitted that the learned Trial

Court has rightly rejected the Counter Claim of the defendants.

125. Learned advocate Mr. Joshi for the respondent no. 1 submitted that the liability for the freight, insurance etc. relating to the second and third consignments is of the defendant No.1 firm because the firm took the delivery of the goods at Bombay through their agent defendant No.5, however, the defendants have failed to prove that they are not liable to pay freight, insurance etc. as the defendant No.5 -M/s. Air Freight (P) Ltd. has not come forward to support the case of the defendant No.1 firm “House of Dubary” and has remained absent and there is only the bare words of Mr. Deepak Darbary that the demurrage was paid by defendant no.1 firm without any corroborative evidence on record. It was submitted that the plaintiff has taken the plea from the beginning in the correspondence that the defendant No.1 firm "House of Dubary" was not empowered to keep the goods in private godown against the provisions of Customs Act which is also evident from the record as the defendants had withheld the goods on their own against the instructions of the plaintiff and it is clear from the correspondence that the defendant No.1 firm "House of Dubary" wrote the letter dated 5.12.1978 addressing to the plaintiff wherein it was clearly mentioned that the plaintiff would not be liable for the demurrage, and this admission on the part of the defendants is sufficient to exonerate the plaintiff from the responsibility of the demurrage and therefore, learned Trial Court has correctly held that the defendants are not entitled to set off for the amount of demurrage from the plaintiff's claim.

126. Learned advocate Mr. Joshi for the respondent no. 1 submitted that in all respect the appellants (original defendants) have failed to prove that the plaintiff has committed breach of the contract, on the contrary, it is clearly proved and established by the plaintiff that the defendant No.1 firm and its partners have committed the breach of the contract and have not paid the dues to the plaintiff namely, M/s. Hanspa Knit (P) Ltd., and withheld the legitimate payment of the plaintiff even after receiving the payment from Yugoslavian buyers without any substantial reasons.

127. Learned advocate Mr. Joshi for the respondent no. 1 in light of the facts of the present case submitted that the Court may allow the total claim of the respondent (original plaintiff) for an amount of Rs.62,91,245.18 from all the defendants Nos.1 to 6 of the Original Special Civil Suit

No.120/1979 with running interest 12% per annum from the date of filing of the Suit till the date of the payment and prayed for allowing the First Appeal No.1093/1987 and dismissing the First Appeal No.531/1986.

128. Learned advocate Mr. Joshi for the plaintiff raised preliminary objection regarding the maintainability of appeal. It was submitted that the appeal filed by the appellants (original defendant nos. 1 to 4) is not maintainable as per Section 69 of the Partnership Act, more particularly, the provisions of Section 69(2) of the Partnership Act, 1932 which is as under: -

> *"Section 69(2) - No suit to enforce a right arising from a contract shall be institute in any Court by or on behalf of a firm against any third party, unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm."*

129. It was submitted that in the present case it is categorically admitted by Deepak Dubari in his deposition (Exh-415) and also admitted in his cross examination that the partnership firm namely, “House of Dubary” defendant No.1 is not a registered partnership firm. It was submitted that the learned Trial Court has rightly come to the conclusion in Para No.110 of the Judgment. It was therefore submitted that in view of aforesaid factual matrix as well as provisions of law, the present Appeal filed by the appellants herein deserves to be dismissed on this ground alone without entering into merits of the matter.

130. In support of his submission reliance was placed on the judgments of the Hon'ble Apex Court in case of **Loonkaran Sethiya and Ors. Versus Ivan E. John and Ors.**, reported in MANU/SC/0048/19 76 and in case of **Jagdish Chander Gupta Versus Kajaria Traders (India)**

Ltd., reported in MANU/SC/0047/1964.

131. Learned advocate for respondent no. 1-plaintiff submitted that on one hand, the appellants-defendants have contended that, Trial Court is not having jurisdiction, and on the other hand the appellants-defendants had filed their counter claim before the same Court. It was therefore submitted that once the defendants have filed their counter claim before the Bhuj Court, then the defendants are estopped from raising the contentions about the jurisdiction of the Bhuj Court. It was further submitted that the appellants-defendants herein cannot blow hot and cold both together as once they submitted themselves to the jurisdiction of the Bhuj Court by way of filing the counter claim, it is crystal clear that the defendants have accepted the jurisdiction of the Court at Bhuj-Kutchh and therefore, defendant nos. 1

to 4 are not legally entitled to raise the contentions about the jurisdiction of the Trial Court to try and decide the suit.

132. It was submitted that if the appellants-defendants were of the firm opinion and belief that the Court at Bhuj is having no jurisdiction in any case and only the Court at Bombay is having jurisdiction, then in that case, they ought to have filed an independent suit before the Civil Court at Bombay instead of filing counter claim before the Bhuj Court. It was therefore submitted that when the defendants themselves submitted and accepted the jurisdiction of the Bhuj Court by way of filing counter claim, which is nothing but a substantial suit in nature, the contentions of the appellants-defendants on the ground of jurisdiction is baseless and not tenable in eye of law. Learned advocate for the respondent no. 1 places reliance on the provision of Section 19 of the Code of Civil Procedure, 1908 which reads as under: -

> *"Section 19 - Suits for compensation for wrongs to person or movables*
>
> *When a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts."*

133. It was submitted that the aforesaid provision itself provides an option to the plaintiff to institute the suit in either of the Courts. It was further submitted that the making of a contract is part of cause of action, and performance of a contract is also a part of cause of action, hence a suit in respect of the breach can always be filed at the place where the contract was made or it should have performed or where its performance is completed. Not only that, even part of cause of action arises where money is expressly or impliedly payable under the contract. In support of the aforesaid submission, reliance was placed on the judgment of the Hon'ble Apex Court, in the matter of **A.B.C. Laminart Pvt. Ltd. and Ors. Versus A.P. Agencies, Salem, MANU/SC/0001/1989.** Therefore the learned Trial Court has rightly decided the issue No.2-A in affirmative on the point of jurisdiction.

134. With regard to the applicability of provisions of Sale of Goods Act, learned advocate for the plaintiff submitted that it is an admitted position that, the goods of second and third Consignments were delivered through M/s. Vijay Transport Co. at Bombay to the defendant No.5, who was the clearing and forwarding agent of the appellants herein. It was submitted that at the instance of the appellants-defendants the goods of second and third consignments were sent to defendant No.5 for the purpose of export to Yugoslavian buyers, which prima facie is deemed to be a delivery of the goods to the buyer. In support of this submission, Section 39 of Sale of Goods Act, 1930 was referred to which reads as under: -

> *"39(1) Delivery to carrier or wharfinger- Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer."*

135. It was submitted, that the learned Trial Court has rightly come to the conclusion that goods of second and third consignments are transmitted and delivered to the defendant No.5 who has received the goods as the agent of the appellants herein and therefore the appellants-defendants are liable to make the payment of the second and third consignments to the respondents (original plaintiff).

136. With regard to the contention of the appellants-defendants that the Goods of second and third consignments were never delivered in time by the plaintiff and therefore the goods were not exported at Yugoslavia in time and the appellants herein has not received any payment towards the second and third consignments, the question of any payment to the plaintiff for the second and third consignments does not arise at all, learned advocate Mr. Joshi for the Respondent No.1 submitted that the said contention is totally misleading and misguiding and completely against the evidence available on record as well as the written statement filed by the Defendant No.6-New Bank of India which is the Bank of the appellants herein. It was submitted that the Exh.318 which is a photocopy of Bank Account of the appellants-defendants with their Bank i.e. Defendant No.6 clearly shows the receipt of money from M/s. SOLUN during the pendency of the suit, moreover, the Statement of Account of the appellants-defendants with their Banker i.e. Defendant No.6, are produced at Exh.386 to Exh.393 which it is important piece of evidence about the payments received by the appellants-defendants from the Yugoslavian buyers. Learned advocate for the plaintiff referred to and relied upon the Written Statement of the defendant No.6 at Exh.38 and more particularly, in Para No.11, the Defendant No.6 wherein it was categorically admitted and stated on oath as under: -

> *"The answering Defendant is not aware of the circumstances under which the first Defendant came in possession of the Airway Bill which he handed over to the answering Defendant along with his Drafts drawn on his foreign buyers, for*

purpose of collection of their Draft amounts by the answering Defendant. The Defendant No.1 had submitted his drafts for US $ 1,09,960/-, US $ 1,02,820/ and US $ 1,00,000/- drawn in his foreign buyers along with necessary documents including the Airway Bill No. 098-2561-9996 in which the name of House of Dubary appeared as one of the shippers. Answering Defendant forwarded the same on 27/12/78 to the Bank of foreign buyer for payment. The answering Defendant got payment of these Drafts on or about 14/2/1979, 30/1/1979 and 30/1/1979 respectively in the account of Defendant No.1 and gave credit of the same to Defendant No.1 in their account. Defendant No.1 has utilized the credits so given by the answering Defendant by making various withdrawals therefrom with the result that there now stands a debit balance in their said account with the answering Defendant."

137. It was submitted that from the perusal of the admission of the defendant No.6, it is clear that whole defense put-forth by the appellants-defendants about non-receipt of the payment of the second and third consignments from the foreign buyers is totally false, frivolous and vexatious, hence the learned Trial Court has rightly come to the conclusion that the appellants-defendants have failed to make the payment of second and third Consignments to the respondents and the appellants-defendants are correctly held liable for the payment of second and third consignments.

138. Learned advocate for the respondent-plaintiff submitted that the contention of the appellants-defendants that there is no privity of contract with the respondent is not valid assuming without admitting that there is no existence of privity of contract between the appellants-defendants and respondent-plaintiff, then in that case how and on what basis the defendants have filed their counter claim in the said Special Civil Suit No.120/1979 and demanded the damages from the plaintiff.

139. It was submitted that in fact, the contentions raised by the appellants-defendants itself is self-contradictory and not tenable in eye of law. It was submitted that there is enough evidence on record which clearly proves that the contract was in existence between the parties and the defendants committed breach of the contract and had not paid the amount of the second and third consignment, though it was received from the Yugoslavian buyers, and it was credited in the accounts of the Appellants-defendants by their Bank i.e. New Bank of India (defendant- No.6) and the plaintiff has sufficiently proved the said aspect by producing the statement of accounts of the appellants herein, before the Trial Court, which contains the entries of the receipt of the amount of the second and third consignment.

140. Learned advocate Mr. Joshi with regard to the contention of the appellants-defendants that the learned trial Judge has wrongly come to the conclusion and committed a grave error by imposing liability of Freight, Insurance etc. on the appellants-defendants submitted that, as a matter of fact, the liability of Freight, Insurance etc. is not at all imposed upon the appellants-defendants, on the contrary on bare perusal of the observations made by the learned trial Judge in Para Nos.137, 139 of the Judgment, it proves that the total amount of Rs.7,22,446-00 towards Freight, Insurance etc. is disallowed by the learned trial Judge and the said amount is deducted from the total claim of Rs.62,91,245-00. It was further submitted that since the learned trial Judge has disallowed the amount of Rs.7,22,446-00, therefore in the Cross Appeal No.1093/1987, the appellant of the said

Appeal has raised one of the grounds in Para No.4, as under: -

> *"(4): That the learned Judge seriously erred in deducting Rs.1,91,646/ and Rs.5,30,800/- by way of freight charges from the price of the goods defendants Nos.1 to 4 were held liable and to which amount the plaintiffs were held entitled to realize from the said defendants. It is submitted that the said finding of the learned Judge with regard to freight charged payable for the second and third consignment is not supported by any evidence on record."*

141. It was therefore submitted that it is misconception of the part of the appellants-defendants that the learned trial Judge has wrongly fastened the liability of the Freight, Insurance etc. on the appellants-defendants as, out of the total claim of Rs.62,91,245.18 for the second and third consignment, the learned trial Judge only allowed the claim of Rs.49,81,336 and remaining amount of Rs.13,09,909 is disallowed by the learned trial Judge, which includes the amount of Rs.7,22,446 of Freight, Insurance etc.

142. Insofar as First Appeal No.1093/1987, it was submitted that since the learned trial Judge has partly allowed the suit and therefore the appellants have preferred the cross Appeal with a prayer to allow the total claim of the appellants for an amount of Rs.62,91,245.18 and also prayed to allow the Special Civil Suit no.120/1979 against all the defendant nos.1 to 6 jointly and severally with the running interest @12% per annum from the date of filling of the Suit till the date of the payment/realization of the dues of the appellants. Hence in view of legal submission made, facts narrated and the relevant and important documentary evidence relied upon, it was submitted to allow the First Appeal No.1093/1987 and dismiss the First Appeal No.531/1986.

143. Learned advocate Mr. Joshi for the Plaintiff submitted that the defendant No.6 deposited an amount of Rs.37,67,420/- with the Trial Court, Bhuj, which as per the knowledge of the plaintiff was later transferred to the Registry of this Court in compliance of Para No.145 of the impugned Judgment of the Trial Court and the directions were given which are as under:

> *“....... I find that the amount of Rs.37,67,420-00 is at present and still lying in the sundry account in the New Bank of India Ltd., Defense Colony New Delhi, and that amount being received towards the value of the goods of the third consignment and that amount is liable to be realized towards the satisfaction of the decree in favour of the Plaintiff in Special Sult No.120/1979 and it is therefore on the ground of justice and equity required to be directed the Defendant No.6 as to be deposited such lying amount in sundry account in this Court for the payment and satisfaction of the decree...”*

144. It was further submitted that in view of the above, the amount which is lying with the

Registry of this Court may please be directed to pay the said amount with accrued interest to the Office of the Respondent No.1 i.e. Official Liquidator, so that the respondent No.1-Official Liquidator can settle the dues of the workers as well as of the secured and unsecured creditors of the Company in Liquidation as per the provisions of the Companies Act, 1956 accordingly dismiss the First Appeal No.531/1986.

8)Points for Determination

145. Considering the submissions of both the sides and oral and documentary evidence on record, following points for determination:

1) Whether the Trial Court has committed an error in assumption of jurisdiction to entertain the suit under section 20 of the Code of Civil Procedure, 1908?

2) Whether the place of contract formation is Delhi or Kandla?

3) Whether the place of performance of contract was at Bombay or Kandla?

4) Whether the place of payment was Delhi or Kandla?

5) Whether the appellants defendants were in breach of contract or not?

6) Whether the Trial Court erred in law in holding that contract was independent of Letters of credit?

7) Whether the decreed amount is arbitrary and based on manifest error or not?

8) Whether the Trial Court was just and correct in decreeing the suit for Rs.49,81,336/- and disallowing the claim of the plaintiff for Rs.13,09,909/-?

9) Whether the Trial Court committed an error in holding that counter claim was barred under section 69 of the Indian Partnership Act, 1932?

10) Whether the Trial Court was justified

in fastening the joint and several liability upon the defendant nos. 1 to 4 only while exonerating defendant nos. 5 and 6?

11) Whether the decree passed by the Trial Court for Rs.49,81,336/- is just and proper?

9)Reasons

Analysis of points for determination and findings

146. Having heard the learned advocates and having perused the impugned Judgment and Order and oral and documentary evidence available on record, it would be necessary to summaries the chronology of events and relevant evidence placed on record by the parties:

Sr No	Date / Period	Event	Exhibit
1.	December 1977	The defendant no. 2 came to the factory of the plaintiff at Kandla with Six Yugoslavian buyers so as to negotiate for export of electronic goods to Yugoslavia.	-

2.	1977 – 1978	Further negotiations were made between the parties at different places and it was agreed that defendant no. 1 firm would act as an export house by placing the orders in its name for export of the goods to Yugoslavia.	-
3.	20.06.1978	Seven Irrevocable Letters of Credit were issued by Yugoslavian Buyers in favour of the defendant no. 1 firm.	283 to 289
4.	04.09.1978	The defendant no. 1 firm issued seven irrevocable Letters of Credit in favour of sister concern of the plaintiff Hasmukh Brothers.	374 to 380
5.	04.10.1978	Defendant Nos. 1 to 4 placed an order for supply of goods worth US$ 7,81,522.14 equivalent to Rs. 62,91,245.10	278 to 281
6.	05.10.1978	Four Letters of Credit were opened by the defendant no. 6 Bank in favour of the Plaintiff wherein terms of the Contract regarding shipment by 01.10.1978 and negotiation of documents by 20.10.1978 was mentioned and the goods were to be shipped from Kandla Port.	290, 295, 300, 305
7.	09.10.1978	The defendant no. 6 Bank amended Letters of Credit by extending the shipment date to 01.12.1978 and last date of negotiation of documents was extended to 30.12.1978.	-

8.	14.10.1978	As per the negotiations between the parties, it was agreed that the shipment would be sent by Air from Bombay Airport for export of the goods to Yugoslavia and accordingly the Letters of Credit were amended.	-
9.	26.10.1978	Letter of the defendant no. 1 firm to extend the period of Letters to Credit to complete the delivery of the goods.	353
10.	18.11.1978	Letter of the Plaintiff for acceptance of the order placed by the defendant no. 1 firm on 04.10.1978	282
11.	October – November 1978	The plaintiff shipped the first consignment of goods through its clearing agent M/s. Dawn India for value of US$ 3,33,285.60 equivalent to Rs. 26,80,327.50. The payment for the first consignment was received by plaintiff and there is no legal dispute regarding the first consignment.	-
12.	04.12.1978	Telex message of Hasmukh brothers to pay airfreight by defendant no. 1 firm and for the amendment of the Letter of Credit on FOB basis.	357
13.	07.12.1978	Airfreight Private Limited was appointed as a clearing and forwarding agent instead of Dawn India for the remaining Letter of Credits by the defendant no. 6.	467
14.	07.12.1978	The defendant no. 1 firm by telex message informed the defendant no.	361

		5 to hold the goods until further advice till the license of the Yugoslavian buyer was not revalidated.	
15.	15.12.1978	Telex message of the defendant no. 1 accepting the liability to pay demurrages.	356
16.	18.12.1978	Telex from the defendant no. 1 firm to plaintiff cancelling of order of models of Indian Star and Ganges.	360
17.	19.12.1978	Export invoices were issued by the defendant no. 1 firm.	310 to 314
18.	27.12.1978	Plaintiff dispatched the goods for second consignment from Kandla to defendant no. 5 Airfreight Private Limited. The Airway bills were also issued by the defendant no. 5 in name of the plaintiff and defendant no. 1 firm.	315 to 317 & 325
19.	16.03.1979	Letter of the defendant no.1 firm informing the plaintiff that the goods will be exported subject to validation of license of the Yugoslavian buyers.	205
20.	06.04.1979	Letter of defendant no. 1 informing the Hasmukh brothers that the goods would be shipped after the licenses are revalidated.	326
21.	26.04.1979	Letter to defendant no. 1 requesting to arrange Letter of Credit in favour of the plaintiff.	327
22.	30.04.1979	Letter of the defendant no. 1 to Hasmukh brothers informing that the goods would be lifted between 10^{th} and 15^{th} May, 1979	329
23.	30.04.1979	Plaintiff had written a letter to	348

		the Asst. Collector of Customs, Bombay for detention of the goods by the defendant no. 5.	
24.	01.05.1979	Letter from defendant no. 1 seeking clarification.	330
25.	02.05.1979	Letter addressed to defendant no. 1 by the plaintiff for providing the clarification.	331
26.	03.05.1979	Letter written by Asst. Collector of Customs, Bombay to defendant no. 5 Airfreight Private Limited.	349
27.	04.05.1979	The defendant No. 5 exported the goods which were retained for approximately 5 months at the request of the defendant no. 1 firm.	316 & 317
28.	21.05.1979	Special Civil Suit No. 120 of 1979 was filed before the Civil Judge (S.D.), Bhuj by the plaintiff claiming Rs. 62,91,245.18.	3
29.	24.05.1979	Defendant no. 1 firm filed the counter-claim for Rs. 1,08,85,152/- for damages and reimbursement of expenses from the plaintiff.	105
30.	12.06.1979	Special Investigation and Intelligence Branch of Bombay Customs issued show-cause notice under section 108 of the Customs Act, 1962 upon the defendant no.1 firm.	334
31.	19.06.1979	Yugoslavian buyers informed the defendant no. 1 by letter requesting the confirmation regarding deduction of 2% for the defective goods.	417
32.	26.06.1979	Appointment of commissioner to take inventory of the account of	41

		defendant no.1 from the books of defendant no.6.	
33.	26.06.1979	Defendant no.1 to 4 were restrained from realizing any consideration of third consignment received from the Yugoslavian buyers.	42
34.	22.08.1979	Payment intimation from Yugoslavia buyers to the defendant no.1 firm.	418
35.	1980	Criminal Complaint was filed by Assistant Collector of Customs against defendants nos. 1 to 5	443
36.	02.01.1981	Order-in-Original was passed by the Customs authorities against unauthorised export of goods by defendant no.1 firm.	337
37.	31.01.1986	The trial court decreed the Special Civil Suit No. 120 of 1979 decreeing in favour of the plaintiff Rs. 49,81,336/- with 12% interest and dismissed the counter-claim.	481

147. From the above chronology of events, there is no dispute between the parties regarding the first consignment as the plaintiff exported the goods through its own clearing and forwarding agent M/s. Dawn India for value of US$ 3,33,285.60 equivalent to Rs.26,80,327.50. The plaintiff has duly received the payment of the said amount from New Bank of India- defendant no.6.

148. Therefore, the dispute between the parties pertains only with regard to 2nd and 3rd consignment. As per the amended terms of Letters of Credit, last date for shipment was 01.12.1978. The plaintiff dispatched the goods from Kandla on 27.12.1978 which was after 26 days from the expiry of Letters of Credit. Goods were sent to defendant no.5 M/s. Airfreight (P) Ltd. through transporter M/s. Vijay Transport Co. from Kandla to Bombay for export by Air.

149. The third consignment was dispatched from Kandla to Bombay through M/s. Vijay Transport Co. on 27.12.1978 for export from Bombay to Yugoslavia by defendant no.5. Defendant no.5 retained the goods for about 5 months and ultimately exported the same to

Yugoslavia in May, 1979. No payment was received by the plaintiff for export of the second and third consignment and thereafter the suit for recovery was filed by the plaintiff and counter claim for damages was filed by the defendants.

150. In view of above facts, with regard to **<u>Points for Determination no. 1 to 4</u>** for objections raised by the appellants-defendant for assumption of jurisdiction by the Trial Court to entertain the suit filed by the plaintiff is required to be considered. In order to consider such objection, it would be germane to refer to the relevant provisions of relevant Acts:

CODE OF CIVIL PROCEDURE, 1908

SECTION 16 : Suits to be instituted where subject-matter situate.

Subject to the pecuniary or other limitations prescribed by any law, suits-

(a) for the recovery of

immovable property with or without rent or profits,

(b) for the partition of immovable property,

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,

(d) for the determination of any other right to or interest in immovable property,

(e) for compensation for wrong to immovable property,

(f) for the recovery of movable property actually under distraint or attachment, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.-In this section "property" means property situate in [India.]

SECTION 19 : Suits for compensation for wrongs to person or movables.

Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

SECTION 20 : Other suits to be instituted where defendants reside or cause of action arises.

Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

[Explanation].-A corporation shall be deemed to carry on business at its sole or principal office in [India] or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

SALE OF GOODS ACT, 1930

SECTION 36 : Rules as to delivery

(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each

case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf: Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as

ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller.

SECTION 39 : Delivery to carrier or wharfinger

(1) Where, in pursuance of a contract of sale the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer.
(2) Unless otherwise authorised by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case(s). If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the

wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit, and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit.

CONTRACT ACT, 1872

SECTION 2 : Interpretation clause.

In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :-

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise:

(c) The person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee":

(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise:

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement:

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises:

(g) An agreement not enforceable by law is said to be void:

(h) An agreement enforceable by law is a contract:

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract:

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

SECTION 3 :Communication, acceptance and revocation of proposals.

The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

SECTION 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."

151. The contention raised on behalf of the appellants-defendants that for assumption of jurisdiction by the Trial Court to entertain the suit only Letters of Credit issued by the defendant no.6 New Bank of India stipulating the terms of contract are required to be considered, is concerned, on perusal of section 19 read with clause (c) of section 20 of the Code of Civil Procedure, it is not in dispute that goods have been dispatched by the plaintiff from Kandla. Moreover, so far as transaction of first consignment out of four Letters of Credit issued by defendant no.6 Bank, transaction has taken place at Kandla for which the payment is also received at Kandla by the plaintiff and there is no dispute with regard to the transaction of first consignment which is one of the part of the goods agreed to be sold by the plaintiff to defendant nos. 1 to 4 for which, four Letters of Credit were opened stipulating the terms and conditions of the contract.

152. On perusal of the terms and conditions stipulated in Letters of Credit placed on record at Exh. 290 to 309 including the letters of amendment of the Letters of Credit issued by defendant no.6 in favour of the plaintiff’s bank State Bank of India, Kandla are considered, it is discernible that terms of Letters of Credit are only for the purpose of payment to be negotiated so as to complete the transaction of sale of goods between the parties. The cause of action wholly or in part can said to have been arisen out of bundle of essential facts necessary for the plaintiff to prove if traversed in order to support the right to the judgment of the Court. It refers entirely to the grounds set forth in the plaint as the cause of action. Clause (c) of section 20 of the Code of Civil Procedure, clearly stipulates that suit may be instituted where the cause of action, wholly or in part arises. In the facts of the case, part of the cause of action can be said to have arisen at Kandla when defendant no.2 had brought along with him 6 Yugoslavian buyers to the factory of the plaintiff in December, 1977 at Kandla. Thereafter, further negotiation had taken place at various places i.e. Bombay, Delhi and Hongkong between the parties. Orders were placed firstly before M/s. Hasmukh Brothers (HK) and 7 Letters of Credit were opened. However, as M/s. Hasmukh Brothers (HK) could not fulfill the contract, it was agreed between the parties to enter into contract for supply of the goods by the plaintiff who is sister concern of M/s. Hasmukh Brothers (HK) and three Letters of Credit were confirmed in favour of M/s. Hasmukh Brothers (HK) on 05.10.1978 and remaining four Letters of Credit were confirmed in favour of the plaintiff vide Exhs. 290, 295, 300 and 305 and on opening of such four Letters of Credit in favour of the plaintiff through State Bank of India, Kandla, four orders were placed by defendant no.1 with the plaintiff vide letters dated 04.10.1978 Exh. 278 to Exh. 281 taking confirmation from the plaintiff. It is also not in dispute that after placing four orders, defendant no.2 had come to Kandla and discussed regarding shipment and on basis of such discussion, the plaintiff vide letter dated 18-19.11.1978 confirmed four orders. It is, therefore, a clear part performance of the contract at Kandla as contract was finally concluded on accepting the orders by the plaintiff at Kandla, Gandhidham-Kutch. Therefore, reliance placed by the defendants only on Letters of Credit for contending that other circumstances and facts are to be ignored and only terms and conditions of Letters of Credit and place of issuance of Letters of Credit is required to be considered to determine the jurisdiction of the Court, is contrary to the facts proved by the plaintiff regarding part performance of the contract at Kandla.

153. It is pertinent to note that merely opening Letters of Credit is not sufficient but thereafter action taken by the plaintiff by letter dated 18.11.1978 confirming the orders placed by the defendants, accepting the offer at Kandla, would be sufficient to confer jurisdiction upon the Civil Court at Kutch-Bhuj within whose territorial jurisdiction, part performance of the contract had taken place.

154. The Trial Court was therefore, justified in holding that only Letters of Credit alone are not required to be considered but in substance who placed orders and accepted the orders as the orders were in form of the offer and that offer was accepted on part of the plaintiff is material.

155. The Trial Court was also justified in considering the transaction while observing that negotiations were to be made for just arrangement for fixing the terms and conditions of the contract and in connection of such discussions or negotiations, Letters of Credit were required to be opened in favour of the first defendant.

156. It is also required to be consider the entire chain of events which had taken place between the parties for sale of goods manufactured in Free Trade Zone at Kandla. The contention of the defendants that merely manufacturing of goods at Kandla and dispatch by the plaintiff for export to Bombay cannot be considered as part performance of the contract, is not tenable because performance of contract is part of the cause of action. It is also not in dispute that payment has been received for the first consignment by the plaintiff at Kandla which is integral part of the entire contract and as per the averments made in the plaint and documents placed along with the plaint as well as oral and documentary evidence led by the parties, it cannot be said that only the terms and conditions stipulated in Letters of Credit would determine the jurisdiction of the Court.

157. The suit in respect of realisation and recovery of the price can always be filed at the place where the contract should have been performed or where its performance is completed. If the contract is to be performed at the place where it is made then the suit on the contract is required to be filed at the said place however, in a contract of sale of goods, the place where the goods have to be delivered, is also the place of performance and the Court of that place would have jurisdiction to entertain the suit in respect of the dispute of the contractual rights of the plaintiff.

158. In the facts of the case, from perusal of the Letters of Credit at Exh. 290 to 309, it appears that it was initial contract that the goods were shipped from Kandla to Greece accompanied by all necessary documents as mentioned therein. However, parties subsequently agreed to permit the shipment by Air from Bombay to Yugoslavia and such arrangement was made for the purpose of expedient delivery to the buyer.

159. From the correspondence between the parties, it is evident that place of shipment is from Kutch and the performance of the contract was to be made at Kandla, Kutch. Therefore, it is not in dispute that cause of action or part of cause of action had taken place at Kandla which is material for the plaintiff to prove to succeed. The plaintiff has therefore, rightly been held to have proved that originally contract between the parties was to ship the goods from Kandla which was agreed to be changed for shipment of goods by Air from Bombay. Therefore, it cannot be said that since the place of delivery of goods has been shifted from Kandla, the Court at Bhuj would not have jurisdiction. In fact, the goods were dispatched from Kandla to Bombay for export. Merely because goods are to be airlifted from Bombay would not be a fact against the plaintiff to hold that goods were delivered at Bombay and therefore, there was no cause of action which had taken place at Kandla. We are therefore of the opinion that the Trial Court was justified in holding that whole cause of action had arisen at Kandla and merely because goods were delivered to defendant no.5 at Bombay, it cannot be considered that goods have not been delivered from Kandla.

160. The Trial Court has rightly referred to and relied upon the provisions of section 39(1) of the Sale of Goods Act, 1930 to turn down the contention of the defendants that the goods delivered by the plaintiff was received at Bombay for the purpose of export and therefore, cause of action had arisen at Bombay only. The undisputed facts are that goods were handed over to the transporter M/s. Vijay Transport Co. to carry them at Bombay as per the amended clause of Letters of Credit. Therefore, as per the provisions of section 39(1) of the Sale of Goods Act, when the goods are delivered to the carrier for the purpose of transmission to the buyer then prima facie delivery of goods would be deemed to have been made to the buyer at Kandla.

161. Reliance placed on behalf of the plaintiff on the decision in case of **Harshad Chiman Lal Modi v. DLF Universal Ltd. and another** reported in (2005) 7 Supreme Court Cases 791, therefore, would not be applicable in facts of the case. However, it would be fruitful to refer to the observations made by Hon'ble Apex Court on applicability of sections 16, 19 and 20 of the Code of Civil Procedure to determine the jurisdiction which would be helpful to determine the issue on hand as under:

> **"14.** Having heard learned counsel for the parties and having considered the relevant provisions of the Code as also the decisions cited before us, in our opinion, the order passed by the trial court and confirmed by the High Court deserves no interference. As stated above, it is an admitted fact that the suit relates to the recovery of immovable property, a plot admeasuring 264 sq. mtrs. in the Residential Colony -

DLF Qutub Enclave Complex, Gurgaon. It is not in dispute by and between the parties that the property is situate in Haryana. It is no doubt true that the defendants are having their head office at Delhi. It is also true that the agreement was entered into between the parties at Delhi. It also cannot be denied that the payment was to be made at Delhi and some installments were also paid at Delhi. The pertinent and material question, however, is in which court a suit for specific performance of agreement relating to immovable property would lie-

15. Now, Ss. 15 to 20 of the Code contain detailed provisions relating to jurisdiction of courts. They regulate forum for institution of suits. They deal with the matters of domestic concern and provide for the multitude of suits which can be brought in different courts. Section 15 requires the suitor to institute a suit in the court of the lowest grade competent to try it. Section 16 enacts that the suits for recovery of immovable property, or for partition of immovable property, or for foreclosure, sale or redemption of mortgage property, or for determination of any other right or interest in immovable property, or for compensation for wrong to immovable property shall be instituted in the court within the local limits of whose jurisdiction the property is situate. Proviso to Sec. 16 declares that where the relief sought can be obtained through the personal obedience of the defendant, the suit can be instituted either in the court within whose jurisdiction the property is situate or in the court where the defendant actually or voluntarily resides, or carries on business, or personally works for gain. Section 17 supplements Sec. 16 and is virtually another proviso to that section. It deals with those cases where immovable property is situate within the jurisdiction of different courts. Section 18 applies where local limits of jurisdiction of different courts is uncertain. Section 19 is a special provision and applies to suits for compensation for wrongs to a person or to movable property. Section 20 is a residuary section and covers all those cases not dealt with or covered by Ss. 15 to 19.

16. Section 16 thus recognizes a well established principle that actions against res or property should be brought in the forum where such res is situate. A court within whose territorial jurisdiction the property is not situate has no power to deal with and decide the rights or interests in such property. In other words, a court has no jurisdiction over a dispute in which it cannot give an effective Judgement Proviso to Sec. 16, no doubt, states that though the court cannot, in case of immovable property situate beyond jurisdiction, grant a relief in rem still it can entertain a suit where

> relief sought can be obtained through the personal obedience of the defendant. The proviso is based on well known maxim "equity acts in personam, recognized by Chancery Courts in England. Equity Courts had jurisdiction to entertain certain suits respecting immovable properties situated abroad through personal obedience of the defendant. The principle on which the maxim was based was that courts could grant relief in suits respecting immovable property situate abroad by enforcing their judgments by process in personam, i.e. by arrest of defendant or by attachment of his property."

162. Another aspect for deciding the jurisdiction of the Court for part performance is where the money is expressly or impliedly payable under the contract. In the facts of the case, admittedly price consideration was payable at Kandla as per the stipulation in Letters of Credit stating that State Bank of India, Kandla to receive the payment and in fact, for first consignment the payment has been received at Kandla. Section 36 of the Sale of Goods Act clearly lays down that in absence of contract to the contrary, goods sold are to be delivered at the place at which they are at the time of sale read with section 32 of the said Act which lays down that unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. Therefore, in the facts of the case when the terms of the contract is and was that price of the goods should have been paid to the plaintiff’s bank at Kandla and as such, place of payment was at Kandla and not at Bombay, therefore, even on this count, considering the place of payment would confer jurisdiction to the Court to entertain the suit.

163. In view of the facts emerging from the record, the part cause of action has arisen at Kandla being place of performance and place of payment, because the plaintiff has accepted the contract at Kandla, performed the contract by dispatching the goods from Kandla and receiving the payment at State Bank of India, Kandla. Therefore, reliance placed by the plaintiff on decision in case of **Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas & Co.** (supra) would not be applicable in facts of the case as the plaintiff has proved part performance of the contract that the place of contract place of performance and place of payment was at Kandla.

164. Reliance placed on decision in case of **A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies** (supra) would also not be applicable in the facts of the case because in view of provision of clause (c) of section 20 of the Code of Civil Procedure, suit can be filed where part of cause of action arises.

165. Similarly, reliance placed on decision in case of **Union of India v. Ladulal Jain**(supra) wherein it is held that the place of performance of a contract is determined by the terms of contract and not by the place where goods are handed over to carrier, would also not be applicable in facts of the case because terms of contract clearly stipulate the goods to be shipped from Kandla which were later on changed to shipment from Kandla to airlifting from Bombay which would not change the nature of contract more particularly, when the goods were sent to the clearing and forwarding agent - defendant no.5 who was appointed by the defendant no.1 for the purpose of export of goods as per the terms of negotiation carried out between the parties.

166. Reliance placed on the decision in case of **Patel Roadways ltd. v. Prasad Trading Co.**

(supra) would also not be applicable to the facts of the case as it cannot be said that contract stipulated a specific place of delivery then that place determines the jurisdiction and not the place of initial handing over to a carrier. In the facts of the case, the place of shipment was changed from Kandla to Bombay and that would not divest the jurisdiction of the Court at Bhuj-Kutch when as part performance, the payment is also received by the State Bank of India at Kandla.

167. The Trial court has also considered the transaction as bundle of essential facts to conclude that there was part performance of the contract at Kandla and therefore, it cannot be said that the cause of action had not arisen at Kandla. The Trial Court was therefore, justified in considering the entirety of facts and circumstances while dismissing the contention of the defendants that only terms and conditions of the contract were the terms and conditions of the Letters of Credit and therefore, the Trial Court would not have any jurisdiction. Such a contention raised on behalf of the plaintiff is nothing but an effort to consider the entire issue in a truncated manner by only referring to the Letters of Credit ignoring the vital fact that goods have been dispatched from Kandla through carrier of the plaintiff to the clearing and forwarding agent at Bombay for export by Air. Therefore, it cannot be said that the goods were not dispatched from Kandla taking into consideration the provisions of section 39(1) of the Sale of Goods Act which is relied upon by the Trial Court only to show that there was a part performance of the contract at Kandla.

168. The contention of the defendants that when the goods were dispatched for second and third consignment, Letters of Credit had expired is also not tenable in view of the fact that the plaintiff had participated in execution of the export of second consignment and third consignment dispatched by the plaintiff and further the contention of the defendants cannot be accepted considering only that Letters of Credit had expired, ignoring transactions which had taken place and not denied by the defendants regarding export of goods dispatched by the plaintiff from Kandla to Bombay and as such, the technical plea of the defendants that because Letters of Credit had expired and there was no contract and therefore, Court has no jurisdiction, is not tenable as such contention of the defendants is *dehors* the facts and is liable to be rejected.

169. With regard to **Point for Determination No.5** that defendants nos. 1 to 4 and not the plaintiff were in breach of contract, the Trial Court on the basis of the oral and documentary evidence led by the parties has categorically arrived at the conclusion that the defendants have committed breach of the contract by retaining the goods with the defendant no.5 who was appointed by defendant no.1 as clearing and forwarding agent, coupled with the fact that even after export of the goods, airway bill was prepared by defendant no.5 in name of defendant no.1 instead of plaintiff so as to negotiate the Letters of Credit with the LC opening bank by defendant no.1 to get the payment directly from Yugoslavian buyers.

170. The Trial Court has analysed the facts and has come to the following conclusion in the impugned order as under:

“60)..... The main point for consideration in this case is whether of the omission of the name of the plaintiff to write first and then mentioned the name of the first deft., in Air-way bill was a part of cause of action which was resulted the damage and on that ground, entitled the plaintiff to bring the suit in the present court for the tortious act. It is now clear from the above of completed action and is wide enough to take in the result as the basis for the purpose of restitution. According to the plaintiff, if the fifth deft. was not made the forged document i.e. Air way bill showing in shipper column of the name of the first deft., as the consigner then the first deft., was entitled to be converted the money of the goods in their own account of the New Bank of India but the sixth deft., New Bank of India was bound to remit the said money to the plaintiff's bank i.e. State Bank of India Kandla in terms of the letters of credit and that the plaintiff had to receive at least value of the goods in time but the change was permitted the first deft., to be converted the said money for their own use otherwise not restrained by the order of the injunction of the court. The learned advocate for the defts., has submitted that the light in which the matter shall be considered is different. It is contended that the sequence of writing the name in Air way bill was not given the right to the first deft., but the first deft., was exporter of the goods to Yugoslavian Buyer in terms of the contract and was entitled to recover the money from the buyer through Bank to Bank and received the money accordingly and nothing more. It is therefore contended that there was no consequential effect resulted to damage or injury to the plaintiff. On the other hand, it is submitted on the part of the plaintiff that the term "cause of action" is much wider and for the present purpose, it shall be understood to mean the bundle of facts constituting the cause of effect in resulting the damage for the tortious act. I am inclined to take the view that the fact of the deprivation of the property would be one of the bundle of the facts which is necessary to be proved in order to entitled the plaintiff to file the suit against the defts., Apart from this in determining whether the court has jurisdiction, or not, the court shall always consider the matter on the pleadings as they stand. I have therefore carefully considered the plaint and the written statement. Admittedly the goods of third consignment were sent from Kandla to Bombay for the purpose of the export to the fifth deft., in Vijay Transport and that the said goods were entrusted along with the necessary documents to the deft., No.5 which were lifted after five months and during the course of such delay, the goods were kept in godown so that the plaintiff wrote the several letters addressing to the fifth deft., that the goods were required under the provisions of the custom Act to be lifted within one month otherwise to be returned back to the plaintiff even if the goods were not returned back to the plaintiff and were exported after five months by Air way bill mentioning the name of the first deft. as the shipper which was resulted to be moved the custom authorities and the suit. I therefore quite agree with the submission of the plaintiff that the plaintiff deprived to be received the goods back and resulted in the consequent to damage. Therefore this court has jurisdiction to try the suit on all counts, In view of this findings and in result thereof I decide issue No.2 in the affirmative.

(61).....In the present case, the plaintiff has set up the case in the plaint that the contract was entered between the plaintiff and the deft. Nos. 1 to 4 and under such contract, the electronic goods which being imported were to be exported to six Yugoslavian buyers so that the deft. Nos. 1 to 4 had placed the orders for the same. The said goods were exported to Yugoslavian buyers as per rules and regulations of the customs in Free Trade Zone of Kandla. It was understood during the negotiations that the Yugoslavian buyers would in their turn obtain the requisite import license for importing such goods in Yugoslavia and would open necessary letters of credit in favour of the first deft., House of Dubary and then the deft., Nos. 1 to 4 would in their turn open the letters of credit in favour of the plaintiff It was also understood during the negotiations that the plaintiff would deliver the goods against of subsisting and valid letters of credit and under rules and regulations of Free Trade Zone Kandla. Therefore, the plaintiff would export the goods under their own clearance of customs in AR-4 form. It was further understood in the negotiations that the goods would be transported under requisite transfer permits and AR-4 forms under the provisions of the Customs Act by road to the clearing and forwarding agent at Bombay and that the goods would be exported by the clearing and forwarding agent from Bombay to Yugoslavia via Athen (Greece) in name of the plaintiff. It has further set up in the plaint that under such terms and conditions of the contract and understanding between the parties, the Yugoslavian buyers had opened the letters of credit in favour of the first defendant House of Dubary and then the deft., Nos. 1 to 4 in their turn opened the letter of credit in favour of the plaintiff through their Bankers i.e., the deft., No.6 New Bank of India Limited, New Delhi Therefore the deft. No.6 is the opening Bank. It has further set up the facts in the plaint that the New Bank of India, New Delhi has been opened the four letters of credit on 5-10-78 in favour of the plaintiff as described more particularly in paragraph No.6 of the plaint. According to those letters of credit, the goods were to be shifted not later than 10-10-78 and bills would be negotiated on or before 30-10-78. It has further stated in the plaint that the date of shipment and negotiation of the documents were extended up to 1-12-78 and 30-12-78 respectively. This extension was conveyed by the deft., No.6 New Bank of India, New Delhi vide letter dated 9-10-78. The deft. No.6 had thus amended the letters of credit by the letters dated 14-10-78, 20-10-78 and 18-11-78. Under this circumstance, it was belief on the part of the plaintiff that the Yugoslavian buyer had got to be extended their own letters of credit in favour of the first deft. It has also set up in the plaint that the plaintiffs have their own clearing and forwarding agent namely M/s. Dwan India.

(61)......In the present case, the plaintiff has set up the case in the plaint that the contract was entered between the plaintiff and the deft.Nos.1 to 4 and under such contract, the electronic goods which being imported were to be exported to six sex Yugoslavian buyers so that the deft., Nos. 1 to 4 had placed the orders for the same. The said goods were exported to Yugoslavian buyers as per rules and regulations of the customs in Free Trade Zone of Kandla. It was understood during the negotiations that the Yugoslavian buyers would in their turn obtain the requisite import license for importing such goods in Yugoslavia and would open necessary letters of credit in favour of the first defendant House of Dubary and then the deft. Nos. 1 to 4 would in their turn open the letters of credit in favour of the plaintiff. It was also understood during the negotiations that the plaintiff would deliver the goods against of subsisting and valid letters of credit and under rules and regulations of Free Trade Zone Kandla. Therefore, the plaintiff would export the goods under their own clearance of customs in AR-4 form. It was further understood in the negotiations that the goods would be transported under requisite transfer permits and AR-4 forms under the provisions of the customs Act By road to the clearing and forwarding agent at Bombay and that the goods Would be exported by the clearing and forwarding agent from Bombay to Yugoslavia Via, ATHENS (Greece) in name of the plaintiff. It has further that the goods had duly exported through the said M/s. Dawn India the 26,90,327-50 shipments from Kandla dated 22-11-78,22-11-78, 25-11-78, 25-11-78 and 2-12-78 which being aggregated value of Indian rupees to paise. The plaintiff has already received the said amount in respect of the first consignment through sixth deft. New Bank of India, New Delhi for and on behalf of the first deft. These goods were expected to be exported by ship however, by letter dated 14-10-78, the letters of credit were amended and permitted shipment by Air from Bombay Airport to THEOSSALONIKI (Greece) Air port and Air way bill was to be made to the order of " "Makosped" SKOPJE Notify Solun (DVGELAJA) Yugoslavia. Further by letter dated 27-11-78, the sixth deft., had amended the letter dated 14-10-78 so as to read "shipment by Air from Bombay Airport to Athens Airport (Greece) permitted one original and two copies of the air way bill made out to the order of Makosped Skopje Notify Solun (DGELALJA) Yugoslavia marked freight prepaid would require. It has further set up the facts that the deft. Nos. 2 to 4 had persuaded and prevailed upon the plaintiff for further shipment by Air to be made through the fifth deft., as the clearing and Forwarding Agents which would provide the 30 days facility for the payment of freight even though the representatives of the plaintiff were hesitating to accept the change of the clearing and forwarding agents as suggested by the deft. Nos. 2 to 4 but at last, the plaintiff relied upon the bonafide of the deft. Nos. 1 to 4 and agreed with suggestion to export the goods by Air through the fifth deft. It has stated in the plaint that the plaintiff was unaware whether the deft. Nos. 1 to 5 were closely associated. It is now alleged that the goods relating to third consignment were sent through M/s. Vijay Transport from Kandla to Bombay by the plaintiff as the consignment consigner of mentioning in consignment note and mentioned as the consignee of the fifth deft., and thereby the goods were sent to the fifth deft. It is alleged that no where in goods consignment note of Vijay Transport Company was mentioned the name of the first defendant as consignee. It is therefore alleged that the fifth defendant had received the goods from Vijay Transport Company for and on behalf of the plaintiff and as the Agent of the plaintiff. It has now set up in the plaint that the receipt of the goods covered by the goods consignment notes of Vijay Transport Company so that the fifth defendant did not entitle to receive or to hold or to deal or to dispose of the goods under the instructions of or at the instance of the first deft. It is therefore alleged that the fifth defendant had to be exported the goods by Air to Yugoslavian Buyer and that the fifth deft., did so for and on behalf of the plaintiff. It is now alleged in the plaint that the deft. Nos. 1 to 5 were acted in collusion with each other and disabled the plaintiff from drawing the documents on the opening Bank because the fifth defendant was not sending the Air way bill to the plaintiff but parted with, the said Air way bill to the first deft., and defrauded the plain- tiff which was resulted not to be realized the payments by drawing the documents on the negotiation Bank, i.e. the deft.No.6. on this background of the facts, it is alleged the fraud by collusion between the deft., Nos. 1 to 5. It has further set up the facts in the plaint that the goods relating to the third consignment notes were exported by Air on 27-12-78 by the fifth deft., to M/s.Solun Export company, (DVGELAJA, Yugoslavia even not sent the Airway Bills but parted with the deft., Nos. 1 to 4 and in the said Air way bills, mentioned in the column of shippers name and address as House of Dubary instead of M/s. Hanspa Knit (P) Ltd., House of Dubary Kandla Free Trade Zone, Gandhidham Kachchh, New Delhi India,. It is therefore alleged that the fifth deft., could not have mentioned in the column of "shipper" the House of Dubary, New Delhi "At the most, in view of the letters of credit the fifth deft., could have mentioned after the name of the plaintiff House of Dubary and not to be described House of Dubary as the shipper at all. It has further set up the case in the plaint that the fifth deft., knew that the goods were forwarded by the plaintiff from Kandla Free Trade Zone which were exempted from Custom duty only if

> the exporter of the goods would be within Free Trade Zone, Kandla.”

171. From the above findings of facts on analysis of evidence done by the Trial Court, we do not find any infirmity in the same and therefore, no interference is called for in the findings arrived at by the Trial Court that the defendants had committed breach of contract. The contention raised on behalf of the appellants-defendants that the plaintiff dispatched the second and third consignment after Letters of Credit had expired without any contractual basis and the plaintiff changed the clearing and forwarding agent from M/s Dawn India to defendant no.5 without the consent of the defendant no.1 and plaintiff failed to ensure that the goods were exported in compliance to the terms of Letters of Credit, are contrary to the subsequent events which had taken place from December, 1978 to May, 1979 as enumerated in detail by the Trial Court on the basis of evidence led before it.

172. We are therefore, of the opinion that the Trial Court cannot be said to have committed any error in holding that the defendant nos. 1 to 4 have committed breach of contract which was subsisting even after expiry of Letters of Credit. It appears that the defendants in order to be discharged from the liability of payment have raised such flimsy contention with regard to the expiry of Letters of Credit or change of agent in spite of the admitted fact that defendant no.5 was the clearing and forwarding agent appointed by the plaintiff.

173. **Point for Determination no.6** refers to the issue as to whether contract was independent of Letters of Credit or not. Contention raised on behalf of the defendants that the Trial court has erred in holding that the contract was independent of the Letters of Credit is also without any basis as the Trial Court has arrived at a conclusion regarding issue no.2(D) and 2(E) to the effect that so far as first consignment is concerned, there is no dispute between the parties.

174. The second and third consignment originated from the purchase orders as well as followed by Letters of Credit determining the terms of contract. Merely because Letters of Credit have expired would not result in termination of the contract when both the parties have carried out the transactions originally agreed upon. On perusal of the oral evidence of Mr.Anilbhai Chandubhai Pota at Exh. 276, it is deposed that the defendant no.1 firm had issued four purchase orders on 04.10.1978 (Exh. 278 to Exh.281) which was confirmed by the plaintiff by letter dated 28.11.1978 (Exh.282) and upon confirmation defendant no.1 firm opened seven Letters of Credit by the Yugoslavian buyers “SOLUN” Import-Export, Gevgelija, from the Bank of Rajasthan, Delhi (Exh.283 to Exh.289) in name of defendant no.1 which were transferred to New Bank of India-defendant no.6. Defendant no.1 in turn opened the Letters of Credit through its LC Opening Bank – New Bank of India -defendant no.6 in favour of the plaintiff (Exh.290 to Exh.309).

175. On perusal of these documents which are exhibited before the Trial Court as per the deposition of the witness of the plaintiff, heavy reliance is placed on behalf of the advocate of the defendants that the terms and conditions mentioned in Letters of Credit would govern the terms of the contract regarding the shipment of goods by the plaintiffs. On perusal of each of the Letters of Credit at Exh.290 to Exh.309 only relevant condition is regarding the date of Letters of Credit stated as 10.10.1978 which was subsequently extended by mutual consent of both the sides. Another condition which is referred to and heavily relied upon by the defendants is with regard to shipment by air from Bombay Airport to Greece Airport was permitted by amending the original Letter of Credit as per letter dated 14.10.1978 (Exh.303) so far as Letter of Credit No.13/1978 and 14/1978 was concerned which are relevant for second and third consignment. It appears that rest of the Letters of Credit were not amended. So far as first consignment is concerned, shipment was made from Kandla port by extending the date of shipment upto 01.12.1978 for submission of the documents upto 30.12.1978. It is true that after 30.12.1978, Letters of Credit were not enforceable.

176. From the facts emerging from the record, shipment of first consignment was made by the plaintiff on 22.11.1978 and thereafter as per the mutual agreement between the parties, second and third consignment were sent through M/s. Vijay Transport Co. to defendant no.5 so as to export the same by Air by preparing the bills by the plaintiff, in turn defendant no.1 also prepared the bills which are placed on record at Exh.310 to Exh.315 regarding second consignment and Exh.316 and Exh.317 for the third consignment.

177. On perusal of the Airway bill prepared by defendant no.5 which is in the name of defendant no.1 and not the plaintiff it appears that admittedly the goods were manufactured by the plaintiff and sent for export from Kandla Free Trade Zone, invoice no. HK/0778-79 of 8.12.1978 along with packing list for 10966 Radio Transistors Model “North Star” 220 packages along with inspection and quality certificates were issued by the plaintiff which are placed before defendant no.6 by defendant no.1 for the Letters of Credit which were issued by defendant no.6 New Bank of India. Even certificate of origin was also provided by Administrative Officer Kandla Free Trade Zone for export of goods on 08.01.1979 in respect of second and third consignment which were admittedly sent by the plaintiff for export.

178. From the facts emerged from the record, it also appears that in spite of the goods having been received by defendant no.5 M/s. Air Freight (P) Ltd. same were not exported as defendant no.1 firm did not complete the required procedure being Export House of the plaintiff who was supposed to carry out the export of the consignment.

179. It appears that thereafter only in the month of May, 1979, defendant no.1 was able to see that the goods which are lying with the defendant no.5 were exported. In the backdrop of the above facts, claim of the defendants for incurring various expenditures as stated in counter claim were not considered by the Trial Court except the freight charges which were borne by defendant no.1 for export of the second and third consignment.

180. Regarding the issue of payment received by defendant no.1 firm from Yugoslavian buyers for second and third consignments is concerned, the witness of the plaintiff has deposed that defendant no.5 has forwarded freight bills to defendant no.1 instead of the plaintiff and before the plaintiff can submit the bills before the bank, defendant no.1 had already encashed Letters of Credit opened by the Yugoslavian buyers.

181. At this stage, it is pertinent to note that during the pendency of the suit, interim order was passed to keep the money received by the defendant no.6 bank in Sundry account and accordingly amount of Rs.33,82,509.08 on 06.09.1979 and amount of Rs.3,84,911.47 on 07.06.1986 were kept in sundry account by defendant no.6 and copy of the statement of Sundry account is placed at Exh.318. The Trial Court while disposing the suit has directed to transfer this amount which during the pendency of the appeal has been now invested by the Registry in the Fixed Deposit with State Bank of India.

182. On perusal of the deposition of witness no.1 of the plaintiff – Anilbhai Chandubhai

Pota, it is deposed in the examination-in-chief that payment of third consignment was received by defendant no.1 in two parts as Yugoslavian buyers made the first payment as per the standard quality of the goods received and dispute of quality was raised regarding some part of the goods and withheld the payment, subsequently such dispute was given up and entire payment was made by the foreign buyer. He has also referred to Form A.R.4 which is placed on record at Exh.319 to Exh.321. It was also pointed out that the carbon copy was sent to the plaintiff, and the original were kept by defendant no.5 M/s. Airfreight (P) Ltd. He has also identified Fixed Deposit Receipt (FDR) for 2nd consignment taken out by defendant nos. 1 to 4 at Exh. 323.

183. By referring to letter dated 06.10.1988 at Exh.324, it was stated that State Bank of

India has returned the unpaid bill received by it from defendant no.6 New Bank of India along with original certificate issued by the Customs department sent by the plaintiff along with the goods. Witness of the plaintiff also referred to telex messages at Exh.326 to Exh.333 in which it is disclosed that the goods would be shifted after licenses are re-validated by the buyer. Telex messages are from 06.04.1979 to 03.05.1979 for not exporting the goods by defendant nos. 1 to 5. Thereafter notice dated 08.10.1979 was issued by the plaintiff and notices were also issued by the Customs Officer and reply was given by defendant nos. 1 to 4 and order of the Special Officer of Customs dated 02.01.1981 against defendant nos. 1 to 4 which was challenged by defendant nos. 1 to 4 before the Board of Revenue who set aside the adjudication order. These documents are placed on record from Exh.334 to 337. The plaintiff has also made efforts for return of the goods through Customs Officer. Documents thereof are placed on record from Exh.339 to Exh. 349 and thereafter in the month of May, 1979, it was decided by the plaintiff to file the suit. Even spare parts were sent to the Yugoslavian buyers by the plaintiff and bill for Airfreight was placed at Exh.352.

184. Reference was also made to telex messages between the parties from Exh.353 to Exh. 368. Thus, the witness of the plaintiff proved that the goods sent by the plaintiff was exported but no payment was made.

185. No cross examination of the witness of the plaintiff was made on behalf of defendant nos. 1 to 4 as advocate was not present. However, cross examination was made on behalf of defendant no.6 - New Bank of India regarding the extension of the Letters of

Credit wherein it is deposed by the witness that defendant nos. 1 to 4 did not pay the amount of the goods and further denied that no amount is sent by the Yugoslavian buyers for the goods manufactured by the plaintiff which were exported by defendant no.5 for 2nd and 3rd consignment. Regarding counter claim of the defendant nos. 1 to 4, witness also deposed in examination in chief to the effect that the plaintiff had informed defendant no.5 to return the goods which is placed on record at Exh.451 and letter dated 10.03.1979 which is at Exh No. 452 and letters dated 30.04.1979, 09.05.1979 at Exh. 453 to Exh.455, letter written to Air India to export the goods through air cargo is also placed at Exh.456 and reply given by the Air India is placed at Exh.457. Even the customs officer has written letter to the plaintiff for return of goods as it was sent from Kandla Free Trade Zone without payment of duty. Said letters are placed from Exh.458 to 460.

186. Considering such documents, it was deposed that the details given in para no. 20 of the counter claim are not true and correct and defendant nos. 1 to 4 have concocted the story of damages to raise exaggerated counter claim.

187. In the cross examination, carried out on behalf of defendant nos. 1 to 4, witness has reiterated the facts which were deposed in examination in chief and deposed that goods sent by the plaintiff was of good quality and same was to be exported at the cost and liability of the plaintiff. However, it was admitted by the witness that airfreight, demurrages and handling charges were not paid by the plaintiff company and the goods of second and third consignment were sent from

Kandla after the expiry of Letters of Credit. However, it was denied that defendant no.1 firm did not inform the plaintiff company to send the goods of second and third consignment. It is also denied that defendant no.1 firm was not liable to export the goods of 2nd and 3rd consignment and the plaintiff company was liable to receive the amount as agreed between Hasmukh Khatri and defendant no.1 firm. It was also denied by the witness that the plaintiff company was not liable to pay demurrage amount to defendant no.1 firm for 3rd consignment.

188. The witness has also denied that there was any negligence on part of the plaintiff as well as it was also denied that goods of 2nd and 3rd consignment was sent through defendant no.1 firm on the basis of collection and after expiry of the Letters of credit, no facilities can be obtained from the bank and there was no correspondence made by the plaintiff company with Yugoslavian buyers. Thus, the witness has not accepted any suggestion made on behalf of the defendants regarding the counter claim and reiterated what is stated in examination in chief.

189. Witness no.1 of defendant no.6- Devraj Indraprasad Anand deposed in examination in chief that defendant “House of Dubary” opened the account in New Bank of India, Defense colony branch, in the year 1978 and at that time only two partners Deepak Darbari and Ravi Darbari were declared. Letters of Credit were issued on 05.10.1978 wherein date of shipping was fixed as 01.12.1978 and date of submission of document was fixed as 20.12.1978. It was also deposed that for 2nd consignment, the defendant firm submitted consignment documents like airway bills invoices, packing list etc. on 27.12.1978 and in airway bill, one of the name of shipper was shown as “House of Dubary” and such documents were sent to Yugoslavian bank and out of three bills of exchange, payment of two bills of exchange were received on 30.01.1979 and the date of payment of third bill was fixed on 14.02.1979 and after receipt of the amount by the bank, the same was credited in the account of the defendant firm. It was deposed that the documents were in the name of defendant firm and therefore, the plaintiff was not entitled to receive such amount, and the amount was permitted to be withdrawn by the defendant no.1 firm, and the defendant firm adjusted the amount against the outstanding dues of the bank. It was also deposed that 3rd consignment was sent through airway bill dated 04.05.1979 and the documents were deposited with the bank on 09.05.1979 and in the airway bill only name of "House of Dubary" was stated as shipper.

190. It also emerges from record that payment for 3rd consignment was also received from Yugoslavian buyers by the defendant no.6 Bank and in view of stay order granted, payment of 3rd consignment of about Rs. 37 Lacs were not paid to the defendant firm but the said amount was kept in sundry account. It was deposed that payment of 3rd consignment could not be made by the bank as the airway bill, inspection and Letters of Credit had expired and there was no agreement between the plaintiff and defendant firm with the bank for making payment directly to the plaintiff.

191. In the cross examination of the said witness of defendant no.6, it was admitted on the basis of documents at Exh.283 to Exh.289, which pertains to Letters of Credit opened by the Yugoslavian buyers in Bank of Rajasthan, Janpath Branch at New Delhi in the name of "House of Dubary" and Letters of Credit of Rajasthan bank, as an agent collected the papers and Letters of Credit through defendant firm to the New Bank of India and on the basis of such documents, New Bank of India issued Letters of Credit in favour of defendant firm.

192. It was also admitted that for 3rd consignment, airway bill was not sent to the State Bank of India, but invoices and packing list etc. was sent to the State Bank of India. It was also admitted that the documents stated in Exh.325 were received by defendant no.6 bank. When document at Exh.318 was shown to the witness of defendant no.6, it was admitted that it was copy of sundry account and no interest is paid in sundry account and such amount is kept for non-use purpose by the bank.

193. Regarding Court Commissioner, it was admitted that papers of the Court Commissioner were signed by him and the Court Commissioner had inspected the accounts of the bank and the report is placed at Exh.400. Witness also agreed that as per Exh.388, 2nd consignment amount of three bills was deposited which was credited on 31.01.1979, 01.02.1979 and 27.02.1979 and amount of FDR from Commissioner's report was pertaining to the 2nd consignment.

194. It was also admitted that name of defendant no.1 firm was mentioned as shipper of the plaintiff and accordingly, the amount received from Yugoslavian buyer was deposited in the account of the defendant no.1 firm.

195. Witness no.1 of defendant nos. 1 to 4 Deepak Darbari at Exh.415 has submitted his examination in chief wherein it is deposed that after expiry of Letters of Credit, the plaintiff sent the goods for 2nd consignment without consent of the defendants and therefore, such goods were not exported. It was also deposed that amount of freight, demurrages and handling charges were paid by defendant no.1 firm though same was to be paid by the plaintiff. It is also deposed that such amount paid by the defendant nos. 1 firm is stated in counter claim. It is also deposed that for 2nd consignment, the amount was received from Yugoslavian buyers however, as Letters of Credit had expired, same was deposited in the account of defendant no.1.

196. With regard to 3rd consignment, it was deposed that the plaintiff informed defendant no.1 firm when the goods reached from Kandla to Mumbai and it was informed by the plaintiff that such goods were to be exported on their own and after Hasmukh Khatri requested for negotiation with regard to 3rd consignment, defendant no.1 paid the amount of airfreight etc. as there was no financial facility with the plaintiff. It was also deposed that defendant no.1 firm paid clearing, handling service demurrage amount for 3rd consignment which was to be paid by the plaintiff and the said amount is stated in the counter claim. It was therefore, deposed that as the plaintiff was required to pay the charges of freight, demurrage etc., amount received from Yugoslavian buyers was adjusted against such charges to be received from the plaintiff by deducting the amount to be payable to the plaintiff and as defendant no.1 firm could not earn profit of about Rs. 20 Lacs had the plaintiff sent the goods within the period of Letters of Credit, the said amount was included in the counter claim filed by the defendant nos. 1 to 4.

197. Various documents were placed on record regarding the payment made by defendant no.1 firm from Exh.420 to Exh.425. In the cross examination, it was admitted by the witness of defendant nos.1 to 4 that defendant no.1 firm is not registered under the Partnership Act and only counter claim was filed on behalf of the firm and its partner. It was also admitted that defendant no.1 firm is keeping the account books at Delhi office and is also paying the income tax. It is also admitted by the witness of defendants in the cross examination that at the time of export of 3rd consignment, free shipping bill was obtained and A.R.4 Form was not submitted. It was also admitted that defendant no.1 firm had exported the goods for 3rd consignment at the cost of the plaintiff by obtaining the free shipping bill in the name of defendant no.1 firm.

198. However, it was denied that A.R.4 Form was not utilised as Yugoslavian buyers were not able to pay the amount of 3rd consignment as Letters of Credit had expired.

199. It was also admitted that Exh.310 to Exh.314 are photocopies of invoices of 2nd consignment which were sent to Yugoslavia and Exh.315 is airway bill of the 2nd consignment. It was also admitted that the amount of 3rd consignment was received in part. It was also deposed that amount of freight, handling services of 2nd and 3rd consignment was to be borne by the plaintiff.

200. It was admitted by the witness that no amount was deducted by Yugoslavian buyers with regard to 2nd consignment and there is no outstanding payment to be made by Yugoslavian buyers regarding any goods which were exported for 2nd and 3rd consignment.

201. Thus, the witness of defendant nos. 1 to 4 admitted that goods of 2nd consignment and 3rd consignment were exported by defendant no.1 firm and payment was received from Yugoslavian buyers which was not paid to the plaintiff as defendant no.1 was required to recover the amount of freight and other charges from the plaintiff.

202. From the above analysis of the oral and documentary evidence on record, it cannot be said that the Trial Court has erred in law in holding that contract was independent of Letters of Credit.

203. So far as the first consignment exported by the parties, transaction and relation thereto was over as per the terms of the Letters of Credit. However, so far as 2nd and 3rd consignment which are admittedly exported, Letters of Credit had already expired and inspite such fact being known to everyone that Letters of Credit had expired, 2nd consignment was also exported and payment was received from the Yugoslavian buyers and third consignment was detained by defendant no.5 Clearing and Forwarding Agent for about four months and ultimately, the said consignment was also exported and defendant no.1 firm received the payment by encashing the Letters of Credit on the basis of airway bill in its name without utilising the A.R.4 Form which were sent by the plaintiff firm along with the goods.

204. Thus, the defendant no.1 firm exported the goods of 2nd and 3rd consignment without considering the Letters of Credit which were issued in favour of the plaintiff. Hence , it cannot be said that the Trial Court has erred in holding that contract was independent of

Letters of Credit.

205. **<u>Points for Determination No.7 and 8</u>** raise a very important issue as to whether the decretal amount is arbitrary and based on manifest error or not and whether the trial Court was just and correct in decreeing the suit for Rs.49,81,336/- and disallowing the claim of the plaintiff for Rs.13,09,909/-. After considering the evidence on record, the Trial Court has rightly concluded that the plaintiff was entitled to the amount of 2nd and 3rd consignment as observed in para no. 137 of the impugned judgment and order as under:

> "(137).... I have carefully examined the plaint and the recital of the cross suit along with the documentary evidence and gone through particularly the relevant invoice at Exhts. 310,312 and 314 along with air way bill at Ex.315 and found that three cargo were sent in the second consignment and thereby supplied the goods viz., 2000 pieces of venus model, 10996

pieces of the model North Stars and 10,000 pieces of the model panasia at rate per piece in US dollar 8.50, 43,6985, 8,00 respectively. The C.I.F. price value was in total US Dollars 93,466-00, 87,397-00 and 80,000 respectively. It was the understanding that the firm House of Darbary should have been arranged for the insurance and therefore be deducted one percent of such price value C.I.F. For the deduction of such one percent it was necessary to be deducted in US Dollar 934.66, 873.97 and 800 respectively from C. I.F. value of these items. After deduction, it will be found that in US Dollars the balance amount will be 92,531.34, 86,523-03 and 79,200-00 respectively.

If we will be converted the balance value of the dollars into Indian rupees then it will be Rs.7,71,094-50 paise, R.7,21,025-00 paise and Rs. 6,60,000-00 paise respectively of the value on basis C & F. I find that the total value on basis C & F of the goods relating to the second consignment will be of Rs. 21,52,119-50 paise. In the present case it is now no longer in dispute that the items as to be shown on page No.11 in paragraph No.110 of the plaint are not entirely second consignment but on the contrary, it is admitted position that the item "shella" and the item "Binoculars" are not relating to the contract with the plaintiff but are related with the contract M/s. Hashmukh

Brothers and the said Hashmukh Brothers had supplied the item Shella and the item Binoculars even wrongly and by mistaken to be mentioned in the plaint. According to the parties, the goods as to be shown above were sent in the second consignment out of the total items as mentioned in the plaint and the remaining goods relating to item "khashmir" and the item "victory" and the item "venus" pieces 3000 were sent in the third consignment along with othe goods. On basis of this fact, I have found that the firm House of Dubary had received the total amount of Rs. 34,49,578-07 paise including the item of "shella" and the item of Binoculars of the second consignment from Yugoslavian buyers which being credited in the account of the firm in New Bank of India Ltd., New Delhi as per Ex.388 showing the same in red ink circle. This shows that this total amount of Rs. 34,49,578-07 paise was including the value of the goods "shella" and Binocular which being supplied by Hashmukh Brothers and therefore it will be required to be deducted from the total amount of Rs. 12,92,87-96 paise out of such total balance. After deducting such amount, we will get the total amount of Rs. 21,56,570-71 paise which will be the amount of the second consignment as received by the firm House of Dubary as per vide Ex. 388 from the Yugoslavian buyers. I have already stated above that the firm House of Dubary paid the chatter freight for the second consignment of the amount Rs. 1,91,646-00 If we will deduct this amount of freight, of the total amount of Rs. 21,56,570.71 paise then will be got the amount of Rs. 19,64,924-71 paise. It shows that the amount of Rs. 19,64,924-71 is less than the total value on basis C & F of Rs.21,52,119-50 paise. This being so, it is now clear that the firm House of Dubary had at all not received any amount towards the freight and insurance from Yugoslavian buyers. If it was the contract on basis of F.O.B. then the firm House of Dubary was certainly received the amount which being spent after the freight and insurance for the second consignment from Yugoslavian buyers when Yugoslavian buyers did not pay such freight and insurance to the firm House of Dubary which would go to show that the goods of second consignment were supplied by the plaintiff under the original contract on basis C.I.F. It is therefore clear that the plaintiff had to be paid the insurance and charter freight of the second and third consignment and it was the provisional accommodation and was given the facility to the plaintiff by the firm House of Dubary with bonafide to be exported the goods even after expiration of the time limit of the contract on basis of C.I.F and not F.O.B. without altering the essence and foundation or nature of the contract on basis of C.I.F. I therefore disagree with

> the submission of the learned advocate Shree Bheda for the plaintiff that the firm House of Dubary and partners there were liable to pay the insurance freight and handling charges of the goods The defence story is found most probable and convincing and it is fully supported by the oral and documentary evidence on record.

206. With regard to the amount for 2nd consignment, Trial Court has rightly observed that amount of Rs.26,00,863/- mentioned in para no. 10 of the plaint is not correct and correct amount would be Rs.19,60,473.50 as per the Letters of Credit on the basis of CIF without deducting 1% value of insurance as per the correspondence as under:

> “138).....I have found from the evidence that the plaintiff is only entitled to get the amount of 5.19,60.473-50 paise for the goods relating to the second consignment from the deft., Nos. 1 to 4 only and not the amount of Rs. 26,0,863-00 as claimed and mentioned in the plaint. The claim of the plaintiff is no correct towards the second consignment. I have found that the facts as to be furnished on page-No.11 in paragraph No.10 of the

> plaint are not correct and it is contrary even on basis of the accounts which have been produced by the plaintiff itself under mark 202/6 (on page No.5 to 7). I have carefully examined the statement of the accounts mark 202/6 and found that the plaintiff has shown the value on basis C & F eventhough mentioned in the plaint the value on basis C.I.F. without deducting the one percent value of the insurance as per the correspondence. I have further found that the invoice H.K. No.8 and the invoice H.K.No.9 relating to the item "Shella" and the item "Binoculars" are not entered into books of account of the plaintiff even if mentioned in the plaint covering such two items as to be supplied by the plaintiff, where there was no orders and contract for the same with the plaintiff but the orders were under the con tract with M/s. Hashmukh Brothers."

207. Regarding 3rd consignment, the Trial Court has held that the plaintiff is entitled to the amount of Rs.30,20,912.75 after deducting freight of Rs.5,30,806/- as under:

> "139).....As regards to third consignment is concerned, it is clear that the goods were sent to Yugoslavian buyers on 4-5-79 vide air-way bill ex, 317. The invoice at Ex. 316 speaks that in the third consignment, the goods were sent

viz. A Car Radio cassettes Model venus 3000 pieces at rate per piece in US Dollars 51-41, (2) Transistor Radio Model panasia 6000 pieces at rate per piece in US dollars 10-00 (3) Transistor Radio Model Tele star, 5000 pieces at rate per piece in US dollars 17,76 (4) radio cassettes Model Kashmir, 2499 pieces at rate per piece in US Dollars 42,49 (5) Radio cassettes Model victory. 2500 pieces at rate per pieces in US dollars 40-32. Now these items are tally with the facts as mentioned on page-11 and on page 20 in paragraphs Nos. 10 and 13 of the plaint and it is found that the goods as mentioned above were sent in the third consignment as per the invoice vide Ex. 316 by the Air-way bill vide Ex. 317 to Yugoslavian buyers. But the plaintiff has shown the price value of such goods in the plaint on basis of C.I.F. without deducting one percent of the charges insurance as per the correspondence. I have found from the accounts mark-202(6) that the plaintiff has entered the price value of such goods into its own books of account on basis C&F after deducting the one percent charges of the insurance. It is therefore clear that the price value of the goods as to be mentioned is not on based. C & F but on basis C.I.F. which is not as per terms of the contract. I have therefore taken total value on basis, C & F from the accounts mark 202 (6) (on- pages 8 to 13) in US dollars 42,6475-53 equivalent in

> Indian Rs. 35,51,712-75 paise. It is now necessary to be deducted the amount of the freight of Rs. 5,30,800 so that we will get the figure of Rs. 30,20,912-75 paise of the value on basis F.O.B. The plaintiff has claimed of Rs. 34,65,606-60 which is incorrect but will be entitled to get only the amount of Rs. 30,20,912-75 paise towards the goods relating to third consignment on basis F.O.B. and not more."

208. The Trial Court has also rejected the claim of the defendants regarding Rs.60,000/- towards demurrages, Rs. 10 Lacs towards defects in goods on coming to the conclusion that no deduction was made by Yugoslavian buyers from the payment of 3rd consignment which is proved by the plaintiff from the evidence on record and the defendants have therefore, failed to prove that the plaintiff has committed breach of contract but it has also been established that defendant nos. 1 to 4 have not paid the money to the plaintiff and withheld the money even after receiving from Yugoslavian buyers.

209. Thus, the Trial Court has passed the decree for Rs.49,81,336/- (for 2nd consignment Rs.19,60,473.50 and for 3rd consignment Rs.30,20,912.75).

210. In view of aforesaid findings of the Trial Court which is borne out from the oral and documentary evidence on record, it cannot be said that decretal amount is arbitrary and based on manifest error. There is no error in arriving at decretal amount of Rs.49,81,336/- awarded by the Trial Court.

211. **Point for Determination no.9** pertains to counter claim raised by defendant no.1 by filing the written statement under Order VIII Rule 6(A) of the Code of Civil Procedure, 1908 raising a claim of Rs.1,08,85,152/-.

212. Learned advocate Mr. Joshi appearing for the plaintiff raised preliminary objection regarding the maintainability of the appeal filed by the defendant nos. 1 to 4 contending that First Appeal with counter claim itself would not be maintainable in view of bar contained under section 69 of the Indian Partnership Act, 1932.

213. Learned Trial Judge while answering issue no.2(G) at para no. 119 and 122 of the impugned judgment and order has discussed this issue and answered that counter claim is not maintainable on the premise that the defendant no.1 partnership firm was not registered under the provisions of the Partnership Act, 1932. Section 69 and section 69A of the Partnership Act reads thus:

> “69. EFFECT OF NON-REGISTRATION. - (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on a behalf of any persons suing as a partner in a firm against the firm or any person alleged to be or to have been a

partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm : Provided that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of the firm or to realise the property of the firm.

(2) No suit to enforce a right arising from a contract shall I be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.

(2A) No suit to enforce any right for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realise the property of a dissolved firm shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or have been a partner in the firm, unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm :

Provided that the requirement of registration of firm under this sub-section shall not apply to the suits or proceedings instituted by the heirs or legal representatives of the deceased partner of a firm for accounts of a dissolved firm or to realise the property of a dissolved firm.

(3) The provisions of sub-sections (1), (2) and (2A) shall apply also to a claim of setoff or other proceedings to enforce a right arising from a contract but shall not affect

(a) the firms constituted for a duration upto six months or with a capital upto two thousand rupees; or;

(b) the powers of an official assigned, receiver or Court under the Presidency Towns Insolvency Act, 1909, or the Provincial Insolvency Act, 1920, to realise the property of an insolvent partner.

(4) This section shall not apply -

(a) to firms or partners in firm which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in areas to which, by notification under section 56 this Chapter does not apply, or OF GUJARAT

(b) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the presidency towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882, or outside the Presidency towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887, or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

Comment: "...Thus, the persons suing, namely, the current partners as on the date of the suit were not shown as partners in the Register of Firms. The result is that the suit was not maintainable in view of the provisions of sub-sec. (2) of S. 69 of the said Partnership Act..." M/s. Shreeram Finance Corporation, Appellants v. Yasin Khan AIR 1989 SUPREME COURT 1769

Section69A PENALTY FOR CONTRAVENTION OF SECTION 60, 61, 62, OR 63.

If any statement, intimation or notice under sections 60, 61, 62 or 63 in respect of any registered firm is not sent or given to the Registrar, within the period specified in that section, the Registrar may, after giving notice to the partners of the firm and after giving them a reasonable opportunity of being heard, refuse to make the suitable amendments in the records relating to the firm, until the partners of the firm pay such penalty, not exceeding ten rupees per day, as the Registrar may determine in respect of the period between the date of expiry of the period specified in sections 60, 61, 62 or as the case may be, 63 and the date of making the amendments in the entries relating to the firm.”

214. A plain reading of the above provision would indicate that no suit to enforce a right arising from a contract or conferred by the Act shall be instituted in any Court by or on a behalf of any persons suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered.

215. Section 58 of the Partnership Act mandates as to how registration of a firm may be effect and the non-consequence of registration is traceable to section 69. The said provision is mandatory in character, and its effect is to render a suit in respect of a right under the Contract which he entered into a partner of a unregistered firm as being void. The Hon'ble Apex Court in the case of **Loonkaran Sethia etc. versus Mr. Ivan E. John and Others** reported in AIR 1977 SC 336 has held that Section 69 is mandatory in character and its effect is to render a suit filed by the plaintiff in respect of a right vested in him or acquire by him under the contract which he entered into as a partner in a unregistered firm, whether existing or dissolved as void. It has been further held in para 21 as under:-

> “21. A bare glance at the section is enough to show that it mandatory in character and its effect is to render a suit by a plaintiff in respect of a right vested in him or acquired by him under a contract which he entered into as a partner of an unregistered firm whether existing or dissolved, void. In other words, a partner of a erstwhile unregistered part- nership firm cannot bring a suit to enforce a right arising out of a contract falling within the ambit of section 69 of the Partnership Act. In the instant case, Seth Suganchand had to admit in unmistakable terms that the firm 'Sethiya & Co.' was not registered under the Indian Partnership Act. It cannot also be denied that the suit out of which

> the appeals have arisen was for enforcement of the agreement entered into by the plaintiff as partner of Sethiya & Co. which was an unregistered firm. That being so, the suit is undoubtedly a suit for the benefit and interest of the firm and consequently a suit on behalf of the firm. It is also to be borne in mind that it was never pleaded by the plain- tiff, not even-in the replication, that he was suing to recover the outstandings of a dissolved firm. Thus the suit was clearly hit by section 69 the Partnership Act and was not maintainable."

216. While examining as to embargo contained under sub-section 3 of Section 69, wherein the expression "other proceedings" is found. The Apex Court in the case of **M/s. Umesh Goel versus Himachal Pradesh Cooperative Group Housing Society Ltd.** reported in AIR 2016 SC 3116, has held :

> "8. Having heard learned counsel for the appellant as well the respondent and having bestowed our serious consideration to the respective submissions, the various decisions relied upon and the provisions contained in the Partnership Act, the Interest Act, Civil Procedure

Code and Arbitration Act, we are of the view that the submissions of Mr. Dhruv Mehta, learned Senior Counsel for the appellant merit acceptance.

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10. Though, some of the decisions which were cited before us dealt with Section 69(3) of the Partnership Act, in the instance we wish to analyze the said sub-section along with the other components of the said Section 69. When we read sub-section (3) of Section 69 carefully, we find that as rightly contended by Mr. Dhruv Mehta, learned Senior Counsel for the appellant, the provisions of sub-sections (1) and (2) have been impliedly incorporated in sub-section (3). When the opening set of expression in sub-section (3) states that the provisions of sub- sections (1) and (2) shall apply, there is no difficulty in accepting the said submission of learned Senior Counsel for the appellant that the entirety of the said two sub-sections should be held to be bodily lifted and incorporated in sub-section (3). It is difficult to state that any one part of sub-sections (1) and (2) alone should be held to be incorporated for the purpose of sub-section (3). Therefore, we are convinced that when we read sub-section (3) it is imperative that all the ingredients contained in sub-sections (1) and (2) should be read into sub-section (3) and thereafter apply the said sub-

section when such application is called for in any matter.

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12. The question for our consideration is by virtue of sub-section (3) whether the expression "other proceedings" contained therein will include Arbitral proceedings and can be equated to a suit filed in a Court and thereby the ban imposed against an unregistered firm can operate in the matter of arbitral proceedings. If sub- sections (1) and (2) are virtually lifted whole hog and incorporated in sub-section (3), it must be stated that it is not the mere ban that is imposed in sub-sections (1) and (2) that alone is contemplated for the application of sub-section (3). In other words, when the whole of the ingredients contained in sub-sections (1) and (2) are wholly incorporated in sub-section (3), the resultant position would be that the ban can operate in respect of an unregistered firm even relating to a set off or other proceedings only when such claim of set off or other proceedings are intrinsically connected with the suit that is pending in a Court. To put it differently, in order to invoke sub-section (3) of Section 69 and for the ban to operate either the firm should be an unregistered one or the person who wants to sue should be a partner of an unregistered firm, that its / his endeavour should be to file a suit in a Court, in which event even if

> it pertains to a claim of set off or in respect of 'other proceedings' connected with any right arising from a contract or conferred by the Partnership Act which is sought to be enforced through a Court by way of a suit then and then alone the said sub-section can operate to its full extent.
>
> 13. As far as the construction of the said sub-section (3) of Section 69 is concerned, we are able to discern the above legal position without any scope of ambiguity. To be more precise, the condition precedent for the operation of ban under sub-section (3) is that the launching of a suit in a Court of law should be present and it should be by an unregistered firm or by a person claiming to be partner of an unregistered firm either to a claim for set off in the said suit or any other proceedings intrinsically connected with the said suit.
> 14. In the event of the above ingredients set out under sub-sections (1), (2) and (3) being fulfilled then and then alone the ban prescribed against an unregistered firm under Section 69(1), (2) and (3) would operate and not otherwise.”

217. The Hon'ble Apex Court concluded that the expression "other proceedings" occurring in section 69(3) of the Act does not having application to the ban imposed under said section, the proceedings initiated for arbitral proceedings as well as arbitration award.

218. Thus, the counter claim filed by first defendant for payment of Rs. 1,08,85,152/- by the plaintiffs in favour of the defendant itself was not maintainable and consequently the appeal preferred by first defendant insofar as rejection of the counter claim by the trial court which is the subject matter of the appeal No. 531 of 1986 would not be maintainable. However, insofar as the appeal filed challenging the judgment and decree of the suit being decreed for a sum of Rs. 49,81,336/- against defendant Nos. 1 to 4, the correctness and legality of the same can be assailed by defendant Nos. 1 to 4, inasmuch the decree being joint and several, the appeal filed under section 96 of CPC by defendant nos. 1 to 4 would be maintainable.

219. Thus, we are of the opinion that the trial Court was justified in rejecting the counter claim filed by defendant nos. 1 to 4. However, merely by rejecting the counter claim we cannot be oblivious to the facts of the case that expenses incurred by the defendant no.1 firm for export of 2^{nd} and 3^{rd} consignment which were liable to be borne by the plaintiff cannot be denied to the defendant no.1 firm. We have therefore, considered this aspect while deciding point no.11.

220. **<u>Point for Determination No.10</u>** pertains to exonerating defendant nos. 5 and 6 from joint and several liability from making the payment of the decretal amount by the Trial Court is justified or not as raised in First Appeal No.1093/1987 filed by the plaintiff.

221. The contention raised on behalf of the plaintiff that defendant no.6 was also party to the breach of contract committed by defendant nos. 1 to 4 was dealt with by the Trial Court in para no. 94 as under:

> “94)...... The question for consideration in this case is whether the six deft., New Bank of India is liable for the fraud as to be committed by the deft., Nos. 1 to 5 regarding to their consignment whereby is the six deft., committed negligence in tort. The learned advocate Shree Bheda for the plaintiff submits that the New Bank of India was liable to make the payments of the second and third consignments under the letters of credit on receipt the actual amounts from the Bank of the Yugoslavian buyers even if failed to do so and permitted the first deft., to be converted the said moneys in personal account of the first deft., which being amounted of the conversion on basis of the fraud and collusion of the defts., Now on the facts and circumstances of the case before us., the Yugoslavian buyers opened the irrevocable seven letters of the credit towards the payments of the orders of the goods in favour of the first deft. The Zerox copies of such letters of credit are produced by the deft., which are exhibited vide Exhts., 283 to 289. After that, in turn, the New Bank of India opened the four letters of credit in favour of the

plaintiff in the State Bank of India, Branch office Kandla. Zerox copies of such letters of credit along with the documents are produced by the defts., which are exhibited vide exhts. 290 to 309. This shows that Bank of India was opening bank and the State India was advising Bank. It appears from the letters of credit vide Exhts., 290 to 309 that the first deft., opened four letters of credit valued at U.S. Dollars 1,867,488-75 equivalent to Indian rupee 1,49,47,909-00 in favour of the plaintiff for supplying the goods as mentioned in the said letters of the credit namely Radio cassette Transistor Radio, Car Radio, Cassettes etc., and proportionate payment as to be made to beneficiary for any part of shipments made. For such payments are required the following documents. Commercial invoice, one origin and five copies (2) packing list, one origin and five copies (3) certificate of origin one original and two copies from Indian Chamber of Commerce (4) Inspection quality certificate, one original and two copies as issued by House of Dubary New Delhi (5) Insurance Policy in U.S. Dollars for 40 percent above the C. I. F. value of the shipment one original and three copies in assignable form endorsed in Bank. Insurance to cover all risks from seller's warehouse to party's warehouse (6) original and two copies of the bill of lading marked freight prepaid, made out to the order of Makosped skopje. Notify solun, Gavgelija, Yugoslavia (7) All the documents will be marked name of shipper A/c House of Dubary, New Delhi, India (8) we (New Bank of India Ltd.) will remit the proceeds to the negotiating Bank of the OD/DC buying

> rate prevailing on the day of the documents are negotiated under the above letter of credit therein are received by us.”

222. In view of the aforesaid finding of the Trial Court, We do not find any infirmity in findings of the Trial Court as the same is based on oral and documentary evidence. So far as defendant no.5 M/s. Airfreight (P) Ltd. is concerned, it was appointed by defendant no.1 as a Clearing and Forwarding Agent and was acting as an agent of the plaintiff as well as defendant no.1 firm for the export of goods and there is no oral and documentary evidence to show that defendant no.5 is liable for not exporting the goods inspite of the instructions either from the plaintiff or defendant no.1 firm. In such circumstances, the Trial Court has rightly come to the conclusion that the suit stands dismissed qua defendant nos. 5 and 6. In our opinion, the Trial Court has rightly concluded that the rest of the suit and the claim stands dismissed against defendant nos.5 and 6.

223. **Point for Determination no.11** pertains to whether the decree passed by the Trial Court for Rs.49,81,336/- is just and proper.

224. At this stage, it is pertinent to note that on appreciation of oral and documentary evidence on record, the Trial Court has not granting set off of the expenses borne by the defendant no.1 firm for export of the goods of 2nd and 3rd consignment through defendant no.5. However, from the findings which emerge from the facts on the basis of oral and documentary evidence, amount of expenditures incurred by defendant no.1 firm are required to be considered to be set off against the amount of decree passed by the Trial Court in favour of the plaintiff. The amount paid by defendant no.1 firm for export of second and third consignment is discernible from the counter claim of defendant nos. 1 to 4 which is supported by the oral evidence of the defendant no.2 as analysed herein above.

225. Therefore, for the purpose of rendering substantial justice to see that the amount spent by defendant no.1 firm for export of goods of second and third consignment on behalf of the plaintiff is required to be reimbursed to defendant no.1 firm and to that extent the decretal amount is required to be modified.

226. The plaintiff in the cross examination of the defendant no.2 could not extract any contradictory facts for the payment of airfreight, demurrage etc. for export of the 2nd and 3rd consignment made by the defendant no.1 firm. Even the witness of the plaintiff in his deposition has admitted that amount of freight, demurrage, handling charges etc. for export of 2nd and 3rd consignment were paid by defendant no.1 firm.

227. In view of analysis of oral and documentary evidence made herein above and considering the submissions of both the learned advocates, we have to consider as to whether the decree passed by the Trial Court for Rs.49,81,336/- is just and proper or not. As we have noted while considering the point no.9 for determination while upholding the findings of the Trial Court that the counter claim of defendant no.1 firm is not maintainable, however, we are of the opinion that the expenses incurred by it for export of the 2nd and 3rd consignment by the defendant no.1 firm are required to be reimbursed.

228. On perusal of the documents placed along with the counter claim and considering the deposition of the defendant no.2, it appears that defendant no.1 firm has incurred the following expenditures:

Rs.4,75,000/- (US$ 59,375.00)	Towards airfreight charges in respect of 2nd consignment (First Charter)
Rs.4,50,000/- (US$ 56,250.00)	Airfreight charges in respect of 3rd consignment (Second Charter)
Rs.1,53,990.08 (US$ 19,248.76)	For goods returned by Yugoslavian buyers
Rs.1,77,128/- (US$ 22141.00)	As per letter dated 19.06.1979 of Yugoslavian buyers for not supplying spare parts
Rs. 60,000/- (US$ 7500.00)	For demurrage charges
Rs.50,000/-	For clearing and forwarding charges
Rs.13,66,118/-	Total

229. The above expenses are considered to be paid by defendant no.1 on the basis of the documents placed on record. Though the counter claim is rejected by the Trial Court, the documents placed along with the counter claim are considered by the Trial Court in the impugned judgment and order in para no. 137 reproduced here-in-above. The Trial Court has also considered the amount of Rs. 60,000/- paid by the defendant no.1 firm towards demurrage charges in para no.140 of the judgment and order and has rejected the claim of Rs. 10 Lacs on the ground that the plaintiff has supplied the goods which were not upto the mark of standard in para no. 141 of the judgment and also referred to Exh. 318 that by the letter by Yugoslavian buyers remitted the amount of Rs.3,84,711/- which was withheld for the defective goods. Even reference was made to letter at Exh. 418 where value of defective goods have been shown in US$ 65,595 and towards the value of defective goods Yugoslavian buyers had paid amount of Rs.3,84,711/- and has come to the conclusion that the entire amount had been paid and the Yugoslavian buyers had not deducted any money towards the defective goods. Accordingly, the Trial Court has held that the claim for defective goods does not survive.

230. Regarding the deficit goods, it was observed by the Trial Court in para no. 141 of the judgment that as per the Letter at Exh. 418, goods worth US$ 8291 equivalent to Rs.65,000/- were sent under the insurance with full value on the basis of C.I.F. and therefore, the defendants would be entitled to take legal course for recovery of damages against the insurance company. However, such findings of Trial Court cannot be accepted as ultimately the plaintiff was responsible for the payment of deficit goods. In that view of the matter, we hold that the aforesaid amount is required to be reimbursed to the defendant no.1 firm by the plaintiff.

Conclusion

231. In view of foregoing analysis, we are of the opinion that amount of Rs. 13,66,118/- is required to be further reduced from the decretal amount of Rs.49,81,336/- awarded by the Trial Court.

232. Therefore, the decree is accordingly modified to the extent of Rs.36,15,218/- (Rs.49,81,336-Rs.13,66,118).

233. We, therefore, hold that the decretal amount as per the decree passed by the Trial Court is modified at Rs.36,15,218/- together with proportionate interest accrued therefrom as per the order passed by the Trial Court.

234. As per the status report of FDR-25 as issued by State Bank of India dated 30.06.2026, principal value of FDR is Rs. 1,91,04,023/- and accrued interest is

Rs.5,23,66,304/- and therefore, total amount on said FDR is Rs.7,14,70,627/- with running interest which may accrue till the date of premature encashment.

235. As the decree is modified to the extent of Rs.36,15,218/-, the plaintiff will be entitled to the said decretal amount along with accrued interest thereon from the amount deposited in Fixed deposit with the State Bank of India, High Court Complex Branch. The balance amount, out of the total amount deposited by defendant no.6 bank i.e. Rs.1,52,202/- [Rs.37,67,420-Rs.36,15,218] together with proportionate interest accrued thereon to be bifurcated from the amount to be realised on premature encashment of Fixed Deposit till the date of realisation shall be paid to defendant nos. 1 firm and remaining amount to be paid to the plaintiff. Ordered accordingly.

236. Appeals stand disposed of in the aforesaid terms. Decree stands modified accordingly. No order as to cost.

(BHARGAV D. KARIA, J)

(L. S. PIRZADA, J)

RAGHUNATH R NAIR