

PETITIONER:
JUGGILAL KAMLAPAT

Vs.

RESPONDENT:
PRATAPMAL RAMESHWAR

DATE OF JUDGMENT 24/11/1977

BENCH:
BEG, M. HAMEEDULLAH (CJ)
BENCH:
BEG, M. HAMEEDULLAH (CJ)
GUPTA, A.C.
KAILASAM, P.S.

CITATION:
1978 AIR 389 1978 SCR (2) 219
1978 SCC (1) 69

ACT:

Sale of Goods Act 1930--Sec. 2(4). 18 and 23.

Meaning of document of title to goods--If pucca delivery order passes the title--If custom can prevail over law or express contract.

Evidence Act 1872 Sec. 92 whether custom can be pleaded to vary a written contract.

Civil Procedure Code 1908 Order VIII rule 2 and 3--Whether all grounds of defence must be raised--Effect of not raising all defence.

HEADNOTE:

The appellant-plaintiff entered into a contract with respondents to sell diverse quantities of B. Twill. By another contract the appellant agreed to sell to the respondents certain quantity of Hessian goods. All contracts were in the standard forms of the Indian Jute Mills Association. All contracts contained the following clause for payment

"Payment to be made in cash in exchange for Delivery Orders on Sellers, or for Railway Receipts or for Dock's Receipts or for Mate's Receipts (Which Dock's or Mate's Receipts are to be handed by a Dock or Ship's Officer to the Seller's representatives."

The appellant tendered to the respondents "Pucca Delivery Orders" on different mills. These pucca delivery orders contained a stipulation that the mills were not bound to recognise any transferee except the original buyer and further requires the transferee to give an undertaking to the mills that he will take delivery of the goods in terms of the contract between the mills and the original buyer. The appellant was not the original buyer of these pucca delivery orders. The respondents refused to accept the pucca delivery orders tendered by the appellant or pay for the same. The appellant, therefore, instituted the present suit. In para 19A of the plaint it was contended that the delivery orders were valid by virtue of trade, custom and usage of the jute trade in Calcutta. The respondents in their written statement contended that the documents described as pucca delivery orders are not delivery orders

at all, and, therefore, the tenders were invalid. The respondents also denied the existence of trade custom or usage as alleged.

The learned Trial Judge of the High Court held that the pucca delivery orders tendered by the appellant to the respondents were not in conformity with the contacts between the parties. He also held that the custom was not proved; that the custom alleged was contrary to sections 18 and 23 of the Sale of Goods Act, 1930 and also to the terms of the written contracts.

In an appeal filed by the appellant the Division Bench of the High Court confirmed the decision of the Single Judge.

In an appeal by certificate Beg, CJ. (concurring with Gupta J.)

HELD : 1. The crux of the whole matter was whether the plaintiff had carried out what it had undertaken and tendered the delivery notes in respect of the contracts. The respondent did not bargain for delivery orders containing reservations or conditions entitling the mills or suppliers to refuse delivery to the holder of the delivery order, unless the defendants complied with such other and additional terms or conditions as the suppliers imposed. It is difficult to see how any alleged custom, could modify the requirement of law as

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to what a document of title is or what a particular contract is or what a particular delivery order means. The plea of custom set up by the plaintiff was not available in the face of express statutory provisions as well as specific terms of the contract between the parties. Alleged custom, amounting to ignoring or contravening the express terms of agreements or the operation of statutory provisions would obviously be invalid. A custom could not be pleaded as an answer to the provisions of section 92 of the Evidence Act which bar oral evidence to contradict, vary add to, or subtract from the terms of an agreement. Moreover, it has been found by both the learned Trial Judge as well as the Division Bench of the High Court that there is no such uniformity of practice or usage about the forms of either contracts or delivery orders or their implications as to annex obligations contained. in a particular type of delivery order to transactions in general. The defendants had to enter into direct separate contracts with the mills before he could demand deliveries. Such conditional delivery orders are certainly not documents of title as defined by section 2(4) of the Sale of Goods Act. [223C, D-226D. E-G. 227A, B, D]

Anglo-India Jute Mills Co. v. Omademull, 38 Cal. I.L.R. 127, Dutni Chand Rataria v. Bhuwalka Brothers Ltd., [1955] SCR 1071, Jute & Gunny Brokers Ltd. and Anr. v. The Union of India & Anr., [1961] (3) SCR 820 and The Morvi Mercantile Bank Ltd., & Anr. v. Union of India, [1965] (3) SCR 254 referred to.

2. The defendants cannot be compelled to pay damages for alleged breach of contract when the delivery order was not what they contracted for.

In view of the above conclusion it is not necessary to deal with the further question whether, the delivery orders, if they authorised the defendants to demand delivery unconditionally, would still not constitute a due performance of the contract between the parties until the goods had been ascertained. [227H, 228A.]

GUPTA J. A delivery order is a document of title to the goods according to section 2(4) of the Sale of Goods Act. A delivery order is an order by the owner of goods directing

the person who holds them on his behalf to deliver them to the person named in the order. If the pucca delivery orders were documents of title the defendant should have been able to get delivery only by lodging them with the mills concerned but the delivery orders issued by the mills contain a term that the mills would not be bound to recognise a transferee. The transferees have to register their names with the mills as buyers and the mills insist on an application being made for that purpose. Thus, the mills insist on a new and separate contract that the holder of a pucca delivery order accept the obligations of the original buyer, which are not necessarily identical with the obligations of the buyers under the contracts concerned in this case. The new contract insists on and includes terms regarding insurance and godown charges which are not mentioned in the contracts between the parties. Thus the pucca delivery orders were not documents of the title under the Sale of Goods Act and were not in conformity with what the parties had contracted for. [230 F. G. 231A. F]

2. The delivery orders did not relate to any specific lot of goods. It is well established that title cannot pass until the goods are ascertained in view of section 18 of the Sale of Goods Act. [231F]

Jute and Gunny Brokers Ltd. and Anr. v. Union of India and Ors, [1961] 3 SCR 820; followed.

3. The forms of the Indian Jute Manufacturers Association are not uniform. They differ in several particulars. The High Court has found that no such custom or usage has been proved on evidence. [232C]

Les Affreteure Raunis Societe Anonyme v. Leopold Walford (London) Ltd., 1919 AC 801 (807) referred to.

Anglo-India Jute Mills Co. v. Omademnull, ILR 38 Calcutta 127, distinguished.

Gunny Brokers Ltd. v. Union of India, [1961] 3 SCR 820, referred to.

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Duni Chand Rataria v. Bhuwalka Brothers Ltd., [1955] 1 S.C.R. 1071, distinguished.

Bayyana Bhimayya v. The Government of Andhra Pradesh, [1961] 3 SCR 267 and State of Andhra Pradesh v. Kolla Sreemaa Murthy, [1961] 1 SCR 184; distinguished.

4. The contention of the plaintiff that the defendant riot having raised the plea in their correspondence with the plaintiff that the delivery orders tendered were defective, were estopped from justifying their repudiation of the contracts on that ground is negatived. The plaintiff did not plead the case of estoppel and was, therefore, debarred from raising the contention. Even otherwise the law permits a defendant to justify the repudiation on any ground which exists at the time of repudiation whether or not the ground was stated in the correspondence. [233A. 234A-B]

Nune Sivayya v. Maddu Ranganayakulu, 62 I.A. 89 (98) approved.

KAILASAM J. (Dissenting).

1. In the original written statement the defendant contended that the bought and sold chits and contracts are invalid and void as hit by the provision of West Bengal Jute Goods Act, 1950. Therefore, on the original pleadings the question as to whether the delivery order was according to the contract was not in dispute. Four years after the original plaint was filed the appellant sought amendment of the plaint. By this amendment, the appellant reiterated that the tenders made by the appellant of the mills pucca delivery orders were duly made in terms of the contract between the parties. An Additional Written Statement was

filed by the defendant contending that the mills pucca delivery orders were not delivery orders at all and, in any event, the appellant had no title to any of them. The definition of document of title to goods under section 2(4) is an inclusive definition. A document which is used in the ordinary course of business as proof of possession would satisfy the definition as also a document which would enable the possessor to receive the goods thereby represented. The transfer of title is therefore, not relevant. The document of title to goods need not be confined to specific goods for it may relate to goods which are not specified. The property in the goods is not transferred to the buyer unless and until the goods are ascertained but the contention that unless by the document the property in the goods passes there could be no document of title cannot be accepted.

[237B-C, D, 239A, B. E, 243A]

Anglo India Jute Mills Co. v. Omademull, I.L.R. 38 Cal. 127, referred to.

Duni Chand Rataria v. Bhuwalka Brothers Ltd., [1955] 1 SCR 1071 applied.

Bayyana Bhimayya v. The Government of Andhra Pradesh, [1961] (3) SCR 267 referred to.

Jute and Gunnv Brokers Ltd., and Anr. v. The Union of India and Ors., [1961] (3) SCR 820, applied,

State of Andhra Pradesh v. Kolla Sreerama Murthy, [1963] (1) SCR 184 and Butterworth v. Kingsway Motors Ltd., [1954] 2 All E.R. 694 referred to.

2. The plea of the appellant that the delivery orders tendered in respect of the contracts are proper tenders would have to be accepted since the possession of the documents entitles to receive the goods thereby represented.

[243-B]

Bhiniayya v. The Government of Andhra Pradesh, [1961] (3) SCR 267 at 270 applied.

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3. The plea of the appellant is that the delivery order is in accordance with the contract and that the respondent knew that the delivery order was in accordance with the contract and that he wanted to avoid the contract without justification as the prices had fallen. [244A-B]

4. In the original written statement there was no challenge to the validity of the delivery orders. The parties to the suit are bound by the procedure prescribed in the Code of Civil Procedure. Order VIII of the C.P.C. provides what a written statement should contain. Order VIII rule 2 requires that a defendant must raise by his pleading all matters which show the suit not to be maintainable or that the transaction is either void or voidable in point of law and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise. Rule 3 requires that it shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff but the defendant must deal specifically with each allegation of fact of which he does not admit the truth except damages. The failure to question the validity of the delivery order on the ground that it required registration with the mill or that the possessor was bound to give an undertaking, would be failure to comply with the requirements of Order VIII. The pleadings of the original side of the High Court must be strictly construed. [245B, G-246A-B]

Badat & Co. v. West India Trading Co., A.I.R. 1964 S.C. 538 followed.

5. The respondent had ample opportunity to put forward his objections to the delivery order in the correspondence that

was exchanged between the parties or in the written statement as originally filed. On the pleadings itself it appears that the defence is without substance and belated and put forward for the purpose of escaping the liability. [246-D-E]

6. The defendant not receiving the delivery orders and not raising the plea. specifically is more in accordance with his having been satisfied with the delivery orders being according to contract and his refusal to accept the delivery orders was to avoid the loss due to fall in price. The fact that 3 contracts, relating to 2 deliveries have been accepted shows that the respondent was following the practice prevalent in Calcutta by the Jute Mills Association. [246F, G.]

7. Taking into account the fact that the appellant as well as the respondent were engaging themselves in the jute trade in Calcutta and were following generally the practice of the jute mills Association and had entered into various contracts and having business relationship, the conclusion is irresistible that the respondent was familiar with the delivery order with the conditions and accepted" it as being in use in the ordinary course of business. It is difficult to accept the plea that the delivery order was not negotiable or that it was not in terms of the contract and that it would not have enabled him to take possession of the goods. The delivery orders were according to the terms of the contract and the respondent was aware of them.. The question is not one of estoppel but the inference to be drawn from the conduct of the respondent. The pleadings as well as the conduct lead one to the conclusion that the delivery orders were in accordance with the contract which the respondent accepted as mills pucca delivery orders. [247H-248A-B, G]

In view of the majority judgment the appeal is dismissed with costs.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2166 of 1968.

From the Judgment and Decree dated 26-4-1966 of the Calcutta High Court in Appeal No. 263 of 1959.

Y. S. Chitale, Leila Sethi (Mrs.), Praveen Kumar, Mukul Mudgal, .

B. P. Maheswari and Suresh Sethi for the Appellant.

S. K. Gupta, S. M. Jain and B. K. Jain for the Respondent.

The following opinions of the Court were delivered
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BEG, C.J.-I have gone through the differing judgments of MY learned brethren Gupta and Kailasam. The difference arises, I find, primarily from divergent interpretations of what was, pleaded by the parties. What Kailasam J. considers as having been admitted in the pleadings, by implication, was assumed by Gupta J. to be the matter put in issue by pleadings of the two sides which had to be decided.

After having considered the pleadings of the parties, I am, unable to agree, with great respect, with my learned brother Kailasam that this case can be decided in favour of the plaintiff on the pleadings of the parties. It is true that the defendant admits the contract under which goods were to be delivered to the defendant under delivery notes to be supplied by the plaintiff for which payments were to be made by the defendant. But, that did not mean that the defendant accepted what the plaintiff alleges to be the contract

between the parties with all its alleged implications. The crux of the whole matter was whether the plaintiff had carried out what it had undertaken and tendered delivery notes in respect of the contracts still left for us to consider so as to comply with the conditions of the contract really admitted by the defendant. In other words, there is a dispute on what the parties understood the contract to provide or mean. While the defendant accepts that there was a contract, he does not accept the plaintiff's version about its due compliance by the plaintiff and a breach of it by the defendant. If this had not been so there could be no dispute. The whole dispute revolved round the question : Was tender of delivery, variance with the contract between the parties ?

The plaintiff realized fully that the difficulty in the way of an acceptance of its case was caused by the additional conditions sought to be attached to actual delivery by the delivery orders tendered by it. It, therefore, amended the plaint by adding as follows :

"19A. The tenders made by the plaintiff of the Mills Pucca Delivery Orders as mentioned in paragraphs 9, 14 and 18 of the Plaint were duly made in terms of the Contracts between the parties. In any event the Delivery Orders tendered in respect of the Contracts mentioned in the Plaint were and are proper tenders by virtue of trade customs and usage of the Jute Trade in Calcutta. Particulars of such customs and/or usages are set out hereunder.

(i) In the Calcutta Jute market there is an usage that upon the issue by the Mills to the buyers of Delivery orders in respect of jute goods purchased, the purchasers are regarded as the owners of the goods with the right to transfer these goods by endorsing the delivery Orders and that the Delivery Orders are regarded as documents of title to the goods covered by them.

(ii) At no time till actual delivery is given, is there any appropriation of the goods either to the Contracts or Delivery Orders, but notwithstanding the absence of

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the appropriation, the holders of the Mills Delivery Orders (known in the market as Pucca Delivery Orders) are regarded by the trade as the owners of the relevant goods.

(iii) That the Pucca Delivery Orders as representing the goods, pass from hand to hand by endorsement being received by the successive buyers against cash payment and are used in the ordinary course of business authorising the holder thereof to receive the goods which they represent irrespective of the forms in which the Mills Pucca Delivery Orders are couched.

(iv) That the tender of Mills Delivery Orders on due date to the buyer, irrespective of the form in which they may be couched, in exchange for cash was and is a fair and valid tender under the Standard India Jute Mills Association Contract Forms, and were and are treated as such.

19B. The defendant, was at all material times

fully aware of the aforesaid trade customs and" usages and dealt with the plaintiff on the basis thereof."

The, defendant in his additional written statement set out in extensor as follows :

"2. With regard to paragraph 19A of the amended Plaintiff, the defendant denies that the alleged tenders or any of them or the alleged delivery orders or any of them were :in terms of the contracts between the parties. Further, the documents described therein as Mills' Pucca Delivery Orders, are not Delivery Orders at all. The plaintiff in any event had no title to any of them. The documents described as Delivery Orders on the face of them relate to goods deliverable under contracts between third parties mentioned in the said alleged Delivery Orders. In any event, the goods mentioned in the alleged Delivery Orders are not goods of the description mentioned in the contracts between the parties herein. Further, the defendant called for the tender of inspection orders in terms of the said contracts, but the plaintiff wrongfully and in breach of contract failed and neglected to tender any inspection order even with the purported tender of the Documents described as delivery orders or otherwise.

The alleged tenders were each and all invalid.

3. With further reference to the said paragraph 19A, the defendant denies that the alleged tenders of alleged Delivery Orders or any such alleged tender were or are, proper tenders by virtue of any alleged trade custom or usage of the jute trade in Calcutta. It is denied that there is any trade, custom

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or usage as alleged. The correctness of the alleged particulars of the alleged custom or usage is disputed and denied.

4. The allegations contained in sub-paragraph (i) of paragraph 19A are denied. The documents described as alleged delivery orders in the said paragraph 19A are not transferable by endorsement.

5. Save that there is no appropriation of the goods either to any particular contract or to any delivery order, the allegations contained in sub-paragraph (ii) of the said paragraph 19A are denied.

6. The allegations contained in sub-paragraph (iii) of the said paragraph 19A are denied.

7. The defendant denies each and every allegation contained in sub-paragraph (iv) of the said paragraph 19A.

8. With regard to paragraph 19B of the said amended plaintiff, it is denied that there was or is any trade custom or usage as alleged or that the defendant was at any time aware of any such alleged custom or usage or that the defendant dealt with the plaintiff on the basis of any such alleged custom or usage. The alleged usage or custom (the existence of which is denied) is in any event inconsistent

with the terms of the said written contracts between the parties and as such evidence of such alleged usage or custom is inadmissible."

As a result of the explicit assertions by the plaintiff and the denials by the defendant, the real dispute between the parties clearly emerged. It was : Did the particular delivery orders, indorsed on behalf of the plaintiff in favour of the defendant, amount to valid tenders as contemplated by the contract between the parties ? Hence, Mr. Justice Bachawat of the Calcutta High Court, who dealt with the case in its earlier stages, framed the following among other issues

"3. (a) Did the plaintiff tender the delivery orders in respect of June portion of the goods in terms of the contracts mentioned in paragraphs 3 of the plaint as alleged in paragraph 9 of the plaint ? If so, was the tender valid ?

(b) Was there any wrongful failure or neglect by the defendant to accept and/or pay for the same ?

(c) Did the defendant fail and neglect to pay for and take delivery of the said June portion of the goods ?

4. (a) Did the defendant fail and neglect to pay for and take delivery of the Pucca Delivery Orders for May & June 1952 portions of the goods in respect of the

226 contracts mentioned in paragraph 13 of the plaint as alleged in paragraph 14 thereof ?

5. (a) Did the plaintiff duly tender the delivery order in respect of June 1952 portion of the contract mentioned in paragraph 17 of the plaint ? If so, was the tender valid ?

(b) Was there any wrongful failure or neglect by the defendant to accept and/or pay for the same ?

(c) Did the defendant fail and neglect to pay for and take delivery of the said June 1952 portion of the goods ?

The Trial Judge at the final stage, Mr. Justice A. N. Ray (as he then was), of the Calcutta High Court, then considered the whole of the law and evidence on these issues at considerable length and held that the plaintiff did not tender the delivery orders in accordance with the terms of the contract between the parties. 'the defendant 'did not bargain for delivery orders containing reservations or conditions entitling the mills or suppliers to refuse delivery to the holder of the delivery order unless the defendant complied with such other and additional terms or conditions as the suppliers impose his, according to the defendant, was "no delivery order". It was only an offer to deliver if certain conditions are fulfilled and new liabilities undertaken. The contract between the parties was for delivery without such additional terms and liabilities. This was the short and simple question decided upon documentary evidence before the Court.

It is difficult to see how any alleged custom could modify the requirements of law as to what a "document of title" is or what a particular contract is or what a particular delivery order means. It could not help a legally defective document to overcome the basic legal defect due to its terms. It could not override the specific terms of the

actual contract between the parties. It could not validate delivery, orders containing reservations derogating from the legal requirements of a document of title. The plea of custom set up by the plaintiff, in desperation, was obviously not available in the face of the express statutory provisions as well as the specific terms of the contract between the parties. An alleged custom, amounting to ignoring or contravening the express terms of agreements or the operation of statutory provisions would, obviously, be invalid. Surely, a custom could not be pleaded as an answer to the provisions of section 92 of the Evidence Act which bar oral evidence to contradict, vary, add to or subtract from the terms of an agreement, although proviso (5) of section 92 allows "any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description" to be proved. Annexing usage or custom to the express terms of the contract is very different from demolishing the original contract by substituting new terms which enable a party to a contract to get over its obligations under the contract itself. Moreover, it has

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been found, by the learned trial Judge as well as the Division Bench of the Calcutta High Court, that there is no such uniformity of practice or usage about the forms of either contracts or delivery orders or their implications as to annex obligations contained in a particular type of delivery order to transactions in general according to various forms of contracts for purchase of jute.

It has been clearly found by Ray J., and the Division Bench, consisting of Sinha C.J. and Sen J., that the contracts now before us (we are not concerned with other contracts for which decrees may or may not have been granted) are for "delivery orders" which are documents of title and not for orders with conditions annexed to them which prevent them from so operating. On the express terms of these delivery orders, the suppliers of jute were not bound to recognise the rights of the holder by mere endorsement of the order. It is only after the holder had applied for registration and undertaken payment of storage charges, and acknowledged the lien of the supplying mills on the goods, that the holder could acquire the right to delivery. In other words, he had to enter into direct separate contracts with the mills before he, could demand deliveries. Such conditional delivery orders are certainly not documents of title as defined by section 2(4) of the Sale of Goods Act, which lays down:

"(4) "document of title to goods" includes a bill of lading, dock-warrant, warehouse keeper's certificate, wharfingers, certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented."

We have examined a number of cases cited before us, including *Anglo-India Lute Mills Co. v. Omademu*, (1) *Duni Chand Kataria v. Bhuwalka Brothers Ltd.*, (2) *Lute & Gunny Brokers Ltd. & Anr. v. The Union of India & Anr.*, (3) and *The Morvi Mercantile Bank Ltd. & Anr. v. Union of India*. (4) We were not referred to any case which has laid down that a

document purporting to be a delivery order hedged round with conditions showing that the supplier of goods had reserved the option to deliver or not to deliver unless further conditions are complied with could possibly be a "document of title" as contemplated by section 2(4) of the Sale of Goods Act get out above. it could not authorise or purport to authorise the holder of the document to transfer the goods mentioned in it until another agreement took place. The holder might put up an equitable claim if he had actually paid some money. But, he could not be compelled to pay damages for an alleged breach of contract when the delivery order was not what

(1) 38 Cal. I.L.R. 127.

(2) [1955] SCR 1071.

(3) [1961] 3 S.C.R. 820.

(4) [1965] 3 SCR 254.

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he had contracted for. It is a simple case in which what the defendant contracts for has not been received by him on patent facts pleaded and established. Therefore with due respect I disagree with Kailasam

J. and concur with the view of my learned brother Gupta.

I do not think it is necessary, on the conclusion reached above by me, to deal with the further question whether the delivery orders, if they had authorised the defendant to demand delivery unconditionally, would still not constitute a due performance of the contract between the parties until goods had been ascertained and title actually passed. If, according to the contract, payment was only to be made when property in goods had passed, Section 18 of the Sale of Goods Act would have also constituted a good defence. But, as I have said, I need not go into this further question as it is enough, for the purposes of the case before us, to conclude, as I do, in agreement with the learned Judges of the Calcutta High Court and my learned brother Gupta, that the so-called delivery orders did not fulfill the terms of the contract between the parties.

The result is that this appeal must be dismissed with costs. GUPTA, J.-This appeal on certificate of fitness granted by the Calcutta High Court is at the instance of the plaintiff in a suit for recovery of damages for breach of contract. The appeal turns on the question whether certain documents described as 'pukka delivery orders' are really delivery orders as known in law.

The question arises on the following facts. The plaintiff and the defendant are both firms registered under the Indian Partnership Act, dealing in the sale and purchase of jute goods. By four different contracts entered into by and between the plaintiff and the defendant, the latter agreed to buy from the plaintiff diverse quantities of B twill deliverable in the months of April, May and June, 1952. By another contract, the defendant agreed to buy from the plaintiff a certain quantity of 'hessian' goods, also deliverable in April, May and June, 1952. The appeal before us concerns only the June quota of B twill and the May and June installments of hessian. The April and May installments of B twill and the April quota of hessian do not form the subject-matter of this appeal.

It is not disputed that all the contracts were in the standard forms of the Indian Jute Mills Association. In all these contracts there is a clause for payment which is in the following terms :

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"Payment to be made in cash in exchange for Delivery Orders on Sellers, or

for Railway Receipts or for Dock's Receipts or for Mate's Receipts (which Dock's or Mates Receipts are to be handed by a Dock or Ship's officer to the Seller's representatives)."

In respect of the June, quota of B twill and the May and June installments of hessian, the plaintiff tendered to the defendant 'pucca delivery orders' on mills like Fort Gloster, Fort William or Auckland generally described as 'European Mills'. These pucca delivery orders which were issued by European Mills passed through several hands

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before they came into appellants possession. They contain a stipulation that the Mills were not bound to recognise any transferee, except the original buyer and require the transferees to give an undertaking to the Mills that they would take delivery of the goods in terms of the contract between the Mills and the original buyer. The appellant, as already stated, was not the original buyer of these pucca delivery orders. The respondent having refused to accept the pucca delivery orders tendered by the appellant or pay for the same, the appellant instituted the suit out of which the appeal arises.

It is alleged in the plaint that the tenders made were in terms of the contracts between the parties and that the defendant committed a breach of the contract by refusing to accept them. In paragraph 19A of the plaint it is claimed that the tender of such delivery orders was valid by virtue of trade custom and usage of the Jute trade in Calcutta. Particulars of such custom or usage as set out in the plaint are as follows :-

"(i) In the Calcutta Jute market there is a usage that upon the issue by the Mills to the buyers of Delivery orders in respect of jute goods purchased, the purchasers are regarded as the owners of the goods with the right to transfer these goods by endorsing the Delivery Orders and that the Delivery Orders are regarded as documents of title to the goods covered by them.

(ii) At no time till actual delivery is given, is there any appropriation of the goods either to the Contracts or Delivery Orders, but notwithstanding the absence of this appropriation, the holders of the Mills Delivery Orders (known in the market as Pucca Delivery Orders) are regarded by the trade as the owners of the relevant goods.

(iii) That the Pucca Delivery Orders, as representing the goods, pass from hand to hand by endorsement being received by the successive buyers against cash payment and are used in the ordinary course of business authorising the holder thereof to receive the goods which they represent irrespective of the forms in which the Mills Pucca Delivery Orders are couched.

(iv) That the tender of Mills Delivery Orders on due date to the buyer, irrespective of the form in which they may be couched, in exchange for cash was and is a fair and valid tender under the Standard India Jute Mills Association Contract Forms, and were and are treated as such."

In the written statement the defendant asserts that the documents described as pucca delivery orders "are not

delivery orders at all" and therefore all the tenders were invalid. The existence of any such trade custom or usage as alleged is also denied. It is further stated that the alleged usage or custom would in any event be inconsistent with the terms of the written contracts between the parties.

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The learned Judge of the High Court who heard the suit held that the tenders of pucca delivery orders made by the plaintiff were not in conformity with the contracts between the parties. He further found that on the evidence adduced the custom pleaded was not proved, that the custom alleged was contrary to sections 18 and 23 of the Sale of Goods Act, 1930, and also to the terms of the written contracts. The learned Judges composing the Division Bench that heard the appeal from his Judgment, by two separate but concurring Judgments affirmed the decision of the single Judge. It has been mentioned already that the scope of the appeal before us is not co-extensive, with the reliefs claimed in the suit but narrower. We have not therefore referred to the other issues in the suit or the other things recorded by the High Court which are not relevant for the present purpose.

Were the pucca delivery orders tendered by the plaintiff in conformity with what the parties contracted for? If not, the defendant committed no breach by refusing to accept them. These pucca delivery orders, as already mentioned, had been issued by the mills. The payment clause in the contracts provides for payment in exchange for delivery orders on sellers. Here, the sellers were the plaintiff and not the mills. A contention rejected by the High Court and repeated in this Court is that where the contracts speak of "delivery orders on sellers", the reference is to the original sellers, namely, the mills. In a contract for sale of goods, the word seller must obviously refer to the party selling under the contract unless there is anything in the context suggesting otherwise. There is nothing in the clause requiring one to read the word sellers to mean the original sellers and not the sellers under the contracts, and this is one of the reasons why the High Court held, in our opinion rightly, that the pucca delivery orders which were offered were not in compliance with the contracts between the parties. More important is the question, did these pucca delivery orders enable the defendant to obtain delivery of the goods from the mills in terms of the contracts? A delivery order is a document of title according to the definition of "document of title to goods" in section 2(4) of the Sale of Goods Act, 1930. A delivery order is an order in his behalf to deliver them to the person named in the order. If the pucca delivery orders were documents of title, the defendant should have been able to get delivery only by lodging them with the mills concerned. But these delivery orders issued by the mills contain a term that the mills would not be bound to recognise a transferee. It appears from the evidence that transferees have to register their names with the mills as buyers, and for this purpose the mills insist on an application being made in the following form (Ext. DDD)

"Dear Sirs,

In requesting you to register us as the Holders of the above Delivery Order(s) we agree that all contract terms covering it are to be applicable and to have been signed by us that we accept all obligations of the original Buyers."

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Thus the mills insist on a new and separate contract, with

the holder of a pucca delivery order accepting the obligations of the original buyer which are not necessarily identical with the obligations of the buyer under the contracts concerned in this case. The new contract insisted on includes terms regarding insurance and godown charges which are not mentioned in the contracts between the parties. As an illustration, the High Court has referred to one such delivery order (Ext. 1) issued by the Fort Gloster Jute Mill which contains these terms :

"(i) That the company shall not be bound to recognise any transfer thereof.

(ii) That the goods are held covered under the company's Insurance policies against risk of fire while at the Mill until 1st October, 1952, after which date a charge of eight annas per bale per month will be levied by the company for this purpose until removal.

(iii) That on and after the 1st October, 1952, the company will charge a godown rent of eight annas per bale per month for the purpose until removal.

(iv) That the company has a lien on the goods for the above charges."

It thus appears that the pucca delivery orders did not, as the High Court has found, entitle the defendant to obtain delivery from the mills in terms of the contracts between the parties to the suit. The term 'delivery order' in its natural sense would not include delivery orders of the kind tendered by the plaintiff, and there is nothing to suggest that the parties while agreeing on payment in exchange for 'delivery orders' used the term in any other sense. It must therefore be held that the pucca delivery orders were not documents of title under the Sale of Goods Act and were not in conformity with what the parties had contracted for.

There is yet another reason why the pucca delivery orders cannot be taken as documents of title. These delivery orders did not relate to any specific lot of goods. It is well established that title cannot pass until the goods are ascertained in view of section 18 of the Sale of Goods Act, 1930. (see *Jute*, and *Gunny Brokers Ltd. and another v. Union of India* and others.) (1) It was argued that requisite quantities of goods were lying in the mills' godown when the pucca delivery orders were issued which was sufficient ascertainment within the meaning of section 18. It appears from the Judgment of the learned single Judge as also of the Division Bench of the High Court that no responsible officer of the mills came forward to prove this. But even assuming that the mills' godowns had sufficient quantities of B twill and hessian when the pucca delivery orders were issued, the requirement is not satisfied. Here the contracts were for the sale of unascertained goods by description. Section 23 of the Sale of Goods Act provides

(1)[1961] 3 S.C.R. 820.

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that in such cases, if goods of that description and in a deliverable state are unconditionally appropriated to the contract by the seller with the express or implied assent of the buyer, the property in the goods passes to the buyer. The assent may be given either before or after the appropriation is made. But here the plaintiff, who was the seller, did not have the necessary control over the goods to be able to appropriate them to the contracts even with the consent of the buyer.

It was next claimed that such pucca delivery orders are

tendered and accepted following the trade custom and usage in the Calcutta jute market. It was suggested that the fact that the contracts were in the standard forms of the Indian Jute Manufacturers' Association was an indication of the existing custom. The forms are however not uniform. It has been found by the High Court that they differ in several particulars. The learned single Judge who disposed of the suit and the Division Bench that heard the appeal have found that no such custom or usage has been proved on the evidence. I find no reason to reconsider this finding of fact.

It has been argued that several decisions of this Court and one of the Calcutta High Court accept the existence of the custom alleged in the plaint. The learned single Judge who decided the suit pointed out referring to the observation of Lord Birkenhead in *Les Affreteurs Reunis Societe Anonyme v. Leopold Walford (London) Limited*(1) that a custom proved in one case should not be utilised to found facts in another. I do not think that any of the decisions relied on by the appellant in support of this contention finds that it is the custom of jute trade in Calcutta to accept pucca delivery orders of the kind we are concerned with in this case as document of title. In the Calcutta case, *Anglo-India Jute Mills Co. v. Omademull*(2), three pucca delivery orders were issued by the defendant company in favour of Janki Dass & Company's principals or order. Janki Dass & Company endorsed the delivery orders to the plaintiffs. The plaintiffs on making enquiries at the mills were informed that the delivery orders were "all right". The delivery orders were in these terms :

"Please deliver to Messrs. Janki Dass & Co.'s Principals or order 50 Bls. 1,00,000 yds. Hess Cloth 40 in 7 1/2 oz., 9 by 9 each 2,000 yds. (One Hundred thousand yards only) Ready Shipment Rs. 113."

The cheque handed to the defendant company by Janki Das & Company in payment of the goods comprised in the delivery orders was dishonored. The defendant company thereupon refused to give delivery of the goods to the plaintiffs under the delivery orders. The plaintiffs brought an action against the defendant company for delivery of the goods or their value or damages for conversion. The defendant company urged that the delivery orders were not documents of title and property in the goods did not pass. They also denied that these delivery orders were taken as equivalent to documents of title by any trade usage in Calcutta. The Calcutta High Court held that

(1) [1919] A.C. 801 (807)

(2) I.L.R. 38 Calcutta 127.

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the defendant company having represented that the delivery orders would confer a good title and having put it in the power of M/s. Janki Dass & Company to endorse the delivery orders and having represented to the plaintiffs that it was "till right", were estopped from denying that they had been paid for the goods to which the delivery orders related or that they had appropriated the goods of the required quantity and description to the delivery orders and that they held these goods for the plaintiffs. It is difficult to see how this case helps the appellant. The form of the delivery orders was quite different from the ones concerned in the case before us and the case was decided on the principle of estoppel arising in the circumstances of the case. The Calcutta case was explained by this Court in *Jute and Gunny Brokers Limited v. Union of India*.(1) Rejecting an

identical argument that in spite of the absence of any appropriation of the goods to the contract or to the delivery orders, by the usage of the jute trade in Calcutta the holders of such pucca delivery orders are regarded as the owners of the goods specified therein, this Court pointed out that the Calcutta case merely laid down the rule of estoppel as between the mill and the holder of the pucca delivery order and that this did not mean "that in law the title passed to the holder of the pucca delivery order as soon as it was issued even-though it is not disputed that there was no ascertainment of goods at that time and that the ascertainment only takes place when the goods are appropriated to the pucca delivery orders at the time of actual delivery". In Jute and Gunny Brokers' case (Supra) this Court held that where the contract concerned in any such delivery order is a contract for the sale of unascertained goods, in view of section 18 of the Sale of Goods Act, 1930, title cannot pass to the buyer until the goods are ascertained by appropriation. Jute and Gunny Brokers' case (supra) is really an authority against the appellant's contention.

Another case cited in this connection is Duni Chand Kataria v. Bhukalka Brothers Limited.(2). The main question that arose for determination in that case related to the meaning of the expression "actual delivery of possession" in section 2(1) (b) (i) of the West Bengal Jute Goods Future Ordinance, 1949 and it was held that the expression included within its scope symbolical as well as constructive delivery of possession. Another question which was raised, whether the delivery orders concerned in that case could be called documents of title within the meaning of section 2(4) of the Sale of Goods Act, was left open. Thus, this case also does not help the appellant. Bayyana Bhiniayya v. The Government of Andhra Pradesh(3) and State of Andhra Pradesh v. Kolla Sreerama Murthy,(4) are the other two decisions on which the appellant relied. Neither of these cases is on the point under consideration. Both these cases deal with the liability for payment of sales tax and are on the question whether the transaction is completed by giving and taking delivery of pucca delivery orders. If pucca delivery orders are accepted and paid for, and the

(1) [1961] 3 S.C.R. 820.

(2) [1955] 1 S.C.R. 1071.

(3) [1961] 3 S.C.R. 267.

(4) [1963] 1 S.C.R. 184.

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contract is fulfilled by delivery of goods, no such question as involved in the case before us can arise. Further, in neither of these two decisions any such trade custom as alleged here has been pleaded. Neither decision is therefore relevant for the present purpose.

It- was also contended that the defendant not having raised the plea in their correspondence with the plaintiff that the delivery orders tendered were defective, was estopped from justifying their repudiation of the contracts on that ground. As the High Court has pointed out. no case of estoppel was pleaded by the plaintiff and therefore,, it was the plaintiff who should be precluded from raising the question of estoppel. Apart from that, the law permits defendant to justify the repudiation on any ground which existed at the time of the repudiation whether or not the ground was stated in the correspondence. (see Nune Sivayya v. Maddu Ranganayakulu(1)).

In the result the appeal fails and is dismissed with costs. KAIISAM, J. This appeal is preferred by the plaintiff on

certificate, of fitness granted by the Calcutta High Court under article II 33 (1) (c) of the, Constitution against the judgment of the Bench of that High Court.

The appellant filed a suit No. 3282 of 1952 in the ordinary Civil Jurisdiction of the Calcutta High Court for the recovery of a sum of Rs. 2.52,968//11/- against the respondent with interest thereon at 6 per cent per annum until realisation or in the alternative an inquiry into damages and decree for the amount as may be found upon such inquiry.

The suit was against the respondent for breach of several contracts mentioned in Paragraph 20 of the plaint. The suit was heard by a learned Judge of the Calcutta High Court and by a judgment delivered on 24th April, 1959, the learned Judge passed a decree for sum of Rs. 67,275/- with interest at the rate of 6% per annum and dismissed the suit with regard to the rest of the appellant's claim. The appellant preferred an appeal to a Bench of the Calcutta High Court and the Bench dismissed the appeal confirming the decree passed by the trial Judge. This appeal is preferred by the plaintiff against the decree by special leave.

The appellant is the owner of Jute Mills and habitually ships and deals in the sale and purchase of jute goods.

The respondent agreed to buy from the appellant and the appellant purported to sell to the respondent various quantities of B Twill. There were three contracts entered into on 22.11.1951, 1.12.1951 and 10.12. 1951 for delivery of certain quantities of bags at specified, rates during April, May and June, 1952. Under the three contracts 3 items of goods were deliverable by the appellant to the respondent in April. 1952. Regarding these three items deliverable in April, 1952, the respondent agreed to sell to the appellant and the appellant agreed to buy from the respondent diverse quantities of B Twill in

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settlement of the goods deliverable in April, 1952 in respect of the three contracts. As there was a fall. in the price of the bags of Twills on the basis of settlement contracts the appellant became entitled to Rs 50,175 and the respondent duly paid to the appellant the said sum. So far as the delivery under the three contracts due in April was concerned it was thus settled by payment by the respondent. Regarding the goods deliverable under the three contracts in May, 1952 the respondent agreed to sell to the appellant and the appellant agreed to buy from the respondent the goods deliverable under the three contracts. As there was a further fall in the price of Twills the appellant submitted 3 bills regarding the three transactions due in May for a sum of Rs. 67,275 but the respondent neglected to pay the sum of Rs. 67,275.

Regarding the goods deliverable in June, 1952 the appellant tendered delivery orders in respect of the June delivery but the respondent failed and neglected to accept the delivery orders and to pay for the same. The appellant after due notice sold the goods at the respondent's risk and thereby suffered a loss of Rs. 91,109/7/-.

Under the fourth contract exchanged between the appellant and the respondent dated 10th January, 1952 the respondent agreed to buy from the appellant and the appellant agreed to sell to the respondent three lakhs yards of hessian delivery in equal installments in April), May and June, 1952. In respect of the goods deliverable under the contract in April, 1952 the appellant delivered the delivery orders and the respondent paid for and took delivery of the goods but regarding heessian deliverable in May and June the

respondent failed to pay and take delivery of pucca delivery orders. The goods were resold after due notice to the respondent and the appellant suffered a loss of Rs. 57,381/4/-. By another contract dated 19th April, 1952, exchanged between the appellant and the respondent the respondent agreed to buy from the appellant and appellant agreed to sell to the respondent certain quantities of B Twills at certain rates in June, 1952. Though the appellant delivered pucca Delivery Orders in respect of the goods deliverable in June, 1952, the respondent failed and neglected to accept and to pay for the goods or the Delivery Orders. The appellant sold the goods at the risk of the respondent at a loss of Rs. 37,203.

The defence to the suit as disclosed in the, written statement is that the respondent has since discovered that the said Bought and Sold Notes and contracts were and are invalid and are void for the reasons stated in the written statement.

The ground on which the Bought and Sold Notes and contracts are stated to be invalid and void is that under the west bengal Act V of 1950 (West Bengal Jute Goods Act) which was promulgated on 15th March, 1950, and the notification issued thereunder. the making of contracts for sale and purchase of jute goods on a forward basis by or with any person not being a person who habitually dealt in the sale or purchase of jute goods involving the actual delivery of possession thereof was prohibited. As the respondent had since discovered that

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the contracts came within the mischief of the said Act and the notification the contracts were and are void. The respondent admitted that he paid a sum of Rs. 50,175/- regarding the three contracts in respect of goods deliverable in April, 1952 but stated that the same was paid before the contracts were discovered to be void. The other allegations made in the plaint were generally denied. The facts and/ or validity of the alleged tender and/or the alleged resale and/or the alleged notice were denied. With reference to allegation in paragraph 14 of the plaint that the appellant delivered the delivery orders and the respondent paid for and took delivery of the delivery orders it was averred in the written statement that the delivery orders delivered by the appellant were paid for and taken delivery of by the respondent before the relevant contract was discovered to be void. The claim in the plaint and the respondent's liability was generally denied.

According to the pleadings of the parties it is seen that the plaint allegations are that the contracts were entered into in the standard I.J.M.A. forms which were annexed to the plaint. It was further alleged 'that regarding the delivery of goods in April, 1952, in respect of the three contracts the respondent entered into a settlement contract and paid the appellant a sum of Rs. 57,175 as per the contract. Regarding goods deliverable in May, 1952 under the three contracts though the bills were submitted the respondent failed and neglected to pay the same. Regarding the goods deliverable under the three contracts in June, 1952, it is alleged that the appellant duly and in terms of the contract tendered the delivery orders in respect of the said goods for June delivery but the respondent wrongfully failed and neglected to accept and to pay for the same. Regarding the hessian contracts for the goods deliverable in April, 1952, it is alleged that the appellant duly delivered delivery orders and the respondent paid for and took delivery of the same but failed and neglected to pay for and

take delivery of the goods deliverable in May and June 1952. In respect of the hessian deliverable in June, 1952, it is alleged in the plaint that the appellant tendered the pucca delivery orders but the respondent failed' and neglected to accept and pay for the said goods or delivery orders. It may be noted that the specific allegation in the plaint is that regarding April delivery of Twills under the three contracts the claim was satisfied by the respondents. Regarding the three contracts for goods deliverable in May it is alleged in the plaint that the appellant submitted the bills but respondent did not honour it. In Paragraph 9 of the plaint it is stated regarding the goods deliverable in June, 1952 that "The plaintiff duly and in terms of the contract tendered the Delivery Orders in respect of the said goods in respect of June Delivery but the plaintiff wrongfully failed and neglected to accept and/or to pay for the same." The allegation specifically is that delivery orders were tendered interms of the contract. So also in the case of hessian contracts it is alleged in Paragraph 14 of the plaint that the appellant duly delivered the delivery orders and the respondent paid for and took delivery of the same. Regarding the goods deliverable in June 1952 also in Paragraph 18 of the plaint it is alleged that the appellant tendered pucca delivery orders in respect of goods deliverable in June, 1952 but the respondent failed and neglected to pay and accept for the

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said goods. The reply to the specific allegations referred to in the various paragraphs of the plaint is that the delivery orders in the case of goods deliverable in April were paid for and taken delivery of before, the relevant contract was discovered to be void. The allegation by the defence according to the written statement is that the respondent discovered the Bought and Sold notes and contracts, to be invalid and void under the West Bengal Act V of 1950 in that it related to a forward contract prohibited under law. The' allegations in the plaint that the delivery orders were issued according to the contract were nowhere denied. The only defence was that the delivery orders were received and paid for in the case of April contracts before realising that the contracts were void. On the' pleadings therefore, the question as to whether the delivery order was according to the contract was not in dispute. Neither were the allegations that the contracts were in the standard I.J.M.A. Contract Forms were denied.

Four years after the original plaint was filed the appellant sought an amendment of the plaint for introduction of paragraphs 19-A and this amendment the appellant while reiterating that the tenders made by the appellant of the Mills Pucca Delivery Orders as mentioned in paragraphs 9, 14 and 18 of the plaint were duly made in terms of the contracts between the parties, further pleaded that the delivery orders tendered in respect of the contract mentioned in the plaint were and are proper tenders by virtue of trade customs and usage of the Jute Trade in Calcutta. The particulars of the customs and usage were set out in four sub-paragraphs of Paragraph 19A of the plaint. In Paragraph 19B the appellant alleged that the respondent was at all material times fully aware of the aforesaid Trade customs and usages and dealt with the appellant on the basis thereof. An additional written statement was filed by the respondent on 9th December, 1957, in which he denied that the alleged tenders or any of them or the alleged delivery orders or any of them were in terms of the contracts between the parties. It was contended that the Mills' Pucca

Delivery Orders were not delivery orders at all and in any event the appellant had no title to any of them. It was also contended that the delivery orders related to goods deliverable under contract between third parties mentioned in the delivery orders and in any event the goods mentioned in the delivery orders are not goods of the description mentioned in the contracts-between the parties and that when the respondent called for the tender of inspection orders in terms of the contracts, the appellant wrongfully and in breach of contract failed and neglected to tender any inspection order. The custom pleaded was also denied. It was also contended that the delivery orders were not transferable by endorsement and that there were no appropriations of the goods relating to any contract or delivery order. The respondent also denied that the customs or usage ever existed and in any event the customs or usage is inconsistent with the terms of the written contracts and that it was not right to allege that the respondent was aware of! any such customs and dealt with the appellant on that basis.

On the amended plaint and the additional written statement the suit took a new turn and the outcome of the suit was considered important

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for the jute trade in Calcutta. On the amended pleadings various issues were framed and the litigation has dragged on for nearly, 25 years. The matter was fought out and elaborate arguments were addressed before the trial court and a Bench of the Calcutta High Court and before us regarding various questions of facts and law.

So far as the original defence to the suit that the contracts were hit at by the West Bengal Act V of, 1950 is concerned it was found against the respondent by both the courts below and was not raised before us, The suit as well as the appeal proceeded on the basis of the amended pleadings. The trial court framed 7 issues as set out at page 262 of the printed Paper Book and answered them at page 304. It found that the contracts were not illegal in contravention of the West Bengal Jute Goods Act. It also found that the tenders made by the appellant were not valid and as such the respondent was not liable. Regarding the custom or usage in Calcutta the trial court found that there was no such custom proved. It also recorded that the appellant had no title to documents described as Mills Pucca Delivery Orders. These findings were confirmed by the appellate court.

The Courts below negatived the custom or usage set up by the appellant. The question mainly is whether the tender of the delivery orders by the appellant is valid.

The trial court as well as the appellate court had gone into the question as to whether delivery orders were documents of title and goods. The trial Judge held that a delivery order is not a document of title nor that the delivery order represented the goods. It was further held that the property in unascertained goods cannot pass and that in any event as according to the delivery order the Mill is not bound to recognise the transfer and as the Mill insisted on written undertaking from the delivery order holder, the delivery order is not a document of title. The appellate court agreed with the conclusions of the trial Judge. The correctness of the conclusions arrived at by the Courts below has to be considered.

The question whether the delivery orders are documents of title and whether there can be documents of title in relation to unascertained goods loomed large before the courts below. The view taken was that the delivery orders

are not documents of title and that there could be no document of title in relation to unascertained goods.

The "document of title to goods" is defined in section 2(4) of the Sale of Goods Act, 1930, as follows :-

"2. (4) "document of title to goods" includes a bill of lading, dock-warrant, warehouse keeper's certificate, wharfingers' certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document. to transfer or receive goods thereby represented;"

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It is an inclusive definition and after enumerating a bill of lading, dock-warrant, warehouse keeper's certificate, wharfingers' certificate, railway receipt, it proceeds to include in the definition warrant or order for delivery of goods and any other document used in the ordinary course of business as proof of possession or control of goods or authorising or purporting to authorise either by endorsement or by delivery the possessor of the document to transfer or receive goods thereby represented. The second part of the definition would include any other document used in the ordinary course of business as proof of possession or control of goods. It would further include an authorisation either by endorsement or by delivery which would enable the possessor of the document to transfer 'Or receive goods thereby represented. The definition is silent as to passing of title. It would include an order for delivery of goods. A document which is used in the ordinary course of business as proof of possession would satisfy the definition as also a document which would enable the possessor to receive the goods thereby represented. The transfer of title is therefore not relevant. It may be noted that while "goods" is defined meaning every kind of movable property "specific goods" is defined as meaning goods identified and agreed upon at the time a contract of sale is made. A document of title to goods need not be confined to specific goods for it may relate to goods which are not specified. Section 18 of the Sale of Goods Act provides that where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. This section states the effect of the contract and as to when exactly the property in the goods is transferred to the buyer. The property in the goods no doubt is not transferred to the buyer unless 'and until the goods are ascertained but the contention that unless by the document the property in the goods passes there could be no document of title cannot be accepted, Chapter III of the Sale of Goods Act relates to transfer of property as between seller and buyer but that would not help in determining whether a particular document is a document of title to goods or not. An order for the delivery of goods comes under the definition document of title to goods.- It does not require an order for delivery of specific goods. So also a document used in the ordinary course of business as proof of possession or control of goods and not necessarily specific goods would come under the definition. Equally a document authorising the possessor of the document to transfer or receive goods thereby represented will be a document of title to goods.

The nature of a delivery order of the Indian Jute Mills Association has been dealt with by decisions of courts and may be referred to. In *Anglo-India Jute Mills Co. v. Omademull*(1) the court was dealing with a delivery order and a common form of contract used by the Indian Jute Manufacturers Association. Clause 3 of the contract is similar to the clause in the present contract and runs as follows :-

" Payments to be made in cash in exchange of delivery order on sellers or for Railway Receipts. or for Dock Receipts or for Mates Receipts (which Mates Receipts are to be handed by Ships' Officer to the Sellers' representative)"

(1) I.L.R. 38 Cal. 127.

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The Court found that it was established in evidence that delivery orders of the nature of the one in suit, passed from hand to hand by endorsement and were sold and dealt with in the market; that according to the invariable course of dealing in the Calcutta jute trade delivery orders were only issued on cash payment, and were dealt with in the market as absolutely representing the goods to which they related and free from any lien of the seller.

In *Duni Chand Rataria v. Bhuwalka Brothers Ltd.*, (1) while considering the provisions of the West Bengal Jute Goods Future Ordinance, 1949, this Court referred to the terms and conditions of the standard form of the Indian Jute Mills Association contracts. Clause (3) of the contract is similar to clause 3 of the present contract and provided for payment to be made in cash in exchange for delivery orders. The Court found that in respect of the goods deliverable under the contracts the mills would, in the case of goods sent by them alongside the vessel in accordance with the shippers' instructions in that behalf, obtain the mate's receipts in respect of the same and such mate's receipts would be delivered by the mills to their immediate buyers who in their turn would pass them on to their respective buyers in the chain of contracts resting with the ultimate shipper. If the mills held the goods in their godown they would issue delivery orders on the due date, which delivery orders would be dealt with in the same manner as the mate's receipts aforesaid. Both these sets of documents would represent the goods and would be passed on from seller to buyer against payment of cash. It proceeded to observe that as a matter of fact on the evidence the trial Judge held that in the Calcutta jute trade mills' delivery orders are ordinarily issued by the mills against cash payment and pass from hand to hand by endorsement and are used in the ordinary course of business authorising the endorser to receive the goods which they represent and that they are dealt with in the market as representing the goods and being passed on from seller to buyer against payment of cash and the delivery orders issued by the mills against cash payment are passed on from hand to hand by endorsement being received by the successive buyers against cash payment and are used in the ordinary course of business authorising the endorser, to receive the goods which they represent. The Court found that the manufacturer of jute goods does not come normally in direct contract with the shipper and it is only through a chain of contracting parties that the shipper obtains the goods from the manufacturer and if only actual delivery of possession as contrasted with symbolical or constructive delivery were contemplated it would be impossible to carry on the busi-

ness. In conclusion this Court held that the delivery orders represented the goods and the sellers handed over these documents to the buyers against cash payment, and the buyers obtained these documents in token of delivery of possession of the goods. They in turn passed these documents from hand to hand until they rested with the ultimate buyer who took physical or manual delivery of possession of those goods. In the view that the delivery orders represented the goods this Court did not go into the question whether the delivery orders would

(1)[1955] 1 S.C.R. 1071.

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be documents of title under section 2(4) of the Sale of Goods Act. The trial court distinguished this case on the ground 'that it was not questioned before the Supreme Court that a Mills pucca delivery order was a document of title and in any event there is no decision that the delivery order is a document of title. The ground on which Supreme Court's decision was held to be not applicable cannot be supported for this Court has definitely held that the delivery order represents the goods. The appellate court held the decision of the Supreme Court as inapplicable because there was no evidence as to what were the actual terms of the contract or as to the terms and conditions which were to be fulfilled by the intermediate buyer at the time when the actual delivery of the goods was sought to be taken from the mills. The reference to the terms and conditions which were to be fulfilled by the intermediate buyer refers to the requirement that the buyer should apply for registration, and to give an undertaking that he would be bound by the terms of the contract between the mills and the original buyer and that the mills would not give delivery of the goods under delivery orders unless his name was so registered. The reference to the conditions would be dealt with later.

In Bayyana Bhimya v. The Government of Andhra Pradesh, (1) the question related to the liability to pay sales-tax. The appellant, entered into contract with the Mills agreeing to purchase gunnies at a certain rate for future delivery. The appellant also entered into agreements with the NM by which the Mills agreed to deliver the goods to third parties if requested by the appellants. Before the date of delivery the appellants entered into agreement with third parties and handed over to them the delivery orders which were known as kutcha delivery orders. The Mills used to deliver the goods against kutcha delivery orders. The tax authorities treated the transactions between the appellants and the third parties as a fresh sale and sought to levy sales-tax again, which the appellants contested. This Court held that so far as the third parties are concerned they did purchase the goods by payment of extra price, and the transaction must, in law and in fact, be considered a fresh transaction of sale between the appellants and the third parties. It was held that the delivery order was a document of title to goods under section 2 (4) of the Sale of Goods Act and the possessor of such document has the right not only to receive the goods but also to transfer it to another by endorsement or delivery. There being two separate transactions of sale, tax was payable at both the points. The kutcha delivery order was held to be a delivery order as the possessor of such a document has the right not only to receive the goods but also to transfer it to another by endorsement or delivery. The question whether the goods were ascertained or not was not considered in the case.

In Jute and Gunny Brokers Ltd. and Another v. The Union of

India and Others(2) this Court approved the view of the Calcutta High Court in Anglo-India Jute Mills Co. v. Omademull(3) that the

(1) [1961](3) S.C.R. 267.

(2) [1961] (3) S.C.R. 820.

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delivery orders are regarded by the trade as owners of the goods specified therein and the pucca delivery orders pass from hand to hand by endorsement and are sold and dealt with in the market as absolutely representing the goods to which they relate. On that basis the Court proceeded to consider the question whether the property in the, good-, represented by the pucca delivery orders can be said to have passed to the holder of the pucca delivery orders when they receive them and answered the question that the title did not pass when there was no ascertainment of goods and only when the ascertainment of goods takes place the goods are appropriated to the pucca delivery orders at the time of actual delivery. It is clear therefore that while a delivery order would be a document of title to goods the property in the goods will not pass in the cast of unascertained goods- till ascertainment takes place. But that would not affect the question of the document of title to goods being transferred and delivered and confer on the possessor of the document a right to transfer or receive the goods thereby represented.

In the Slate of Andhra Pradesh v. Kolla Sreerama Murthy,(1) the question that arose was whether a person who instead of taking delivery himself endorsed the delivery orders and these pass through sever hands before the ultimate holder of the delivery order presented it to the Mills and obtained delivery of the gunnies from them was liable to pay sales-tax. This 'Court held that as the goods which were subject matter of the purchase were not appropriated to the contract there was no completed sale since no property passed but only an agreement of sale. But applying the rule in Butterforth v. Kingsway Motors Ltd.,(2) that though the purported sellers in a long chain of transaction had no title to it at the times when the purported sales took place but when the last buyer made payment and acquired a good title and the title so acquired went to feed the previously defective titles of the subsequent buyers and ensured to their benefit. This decision was rendered when considering the question whether there was sale at every stage and it was held that if there was no delivery of the goods to the last holder of the delivery, order the entire fabric on which the case rested would disappear. But the question that arises for consideration before us is whether the delivery order would be construed as a document of title of goods which could be transferred on endorsement and delivered and the fact that whether there was a sale at every stage or not would not affect the question.

The High Court on appeal held at page 351 of the Paper Book that in view of the restrictions in the terms and conditions regarding the delivery orders, the buyer cannot be said to be in the ordinary course of business put in possession or control of the goods as they are unascertained and as control over the goods can only be had on registration of the buyer's name on giving his undertaking. It further observed that the possessor of the document cannot receive the goods as under section 18 of the Act title cannot pass in unascertained goods. The view of the High Court that there could be no document

(2) [1954] 2 All E.R. 694.

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of title regarding unascertained goods is erroneous on a construction of the definition of "document of title". The document of title to goods need not be confined to specific goods and as long as the possessor of the document could receive the goods the requirement is completed. The passing of the title after ascertainment of goods is not relevant in determining whether the document is a document of title to goods. The other reason for holding that the buyer under the delivery order is not entitled to possession as he had to register his name and give an undertaking will be dealt with in due course.

In this view the plea of the appellant that the delivery orders tendered in respect of the contracts are proper tenders would have to be accepted if the possessor of the documents is entitled to transfer or receive the goods thereby represented. In this connection it may be noted from *Anglo-India Jute Mills Co. v. Omadenull*, (1) the practice in the jute trade by the Indian Jute Mills' Association has been recognised. The practice of issuing delivery orders in pursuance of clause similar to clause 3 in the contract has also been recognised. The delivery orders that passed on from person to person by endorsement and delivery were construed as documents representing the goods by this Court in, (1955) 1 S.C.R. 1071 (supra). It was also recognised in *Bayyana Bhimayya v. Govt. of Andhra Pradesh* (2) that delivery orders are documents of title. The delivery order if it satisfies the requirements of section 2(4) either by the document being an order for delivery of goods or used in the ordinary course of business as proof of possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented, it would become "document of title to goods". That the delivery order is used in the ordinary course of business as proof of possession and transferable by endorsement or by delivery has been recognised by Courts. The only question therefore is whether the requirement of section 2(4) has been fulfilled in that the delivery orders which were given to the respondent would have enabled the possessor of the documents to transfer or receive the goods thereby represented. The respondent's main attack against the delivery orders is that the possessor of the documents could not receive the goods unless he fulfilled the conditions, namely that he should register with the Mills, and sign an undertaking to the Mills agreeing to be bound by the terms of the contract between the original buyer and the seller. The Mill is not bound to recognise the buyer. The trial court as well as the appellate court found that these conditions negated the plea of the appellant that the delivery order is a document of title to goods which would enable the possessor to take delivery of the goods. It is clear that before obtaining possession the conditions will have to be satisfied and therefore it is not an unconditional order for delivery and therefore will not satisfy the requirements of a delivery order. It may also be noted that the appellant has not succeeded in establishing any custom or usage or practice in the jute trade that delivery orders with such conditions are being accepted. Neither have the decision of courts recognised any such practice.

(2) [1961] (3) S.C.R. 267 at 270.

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These objections appear to be insurmountable and the courts below took the view that the appellant cannot succeed as the

delivery order is not unconditional and therefore not in accordance with the contract. On a careful consideration of the, records and hearing the arguments of the counsel it appears, that one important aspect was not duly considered by the Courts below. The plea of the appellant is that the delivery order is in accordance with the contract and that the respondent knew that the delivery order was in accordance with the contract and that he wanted to avoid the contract as the prices had fallen without any justification. The contents of the plaint have been set out at length at the beginning of the judgment. It may be noted that the appellant and the respondent entered into several contracts. The first 3 contracts were entered into on 22nd November, 1st December and 10th December, 1951. Under each of the contracts goods were to be delivered in April, May and June. The rates specified are Rs. 206/- per 100 bags according to the first contract, Rs. 210/4/- per 100 bags and Rs. 216/- per 100 bags respectively. At the commencement of the first period of delivery in April, 1952, it was found that the rate had fallen to Rs. 1551- per 100 bags. The margin in the three deliveries due in April under the 3 contracts resulted in a loss of about Rs. 50,175 to the respondent. That this contract was under Indian Jute Mills' Association was not disputed and accepting its full implications the respondent paid the amount under settlement contracts. Regarding the delivery due in the month of May under the 3 contracts there was a Sold and Bought note exchanged between the parties whereby the respondent agreed to sell to the appellant and the appellant agreed to buy from the respondent 90,000 bags of B Twills at Rs. 136/- per 100 bags. It may be noted that the price had come down further from Rs. 1551- in April to Rs. 136/- in May. There was no protest and for the month of May also the goods were delivered by the appellant to the respondent and back by the respondent to the appellant. Due to the fall in prices the appellant claimed Rs. 67,275/- and a decree had been passed so far as that claim was concerned by the trial Court which has become final. While the contract was accepted and a settlement contract was affected on the basis of delivery of goods by the appellant as regards April and May the dispute is as regards the goods deliverable in June under the 3 contracts. Regarding all the 3 contracts the first 2 deliveries due in April and May have not been disputed. For the delivery of goods under the 3 contracts in June, 1952. it is alleged in the plaint in Paragraph 9 as follows

"The plaintiff further states that in respect of the Contracts mentioned in paragraph 3 above the defendant failed and neglected to pay for and/or to take delivery of the goods which were deliverable under the aforesaid contracts in June 1952. The plaintiff duly and in terms of the contract tendered the Delivery Orders in respect of the said goods in respect of June Delivery but the plaintiff wrongfully failed and neglected to accept and/or to pay for the same."

This is the crux of the appellant's case. The answer to this case is found in Paragraph 6 of the written statement which is as follows

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"The defendant denies each and every allegation contained in paragraphs 9, 10 and 11 of the plaint as if the same is set out seriatim and specifically denied. The facts and/or validity of the alleged tender and/or

the alleged resale and or the alleged notice are denied."

In the written statement that was filed on 22nd November, 1952, the plea was that the respondent discovered that the Bought and Sold notes and contracts were and are invalid and void as they were in contravention of the provisions of the West Bengal Act V of 1950. While there is a challenge to Bought and Sold notes and contracts as being void there is no challenge as to the validity of the delivery orders. While the allegation in Paragraph 9 is specifically denied it does not say whether there was or there was not any tender of delivery orders and whether the delivery orders were in accordance with the contract or not. Much less is there any reference to the delivery order requiring that it should be registered with the Mill or that an undertaking to abide by the conditions was insisted upon in the delivery order. In the amended plaint Paragraph 19A was introduced wherein the appellant reiterating that Mills' pucca delivery orders were made in terms of the contracts between the parties proceeded to state that in any event the delivery orders were proper tenders by virtue of trade customs and usage of the Jute Trade in Calcutta. In the additional written statement filed on 9th December, 1957, further particulars in reply to Paragraph 19A of the plaint are given in Paragraph 2- It is stated that the delivery orders are not in terms of the contracts and that the appellant had no title to them. It is further stated that the delivery orders on the face of them relate to goods deliverable under co acts between third parties, mentioned in the said delivery orders, that the goods are not of the description as mentioned in the contracts and that when the respondent called for the tender of inspection orders appellant neglected to tender any. In Paragraph 4 it was stated that the delivery orders were not transferable by endorsement. Though the opportunity provided by the amended plaint was availed of for challenging the validity of the delivery order which was not done in the original written statement the challenge to the delivery order is not based on any of the grounds which ultimately found acceptance with the courts below, namely that the delivery order required registration with the Mills and required the possessor of the document to give an undertaking that he would abide by the conditions and that the Mill was not bound to recognise the transfer.

The burden is no doubt on the appellant to prove his case but the parties to the suit are bound by the procedure prescribed in the Code of Civil Procedure. Order VIII of the Civil Procedure Code requires what a written statement should contain. Order VII, Rule 2. requires that the defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise. Rule 3 requires that it shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff. but the defendant must deal specifically with each allegation of

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fact of which he does not admit the truth, except damages. Though the respondent did not question the validity of the delivery order at the first instance he was at liberty to question it when he filed the additional written statement and to raise a grounds of defence to the validity of the delivery order. The failure to question the validity of the

delivery order on the ground that it required registration with the Mill or that the possessor was bound to give an undertaking would be failure to comply with the requirements of Order VIII. The pleadings were before the Original Side of the Calcutta High Court and the courts have recognised that the pleadings of the Original Side of the High Court must be strictly construed. In *Badat and Co., v. East India Trading Co.*, (1) this Court observed regarding the requirements of the written statement under Order VIII, Rules 4 and 5, as follows

" These three rules from an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written-statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary."

The respondent had ample opportunity to put forward his objections to the delivery order in the correspondence that was exchanged between the parties or in the written statement as originally filed. The additional written statement of course, gave another opportunity but even in this respondent has failed to put forward the grounds which he is in law required to do. On the pleadings itself it appears that the defence is without substance and belated and put forward for the purpose of escaping the liability. The three delivery orders regarding B Twill deliverable in June on the first three contracts, and of hessian deliverable in June and regarding the last contract by which B Twill was deliverable in June, the respondent did not receive the delivery orders. He did not wait to see whether the delivery orders were according to the contract or not. Though the respondent is entitled to raise all objections open to him under law that the delivery orders are not according to contract, his not receiving the delivery orders and not raising the plea specifically is more in accordance with his having been satisfied with the delivery orders being according to contract and his refusal to accept the delivery orders was to avoid the loss due to fall in price. This conclusion is strengthened by his conduct. The 3 contracts specified in Paragraph 3 of the plaint were entered into in November and December, 1951, for delivery of goods in April, May and June, 1952. The 3 contracts were accepted and proceeded with regarding April and May delivery in that the validity of the contracts, the delivery by the appellant and the delivery back by the respondent are all admitted and the appellant was awarded a decree accordingly. The dispute as already pointed out is, regarding the June delivery and

(1) A.I.R. 1964 S.C. 538.

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the plea that the delivery orders in respect of the goods relating to June delivery were in terms of the contract was not specifically denied. There were several transactions between the appellant and the respondent which will be referred to presently and the contracts were entered into in the standard I.J.M.A. Contract forms. The fact that 3 contracts relating to two deliveries have been accepted show that the respondent was following the practice prevalent in

Calcuttaby respondent agreed to buy from the appellant and the appellant agreed to sell to the respondent 3,00,000 yards of hessian at Rs. 74/- per 100 yards deliverable in equal installments in April, May and June. It is alleged in Paragraph 14 of the plaint that he had duly delivered the delivery orders and the respondent paid for and took delivery of the same. But the respondent wrongfully failed and neglected to pay and take delivery of pucca Mills Delivery Orders relating to goods deliverable in May and June, 1952. In the written statement the respondent stated that the delivery orders delivered by the appellant were paid for and taken delivery of by the respondent before the relevant contract was discovered to be void. In the written statement the respondent did not deny that the appellant duly delivered the delivery orders and the respondent paid for and took delivery of the same but pleaded that he paid and took delivery before he discovered that the relevant contract was void. It is significant that the attack was on the contract on the ground that it became void because of the West Bengal Act V of 1950. There is no challenge against the delivery order. The contention of the appellant that the delivery orders relating to the present suit were the usual delivery orders which were prevalent in the Jute Trade in Calcutta appears probable. No specific plea that the delivery orders relating to the suit were different from the delivery orders which the respondent accepted regarding the April delivery was raised nor was it contended that the delivery orders which lie accepted did not contain the restrictions requiring registration and giving of an undertaking. In the additional written statement there is no specific reference to Paragraph 14 of the plaint.

Another contract was entered into between the appellant and the respondent on 19th April, 1952, whereby the respondent agreed to buy from the appellant and the appellant agreed to sell to the respondent 90,000 bags of B Twills at Rs. 155/- per 100 bags deliverable in June, 1952. The contract was in the Standard I.J.M.A. Contract Forms. In Paragraph 18 of the plaint it is alleged that on the due date the plaintiff duly tendered the pucca Delivery Orders in respect of the goods deliverable in June, 1952, and the respondent failed and neglected to accept and pay for the goods. Regarding this contract the defence in the written statement is in Paragraph 6 where it is stated that "the facts and/or validity of the alleged tender and/or the alleged resale and/or the alleged notice are denied". There is no reference about the transactions in the additional written statement.

'raking into account the fact that the appellant as well as the respondent were engaging themselves in the Jute Trade in Calcutta and were following generally the practice of the Jute Mills Association and had entered into various contracts and having business relationship,

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the conclusion seems to be irresistible that the respondent was familiar with the delivery order with its conditions and accepted it as being in use in the ordinary course of business. It is difficult to accept the plea that the delivery order was not negotiable or that it was not in the terms of the contract and that it would not have enabled him to take possession of the goods as he had to fulfill certain other conditions as getting himself registered with the Mill and giving an undertaking as required. From these circumstances it is clear that the delivery orders were according to the terms of the contract and the respondent

himself was aware of them. The plea that the delivery orders are not in accordance with the contract and that the conditions imposed amount to a new agreement are all belated pleas put forward to avoid the liability.

This aspect of the case was not brought to the notice of the trial Judge and the appellate court. The learned trial Judge held that the appellant had not raised any plea of estoppel and therefore cannot rely on the failure of the respondent to point out the defects in the delivery observed as follows :

"The plaintiff's contention was that under the contract the tender of delivery orders, namely, Mill Pucca Delivery Orders, was a valid tender according to the contract and in, any event was proper tender by virtue of trade customs and understood and accepted Mills pucca delivery orders as delivery orders and that the defendant had accepted mill's pucca delivery orders and paid therefore with respect to certain deliveries under the contracts in question. It was also contended on behalf of the plaintiff that in some of the correspondence the defendant alleged that as the plaintiff failed to tender mill's pucca delivery orders, the contract was cancelled and, therefore, there was in the correspondence never any contention on behalf of the defendant that mill's pucca delivery orders were not proper tender. No case of estoppel was pleaded and I am, therefore of opinion that the plaintiff cannot raise any such plea of estoppel."

The question is not one of estoppel but the inference to be, drawn from the conduct of the respondent. The pleadings as well as the conduct lead one to the conclusion that the delivery orders were in accordance with the contract which the respondent accepted, as Mills' pucca delivery orders. In the result apart from the questions of law which have been discussed in full by all the courts the appellant is entitled to succeed on the simple ground that he has established that in the cases in dispute the delivery orders were in accordance with the contracts. The is allowed with costs.

ORDER

In view of the majority judgment, the appeal is dismissed with costs. P.H.P.