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M/S GOKULDAS EXPORTS

v.

M/S JAIN EXPORTS (P) LTD.

SEPTEMBER 4, 2003

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[BRIJESH KUMAR AND ARUN KUMAR, JJ.]

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Export-Import Policy, 1981-82 Paras 198(2); 199(1); 211—Import Licences—Second revalidation—Permissibility of—Held, not permissible—Request for revalidation can be allowed for a period not exceeding six months—Party seeking revalidation for a longer period has to make such a request while seeking revalidation at the first instance disclosing special reasons—Such request is to be considered with the approval of Chief Controller of Imports and Exports—There cannot be two requests for revalidation—IPC Circular No. 10/04 dated 11/5/1984—IPC Circular No. 14/92 dated 3/5/1982—Handbook of Import and Export Procedures 1981-82—Para 201(2).

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Import Licences—Failure on part of licensee to utilise licences—Claim for refund of proportionate amount of margin money—Appellant obtaining import licences which were purchased by respondent as per an agreement—Appellant issuing requisite letter of authority in favour of respondent—Respondent unable to utilise licences during validity period of one year—Appellant seeking revalidation of licences at respondent's request which was extended for six months by licencing authority—Request for second revalidation by respondent not complied by appellant on ground that second revalidation was not permissible—Claim of respondent for refund of proportionate amount of margin money received by appellant—Maintainability of—Held, question of refund of proportionate amount of margin money did not arise—The agreement did not visualise any piecemeal or pro rata payment of margin money based on utilisation of licence—Payment of margin money not linked to respondent's performance qua the licence.

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Import Licence—Facilitating operation of—Meaning of—Held, it means taking steps in order to see that the licence is fully exploited and

does not cast any obligation to seek extension of the operation period of the licence. A

Appellant obtained an import licence of the value of Rs. 1,91,28,382 which was split into two licences, one for Rs. 1,00,000 and the other for Rs. 91,28,382. The licences were issued on 16/1/82. Respondent purchased the licences from appellant as per agreement on 15/2/82. In pursuance of the above agreement, appellant issued requisite Letter of Authority in favour of respondent. Respondent paid a sum of Rs. 7,65,135.28 to appellant being the minimum margin guaranteed under the terms of the agreement. B

The validity period of licences was one year. Respondent was unable to utilise the licences during that period. Therefore, appellant sought revalidation of the licences at respondent's request. Accordingly, validity of the licences were extended for six months. The licences ultimately expired on 1st October, 1983. Subsequently, respondent requested appellant to seek second revalidation of the licences. Appellant expressed regret in applying for second revalidation stating that Joint Chief Controller of Imports and Exports informed them that Letter of Authority facility had been withdrawn under the new Policy. Respondent disagreed stating that the new policy relating to discontinuance of Letter of Authority would not apply to old cases where such letters had already been issued. C D E

Respondent, ultimately, filed a suit in the City Civil Court for recovery of the proportionate amount of margin money which the appellant had received from the respondent along with interest. The trial court decreed the suit holding that appellant had committed breach of contract in not applying for second revalidation of the licences. Therefore, appellant was held liable to refund the proportionate amount of the margin money received. Appeal by appellant in the High Court was dismissed. Hence the present appeal. F G

Allowing the appeal, the Court

HELD : 1.1. Second revalidation of the licence is not permissible. A reference to paras 198(2) and 199(1) of the Export-Import Policy, 1981-82 shows that request for revalidation is not normally entertained. H

A However, after considering the request on merit, request for revalidation can be allowed for a period not exceeding six months. If a party seeks revalidation for a longer period it has to make such a request while seeking revalidation at the first instance and the request has to be considered with the approval of the Chief Controller of Imports and Exports, New Delhi subject to such conditions as may be imposed.

B Therefore, as per the limitations prescribed in this behalf, there can be only one request for revalidation. The above provisions do not mean or suggest that there can be two requests for revalidation and the second request is to be made after the expiry of initial period of revalidation of six months. Appellant was not obliged to apply for second revalidation of the licence and its failure to do so does not amount to breach of agreement on its part. [387-F-G-H, 388-A-C, 391-B-C]

C 1.2. Revalidation of licence is not normal. It is an exception. Normally import had to be carried out during the validity period of the licence. It is only in case of some unforeseen difficulty or for reasons beyond control of the importer that the validity of a licence can be sought to be extended. Only one request for revalidation is permissible and if it is for a period of six months it is to be dealt with differently by the department while if it is for a period longer than six months, it has to be considered with the approval of the Chief Controller of Import and Export, New Delhi. This means that a party has to make up its mind before making a request for revalidation as to the period for which revalidation is required. It is not the case of the plaintiff that in the first instance itself, it had desired that revalidation of licence for a period longer than six months be sought. Moreover, for making out such a case the plaintiff would have had to disclose special reasons because a case for hardship has to be made out for request for revalidation for a longer period and the plaintiff never spelled out any hardship either in the correspondence or even in the plaint. [389-A-D, 390-C-H, 391-A-B]

D 2.1. In the instant case, the question of refund of proportionate amount of margin money does not arise. The agreement does not visualise any piecemeal or *pro rata* payment of margin money based on utilisation of the licence. It does not contain any clause that in the event of plaintiff's failure to fully utilise the licence, the defendant would be liable to refund the proportionate amount. The transaction

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was a composite transaction for the licence and was not based on extent of its utilisation. The payment of margin money is not linked to plaintiff's performance qua the licence. It is an outright 'sale' of the licence though the words 'sale' may not legally be possible to use. The agreement between the parties is neither an agency agreement nor a service contract. A reading of the entire agreement suggests that everything was left to the plaintiff and everything was to the account of plaintiff. How the licence was to be utilised was totally left to the plaintiff. In such a case, the plaintiff cannot ask the defendant to pay for failure on the part of the plaintiff. If the plaintiff failed to utilise the licence to its full extent the plaintiff has to blame itself for this. [391-E-H, 392-A-B]

2.2. A party which alleges breach of agreement on the part of the opposite party has to sue for the damages. In the present case, since the defendant did not commit any breach of agreement such an eventuality did not arise. [392-B-C-D]

3. Facilitating operation of the licence only means taking steps in order to see that the licence is fully exploited. It does not cast any obligation to seek extension of the operation period of the licence. Facilitating operation of the licence means operation of the licence during its validity period. If the validity period expires, the question of operation of a licence does not arise. An expired licence is no licence. It cannot be operated. [386-D-E, 389-E-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1877 of 1997.

From the Judgment and Order dated 24.6.96 of the Karnataka High Court in R.F.A. No. 301 of 1993.

S. Ravindra Bhat, Naveen R. Nath, Sanjay Sharawat and Ms. Hetu Arora for the Appellant.

P.N. Mishra, G.L. Rawaz, G. Venugopal and Mrs. D. Bharathi Reddy for the Respondent.

The Judgment of the Court was delivered by

ARUN KUMAR, J. This appeal is directed against the judgment of

A the High Court dated 24th January, 1996 confirming the decree passed by the trial court in a suit for recovery of money filed by the respondent against the appellant. By the impugned judgment a decree for payment of Rs. 5,47,740 with interest at the rate of 18% per annum from the date of suit till realisation was passed in favour of the respondent and against the

B appellant.

Briefly, the facts are : both the parties to the suit are in import-export business. The appellant obtained an import licence of the value of Rs. 1,98,28,382 which was split into two licences, one for Rs. 1,00,00,000 (Rupees One Crore) only and the other for Rs. 91,28,382 (Rupees Ninety

C One lakhs twenty eight thousand three hundred eighty two) only. The licences were issued on 16.1.1982. The parties entered into an agreement on 15th February, 1982 as per which the respondent purchased the licences from the appellant. Some of the relevant terms of the agreement are as under :

- D** 1. JEPL guarantees a minimum margin of 4% (four per cent) amounting to Rs. 7,65,135.28 (Rupees Seven Lakhs Sixty Five Thousand One Hundred Thirty Five and Paise twenty eight only) of the value of the licence for the imports to be made under the said licence. JEPL shall arrange to pay the full amount immediately
- E** to GE. The said payment will be made to GE by means of an account payee Demand Draft payable at Bangalore.
2. JEPL will act as the Letter of Authority holder of GE as allowed in the import Policy 1981-82.
- F** 3. JEPL will place the necessary indents on the overseas suppliers from whom they wish to import the goods after satisfying that goods are allowed to be imported under Para 186 of ITC policy for 81-82, and subject to any amendments announced by the Government from time to time.
- G** 4. JEPL will open an irrevocable letter of credit with their own funds through their own bankers in favour of the foreign suppliers and inform GE accordingly. JEPL will make all financial arrangements for the opening of letter of credit and GE will not be in any way responsible for any financial arrangement regarding the said letter
- H** of credit established by JEPL.

12. GE hereby undertakes to give all necessary documents and papers for facilitating the operation of the licences for import clearance and delivery of the goods in question to sign claim papers relating to Insurance claim, shortage etc., and also agree to pass on proceeds of claims, shortage etc., if any received direct, with 72 hours of their receipt.

13. Subject to GE being paid the fixed margin described in Clause 1 of this Agreement, it is hereby agreed that this agreement is irrevocable and GE will not enter into any other contract/agreement regarding the import licence which forms the subject matter of this agreement.

16. It is hereby further agreed and understood that the profits/surplus, if any arising out of this transaction will be exclusively of JEPLand that GE will not have any right or claim any amount therefrom in excess of the fixed margin described in clause 1 of this agreement.

In pursuance of the above agreement, appellant issued requisite Letter of Authority in favour of respondent. Respondent paid a sum of Rs. 7,65,135.28 (Rupees Seven Lakh Sixty Five Thousand One Hundred Thirty Five and Paise twenty eight only) to appellant being 4% of the licence amount mentioned in Clause (1) of the agreement. The validity period of licences was one year. Respondent was unable to utilise the licence during that period and therefore, requested the appellant to seek revalidation of the licence and to sign necessary papers in this behalf. Accordingly appellant sought revalidation of the licence from the Licencing Authority. The validity of the licence was extended for six months. The licence ultimately expired on 1st October, 1983. During the validity period of the licence respondent was able to import goods worth Rs. 54,34,897.10 (Rupees Fifty Lakhs Thirty Four Thousand Eight Hundred Ninety Seven and Paise ten) only. By its letter dated 25th October, 1983, respondent requested appellant to sign an application for second revalidation of the licence. Alongwith the said letter respondent sent some papers with a request to appellant to sign the same for purposes of applying for revalidation. A proforma of the application was sent because the application had to be on the letter-pad of the appellant. The appellant replied to the said letter of the respondent on 11th July, 1983 stating that they had

A discussed the matter with the Joint Chief Controller of Imports and Exports and they were informed that Letter of Authority facility had been withdrawn under the new Policy. Appellant was further advised that it will not be in order for appellant to approach the Chief Controller of Imports and Exports for any further extension. In view of this appellant expressed regret in applying for second revalidation. Respondent sent a letter dated 24th November, 1983 in reply to appellant's letter of 7th November 1983, disagreeing with the stand of appellant. It was stated that the new Policy was relating to discontinuance of Letter of Authority and it would not apply to old cases where such letters had already been issued. The respondent accordingly requested the appellant to apply for second revalidation of the licences. In the alternative it was communicated to the appellant that if they did not wish to apply, they should refund the proportionate amount of margin money received by them already from the respondent. The respondent further threatened to take recourse to legal remedy against the appellant if the appellant failed to accede to either of their requests. The appellant responded to the above vide their letter dated 8th December, 1983. Attention was drawn to the respondent's failure to utilize licences during the validity period including the period of first revalidation of six months. The appellant further informed the respondent that they had against approached the Joint Chief Controller of Imports and Exports, Bangalore and as per the discussion held with him, second revalidation was not possible. The respondent was requested to obtain a written confirmation from the Licencing Authority on the question of second revalidation and based on the written confirmation, if available, the appellant promised to consider doing the needful. The respondent replied to the said letter of the appellant vide their letter dated 26th December, 1983. They enclosed with their reply a copy of IPC circular No. 14/92 dated 3rd May, 1982 issued by the Office of Chief Controller of Imports and Exports and again requested for making the application for second revalidation. The said circular only clarifies that the change in the policy regarding Letters of Authority in the Policy relating to 1982-1983 was not applicable to Letters of Authority issued prior to 5th April, 1982 in respect of licences issued prior to 1st April, 1982. The appellant claims that on 7th June, 1984 it again consulted the Joint Chief Controller of Imports and Exports, Bangalore with reference to the circular sent by respondent to the appellant. As per the said consultation the stand of the appellant is that second revalidation was not possible and, therefore the appellant stated that it was not in a

position to apply for further revalidation. However, the appellant offered to do so in case written confirmation was available in this behalf from the office of Chief Controller of Imports and Exports, New Delhi. A

This is the substance of the correspondence which ensued between the parties on the subject. Ultimately respondent filed a suit for recovery of Rs. 8,53,640 (Rupees Eight Lakhs Fifty Three Thousand Six Hundred Forty) only besides interest from the date of suit till realization at the rate of 18% per annum against the appellant in the City Civil Court at Bangalore. The break-up of the suit amount is : Rs. 5,47,740 (Rupees Five Lakhs Forty Seven Thousand Seven Hundred Forty) only proportionate amount out of margin money already received by the appellant (defendant) and Rs. 2,85,900 (Rupees Two Lakhs Eighty Five Thousand Nine Hundred) only as interest at the rate of 18% per annum up to the date of institution of the suit. The trial court decreed the suit vide its judgment dated 22.6.1993 holding that appellant had committed breach of contract in not applying for second revalidation of the licences, and therefore, it was liable to refund the proportionate amount out of the total amount of Rs. 7,55,132.35 (Rupees Seven Lakhs Fifty Five Thousand One Hundred Thirty Two and Paise Thirty Five) only received by the appellant as margin money. The onus to prove that second revalidation was not possible was placed on the defendant-appellant and it was held that the defendant had failed to prove the same. The suit was decreed in the sum of Rs. 5,47,740 (Rupees Five Lakhs Forty Seven Thousand Seven Hundred Forty) only with current and future interest at the rate of 18% per annum. B C D E

The appellant filed appeal against the said judgment and decree in the High Court of Karnataka. The appeal met the same fate. It was dismissed and the judgment of the trial court was confirmed. According to the High Court the only point which arose for consideration in the appeal was as to whether under the terms of the agreement the defendant was obliged to seek second revalidation of the licences. On this point the High Court held against the appellant and therefore the appeal failed. This has led to the filing of the present appeal. F G

We have heard the learned counsel for the parties and perused the relevant material on record. In our view, apart from the question for consideration for deciding the fate of this litigation which was posed by the High Court referred to above another question which arises for consideration is : H

A Assuming that the defendant was obliged to apply for second revalidation of the licence and it failed to do so, was the defendant liable to refund to the plaintiff proportionate amount of the margin money received by it from the respondent?

B *Question No. 1 :*

Whether the appellant was obliged to seek second revalidation of the licence?

C For deciding this question first and foremost one has to make a reference to the relevant term in the agreement between the parties, i.e. condition No. 12. The relevant portion contained in the said condition No. 12 is "GE hereby undertakes to give all necessary documents and papers for facilitating the operation of the licence.....". What do these words mean?

D Does facilitating the operation of the licence mean facilitating the extension of validity period of licence?

E In our view facilitating operation of the licence only means taking steps in order to see that the licence is fully exploited. It does not cast any obligation to seek extension of the operation period of the licence. Secondly, assuming that facilitating the operation of the licence includes getting validity period extended, it is to be noted that the appellant did get the validity period of the licence extended once when an extension for six months was sought which was allowed. Regarding the request for second extension of validity period of licence, reference is required to be made to the relevant provisions contained in the Export Import Policy for the relevant period i.e. 1981-82. Para 211 requires that all enquiries emanating from Export Houses are to be addressed to the Chief Controller of Imports and Exports, New Delhi for necessary advice. Any interpretation of the Policy given in any other manner by any other person is binding on the C.C.I. & E. Besides the Policy there is another publication called a Handbook of Import and Export Procedures 1981-82. Para 198 thereof deals with the question of revalidation of licences. It provides that no request for extension of the period of validity of REP licences issued against exports made on or after 1st April, 1978 will normally be entertained.

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- (1) In hard cases, however, revalidation may be allowed by the Licencing Authority concerned with the prior approval of the Chief Controller of Imports and Exports, New Delhi subject to such conditions as may be imposed. A
- (2) Requests for extension of the period of validity of the advance and impressed licences issued under the Import Policy for registered exporters may be considered by the Licencing Authorities concerned, on merits and revalidation allowed up to a period not exceeding six months. Request for revalidation for a period longer than this may also be considered with the approval of the "Chief Controller of Imports and Exports, New Delhi." B C

Further para 199(1) provides :

"Request for revalidation of other licences will be considered on imports by the Licencing Authorities concerned, and revalidation allowed for a period not exceeding six months. Requests for revalidation longer than this may be considered with the prior approval of Chief Controller of Imports and Exports, New Delhi, subject to such conditions as may be imposed." D

Since the point in issue is to be decided on the basis of the above statement of Import-Export Policy and the Handbook of Procedures prescribed by the authorities, the correspondence exchanged between the parties on the issue to which reference has already been made loses its significance. We have to read the above provisions to decide whether second revalidation of the licences was permissible. In our view, based on reading of the above provisions, second revalidation of the licence is not permissible. A reference to paras 198 (2) and 199 (1) shows that request for revalidation is not normally entertained, however, after considering the request on merit, request for revalidation can be allowed for a period not exceeding six months. If a party seeks revalidation for a longer period it has to make such a request while seeking revalidation at the first instance and the request has to be considered with the approval of the Chief Controller of Imports and Exports, New Delhi subject to such conditions as may be imposed. From a careful reading of these provisions shows that normally requests for revalidation are not entertained. When a party wants to apply for revalidation it has to make up its mind whether the request E F G H

A is for extension for a period of six months or more. If the request for revalidation is for a longer period it can be considered only with the approval of Chief Controller of Imports and Exports, New Delhi. Normally revalidation can be only for a period not exceeding six months. Therefore, as per the limitations prescribed in this behalf, there can be only one request

B for revalidation. Before making such a request a party has to decide whether revalidation is being sought for a period of six months or more and that is the end of the matter. The above provisions do not mean or suggest that there can be two requests for revalidation and the second request is to be made after the expiry of initial period of revalidation of six months. The respondent's interpretation of the relevant provisions in

C our view is not tenable. The view of the Chief Controller of Imports and Exports, New Delhi as expressed in IPC Circular No. 10/04 dated 11th May, 1984 on this issue is the same. It is stated in the said circular in para 3 (3) : "the extension period of validity in such cases will be allowed only up to a period of six months, so that the total period of validity of the

D licence including the grace period of this does not exceed eighteen months from the date of issue of the licence."

The said circular was issued in view of representation received from representatives of the trade asking for clarification as to whether licences

E issued prior to 1st April, 1984 with twelve months validity will be automatically treated as valid for eighteen months and whether requests for grant of extension in validity period of such licence will be considered. From this it is clear that even though the Circular is dated 11th May, 1984, it applies to facts of the case in hand. In view of the clear provision

F contained in the Policy and the Handbook referred to above it emerges that the defendant-appellant was not obliged to apply for revalidation of the licence second time. The second revalidation of the licence is, in our view, not permissible, and therefore, the appellant rightly did not accede to the request of the respondent-plaintiff in this behalf. It cannot be said that the appellant committed breach of the contract between the parties. The finding

G of the trial court in this behalf as upheld by the High Court, is therefore, liable to be set aside. As a matter of fact, the trial court observed that it was the obligation of the defendant to keep the licence operative, and therefore, it had to seek revalidation of the licence, if permissible. We have held that the second revalidation of licence was not permissible. Therefore,

H even as per observation of the trial court, there is no breach of agreement

on the part of the defendant. The plaintiff knew that a licence has a validity period. It was for the plaintiff to ensure that the licence was utilised during its validity period. Revalidation of licence is not normal. It is an exception. The plaintiff could not leave utilization of the licence for revalidation period. A

On this aspect the High Court observed that there was no clause in the agreement that the plaintiff should complete the import of goods within the period of validity of licence and that if it failed to do so, the defendant would not be liable to refund a portion of the margin money received by it. In our view, this approach on the part of the High Court was totally erroneous. Normally import had to be carried out during the validity period of the licence. It is only in case of some unforeseen difficulty or for reasons beyond control of the importer that the validity of a licence can be sought to be extended. We have already referred to the provision in para 198 of the Handbook of Import-Export Procedures as per which no request of extension of period of validity of licences is to be normally entertained. B C D
The High Court should have rather found that the agreement between the parties did not contain any provision for refund of margin money or any part of it. In the absence of such a clause in the agreement, the High Court should not have ordered refund.

Again the High Court was wrong in observing that clause of the agreement requiring defendant to facilitate operation of the licence does not mean that it is to be facilitated only during validity of the licence. This is misreading of the clause by the High Court. Facilitating operation of the licence means operation of the licence during its validity period. If the validity period expires, the question of operation of a licence does not arise. E
An expired licence is no licence. It cannot be operated. The High Court has also erred in believing that it was for the defendant to prove that second revalidation was not possible. The plaintiff had requested for second revalidation and it was for the plaintiff to establish that second revalidation was permissible under the rules. The onus was wrongly placed by the High F G
Court on the defendant which led to an adverse inference against the defendant. A party which asserts a fact has to establish it. In this case it was the plaintiff who asserted that second revalidation was permissible. It was for the plaintiff to establish it. The plaintiff failed to do so. At least this much was known to the plaintiff that a request for revalidation for a H

A period longer than six months could be allowed only with the approval of the Chief Controller of Import and Export, New Delhi. In spite of being requested to do so by the defendant, the plaintiff failed to get any confirmation from the office of the Chief Controller in this behalf. If the plaintiff was able to establish that second revalidation of the licence was permissible only then the defendant could be blamed for not facilitating the same. An inference is clear from plaintiff's failure to seek clarification from the C.C.I. & E, New Delhi. Plaintiff knew that it had sought such a clarification it would be against its stand. Thus the High Court unfortunately proceeded on an entirely wrong basis. The finding of the High Court based on para 201 (2) of the Handbook of Import and Export Procedure to the effect that even after the expiry of the revalidation period of six months, request for further revalidation could be considered with the approval of the Chief Controller of Import and Export is based on misreading of the said provision. We have already quoted the provision and in our view this provision clearly suggests that only one request for revalidation is permissible

B and if it for a period of six months it is to be dealt with differently by the department while if it is for a period longer than six months, it has to be considered with the approval of the Chief Controller of Import and Export, New Delhi. This means that a party has to make up its mind before making a request for revalidation as to period for which revalidation is required.

C Request can be only once. The circular relied upon by the plaintiff which it annexed with its letter dated 26th December, 1983 is on the question of issue of Letters of Authority and has nothing to do with revalidation of a licence. On the other hand, the circular dated 11th May, 1984 (Exhibit D-13) makes the position absolutely clear. It categorically says that extension of validity period of a licence can be allowed only up to a period not exceeding six months and total validity period of a licence including a grace period and extension cannot exceed 18 months from the date of issue.

D In the present case the licence was issued on 16th January, 1982 and it remained valid up to 1st October, 1983. The High Court went to the extent of saying that even if the second revalidation was legally not permissible the defendant should have applied for second revalidation. This again shows that the High Court had adopted a totally perverse approach in the present case. Such a step could be at the risk of incurring disqualification for the future. Why should such a risk be undertaken?

E It is not the case of the plaintiff that in the first instance itself, it had

desired that revalidation of licence for a period longer than six months be sought. Moreover, for making out such a case the plaintiff would have had to disclose special reasons because a case for hardship has to be made out for request for revalidation for a longer period and the plaintiff never spelled out any hardship either in the correspondence or even in the plaint. Thus we hold that defendant-appellant was not obliged to apply for second revalidation of the licence and its failure to do so does not amount to breach of agreement on its part.

Question No. 2

Was the defendant liable to refund to the plaintiff proportionate amount of margin money received by it from the respondent?

On this issue first a reference has to be made to the relevant clause in the agreement which has already been quoted. The plaintiff guaranteed a minimum margin as a consideration for the transaction in suit and the total amount was spelled out as Rs. 7,65,135.28 (Rupees Seven Lakhs Sixty Five Thousand One Hundred Thirty Five and Paise twenty eight) only. The mention of 4% of the total value of the licence was only by way of showing the method of calculation of the margin money. The total amount which was consideration for the transaction in the suit was paid by the plaintiff to the defendant. On receipt of the said amount, for all practical purposes, the defendant washed its hands off the licence. It was left to the plaintiff to utilise the licence as it wished. The agreement does not visualise any piecemeal or *pro rata* payment of margin money based on utilisation of the licence. It does not contain any clause that in the event of plaintiff's failure to utilise fully the licence, the defendant would be liable to refund the proportionate amount. The transaction was a composite transaction for the licence and was not based on extent of its utilisation. The payment of margin money is not linked to plaintiff's performance qua the licence. It is an outright 'sale' of the licence though the words 'sale' may not legally be possible to use. The agreement between the parties is neither an agency agreement nor a service contract. A reading of the entire agreement suggests that everything was left to the plaintiff and everything was to the account of plaintiff. How the licence was to be utilised was totally left to the plaintiff. When this was totally in the hands of the plaintiff how could the plaintiff ask the defendant to pay for failure on the part of the plaintiff?

A If the plaintiff failed to utilise the licence to its full extent the plaintiff has to blame itself for this. Therefore, in our view, the question of refund of proportionate amount of the margin money did not arise in any case.

B It is to be noted at this stage that if on question No. 1 our findings would have been that the defendant committed breach of agreement, the remedy of the plaintiff would have been an action for damages for breach of agreement. Therefore, even in such an event question of seeking proportionate, refund of margin money would not have arisen. A party which alleges breach of agreement on the part of the opposite party has to sue for the damages. In the present case in view of our finding that the defendant did not commit any breach of agreement such an eventuality did not arise.

C The suit filed by the respondent is thus without any permit and is liable to be dismissed. Accordingly, the appeal is allowed and the judgments of the courts below decreeing the suit filed by the respondent are hereby set aside and the suit is dismissed. In the facts of the present case, the parties are left to bear their respective costs.

D M.P.

Appeal allowed.