

**IN THE SUPREME COURT OF BANGLADESH
(APPELLATE DIVISION)**

PRESENT:

Mr. Justice Md. Abdul Wahhab Miah
Ms. Justice Nazmun Ara Sultana
Mr. Justice Muhammad Imman Ali
Mr. Justice Md. Nizamul Huq

CIVIL APPEAL NOS.175-76 OF 2008

(From the judgment and decree dated the 29th day of August, 2006 passed by the High Court Division in First Appeal No.221 of 2002).

M/S. Gramsico Limited : Appellant
(in C.A. No.175 of 2008)

Bangladesh Textile Mills : Appellant
Corporation (in C.A. No.176 of 2008)

-Versus-

Bangladesh Textile Mills : Respondent
Corporation (in C.A. No.175 of 2008)

M/S. Gramsico Limited : Respondent
(in C.A. No.176 of 2008)

For the Appellant : Mr. A. J. Mohammad Ali, Senior
(in both the cases) Advocate with Mr. Provir Neogi, Senior
Advocate instructed by Syed Mahbubar
Rahman, Advocate-on-Record

For the Respondents : Mr. Mahbubey Alam, Senior Advocate
(in both the cases) with Mr. Md. Badruddoza, Advocate
instructed by Mrs. Madhumalati
Chowdhury Barua, Advocate-on-Record

Date of hearing : **11.05.2016**

Date of Judgment : **The 17th day of May, 2016**

JUDGMENT

Md. Abdul Wahhab Miah, J: These two civil appeals (C.A), by leave, are from the judgment and decree dated the 29th day of August, 2006 passed by a Division Bench of the High Court Division in Appeal From Original Decree (F.A) No.221 of 2002 allowing the appeal in part modifying the decree of the trial Court, i.e. giving decree for taka 16,21,510'13 (taka sixteen lac, twenty one thousand, five hundred ten and thirteen paisa)

against the defendant in place of taka 27,75,98581 (twenty seven lac, seventy five thousand, nine hundred eighty five and eighty one paisa) as decreed by the trial Court and no interest as allowed by the trial Court.

Facts necessary to dispose these C.A.s are that the appellant in C.A. No.175 of 2008 and respondent in C.A.No.176 of 2008 as the plaintiff filed Money Suit No.15 of 1996 in the Court of Joint District Judge, 2nd Court, Chittagong for realization of a sum of taka 19,43,71813 from the defendant as detailed in the schedule to the plaint.

The case of the plaintiff, in short, was that it was a company incorporated in Bangladesh under the Companies Act and had been carrying on business as a Clearing and Forwarding Agent (C&F Agents) at Chittagong Port. The defendant, a statutory corporation, established and incorporated under President's Order No.27 of 1972 has been controlling and managing the nationalised Textile Mills in the Country. The defendant appointed the plaintiff as its C&F Agent for clearance of the goods imported by it from abroad through Chittagong Port and for despatch of such goods to the ultimate destinations as per the terms and conditions contained in the agreement dated 19.12.1988 executed by both the parties. The plaintiff cleared large number of consignments of the defendant from Chittagong Port and delivered them to different destinations by hired trucks with the consent of the defendant in terms of the said agreement. In course of work, the plaintiff as Agent of the defendant despatched 39 bales of Pak cotton on 04.08.1890 by a hired truck being Khulna-Ta-1424 to be delivered to Khulna Textile Mills Ltd. Similarly 36 bales of Pak cotton were loaded and despatched on 20.11.1991 by hired truck No.Dhaka-NA-2824 to be delivered to Barisal Textile Mills and 36 bales of Pak cotton were despatched on 14.12.1992 by hired truck No.CTG-NA-3391 to be

delivered to Kohinoor Spinning Mills Ltd. But the aforesaid bales of cotton despatched from Chittagong transmit depot to Khulna Textile Mills, Barisal Textile Mills and Kohinoor Spinning Mills did not reach the destinations and were lost in transit. The plaintiff duly lodged 3(three) First Informantion Reports with Bandar Police Station, Chittagong, but none of the missing bales of cotton was recovered by the police. 144 bales of Pak cotton were loaded in four hired trucks at the transit depot of the defendant after proper verification of the blue-book and the driver's licence by the officers of the defendant and these goods were despatched for its respective destinations. It subsequently transpired that National Cotton Mills received 398 kgs short out of 144 bales. Simillarly, Noakhali Textile Mills received 422 kgs short out of 36 bales despatched on 24.08.1992. It appeared that the said two Mills did not make any complaint with the Police Station for the alleged loss due to short receipts. The plaintiff submitted a large number of bills to the defendant for the works done by it as its C & F Agent, but the defendant did not make payment of its bills inspite of repeated demands. The plaintiff received letter dated 18.11.1993 from the defendant showing deduction of a total amount of taka 10,33,83013 from different bills for the alleged loss due to short receipt of cotton. The plaintiff submitted another bill of taka 11,68,73813, but it came to learn that the defendant deducted and adjusted a large amount of money from the bills as cost of missing cotton in transmit. The plaintiff submitted various representations to the authorities of the Governement of Bangladesh explaining the whole circumstances and claimed that it was not responsible for the loss of cotton in transmit, but the authority did not pay any deed to it. The plaintiff having failed to get proper redress, served a demand notice on 29.06.1995 upon the General Manager of the defendant demanding full

payment of the bills without deduction, but the defendant sent a reply on 13.07.1995 denying the claim of the plaintiff.

The officers of the defendant were in full knowledge that the plaintiff was not in possession of the goods after loading and despatching them by the hired trucks as such, the plaintiff was, in no way, responsible for the loss of the goods in transit in terms of the agreement. The defendant was not legally entitled to deduct or withhold payment of any money from the bills of the plaintiff. It was the sole responsibility of the defendant to properly insure the goods in transit with Sadharan Bima Corporation covering transit risk. The defendant has already filed two money suits in the 2nd Court of Subordinate Judge, Chittagong for realization of loss of goods in transit against the plaintiff, Shadharan Bima Corporation and the truck owners and the said suits were pending. The plaintiff's bills were illegally withheld by the defendant for a long time without payment and as such, the plaintiff was legally entitled to claim interest on the amount withheld at the rate of 18% per annum from the date of withholding till the date of filing the suit. The plaintiff was entitled to get from the defendant the amount withheld with interest thereon amounting to taka 19,43,71813 as per schedule of claim given to the plaintiff. The cause of action for the suit arose on the date of demand notice dated 29.06.1995 and from the date of the reply dated 30.07.1995 of the defendant and implied repudiation of the claim of the plaintiff on 07.02.1996.

During the trial of the suit, the plaintiff was amended stating, *inter alia*, that in recognition of the past performance of the plaintiff as C & F Agent, the defendant issued several certificates to the plaintiff expressing high satisfaction of its works. The plaintiff submitted bills as shown in schedule-

'B' to the plaintiff for the works done by it, but the defendant did not settle the bills on the plea of alleged loss. The plaintiff was entitled to get arrear bills for further amount of taka 1,97,84148 and compensation amounting taka 3,51,92620 due to loss of profit as it could not use the money in its business. The plaintiff was also entitled to get back taka 1,00,000.00 (one lac) deposited by it as security since the defendant refused to renew the agreement of the C & F Agency with the plaintiff. The plaintiff deposited bank guarantee issued by Arab-Bangladesh Bank as shown in schedule-'D' to the plaintiff for an amount of taka 2,00,000.00 as deposit of 50% with interest as such, the plaintiff was entitled to get back taka 1,00,000.00 with interest and the bank guarantees as shown in schedule-'E' to the plaintiff. The plaintiff was entitled to recover taka 27,75,985.81 from the defendant as shown in schedules-'A' 'B' 'C' and 'D' to the plaintiff.

The defendant contested the suit by filing written statement denying all the material statements made in the plaintiff contending, *inter alia*, that the plaintiff was appointed by it as its C & F Agent for despatching its goods to the ultimate destinations in terms of the agreement dated 19.12.1988. It was correct that 39 bales of Pak cotton were despatched by the plaintiff for Barisal Textile Mills and 36 bales of cotton were despatched by the plaintiff for Kohinoor Spinning Mills and similarly the plaintiff received 36 bales of Pak cotton from the defendant for despatching to Khulna Textile Mills. The plaintiff received 144 bales of Pak cotton from the defendant, but 39 kgs of cotton out of 144 bales were short delivered. The defendant had no obligation for transportation of the goods to the destinations. It was the contractual obligation of the plaintiff to indemnify the loss caused to the defendant by non-delivery and short delivery of the goods to the Mills of the defendant. The defendant filed 3(three) suits in the Court of

Subordinate Judge, Chittagong against the plaintiff, truck owners and Shadharan Bima Corporation, for recovery of loss caused by misappropriation of the cotton bales in question. It has been stipulated in clause No.7, sub-clause No.III of the agreement that the plaintiff as C & F Agent shall be responsible for safe custody of the shortages which would be in their possession in despatching the goods to the ultimate destinations. The plaintiff was not entitled to get any relief against the defendant who acted in good faith in terms of the agreement dated 19.12.1988. If it would get the claim from Sadharan Bima Corporation, it would return the amount of the bills deducted from the plaintiff's bills.

The defendant filed additional written statement contending, *inter alia*, that the claim of money made in the amendment application as shown in schedules-'C' and 'D' was barred by limitation. The amended claim was made long after a decade. The suit was instituted on 13.05.1996 and the amendment of the plaint for further claim was allowed on 12.10.2000, i.e. after more than 3(three) years from the date of institution of the suit. The suit was misconceived and was liable to be dismissed with cost.

At the trial, both the parties adduced evidence, oral and documentary. On conclusion of the trial, the trial Court by its judgment and decree dated 17.01.2002 decreed the suit directing the defendant to pay a sum of taka 27,75,985.81 along with interest at the rate of 18% per annum from the date of institution of the suit till realization of the decretal amount and also directed the defendant to return the bank guarantee.

Being aggrieved by and dissatisfied with the judgment and decree of the trial Court, the defendant filed the above mentioned first appeal before the High Court Division. A Division Bench hearing the appeal by its

judgment and decree dated 29.08.2006 allowed the appeal in part, i.e. decreed the suit for taka 16,21,510·13 (taka sixteen lac, twenty one thousand, five hundred ten and thirteen paisa) only. The High Court Division gave clear finding that the plaintiff was not entitled to any compensation as allowed by the trial Court. Against the judgment and decree of the High Court Division, the plaintiff filed Civil Petition for Leave to Appeal (C.P) No.291 of 2007 and the defendant also filed C.P. No.268 of 2007 before this Court. Both the CPs were heard together by this Court and leave was granted on 18.06.2008 in both the petitions. But in the leave granting order, the submission of the learned Advocate for the petitioner of C.P. No.291 of 2007 was only noted. Be that as it may, since leave was granted in both the petitions giving rise to two civil appeals (C.A. No.176 of 2008 has arisen out of C.P. No.268 of 2007), we are treating the grounds taken in C.P. No.268 of 2007 as the grounds on which leave was granted. It may be further stated that in C.A.No.176 of 2008 concise statement has also been filed taking grounds similar to the grounds taken in the C.P.

The submissions on which leave was granted in C.P No.291 of 2007 giving rise to C.A. No.175 of 2008 are as under:

“Mr. Mahmudul Islam, learned Counsel, appearing for the petitioner submitted that the respondent having deliberately withheld the Commission of the petitioner, the High Court Division was wrong in setting aside the decree of the trial Court so far as regards *pendente lite* and post-decree interest granted under Section 34 of the Code of Civil Procedure. The learned Counsel further submitted that the petitioner suffered damae due to non-payment of Commission in violation of the terms of the agreement which the petitioner quantified in terms of interest payable for taking loan from the banks and

the High Court Division was wrong in denying the petitioner the interest claimed up to the date of filing of the suit.”

Mr. A. J. Mohammad Ali, learned Counsel appearing with Mr. Probir Neogi, learned Counsel, has canvassed the submissions on which leave was granted. He has also defended the finding of the High Court Division in respect of the non-liability of the plaintiff for the loss of the goods for which money was deducted from its bills as the C & F Agent.

Mr. Mahbubey Alam, learned Counsel for the appellant in C.A. No.176 of 2008 as well as for the respondent in C.A. No.175 of 2008 by referring to sub-clause (iii) of clause 7 of the agreement has argued that the plaintiff being the C & F Agent, it was obliged to despatch the goods to the ultimate destinations of the goods, namely, the Mills site, but the goods having been lost in the transit, it was liable for the loss of the goods, the defendant rightly deducted the equivalent price of the lost goods from the bills of the plaintiff; but both the Courts below failed to consider the said clause of the agreement in its proper perspective and thus erred in law in decreeing the suit and as such, the impugned judgment and decree is liable to be set aside.

From the judgment of the trial Court, it appears that it decreed the suit of the plaintiff on the findings, *inter alia*, that when the goods were lost, those were not in the custody of the plaintiff and those were lost on the way from the truck (in the judgment in Bangla, it has been written as “মালামাল ভাড়া করা ট্রাক হইতে পথিমধ্যে হারানো গিয়াছে” for which the plaintiff filed 3(three) criminal cases; that as per terms of the agreement, the plaintiff was responsible for clearing the goods from the Chittagong Port and delivered those at the transit shed and then to send the goods to different destinations at the direction of the defendant and it would get commission only for

clearing the goods and would get no commission for sending the goods to the place of destinations; that the plaintiff paid the fair of the truck and that the officers of the defendant issued the get pass after being satisfied about the concerned papers and examining the licence of the driver of the hired trucks for carrying the goods to the place of destinations and the very fact that the goods were loaded in the trucks also proved that the goods were not lost when those were in the custody of the plaintiff for which it could not be held responsible; that as per terms of the agreement the goods were insured with Sadharan Bima Corporation to cover up the loss of the goods in the transmit and in case the goods were lost, it was the said insurance corporation which was supposed to pay the price for the lost goods and not the plaintiff; from the written statement, it appeared that the defendant took the plea that if it would get the claim from Sadharan Bima Corporation, it would return the amount of the bills deducted from the plaintiff's bills which made it clear that the defendant would get the amount of the lost goods from the Insurance Corporation and not the plaintiff; that the defendant filed 3(three) money suits being Nos.9 of 1991, 25 of 1992 and 87 of 1993 against the Insurance Corporation for the same amount which was deducted from the bills of the plaintiff and, in fact, it was the Insurance Corporation which was liable to pay the amount for the lost goods.

The High Court Division as the Appellate Court also endorsed the above view taken by the trial Court. However, it set aside the decision of the trial Court allowing interest @ 18% on the claim of the plaintiff.

In view of the pleadings of the respective party, the evidence adduced in the suit, the findings of the trial Court as well as the High Court Division, the whole case hinges upon the interpretation of the various clauses of the agreement entered into between the plaintiff and the

defendant on 19.12.1988. The agreement is a lengthy one, so we propose to quote the relevant portion of some of the clauses which are necessary to decide the questions involved in the appeals. The relevant portions of the clauses from the agreement are as follows:

Nature of Work:

- “1.....
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- 2. a)
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The C&F Agents will be responsible for correct assessment, prompt clearance and despatch of all consignments and prompt submission of complete and detailed accounts showing all actual charges incurred duly supported by vouchers.

- b).....
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- ...

Immediately after clearance of import consignments, the C&F Agents shall effect dispatch of cargo to the allottee mills and in the event of necessity they may store the cargoes particularly small consignments (i.e. cargo not dispatchable by railway parcel) at BTMC Transit Depot temporarily with prior permission of the General Manager, BTMC Shipping Office, Chittagong and shall have to carry upto mill-site conveniently at a later date and until delivery of consignment in question is made to the ultimate consignee mills, the C&F agents shall not be entitled to their commission. (underlining is by me) In case of small consignment to be subsequently transported by Consignee Mills’ own representatives the C&F commission may be released for payment at the discretion of the General Manager, BTMC Shipping Office against clean receipt issued by the In-charge of the Transit Depot upon receipt of delivery of such consignment.”

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c)
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d)
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“The C&F Agent will arrange necessary transportation and equipment that may be required for the loading and despatch of consignments and also effect delivery at the mills site/Godown. Any delay on this account will be their responsibility.”

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e)
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f)
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g)
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h)
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i) The C&F Agents immediately after booking the consignments by Railway/Barges/Coasters/Truck should telegraphically inform the ultimate consignee with the relevant particulars such as R.R/S.R number and date, quantity booked at Station of origin and destination covering Transit Insurance risk, if necessary, under intimation to Shipping Office Chittagong and concerned mill. In case of despatch by Railway Wagon the consignee Mills shall arrange or take delivery of cargo from the respective Railway station to which the cargo has been booked.”

j)
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“3. PAYMENT AND MAINTENANCE OF RECORDS.

i) The corporation shall pay their bills for commission, carrying and other charges as will be admissible to them only depending on the performance, actual operation duly certified by the shipping Section. In case of machinery carriage the General Manager and Addl. Chief Accountant, Shipping Office, Chittagong may at best

allow part payment to the extent not exceeding 60% (sixty percent) of the billed amount Subject to availability of fund on the basis of provisional M.R.R. considering the abnormal delay in the issuance of final M.R.R. by the consignee mill. No other claim of the C&F Agents shall be entertained towards any other expenses, such as establishment, office rent, electricity/Stationery, postage and telegram etc.

ii) The C&F Agent will maintain complete and bonafide account separately for such consignments cleared by them and submit a statement of account within 7 days after the consignment is cleared and despatched. Their bill must accompany all relevant vouchers including the receipt of the goods delevered to the mill. (underlying by me) The bill will be paid on receipt of M.R.R. from the mills. The mill authority shall send M.R.R. to shipping office and concerned C&F Agent. If the C&F Agents do not receipt M.R.R. within two weeks of delivery of goods to the mills, they shall inform the mill concerned with intimation to shipping officer, BTMC immediately. Every Clearing and Forwarding Agents Commission bill will bear a certificate to the effect that whatever have been charged in the bill have been actually incurred as per evidence of supporting vouchers attached as per contract and should any wrong charge or wrongly charged bill be detected by the Corporation at any time, the Corporation will be at liberty to realise the excess payment from the regular bill or security deposits. The Corporation shall have the right to deduct any amount from the concerned C&F Agents pending bills/security deposit which the Corporation considers unjustified.

- 4.
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- 5.
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- 6.
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“7) **DUTIES AND RESPONSIBILITIES:**

The C&F Agents shall be required to attend the C&F Jobs as follows:-

- i) To undertake prompt clearance of goods within free time of CPA/with proper declaration and damage charged due to inefficient handling of merchandise shall be recoverable from the C & F Agents.
- ii) Should the C&F Agents fail to discharge the clearance and subsequent delivery as called upon strictly as per instructions, of BTMC, the Authority have the option to recover the loss or damages so sustained by BTMC in cash on demand from the C&F Agents or even from their security deposits/Bank Guarantee and Commission bills in a manner it deems fit. The clearance functions so held up and discontinued may be assigned to other Agents at the discretion of the Authority. In case of recovery against the deposit held, the C&F Agents shall replenish the amount again within 30 days failing which the contract shall stand cancelled.
- iii) The C&F Agents shall be responsible for the safe custody of the storages which is in their possession during or after clearance of CPA/MPA, carriage from port areas upto ultimate destinations. In case of any loss, the value will be determined by the BTMC based on current local market and shall be realised from the C&F Agents. (underlying is by me)
- iv) Incorrect delivery or despatch involving loss of time, money or material shall be the responsibility of the C&F Agents who shall be liable to indemnify the loss. The demurrage shall be fixed by the General Manager, shipping office on the merit of each case and his decision in this regard will be final.
- v) When a consignment which has already been assigned to the C&F Agent, arrived/MPA ex-carrying vessel and get stored in CPA/shed, the C&F Agent must supervise the unloading from vessel and storage at Jetty shed. In case of defective condition or un-traceable packages the C&F Agent must inform BTMC Shipping Office of the situation within 48 hours, failing which they will be held responsible for any loss or damage.
- vi) The C&F Agents shall be responsible to issue prior notice to the mill management regarding delivery of the consignment to the mills under intimation to the Shipping Office. If after due

intimation trucks are detained with load at mill premises for over 3 hours due to failure of the mill Authority to accept delivery of the consignment the C&F Agents will be entitled to get detention charges @ Tk.20/- per hour on part thereof beyond three hours of normal free time in support of documentary proof at the satisfaction of BTMC Shipping Office, Chittagong. (underlying by me)

- vii) The C&F Agents will intimate to the General Manager (Proc), Dhaka regarding the arrival of barge/coaster with load of cargo as soon as the goods arrived in Dhaka/Narayangonj and Khulna Ghat, and after completion of despatch to the allottee mills, the C&F Agents will also submit a complete report to him giving details viz name of the ship, contract No. name of barge/coaster, name of allottee mills, quantity and date of delivery etc.
- viii) The C&F Agents when entrusted with the job shall as a routine procedure furnish day to day particulars of movement of consignments to various mills from the vessel Transit depot or other points in writing, failing which the General Manager, BTMC Shipping Office shall exercise his discretion for explanation or any other action he deems proper.
- ix) Abnormal size of machinery cases which are measuring above 15(fifteen) feet in length, 10 (ten) feet in height and 7.25 feet in breadth or packages above 7(seven) tons, the rates for such cases will be decided by the General Manager and Addl. Chief Accountant, BTMC shipping office, Chittagong inclusive of loading, transportation and unloading at mill site. (underlying by me”

(There are three other clauses, clauses 8, 9 and 10 in the agreement, but those are not relevant for the questions involved in these appeals).

Admittedly the appellant of C.A. No.175 of 2008 was appointed as the C & F Agent of Bangladesh Textiles Mills Corporation, the defendant under a written agreement dated 19.12.1988. Therefore, it does not require any elaboration for the legal proposition that the plaintiff being a party to the agreement was bound by the terms of the agreement. In the context, the

provisions of section 37 of the Contract Act, 1872 may be referred to. A careful reading of the section shows that the parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of the Act or of any other law and the promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract. It is to be put on record that the plaintiff, in no way, disowned any of the terms of the agreement as quoted hereinbefore.

Now, if we look at the various subclauses of clause 7, particularly, sub-clause (iii) of the agreement as quoted hereinbefore, it would be clear that the C & F Agent shall be responsible for the safe custody of the storages which would be in its possession during or after clearance of CPA/MPA, carriages from the port areas up to the ultimate destinations, i.e. at the Mills site and in case of any loss, the value thereof shall be determined by the defendant based on current local market and shall be realised from the C & F Agent. Sub-clause (ii) of clause 3 of the agreement has specifically provided that the corporation shall have the right to deduct any amount from the concerned C & F Agent's pending bills/security deposit which it considers unjustified.

The trial Court as well as the High Court Division fell into an error in giving a narrow meaning of the words "in their possession" *appearing in sub-clause (iii) of clause 7* considering those in isolation of the other words/phrasologies in the same sub-clause in holding that after the get pass was given to the respective hired truck by the officers of the defendant and the goods were loaded therein, the goods could not be said to be in possession of the C & F Agent and therefore, it was not responsible for the

loss of the goods in the transshipment. In holding so, the trial Court as well as the High Court Division failed to consider the subsequent words “during or after clearance of CPA/MPA, carriage from port areas upto ultimate destinations. In case of any loss, the value will be determined by the BTMC based on current local market and shall be realised from the Agents” (underlying by me).

Both the Courts below also failed to consider the other relevant terms of sub-clauses (b) and (d) of clause 2 as quoted hereinbefore. Of these two sub-clauses, sub-clause (b) has stipulated that immediately after clearance of the imported consignments the C & F Agent shall effect despatch of cargo to the allottee Mills and that until delivery of the consignment in question is made to the ultimate consignee Mills, the C & F Agent shall not be entitled to their commission. Sub-clause (d) has specifically stipulated that *“the C&F Agent will arrange necessary transportation and equipment that may be required for the, loading and despatch of consignments and also effect delivery at the Mills site/Godown. Any delay on this account will be their responsibility.”* Sub-clause (ii) of clause 3 is also very relevant. This sub-clause has stipulated that the bills of the C & F Agent must accompany all relevant vouchers including the receipt of the goods delivered to the Mills and that the bills will be paid on receipt of M.R.R. from the Mills. A combined reading of these sub-clauses clearly shows that the C & F Agent shall not be entitled to get the commission fees for their service as a C & F Agent, till it was proved that the goods/consignment reached the Mills site or in other words the goods/consignment were received by the Mills to whom the goods/the consignment were despatched.

The terms of an agreement have to be read as a whole and not in isolation or in piece meal and in order to give a workable and effective meaning of a particular phraseology/phraseologies used in a clause of an agreement the other phraseology/phraseologies used in other clauses have to be taken into consideration. Reading the other phraseologies used in sub-clause (iii) along with the phraseologies “in their possession” of clause 7 and the other phraseologies in other clauses in the agreement as discussed above, it appears to us that the plaintiff being the C & F Agent of the defendant was responsible to clear the consignment from the Port authority and then make arrangement for necessary transportation and the equipment that may be required for the loading and despatch of the consignment and also effect delivery at the Mills site/godown as fixed by the defendant through its officers and the goods shall be treated in its possession until the same is delivered at the destination or the Mills site.

The trial Court as well as the High Court Division also failed to apply their mind as to the consequence that would follow, if it is held that a C & F Agent would be responsible upto the loading of the goods in a hired truck only, then the C & F Agent itself may behave in an unscrupulous way and in the process may join hands with the truck drivers in misappropriating the goods in the transshipment in the name of loss of the goods and in that case, the owner(s) of the goods, here the defendant shall be put to a helpless situation as well as in double jeopardy, i.e. it would lose the goods and at the same time have to also pay the commission fee to the C & F Agent for clearing the goods from the port.

For the discussions made above, we conclude that the trial Court and the High Court Division erred in law in holding that the plaintiff was not responsible for the loss of the goods of the defendant in the transshipment.

However, we would like to keep on record that the defendant already filed three suits being Money Suit Nos.09 of 1991, 25 of 1992 and 87 of 1993 in the same Court for the recovery of the amount of the value of the lost goods impleading Sadharan Bima Corporation, the plaintiff and the truck owners and in the written statement, the defendant categorically stated that if it could realise the money from Sadharan Bima Corporation, it would refund back the money to the plaintiff deducted from its bills and the defendant would be bound by such promise. We like to further observe that even if the defendant would not have taken this stand in the written statement, it would be an unethical and unconscionable act on the part of the defendant not to return the amount of the bills deducted from the commission fee of the plaintiff, in case its suits are decreed against Sadharan Bima Corporation for the amount of the lost goods, it deducted from the bills of the plaintiff.

For the reasons stated hereinbefore, we find merit in C.A. No.176 of 2008 and no merit in C.A. No.175 of 2008.

Accordingly, C.A. No.176 of 2008 is allowed and C.A. No.175 of 2008 is dismissed and the suit is dismissed. There will be no order as to cost.

J.

J.

J.

J.