

## MAHABIR COMMERCIAL CO. LTD

v.

## C.I.T. WEST BENGAL, CALCUTTA

September 8, 1972

[P. JAGANMOHAN REDDY AND H. R. KHANNA. JJ.]

*Income tax Act (11 of 1922) Place, where property passes.**Sale of Goods Act (3 of 1930), s. 23(2)—Effect of appropriation on passing of property.**Letter of Credit and C.I.F. contract—Nature of, explained.*

In all transactions of sale of goods the time and place of appropriation are important elements for determining when the property in the goods passes. In the case of a sale of unascertained goods in a deliverable state, under s.23(2) of the Sale of Goods Act, 1930, if, in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee, whether named by the buyer or not, for the purpose of transmission to the buyer, and the seller does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract and the buyer's assent to the passing of the property is implied. But appropriation of the goods to the contract by itself would not be such as to pass the property in the goods if it appears or can be inferred that there was no actual intention to pass the property. The intention of the parties therefore determines the situs of the passing of property to the buyer in pursuance of the contract. [142D-H; 155D]

In the case of transactions of sale of goods between the buyer and seller living in two different countries the seller sends the goods through a carrier and the contract may envisage the payment being made either at the place where the seller resides or where the buyer resides. In such a transaction the banks and the bankers, commercial credit system, which assures payment to the seller on the one hand and delivery of the goods to the buyer on the other play an important part. One of the means of effecting commercial credit is by letters of credit. The buyer requests his bank to facilitate credit in the country of the seller, where the bank or its constituent, for some consideration, assumes liability for payment of price against specified documents. The buyer agrees also to indemnify the bankers in respect of such advances and of any claim arising out of the credit. On receipt of the bankers' application, the bank issues the credit. These letters of credit are given for the purpose of being shown to third parties who may act thereon. Such letters are either revocable or irrevocable and where they are the latter, they may be confirmed or unconfirmed. If confirmed, it means that words of confirmation of another banker are added to it by which that banker also commits himself irrevocably. The letter of credit notifies the seller that the issuing banker or his correspondent will accept or honour drafts drawn for the price of the goods, provided that the documents of title and other documents specified in the letter of credit are simultaneously presented to the banker. On receipt of the information the seller ships the goods, insures them and obtains a bill of lading. He then draws a draft for the price of the goods and presents it for acceptance, payment and negotiation together with the other documents specified in the letter of credit such as the bill of lading, policy, invoice etc. The documents are sent by the Banker to the

A buyer's bank and on the bill of exchange being accepted by him by payment, the bill of lading and the invoice are delivered to the buyer to enable him to obtain delivery of the goods. [143A-D; 144G-H; 145A-E]

B In a C.I.F. contract, that is, where the contract is for the sale of goods at a price to cover cost, insurance and freight and ex-ship, the seller has first to ship at the port of shipment goods of the description contained in the contract. He must then procure the shipping documents as contemplated by the contract upon the terms current covering the whole transit of the goods. He must arrange for insurance, must make out an invoice which is a written account of the particulars of goods delivered and their price and charges etc. This invoice is made out debiting the buyer with the agreed price and giving him credit for the amount of freight which he will pay the shipowners on actual delivery. The shipper should tender the shipping documents to enable the buyer to deal with the goods in the usual way of business. He is also required to tender such other documents as are specified in the contract and if the contract is silent, it is sufficient if the seller tenders the bill of lading, insurance policy and invoice. Under such a contract *prima facie*, the property in the goods passes once the documents are tendered by the seller to the buyer or his agent as required under the contract. But when the seller retains control over the goods by either obtaining a bill of lading *in his own name or to his order*, the property in the goods does not pass to the buyer until he endorses the bill to the buyer and delivers the documents to him. If however the seller's dealing with the bill of lading is only to secure the contract price, not with the intention of withdrawing the good from the contract, and he does nothing inconsistent with an intention to pass the property, the property may pass either forthwith subject to the seller's lien or conditional on performance by the buyer of his part of the contract. Even though the property in the goods may pass to the buyer when the documents are handed over, the buyer may yet retain the right to examine and repudiate the goods. But this right generally, which a buyer has in a C.I.F. Contract, does not by itself indicate that the property in the goods has not passed to him. The ascertainment of the obligations under the contract will determine to what extent the transfer of property is subject to a condition, or, if the property passes conditionally whether the ownership left in the seller is the reversionary interest in the property in the event of the conditions subsequent operating to restore it to him. In any case where the performance of some condition is imposed upon the buyer but is not made a condition of the transfer of the property, the property once passed is not re-vested in the seller by the buyer's subsequent default. [149C-D, E-H; 150A-C; 152D-G]

G In the present case, the assessee-company dealt in sale and purchase of jute in Pakistan and India, and certain sales were made under a contract executed in Calcutta. The terms of the contract included delivery free to the buyer's mill-siding or at the ghat in India, provisions for weighment and assay of goods for short weight and quality claimed at the destination in Calcutta, a provision that before the goods were actually shipped the buyers should open an irrevocable letter of credit with a bank in Calcutta and that the seller should advise the buyers immediately after the loading commenced. The buyers opened letters of credit with banks in Calcutta which had branches in Pakistan and the banks in Pakistan informed the assessee that they were prepared to negotiate drafts as per the terms of the contract. The assessee thereupon placed the contracted goods on board a steamer in Pakistan, and advised the buyers about the quality and weight of goods. The assessee then obtained bills of lading *in the name of the buyers*, prepared invoices on the basis of the bills of lading, drew bills of exchange on the buyers' bank where the letters of

credit were opened and negotiated the bills of exchange together with the bill of lading and the invoices and obtained payment from the bank less freight and insurance which were payable by the buyers on account of the sellers. The bank forwarded the documents to its office in Calcutta and the Calcutta office sent them to the purchaser. [138 E-H; 139 A-D]

The Income-tax Officer, and the Appellate Assistant Commissioner held that the property in the goods passed to the buyer in India and hence the assessee was liable to tax on the profits derived from the sales. The Tribunal held in favour of the assessee on the ground that the sales were effected in Pakistan.

The High Court, on reference held against the assessee on the basis that under cls. 7 and 9 of the contract, there was no unconditional appropriation of the goods by the buyer as soon as they were placed on board the steamer on C.I.F. terms, and that the appropriation took place in India where the title to the goods passed to the buyers. Clauses 7 and 9 dealt with the non-acceptance of documents and the buyer's failure to pay against documents and/or in cases where buyers make any claim in respect of quality or excess moisture, in which case, an option is given to the buyer either of accepting the goods with allowances or of cancelling the contract in respect of a particular lot or lots or of rejecting the particular lot or lots and claiming fresh tender.

Allowing the appeal to this Court,

HELD: A consideration of the terms of the contract and the letter of credit makes it evident that once the bills of lading and documents contemplated under the contract were handed over to the bank to be delivered to the buyer and the seller received the value thereof as shown in the invoice and in terms of the contract, he no longer retained any property in the goods. [155G-H]

(a) The sale was of unascertained goods in a deliverable state, the letter of credit is a confirmed irrevocable letter of credit and the contract is a C.I.F. contract. [149C-D]

(b) The bill of exchange which the assessee had to draw in accordance with the invoice was for the price of the goods less the premium and freight which the buyer was paying in India on account of the seller. On the presentation of the shipping documents, the bank in Pakistan, under the irrevocable letter of credit, was to make payment of the invoice value to the seller. Once the seller has performed his part and presented the documents for being sent to the buyer for acceptance and received payment in Pakistan he has no longer any control over the goods and the property in the goods passes to the buyer. The bill of lading when it is handed over to the buyer by the bank, on the buyer accepting the bill of exchange and paying the amount specified in the invoice, confers on him the right to take delivery of the goods at the place of disembarkation. [153B-D]

(c) There is nothing in cls. 7 and 9 of the contract which justified the conclusion that the property passed in India. Under cl.7, where there is a total failure on the part of the buyer to perform the contract, the seller has a right to cancel the contract or treat it as cancelled and resort to the remedies thereunder. But that is a condition where the buyer fails or refuses to perform the contract altogether by not accepting the documents or in not paying against the documents. Even under cl. 9, the condition as to the quality and of excessive moisture is not a condition of the transfer of property. The right of the buyer thereunder is not a right to cancel the

**A** contract *in toto* but only to adjust claims in respect of the quality or moisture for which a remedy has been provided for thereunder. There is nothing in the agreement which envisages the property in the goods being in the seller even after the value of the invoice had been paid by the bank under the letter of credit in Pakistan. Where a purchase is financed by an irrevocable credit the transaction would not be affected by rejection of the goods after acceptance of the documents if the latter were such as were called for by the credit or where under that credit, the payment of the invoice value is payable on presentation of the documents. [152G-H, 154H; 155A-D]

**B** (d) It is well-settled that an appropriation takes place where the goods are situated at the time of appropriation and not where the contract of sale is made. There may be an authority given by one party to the other to appropriate and that appropriation is presumed to be finally made where by the terms of the contract the party so authorised has determined his election by doing such act or thing which cannot be done until the goods are appropriated. Generally, a seller appropriates the goods by delivery of the bill of lading—the document giving control over the goods—in exchange of payment of price, by which, he shows that he does not intend to retain the right of disposal of the property in the goods. [155D-G]

**C** (e) The provision in the contract that all drafts drawn under the letter of credit are to be treated as advance bills through their Pak'stan office does not in any way affect the nature of the transaction inasmuch as they are intended as advance notice to the buyer who may want to make arrangements regarding the taking of delivery or dealing with the goods. In fact, under the contract, it is provided that immediate notice should be given to the buyer as soon as the seller begins to load the goods. [155H]

**D** (f) In any case, under the letter of credit the bank informed the seller that it guarantees to protect the drawers, endorses and *bona fide* holders from any consequences which may arise in the event of the non-acceptance or non-payment of the drafts drawn in accordance with the terms of the credit. This clause, in the letter of credit, assures the seller of the performance of the contract and does not affect the property in the goods passing to the buyer in Pakistan. [156B-C]

**E** *Commissioner of Income-tax v. Mysore Chromite Ltd.* 27 I.T.R. 128, *Guaranty Trust Company of New York v. Hannay & Co.*, [1918] 2 K.B. 623, *Biddell Brothers v. E. Clemens Horst Company*, [1911] 1 K.B. 934, *E. Clemens Horst Company v. Biddell Brothers*, [1912] A.C. 18 and *Kwei Tek Chao v. British Traders and Shippers Ltd.* [1954] 2 K.B. 459, referred to.

**F** CIVIL APPELLATE JURISDICTION : Civil Appeal No. 450 of 1969.

**G** Appeal by special leave from the judgment and order, dated November 15, 1967 of the Calcutta High Court in Income-tax Reference No. 19 of 1958.

*A. K. Sen, Leila Seth, O. P. Khaitan and S. P. Maheshwari*, for the appellant.

*B. Sen, A. N. Kripal and S. P. Nayar*, for the respondent.

**H** The Judgment of the Court was delivered by

JAGANMOHAN REDDY, J. The following question was referred to the High Court of Calcutta by the Income-tax Appellate Tri-

bunal (hereinafter called the 'Tribunal') under s. 66(1) of the Income-tax Act, 1922 :

"Whether on the facts and in the circumstances of the case and on a proper construction of the terms of the relevant contracts the sales covered by the bills of lading in the name of the buyers in five cases took place outside India and therefore the profits derived from the said sales arose outside India ?"

The High Court answered the question in the negative and against the assessee against which this appeal is by special leave.

The aforesaid question related to the assessment year 1952-53 of which the accounting year is 1951-52 ending 31st December 1951. The assessee company deals in sale and purchase of jute in Pakistan as well as in India. During the year of account relevant for the assessment year it sold jute of the value of Rs. 23,93,767/- out of which Rs. 10,06,772 were sales in foreign countries and Rs. 2,44,015/- in India. The balance of sales worth Rs. 11,42,979/- according to the assessee were effected in Pakistan. The Income-tax Officer over-ruled the contention of the assessee and found that the quandom sales in India amounted to Rs. 13,86,995 which included Rs. 11,42,979 alleged to have been sold in Pakistan and assessed the appellant accordingly. It appears from the statement of the case that the sales were made under a contract executed in Calcutta between the buyer and the seller. The terms of the contract included delivery free to the buyer's mill-siding or at the ghat in India. It further contained provisions for weighment and assay of goods for their short weight and quality claimed at the destination in Calcutta. It was also a term of the contract that before the goods were actually shipped the buyers were required to open an irrevocable letter of credit with a bank in Calcutta and accordingly the buyers opened letters of credit with the Imperial Bank of India, the Chartered Bank of Australia and China and Hind Bank Ltd., Calcutta. All these banks had their branches in Pakistan, at Chittagong and at Narayangunj. The fact that letters of credit had been opened was communicated by the respective banks to their branches in Pakistan and the banks in Pakistan in their turn informed the assessee that they were prepared to negotiate the draft as per terms of the contract. On receiving information from the bank in Pakistan that they were prepared to negotiate the draft drawn as per the terms of the contract, the assessee placed the contracted goods on board the steamer at Ashurganj in Pakistan. Immediately the loading on the ship had commenced the seller had further to advise the buyers about the quality, assessment and the weight of goods in maunds. The assessee had to then obtain a

A complete set of shipping documents and present them to the bank for payment of invoices' value in terms of the contract in the equivalent Pakistan currency at the exchange rate prevailing on the presentation of the documents at the bank less freight and insurance which were payable in India by the buyers on account of the sellers. The manner in which this was done was that as soon as the goods were placed on board the steamer the seller obtained the bills of lading in the name of the buyers in five cases and in two cases in the name of Mahabir Trading Co. Ltd., an agent of the assessee company. The assessee then prepared invoices for contracted bills on the basis of the bills of lading and drew bills of exchange on the buyers' bank where the letters of credit had been opened. The bill of exchange together with the bill of lading and the invoices were negotiated with the bank and the bank forwarded the documents to their offices in Calcutta which in their turn sent the documents to the purchaser.

D According to the Income-tax officer these transactions disclosed that the property in the goods had passed to the assessee in India and on this basis he assessed the appellant.

E In the appeal before the Appellate Assistant Commissioner, the assessee further contended that the Income-tax Officer in Pakistan held that a sum of Rs. 18,06,772 represented the sales effected in Pakistan because of the fact that the delivery of the goods had been made to the common carrier and the consideration money was also paid in Pakistan through the State Bank of Pakistan. In this view, the Income-tax Officer assessed the appellant in Pakistan on the ground that he had taken constructive delivery in Pakistan where according to him the sales were made.

F This finding the assessee submitted was correct. The Appellate Assistant Commissioner however rejected the contention and dismissed the appeal. When the matter was agitated in appeal before the Tribunal the assessee filed an affidavit disputing the findings. The Tribunal, having regard to the facts stated therein remanded the matter to the Income-tax Officer and directed him to enquire and send a report on the facts disputed by the assessee.

G After the remand report was received, the Tribunal having considered the terms of the contract, the course of the dealings between the parties and applying the principles laid down in *Commissioner of Income-tax v. Mysore Chromite Ltd.*<sup>(1)</sup> held that in respect of the five cases in which the assessee drew the bills in favour of the buyers the sales were effected in Pakistan whereas in the two cases in which the bills were drawn in favour of the assessee's agent at Calcutta, the sales were effected in India.

1) 27 I.T.R. 128.

On hearing the reference the High Court directed the Tribunal to submit a supplementary statement of case because in its view, in order to deal with a rather complicated question raised in that reference in respect of which there was a great divergence of authority, it was absolutely essential for giving an effective answer to it to have before it the exact form of acceptance by Pakistan banks regarding negotiations of the draft drawn as per the terms of the contract. It therefore required the Tribunal to set out "the exact wording and content of the documents", namely, the particular contracts that have to be construed, the exact form of acceptance by Pakistan banks regarding negotiation of the draft drawn as per the terms of the contract and to annex therewith true copies of the contracts, the bills of exchange, bills of lading and the letters of credit. It was also asked to indicate on what bases it came to the conclusion that the Pakistan banks were prepared to negotiate the drafts drawn as per the terms of the contract. The High Court considered and rejected the two contentions urged on behalf of the Revenue that (1) until assay and weighment of the goods at the destination the buyers would not unconditionally appropriate the goods and (2) that the bank was not the banker but merely an agent of Thomas Duff & Co. (India) Ltd. and as such the presentation of the documents were made to the principals in Calcutta. The first of these which were said to have been supported by the case of this Court in *Commissioner of Income-tax v. Mysore Chromite Ltd.* (supra) was rejected on the ground that this Court did not desire to express any opinion on the "extreme contention" and the second on the ground that there is little to establish an agency and even if there is any such agency that it is limited to the extent that the banker stands as agent to the person whose banker it is. After having rejected these contentions it observed "but all these notwithstanding" cls. (7) and (9) in the contract go to show that there was no unconditional appropriation of the goods by the buyer as soon as they were placed on board the steamer on c.i.f. terms which appropriation took place in India where the title to the goods passed to the buyers. It may be mentioned that cls. (7) and (9) deal with the non-acceptance of documents in the event of the buyer's failure to accept or pay against documents and/or in cases where buyers make any claim in respect of quality or excess moisture in which case an option was given to the buyer either of accepting the goods with allowances or of cancelling the contract in respect of particular lot or lots or of rejecting the particular lot or lots and claiming fresh tender. What is to be considered in this case therefore is, under the terms of the contract and the dealings between the parties, where did the property in the goods pass? Is it in Pakistan where the seller pursuant to an irrevocable letter of credit placed the goods on board the ship, drew the bills of exchange and invoices and along with the

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- A bill of lading etc. negotiated them through a constituent of the buyer's bank in Pakistan or as held by the High Court having regard to cis. (7) and (9) of the contract no unconditional appropriation of the goods was effected in India even though the goods were placed on board the steamer on c.i.f. terms.
- Before we examine the terms of the contract and the dealings between the parties to ascertain where exactly the unconditional appropriation of the goods under the contract was effected, it is, we think appropriate to set out the principles which are applicable for the determination of that question. It would also be useful to an understanding of the terms of the contract and the intention of the parties, if we were to ascertain what exactly is the significance of an irrevocable letter of credit. In this case we are dealing with the sale of unascertained goods in a deliverable state in respect of which where the property in the goods passes is the question to be determined. Sections 23 and 39 of the Sale of Goods Act which are in identical terms with rule 5 of s. 18 and s. 32 of the English Sale of Goods Act lay down the principles for ascertaining where the property in the goods passes. They are in these terms :—

“23.(1) Where there is a contract for the sale of unascertained or further goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

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

(2) Unless otherwise authorised by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable

having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit or while in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible in damages.

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

It is apparent that for the purposes of sub-s. (1) of s. 23 there should be an unconditional appropriation with the assent of the parties as indicated before the property in the goods passes to the buyer. This sub-section is quite independent of sub-s. (2) and does not contemplate an unconditional appropriation in pursuance of the contract. Sub-s. (2) on the other hand requires the delivery to a carrier in pursuance of a contract which operates or is deemed to operate as an unconditional appropriation. Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee whether named by the buyer or not for the purposes of transmission to the buyer and does not reserve the right of disposal he is deemed to have unconditionally appropriated the goods to the contract. The buyer's assent to the passing of the property in the said circumstances is implied and that when the seller despatches the goods and delivers them to the common carrier for purposes of transit to the buyer, the common carrier not only receives the goods as agent of the buyer but also assents to the appropriation made by the seller. Where however the intention is clearly indicated and the carrier assents it is immaterial by what document the consignment is effected. In cases where the seller bears the freight for the transmission of the goods free of cost to the buyer, the property in the goods passes to the buyer as soon as they are sent to the carrier, though there may be a provision that they are to be paid for by the buyer on behalf of the seller after the arrival of the goods. But where however the seller exercises a right of disposal or where he agrees to deliver the goods at their destination, the carrier is the seller's agent and the delivery is not a final appropriation. The intention of the parties is therefore one of the important elements in determining the situs where the property passes to the buyer in pursuance of the contract. The decided cases are of little help and are only

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A illustrative of the principles which are applicable for determining when the goods are unconditionally appropriated to the contract.

B In the case of transactions of sale of goods between the buyer and seller living in two different countries, the contract may envisage the seller sending the goods through a carrier and the payment being made either at that place or at the place where the buyer resides. In such a transaction the banks have come to play an important part and the bankers' commercial credit system facilitates merchants domiciled in different countries and assures payment to the seller on the one hand and delivery of the goods contracted for to the buyer on the other. This is done by means of what are known as letters of credit which under the terms of the contract the seller may insist on the buyer to provide for in a bank doing business in the place of the seller's domicile. This may be effected by the buyer requesting the bank to facilitate a letter of credit in the country of the seller where the bank or its constituent assumes liability for payment of the price for some consideration which may either be by loan or an over-draft arrangement or perhaps on the security by the pledge of documents of title to the goods or by some other arrangement arrived at between them. An understanding of the mechanism of credit made available to the buyer and the seller by the banks in the sale of goods and the manner in which these transactions take place through the banking institutions will greatly facilitate the ascertainment of the question when and at what place the property in the goods passes from the buyer to the seller. Inasmuch as those innovation of commercial credit have been developed by the maritime powers of which England was the leader a reference to English decisions will be of assistance. In *Guaranty Trust Company of New York v. Hannay & Co.*<sup>(1)</sup> Lord Justice Scrutton set out at p. 659 the manner in which commercial credit operates. He said :—

G "The enormous volume of sales of produce by a vendor in one country to a purchaser in another has led to the creation of an equally great financial system intervening between vendor and purchaser, and designed to enable commercial transactions to be carried out with the greatest money convenience to both parties. The vendor, to help the finance of his business, desires to get his purchase price as soon as possible after he has despatched the goods to his purchaser; with this object he draws a bill of exchange for the price, attaches to the draft the documents of carriage and insurance of the goods sold and sometimes an invoice for the price, and discounts the bill—that is, sells the bill with documents

(1) [1918] 2K. B. 623.

attached to an exchange house. The vendor thus gets his money before the purchaser would, in ordinary course, pay; the exchange house duly presents the bill for acceptance, and has, until the bill is accepted, the security of a pledge of the documents attached and the goods they represent. The buyer on the other hand may not desire to pay the price till he has resold the goods. If the draft is drawn on him, the vendor or exchange house may not wish to part with the documents of title till the acceptance given by the purchaser is met at maturity. But if the purchaser can arrange that a bank of high standing shall accept the draft, the exchange house may be willing to part with the documents on receiving the acceptance of the bank. The exchange house will then have the promise of the bank to pay, which, if in the form of a bill of exchange, is negotiable, and can be discounted at once. The bank will have the documents of title as security for the liability on the acceptance, and the purchaser can make arrangements to sell and deliver the goods. Before acceptance the documents of title are the security, and an unaccepted bill without documents attached is not readily negotiable. After acceptance the credit of the bank is the security, . . . . .”

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The operation of the banker's commercial credit is generally and in an increasing manner resorted to by the exporters stipulating in contracts for the sale of goods the responsibility for the payment of price by a banker which is done by means of a documentary credit. It takes the form of a promise by the buyer's bank to accept or honour bills of exchange if drawn on him or his guarantee of payment if drawn on the buyer, the security for which resides in the pledge of the documents of title to the goods exported. Where the device of commercial credit is resorted to as indeed in all overseas transactions this has become a general practice—there is to be a prior contract for the sale of goods the payment of price for which is to be made by a banker. We are here not concerned for the purpose of this case, with the various intricacies and practical technicalities of different means which are adopted to meet different situations. But a simple example of the device may be indicated. The buyer requests his bank and arranges with it the issuance of credit for payment at the place of the seller's domicile specifying the documents against which it has to make payment. The buyer agrees also to indemnify the bankers in respect of such advances and of any claim arising out of the credit. The letter constitutes the memorandum of the buyer's instructions to the banker. On receipt of this application

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- A the banker issues the credit which is addressed to and sent to the seller or it may take the form of a request to an intermediary banker who is asked either merely to advise the seller or advise and to add his confirmation. The credit may be issued by cable which is later followed by writing. These letters may be given for the purpose of being shown to third parties who may act thereon.
- B Letters of credit are either revocable or irrevocable and where it is the latter it may be confirmed or unconfirmed. If confirmed it means that words of confirmation of another banker is added to it by which that banker also commits himself irrevocably. The letter of credit notifies the seller that the issuing banker or his correspondent will (if they are drawn on him) accept or honour
- C drafts drawn for the price of the goods, provided that the documents of title and other documents specified in the credit are simultaneously presented to the banker. On receipt of the credit the seller ships the goods and insures them, obtaining a bill of lading normally made out to his order but perhaps to that of the banker, and also a policy of marine insurance. He then draws a
- D draft for the price of the goods and with the documents *i.e.* the bill of lading, policy and invoice specified in the credit presents the draft for acceptance, payment and negotiation. In this way the exporter gains the advantage of receiving payment for his goods without delay. The documents are then sent by the banker to the buyer's bank and on the bill of exchange being accepted by him by payment of the price the bill of lading and the invoice
- E is delivered to him; see Halsbury, Vol. 2, p. 213 and Gutteridge and Megrah on The Law of Commercial Credits (1968 edition).

- The contract that has been entered into between the buyer and the seller in this case is in the form of a sold note by the seller's broker in Calcutta in the form of the Indian Jute Mills
- F Association for jute contracts with variations in respect of some of the terms. Under cl. (1) of this contract the amount of tax payable under the Bengal Raw Jute Taxation Act, 1941 is to be on the seller's account and to be deducted by the buyers from the price quoted for payment, to the Provincial Government in the prescribed manner unless at the time of concluding the contract the seller satisfies the buyer by means of satisfactory evidence
- G that tax is not payable on the sale. Any increase or decrease in the existing Bengal Jute Tax or in any other form of tax by whomsoever levied or any new taxes on raw jute after the contract also shall be on the buyer's account. It also states that the contract is accepted by the buyers on the seller's representation and assurance that the jute as shown in the margin is under a mark
- H entered in the said register and that its bailing and packing is in strict accord with the particulars contained therein. Should tenders not be in accordance with it the buyers shall be entitled to reject the goods and the sellers shall be liable for all losses sustained in-

cluding the difference between the contract and the market prices. Cl. (2) provides for delivery to the mills specified therein and the carrier or carriers through which that delivery should be made to the mills. Cl. (3) which is varied deals with the transit insurance to be covered by the buyers at contract value plus 10% under their open cover and premium to be paid for by sellers in India. Sellers to advise buyers the contract and assortment in maunds to be supplied immediately loading is commenced. Cl. (4) which deals with reimbursement of cash is again varied by the following :—

“Buyers to open letter of credit with the Pakistan Bank in favour of seller’s nominee. A complete set of shipping documents to be presented to the bank and payment of invoice valid in terms of the contract to be made to the shippers in the equivalent of Pakistan currency at the exchange rate ruling on the date of presentation of documents at the bank, less freight, if payable in India.”

Cl. 6 deals with non-delivery of documents. Cl. 7 provides for non-acceptance of documents. Cl. 8 provides for maximum amount of moisture the jute should contain and cl. 9 provides for claims with the variation that the amount of short weight value and claim to be paid by sellers to buyers in Indian currency. The High Court, as we have earlier stated, relied on cls. 7 and 9(3) for coming to the conclusion that the appropriation took place in India. These clauses are given below :—

“7. Non-acceptance of documents should buyers fail to accept or pay against documents properly submitted under the terms of the contract Sellers have the right to exercise any of the following options :—

- (a) Cancelling the contract.
- (b) Cancelling the contract and charging buyers the market difference between the contract rate and the market rate of the date of the breach of contract.
- (c) Selling against buyers in the open market on the first working day following the default.

9. (3) In any case where buyers make any claim in respect of quality and/or excessive moisture and the Award on the dispute being referred to arbitration as provided for in Clause 13 provides for an allowance of not less than 50 percent on the market difference between the grades of the goods contracted for

**A** and the goods supplied and/or finds a moisture content in the goods supplied in excess of the maximum percentage of moisture allowed under clause 8 by not less than 3 per cent and stipulates an allowance therefore, buyers shall thereupon be entitled to exercise any of the following options :—

**B** (a) Of accepting the goods with the allowance(s) awarded.

**C** (b) Of cancelling the contract in respect of the particular lot or lots of goods supplied and charging sellers for the market difference on the goods as contracted for and those offered in fulfilment of the contract and on which the award has been made.

**D** (c) Of rejecting the particular lot or lots of goods supplied and claiming a fresh tender in lieu thereof to be made within days from the date on which the option is declared."

The letter of credit which has been referred to in the contract is by the Chartered Bank of India, Australia and China and since several contentions have been urged on the import of this letter we give below its contents in entirety :—

**E** "THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA

Messrs. Mahabir Commercial Co. Ltd.,  
P.O. Ashuganj,  
Distt. Tipperah  
East Pakistan

Calcutta, 14th August, 1951. This letter of Credit was wired through the Chartered bank, Cittagong on and is only to be delivered to beneficiaries against surrender of the letter advising contents of the telegram, and any negotiations made in the interval are to be transferred to the original credit before it is handed over.

**F**

Confirmed Letter of Credit No. 94/743 Irrevocable.

Dear Sirs,

**G**

You are hereby authorised to draw on M/s Thomas Duff & Co. (India) Ltd. a/c. The Titaghur Jute Factory Co. Ltd., of Calcutta for a sum not exceeding Rs. 2,00,750/- (Rupees two lacs seven hundred and fifty) available by your drafts on them at sight accompanied by :

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(1) Complete set of Bills of lading and/or Railway receipts to order and blank endorsed, "Shipped on Board". . . . Bills of Lading are essential and the statement 'freight paid' must appear thereon.

The Bills of Lading must cover shipment as detailed below.

- (2) The Insurance to be covered by buyers under Open Cover No. 1249 and premium to be deducted from shipper's invoice.
- (3) Signed Invoices in triplicate.
- (4) Freight "To Pay" to be deducted from shipper's invoice.

### SHIPMENT

As per overload from Pakistan to Calcutta C.&F. by I.G.N., R.S.N., B.A.S.S., E.B.R.S.S., I.S. Co.'s steamer and/or Flat and/or Rail direct or indirect with or without transshipment. Partial shipments allowed.

### PRO-RATA :

Shipments are permissible.

### CONDITION OF SHIPMENT :

Shipment is to be affected not later than 15th August, 1951.

### CREDIT EXPIRY DATE :

This credit expires on 30th August, 1951.

Drafts should bear the following clause drawn under the Chartered Bank of India, Australia & China, Calcutta Credit No. 94/743, dated 14th August, 1951.

Purchasers are to note the amount of the drafts separately on the back hereof.

All drafts drawn under this letter of Credit are to be treated as Advance Bills, through our Chittagong Office.

We hereby guarantee to protect the Drawers, Endorsers and bonafide holders from any consequences which may arise in the event of the non-acceptance or non-payment of drafts drawn in accordance with the terms of this Credit.

SEAL

Yours faithfully,  
Sd/ S.C.R. Northcote  
P. Manager  
Sd/ M.W. Whyte  
Accountant

Mid. 100 Mds. Raw Jute @ 103 per Md. (CIF)	Rs.
Port. 1,000 Mds. Raw Jute @ 98 per Md. (CIF)	1,03,000
	98,000
	<hr/>
	2,01,000
Less Jute-tax on 2,000 Mds. @ -/12/- per Md. Ind.	250
	<hr/>
Ind.	2,00,750
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**A** Under G. Da. & Co., Ltd.'s Contract No. 3807 of 4-6-51.  
Under Import Licence Clearance Permit No. 0003.  
Goods of Pakistan Origin

Sd/- S.C.R. Northcoats

P. Manager

**B**

Sd/- M.W. Whyte,

Accountant

**C** The above document is a confirmed irrevocable letter of credit under which the sellers were authorised to draw on the clearing agents of the buyer the sums mentioned therein. It will be seen from the contract between the parties and the irrevocable confirmed letter of credit that the transaction is one known as c.i.f. contract, that is, carriage, insurance and freight, which in the commercial parlance indicates that the contract for the sale of goods is at a price to cover cost, insurance and freight and ex-ship. In f.o.b. contract (free on board) in the absence of a contract to the contrary, the buyer must nominate the ship and notify the seller when it is likely to arrive which is a condition precedent to the seller's duty to bring the goods to the port. On the ship's arrival the seller must deliver the goods on board at his own expense. Thereafter the goods are at the buyer's risk and he is responsible for the freight and any subsequent charges. In a c.i.f. contract the seller has first to ship at the port of shipment goods of the description contained in the contract. He must then procure the shipping documents (contract of affreightment) as contemplated by the contract upon the terms current covering the whole transit of the goods. He must arrange for an insurance for an amount equal to their reasonable value of shipment upon the terms current in the trade which will be available and it should be for the benefit of the buyer. He must also make out an invoice which is a written account of the particulars of goods delivered to the buyer with value of the goods or their price and charges etc. annexed. This invoice is made out debiting the buyer with the agreed price and giving him credit for the amount of freight which he will pay the ship owner on actual delivery. And lastly the shipper should tender the shipping documents to enable the buyer to deal with the goods in the usual way of business. He is also required to tender such other documents as are specified on the contract and if the contract is silent, it is sufficient if the seller tenders the bill of lading, policy of insurance and invoice. All these documents must be valid on tender. Under the c.i.f. contract prima facie the property in the goods passes once the documents are tendered by the seller to the buyer or his agent as required under the contract. But where the seller retains control

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over the goods by either obtaining a bill of lading in his name or to his order, the property in the goods does not pass to the buyer until he endorses the bill to the buyer and delivers the documents to him. A

The appropriation of the goods to the contract by itself would not be such as to pass the property in the goods if it appears or can be inferred that there was no actual intention to pass the property. But if however the seller's dealing with the bill of lading is only to secure the contract price not with the intention of withdrawing the goods from the contract, and he does nothing inconsistent with an intention to pass the property the property may pass either forthwith subject to the seller's lien or conditional on performance by the buyer of his part of the contract. Kennedy L. J. in *Biddell Brothers v. E. Clemens Horst Company*<sup>(1)</sup> dissenting with the majority stated the principles for ascertaining in c.i.f. contract when the property in the goods passes which was later confirmed in an appeal against that judgment in *E. Clemens Horst Company v. Biddell Brothers*<sup>(2)</sup>, the Lord Chancellor describing it as "the remarkable judgment illuminating as it does, the whole field of controversy." In that case the seller was to ship a cargo of hops was to contract for freight, had to effect insurance and was to receive 90 s. per 112 lbs. of hops. The buyer had to pay cash. The contract did not say when the price was to be paid. The buyer said that he is to pay cash against physical delivery and acceptance of the goods when they come to England. Under s. 28 of the Sale of Goods Act the payment was to be against delivery. But when was delivery of the goods which are on board ship said to take place. The Earl Loreburn L. C. said : B

"The answer is that delivery of the bill of lading when the goods are at sea can be treated as delivery of the goods themselves, this law being so old that I think it is quite unnecessary to refer to authority for it. C

Now in this contract there is no time fixed at which the seller is entitled to tender the bill of lading. He therefore may do so at any reasonable time; and it is wrong to say that he must defer the tender of the bill of lading until the ship has arrived; and it is still more wrong to say that he must defer the tender of the bill of lading until after the goods have been landed, inspected and accepted." D

By a reference to s. 32 of the Sale of Goods Act (corresponding to s. 38 of the Indian Sale of Goods Act) Kennedy L.J. at p. 956 of the judgment to which we have referred, observed : E

(1) [1911] 1.K.B. 934, 952.

(2) [1912] A.C. 18, 22. F

A "Two further legal results arise out of the shipment. The goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his c.i.f. contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available B for his use, if the goods should be lost in transit; and the property in the goods has passed to the purchaser, either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or representative : see the judgments of Bramwell L. J. and C Cotton L. J. in *Mirabita v. Imperial Ottoman Bank* (1878—3 Ex.D.164). It passes unconditionally where the bill of lading is made out in favour of the purchaser or his agent or representative, as consignee. But D the vendor, in the absence of special agreement, is not yet in a position to demand payment from the purchaser; his delivery of the goods to the carrier is, according to the express terms of s. 32 only "prima facie deemed to be a delivery of the goods to the buyer"; and under s. 28 of the Sale of Goods Act, as under the common law E (an exposition of which will be found in the judgments of the members of the Exchequer Chamber in the old case of *Startup v. Macdonald* (6 Man, & G. 593), a tender of delivery entitling the vendor to payment of the price must, in the absence of contractual stipulation to the contrary, be a tender of possession. How is such a tender to be made of goods afloat under a c.i.f. contract? F By tender of the bill of lading, accompanied in case the goods have been lost in transit by the policy of insurance. The bill of lading in law and in fact represents the goods. Possession of the bill of lading places the goods at the disposal of the purchaser."

G Again dealing with the argument of the plaintiffs that a right under the c.i.f. to withhold payment until delivery of the goods and after having had an opportunity of examining them, the learned Judge says that this cannot possibly be effected except in one of the two ways. At p. 959 he stated :

H "Landing and delivery can rightfully be given by the shipowner only to the holder of the bill of lading. Therefore, if the plaintiffs' contention is right, one of two things must happen. Either the seller must surrender to the purchaser the bill of lading, whereunder the delivery can be obtained, without receiving payment, which, as

the bill of lading carries with it an absolute power of disposition, is, in the absence of a special agreement in the contract of sale, so unreasonable as to be absurd; or, alternatively, the vendor must himself retain the bill of lading, himself land and take delivery of the goods, and himself store the goods on quay (if the rules of the port permit), or warehouse the goods, for such time as may elapse before the purchaser has an opportunity of examining them. But this involves a manifest violation of the express terms of the contract "90 s. per 112 lbs. cost freight and insurance". The parties have in terms agreed that for the buyer's benefit the price shall include freight and insurance, and for this benefit nothing beyond freight and insurance. But if the plaintiff's contention were to prevail, the vendor must be saddled with the further payment of those charges at the port of discharge which *ex necessitate rei* would be added to the freight and insurance premium which alone he has by the terms of the contract undertaken to defray."

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Even though the property in the goods may pass to the buyer when the documents are handed over, the buyer may yet retain the right to examine and repudiate the goods but this right generally which a buyer has in c.i.f. contract does not by itself indicate that the property in the goods has not passed to him. This supposed incongruity was sought to be explained per curiam in *Kwei Tek Chao v. British Traders and Shippers Ltd.*<sup>(1)</sup> that if property passed when the documents are transferred that property is subject to the condition that the goods should re-vest in the seller if on an examination by the buyer he finds them not to be in accordance with the contract. It is not necessary to consider this aspect because in any case the ascertainment of the obligations under the contract will determine to what extent the transfer of property is subject to a condition or if the property passes conditionally whether the ownership left in the seller is the reversionary interest in the property in the event of the conditions subsequent operating to restore it to him. In any case where the performance of some condition is imposed upon the buyer but is not made a condition of the transfer of the property, the property once passed is not re-vested in the seller by the buyer's subsequent default. But where however the purchase is financed by an irrevocable credit the transaction would not be affected by rejection of the goods after acceptance of the documents if the latter were such as were called for by the credit or where under that credit the payment of the invoice value is payable on presentation of the documents. It will

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(1) (1954) 2 K.B. 459.

A be seen from the course of the transactions between the parties that  
 all the conditions of a c.i.f. contract are fulfilled subject to the  
 variations which the parties under the contract agreed, and to  
 which a reference has been earlier made. The bill of exchange  
 which he had to draw in accordance with the invoice was for the  
 price of the goods less the premium and freight which the buyer  
 B was paying in India on account of the seller. On the presentation  
 of the shipping documents as noted already, the bank in Pakistan  
 under the irrevocable letter of credit was to make payment of the  
 invoice value in terms of the contract to the sellers in equivalent  
 Pakistan currency at the exchange rate ruling on the date of pre-  
 C sentation of the documents at the bank. Once the seller has per-  
 formed his part and presented the documents for being sent to  
 seller for acceptance and received payment in Pakistan he has no  
 longer any control over the goods and the property in the goods  
 passes to the buyer. The bill of lading when it is handed over to  
 the buyer by the bank on the buyer accepting the bill of exchange  
 and paying the amount specified in the invoice, confers on him  
 D the right to take delivery of the goods at the place of disembarka-  
 tion.

On the facts as found, *C.I.T. v. Mysore Chromite Ltd.* (*supra*)  
 decided by this Court is clearly distinguishable, because in that  
 case the assessee company which is the seller had shipped the goods  
 under a bill of lading issued in its own name and that under the  
 E contract it was not obliged to part with the bill of lading until the  
 bill of exchange drawn by it on the buyer's bank where the irrevoc-  
 able letter of credit was opened was honoured. It is not necessary  
 to relate all the details of the contracts except to say that the  
 contracts of sale of chromite by the Mysore Company to purchasers  
 in Europe were entered into between the buyers and the assessee's  
 F agents in London and the contracts of sale to persons in America  
 were signed by the assessee's managing agents in Madras and by a  
 company in America who bought for undisclosed principals. Under  
 the contracts the price was F.O.B. Madras. Provision was made  
 for weighment, sampling and assay of goods at destination. Before  
 the goods were actually shipped, the buyers opened a confirmed  
 G irrevocable bankers' credit with a bank in London. The fact that  
 letters of credit had been opened was communicated by the  
 assessee's bankers in London, Eastern Bank Ltd., to their branch in  
 Madras who thereupon wrote to the assessee offering to negotiate  
 the drafts drawn in terms of the contract provided the documents  
 were in order and concluded the letter with a warning that the  
 H advance was given for the assessee's guidance without involving any  
 responsibility on the part of the bank. On receipt of this intima-  
 tion the assessee placed the contracted goods on board the steamer  
 at Madras and obtained a bill of lading in its own name. The

Court held that upon the terms of the contract and the course of dealings between the parties the property in the goods passed in London where the bill of lading was handed over to the buyer's bank against the acceptance of the relative bill of exchange. The sales therefore took place outside British India and ex-hypothesi, the profits derived from such sales arose outside British India. An argument was advanced before the Court that under the provisions in the contract for weighment and assay which was ultimately to fix the price unless the buyer rightly rejected the goods as not being in terms of the contract, the passing of the property in the goods could not take place until the buyer accepted the goods and the price was fully ascertained after weighing and assay. Dealing with this contention S.R. Das, J. (as he then was) speaking for the Court said at p. 135 :

"It is submitted that that being the position, the property in the goods passed and the sales were concluded outside British India, for the weighment, sampling, assay and the final fixation of the price could only take place under all these contracts outside British India. It is not necessary for us to express any opinion on this extreme contention. Suffice it to say, for the purposes of this case, that in any event upon the terms of the contracts in question and the course of dealings between the parties the property in the goods could not have passed to the buyer earlier than the date when the bill of exchange was accepted by the buyers' bank in London and the documents were delivered by the assessee company's agent, the Eastern Bank Ltd., London, to the buyers' bank. This admittedly and as found by the Appellate Tribunal, always took place in London. It must therefore follow that at the earliest the property in the goods passed in London where the bill of lading was handed over to the buyers' bank against the acceptance of the relative bill of exchange."

It will be observed that the terms of the contract and the course of dealings between the parties is not the same as in this case because in that case the seller clearly retained the property in the goods by having a bill of lading issued in his own name and would only part with the property after the bill of exchange was accepted by the buyer's bank in London when the documents would be delivered by him to the company's agent in London and that the fixation of price was dependent on weighment and assay. In the case before us the High Court relied on cls. (7) and 9(3) of the contract for its conclusions. In our view nothing in those clauses justifies that conclusion. Under cl. (7) where there is a total failure on the part of the buyer to perform the contract, the

**A** seller has a right to cancel the contract or treat it as cancelled and resort to the remedies thereunder. But that is a condition where the buyer fails or refuses to perform the contract altogether by not accepting the documents or in not paying against the documents. Even under cl. (9) the condition as to the quality and of excessive moisture is not a condition of the transfer of property. The right of the buyer thereunder is not a right to cancel the contract *in toto* but only to adjust claims in respect of the quality or moisture for which a remedy has been provided thereunder. There is nothing in the agreement which envisages the property in the goods being in the seller even after the value of the invoice had been paid by the bank under the letter of credit in Pakistan. It may be further noticed that the bills of lading and or railway receipts have to be made out to order and endorsed in blank. In all transactions of sale of goods the time and place of appropriation are important elements for determining when the property in the goods passes. It is well settled that an appropriation takes place where the goods are situate at the time of appropriation and not where the contract of sale is made. There may be an authority given by one party to the other to appropriate and that appropriation is presumed to be finally made where by the terms of the contract the party so authorised has determined his election by doing such act or thing which cannot be done until the goods are appropriated. Generally, subject to the limitations already discussed a seller appropriates the goods by the delivery of the bill of lading—the document giving control of the goods—in exchange for payment of the price by which he shows that he does not intend to retain the right of disposal of the property in the goods.

**G** A consideration of the terms of the contract and the letter of credit makes it evident that once the bills of lading and documents contemplated under the contract are handed over to the bank to be delivered to the buyer and the seller receives the value thereof as shown in the invoice and in terms of the contract, he no longer retains the property in the goods. The provision that all drafts drawn under the letter of credit are to be treated as advance bills through their Chittagong office do not in any way affect the nature of the transaction inasmuch as they are intended as advance notice to the buyer who may want to make arrange-

ments regarding the taking of delivery or dealing with the goods etc. In fact under the contract it is provided that immediate notice should be given to the buyer as soon as the seller begins to load the goods. In any case under the letter of credit the bank informs the seller that it "guarantees to protect the drawers, endorsers and *bona fide* holders from any consequences which may arise in the event of the non-acceptance or non-payment of the drafts drawn in accordance with the terms of this credit." This clause in the letter of credit further assures the seller of the performance of the contract and does not affect the property in the goods passing to the buyer in Pakistan.

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In this view, agreeing with the Tribunal, our answer to the question is in the affirmative and against the department. The appeal is allowed with costs.

V.P.S.

*Appeal allowed.*