

Against the sealed and 314 of 1985 Patna

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1. The State Bihar, D Patna
2. The Colle
3. The Chief Bhawan,
4. The Sup

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.....Defendants.....Appellants.

Versus

M/S Ruby Construction, through its Partner Shri Baleshwar Singh,
Arya Kumar Road, Rajendra Nagar, P.S.- Kadam Kuna, Patna
.....Plaintiff.....Respondent

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For the Appellant

:- Mr. Binod Kumar, Advocate
Mr. AC to GP 10

For the Respondent

:- Mr. Uma Kant Shukla, Advocate
:- Mr. Pramod Kumar, Advocate

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C.A.V. JUDGMENT

Date: 06.10.2016

The instant appeal has been preferred against the judgment and decree dated 20.10.2006, decree sealed and signed on 31.01.2006 in Title (Arbitration) Suit No. 314 of 1985 by learned sub-Judge VI, Patna whereby and whereunder the Title Suit filed by the plaintiff/respondent was decreed with cost. The defendants are the appellants and the plaintiff is the respondent.



2. The suit was filed by the plaintiff for settlement of his claim related with an agreement by appointing Arbitrator or settlement of his claim by the court admitting it to be regular suit for passing decree of Rs. 7,20,524/- with interest in favour of the plaintiff. The case of the plaintiff, briefly stated, is that on 12.12.1980 Sone-Ganga Flood Protection Department has published an auction notice in the daily newspaper for construction of revetment and slope of 920 feet from Ranighat to Gulbi Ghat under Group 3A for the protection of right bank of Ganga river, that had to be completed till June, 1981. By the said auction notice, Bids were invited from the registered contractors of the Irrigation Department, Govt. of Bihar in the office of defendant no. 4, the Superintending Engineer, Sone Bhawan, Beer Chand Patel Road, Patna till 3:00 p.m. on 12.01.1981 and Bids have to be opened on the same day in presence of the Bidders by the defendant no.4. But on 30.12.1980 the defendant no. 5, the Executive Engineer, had revised the last date of applying the Bids and made it to 14.01.1981. The plaintiff is a registered firm and it had deposited its Bid on 14.01.1981 along with other documents with necessary security deposit that was done by putting the National Saving Certificate and Pass Book of Bankipur Post Office on mortgage in favour of defendant no. 5. The Bids, thus, received were opened by the defendant no. 4, the Superintending Engineer, in which almost all the valid Bids, the plaintiff's Bid was the lowest but the defendant no. 4 had showing favour and malafide, recommended the Bid of Jawahar Lal Singh for



approval. His Bid was not valid which was below the estimated limit. That was informed to the defendant no. 4 by the plaintiff through his letter dated 27.02.1981 and by the defendant no. 5 through its letter no. 168 dated 29.02.1981 in which defendant no. 5 had informed to the defendant no. 4 that in such a small money said work of auction could not be completed and he stated that the Bid of the plaintiff is valid and lowest. In the mean time, due to increase in rates of articles, Department has changed the schedule rate with effect from 1st July, 1981. The plaintiff had received the auction under new conditions that is verified in the letter of the plaintiff dated 03.09.1981, that was accepted by the defendant no. 4, the Superintending Engineer, by its letter no. 1347 dated 15.09.1981. On 15.09.1981, some difficulties arose and that were discussed with the Superintending Engineer and agreement was reached to the point that the Department shall undertake the management of the treated Sall Balla through the Forest Department, it is also agreed that the defendant no. 4 shall write a letter to the appropriate authority of the Railway to provide 125 wagons on adhoc basis that will carry essential goods to Rajendra Nagar Patna from Bakudih Railway Station of North Eastern Railway. Finally, this was also agreed between the parties that the calculation of 90 days of finishing auction work shall be made after proper and correct measurement of the entire place of work by the Surveyor and providing paying. Further case of the plaintiff is that through the correspondence, defendant no. 3, Chief Engineer has accepted



the Bid of the plaintiff on 14.01.1981 as is clear from the Superintending Engineer's letter No. 1347 dated 15.09.1981. Thus, plaintiff had been allotted the work of Rs. 8,34,718.17/- and after executing the agreement making contract with Executive Engineer given instruction to collect treated Sall Balli, boulders and other materials. On 12.09.1981, plaintiff by the signatures of its partner Baleshwar Prasad Singh, entered into an agreement with Executive Engineer in presence of the witnesses that was attested by him and one copy was provided to the plaintiff. Thus, value of the contract stood to Rs. 8,34,718.17/- and its number was Contract No. 1/2-36 year 1981-82. On 12.12.1981, the defendant no. 5 had issued an authority letter for taking Sall Balla from Hazaribagh Forest Department but document D was issued to the plaintiff on 16.12.1981, after termination of the period of completion of work. Work till 14.12.1981 was not measured by the defendants nor total length of 920 feet was marked to the plaintiff. Plaintiff had written a letter dated 31.03.1982 for extension of period of completion of work that was accepted by the Junior Engineer, S.D.O. and finally it was approved by the defendant no. 5. Now plaintiff had started work according to the contract. Within the contract the defendants and department had important role of responsibility and accountability and it was their duty that they should provide treated Sall Balla and boulders to the plaintiff and Engineer Incharge should provide boundary mark and marking of the work place to the plaintiff. Again, on 28.05.1982, prayer was made for



extension of time from 31.03.1983 that was verified by the Junior Engineer and S.D.O. but defendant no. 5, the Executive Engineer, had kept it into pending. Stone materials of Rs. 2.79 lacs reached from Bakudih Railway Station to Rajendra Nagar, Patna, that was booked by the plaintiff and R.R. was sent to the defendant no. 5 who received that on 9th June, 1982 through the defendant no. 6 under the instruction of defendant no. 4 and that was not supplied to the plaintiff contractor and the contract of the plaintiff was breached by malafide and illegality and plaintiff suffered a loss of Rs. 7,20,524/- by the acts of the defendants and plaintiff has also stated that the defendants being under collusion misappropriated the stone materials and despite several request and sending of legal notice, defendants have kept hold of the advance and security money of the plaintiff and due to acts of the defendants and knowingly obstruction of the defendants and due to not observing accountability, plaintiff suffered loss of Rs. 7,20,524/- for which the plaintiff filed the suit against the defendants to recover the money with interest and costs payable as per law.

3. After filing of the suit show cause notice was issued to the defendants and they have in their reply to show cause denied all the charges of the plaintiff and pleaded that the suit of the plaintiff is not maintainable and plaintiff has no cause of action. The entire suit is time barred and plaintiff is knowingly raising doubt and on arising of any dispute as per contract, Superintending Engineer is the competent authority for settlement and no suit related to Money



may be accepted. The defendant further pleaded that the plaintiff in his plaint not specifically mentioned any item of the suit, hence, they are not in a position to reply the plaintiff, if they have any valid claim, then they should file it before Arbitrator and if there is any kind of dispute related to contract, then, it shall be sent before the Superintending Engineer for Arbitration.

4. After hearing both the parties, the case was sent to Superintending Engineer for arbitration, who sent his Arbitration Award to the court on which both parties were heard and the Sub-Judge had accepted the award partially and admitted the return of part payment of the advance and security deposit made by the plaintiff and remaining portion was set aside, along with this the Sub-Judge opined that the work claim and counter claim of the parties shall be determined by the Court. On 06.10.1994, against the order passed by the learned Sub-Judge X, Patna, the Government had filed a revision before the High Court of Patna in which High Court dismissed the revision petition and gave decision that both parties have opportunity to produce their oral and documentary evidences before the Sub-Judge to prove their claims and counter claims. In the light of above order, learned Sub-Judge has recorded oral and documentary evidences of the parties and later, on 27.02.1999, Sub-Judge III decided and determined the case against which plaintiff had filed a Civil Revision No. 835 of 1999 before the High Court wherein High Court set aside the judgment dated 27.02.1999 passed by learned Sub-Judge and

directed to hear the case freshly on the evidences available on record and then, this impugned judgment has been passed.

5. In the light of judgment and order of the High Court in Civil Revision No. 835 of 1999 and on the basis of the pleadings of the parties, following issues were framed for determination by the learned Sub-Judge:

- (i) Whether the Suit is maintainable ?
- (ii) Whether the suit is barred by law of limitation ?
- (iii) Whether the suit is barred by principle of estoppels and acquiescence ?
- (iv) Whether the plaintiff has valid cause of action to bring the suit ?
- (v) Whether the plaintiff is liable to receive the payment on the basis of newly sanctioned and approved rates by the department ?
- (vi) Whether the order dated 30.12.1982 passed by the defendant no. 5 for cancellation of contract is illegal and improper and whether the plaintiff is liable to receive the damages against the defendants for cancellation of contract ?
- (vii) Whether the defendant is Bailiff of the plaintiff and whether the plaintiff is liable to receive back the goods kept in control of Bailiff ?
- (viii) Whether the plaintiff is entitled for any other reliefs ?

6. Learned Sub-Judge took up issue no. 5 at first and



decided the same in favour of the plaintiff and against the defendants. Thereafter issue no. 6 was taken up and that was also decided in favour of the plaintiff and against the defendants. Issue no. VII was also decided in favour of the plaintiff and against the defendants and accordingly, issue no VIII was decided holding that the plaintiff is entitled for realization of the amount as per the issue no. (i) and (ii) from 30.12.1982 till its realization with 8 % annual interest in favour of the plaintiff and accordingly, the suit was decreed with cost of Rs. 1,56,500/- and the defendants were directed to pay the decretal amount with interest and cost within 60 days, failing which the plaintiff will be entitled to realize the same through the process of the court.

7. The defendants being aggrieved and dissatisfied with the said judgment and decree filed this appeal challenging the legality and correctness and propriety of the same. It is true that the work was allotted to the respondent M/s Ruby Construction at the tender rate, as approved by appellant no. 3 (Chief Engineer), is at a value of Rs. 8,34,718.17/- and agreement was also signed with the department to execute the work at their tender rates without any condition or reservation. The rates entered in the agreement were, thus, binding and conclusive for both the parties. As per the agreement, the date of completion of the said work was 14.12.1981 but, no progress was made by the respondents till that date and on their request extension of time was granted to them by the appellant department till 31.03.1982. Till that date work of the



value of Rs. 2,18,923/- only was executed against the agreement value of Rs. 8,34,718/-. Even, thereafter, the progress of work remained unsatisfactory and contractor were issued with a notice by the appellant no. 5 to complete the work in all respect by 30.10.1982, failing which necessary action would be taken against them in terms of the agreement. As per the information, received by the appellant no. 5, work up to the value of Rs. 3,58,441/- only has been executed by the contractor till 30.12.1982. In view of unsatisfactory progress of work, the agreement, therefore, was closed by the appellant no. 5 on 30.12.1982 and final measurement were recorded on 25.01.1983, according to which, the total value of work done by the contractor was Rs. 3,69,820/-. The amount, as per final bill, was paid to the contractor on 26.02.1983. After about five months from the date of closing of contract agreement, the contractor referred the claim for Rs. 2,28,309/- on the plea of price escalation which has taken place during intervening period between the receipt of tender and allotment of work. This claim was disposed of by the appellant no. 2 vide his letter no. 1053, dated 21.08.1984, in which the claim was rejected save and except of payment of Rs. 540/- for the supply and fixing of steel pipe 4" diameter at the site of the work. Another claim amounting to Rs. 7,20,524/- was preferred by the contractor on 23.07.1984 i.e. after about 2 years of preferring the first claim in which the amount of the first claim referred above was also included and they had claimed for the supply of 8317 quintals stone chips and 13516 quintals stone metal

besides the payment of compensation for illegal closure of contract, refund of earnest money and security deposit and interest thereon etc.

8. Thereafter, a Title Suit was filed bearing Title (Arbitration) Suit No. 314 of 1985 / 148 of 1987. Thereafter, appellant no. 4 was appointed as Arbitrator for deciding and disposing of the matter of the claim. The Arbitrator proceeded with the Arbitration proceeding and gave his award on 24.02.1994. As per award, given by the Arbitrator, Rs. 70,657/- was directed to be paid to the respondents including payment of Rs. 540/- for the supply and fitting of steel pipe of 4" diameter and interest accrued thereon and Rs. 70,117/- towards the refund of earnest money, security deposit and withheld amounts from various bills of the contractors. It was also directed that the contractors were to pay Rs. 3895.70/- to the State being the cost of working and lying of local sand which was actually not done by them but incorporated in the final bill. The Arbitrator rejected the other claim of the contractor. The respondent moved the court below in the said Title Suit against the award of Arbitrator and Sub-Judge X, Patna passed the judgment in the instant case on 06.10.1994 against which the appellant preferred appeal which was registered as Miscellaneous Appeal No. 49 of 1995. However, the appeal was dismissed and the arbitration claim was superceded with a direction to the court below to proceed and dispose of the matter on merit and in accordance with law after taking into consideration the evidences and materials



on record. The said claim suit was dismissed without cost on 27.02.1999 by the court below. Thereafter, the respondent preferred Civil Revision No. 835 of 1999 which was allowed and order dated 27.02.1999 was set aside and the matter was remitted to the learned court below to decide the matter afresh in accordance with law on the basis of material and evidence already on record within a period of four months from the date of receipt/production of a copy of this order dated 25.07.2005 and thereafter, the impugned judgment and decree has been passed.

9. The impugned judgment and decree are quite erroneous in law as well as on fact and has been passed without appreciating the materials and evidences on record. The impugned judgment has been based on conjectures and surmises. Important piece of oral and documentary evidences has not been considered by the learned court below and has ignored the material on record. The learned Court below has failed to consider that project was in the interest of public at large and time was the essence of the contract and the contract was signed on 28.09.1981 and value of work was determined at Rs. 8,34,781/- and said work was to be completed within 90 days. In spite of extension of time the work was not completed and only work of Rs. 3,24,354/- was completed by June, 1982. Then, in spite of several extension, when work was not completed, on 30.12.1982, the agreement was terminated. The said work was completed through another contractor on total cost of Rs. 10,00,000/- and thus, appellants suffered loss by such contract.



It was not justified to allow unlimited time to benefit the contractor considering the larger interest of the public. Respondent has not claimed any arrear of amounts within said contract but claim amount of Rs. 7,20,524/0- for loss sustained by him out of such contract invoking arbitration clause but there is no material on record to ascertain the loss incurred by him. Learned court below has wrongly ordered for payment of enhanced rate ignoring written agreement only on the basis of inter-departmental correspondence which has no relevance. Acknowledgement of liability has to be signed by the parties sending of letter by higher authority to settle the dispute that does not amount to acknowledgement. The scheme was for the protection of town and as per the contract the work was to be completed within 90 days and in spite of repeated extension, it could not be completed, therefore, agreement was rescinded on 30.12.1982 after more than a year, therefore, claim of plaintiff was barred as time being essence of the contract.

10. Learned court below wrongly held that the appellants are responsible for delay. It was not the duty of the appellant to supply material or arrange of the work site. The terms of the agreement are clear and according to those terms, the contractor shall have to make his own arrangement for extra land either for storing of construction material or its carriage or handing at the work site. As soon as the contractors put their problem about difficulties in obtaining Sall Balla, vide letter, dated 06.02.1981, the appellant acted promptly and send



recommendation letter, dated 12.12.1981, to D.F.O. to supply the same, therefore, the appellant in view of aforesaid contract cannot be saddled with any responsibility or liability for delaying the performance of the contract. The contract has come to end by lapse on the part of the respondent. The respondent has no right to enforce any claim on the basis of contract. There is no claim of respondent for payment in terms of the work done by him, as per rate quoted in agreement, but based his claim on differences of enhanced rate and cost of stone chips without any legal evidence or material on record. It is not permissible for the appellants to enhance the rate after acceptance of lowest tender, it will amount to discrimination to other tenderer in violation and contravention of Articles 14 and 16 of Constitution of India. Learned court below has wrongly relied upon Railway Receipt of stone chips sent to Executive Engineer. Moreover, time of contract has expired on 31.03.1982 and no extension was granted till June, 1982 when stone chips were sent and contract was not enforced at that time. There is not a single material on record to show that R.R. sent in favour of Executive Engineer was taken back by the respondent after bank endorsement to deliver the goods to firm. There is no evidence on record to show that the said R.R. was ever sent to Executive Engineer either by post or by any other mode. Thus, version of the respondent has no reason to be accepted by the learned court below without any basis. Cost of stone chips cannot be claimed as it was beyond the terms of agreement. Respondent in his deposition



was unable to say that when stone chips was purchased or from whom it was purchased and whether it came to Patna or not and no purchase memo of stone chips has been filed in the court below and it shows that it had least interest in stone chips after alleged sending of stone chips to Patna and even respondent has not made any complaint either to Executive Engineer or to other legal authority and claiming the cost of said stone chips after three years is also barred by limitation. DW 1 has explained by saying that R.R. were sealed and signed and taken away by respondent. Learned court below wrongly ordered to pay the cost of stone chips which was never entrusted to appellants, hence, finding of learned court below to pay the cost of stone chips is unwarranted and without any authority of law. When the matter is required to be settled beyond scope of Arbitration Act, then, the Advoluerum Court fee is required to be paid for deciding money dispute between the parties. Learned court below has not appreciated the facts and the law involved in right perspective. Learned court below has over read the evidence of respondent and misread the evidence of appellants and wrongly decreed the suit.

11. On the other hand learned counsel for the respondents has argued that judgment and decree passed by the learned court below is quite legal, proper and correct and this appeal is not maintainable. Learned court below has considered the pleadings and evidence of both the parties in right perspective and decided the suit on all the issues after careful and cautious

consideration of the evidences available on the record. There is no illegality and incorrectness or impropriety in the judgment and decree passed by the learned Sub-Judge and the same does not require any interference by this Court.

12. On the basis of rival contentions of the parties, the points for consideration in this appeal are as follows:

(i) Whether the delay caused in completing the work was due to negligence of the plaintiff or whether it was due to inaction of the defendants ?

(ii) Whether the plaintiff is liable to receive the payment on the basis of newly sanctioned and approved rates by the department ?

(iii) Whether the cancellation of contract of the plaintiff by order dated 30.12.1982 is illegal and improper and whether the plaintiff is liable to receive the damages against the defendants for cancellation of contract ?

(iv) Whether the defendants are bailiff of the plaintiff and whether the plaintiff is liable to receive back the goods kept in control of bailiff ?

(v) Whether the suit of the plaintiff as framed is maintainable and whether it is time barred.

(vi) Whether the suit has been rightly decreed and whether the plaintiff is entitled for decretal amount with interest as awarded by the learned court below ?

13. The plaintiff to prove his case has examined

himself as PW 1 Baleshwar Singh and he has filed following documents in evidence to prove his claim :-

Exhibit 1: A letter dated 06.12.1981 written by plaintiff to defendant no. 5.

Exhibit 1/A- Letter dated 12.12.1981 written to the District Forest Officer, Hazaribagh by defendant no. 5.

Exhibit 1/C- A letter dated 27.01.1982 written by the plaintiff to defendant no. 5 for supply of remaining Sal Balla.

Exhibit 1/D- A letter dated 26.04.1982 of the plaintiff to defendant no. 5.

Exhibit 1/E- A letter dated 03.04.1982 of plaintiff to defendant no. 5.

Exhibit 1/F- Letter dated 04.04.1982 of the plaintiff to defendant no. 5.

Exhibit 1/G- A letter dated 25.02.1982 of defendant no. 5 to the plaintiff.

Exhibit 1/H- A letter dated 26.04.1982 of the plaintiff to the S.D.O.

Exhibit 1/I- A typed letter dated 26.04.1982 written by the plaintiff to the S.D.O.

Exhibit 1/J- A letter written by the plaintiff to extend the time.

Exhibit 1/K- A letter dated 15.10.1982 of defendant no. 5 to the plaintiff.

Exhibit 1/L- A letter dated 26.10.1982 of the plaintiff

to defendant no. 5.

Exhibit 1/M- A letter of the plaintiff to defendant no. 5.

Exhibit 1/N- A letter dated 11.03.1982 of the plaintiff to defendant no. 5.

Exhibit 1/O to 1/T- Letters by the plaintiff on different dates written to defendant no. 4.

Exhibit 1/S- A letter written by the Superintending Engineer to the plaintiff for contract.

Exhibit 1/U- A letter dated 23.09.1981 by defendant no. 4 to defendant no. 5 for supply of Sal Balla from the Forest Department.

Exhibit 1/V- A letter dated 23.09.1981 by defendant no. 4 to the Director, Transport Department to provide 125 Railway Wagons.

Exhibit 1/W- Letter dated 19.06.1982 by defendant no. 5 to defendant no. 4 (Arbitrator).

Exhibit 1/X- Letter dated 23.09.1981 by defendant no. 5 to the Forest Department.

Exhibit 1/Y- Letter dated 30.12.1982 and 15.02.1983 by defendant no. 5 to the plaintiff.

Exhibit 1/AA to 1/GG- Letter written in different dates by the plaintiff to defendant no. 5.

Exhibit 2- Letter dated 17.7.1982 of the plaintiff to defendant no. 5 through S.D.O., Mainpura.

Exhibit 2/A- Claim Book No. 2 of the plaintiff

Exhibit 3- Deed of Contract

Exhibit 4- Notice sent to the defendant from the Advocate of the plaintiff Shri Ganesh Prasad Singh.

Exhibit 5 and 5/A- Acknowledgment Receipt.

Exhibit 6 and 6/41- R.R.

Exhibit 7 and 7/A- List and several annexures given to the arbitrator, defendant no. 4 by the plaintiff.

Exhibit 8- Acknowledgment of the firm registration of the plaintiff.

14. On behalf of defendant two witnesses have been examined who are DW 1 Chandra Narayan Jha, the Executive Engineer and DW 2 Krishna Mohan Prasad, Accountant, besides that the following documents have been exhibited in evidence :

Ext. A to A/20:- letters of plaintiff and defendant written on several dates.

Ext. B series- MB book

Ext. C- Claim Book

Ext. D- agreement

Ext. E- Arbitration Proceeding,

Ext. F- Documents of plaintiff's tender

Ext. G- Plaintiffs claim dated 23.07.1984.

15. Point No. (i) - : Ext. A/1 is the letter of Superintending Engineer, defendant no. 4, written to the plaintiff on 15.09.1981 in its reference it is stated that your rate of tender has



been approved on the basis of tender dated 14.01.1981, 27.02.1981, 28.02.1981, 02.03.1981 and 03.09.1981 by the Chief Engineer and plaintiff has been instructed to execute the agreement. Ext. 7/B is the letter written by the Executive Engineer to the Superintending Engineer. In its page three the Executive Engineer has given opinion that the demand of enhanced amount of rate made by Ruby Construction was fully proper and justified and they should be given enhanced rate on the work done by them. Ext. A/16 is the letter written to the Executive Engineer by the Assistant Engineer in which it has been stated that within prescribed period water level of the river would not come to such a level that the work of Balla piling may be undertaken. In Ext. A/17 the Assistant Engineer has told to the Executive Engineer that for the reason of unavailability of any sanctioned map showing drain etc. it could not be handed over to the contractor. Contractor could not be supplied boulders till date of application dated 27.12.1982. Ext. A/9 is the letter dated 03.04.1982 written to the Executive Engineer by the plaintiff and Ext. A/10 is the letter written on 04.04.1982 by which it is clear that for the reason of being swamp on the site, work could not be completed. On perusal of Ext. A/19, it is noticed that as per the contract, the date of completion was 14.12.1981 but work could not even started till 14.12.1981 hence, the work period was enhanced. From the pleadings of both the parties it is clear that the work place was of 920 feet from Ranighat to Gulbi Ghat. Ext. A/6, A/7 and A/8 are the letters, dated 03.12.1981, 06.12.1981,



22.12.1981 and 27.12.1982, written by the plaintiff to the defendants in which request has been made to supply Sall Balla. On looking at Ext. A/10 it is clear that in this letter the defendant had requested the plaintiff on 04.04.1982 that old Sall Balla should be removed from there and place of work is swampy and the said letter was sent by the defendant after end of time period. Vide Ext. A/11, letter, dated 28.05.1982, plaintiff had requested to the defendant to extend the time period of work that was proposed by the Junior Engineer and Assistant Engineer, in which the plaintiff has clarified the reasons for extending time limit that he has not been supplied with Cross Section and departmental boulders. Ext. A/12 is the letter, dated 27.12.1982, written by the plaintiff to the defendant in which request has been made to mark the place of work by the department and to supply the departmental stone chips and boulders. Thus, I find that even from the defendants evidence it is clear that till 27.12.1982 site was not marked and departmental boulders were not supplied. By the material specifications details annexed with the deed of agreement, it is clear that the department had to supply departmental boulders to the plaintiff. Ext. A/19 is the letter, dated 04.09.1983, by the Executive Engineer written to defendant no. 4, in which he has clearly mentioned that work of Balla pilling and capping has already been completed. Thereafter, contractor had to complete the work of sand filling for which contractor was demanding two Cross Sections. In this exhibit it is further mentioned that in BOQ quantity of boulders and folder are



also involved even then, contractor had vide his letter gave an application to supply boulders by current rates regarding sub clause 1.09. Ext. A/18 is the letter written by the Junior Engineer by which it is clear that the Executive Engineer had not given written directions and he found swamp at the time of inspection of the site. Ext. A/16 is the letter written by the Assistant Engineer, in which Assistant Engineer has clearly stated that work had to be finished till 14.12.1982, but till that period the water level of the river could not come down to a level that pilling work may be done at all places. In this letter he has also stated that work was stalled waiting the decision of the Superintending Engineer for marking of site and decision could be taken only in the month of April. Ext. 1/W is the letter written to the Superintending Engineer by the Executive Engineer in which he has written about his intention in page 3 that stalling the work of Ruby Construction and cancelling their contract was neither valid nor it was in the interest of the department. He has stated at page 2 that for the supply of stone metal and stone chips etc. letter was written to the Railway Officers to supply Railway Wagons. PW 1 has stated in paragraph 10 of his evidence that he worked as per contract, it was for the department to mark the site that is not given to us till date. On 06.12.1982 a letter was written to the Executive Engineer after his return from Hazaribagh i.e. mentioned at Ext. 1. In this letter plaintiff has requested defendant no. 5 to mark the site from Gulbi Ghat to Rani Ghat. PW 1 has stated in paragraphs 11, 12, 13, 15, 16 and 17 that till



17.03.1982 total 430 Balla were given by the department, on 03.04.1982 inspection of work was done and before that work of capping in 350 feet had been completed and at that time Assistant Engineer and Junior Engineer were present at the place of site. In paragraph 30 PW 1 has stated that carbon copy of plaintiff letter dated 27.12.1982 i.e. mentioned as Ext. 1/M is also marked by the defendant as Exhibit. In paragraph 47 PW 1 has stated that he was always ready to work as per contract and he was not handed over the possession marking the site.

16. DW 1 in paragraphs 7, 8 and 9 has stated that contract work had to be finished within 90 days, work was not completed within time. In paragraph 10 he has stated that the work was not completed till 31.03.1982, then, agreement was cancelled on 30.12.1982. This witness has not stated that why this decision was not taken within period of nine months from 31.03.1982 to 30.12.1982 and in what manner the department had written to the Forest Department to supply the Sall Balla or written a letter to the Railway Department to supply Railway Wagons and in this period contractor had work at site in which capacity. Thus, it is manifest that the delay caused in completion of work was due to inaction of the defendant and not due to the plaintiff. Thus, this point is decided in favour of the respondent and against the appellants.

17. Point No. ii:- In the present case tenders were accepted six months after publication of tender notice and department had itself enhanced the rates of articles and due to



reason of enhanced rates in the market the plaintiff had given representation application dated 03.09.1981 on which acceptance was granted by the defendant no. 4 after consideration, this is verified by the plaintiff letter no. 1347 dated 05.09.1981 and in the light of above said letter of the defendant, plaintiff entered into an agreement and defendant also agreed over it. On the letter dated 03.09.1981 of the plaintiff, defendant no. 4 had put its consent and he promised to supply treated Sall Balla from the Forest Department and also wrote a letter to the Railway to provide 125 wagons of its adhoc basis and stated that 90 days as period of work shall be calculated after measuring work place and providing the boundary of the same to the plaintiff. Plaintiff had worked under the aforesaid terms and the details of work undertaken that is present in the measurement book and produced his bills before the department of new rates. Plaintiff had signed the agreement on 26.09.1981 and handed it over to the defendant no. 5 but he did not sign on it on that date and later after signing the agreement on 28.09.1981 entered the old rates in the agreement. In the above said circumstances, plaintiff is liable to receive the payment of his work i.e. present in the measurement book and that was handed over to the department on new rates.

18. On the other hand defendant has pleaded that payment of work done by the plaintiff has already been made according to the agreement and plaintiff is not liable to receive payment on the basis of new rates.



19. In Ext. 7/B the Executive Engineer himself had admitted that the demand of increased rate by the plaintiff is legal. On perusal of the agreement, Ext. D, it is found that plaintiff had put his signature over it on 26.09.1981 and the defendant Executive Engineer had signed over it on 28.09.1981. The explanation has not been given by the defendant that under what circumstances the defendant had signed two days later. Therefore, this fact could not be denied that the rates given by the defendant have been fixed without consent of the plaintiff and by the letter (Ext. 4) written by the defendant no. 4 it is found that Superintending Engineer had issued instructions to execute the contract in the light of applications of the plaintiff. PW 1 in paragraph 7 and 8 of his evidence has stated that he executed the contract in view of letters no. 1386, 1387 dated 23.09.1981 and 26.09.1981. He had put his signature over F (ii) on which the Executive Engineer had signed on 28.09.1981 and admitted the letter dated 15.09.1981 and 03.09.1981, they admitted the effective rates of the department. Thus, it is manifest that the department itself had fixed effective increased rates and thus, plaintiff is also liable to be paid for the work undertaken by it from claim book (Ext. 2/A). It is found that in this regard plaintiff had made claim of Rs. 2,28,309.03/-. This detail is given at Ext. 2, but this is not verified by the department. Therefore, it is found that the department shall made payment of the claims made by the plaintiff at increased rates in this item after verifying documents filed before the department and the amount

paid to the plaintiff previously should be adjusted in it and only difference accrued from them should be payable to the plaintiff. Accordingly, this point is decided in favour of the respondent and against the appellants.

20. Point No. (iii):- As per plaintiff, tender were published from the department and plaintiff filed his tender in the department on 14.01.1981 but the defendants have wrongly accepted the tender of Jawaharlal Singh that was contrary to the Rule, while the tender of the plaintiff was valid because it was the plaintiff whose rate in the tender were lowest and the Bids of Jawaharlal Singh were filed at the rates below to admissible rate of tender in which no work could have been undertaken, against which plaintiff had given his representation application and finally plaintiff's representation application and tender were admitted by the defendants. In view of letter, dated 15.09.1981, of the defendant no. 4, he entered into the agreement with the department and in view of letter of the plaintiff, defendant had written a letter to the District Forest officer, Hazaribagh for supply of 920 treated Sall Balla and wrote a letter to the competent authority of the Railway to provide Railway Wagons but Forest Department, Hazaribagh had not supplied the entire Balla within time and the time fixed for completion of work was ended till 14.12.1981 even the 920 feet alignment could not be marked and application was given for extension of time to complete the work that was proposed by Junior Engineer and Assistant Engineer and



defendant no. 5 had also approved the same. The time for completing the work was extended for three more months, the period in which the plaintiff had completed the work of piling 450 Balla, the work of remaining 470 Balla supplied later could be completed till 30.04.1982 and the date of completion of work on 31.03.1982 was passed away. Therefore, on 26.04.1982, a request was made again by the plaintiff to extend the time period. PCC work and fixing Sall Balla could not be taken up together because the soil was swampy. The proposal of plaintiff to extend the time was proposed by Junior Engineer and Assistant Engineer because the Engineer in charge had not provided Cross Section to the plaintiff and neither Sall Balla was supplied nor boulders were supplied but defendant no. 5 kept the same pending and passed no order on it. In the meantime stone metal of worth Rs. 2.79/- lacs was reached at Rajendra Nagar from Bakudih Railway Station that was received by the defendant no. 6 in the month of June, 1982. Plaintiff has further stated that due to flood no work could be undertaken till 10.2.1982 and after 10.12.1982 the plaintiff had again started the work and defendant no. 5 had inspected the work place on 15.12.1982 but even till that date Cross Section was not given to the plaintiff. Plaintiff has further stated that from even April 1982 plaintiff continuously started demanding boulders from the department, that could not be supplied and on 27.12.1982 plaintiff wrote to the defendant that entire quantity of boulders should be supplied otherwise he should be given permission to purchase it at



market rate. Plaintiff has further pleaded that the defendant no. 5 had by its letter dated 30.12.1982 cancelled the contract of the plaintiff, as a result, the plaintiff suffered loss of Rs. 7,20,524/-. On the other hand defendant has stated that as per contract, work has to be completed within 90 days. Plaintiff had not completed the work, hence, his contract was cancelled and the order dated 30.12.1982 is fully valid, legal and correct. According to the defendant, the time was the essence of the contract.

21. According to Section 55 (i) of the Indian Contract Act when time is the essence in a contract then, i.e. voidable at the option of the promisee. But Under Section 51 of the Contract Act there is provision that when there is reciprocal contract then, promisor shall not keep up his promise unless the opposite promisee is ready and interested to fulfill the promise. In Section 52 of the Contract Act it is mentioned that in the reciprocal contract the parties shall perform their promises as per transactions and if it is not clear in the contract then, it shall be fulfilled as per nature of the transaction. Here, as per contract, material specification is also annexed in its clause 1.09 in which it is clearly mentioned that department shall make supply of boulders. By the letter of Ext. A/12 and letters of Junior Engineer and Assistant Engineer this fact is verified that till 27.12.1982 plaintiff contractor was not supplied boulders and even Cross Section was not supplied to him and until boulder is supplied it could not be placed at the site of work. Therefore, in above said circumstances, it is found that calculation



of the period of 90 days shall be made only on performance of promise by the defendant. In above said facts and circumstances, it is found that till 27.12.1982 the defendants have not completed their promise and the cancellation of contract dated 30.12.1982 declare by the defendant no. 5 is wholly arbitrary, malafidely and illegal. Plaintiff is liable to receive compensation for loss suffered in this regard. Plaintiff in his claim book no. 2 made claim of Rs. 80,000/- for remaining work that is correct for compensation. Thus, this point is also decided in favour of the respondents and against the appellants.

22. Point No. (iv) :- PW 1 in paragraph 19 of his statement has stated that in same period the plaintiff had sent stone material of Rs. 2.79 lacs to the defendant no. 5 from Bakudih Railway Station that reached at Rajendra Nagar Railway Station and in the month of June, 1982 it was received through defendant no. 6 under the directions of defendant no. 4 and defendants have not supplied the said stone chips to the plaintiff and the contract of the plaintiff was rescinded malafidely and illegally by which the plaintiff suffered loss of Rs. 7,20,520/-. The defendants have stated that the defendants have not received the stone materials. In this regard PW 1 in paragraph 48 has stated that stone chips were sent by his R.R. to the Executive Engineer, Ganga Sone Flood Division, Digha. R.R. was sent to the Executive Engineer to discharge the goods. The goods were received by the Executive Engineer. The acknowledgement receipt was prepared by Krishan Mohan,



Divisional Accountant, Executive Engineer Office. R.R. No. 42 which is marked as Ext. 6 and 6/41. In paragraph 66 PW 1 has stated that the stone chips of Rs. 2,88,000/-, that was supplied by him, was brought to Patna by loading in wagons from Bakudih Railway Station, that was purchased to complete the tender work. In paragraph 67 PW 1 has stated that first it was booked on 30.05.1982 and he himself was the owner of that chips and was the sender.

23. DW 1 has stated in paragraph 11 of his statement that stone chips were not to be supplied by the Government but contractor had given application to the department for providing wagons and at the request of contractor, a letter was sent to the Railway Department and I was never given R.R. of Stone Chips. There is no outstanding pending of plaintiff as in my knowledge. Thus, upon the said evidence of this witnesses it is found that is clear that stone chips had to be purchased by the contractor and its supply was made by the contractor only. DW 2 has stated in paragraph 1 of his statement that Baleshwar Singh plaintiff gave him R.R., Ext. 6 series, and asked for discharge. The Executive Engineer was consignee of the Tailor. The time when R.R. was given to him the Executive Engineer was not present in the office. After affixing seal of office and his signature, office assistant had given it to Baleshwar Singh. In paragraph 2 this witness has stated that Baleshwar Singh was not given order of supply the stone chips. This witness becomes false by Ext. D because there it is



written that supply of stone chips has to be made by the contractor and defendant DW 1 has stated in his evidence that supply of stone chips has to be made only through contractor and only on his request letter was written to the Railway Department to provide wagons but these witnesses have admitted that who signed on it. R.R. has been sent to the court by the Railway therefore, this statement of this witness could not be accepted that Baleshwar Singh took away the R.R. In paragraph 5 this witness has stated that R.R. is recorded in the register and that register should be preset in the department. In paragraph 4 this witness has stated that the Executive Engineer had no power to receive any consignment and he sent the information of his signature over R.R. to the Executive Engineer. The Executive Engineer had not proved for approved it. Thus, upon statement of this witness it is clear that the Executive Engineer had knowledge of the signature over the R.R. and department became unable to bring this fact before the court at the time of hearing that the collection of register that is kept by the accountant or other officer or the chips that is kept by the store keeper what action was taken over that or what clarification was sought from them. From looking at the R.R. (Ext. 6 to 6/41) it is clear that its consigner Baleshwar Singh and consignee Executive Engineer defendant no. 5 and by his stamp and signature of his accountant stone chips were accepted. Ext. 1/W is the report that was sent to the Superintending Engineer by the Executive Engineer by making inquiry of the case in hand. In paragraph 4 of



this report it is mentioned that stone materials and stone chips were supplied to the department from Ruby Construction through Railway Wagons for which consignee was the erstwhile Executive Engineer, Ganga Sone Flood Protection Zone, Digha and on the R.R. on the receiving signature with stamp of erstwhile accountant for Executive Engineer, Digha is mentioned. This is the proof of the fact that erstwhile Executive Engineer, Digha had received the goods from Railway through signature of its accountant sent from different consignors but in the zonal records and registers who were the officers receiving supply of metal chips responsible, is not mentioned. The site account book of that period and site order book is also not present in the zonal office. In page 5 of its report erstwhile Executive Engineer has stated that Ruby Construction had demanded advance payment for supply of stone chips and stone metals but on looking at the records of zonal register and other records it is noticed that regarding this no advance payment was made to them and suddenly their contract was declared closed. From the above said facts and exhibits it is found that the defendant had admitted that stone materials were supplied by the contractor and that was received by the accountant of the defendant no. 5 and in this regard no payment was made to the contractor. By Ext. 1/W it is also clear that in the register of the department and accounts no entry regarding receipt and storage of stone material has been made in the file, register or accounts of the department. But upon above said facts it is also clear that the information of this fact was



available to the senior officers of the department and plaintiff shall not suffer the loss for the negligence of the department. It is also found that the defendant is the bailiff of the plaintiff and plaintiff is liable to receive back the goods kept in possession of bailiff. Plaintiff has pleaded in his plaint regarding this claim that he has purchased stone material of Rs. 2,79 lacs while in his evidence he stated that he has purchased stone materials of Rs. 2.88 lacs and in his claim book-2 (Ext. 2/A) has claimed for value of Rs. 1,21,677.71/- plus Rs. 1,67,260.50/-. Total Rs. 2,88,938.21/- for stone materials. And Rs. 45,000/- plus Rs. 10,000/- for fare of wagons.

24. In a judgment reported in **AIR 1958 Supreme Court 274** in the case of **Dhian Singh Sobha Singh and another v. Union of India** the Apex Court held that bailor is not only entitled to receive his moveable property or its cost but also the damages for wrongful restraint (para 53). In para 56 of the said judgment the Apex Court has opined that amount of compensation may be large or small. Therefore, in para 39, 40 and 50 and 52 of the said judgment it is held that bailor is entitled to receive damages from the bailee regarding his moveable property and in case of not returning moveable property, he is entitled to receive the value of the moveable property, whatever is the rate of same at the time of passing decree or judgment. The Apex Court propounded that where value of moveable property is flexible there bailor is entitled to receive maximum rate. The learned Sub-Judge has rightly relied upon the said decision and has held that the



plaintiff shall be entitled to receive the value of stone materials as is rate in the department on 20.01.2006 along with this regarding the payment of fare of goods paid regarding Ext. 6 to 6/41 the plaintiff is entitled to receive the payment made by him at the current rates. In this case the plaintiff has been granted payment of rate of stone materials at the rate effective on 20.01.2006 that is quite high to the expenses made by the plaintiff to purchase the stone materials and as the Railway fare has also been paid at the current rates, has also very much increased, that will fulfill the loss of the plaintiff and the plaintiffs are also to be entitled to receive interest at the rate of 8 % per annum on entire above said amount from the date of decree till the date of payment. Accordingly, this point is decided in favour of the respondents and against the appellants.

25. Point no. (v):- The suit filed by the plaintiff is maintainable and it is not barred by law of limitation. Accordingly, this point is decided in favour of the respondent and against the appellants.

26. Point No. (vi) :- After perusal of the impugned judgment and decree it reveals that the learned Sub-Judge has granted cost of Rs. 1,56,500/- on the ground that the plaintiff is contesting the suit since the year 1985, in my opinion, this is not proper and reasonable. The cost awarded is excessive. By way of cost, the amount of Rs. 25,000/- will be appropriate and reasonable and with this modification in the decree the other relief granted is hereby confirmed. The suit has rightly been decreed except the cost

amount which has been modified as stated above and the plaintiff is entitled to receive the decretal amount with the modification as stated above. The defendants/appellants are directed to pay the decretal amount with interest and cost of Rs. 25,000/- (twenty five thousand) to the plaintiff/respondent within a period of 90 days. Accordingly, this point is decided partly in favour of the appellant and partly in favour of the respondent.

27. In the result, this appeal is hereby dismissed on contest but without cost with modification in the cost as indicated above and the appellants and respondent shall bear their own cost.

(Jitendra Mohan Sharma, J)

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AFR/NAFR	AFR
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