

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**1. RSA No.4012 of 2013 (O&M)
Date of Decision: 18.10.2016**

**Punjab State Electricity Board and others
.....Appellants**

Vs

**Bassi Cold Store, Kharar
.....Respondent**

2. RSA No.3772 of 2013 (O&M)

**Bassi Cold Storage
.....Appellant**

Vs

**The Punjab State Electricity Board and others
.....Respondents**

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Pankaj Jain, Sr. Advocate with
Mr. Sachin Bhardwaj, Advocate
Mr. Gaurav Mittal, Advocate and
Mr. Radhey Mohan, Advocate
for the appellants in RSA No.4012 of 2013 and
for the respondents in RSA No.3772 of 2013.

Mr. Hemant Bassi, Advocate
for the respondent in RSA No.4012 of 2013 and
for the appellant in RSA No.3772 of 2013.

RAJ MOHAN SINGH, J.

[1]. Vide this common judgment RSA Nos.4012 and 3772 of 2013 are being disposed of as common issue is involved in both the appeals. For brevity, the facts are being culled out from

RSA No.4012 of 2013.

[2]. Defendants-Punjab State Electricity Board and others have preferred this Regular Second Appeal against judgment and decree dated 29.05.2013 passed by Additional District Judge, SAS Nagar, Mohali vide which appeal of the defendants was partly accepted and the suit of the plaintiff was partly decreed in the manner as decided by the trial Court.

[3]. Brief facts as gathered from the record are that plaintiff/respondent-Bassi Cold Storage filed a suit for declaration to the effect that defendants-Punjab State Electricity Board was liable to pay a sum of Rs.80 lacs as damages for the losses caused to the plaintiff on account of illegally disconnecting the power supply to plaintiff in the month of June/July 1979 along with interest @ 18% per annum from the date of filing of the claim petition before the Arbitrator till the date of realization. A sum of Rs.6 lacs per season (from January to December, every year) was also claimed towards damages for illegally disconnecting the power supply on 04.02.1980 till the actual date of realization. Declaration was also sought that the defendant-Board was liable to restore the electric supply to plaintiff which was illegally disconnected on 04.02.1980. Consequential relief was also sought, directing the defendant-

Board to pay the plaintiff the sums mentioned hereinabove with interest and to restore the electric supply as mentioned above.

[4]. Plaintiff was engaged in the business of running cold storage for storing and preserving seed and potatoes etc. under the name and style of Bassi Cold Storage at Kharar. An agreement was entered into between plaintiff and defendant-Board in the year 1969 for the supply of power. Agreement was executed and both the parties were bound by the abridged conditions of supply. Plaintiff was allotted Account No.C-2/307 under PSEB Sub Division. Plaintiff became consumer of the defendant-Board. According to condition No.29 of abridged conditions of supply all disputes of supply of power were to be settled by two Arbitrators/Umpires. Condition No.20 was to the effect that the defendant-Board was liable to pay damages, if the disconnection of supply to consumer found to be illegal. Abridged conditions of supply were on account of bilateral agreement executed between the parties on agreement form Ex.PW-11/2.

[5]. After few years the plaintiff started getting inflated and excessive electric energy bills as against the actual energy consumption. The bills were paid under protest over the years from 1973 to 1977. The over payment made to the defendant-

Board was to the tune of Rs.1,40,000/-. In the year 1977 plaintiff claimed refund of over payment. The functionaries of the defendant-Board demanded a share out of refund amount which was refused by the plaintiff. This led to annoyance. The officials of the defendant-Board threatened the plaintiff to disconnect the power supply to plaintiff illegally with a view to cause losses to the plaintiff.

[6]. On 18.10.1977, plaintiff filed a suit for permanent injunction in civil Court at Kharar and obtained *ad interim* injunction against the defendant-Board, restraining them from disconnecting or interfering in the supply of electricity to the plaintiff. In the abovesaid suit Defendant-Board filed an application under Section 34 of the Arbitration Act for stay of the suit on the ground that there was an arbitration agreement between the parties for settlement of disputes and also moved application for vacation of *ad interim* injunction order. The suit was transferred to the Court of Senior Sub-Judge, Ropar. The proceedings under Section 34 of the Arbitration Act were stayed vide order dated 02.12.1977, but the Court did not vacate the order of *ad interim* injunction dated 18.10.1977. The order remained in force. Despite the order of injunction defendant-Board disconnected the power supply of the plaintiff in the intervening night of 3/4th December 1977 in an illegal

manner thereby causing damage to the stocks of the plaintiff. Plaintiff claimed damages. The dispute was referred to Arbitrator and an Umpire was appointed.

[7]. The defendant-Board got conducted an inquiry on 04.04.1978 by DIG Vigilance and Security PSEB. In the said inquiry, the functionaries of defendant-Board were found guilty of vindictively and illegally disconnecting the power supply of the plaintiff. The correctness of the report was admitted by learned counsel for the defendant-Board. The report was supplied to the Arbitrators. The contents of the report were admitted by the defendant-Board before the Arbitrators. After hearing the case, the Umpire decided that the disconnection of the power supply was on the account of illegal exercise by the defendant-Board. The Arbitrator awarded damages with interest. The award was filed in the Court of Senior Sub-Judge, Patiala and was made a rule of the Court on 12.06.1984. The appeal was filed by the defendant Board before this Court, which was dismissed on 14.01.1986. Thereafter defendant-Board filed SLP which was also dismissed by the Hon'ble Apex Court on 05.03.1986.

[8]. When the dispute regarding 1977 illegal disconnection of power supply to plaintiff was pending before the Court, defendant-Board filed another application for vacation of stay on

04.08.1978. That application was dismissed by the Court on 27.01.1979, however plaintiff was directed to furnish security to the tune of Rs.2 lacs with one surety in the same amount upto 12.02.1979 for the order of injunction dated 18.10.1977 (Ex.PW-11/3). On 30.01.1979, plaintiff furnished the security bond as directed by the trial Court. When the trial Court did not vacate the *ad interim* injunction, defendant-Board filed a revision petition in the High Court which remained pending till 24.07.1979. On 17.06.1979 defendant-Board disconnected the power supply to plaintiff for two days thereby causing huge damage to the potatoes lying in the cold store. The officials of the defendant-Board under the instructions of SDO did not entertain the complaint of the plaintiff and refused to register the complaint. Plaintiff send telegram to the defendant-Board, but the same also remained unattended. However, thereafter the SDO in the night of 17.06.1979 under the pretext of restoring the electric supply to plaintiff, illegally removed three defective meters installed in the premises of the plaintiff without giving any receipt in order to destroy the evidence regarding excessive billing and also to fabricate false evidence. In the morning of 18.06.1979, plaintiff also sent telegram to the defendant-Board, but to no avail. The power supply of the plaintiff was restored by the defendant-Board, but the threats of intermittent stoppage of

electricity loomed large over the head of the plaintiff.

[9]. On 24.07.1979, Civil Revision No.524 of 1979 filed by the defendant-Board against the order dated 27.01.1979 was disposed of with a direction that the order of injunction would remain continue, if the plaintiff furnishes bank guarantee/surety of Rs.62,000/- in favour of the defendant-Board upto 25.08.1979. The defendant-Board was restrained by this Court from disconnecting the power supply to plaintiff till 25.08.1979. Plaintiff furnished the requisite surety for a sum of Rs.62,000/-. Threat of disconnection persisted at the instance of the defendant-Board. The plaintiff had to file another suit in Patiala and obtained yet another *ad interim* injunction on 26.07.1979. The defendant-Board was restrained from disconnecting the power supply to the plaintiff. Order of injunction was served upon XEN (Operations) Mohali and SDO, Kharar by the plaintiff on 26.07.1979 itself. Counsel for the defendant-Board was also informed.

[10]. The factum of aforesaid information was an admitted fact, which was not denied by the defendant-Board in their written statement. The beneficiary of the injunction was supposed to convey the Authorities well in time and was not supposed to let it remain with him in view of impending threat of

disconnection. Copy of injunction order dated 26.07.1979 was also sent through registered post to the defendant-Board. Even at that time order of injunction dated 18.10.1977 passed by the Court was also effective. Despite the aforesaid, the defendant-Board disconnected the power supply to the plaintiff on 27.07.1979. The registered post was acknowledged by SDO as well as by SDC on 27.07.1979 itself as both signed the receipt at 12.30 p.m. on 27.07.1979 (Ex.PW-11/36). The

[11]. The disconnection was done despite the orders dated 27.01.1979, 24.07.1979, 26.07.1979 and 18.10.1977 passed by the different Courts. The complaint of the plaintiff was not registered at the instance of SDO. Telegram sent to XEN remained futile. Necessary correspondence in terms of Exhibits PW-11/26, PW-11/27, PW-11/28 and PW-11/29 were not in dispute. On 27.07.1979, plaintiff and its Manager contacted the Police Station, Kharar and gave complaint (Ex.PW-10/30) to Head Constable No.80 Sangat Singh, who inquired about the reported disconnection of electric supply and non-registration of complaint. Two phases of the connection were restored in the presence of Head Constable, but 3rd phase was not restored which ultimately resulted in non-functioning of motors and machineries of the plaintiff. The report of the Head Constable was fully proved as PW-11/31 which was duly

endorsed by PW-12 Narinder Pal as PW-12/A. Again a telegram was sent in respect of connection of two phases and not the 3rd phase. Complaints were received, but of no avail. Telegram was also sent to the trial Court at Patiala. On 27.07.1979, in the evening, even supply of two phases was disconnected. Complaint was also refused to be entertained by the defendant-Board. Heavy stocks were present in the cold storage.

[12]. Plaintiff along with his Manager met Chief Engineer and gave him the original bills and other photocopies of the bill for the month of June and July 1972 for comparison and also the copies of order of injunction passed by the Courts from time to time. Request was made to restore the electricity supply and to fix reasonable amount per month as current charges till final adjudication by the Courts. On 31.07.1979, the Chief Engineer imposed condition that the plaintiff should sign agreement/undertaking drafted by the defendant-Board and should not pursue the proceedings in the Courts. Assurance was made by the Chief Engineer to make good the damages, if the same were due to disconnection by the defendant-Board. Plaintiff signed the agreement (Ex.PW6/B) on 31.07.1979 as there was no other option available to him. On 27.08.1979 the deed was signed by the plaintiff and the defendant-Board

whereby second charge created in favour of the defendant-Board came to be in existence. Charge was created in the form of surety to secure a sum of Rs.2,55,000/- which included an amount of Rs.62,000/- as directed by this Court to continue with the injunction order dated 27.01.1979. The charge was created in favour of defendant only in case the legal adjudication goes against the plaintiff. Since the legal adjudication by Arbitrator ultimately culminated in award which was upheld by the Hon'ble Apex Court thereby finding fault with the defendant-Board, therefore, nothing was attributable to the plaintiff, the charge stood extinguished on 05.03.1986 when SLP was dismissed by the Hon'ble Apex Court vide Ex.PW11/8.

[13]. Electric supply was restored on the aforesaid undertaking Ex.PW-6/B on 01.08.1979. On opening of the doors of cold storage, the stocks were found damaged because of illegal disconnection of electric supply. Plaintiff and its Manager met the Chief Engineer on 02.08.1979 in order to apprise him about the damages and showed the stock register, reflecting damage to 29,934 bags of potatoes. The Chief Engineer assured the plaintiff that he will send his representative to assess the damage and to pay for the same to compensate the plaintiff and also asked the plaintiff to fulfill his obligation of undertaking i.e. to create charge and to continue to make

payment of Rs.2,500/- per month as current charges to the defendant-Board. On 16.08.1979, plaintiff withdrew the suit at Patiala in view of undertaking. The contempt proceedings also came to be stopped. So as to continue the order of injunction dated 18.10.1977 (Ex.PW-11/3) and in accordance with the agreement dated 31.07.1979 (Ex.PW6/B), the plaintiff paid Rs.2,500/- per month as current charges to the defendant-Board for the subsequent months on or after 03.10.1979 upto 03.12.1979. The defendant-Board acting on the undertaking was accepting Rs.2500/- towards current charges being paid by the plaintiff. The defendant-Board did not send anyone to assess the damages caused to the plaintiff despite the request of the plaintiff. The rotten potatoes emanated foul smell and acquired dangerous proportions.

[14]. The letter dated 09.11.1979 (Ex.P-4) and a news item dated 24.11.1979 (Ex.P-2) were the instances of showing concern by the Municipal Corporation. On 15.12.1979 the plaintiff issued a registered notice to the defendant-Board claiming Rs.80 lacs as damages plus interest as per details contained in the accompanied document. The notice was acknowledged by the defendant-Board, but no reply was given. On 04.02.1980, the defendant-Board again illegally disconnected the power supply and refused to entertain the

complaint at the instance of SDO. Plaintiff again sent telegram on 05.02.1980 (Ex.PW-11/66). Plaintiff also got the demand draft for Rs.2500/- encashed from the Bank and retained the original forwarding letter Ex.PW-11/69 and the Envelope Ex.PW-11/87. Registered notice was issued by the plaintiff to the defendant-Board on 05.02.1980 (Ex.PW11/70) informing the return of demand draft due to illegal disconnection and also holding the defendant-Board liable for consequences through postal receipts (Ex.PW-11/71 to Ex.PW-11/76).

[15]. On 01.10.1980, the defendant-Board filed civil suit No.313 (Ex.PW-6/A) for foreclosure of the property of the plaintiff. However, the defendant-Board consented for the suit to be stayed under Section 34 of the Arbitration Act in view of arbitration proceedings (Ex.PW-11/84). On 12.11.1980, the defendant-Board turned the request of the plaintiff to refer the claims of damages arising out of illegal disconnection of power in the year 1979 amounting to Rs.80 lacs as well as for the damages arising out of illegal disconnection on 04.02.1980. On 04.12.1980, the plaintiff appointed sole Arbitrator under the Arbitration Act. Plaintiff also filed claim petition on 31.12.1980 before the Arbitrator Ex.PW8/A. Defendant-Board challenged the appointment of Arbitrator and got the stay. Court at Patiala dismissed the petition of defendant-Board on 03.04.1986.

Defendant-Board remained unsuccessful in Civil Revision No.1791 of 1986 which was dismissed on 22.08.1986. Special Leave Petition of the defendant-Board was also dismissed on 16.03.1994. The Hon'ble Apex Court directed the plaintiff to have redressal of his grievances in the civil Court of competent jurisdiction. Thereafter the original claim filed before the Arbitrator was returned in original to the plaintiff. In the aforesaid background, a civil suit came to be filed at the instance of plaintiff on 21.11.1995.

[16]. The suit was contested by the defendant-Board and its functionaries.

[17]. On 07.03.2007 trial Court dismissed the suit on the ground that the orders dated 24.07.1979 passed by this Court though referred, but was not exhibited and was found to be suspicious. Plaintiff filed appeal before the lower Appellate Court. An application for placing certified copy of order dated 24.07.1979 passed by this Court by way of additional evidence under Order 41 Rule 27 CPC was also moved. Defendant-Board filed an application before the Appellate Court to treat the suit as a suit for recovery and *ad valorem* court fee be affixed on the plaint as well as the Memorandum of Appeal. On 29.08.2007, the lower Appellate Court allowed the application of the

defendant-Board and directed the plaintiff to pay *ad valorem* court fee on the plaint vide order dated 14.11.2009. The plaintiff paid the requisite court fee on the plaint as well as in the appeal on 17.12.2009. However, the lower Appellate Court directed the plaintiff to file the same before the trial Court. On 19.12.2009 plaintiff affixed the requisite court fee of Rs.80,425/- before the trial Court. The requisite court fee was also affixed on Memorandum of Appeal as directed by the Court. In view of aforesaid, the objections regarding maintainability of the suit could not survive and the suit was treated to be a suit for recovery and for that *ad valorem* court fee was affixed.

[18]. The lower Appellate Court vide order dated 17.03.2011 set aside the judgment and decree of the trial Court dated 07.03.2007 and remanded the case back to the trial Court for afresh decision. Pursuant to remand, the trial Court took the order dated 24.07.1979 passed by this Court on record as Ex.PX. No evidence was led by the defendant in rebuttal. Ultimately vide judgment and decree dated 31.10.2012, trial Court decreed the suit of the plaintiff and granted Rs.80 lacs as damages for illegal disconnection. Rs.70,34,390/- towards damages to 29934 bags of potatoes, Rs.3,59,208/- towards loss of rent/charges and Rs.6,06,402/- for other claims was granted. Trial Court ordered restoration of electricity connection. An

amount of Rs.6 lacs per annum from 04.02.1980 for loss of rent /charges till restoration of electricity was also ordered along with interest @ 18% per annum.

[19]. Defendant-Board filed an appeal before the lower Appellate Court. The lower Appellate Court partly accepted the appeal vide judgment and decree dated 29.05.2013 that is how two appeals came to be filed before this Court, which are being decided vide this common judgment.

[20]. Appellants laid challenge to the impugned judgments and decrees on the basis of following substantial questions of law as framed in para No.6 of the grounds of appeal:-

- i) Whether the learned Trial Court could have travelled beyond the terms of the order of remand especially when the order of remand specifically prescribed the issue for which the case had been remanded?*
- ii) Whether the suit which is barred on the principles of limitation can be allowed?*
- iii) Whether filing of a fresh claim before the competent court instead of presentation of the returned claim amounts to institution of a fresh suit?*
- iv) Whether the delay in institution of the suit beyond the limitation prescribed can be condoned?*
- v) Whether damages based upon no evidence are bad and liable to be set aside?*

- vi) *Whether the liability of damages could be fastened even though it is specifically noticed that there had been no wrong committed on the part of the appellants in making a disconnection?*
- vii) *Whether performance of statutory function would invite payment of compensation?*
- viii) *Whether the order based upon misreading of facts is nonest and liable to be set aside?*
- ix) *Whether compensation in the form of damages without any proof is imaginary and liable to be set aside?*
- x) *Whether the claim was not maintainable and hence liable to be set aside?*
- xi) *Whether the directions violating the discharge of corresponding liability are bad and liable to be set aside?"*

[21]. Appellants have also framed additional substantial question of law in the following manner:-

"Whether under the facts and circumstances of the case, once the prayer for claiming 'primary relief' is declined by recording findings based on facts and evidence, is it unreasonable to grant 'consequential damages' bereft of 'material facts' containing 'material particulars', hence even against doctrine of restitution?"

[22]. I have heard learned counsel for the the parties and have gone through the record.

[23]. Learned Senior counsel for the appellants contended

that claim regarding damages of Rs.80 lacs by the plaintiff as granted by the trial Court was set aside by the lower Appellate Court on examination of facts and evidence on record. Once the primary prayer and claim of Rs.80 lacs towards loss of reimbursement as occurred due to disconnection of electricity by the defendant-Board was reversed by the first Appellate Court, therefore, under Section 100 CPC there was no occasion for the lower Appellate Court to grant consequential relief/damages in the form of compensation which was totally unreasonable being disproportionate to the payment of Rs.2500/- per month which was being made by the plaintiff to the defendant-Board.

[24]. Learned Senior counsel for the appellants further contended that the legal position as regards claims and allowances of compensation and restitution has been considered by the Court in **Citibank N.A. vs. Hiten P. Dalal and others, (2016) 1 Supreme Court Cases 411.** The lower Appellate Court has failed to appreciate the material on record while awarding compensation to the tune of Rs.6 lac per season on account of disconnection of electric supply from 04.02.1980 till restoration of the power supply by the defendant-Board along with interest @ 8% per annum. According to learned Senior counsel the aforesaid amount of Rs.6 lacs per season on

account of disconnection was not maintainable for the simple reason that the plaintiff had miserably failed to prove that any stock was ever existed in the cold storage and the findings recorded by the Courts below were on the basis of no evidence. The plaintiff had made its base to claim the aforesaid amount of Rs.6 lacs on the basis of destruction of stocks which allegedly took place in the premises of the plaintiff. In fact no such stock existed and a finding was recorded by the lower Appellate Court for want of evidence to that extent.

[25]. Learned Senior counsel for the appellants submitted that the plaintiff has tried to claim the amount of Rs.6 lacs towards damages per season per year till date and the relief was totally non-substantiated in the absence of existence of any stock. The claim of the plaintiff was false and there was no occasion to grant damages on false premise. Warehouse was never occupied with the stocks. Learned Senior counsel highlighted that the defendant-Board was an entity of the State and was rendering services to the whole State by providing electricity to various industrial units and household and was under pervasive control and management of the State Government. Since the damages could not be proved by the plaintiff by quantification thereof, once the primary prayer of Rs.80 lacs was declined by the lower Appellate Court, there was

no occasion for the plaintiff to claim recovery towards consequential damages from the defendant-Board.

[26]. By relying upon **Citibank N.A.**'s case (supra), learned Senior counsel for the appellants pressed for acceptance of the appeal. Learned Senior counsel also emphasized upon the fact that the Court has vast powers to ensure equity and fair play for both the parties and adopt realistic and verifiable approach instead of resorting to hypothetical and presumptive approach. The Court must keep in mind not only the loss suffered by the party entitled to restitution, but also the gain, if any, made by the other party, who was obliged to make restitution. No unmerited injustice should be caused to any of the parties. Learned Senior counsel prayed for acceptance of the appeal filed by the defendant-Board and dismissal of the appeal filed by the plaintiff.

[27]. On the other hand, learned counsel for the plaintiff-respondent submitted that the lower Appellate Court has gravely erred in setting aside the damage to the tune of Rs.80 lacs. The details of damage to the tune of Rs.80 lacs were given in the plaint (Ex.PW-11/91) as well. The details have gone unrebutted by the defendant-Board. The stock register Ex.PW-10/E was suggestive of the fact that total 29934 bags of potatoes were

present in the cold storage. The testimony of the plaintiff (PW-11) had gone uncontroverted and unrebutted. The trial Court gave reasoned order after appreciating the evidence and admitted the loss suffered by the plaintiff. No reasons were given by the lower Appellate Court as to how the findings recorded by the trial Court were perverse in nature. The lower Appellate Court has substituted its opinion with the findings recorded by the trial Court without any lawful justification.

[28]. The stock register Ex.PW-10/E was duly corroborated by the evidence of the PW-10, PW-15 and PW-16. Aforesaid witnesses duly proved their stocks in cold storage which were admitted and they had received the compensation thereof from the plaintiff. It was not necessary, nor the same was possible to produce all the persons who had stored their potatoes in the cold storage and who had received compensation from the plaintiff. The findings of the lower Appellate Court that the plaintiff had failed to prove any stock was perverse in nature and was against the record. The defendant appellant admitted in para No.13 of the grounds of appeal before the lower Appellate Court that some stocks were proved to be lying in the cold storage. Testimonies of PW-10 and PW-11 were sufficient to prove existence of 29934 bags in the cold storage. No suggestion was put to the witnesses to challenge the storage

and damage to the stocks or the register being allegedly forged. Ex.P-4 letter issued by the Municipal Corporation and the news item Ex.P-1, Ex.P-2, PW-7/A, PW-7/B and PW-11/80 were the corroborative pieces of evidences to show damage caused to the stocks of potatoes due to illegal disconnection.

[29]. Learned counsel for the respondent further emphasized that the execution of agreement Ex.PW-6/B was also a piece of evidence to show that on account of damage, the plaintiff was pursuing his case. The deliberations and the discussions between the plaintiff and the Chief Engineer Mr. H.L. Sharma proceeded the execution of the agreement/undertaking Ex.PW-6/B. The plaintiff was claiming damages on account of illegal disconnection throughout, the complaint to the Police on 27.07.1979 and the report Ex.PW-11/31 and PW-12/A submitted by the Head Constable Sangat Singh was also a piece of evidence that on 27.07.1979 the cold storage was full of bags of potatoes.

[30]. Learned counsel for the respondent also pointed out that in the written statement filed by the defendant-Board, there was no specific denial to paragraph Nos.40-45 of the plaint. There was recital that there were huge stocks of potatoes lying in the cold storage and in those circumstances, plaintiff was

forced to enter into agreement on the assurance of the defendant-Board that the electricity supply would be restored and suitable compensation would be paid. There was no denial to para Nos.51-56 in the written statement of the defendant-Board. The recital was that there were huge stocks of potatoes lying in cold storage which got damaged. The only witnesses of the defendant-Board appeared i.e. DW-1, who did not deny the damages to the stocks of the plaintiff and the plaintiff while appearing as PW-11 and its Manager while appearing as PW-10 had specifically deposed in respect of damages caused to the plaintiff. Their testimonies have gone unrebutted. Both the Courts have concurrently held that there was a damage caused to the plaintiff on account of illegal disconnection in the month of June/July 1979. The Appellate Court even held that since the plaintiff was consuming substantial amount of electricity vide the bills in question and, therefore, some business might have been carried out by the plaintiff, of course leading to profit. By way of aforesaid reasoning, learned counsel further asserted that there was a certain damage caused to the plaintiff and the amount towards damages to the tune of Rs.80 lacs was justified in law.

[31]. Learned counsel for the respondent further submitted that the findings recorded by the lower Appellate Court in respect of stock register Ex.PW-10/E were not based on true

interpretation of evidence. Firstly there was no plea in the written statement by the defendant-Board that the stocks register was forged. The alleged fraud and fabrication was to be pleaded and proved by the defendant-Board like a criminal case. No suggestion was given to the PWs' in their cross-examination in respect of alleged fraud and fabrication. Even no challenge was made in the grounds of appeal before the lower Appellate Court. The defendants' witness did not state anything in examination-in-Chief, nor any evidence was led by the defendants in respect thereof. No issue was framed in respect of stock register being fake and fabricated. The finding recorded by the lower Appellate Court was beyond the pleadings and beyond the issue which was not only perverse, but was unwarranted in law. PW-10 and PW-11 categorically submitted with regard to stock register, indicating that 29934 bags of potatoes were stored in the cold storage. The Chief Engineer of the defendant-Board on a visit by PW-10 and PW-11 on 02.08.1979 was apprised of the pending stock in the cold storage. No question was put to both the witnesses in their testimonies and the same went unrebutted.

[32]. Learned counsel for the respondent further submitted that the findings recorded by the lower Appellate Court in respect of stock register being not proved by producing the

author was totally wrong as the Manager while appearing as PW-10 clearly proved the stock register Ex.PW-10/E. The stock register was maintained in regular course of business. The handwriting of Mohinder Singh was duly identified by PW-10 as he used to see him writing daily in due course of business. Since, Mohinder Singh was not traceable and he had already left the job after disconnection, therefore, plaintiff could not produce him. There was no challenge made to this effect in the cross-examination of PW-10, nor the authenticity of the stock register was challenged by the defendant-appellant in the cross-examination of the plaintiff witnesses. The observation of the lower Appellate Court based on interpretation of Section 34 of the Evidence Act was illegal inasmuch as that PW-10 has categorically stated about the stock register being maintained in regular course of business under his supervision by Mohinder Singh. The stock register should have been considered as genuine piece of evidence by the lower Appellate Court. Stock register Ex.PW-10/E was properly tendered in evidence and, therefore, on the strength of **Gian Singh and brothers and another vs. Rattan Lal @ Rattan Singh, 2013(1) RCR (Civil) 961** and **P.C. Purushothama Reddiar vs. S. Perumal, 1972 AIR SC 608**, learned counsel contended that the stock register was required to be read in evidence.

[33]. Learned counsel for the respondent further submitted that non-production of receipt and statement of accounts was on account of theft having taken place in the cold storage for which complaint dated 16.09.1998 (Ex.PW-13/B) was lodged in the Police Station. The complaint was duly proved by PW-13 and, therefore, the observations made by the lower Appellate Court was totally unwarranted. The challenge made by the defendant-appellant to the claim of damages of Rs.6 lacs per season w.e.f. 04.02.1980 upto the date of restoration of power supply, on illegal premise inasmuch that the contention of the defendants only that since the lower Appellate Court has reversed the claim of the plaintiff for damages of Rs.80 lacs so that the other damages of like nature i.e. Rs.6 lac per season should also be disallowed. According to learned counsel, the contention was totally bereft of merits as both the Courts have concurrently found that with regard to the said damages, the findings cannot be challenged by the defendant.

[34]. On the strength of **Damodar Lal vs. Sohan Devi and others, 2016 AIR (SC) 262**, learned counsel for the respondent emphasized that the challenge made by the appellant was totally unfounded. Both the Courts have found that the power supply was disconnected by the defendant-Board illegally on 04.02.1980. The said disconnection was not only in violation of

the Court orders, but was also in violation of agreement dated 31.07.1979 (Ex.PW-6/B). The plaintiff never breached the said agreement, but complied with obligation of paying Rs.2500/- per month regularly. Apparently the power supply was not restored by the defendant-Board despite the concurrent findings of fact recorded by the Courts below, therefore, it is a case of continued sufferance by the plaintiff-respondent. The damages @ 6 lacs per season were allowed by the Courts below towards loss of profit which the plaintiff continued to suffer on account of illegal disconnection of electricity supply by the defendant-Board, despite the fact that the plaintiff-respondent was paying an amount of Rs.2500/- per month regularly. The defendants cannot take advantage of its own wrong.

[35]. Learned counsel for the respondent further submitted that the contention of the appellants that with the reversal of claim towards damages of Rs.80 lacs, the claim regarding damages @ 6 lac per season should also be reversed is fallacious inasmuch as that the reversal of claim towards Rs.80 lacs was wrong and perverse in view of facts proved on record. Secondly, the said claim was independently awarded because of failure on the part of the defendant-Board re-connecting the power supply which was disconnected illegally. The amount of damages @ 6 lac per season was a meagre amount. The said

amount was only provided during the period in the year 1980 and 1990 when the claim was filed. Post 1990 the profit margin was increased drastically and a sum of Rs.6 lacs was on the lower side. Plaintiff had made a deposition that the rent per bag was enhanced to Rs.60-80 per bag for the said period. This submission had gone unrebutted. The higher amount @24 lacs per season with 10% increase every year should have been granted by the Courts below, however the defendant did not challenge the said quantum either before the lower Appellate Court.

[36]. At last, learned counsel for the respondent vehemently submitted that interest was wrongly reduced from 18% to 8% by the lower Appellate Court as there was no challenge to the interest rate made by the defendants in the written statement, nor any challenge to interest rate was made in the cross-examination of the plaintiff's witnesses. The rate of interest could not be reduced in the light of observations made in **State Bank of India vs. Kaushal Plastics, 2000 (85) DLT 558**. No justifiable reasons were recorded by the lower Appellate Court in reducing the rate of interest, nor the interest rate was ever challenged in the grounds of appeal. The reduction of interest rate was totally on illegal knot and the judgment and decree passed by the trial Court was not required to be modified.

[37]. Having considered the submissions made by both the sides, I found that the trial Court and the lower Appellate Court both have rightly decided the claim in respect of amount of Rs.6 lac per season from January to December every year from 04.02.1980 till the date on which the defendants restored the electricity supply to plaintiff-cold storage as damages for the losses caused to the plaintiff for illegal disconnection of power supply w.e.f. 04.02.1980 together with an interest. The electricity supply was also rightly ordered to be restored. The lower Appellate Court modified the judgment and decree of the trial Court to the extent of declining the claim in respect of Rs.80 lacs and the award of interest @ 18% per annum.

[38]. The substantial questions of law as formulated by learned counsel for the appellants, do not arise at all. In view of facts apparent on the record, question nos.(i), (ii) and (iv) do not arise as the same are related to patent facts on record. The cumulative discussion of other questions would be that misconduct on the part of the defendants was writ large on the face of the record, when the power supply was disconnected illegally on 04.02.1980 despite the interim protection granted by the Court and in violation of agreement dated 31.07.1979. The electricity connection was not restored even the decree having been passed by the trial Court as well as the lower Appellate

Court. The record reveals that there is no order of stay granted by this Court. It is very surprisingly noticed that the defendant-appellants have virtually rendered the business of the plaintiff to be useless in the absence of electricity which was disconnected way back in the year 1980. Even prior thereto and still the appellants have been litigating the matter without adhering to the judgments and decrees passed by the Courts below. Damages @ 6 lac per season were allowed by the Courts below toward loss of profit which the plaintiff continued to incur on account of forced disconnection of power supply by the defendant-Board despite the fact that plaintiff continued to make payment of Rs.2500/- per month as per agreement.

[39]. In my considered opinion, the award of Rs.6 lacs per season w.e.f. 04.02.1980 till the date of restoration of power supply would be just and proper keeping in view the misconduct of the appellants proved on record. The arguments of learned Senior counsel for the appellants to the effect that with the reversal of main relief of Rs.80 lacs, the allied relief like grant of Rs.6 lacs per season should have been disallowed appears to be fallacious on the face of it.

[40]. Against the reversal of Rs.80 lacs the connecting appeal i.e. RSA No.3772 of 2013 was preferred by the plaintiff

and the same is being disposed of along with the present appeal. The award of Rs.6 lacs per season was an independent award based on failure of the defendants to reconnect the power supply which was illegally disconnected and, therefore, loss of profit to the plaintiff was a recurring cause of action. The award of Rs.6 lacs per season was also on the meagre side, but in the absence of any pleadings and material on record, the same cannot be enhanced, even though the plea has come on record that during the period 1980 to 1990s, when the claim was filed, the profit margin per season was drastically increased in the year 1990 and a sum of Rs.6 lac per season was totally on the lower side. Be that as it may, since both the Courts have found this figure to be a factual figure, therefore, in my considered opinion, the findings recorded by the Courts below *qua* the damages @ 6 lacs per season w.e.f. 04.02.1980 upto the date of restoration of the power supply would require no interference at the hands of this Court. Consequently the substantial questions of law as framed in RSA No.4012 of 2013 by the appellants on that premise stand answered in negative.

[41]. So far as the appeal preferred by plaintiff i.e. RSA No.3772 of 2013 is concerned, it can be noticed from the record that based on inquiry conducted by the DIG Vigilance and Security PSEB found the misconduct on the part of the

functionaries of the defendant-Board to be proved. The contents, facts and findings of the inquiry report were accepted by the defendant-Board and even by the Arbitrator and award of damages was passed on 15.09.1982 along with interest @ 9%. The award was even made rule of the Court under Arbitration Act 1940 vide order dated 12.06.1984 and Rs.1,40,000/- was awarded as arrears having been charged by way of excessive billing from the plaintiff and damage to the tune of Rs.24,84,011.35 was assessed to be the actual damage done to the stocks in the cold storage. The amount towards damage was ordered to be awarded with interest.

[42]. The defendants remained unsuccessful in appeal before the lower Appellate Court, before this Court and even before the Hon'ble Apex Court. The issue with regard to excessive billing and pursuant to such action, filing of suit by the plaintiff and thereafter the conduct of the defendants led to disconnection of the power supply to plaintiff. All the pleadings and issues were so intermittently mixed up that over all conduct of the defendants was to be appreciated in the lights of different proceedings initiated and culminated during intervening period and ultimately after the permission to file civil suit, the proceedings culminated in decree by the trial Court as well the lower Appellate Court. Even though the award of Arbitrator was

made rule of the Court on 12.06.1984 and quantified damages to the tune of Rs.24,84,011.35 was assessed towards damages of stocks of the plaintiff along with interest. However the subsequent act, ultimately the decision of the Hon'ble Apex Court dated 16.03.1994 whereby plaintiff was directed to seek relief before the civil Court and thereafter withdrawal of claim petition from the Arbitrator and filing of the same before the civil Court would definitely cast obligation on the Court to assess the real amount of damage suffered by the plaintiff.

[43]. The lower Appellate Court has reversed the findings of the trial Court primarily on the ground that the scribe of stock register Ex.PW-10/E was not examined. It can be noticed that details of damages to the tune of Rs.80 lacs were specifically pleaded in the plaint. Those details duly found mentioned in the stock register with corresponding details of total 29934 bags of potatoes. The statement of plaintiff while appearing as PW-11 has gone unrebutted on material particulars. The statements of PW-10 Ujjagar Singh, PW-11 Narinder Pal Singh, PW-15 Bhagat Singh and PW-16 Karnail Singh have categorically proved that the stocks were duly entered in the stock register. PW-10, PW-15 and PW-16 had stored their stocks in the storage and they had received the due compensation from the plaintiff.

[44]. The findings recorded by the lower Appellate Court were based on no expert opinion on the aspect that the entries were made in the same pen and in the same ink. Besides the statements of aforesaid witnesses, the letter Ex.P-4 issued by the Municipal Corporation and the news items Ex.P-1, Ex.P-2, PW-7/A, PW-7/B and PW-11/80 had corroborated the factum of storage of potatoes in the cold storage and the damage caused to the stocks by illegal disconnection. The execution of agreement Ex.PW-6/B also corroborated the damages as the plaintiff was then pursuing its case. The deliberations and discussions between the plaintiff and the Chief Engineer Mr. H.L. Sharma before execution of the said agreement also was an evidence in furtherance of storage of potatoes and damage caused to it.

[45]. Further the evidence in the form of PW-10/C i.e. the complaint dated 27.07.1979 to SHO against the defendant-Board and the inquiry report Ex.PW-11/31 and Ex.PW-12/A of Head Constable Sangat Singh also proved that on 27.07.1979, the cold storage was full of potatoes. Even otherwise, there was no specific denial to para Nos.40 to 45 of the plaint in the written statement filed by the defendant-Board. The aforesaid paragraphs recited that there was huge stocks of potatoes lying in the cold storage and the circumstances forced the plaintiff to

enter into agreement Ex.PW-6/B on the assurance given by the defendant-Board that the supply would be restored and suitable compensation would be paid. Even there was no specific denial to para Nos.51-56 of the plaint in the written statement filed by the defendant-Board. The recital of huge stocks of potatoes was mentioned and the same got decayed which caused damage to the building and necessitated shifting of rotten stocks from cold storage.

[46]. The evidence led by the defendants was totally inadequate to answer the corroborated evidence of the plaintiff. Even the findings on stock register Ex.P-10/E recorded by the lower Appellate Court were discrepant inasmuch as that there was no plea in the written statement of the defendant in respect of stock register being forged. Plea of fraud and fabrication has to be specifically pleaded and proved like a criminal case. The same was never done by the defendants. In the cross-examination of PW-5, no such suggestion was ever made by the defendants in respect of alleged plea of stock register being forged and fabricated. The grounds of appeal filed by the defendants remained conspicuously silent about the alleged fraud and fabrication. No evidence was led by the defendants in respect of stock register being forged and fabricated, nor anything was done by them in their cross-examination. No

issues were framed in respect of stock register being forged and fabricated and, therefore, no evidence could be led.

[47]. The statements of PW-10 and PW-11 in respect of stock register and storage of 29934 bags of potatoes remained unrebutted. Nothing was suggested in their cross-examination. PW-10 Manager clearly deposed in respect of stock register which was maintained by the plaintiff in due course of business. Handwriting of Mohinder Singh was identified by PW-10 as he used to see him writing daily in course of business. Since Mohinder Singh was not traceable, therefore, the testimony of PW-10 should have been taken into consideration by the lower Appellate Court. No challenge was made in the cross-examination of PW-10. The section 4 of the Evidence Act was pressed into service by the lower Appellate Court on the premise that the entries in the stock register were to be ignored. PW-10 was categoric in his deposition that stock register was maintained in regular course of business under his supervision. The same was being maintained by the Mohinder Singh.

[48]. The stock register was duly exhibited. Even though mere exhibition of document does not dispense with the proof of execution, but the same can be relied, if other attending features and surrounding evidence have been proved on record.

Non-production of receipts and statement of accounts was construed to be an event of disbelieving the claim of Rs.80 lacs by the plaintiff. The factum of theft having been pleaded and filing of complaint dated 16.09.1998 may or may not be sufficient to prove theft in the premises of the cold storage, but in any case, the factum of sustaining damage on account of disconnection cannot be outrightly rejected on the premise of proof of maintaining stock register in due course of business and non-production of sufficient material to prove theft in order to support non-production of receipts and statement of accounts. In my considered opinion, such a default should not have been construed to decline the total claim towards damages. Evidently, at one point of time even the award was made by the Arbitrator on perusing the inquiry report conducted by the DIG Vigilance and Security PSEB. Once the officials of the defendant-Board came to the conclusion and found misconduct on the part of the defendant-Board, certainly there was an instinct of misconduct at the hands of defendant-Board.

[49]. The Arbitrator on appreciation of correctness of inquiry and finding of facts recorded therein commented upon the conduct of the respondent-Board and held them guilty and awarded damages with interest. The amount of damage was computed Rs.1,40,000/- as arrears having been charged by way

of excessive billing and consolidated amount of Rs.24,84,011.35 as damages of stocks with interest. The subsequent channel of litigation in different Courts ultimately made the plaintiff to file the civil suit.

[50]. The overall assessment of the evidence on record is suggestive of the fact that there was a certain damage caused to the plaintiff on account of illegal disconnection of power supply from the premises of cold storage. Though the amount of damages could not be quantified as Rs.80 lacs, in considered opinion of this Court, even if the amount is not capable of being quantified, the same can be awarded on the basis of preponderance of evidence. An amount of Rs.24,84,011.35 was assessed in the year 1984 along with an amount of Rs.1,40,000/- awarded towards arrears of excessive billing. If the total of the aforesaid amount is taken to be the amount of damages along with interest in the year 1984, the same can be carried forward along with interest for the purposes of computation of damages under the first head.

[51]. In view of finding recorded hereinabove, I hereby partly accept the appeal preferred by the plaintiff i.e. RSA No.3772 of 2013 thereby awarding an amount of Rs.26,24,000/- assessed under two heads, as quantified damages as on 12.06.1984. This

amount would carry a suitable interest @ 12% per annum from 12.06.1984 till date, keeping in view the condition No.20 of the abridge condition of supply (Ex.P-11/2).

[52]. So far as the appeal at the instance of defendants-Board i.e. RSA No.4012 of 2013 directed against the award of Rs.6 lac per season w.e.f. 04.02.1980 upto date, is concerned, the same is found to be totally bereft of merits and the same is accordingly dismissed.

October 18, 2016

Atik

**(RAJ MOHAN SINGH)
JUDGE**

Whether speaking/reasoned

Yes / No

Whether reportable

Yes / No