IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.43 of 2001

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1. Bihar State Electricity Board through its Chairman, Vidyut Bhawan, Bailey Road, Patna in the town and District of Patna
2. Electrical Superintending engineer (Purchase), Bihar State Electricity Board, Vidyut Bhawan, bailey Road, Patna
3. General manager-cum-Chief Engineer, Area Electricity board, Mundichak, Bhagalpur

………………………Defendants……………..Appellants

Versus

M/s. Anupam Udyog, through its sole proprietor, Shri Anand Kumar Singhania, having its office at Patel babu road, Bhagalpur and works at East Aerodrom, Sabour Road, Bhagalpur in the town and distrcit of Bhagalpu

…………………..Plaintiff………...... ... Respondent

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Appearance :

For the Appellants : Mr. Vinay Kirti Singh, Sr. Advocate
Mr. Pramod Kumar Sinha, Advocate
Mr. Vijay Kumar Verma, Advocate
Mr. Arvind Kumar Sharma, Advocate
Mr. Chetan Kumar, Advocate
Mr. Akhileshwar, Advocate

For the Respondent/s : Mr. Krishna Mohan, Advocate
Mr. Praveen Kumar, Advocate
Mr. Sanjeet Kumar Tiwary, Advocate

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CORAM: HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA

C.A.V. JUDGMENT

Date : 17-04-2018

The instant appeal has been preferred against the judgment dated 26.09.2000 and decree dated 07.11.2000 passed by Shri Ratindra Prakash Sinha, the then Sub-Judge-IV, Bhagalpur in Money Suit No. 20 of 1998 whereby and whereunder the suit was decreed on contest with cost and the plaintiff was held entitled to recover Rs. 3,98,465.64/- from the defendants along with interest calculable from 01.05.1996 at the rate of 22 % at monthly rest along with interest pendentilite at the same rate. The plaintiff was also held entitled to realize 6 % per annum simple interest from the date of order till realization. The defendants are the appellants and the plaintiff is the respondent.

2. The plaintiff filed the aforesaid Money Suit for realization of Rs. 6,69,117/- (Rs. 3,98,465.64/- principal + Rs. 2,70,652/- interest at the rate of 23 % monthly rests) with interest pendentilite and future interest at the rate of 23 % on monthly rests with cost of the suit.

3. Briefly stated, the case of the plaintiff is that the defendants invited tender for supply of A.C.S.R. Squirrel Conductor. The plaintiff filed tender form on 22.08.1994. The defendant no. 2 vide its letter no. 1412 requested to accept the rate offered and thereafter, sent letter of intent No. Pur/cond -200/94/420 purchase dated 22.05.1995 to the plaintiff. The plaintiff accepted the offer vide its letter dated 30.05.1995 and entered into a contract No.36 dated 02.06.1995 and defendants no. 2 issued purchase order no. 33/Pur/cond-206/94 dated 14.06.1995 for supply of goods of 444 K.M. at the rate of Rs. 6355.58/- per Kilometer on landed cost basis as per schedule of column 4 of the said purchase order with certain price variation as per annexure A attached therewith vide registered letter to the plaintiff. The plaintiff supplied the order goods as per purchase order no. 33 as per specification to the satisfaction of the purchaser but payment was not made as per schedule which disturbed the supply and as such delivery schedule could not be adhered due to lapse of the defendants. The plaintiff supplied goods on 25.03.1996 by Challan No. 6 and 7 for total price of Rs. 2,30,785.81/- but no amount has been paid by the defendants for such subsequent supply of goods as yet. The defendants paid only Rs. 10,84,405.54/- out of the total price of Rs. 14,82,871.18/- for the supply of goods made to defendants on 08.08.1995, 11.08.1995, 26.08.1995, 02.12.1995 and 25.03.1996 and a sum of Rs. 3,98,465.64/- remained due payable by the defendants. The plaintiff submitted the Bills to Deputy Director of Accounts, Bihar State Electricity Board, Patna for price of the goods supplied as per terms of purchase order for payment for the sum of Rs. 3,98,465.64/-. The plaintiff is entitled to get the Bill amount with compound interest at monthly rest of 23 % from the date of the Bill under the provision of the interest on delayed payment to small scale and Ancillary Industrial Undertaking Act 1993 inasmuch as because holding up payment by the defendants, the plaintiff suffered heavy financial loss and the plaintiff had to suspend its operation due to financial crunch. The plaintiff also submitted test certificates for approval by registered letter on 17.10.1996 to defendants no. 2 for enabling the defendants to release the balance amount due to the defendants for the supply made so far at the earliest to the plaintiff. The plaintiff made several demands under letter dated 08.06.1996, 27.06.1996, 28.02.1997, 12.03.1997, 07.07.1997 and 10.06.1998 for the payment of the amount due but defendants did not pay any heed to such demand letters and as such the plaintiff is entitled for Rs. 6,69,117/- from the defendants i.e. the principal and interest till 09.08.1998.

4. The defendants in their written statement denied the claim of the plaintiff stating that the suit is barred by law of limitation, waiver and acquiescence, the suit is under valued and court fee paid is insufficient. The plaintiff has no cause of action and the suit as framed is not maintainable. The defendants admitted that supply of 444 kilometer A.C.S.R. Squirrel Conductor at the rate of Rs. 6355.58/- per kilometer was fixed on the landed cost basis. The plaintiff firm delivered parts supply and payment was made accordingly to the plaintiff. There is no time factor for payment and payment were never delayed abnormally. The payment was blocked due to black listing orders issued vide letter no. 3270 dated 28.06.1996 and memo no. 868 dated 28.06.1996. A sum of Rs. 2,30,785.81/- was the submitted Bill amount but the purchase department had blocked due to black listing. There was no agreement for payment of interest much less to 23 % at monthly rest, there was no condition, laid down in the purchase order, for the payment of interest of delayed payment. Black listing of plaintiff necessitated to withhold payment of the balance due with a view to meet the liquidated damage charged by the Board which works out Rs. 5,72,755.38/-. The plaintiff has to pay Rs. 5,72,735.38/- on account of damage cost to the Board and the plaintiff is not entitled to claim Rs. 6,69,117/-.

5. On the basis of the pleadings of the parties the learned court below framed the following issues:-

(i) Whether the suit as framed is maintainable ?

(ii) Whether the plaintiff has got cause of action to sue ?

(iii) Whether the suit is barred by limitation, waiver and acquiescence ?

(iv) Whether the suit is under valued and the court fee paid is insufficient ?

(v) Whether the plaintiff firm is entitled to get the price of the goods supplied to Electricity Department ?

(vi) Whether the Electricity Board is within his right in blocking the payment of Bills of the goods already supplied ?

(vii) Whether the plaintiff is entitled to charge interest on the outstanding amounts ?

(viii) Whether the plaintiff is liable to pay damages as claimed by the defendants ?

(ix) Whether the plaintiff is entitled to get any other relief or reliefs than claimed ?

6. Learned Sub-judge took up the issues no. v, vi, vii and viii together and decided the same in favour of the plaintiff and against the defendants holding that the plaintiff is entitled to recover 22 % interest at the monthly rests on Rs. 3,98,465/-, thereafter, issues no. i, ii, iii, iv and ix were taken together. Issues no. iii and iv have not been pressed, thus, no finding was given and it was held that the plaintiff has got cause of action to sue and the suit as framed is maintainable. The plaintiff is not entitled to any other relief than given and accordingly, decreed the suit on contest with cost.

7. The defendants being aggrieved and dissatisfied with the judgment and decree have preferred this appeal challenging the maintainability of the same. On behalf of the appellants-defendants it has been argued that the plaintiff did not perform contract in terms of contract No. 36 dated 02.06.1995 (Ext. 5) as well as purchase order No. 33 dated 14.06.1995 (Ext. 8). The plaintiff did not supply the goods in time schedule but irregularly and out of agreed quantity of 444 kilometers of A.C.S.R. Squirrel Conductors, it supply only 233.318 kilometers and failed to perform contract and committed breach. The plaintiff failed to preform conditions of purchase order which forms part of the contract as agreed upon. He did not produce any bank guarantee of total value of goods which further stipulated that in case of non-furnishing of bank guarantee of the full value of the order by the supplier, the defendants-appellants were entitled to retain 5 % of the value of the goods till one year from the date of receipt of materials and on approval of the test certificate. This being a term of contract the defendants-appellants were not required to pay any interest on 5 % of the total value of the goods as stipulated under condition no. 6 of the purchase order itself. The purchase order (Ext. 8) clearly stipulated minimum penalty of 1 % over delayed supplied goods for each fortnight which further entitled the defendants-appellants to charge a penalty of 1 % of the value of materials delayed for each fortnight and part thereof and up to 5 % at the maximum. The plaintiff failed to perform contract as agreed upon and the learned court below failed to appreciate the same. The learned court below further failed to appreciate that the contract was vitiated due to fraud practiced by the plaintiff firm and it, being quality of fraud, was liable to bear consequences thereof and as such he was not entitled for any damages. The learned court below misconstrued the case of these appellants leading to erroneous conclusion. The learned Sub-judge has seriously erred in not allowing the set-off of Rs. 5,72,755.38/- claimed by the defendants Board as liquidated damages for the breach of contract committed by the plaintiff for which he had been black listed vide Ext. B. The order of black listing was passed after show cause notice (Ext. A) to the plaintiff. From plaint (para 9) it is apparent that goods were supplied not as per time schedule. In the judgment, evidences have not been dealt with and as such the judgment and decree passed by the learned Sub-Judge are fit to be set aside.

8. On behalf of the appellants, reliance has been placed upon a judgment reported in **AIR 2016 Supreme Court page 2841** (paragraph 7) in the case of **State of Madhya Pradesh vs. M/s. Ruchi Printers**. It has been argued that in the present case also time was the essence of the contract and the plaintiff was to supply the goods as per time schedule and as such the plaintiff is not entitled for any claim and much less as decreed. Further reliance has been placed upon a judgment reported in **AIR 2016 Madras page 150** (paragraph 11) in the case of **United India**

Insurance Co. Ltd., Chennai v. SBK Shipping Privat Ltd., Cuddalore, Habour. It has been argued that duty of the court is to interpret the words in which the contract is expressed by the parties, because it is not for the court to make a new contract or to rewrite the same, if the parties have not made it themselves. A contract has to be interpreted based on the plain and ambiguous terms of the contract and not by dissecting with the help of scalpel or deriving by a scientific formula or theory of science. That will amount to rewriting the terms of the contract. Further reliance has been placed upon the judgment reported in **AIR 2016 Patna page 47** (Para 6) in the case of **Sunil Chandra Mishra Vs. State of Bihar** and it has been argued that once there is a concluded agreement between the parties and specific rates have been fixed with regard to incentive payable to the petitioner under the scheme, the period not having lapsed, there cannot be any unilateral revision or modification in the said scheme. It has also been argued that the interest allowed by the learned court below is unreasonable and even excessive as awarded to a defaulting party to the contract and for that reliance has been placed upon a judgment reported in **AIR 2017 Kerala 161** (paragraph 12) in the case of S**outh Indian Bank Limited Thiruvananthapuram v. K. P. Ramachandran and another**, wherein it has been held that the court below has awarded interest at the rate of 18 % per annum from the date of suit till date of recovery which is apparently excessive. Considering the fact that the claim is of the year 1990 and looking into the interest compounding and principal, adopting the principle laid down by the Apex Court in Central Bank of India Vs. Ravidnra and Ors. ([2002] 1 SCC page 367) :(AIR 2001 SC 3095) we feel that grant of interest at the rate of 6 % is just and reasonable, accordingly, we re-fix the rate of interest at the rate of 6 %. Further reliance has been placed upon a judgment reported in **AIR 2017 Kerala 237** (para 12) in the case of **T. S. Arumunghan and others,. v. K. Madhusudhanan Nair and others,** wherein also the interest was allowed at 6 % per annum from the date of suit till realization.

9. On the other hand, on behalf of respondent it has been argued that the judgment and decree passed by the learned Sub-judge are quite proper, legal and correct and there is no need of any interference by this Court. In the present case, supply of goods as made by the plaintiff, as per paragraph 9 of the plaint, were received by the defendants. In written statement of the defendants -appellants, in paragraph 10, only it has been submitted that the submission as made in paragraph 9 of the plaint is a matter of record. There is no specific denial and as such the fact stated in paragraph 9 of the plaint must be deemed to be admitted and in this regard there is clear provision under Order 8 Rule 4 and 5 of the C.P.C. The defendants have paid the amount of Bill No. 1/C/95-96 dated 14.08.1995 in part. Similarly they have paid the amount of Bill No. 2/C/95-96 dated 14.08.1995 in part. Similarly the amount of the Bill No. 3/C/95-96 dated 01.09.1995 was also paid in part and the amount of Bill No. 4/C/95-96 dated 12.12.1995 was also paid in part and thereafter, the defendants did not pay the amount of Bill No. 5/C/95-96 dated 29.03.1996 and of Bill No. 1/C/96-97 dated 03.04.1996 though they received the goods supplied and as such in this way there remained outstanding dues of Rs. 3,98,465.64/- and this fact is mentioned in paragraph 9 of the plaint which should have been specifically denied in the written statement. If the goods were supplied not as per time schedule, then, the defendants ought to have refused to receive the goods supplied but they received the goods supplied and utilized the same. From the conduct of the defendants it is manifest that the time was not the essence of the contract in the present case. It has further been argued that as the defendants have not specifically denied paragraph 9 of the plaint and as such the same will be deemed to be admitted and for that reliance has been placed upon a judgment reported in **1988 PLJR page 391** (paragraph 4) in the case of **M/s Star Printing Press, Dhanbad Vs. M/s Bharat Coking Coal Ltd. Dhanbad**. Further it has been argued that here, subject matter is contract no. 36 dated 02.06.1995 (Ext. 5) whereas black listing order was passed in contract no. 15 dated 10.06.1993 which is evident from Ext. B itself. The learned Sub-Judge has rightly held in paragraph 18 of the judgment that present contract no. 36 (Ext. 5) and earlier contract No. 15 are distinct and separate issues. Further the learned Sub-judge has held that the Electricity Board is required to act according to law and prove the alleged liquidated damage of Rs. 5,72,755.38/- so, no finding can be given on this aspect. Therefore, certainly withholding of Rs. 3,98,465.64/- by the Electricity Board is neither proper nor genuine and as such withholding will be considered as deliberate act. It has also been argued that interest awarded by the learned Sub-Judge is quite proper and legal in the facts and circumstances of the present case. It has further been argued that the rulings cited on behalf of the appellants are not applicable in the present case. Here, the facts are on different footing as the defendants have not denied the averments made in paragraph 9 of the plaint. The acts of defendants being deliberate, no interference is required in the judgment and decree.

9. On the basis of rival contentions of the parties, the only point for consideration in this appeal is as to whether the judgment and decree passed by the learned Sub-Judge are fit to be maintained.

FINDINGS

10. In this case following facts are admitted:- (a) the parties entered into contract no. 36 and the defendant no. 2 issued purchase order No. 33 to the Plaintiff firm for the supply of goods 444 kilometer at the rate of Rs. 6355.58/- per kilometer, (b) the Electricity Board blocked Rs. 3,98,465.64/- for not completing contract no. 15 by the plaintiff firm towards the satisfaction of liquidated damages suffered by the Electricity Board.

11. According to the plaintiff, the amount of Rs. 3,98,465.64/- was illegally blocked by the Electricity Board and due to that the plaintiff suffered heavy loss, so the plaintiff firm is entitled to interest at the rate of 18 % at monthly rests along with 5 % compound interest at floor rate. According to the defendants, the plaintiff firm was black listed (Ext. B) for not completing the contract No. 15 and thereby the defendants suffered a liquidated damage of Rs. 5,72,755.38/- so, the defendants blocked the aforesaid sum of Rs. 3,98,465.64/- of the plaintiff firm and the plaintiff firm is not entitled to interest at the rate of 23% at monthly rests because there was no such condition in the purchase order about payment of interest on the delayed payment. According to the defendants, the plaintiff firm was black listed on 25.06.1996 after giving plaintiff firm a show cause notice. According to the plaintiff, the present contract no. 36 and earlier contract no. 15 are different issues and both cannot be clubbed together. Therefore, withholding of Rs. 3,98,465.64/- is never justified. It is also submitted by the plaintiff that he did not receive the show cause notice in black listing proceeding. The defendants have not filed any counter claim after appearance in Money Suit No. 20 of 1998 and further have failed to prove the liquidated damage of Rs. 5,72,755.38/- as alleged.

12. The present contract no. 36 and earlier contract no.15 are distinct and separate issues. Paragraph 9 of the plaint has not been specifically denied. It is stated in the written statement that the defendants received the goods supplied by the plaintiff firm and made part payment. The defendants have to deny specifically the assertions made in the plaint. The averments of the plaint which are not specifically denied by the defendants will be deemed to be admitted. In this connection, reference may be made to Order 8 Rule 4 and Order 8 Rule 5 of the Civil Procedure Code. In view of the fact that the defendants did not specifically denied the averments made in paragraph 9 of the plaint, such averments will be deemed to be admitted. The reliance can be placed upon a judgment reported in **1988 PLJR page 391** (para 4) (Supra). In the present case the subject matter is contract no. 36 dated 02.06.995 (Ext. 5) whereas black listing order of the plaintiff by the defendants is with respect to contract no. 15 dated 10.06.1993. After receiving the goods supplied by the plaintiff, the details of which are mentioned in paragraph 9 of the plaint, now the defendants are not entitled to say that supply was not made as per time schedule. The ruling cited on behalf of the appellants reported in **AIR 2016 Supreme Court page 2841** (paragraph 7) (supra) is not applicable in the present case. Here, the facts are on different footing. Here, the defendants received the goods supplied by the plaintiff made part payment and withhold Rs. 3,98,465.64/-. In the case before the Apex Court it was ordered by the authority of the State that after 31.03.2008 no booklets shall be accepted and then that decision was questioned. Further the ruling relied upon by the appellants reported in **AIR 2016 Madras page 150** (paragraph 11) (Supra) is also not applicable in the present case. Here, no new contract has been made by the learned court below. In the present case the defendants by accepting the goods supplied by the plaintiff firm have waived the right to challenge the same.

Similarly the ruling reported in **AIR 2016 Patna page 47** (Supra) is also not applicable in the present case. Here the facts are on differing footing as has already been stated above. The learned court below has rightly held that withholding Rs. 3,98,465.64/- by Electricity Board is neither proper nor genuine and as such withholding will be considered as deliberate act. I am also of the same view.

13. Regarding interest as allowed, it appears that there was no such condition either in contract no. 36 or in the purchase order regarding the payment of interest on the delayed payment. The interest allowed by the learned sub-judge appears excessive. In the case of **M/s Star Printing Press, Dhanbad Vs. M/s Bharat Coking Coal Ltd. Dhanbad** (Supra) relied upon by the learned counsel for the respondent, the interest pendentilite and future was allowed 6 % per annum. Further in the case of S**outh Indian Bank Limited Thiruvananthapuram v. K. P. Ramachandran and another (**Supra**)** and in the case of **T. S. Arumunghan and others,. v. K. madhusudhanan Nair and others** (Supra) relied upon by the appellants, the interest at the rate of 6 % per annum from the date of suit till recovery have been allowed. Considering the interest component which would accrue, the suit being one of the year 1998, I feel that grant of interest at 6 % per annum from the date of the suit till realization is just and proper in the facts and circumstances of the case.

14. Accordingly, the appeal is allowed in part without cost. The rate of interest payable is re-fixed at 6 % per annum from the date of suit till realization. The plaintiff-respondent is entitled to recover Rs. 3,98,465.64/- from the defendants-appellants with interest at the rate of 6 % per annum from the date of suit till recovery. In all other respects the judgment and decree of the learned court below stands confirmed.

(Jitendra Mohan Sharma, J)

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