

## IN THE HIGH COURT OF JUDICATURE AT PATNA

**First Appeal No. 226 of 2007**

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1. Bihar State Electricity Board represented by its Chairman, vidyut Bhawan Bailey Road, Patna.
  2. Electrical Superintending Engineer (P) Bihar State Electricity Board, Vidyut Bhawan, Bailey Road, Patna.

.... .... Defendants/Appellants

Versus

Vijay Electricals Ltd. represented by S. Subrahnonian, son of S.S.S. Badyar, GPA Holder, Bala Nagar, P.S. Bala Nagar, District-Hyderabad-500037(A.P.)

.... .... Plaintiff/Respondent

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**Appearance :**

For the Appellant s : Mr. Vinay Kirti Singh, Sr. Adv.  
Mr. Pramod Kr. Sinha, Adv.  
Mr. Arvind Kr. Sharma, Adv.  
Mr. Vijay Kr. Verma, Adv.  
Mr. Chetan Kumar, Adv.  
Mr. Akhileshwar Singh, Adv.  
For the Respondent : Mr. Pushkar Narain Shahi, Sr. Adv.  
Mr. Ritesh Kumar, Adv.  
Mr. Sanjeet Kumar Singh, Adv.

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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR  
SRIVASTAVA  
CAV JUDGMENT  
Date: 27-06-2018**

1. This first appeal has been preferred by the defendants-appellants (hereinafter referred to as “defendants” for sake of convenience) against the judgment and decree dated 08.06.2007 passed by learned Sub Judge-2<sup>nd</sup>, Patna in Money Suit No. 134 of 1995 by which and whereunder the learned Sub judge decreed the aforesaid money suit on contest against the defendants directing them to pay all the three claims as claimed by the respondent-plaintiff to the respondent-plaintiff (hereinafter referred to as “plaintiff” for sake of convenience) with interest at the rate of 9%



from the date of filing of writ petition pendente lite and future interest till the date of realization within 90 days failing which the plaintiff will get the said amount through the process of the court.

2. The plaintiff filed above stated Money Suit No. 134 of 1995 against the defendants seeking relief for issuance of direction to defendants to make payment of Rs. 97,473/- towards payment due on pending bills, Rs.1,16,970/- towards interest at 21% P.A. compounded annually from 15.05.1991 to the date of filing the suit on the amount of Rs. 97,473/-, Rs. 5,28,060/- towards payment of interest/compensation for the loss sustained due to the refusal of defendant no. 1 to receive the balance 146 numbers of transformers, Rs. 7,76,250/- towards payment of interest/compensation at the rate of 21% P.A. compounded annually for the loss sustained due to delay in payment of amount of Rs. 5,28,060/- from 09.10.1990 to the date of filing the suit, Rs. 13,27,792/- towards refund of penalties recovered from the bills, Rs. 25,28,380/- towards interest/compensation at the rate of 21% P.A. compounded annually for loss due to delay in refunding the amount of Rs. 13,27,792/- from 05.12.1989 to the date of filing the suit, Rs. 80,43,238/- towards interest/compensation for loss due to delay in payment of bills up to 31.10.1991 and Rs. 81,79,970/- towards further interest/compensation at the rate of 21% p.a. compounded annually



for loss due to delay in payment of amount of Rs. 80,43,238/- from 01.11.1991 to the date of filing the present suit and furthermore, the plaintiff sought interest at the rate of 21% P.A. compounded annually from the date of filing the suit till the date of realization of above stated amounts.

3. The case of the plaintiff is that the plaintiff is a limited company and manufacturer of electrical transformers. The defendant no. 1, Bihar State Electricity Board invited tenders for supply of 8,800 numbers of 63 KVA, 11/0.433 KV Conventional Aluminum Wound Distribution Transformers on 27.01.1989. The plaintiff submitted his tender on 10.02.1989 in response to the above stated invitation of the defendants. The defendant no. 2 sent to the aforesaid letter of intent dated 30.05.1989 for supply of 2500 numbers of 63 KVA, 11/0.433 KV Distribution Transformers at F.O.R. destination price of Rs. 19400/- per transformer and accordingly, a contract was entered into between plaintiff and defendant no. 1 vide contract no. 79 dated 29.06.1989. According to terms and conditions of the contract, the plaintiff agreed to deliver the materials in conformity with the provisions of general conditions of NIT and other documents and the commencement of delivery period shall be reckoned from the date of contract agreement or date of expiry of 30 days after notification of letter of intent by the



purchaser whichever is earlier at the rate of 800 numbers per month and the defendant no. 1 (Board) agreed to pay the plaintiff on due performance of the contract the price of Rs. 4,85,00,000/- in the manner and in accordance with the terms specified in the NIT and furthermore, the purchase order will form part of the contract. In compliance of the aforesaid agreement, the defendant no. 2 issued purchase order in favour of the plaintiff vide purchase order no. 79 dated 10.07.1989. The plaintiff submitted his drawing to the defendant no. 2 for his approval vide letter dated 03.07.1989 and subsequently, the defendant no. 2 approved the drawing and forwarded the same to the plaintiff. The aforesaid purchase order contained a condition that materials are to be inspected by the Board's representative during the process of manufacturing and prior to dispatch and the plaintiff was requested to intimate the progress of manufacturing and testing at least 15 days in advance to Electrical Superintending Engineer(Stores), Bihar State Electricity Board, Patna with copies to Chief Engineer(S&P) and Electrical Superintending Engineer(Purchase), Bihar State Electricity Board, Patna to enable them to depute an officer or an authorized representative for inspection. In compliance of the aforesaid terms and conditions of the purchase order, the plaintiff requested the defendant no. 2 vide letter number S-502/89/1450 dated 14.07.1989



to depute inspecting officer for inspection of transformers. In reply to the aforesaid letter, the defendant no. 2 informed the plaintiff vide letter dated 01.08.1989 that Sri M.C. Agrawal, A.E.E. (Purchase), Bihar State Electricity Board, Patna would inspect the materials on their workshop and the aforesaid authorized officer inspected 800 numbers of transformers from 04.08.89 to 07.08.89 and gave his report on 07.08.89 having found the aforesaid transformers satisfactory. Thereafter, defendant issued dispatch allocation to the plaintiff vide letter no. 08.08.89 for supply of 800 numbers of 63 KVA transformers. Again, on the request of the plaintiff for deputation of an inspecting officer to inspect the transformers, the defendants informed through telex message that above stated Mr. M.C. Agrawal would inspect the transformers and subsequently, on 19.09.1989, 20.09.1989 and 21.09.1989 Mr. M.C. Agrawal inspected 1010 numbers of 63 KVA transformers and cleared them for dispatch having found the aforesaid transformers satisfactory and on 19.09.89 the defendant no. 2 issued dispatch allocation vide letter dated 19.09.89 for supply of 800 numbers of 63 KVA transformers. Again, on 12.10.89 the defendant no. 2 further informed through telex message that Sri D.K. Choudhary, Electrical Executive Engineer (P) would inspect 690 numbers of 63 KVA transformers and subsequently, defendant no. 2 issued dispatch allocation to the



plaintiff vide letter dated 13.10.1989 for supply of 900 transformers. The above stated D.K. Choudhary inspected 690 numbers of transformers on 19.10.1989, 20.10.1989 and 21.10.1989 and having found the aforesaid transformers satisfactory cleared them for dispatch. The plaintiff supplied 2354 transformers and as regards the remaining 146 transformers, the plaintiff requested for issuance of revised dispatch instruction vide letter dated 07.11.1989. After receiving 2354 numbers of transformers the 2<sup>nd</sup> defendant issued “Stores Received and payment authorizing vouchers” to the plaintiff. After receipt of “stores received and payment authorizing vouchers” the plaintiff submitted its bill to the Deputy Director of Accounts(S & P), Bihar State Electricity Board, Patna and the same were passed for payment. Further case of the plaintiff is that on the request of the plaintiff, the 2<sup>nd</sup> defendant approved the Price Variation Claims vide his letter dated 11.11.89 as per the terms of the agreement. The plaintiff sought dispatch instruction but after delay of more than ten months, the second defendant vide letter dated 19.09.1990 informed the plaintiff not to deliver balance 100 KVA distribution transformers and 63 KVA distribution transformers against purchase order no. 77 dated 08.07.89, purchase order no. 79 dated 10.07.1989 and in response to the aforesaid letter, the plaintiff vide letter dated 08.10.1990 requested the defendant no. 2 to issue dispatch



instruction for balance of 146 numbers of 63 KVA transformers lying in its factory for nearly 14 months but was of no avail and as substantial amounts payable to the plaintiff were locked up with the defendants for considerable periods, the plaintiff had to borrow huge amounts from Bank and suffered heavy loss for his no fault and thereafter, the plaintiff again requested vide letters dated 12.11.1991 and 13.06.94 to the defendant no. 2 to pay early mentioning amounts due to it but no response was given by the defendants. The bills submitted on 15.04.1991 amounting to Rs. 97,473/- remain unpaid till the date of filing of the suit. The defendants without any rhyme and reason refused to take delivery of balance 146 numbers of transformers covered by the purchase order dated 19.09.1990 and the defendant no. 2 failed to issue revise dispatch instruction though the plaintiff had requested earlier vide his letter dated 07.11.1989 that the plaintiff was ready and willing to deliver the same but due to refusal of the defendants, he suffered heavy loss. Further case of the plaintiff is that defendants levied and recovered penalties from the bills of the plaintiff amounting to Rs. 13,27,792/- on the ground of alleged delay in the supply of transformers against his purchase order no. 79 but as a matter of fact, delay in supply of the transformers was not due to laches and negligence of the plaintiff rather the delay in supply of the transformers happened on account



of negligence of the defendants as the delay was made in issuance of purchase order as well as in deputing the inspecting officers for inspection. Further case of the plaintiff is that contract agreement was entered into on 29.06.1989 but the purchase order was issued on 10.07.1989 and the same was received to plaintiff on 01.08.89 and similarly inspection call was given by the plaintiff on 14.07.89 for deputing the inspection officer for inspection but the inspection officer inspected and cleared the first lot for dispatch only on 07.08.1989 and similarly, for second lot of transformers inspection call was given by the plaintiff on 02.09.1989 for deputing the inspecting officer but the inspecting officer inspected and cleared second lot of 1010 numbers of transformers for dispatch on 21.09.1989 and similarly, for the balance of 690 numbers of transformers inspection call was given by the plaintiff on 27.09.1989 for deputing the inspector but the inspecting officer inspected and cleared the transformers for dispatch on 21.10.1989 and, therefore, delay was caused due to negligence of the defendants and furthermore, due to unprecedented heavy floods rail and road traffic was cut off in the month of August 1989 and that was the reason of delay of 15 days in dispatching the transformers to different consignees in Bihar from Hyderabad and the aforesaid circumstance shall be beyond the control of the plaintiff. On the basis of aforesaid



pleadings, the plaintiff sought the reliefs as stated above.

4. The defendants appeared and contested the suit by filing written statement. The defendants raised ornamental objections and pleaded that for the purpose of transmission and distribution of energy, the Bihar State Electricity Board had required transformers and for that purpose Notice Inviting Tenders was issued. The plaintiff responded to the aforesaid notice and eventually selected as one of the parties for supply of transformers and purchase orders for the year 1987, 1988 and 1989 were placed to him. The plaintiff supplied 6142 numbers of transformers to the defendants during the year 1987 to 1990 out of which 104 transformers were found to be completely useless within the guarantee period itself and apart from this, a number of transformers supplied by the plaintiff were required to be sent for major repairs which caused huge expenses to the defendants. Since substandard and inferior quality of the transformers were supplied by the plaintiff and several complaints in respect of inferior quality of the transformers were received from field officers, the defendants became bound to take drastic steps in this regard and accordingly, the defendants stopped the plaintiff from supplying the remaining transformers which were to be supplied by the plaintiff to the defendants in respect of purchase order no. 77 dated 08.07.1989 and purchase order no. 79 dated



10.07.1989 and accordingly, the defendants cancelled supply of remaining 12 transformers of 100 KVA and 146 transformers out of 2500 numbers against purchase order no. 79 dated 10.07.1989 of 63 KVA. Since the defects in the transformers occurred during guarantee period and several complaints regarding inferior quality of transformers were received, a Committee was constituted and Committee submitted its report which was placed before the Members and the comments of the Members were obtained and thereafter, the report and comments were placed before the Central Purchase Committee on 15.09.1990 under intimation and information to the plaintiff and, thereafter, the Central Purchase Committee came to unanimous conclusion that plaintiff had made supply of substandard transformers against three purchase orders dated 19.10.1987, 14.10.1987 and 01.07.1988 and accordingly, the Central Purchase Committee took decision that 15 % of the total Bill amount against the above stated purchase orders should be deducted and remaining supply of transformers should be discontinued and in pursuance of aforesaid decision, 15 % deduction from the payment of plaintiff was made and there is no outstanding amount of the plaintiff due with the defendants against the bills submitted by plaintiff in respect of seven purchase orders issued in between the year 1987 to 1989. Further case of the defendants is that the plaintiff



not only supplied substandard transformers but also did not follow the delivery schedule as provided in purchase orders as the plaintiff was required to make delivery from July 1989 and had to complete by October 1989 but the plaintiff did not maintain the delivery schedule. Further case of the defendants is that all the payments of the plaintiff against the first three purchase orders dated 19.10.1987, 14.10.1987 and 01.07.1988 had already been made and as per decision of the Central Purchase Committee, recovery of 15% of total cost of the transformers was made from the other pending bills of the plaintiff and accordingly, amount of Rs. 16,90,019.17/- was adjusted from pending bill of the plaintiff in respect of purchase order no. 57 dated 01.07.1988 and similarly, Rs. 66,55,112.12/- was also adjusted against purchase order no. 166 dated 05.11.1988 and similarly, Rs. 4,16,551.56/- was adjusted on account of defective supply of transformers by the plaintiff and the balance amount has already been paid to the plaintiff. Further case of the defendants is that in respect of purchase order no. 57 dated 01.07.1988, a bill dated 15.02.1989 for Rs. 99,092.93/- was received and the same had already been paid to the plaintiff and no bill in respect of amount of Rs. 24,911.03/- pertaining to bill no. 155 dated 15.02.1989 was received to the defendants. Further case of the defendants is that a sum of Rs. 40,84,273.37/- was to be recovered out of which amount



of Rs. 16,90,019.17/- has already been recovered whereas balance amount of Rs. 23,94,250.20/- has to be recovered from other pending bills. Further case of the defendants is that all the deductions were made according to the terms and conditions of the agreement and, therefore, plaintiff has no right to claim the same and similarly, there is no provision for the interest in the agreement and, therefore, plaintiff is not entitled for any interest against the pending bills. On the basis of aforesaid pleadings, the defendants claimed for dismissal of plaintiff's suit.

5. On the basis of above stated pleadings of the parties, the learned trial court framed the following issues:-

- (i) Is the suit as framed maintainable?
- (ii) Has the plaintiff valid cause of action for the suit?
- (iii) Is the suit barred by law of limitation?
- (iv) Is the plaintiff entitled for decree as claimed for?
- (v) What other relief or reliefs plaintiff is entitled?

6. The plaintiff examined three witnesses and also got exhibited several documents in support of his claim. On the other hand, the defendants got examined, altogether, six witnesses and also got exhibited some documents in support of their case. The learned court below after scrutinizing and analyzing the evidences



available on the record while deciding the issue no. 4 came to conclusion that defendants could not succeed to prove that there was any defect in transformers supplied against the purchase order no. 79 and furthermore, the delay in supplying the transformers was caused due to negligence of the defendants and furthermore, the defendants wrongly deducted 15% amount against the submitted bill of the plaintiff regarding purchase order no. 79 dated 10.07.1989 and accordingly, plaintiff is entitled for realization of Rs. 13,27,792/-. The learned trial court also came to conclusion that plaintiff is entitled for the claim of Rs. 5,28,060/- with interest as damage and furthermore, the plaintiff is entitled for Rs. 76,400/- against the submitted bills vide Exhibit-9, 9/A and 9/B with interest and furthermore, plaintiff is entitled for interest at the rate of 9% from the date of initiation of the litigation i.e. from the date of filing of the writ petition till its realization and accordingly, issue no. 4 was decided in favour of the plaintiff. The learned court below while deciding issue no. 3 came to conclusion that the suit was filed within period of limitation and accordingly, the aforesaid issue was also decided in favour of the plaintiff and since issue no. 1, 2 and 5 were not pressed by the parties, the aforesaid issues were also decided in favour of the plaintiff.

7. Learned counsel appearing for the defendants challenged



the impugned judgment and decree arguing that suit filed by the plaintiff was time barred as according to plaint itself, cause of action arose in the year 1990 and the present suit was filed in the year 1995 but the learned trial court wrongly held that suit was filed within period of limitation. Continuing his submission, he submitted that learned court below wrongly interpreted Section 14 of the Limitation Act and excluded the period which was spent by the plaintiff in pursuing the writ petition. He submitted that writ court is not a court of first instance and as a matter of fact, the plaintiff initially, filed writ petition before this court but this court declined to grant any relief to the plaintiff against which the plaintiff not only filed L.P.A. but also S.L.P. and review petition and, therefore, the aforesaid fact clearly goes to show that plaintiff was not pursuing the aforesaid litigation in good faith and unless the litigation is pursuing in good faith, Section 14 of the Limitation Act cannot be invoked. He further submitted that no doubt, the trial court framed issue regarding period of limitation but the plaintiff did not adduce any evidence to show that he was pursuing the writ petition before another forum in good faith and mere assertion in the plaint is not sufficient to prove the aforesaid fact.

8. Learned counsel appearing for the defendants further submitted that the plaintiff, himself, breached the terms and



conditions of the contract and failed to supply the transformers within the stipulated period of contract. He further submitted that plaintiff had to supply the transformers by 12.11.1989 but it is admitted position that till 12.11.1989 the plaintiff had not supplied the entire transformers rather 146 numbers of transformers had to be supplied by the plaintiff.

9. Learned counsel appearing for the defendants further submitted that the plaintiff supplied defective and substandard transformers and when several complaints were received, the defendants constituted a Three Member Committee and the aforesaid Committee having enquired into the matter came to conclusion that the transformers supplied by the plaintiff were defective and substandard and thereafter, the defendants immediately stopped the plaintiff from supplying 146 transformers and also deducted the amount from pending bills of the plaintiff as per terms and conditions of the agreement. He further submitted that plaintiff claimed that bills of Rs. 97,473/- was not paid to him but as a matter of fact, those bills were never produced before the defendants and the onus lies upon the plaintiff to prove that bills were produced and submitted before the defendants. He further submitted that plaintiff never informed the defendants that all the 2500 transformers were ready for supply and admittedly, the plaintiff supplied the



transformers in part wise and the plaintiff delayed in supply of the transformers and breached the terms and conditions of the contract. He further submitted that time was essence of the contract but even then plaintiff failed to supply the entire transformers within the stipulated period of contract and, therefore, the plaintiff cannot claim any damage. In support of his contention, he referred the decision reported in AIR 2016 SC 2841.

10. Learned counsel appearing for the defendants further submitted that there was no provision regarding the payment of interest on pending bills but even then the court below passed order for making payment of interest on pending bills. He submitted that it is well settled principle of law that court cannot make out new terms of contract.

11. On the other hand, learned counsel appearing for the plaintiff supported the impugned judgment and decree arguing that admittedly, initially, the plaintiff filed CWJC No. 2525 of 1992 on 16.03.1992 and the aforesaid CWJC No. 2525 of 1992 was dismissed on 17.09.1993 and similarly, S.L.P. No. 3881 of 1994 was filed on 14.01.1994 which was dismissed on 31.03.1994 and altogether 624 days were spent in pursuing the aforesaid writ petition as well as special leave petition including review petition and the aforesaid fact has, specifically, been pleaded at para 37 of the plaint



but the defendants have not denied the aforesaid fact and, therefore, the aforesaid fact has been admitted by the defendants. He further submitted that as a matter of fact, the plaintiff was pursuing writ petition and special leave petition in good faith and this court while dismissing the CWJC No. 2525 of 1992, specifically, observed that the ordinary civil court is proper forum for deciding the subject matter directing for adding the period spent in obtaining the certified copy in reckoning the period of limitation. He further submitted that since the plaintiff was prosecuting the writ petition and special leave petition in good faith, the aforesaid period was rightly excluded from the period of limitation while counting the same by the court below. In support of his contention, he referred the decision reported in AIR 2003 SC 2084.

12. Learned counsel appearing for the plaintiff further submitted that admittedly, the defendants awarded the contract to plaintiff for supply of 2500 numbers of 63 KVA of transformers to the defendants and purchase order was issued on 10.07.1989. The plaintiff supplied the transformers and received payments except three supplementary bills which are still pending. He submitted that the contract in question is not in dispute. He further submitted that supply of transformers was to be completed in the financial year 1989-90 i.e. by March 1990 and, therefore, the time fixed in



purchase order for supply of transformers was not the essence of the contract and the delivery could have been completed by March 1990. He further submitted that no doubt, in purchase order, it was mentioned that commencement of delivery period shall be reckoned from the date of contract agreement or expiry of 30 days after the notification of letter of intent whichever is earlier at the rate of 800 numbers per month but purchase order does not give any schedule of supply except the said clause. He further submitted that there was a clause in the agreement and purchase order that before supply of the transformers, the officials of the defendants shall inspect the transformers and after that they shall send dispatch allocation and after placing dispatch allocation, the plaintiff had to send the transformers at the destination as mentioned in dispatch allocation. He further submitted that according to Board's letter dated 11.11.1989 (Exhibit-6/H), in the month of July 1989, 800 numbers of transformers, in the month of August 1989, 800 numbers of transformers, in the month of September 1989, 800 numbers of transformers and in the month of October 1989, 100 numbers of transformers had to be supplied by the plaintiff but the defendants delayed the process of the inspection and sending of dispatch allocation as a result whereof, the plaintiff could not succeed to supply the transformers in the month of July 1989 and consequently,



the delay was caused in supply of the transformers in the remaining months also and, therefore, it was defendants who breached the terms of the contract. He further submitted that contract was reciprocal in nature and the plaintiff was not in a position to send the transformers unless the process of the inspection and dispatch allocation is completed but since the defendants delayed the process of inspection and sending dispatch allocation, delay was caused in sending the transformers.

13. Learned counsel appearing for the plaintiff further submitted that admittedly, 33 numbers of transformers were less in second lot and 113 nos. in third lot and, therefore, it is admitted position that altogether 146 nos. of transformers were not supplied by the plaintiff but vide his letter dated 07.11.1989 (Exhibit-6/G) the plaintiff requested the defendants for sending dispatch allocation for sending 146 transformers but the defendants without ascertaining any reasons stopped dispatch of 146 nos. of transformers vide letter dated 19.09.1990 (Exhibit-6/I). He submitted that before taking the aforesaid decision, the defendants did not give any notice to plaintiff nor asked for any show cause. He further submitted that above stated 146 transformers were manufactured as per special specification of the Board and were also inspected by the Board and huge amount was invested for manufacture of those transformers but due to



negligent act of the defendants the plaintiff suffered heavy loss and, therefore, the learned trial court rightly awarded damage in favour of the plaintiff.

14. Learned counsel appearing for the plaintiff further submitted that admittedly, the defendants recovered Rs. 13,27,792/- from different bills of the plaintiff but before recovery of the aforesaid amount, neither any notice nor any show cause nor any opportunity was given to the plaintiff. He further submitted that according to Clause 7 of purchase order (Exhibit-5), the defendants were entitled to impose penalty at the rate of 1% of the value of materials delayed for each fortnight or part thereof subject to maximum of 5% value of the materials delayed. He further submitted that no doubt, the plaintiff accepted the aforesaid penalty clause but admittedly, subject to *Force Majoure*. He further submitted that moreover, the aforesaid deduction was made due to delay in delivery but the delay in delivery was caused due to negligence of the defendants and, therefore, the defendants had no right to deduct the above stated amount from the bills of the plaintiff. He further submitted that moreover, there is nothing to show the rate at which the aforesaid penalty was imposed upon the plaintiff. He further submitted that there is nothing on the record to show that any complaint was made by the defendants to plaintiff to



this effect that defects were not rectified by the plaintiff within the period of guarantee. He further submitted that defendants failed to bring any evidence to show that defective and substandard transformers were supplied to them except assertion in the written statement.

15. Learned counsel appearing for the plaintiff further submitted that at para 20 of the written statement, it has been averred by the defendants that one supplementary bill (Exhibit-9) dated 15.04.1991 had already been paid to the plaintiff and remaining two supplementary bills were not produced before the Board for payment. He submitted that aforesaid pleading goes to show that at least two supplementary bills remain unpaid and moreover, the defendants failed to produce any evidence to show that one supplementary bill had been paid to the plaintiff. He submitted that plaintiff produced the aforesaid three supplementary bills as Exhibit-9 series along with related SRVs vide Exhibit-13 series. He submitted that Exhibit-9 series relate to supply of four transformers. He submitted that as a matter of fact, some transformers were damaged in transit which were removed and replaced and after replacement of the aforesaid transformers supplementary bills were submitted and the store receipt vouchers of those transformers fortifies this fact that those transformers were supplied and bills



were submitted to the defendants and, therefore, the learned trial court rightly directed the defendants to make payment of those pending bills. He further submitted that no doubt, the agreement entered into between the parties is silent on the point of grant of interest but in the agreement in question, there is no prohibiting clause for grant of interest and, therefore, the learned trial court has got power to grant interest. He submitted that plaintiff has claimed certain amount over the amount of interest and award of interest over interest is not illegal and may be granted in suitable cases such as in the present case. In support of his submission, he relied upon decision reported in AIR 1994 SC 860.

16. Certain facts are admitted in this case. It is admitted case of the parties that defendants issued Notice Inviting Tender vide Annexure-1 for supply of large number of transformers and in response to the aforesaid Notice Inviting Tender, plaintiff submitted its tender dated 10.02.1989 which is Annexure-2. The defendants sent letter of intent dated 30.05.1989 for supply of 2500 numbers of transformers at the rate of Rs. 19,400/- per transformer. Furthermore, it is an admitted position that plaintiff and defendants entered into contract vide contract no. 79 dated 29.06.1989 and according to aforesaid contract, the commencement of delivery period was to be reckoned from the date of contract agreement or



date of expiry of 30 days after the notification of letter of intent by the purchaser whichever was earlier at 800 nos. per month. Furthermore, one of the conditions of the contract is that purchase order will form part of the agreement. It is also an admitted position that defendants issued purchase order in favour of the plaintiff vide purchase order no. 79 dated 10.07.1989. It is also an admitted position that Clause 14 of aforesaid purchase order contains a condition that materials are to be inspected by the Board's representative during process of manufacturing and prior to dispatch, and the suppliers have to intimate the progress of manufacturing and testing at least 15 days in advance to Electrical Superintending Engineer (Stores), B.S.E.B, Patna with copies to Chief Engineer (S&P) and Electrical Superintending Engineer (P), B.S.E.B, Patna to enable them to depute an officer or an authorized representative for inspection. Furthermore, according to contract, after inspection, defendants had to issue dispatch allocation and after issuance of dispatch allocation, the plaintiff had to send the transformers at the destination as mentioned in despatch allocation. It is also an admitted position that plaintiff supplied 2354 numbers of transformers till first week of November 1989 and the defendants stopped the plaintiff from supply of 146 transformers and also deducted huge amount from pending bills of the plaintiff.



17. The claim of the plaintiff is that delay in supply of the transformers was due to negligence of the defendants and furthermore, the defendants wrongly deducted the amount from pending bills and also wrongly stopped the plaintiff from supply of 146 transformers causing heavy loss to him. On the other hand, the defendants claimed that the plaintiff failed to supply the transformers within stipulated period of contract and he has supplied defective and substandard transformers causing loss to the defendants and therefore, the defendants rightly stopped the plaintiff from supply of 146 nos. of transformers and also rightly recovered the penalty amount from pending bills of the plaintiff as per terms and conditions of the contract.

18. Now, the question arises as to who has breached the terms and conditions of the contract. The learned trial court has dealt with the aforesaid point while deciding issue no. 4. It is not in dispute that plaintiff and defendants entered into an agreement on 29.06.1989 and letter of intent was issued on 30.05.1989 and the purchase order was issued on 10.07.1989. It is also not in dispute that supply was to be completed within the financial year 1989-90. Clause 2 of tender notice (Exhibit-1) goes to show that transformers were to be delivered within the financial year 1989-90 for which monthly delivery schedule shall be indicated and earlier deliveries



may be preferred. In clause 6 of the purchase order dated 10.07.1989 (Annexure-5), the delivery schedule has been mentioned which says that commencement of delivery period shall be reckoned from the date of contract agreement or date of expiry of 30 days after the notification of letter of intent whichever is earlier at the rate of 800 numbers per month and in case of despatch by road transport, the date of receipt of material in a good condition at the consignee store shall be taken as the date of delivery. The aforesaid purchase order goes to show that no specific schedule of supply was given except the aforesaid clause. Furthermore, clause 14 of the aforesaid purchase order says that materials are to be inspected by the Board's representative during the process of manufacturing and prior to despatch. Furthermore, a duty was cast upon the suppliers by the aforesaid clause 14 to intimate the progress of manufacturing and testing at least 15 days in advance to concerned officials of the Board so that they could depute an officer or an authorized representative for inspection. The aforesaid clause of purchase order goes to show that before despatch, the authorized officer or representatives of the defendants had to inspect the transformers and moreover, it was also agreed between the parties that transformers could not be supplied without despatch allocation from the Board. However, the defendants vide letter dated 11.11.1989 (Exhibit-6/H)



gave schedule of supply of transformers and according to Exhibit-6/H, in the month of July 1989, 800 transformers, in the month of August 1989, 800 transformers, in the month of September 1989, 800 transformers and in the month of October 1989, 100 transformers total 2500 numbers of transformers had to be supplied. It is also admitted position that after purchase order dated 10.07.1989, the plaintiff offered for inspection on 14.07.1989 which is evident from perusal of Exhibit-6/A. The aforesaid fact goes to show that plaintiff made offer for inspection of supply of transformers of the month July 1989 within stipulated period but the defendants gave information to plaintiff regarding appointment of inspecting officer on 01.08.1989 which is evident from perusal of Exhibit-6/B and the inspection was done between 04.08.1989 to 07.08.1989 which is evident from perusal of Exhibit-7. The despatch allocation was received to plaintiff for supply of 800 transformers on 12.08.1989 which is evident from Exhibit-6/C. However, the plaintiff started supplying transformers on 13.08.1989 and completed the same on 07.09.1989. The aforesaid fact clearly goes to show that delay in supplying the transformers of the month of July 1989 was caused due to delay in appointment of inspecting officer and the defendants failed to follow the time schedule, particularly, in the circumstance when the plaintiff had already prayed for



appointment of inspecting officer 15 days in advance. Furthermore, it is obvious that plaintiff gave intimation for appointment of inspecting officer for second lot of supply on 02.09.1989 which is evident from perusal of Exhibit-6/L. It is pertinent to note here that supply of first lot of transformers was delayed due to delay caused by the defendants as a result whereof the supply of second lot of transformers was also delayed. Admittedly, the second lot of transformers had to be supplied in the month of August 1989 but on account of laches of the defendants, the first lot of supply of transformers was completed on 07.09.1989 but even then the plaintiff had requested for appointment of inspecting officer for second lot of transformers on 02.09.1989. Moreover, the inspecting officer was appointed on 12.09.1989 and the said inspecting officer gave his report on 21.09.1989 which is evident from perusal of Exhibit-7/A. The despatch allocation was cleared on 22.09.1989 and, thereafter, plaintiff started supplying the transformers on the same day and till 07.10.1989, altogether, 767 transformers were supplied. So far as supply of third lot of transformer is concerned, the same was to be completed by September 1989 but since the previous two lots were delayed on account of laches of defendants, the third lot also delayed. Moreover, the plaintiff gave inspection offer for supply of third lot of transformers on 27.09.1989 but the defendants



appointed inspecting officer on 12.10.1989 and by 21.10.1989 the inspecting officer cleared 690 nos. of transformers. The aforesaid facts are evident from perusal of Exhibit-7/B and Exhibit-8/A. The plaintiff started supply of third lot of transformers on 21.10.1989 and completed supply on 04.11.1989 which is evident from the evidence available on the record that altogether 146 transformers were not supplied and vide letter dated 07.11.1989(Exhibit-6/G) the plaintiff requested for sending despatch allocation for supply of 146 transformers but defendants vide letter dated 19.09.1990 (Exhibit-6/I) stopped the plaintiff from supply of the aforesaid 146 transformers. Exhibit-6/I does not contain any reason as to why the defendants stopped plaintiff from supply of 146 transformers. Furthermore, there is nothing on the record to show that before stopping the plaintiff from supply of 146 transformers, the defendants had given any notice to the plaintiff.

19. The above stated facts clearly go to show that contract in question was in the nature of reciprocal contract because the plaintiff could not have dispatched the transformers until the defendants or their authorized representative inspected the transformers and issued despatch allocation. Therefore, it is obvious that the contract in question stipulates mutual obligations to be performed by the parties and the defendants are not entitled to



complain of non performance of later obligation by the plaintiff without performing their earlier obligation in time. Therefore, in my view, it were defendants who breached the terms and conditions of the contract because they delayed in issuance of purchase order as well as appointment of inspecting officer. Furthermore, it is an admitted position that plaintiff was given time to supply the transformers by end of October 1989 but due to conduct of the defendants one month time was extended and therefore, it is quite natural that plaintiff could supply 2354 nos. of transformers by the month of November 1989 and also asked the defendants to issue despatch allocation for supply of remaining 146 nos. of transformers vide his letter dated 07.11.1989 which is evident from perusal of Exhibit-6/G and also explained the circumstances due to which the aforesaid 146 transformers could not be sent but the defendants did not respond to the aforesaid explanation of the plaintiff and all of a sudden vide letter dated 19.09.1990 i.e. after eight months stopped the plaintiff from sending the aforesaid 146 transformers. It is an admitted position that above stated transformers were manufactured in accordance with specification given by the defendants and those transformers could not be utilized by any other person except the defendants. It is not in dispute that huge amount was spent for manufacturing the aforesaid transformers and, therefore, it is



obvious that plaintiff suffered heavy loss due to non supply of aforesaid 146 transformers and in my view, the learned trial court rightly awarded damage to the plaintiff.

20. Admittedly, Rs. 13,27,792/- was deducted by the defendants from the bills of the plaintiff but before making the aforesaid recovery, neither any notice nor any show cause was given to the plaintiff and in my view, it is violation of principles of natural justice. No doubt, the purchase order contains a provision of recovery of penalty, if the delay is caused in supply of the transformers but as I have already stated that delay was caused due to act of the defendants and the plaintiff was not at fault for causing delay in supply of the transformers and, therefore, in my view, the defendants had no right to recover the amount from the pending bills of the plaintiff taking help of clause 7 of the purchase order. Moreover, the aforesaid clause 7 of purchase order says that penalty at the rate of 1% of the value of materials delayed for each fortnight or part thereof subject to maximum of 5% value of the materials delayed shall be deducted but in this case, there is nothing to show the rate at which the defendants imposed penalty upon the plaintiff. Moreover, clause 7 of purchase order, nowhere, dispense with a requirement of giving an opportunity to explain in case of penalty and, therefore, in my view, the defendants had no right to recover



Rs. 13,27,792/- from the pending bills of the plaintiff.

21. The defendants have come with this stand that plaintiff supplied defective and substandard transformers but as per terms and conditions of the agreement, supplied transformers were under guarantee period for 12 months from the date of installation and 18 months from the date of despatch whichever is earlier but the defendants did not bring any evidence on record to show that within the aforesaid guarantee period, any complaint was made in respect of supplied transformers. No doubt, the defendants claimed that a Committee was constituted and the said Committee found the transformers unsatisfactory and substandard but admittedly, the aforesaid Committee did not give any opportunity to plaintiff to explain his stand. Furthermore, there is nothing on the record to show that plaintiff refused to rectify the defects, if any, of the transformers.

22. So far as pending three supplementary bills are concerned, the defendants claimed that one supplementary bill (Exhibit-9) has already been paid and remaining two supplementary bills were never received by the defendants. Therefore, it is obvious that the amount vide bills (Exhibit-9/A and 9/B) claimed by the plaintiff have not been paid as yet and so far as supplementary bill (Exhibit-9) is concerned, there is nothing on the record to show that



aforesaid bill was ever paid and cleared. Moreover, the plaintiff has brought on record the above stated supplementary bills along with two related SRVs which is evident from perusal of Exhibit-13 series. In this regard, it is pertinent to note here that at para 5 of his deposition, PW-2 stated that some transformers were damaged in transit but subsequently, the aforesaid transformers were removed and supplementary bills were sent to the Board. Exhibit-13 series corroborates the above stated statement of PW-2 because Exhibit-13 series goes to show that four transformers were taken in store of the defendants.

23. Admittedly, the learned trial court has awarded interest to the plaintiff and the defendants have challenged the aforesaid finding of the trial court. Now the question arises as to whether the learned trial court had got power to impose interest. In this regard, it is admitted position that in the contract entered between the parties, there was no provision to debar from claiming interest and if there is no prohibitory provision in contract for claiming interest, the parties to the contract may claim interest against the dues. The documents available on the record go to show that transformers were manufactured by the plaintiff after taking huge loan from the Bank and, therefore, in my view, the learned trial court rightly awarded interest to the plaintiff against his dues.



24. Learned counsel of the defendants raised objection regarding maintainability of the suit of the plaintiff on the ground of limitation arguing that suit was hopelessly time barred but admittedly, the plaintiff had filed CWJC No. 2525 of 1992 within the period of limitation and in the aforesaid CWJC No. 2525 of 1992, the subject matter was same and the aforesaid writ petition was dismissed as withdrawn with a liberty to file civil suit before appropriate forum. No doubt, the plaintiff unsuccessfully challenged the aforesaid dismissal order by filing special leave petition and review petition but the aforesaid fact goes to show that plaintiff was prosecuting the aforesaid litigation in good faith and the aforesaid litigation could not succeed as the writ court had no jurisdiction to decide the dispute and that is the reason the writ court granted liberty to plaintiff to approach the appropriate forum for redressal of his grievances and thereafter, plaintiff filed the present suit and, therefore, in my view, the learned trial court rightly excluded the period spent by the plaintiff in pursuing the above stated writ petition, special leave petition and review under Section 14 of Limitation Act. Admittedly, the plaintiff spent near about 624 days in pursuing the matter before the writ court and if the aforesaid 624 days is excluded from the period of limitation as per section 14 of the Limitation Act, it cannot be said that suit was filed beyond



period of limitation and, therefore, in my view, the learned trial court rightly held that suit was filed by the plaintiff within time and this court does not think it proper to interfere into the findings of the learned trial court.

25. On the basis of aforesaid discussions, I am of the view that this appeal is devoid of merit and liable to be dismissed. Accordingly, this appeal stands dismissed and the impugned judgment and decree of the court below are hereby confirmed.

26. The parties shall bear their own costs.

**(Hemant Kumar Srivastava, J)**

SHAHZAD/-

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