(2006) 02 PAT CK 0037

In the Patna High Court

Case No : First Appeal No. 8 of 2000

The State of Bihar and Others	APPELLANT
Vs	
Shakti Tubes Limited	RESPONDENT

Date of Decision : 20-02-2006

Acts Referred:

Citation : (2006) 02 PAT CK 0037

Judgement

Rekha Kumari, J.—This appeal is directed against the judgment and decree dated 31.5.1999 passed by Shri Nritya Nand Sinha, Subordinate Judge 1st, Patna in Money Suit No. 153 of 1997 by which he has decreed the suit with costs in favour of the plaintiff-respondent and has ordered the defendants-appellants to pay interest compounding at monthly rests at the rate of 24%: per annum on the decreetal amount of Rs. 38,13,480/- of Money Suit No. 97 of 1996, with effect from 1.6.1993 till realisation.

2. The case of the respondent is that the plaintiff is a Company incorporated under the Indian Companies Act and is registered as a Small Scale Industry in the Industries Department Bihar. It manufactures Mild Steel Black Pipes. The defendant Chief Engineer, Minor Irrigation Department issued, notice inviting tenders for the supply of E.R.W. M.S. Black Pipes 100mm N.B. Light Class. The date of opening of the tenders was 21.3.1992. The plaintiff submitted its tender on 21.3.1992 for Supply of 11 lac metres of M.S. Black Pipes. Many other firms also submitted their tenders. All the tenders were opened and the tender of the plaintiff was accepted and after negotiation, the plaintiff offered to supply the pipes at the rate of Rs. 147.95P. per metre. The offer was accepted by the Chief Engineer vide his memo No. 3956 dated 16.7.1992 and by the same memo he also placed orders for the supply of pipes and directed to execute an agreement with the Executive Engineer, Investigation Division, Patna within 15 days of issue of the order. In the above letter it was clearly mentioned that 90% payment of the total value of the material supplied, would be made on receipt of the materials, and the balance would be paid after full verification of the same within one month of the receipt of the materials.

3. The Steel Authority of India Limited, in the meantime, increased price of H.R. coils on 19.5.1992. Accordingly, the plaintiff informed the defendants by letter dated 18.6.1992. about the increase and requested that it may be allowed to make supply on the escalated rates. After several reminders, the department informed through its letter. No. 4444 dated 4.8.1992 that the matter was under consideration and the escalated rates would be communicated after decision. According to the above direction of the Chief Engineer and the assurance given vide above letter dated 4.8.1992 the plaintiff on 8.8.1992 executed agreement with the Executive Engineer. The terms of payment was duly incorporated therein, It was stated in the agreement that event of variation in total cost of steel, the payment would be made at the escalated rate applicable for the quantity of pipes supplied after such escalation came into force. The other terms of the payment as enumerated in the above letter dated 16.7.1992 of the Chief Engineer remained un-changed.

4. The further case of the plaintiff-respondent is that as per the price escalation the defendants were to fix the rate at Rs. 199.04 per metre with effect from 16.07.1992 but the department erroneously granted price after calculating the actual amount of escalation at Rs. 190.48 P only per metre vide letter No. 6287 dated 4.11.1992. There was thus, an apparent calculation mistake in deciding the exact amount of escalation.

5. The plaintiff supplied the pipes as per agreement to the concerned consignees, who duly accepted the pipes as per measurement, but the payments were not made. The plaintiff sent reminders to the Chief Engineer for making payment. After some time, the payment was made at the rate of Rs. 190.48P, instead of actual escalated rate of Rs. 199.04P. A sum of Rs. 38,13,480/- thus was curtailed illegally by the department.

6. The plaintiff through its letter dated 4.1.1993 wrote to the Secretary, Minor Irrigation Department (defendant No. 3) to pay the pending dues otherwise it would charge interest over the amount for the period of delay as per the provisions of the Interest on Delayed Payment to Small Scale and Industrial Undertaking Act, 1993 (hereinafter referred to as "the Act").

7. The case of the plaintiff-respondent further, is that the plaintiff supplied 4,45,500 metres of M.S. Black pipes to the concerned authorities as per the terms of the agreement. The balance escalated amount at the rate of Rs. 8.56P per metre not paid so far comes to Rs. 38,13,480/- and compound interest with monthly rests payable thereon as per the above Act amounted to Rs. 27,83,839.00 at the rate of 26.25 % per annum calculated from 1.6.1993 till 15.6.1993 i.e. the date of filing of the money suit No. 97 of 1996. Thus, the total amount payable remained due with the department till 15.6.1996 became Rs. 65,97,319/- which the department refused to pay.

8. The plaintiff, in the meantime, had filed C.W.J.C. No. 274 of 1994 before the High Court. for payment of the sum of Rs. 38,13,480/- along with interest under

the Act, but as, regarding the balance of escalated amount, controversy arose, the Court disposed of the matter with the observation that it was a civil dispute and the plaintiff might file a suit. The plaintiff hence, several notice u/s 80 of the CPC on the defendants, but they failed to pay the dues. The plaintiff then filed the above Money Suit No. 97 of 1996. They claimed Rs. 38,13,480/- as the balance escalated amount at the. rate of Rs. 8.56P per metre and. interest thereon as per the Act. In Money Suit No. 97 of 1996 decree was passed in respect of the balance escalated amount of Rs. 38,13,480/-, but as with regard to the payment of intrest as provided under the Act, the C.W.J.C. No. 274 of 1994 was still pending before the Hon''ble Court, no relief was- granted to the plaintiff in the money suit by the court below on that ground.

9. However, as there was expected delay in disposal of C.W.J.C. No. 274 of 1994, the plaintiffs were advised to withdraw the same. The Hon''ble High Court by order dated 20.10.1997 permitted the plaintiff to withdraw it to enable it to file a properly constituted suit before the civil court of competent jurisdiction and, hence, necessity of the suit arose.

10. According to the calculation of the plaintiff, total interest upto 15.12.1997 (as per chart enclosed with the plaint) comes to Rs. 74,08,047/- but the plaintiff filed the suit for realisation of Rs. 74,03,019/- from the appellants (defendants) being the interest at. the rate, of 24% compounding monthly rests from 1.6.1993 to 15.12.1997 on the amount of Rs. 38,13,480/- decreed in Money Suit No. 97 of 1996.

11. The defendants-appellants contested the suit by filing a written statement. All possible legal objections were taken by them in their written statement?

12. The defendants appellants in their written statement admitted that the defendants had invited tenders for the supply of 4" diameter black M.S. Pipe and the plaintiff had participated in it and the tenders were opened on 21.3.1992 and the tender of the plaintiff was accepted and work order was issued to them at the rate of Rs. 174,95P and the. Chief Engineer had directed the plaintiff by memo No. 3956 dated 15.7.1992 to execute an agreement and the same was executed on 8.8.1992. It is also admitted that there was price escalation clause in the agreement and that 90% of the total value of the materials received was; to be paid after receiving the materials and the balance was to be paid within a month after full verification. Their case, however, is that the plaintiff was given purchase order for seven lakh metres of 4" diameter M.S. Black Pipes to be supplied by 31.12.1992 but the plaintiff could not supply seven lakh metres of pipes. It supplied only 3,07,500 metres by 23.11.1992. The department, hence, cut down the quantity from seven lakh metres to four lakh metres due to slow performance of supply, but yet the plaintiff could not supply the remaining quantity of the materials by -31.12.1992 in clear breach of the contract. The plaintiff supplied the aforesaid materials by 30.4.1993. The defendants, however, on the request of the plaintiff, regularised the supply, in the interest of the work.

13. The further case of the defendants is that the department. of Minor Irrigation after examining the price escalation of the materials decided to fix the escalated rate at the rate of Rs. 190.48 per metre and the same was communicated to the plaintiff vide Chief Engineer''s Letter No. 6287 dated 4.11.1992, The same rate was given to the other tenderers also. There was no provision in the agreement for giving inter est. The defendants have also paid the price of materials supplied at the above escalated price. The plaintiff also did not supply the materials on time. Therefore, there was no question of interest on any delayed payment. The escalated rate at Rs. 199.04P as calculated by the plaintiff is wrong.

14. It is also the case of the defendants that in C.W.J.C. No. 274 of 1994 the plaintiff had. two fold claims and as the defendants in the writ petition denied the claims, in respect of first claim, i.e. the liability to make payment on escalated rate was rejected with permission to file a suit in civil court, but with regard to the claim of delayed payment under the Act, as other writ petitioners on the same point were admitted and referred to a Division Bench, the writ petition of the plaintiff was admitted on this limited question and referred to the Division Bench in C.W.J.C. No. 2459 of 1994 and that writ petition is still pending and, therefore, suit in civil court is not maintainable. It is also their case that the claim of the plaintiff relates to the period prior to 3.4.1993, on which date the Act came into force and, therefore, the claim of the plaintiff is not maintainable on this score also.

15. With the above averments the defendants-appellants in their written statement prayed to dismiss the suit with costs.

16. At trial the following issues were framed:-

I. Is the suit as framed maintainable?

II. Has the plaintiff got valid cause of action for the suit?

III. Is the suit barred by the principle of resjudicata?

IV. Is the plaintiff entitled to a decree as claimed against the defendants?

V. What other relief or reliefs, the plaintiff is entitled to?

17. The learned Subordinate Judge decided the issues in favour of the plaintiff and decreed the suit with costs as mentioned above.

18. The points that have been urged in this appeal are : -

(i) Whether the suit is barred by res judicata?

(ii) Whether the suit is barred by law of limitation ?

(iii) Whether the Interest on delayed payment to Small Scale and Ancillary Industrial Undertakings Act, 1993 is applicable in this case and the plaintiff respondent is entitled to get interest under the Act?

19. Point No. (i) :- Learned counsel for the. appellants submitted that as the claim of interest was made by the respondent in Money Suit No. 97 of 1996 and the claim of interest was also the subject matter in the writ application, the, suit is barred by res judicata.

20. Learned counsel for the respondent, on the other hand, submitted that, as in both the cases i.e. Money Suit No. 97 of 1996 and C.W.J.C. No. 274 of 1994, the. issue was not decided, the suit cannot be said to be barred by res judicata.

21. The judgment of Money Suit No. 97 of 1996 (Ext. 5) shows that though prayer was made therein also for interest on delayed payment, as a writ petition C.W.J.C. No. 274 of 1994 was pending in the High Court, no order was passed on this issue in the suit. Then though, admittedly in the above writ petition No. 274 of 1994, the. plaintiff respondents had claimed the balance escalated amount as well as the interest on delayed payment, it is also admitted that the first claim i.e. liability to make payment on escalated rate was rejected with permission to file a suit, and the writ with regard to the interest on delayed payment was admitted. The order of the High Court passed in C.W.J.C. No. 274 of 1994 in this regard, of course has not been filed by any party, but admittedly this order was passed prior to the filing of Money Suit No. 97 of 1996 and the judgment of Money Suit No. 97 of 1996 (Ext.5) shows, that the order was passed on 14.9.1995 and as per as the averment made in the written statement, which is not controverted, the writ was admitted on the limited question of payment of interest as some other writ petitions were also under consideration and it was further ordered therein that the application would be heard along with C.W.J.C. No. 2959 of 1994. The parties have not filed any order passed in C.W.J.C. No. 2959 of 1994 but the plaintiff respondent has filed copy of order dated 20.10.1997 passed by the Division Bench in C.W.J.C. No. 274 of 1994 which shows that the plaintiff respondent was permitted to withdraw the writ application in respect of the interest to enable it to file a properly constituted . suit before a competent civil court. Hence, it is also obvious that the issue regarding the payment of interest was not heard and decided in the writ petition.

22. Therefore, I agree with the learned counsel for the respondent that though both in Money Suit No. 97 of 1996 and C.W.J.C. No. 274 of 1994 prayer was made by the. respondent for payment of interest, as the issue was not heard and decided, the suit would not be barred by res judicata.

23. Point No. (ii) :- Learned counsel for the appellants submitted that the suit was barred by limitation. Learned counsel for the respondent, on the other hand, submitted that the supplies continued upto 30.4.1993. The payment was to be made within one month, The cause of action, hence, arose on 1.6.1993. The suit was filed on 20.12.1997 i.e. after four years 6 months" and 19 days, but the order of the High Court dated 20.10.2997 passed in C.W.J.C. No. 274 of 1994 would show that while permitting the respondents to withdraw the writ, the High Court had. ordered that as the petitioner (respondent) was bonafide prosecuting the writ application, if an application was filed u/s 14 of the Limitation Act, the

period spent in Court i.e. from the date of filing of the application , (10.1.1994) till today (i.e. 20.10.1997) would be excluded. He further submitted that the lower court record dated 23.1,1998 would show that such a petition was filed. Hence, in view of the order of the High Court, the suit was filed well within three years from the date on which cause of action arose and the suit was not barred by limitation.

24. The order dated 20.10.1997 passed by the High Court in C.W.J.C. No. 274 of 1994 (Ext.4) shows that the Court had directed that in the event of filing of a suit, the period of 10.1.1994 to 20.10.1997 (which is more than than three and a half years) would be excluded if an application u/s 14 of the Limitation Act is filed, The order dated 23.1.1998 passed by the court below also shows that such an application was '' filed, Therefore, I agree with this submission also of the learned counsel for the respondents that the suit was not barred by limitation.

25. Point No. (iii) :- It is an admitted position that the appellants had invited tenders for purchase of M.S. Black Pipes and the respondent had participated in it and the tender of the respondent was accepted and after negotiation between the parties, the respondent offered to supply the pipes at the rate of Rs. 174.95 P per metre and the Chief Engineer accepted the offer. Letter No. 3956 dated 16.7.1992 (Ext. 6) also shows that by that letter the Chief Engineer ordered to supply seven lakh metres of the pipe by 13.12.1992 and there was payment clause in that letter under which 90% of the value of the material was to be paid by the district authorities who were consignees of the goods on receipt of the materials and balance 10% was to be paid after full verification of the same within one month of the receipt of the materials. In the letter there is also a clause that in the event of variation in the total cost of steel as notified by the Steel Authority of India Limited, adjustment in the price would be made and revised price would be applicable to "the store tendered for inspection after 30 days from the date of such variation in the cost of steel. The letter also shows that the respondent was to execute an agreement with the Executive Engineer, Water Resources (Minor Irrigation) Department within 15 days of, the issue of the order. It is also admitted that accordingly an agreement (Ext. A) was executed on 8.8.1992 incorporating, inter alia, the above terms and conditions. The agreement shows that there is no clause for interest on delayed payment of the price of materials supplied.

26. It is also not denied by the respondent that by 30.11.1992 it supplied only 3,07,500 metres and thereafter the supply order of seven lac meters was cut down to four lakh metres only. It is also an admitted position that the respondents completed the supply by 30.4.1993.

27. It is further admitted that there was increase in the price of the raw material H.R. Coil by Steel Authority of India Limited, and. the appellants enhanced the rate of pipe from Rs. 174.95P to Rs. 190.48P per metre when according to the respondent the rate should have been Rs. 199,04P per metre; and the appellants paid price. of pipes supplied by the respondent at the rate of Rs. 190.48P per

metre.

28. It is also admitted that in order to realise the balance amount of the price on escalated rate and interest thereon at the rate mentioned under the Act, the respondents filed C.W.J.C. No. 274 of 1994 and the writ so far as the realisation of the balance amount was not admitted and the respondents were directed to file a regular suit for the same and the respondents filed Money Suit No. 97 of 1996 for the balance amount of Rs. 38,13,400/- together with the interest pendentelite and future at the rate prescribed under the Act. The judgment (Ext. 5) shows that the Judge 1st, Patna, in Money Suit No. 97 of 1996, allowed the prayer of the respondent holding that they are entitled to a decree of Rs. 38,13,400/- as the balance amount towards escalation of price of steel, but as the matter with regard to interns under the Act was pending in High Court, the Court held that the same would depend upon the order of the High Court in the writ. It is also admitted that thereafter the respondent withdrew its writ with regard to the interest under the Act from the High Court and filed Money Suit No. 153 of 1997 in the court of the Subordinate Judge 1st, Patna, against the judgment and decree of which, this appeal has been filed. It appears from the judgment that the learned Subordinate Judge by the impugned judgment has allowed the prayer of the respondent with respect to interest at the rate of 24% (19% being interest charged by the Bank of India on Cash Credit Account in the year 1992 plus 5%) compounding at a monthly rests on the decretal amount of Rs. 38,13,400/- with effect from 1.6,1993 till realisation as per the provisions of the Act.

29. The question, hence, that arises for determination is whether the Act is applicable in this case and the learned Subordinate Judge was justified. in awarding interest on the delayed payment under the Act.

30. It is not denied that the respondent is a Small Scale Industrial Unit. The certificate (Ext. 3) also proves that M/S. Shakti Tubes Limited (respondent) is registered with the Directorate ,of North Bihar Industrial Area Development Authority for manufacturing ERW Steel Pipes and Tubes.

31. Sections 3, 4 and 5 of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (the Act) reads as follows : -

Section 3:-" Where any supplier supplies any goods or renders any service to any buyer, the buyer shall make payment therefore on or before the date agreed between him and the supplier in writing or where there is no agreement in this behalf before the appointed day.

Section 4 :- "Where any buyer fails to make payment of any amount to the supplier as required u/s 3, the buyer shall, not-withstanding anything contained in agreement between the buyer and the supplier or any law for the time being in force, be liable to pay interest to the supplier on that amount from the appointed day or as the case may be from the date immediately following the date agreed upon at such rate, which is 5% points above the floor rate of comparable lending.

Explanation :- For the purpose of this section "floor rate for comparable lending" mean the highest of minimum lending rates charged by the Schedule bank (not being Co-operative banks) on Credit Limits in accordance with the directions given or issued to the banking companies generally by the Reserve Bank of India under the Bank Regulating Act, 1945,

Section 5:- "Notwithstanding anything contained in any agreement between a supplier and a buyer or any law for the time being in force, the buyer shall be liable to pay compound interest (with monthly rests) at the rate mentioned in Section 4 on the amount due to the supplier.

32. According to Section 2(b) of the Act "appointed day" means the day following immediately after the expiry of the period of 30 days from the date of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier.

33. Supplier under the Act has been defined as "supplier" means an ancillary Industrial Undertaking or a Small Scale Industrial Undertaking holding a permanent registration certificate issued by the Directorate of Industries of a State or Union Territory. Similarly, u/s 2(c) of the Act "buyer" means, whoever buys any goods or receives any services from a supplier for consideration.

34. Thus, it is clear that the respondent is a Small Scale Industrial Unit and covered under the definition of supplier. The judgment of Money Suit No. 97 of 1996 shows that the respondent had supplied to the appellants i.e. the buyer, steel pipes for which a sum of Rs. 38,13,400/- is still due, and admittedly the same has not been paid by the buyer as yet. The agreement between the parties also shows that 90% payment of the value of material had to be made on receipt of the materials and the balance 10% after full verification of the materials within one month of the receipt of the materials. It is also admitted, as already mentioned, that the supply of the materials had been completed on 30.4.1993. Therefore, if the Act is applicable in this case, the respondent is entitled to interest with effect from 1.6.1993 at the rate mentioned in Sections 4 and 5 of the Act.

35. Learned counsel for the appellants, however, submitted that the Act is not applicable in this case and the respondent is not entitled to any interest therein. He contended that (1) there was no agreement between the parties with regard to payment of interest. (2) The Act came into force after execution of the agreement between the parties for supply of the materials. (3) The respondents were required to supply the materials by 31.12.2002 but: they failed to do so in breach of the terms of agreement and, therefore, are not entitled to any interest.

36. Learned counsel for the respondent, on the other hand submitted that in view of the non obstante clauses in Sections 4 & 5 of the Act, the respondent is entitled to interest at the rate mentioned therein whether there was any

agreement regarding interest between the parties or not. He further submitted that as per Section 1(3) of the Act, the Act. came into force on 23.9.1992. The materials admittedly were supplied till 30.4.1993. Hence, according to the agreement payment of the price of materials was to be made within one month from that date, but the payment has not been made. So, the cause of action for delayed, payment arose on 1.6.1993, and as by that time, the Act had come into force, the Act would be applicable in this case. He then submitted that there is no penalty clause for delayed supply of materials in agreement and the appellants had from time to time extended the period of supply of materials. Therefore, though originally the materials had to be supplied by 31.12.1992 and the supply had been completed by 30.4.1993, that is no ground to withhold the amount and not to pay interest on delayed payment.

37. I think in. this connection the recent decision of the Apex Court in the case of Assam Small Scale Ind. Dev. Corp. Ltd. and Others Vs. J.D. Pharmaceuticals and Another, may be referred to. According to the facts of that case, the respondent had entered into an agreement with the appellant Corporation on or about 19th October, 1990 and pursuant to that agreement, the Corporation placed orders for supply of medicines manufactured by the respondent, a Registered Small Scale Industrial Unit, for the period from 1991 to June, 1993. The total price of the medicine supplied by the. respondent in pursuance of the supply orders of the Corporation stood at Rs. 20,50,654,13P out of which only, a sum of Rs. 46,51 2.80P was paid to the respondent when according to the agreement 90% of the value of the medicines was to be released to the respondent on delivery and the balance 10% was to be paid on receipt of full payment from the purchasing department. A suit was filed by the respondent on 7.9.1993 claiming the amount due together with interest in terms of 1993 Act. The trial Judge decreed the suit in favour of the respondent and the appeal preferred against that judgment was dismissed. The Corporation, hence, filed the appeal in the Apex Court.

38. The Apex Court held that "1993 Act came into force with effect from 23.9.1992 and will not apply to transactions which took place prior to that date. We find that out of 71 suit transactions, serial Nos. 1 to 26 (referred to in the pen ultimate para of the trial court judgment) that is Supply Orders between 5.6.1991 and 28.7.1992, were prior to the date of 1993 Act coming into force. Only the transactions at serial Nos. 27 to 71 (i.e. supply orders between 22.10.1992 and 16.6.1993). will attract the provisions of the 1993 Act.

39. Therefore, according to the above decision, it is not the date of agreement or the date on which payment became due, which is material in determining whether the provisions of the Act would be attracted. The crucial date is the date, of supply order. In this case also it is admitted that the order to supply the pipes was placed by the appellants through Chief Engineer''s letter No. 3956 dated 16.7.1992 which is prior to the coming into effect of the Act. Hence, in view of the above decision which is fully applicable in this case, it is obvious that the Act of 1993 would not be applicable in this case and the learned trial court

was not justified in allowing interest in terms of the Act.

40. The above decision of the Apex Court, however, further shows that though there was no agreement for payment of interest for the transactions made prior to coming into force of the Act, the Court allowed simple interest at the rate of 9% per annum being the Bank rate at the relevant time for both prior to the date of filing of the suit, pendentelite and as future interest in terms of Section 34 of the Code of Civil Procedure. In this case also, the respondent is Small Scale Industrial Unit and needs encouragement. The transaction in this case also related to the period of that case. Hence, in view of the apex Court''s decision, though the respondent is not entitled to interest in terras, of the Act of 1993 and there was no agreement of interests, it may be allowed interest at the rate of 9% per annum in terms of Section 34 of the CPC from 1.6,1993 till realisation.

41. It is, accordingly, ordered that instead of compound interest (with monthly rests) at the rate of 24% per annum allowed by the trial court, the respondent would be. entitled to simple interest at the rate of 9% per annum with effect from 1.6.1993 till realisation. The judgment and decree of the trial court is modified to that extent. It may also be mentioned that the interest has been awarded in this appeal on the decretal amount of Rs. 38,13,480/- passed in Money Suit No. 97 of 1996. But the case of the appellants, in their written statement, is that they have preferred. First Appeal in High Court against the judgment and decree, passed in Money Suit No. 97 of 1996 which is still pending. D.W. 1 in his evidence has also stated that an appeal has been filed against the judgment and decree passed in Money Suit No. 97 of 1996. Therefore, the liability of payment of interest is, ultimately, dependent upon the decision of the First Appeal pending in the High Court. So, any amount realised in execution of the decree of this appeal, would be subject to the decision of the Fist Appeal arising out of Money Suit No. 97 of 1996.

42. In the result, with the above observation, the appeal is allowed in part, as indicated above, with appropriate cost.

