

(2007) 10 PAT CK 0029

In the Patna High Court

Case No : Appeal from Original Decree No. 388 of 1997

The State of Bihar and Others

APPELLANT

Vs

Shakti Tubes Ltd.

RESPONDENT

Date of Decision : 03-10-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (2007) 4 PLJR 770

Hon'ble Judges : Syed Md. Mahfooz Alam, J

Bench : Single Bench

Advocate : Anil Kumar Jha and Uday Bhan Singh, for the Appellant; Sidheshwari Pd. Singh, Rajendra Pd. Singh, Krishna Kishore Sinha and Prabhat Kumar, for the Respondent

Judgement

S.M.M. Alam, J.—This First Appeal has been preferred against the judgment dated 28th June, 1997 and decree dated 8th July, 1997 passed in Money Suit No. 97 of 1996 by Sri Suvesha Nand Jha, Sub Judge I, Patna whereby he has been pleased to grant money decree amounting to Rs. 38,13,480/- in favour of the plaintiff and thereby decreed the plaintiff's suit in part on contest with cost. The case of the plaintiff, in short, is that the plaintiff is a company registered under the Indian Companies Act and it is also registered under the Industries Department, Government of Bihar as small scale industries engaged in manufacturing M.S. Black Pipes in the name of M/s Shakti Tubes Limited. Vide Memo No. CEMT (CELL) PLJR (Pipe) 01/90 Part II No. 49 dated 10th February, 1992, defendant no. 6 Chief Engineer, Minor Irrigation Department, Government of Bihar, Patna issued notice inviting tender for supply of ERW MS Black Pipes 100 mm N.B. light class. The tender was published in the leading newspapers and opening date of tender was notified as 21st March, 1992. On 21st March, 1992 the plaintiff submitted tender in compliance of the tender notice. The plaintiff stipulated this fact in the tender that 90% of the total value of the materials supplied including all the taxes and levies must be paid within seven days of delivery of materials and balance 10% be paid within one month of the

delivery of materials. The tender was submitted for supply of eleven lakhs meters of M.S. pipes of 4" diameter. Other firms also submitted their tender in compliance of the tender notice. As per schedule, all the tenders were opened on 21st March, 1992 at the office of the Chief Engineer, Minor Irrigation, Government of Bihar (defendant no. 6) now appellant no. 7. The plaintiff has quoted the rate of supply of M.S. pipe at the rate of Rs. 178.88 per meter inclusive of all taxes and charges subject to Rate Variation Clause if the basic price of raw materials, H.R. Coils/ Skelp increased by the Steel Authority of India Limited during the continuity of supply order then the price will be altered according to the price rise with immediate effect.

After opening of the tender the lowest rate quoted in the tender by other manufacturers was found at Rs. 174.95 per meter but keeping in view the terms and conditions offered by the plaintiff, the defendants asked the plaintiff for rate negotiation vide letter No. CEMT/(CELUPUR/ (PDPE)/01/90 Part-II 1583 dated 9.4.1992 and after negotiations with the defendants, the plaintiff accepted to supply the pipes at the lowest offered rate i.e. Rs. 174.93 per meter subject to the terms and conditions mentioned in the tender paper of the plaintiff vide letter dated 16.4.1992. The plaintiff's offer was accepted by defendant no. 6 vide his Memo No. 3956 dated 16.7.1992 and then the defendant no. 6 placed the order for supply and directed to execute an agreement on Agreement Form "H" with the Executive Engineer, Investigation Division, Water Resources (Minor Irrigation) Department, Patna within 15 days of issue of the order vide abovementioned memo. It was incorporated in the memo that 90 % of the payment of the total value of the material will be made on receipt of the material and balance 10% will be paid after full verification of the same within one month of the receipt of the materials.

Further case of the plaintiff is that the Steel Authority of India Limited increased the price of H.R. Coils on 19.5.1992 and accordingly, the plaintiff informed the Department by writing a letter dated 18.6.1992 about the increase of the price and requested that the plaintiff be allowed to make the supply on the escalated rates. After several reminders the Department replied vide Memo No. 4444 dated 4.8.1992 that the matter was under consideration and the escalated rates would be communicated after decision. It has been stated that the agreement for the abovementioned tender was executed as per directions contained in the letter dated 8.8.1992 in which the terms of the payment was also incorporated. The clause was added in the agreement that in the event of variation of total cost of steel, the payment would be made at the escalated rate applicable for the quantity of pipes supplied after such escalation. It is further stated that after execution of the agreement on 8.8.1992 the plaintiff started supply of pipes. After escalation of the price by the Steel Authority of India Limited on 19.5.1992, the defendants revised the rate and fixed the same at Rs. 190.48 per meters vide letter no. 6287 dated 4.11.1992 issued by the defendant no. 6 but according to the plaintiff, this was an apparent calculation mistake and on the basis of the escalation of price of materials, the revised rates should have been

fixed at Rs.199.04 per meter with effect from 16.7.1992 as per the terms of the agreement. The plaintiff made several request to calculate and consider the actual escalation in price but the defendants did not consider the plea and in spite of the protest, payments were made at the rate of Rs. 190.48 per meter instead of escalated rate of Rs. 199.04 as a result of which the plaintiff suffered loss of Rs. 8.56 as price of per meter pipe and in this way, total sum of Rs. 38,13,480/- becomes payable to the plaintiff towards escalation price as per the agreement arrived at with the defendants. It is further stated that when on repeated demands the defendants failed to make payment at the escalated rate, as mentioned above, the plaintiff through letter 4.1.1993 asked the defendants to pay the abovementioned amount failing which the plaintiff will be entitled to charge interest over the said amount as per the Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertaking Act i.e. 5% over and above the bank interest rate. It is further stated that the plaintiff has supplied 4,45,500/- meters of pipes to the concerned authorities as per the terms of the agreement. The balance escalated amount at the rate of 8.56 per meter which comes to Rs. 38,13,480/- and the interest payable over the said amount as per S.S.I. Unit Acts at the rate 24% per annum since 1.6.1993 till 15.6.1996 which comes to Rs. 27,83,839/- remained unpaid and as such, the plaintiff filed money suit for recovery of total amount of Rs. 65,97,319/-, However, by the impugned judgment, the plaintiff's suit was decreed in part and decree for Rs. 38,13, 480/- was awarded in favour of the plaintiff.

2. A joint written statement has been filed on behalf of all the defendants stating therein that the suit is not maintainable in its present form, the same is barred by estoppel, waiver, acquiescence and limitation and is also bad for non-joinder and misjoinder of the necessary parties. It is also barred under the Specific Relief Act. Further case of the defendants is that the defendant-Minor Irrigation Department, invited a tender for purchase of 25,00,000/- meter of M.S. black pipe and in reply to the tender notice, the plaintiff and several other contractors filled up tender which was opened in the office of the Chief Engineer, Minor Irrigation Department, Government of Bihar, Patna. On opening of the tender it was found that the plaintiff had quoted the rate of supply of pipe at Rs. 178.88 per meter inclusive of all taxes for supply of 11,00,000/- meter of pipe. Some other firms had also filled up tender and the lowest tender was at Rs. 174.95 per meter. The Chief Engineer, Minor Irrigation Department, Patna offered all tenderers to give their consent for supply of pipe at the lowest rate quoted in the tender i.e. Rs. 174.95/- per meter. Further case is that the plaintiff and all the other tenderers gave consent for supply of pipe at the lowest rate of Rs. 174.95 per meter. Thereafter the Chief Engineer, Minor Irrigation Department, Government of Bihar (defendant no. 6) accepted the offer of the plaintiff and issued purchase order for supply of 7,00,000/- meter of pipe and directed the plaintiff to execute an agreement within 15 days of the issue of the order vide Memo No. 3956 dated 16.7.1992. The last date for supply of pipe was fixed on 31.12.1992. Further case is that the plaintiff failed to supply the required pipe

before 31.12.1992 as per the agreement. The plaintiff was given a purchase order of 7,00,000/- meter pipe but the plaintiff supplied only 3,07,500 meter of pipe before 31.12.1992 and so due to slow performance of the plaintiff, defendant no.6 cut down the quantity of supply of pipe from 7,00,000/- meter to 4,00,000/- meter. However, on request made by the plaintiff, the date for supply of pipe was extended from 31.12.1992 to 30.4.1993 other conditions remaining the same. Further case of the defendants is that the Steel Authority of India Limited (SAIL) enhanced the rate of the iron and so the defendant enhanced the rate of the pipe from Rs.174.95 per meter to Rs.190.48/- per meter payable from 18.6.1992 and this enhancement of rate was duly communicated to the plaintiff vide letter no. 7239 dated 14.12.1992 of the Chief Engineer, Minor Irrigation Department, Patna. Accordingly, the defendants paid the price of the pipe supplied by the plaintiff till 30.4.1993 at the settled rate and as such, the entire dues of the plaintiff was cleared.

Further case is that the plaintiff preferred C.W.J.C. No. 274 of 1994 before the High Court in which the defendant appeared and filed counter affidavit. The said writ petition was dismissed on 14.9.1995. It has been specifically stated by the defendants that the last date of supply of pipe was fixed on 30.4.1993 and as such, the plaintiff should have filed the suit within three years from that very date but the plaintiff filed the suit beyond three years period and so, the claim of the plaintiff is barred by limitation and on this score alone, no relief can be granted to the plaintiff. It is further stated that the defendants have already paid the escalated rate of pipe to the plaintiff and other tenderers. The other tenderers have accepted the escalated rate without raising any objection and as such, the plaintiff is not entitled to claim any further escalated rate of the pipe. It is further stated that in fixing escalated rate of the pipe i.e. Rs. 190.48 per meter, there has been no calculation mistake on the part of the defendants which will also be established from the fact that the plaintiff was paid escalated price at the rate of Rs. 190.48 per meter in other supply order which was issued to him on 31.7.1992 for which the tender was invited on 27.9.91 and this fact goes to prove that the plaintiff's claim of escalated price of pipe at the rate of Rs.199.04 per meter is false. On the basis of the above pleadings, it has been prayed that the plaintiff's suit should be dismissed.

3. From perusal of the impugned judgment, it appears that the trial court framed as many as four issues for adjudication which are as follows:-

- (i) Is the suit, as framed, maintainable?
- (ii) Has the plaintiff got cause of action for the suit?
- (iii) Is the plaintiff entitled to a decree as claimed for?
- (iv) To what other relief or reliefs, if any, is the plaintiff entitled to?

4. It further transpires that the trial court has taken up issue no. (iii) as the main issue and after considering the oral as well as documentary evidence of both the

parties, the trial court held that the plaintiff is entitled to a decree of Rs. 38, 13,480 towards escalation of price of steel but did not grant relief with regard to the claim of the interest over the said amount. Accordingly, the trial court decreed the suit of the plaintiff in part. This finding of the trial court has been challenged by the defendants-appellants in this appeal.

5. Let me see-whether the said finding of the trial court is correct on the basis of the materials available on record.

6. In this case there are some admitted facts which are as follows:-

It is admitted that the Chief Engineer, Minor Irrigation Department, Government of Bihar (defendant no. 6) invited tender for supply of ERW M.S. black pipes 100 mm N.B. light glass through the advertisement in the newspaper vide Memo No. CEMT (CELL) PLJR (Pipe) 01/90 Part II No. 49 dated 10th February, 1992. It is also admitted that the date of opening of the tender was notified as 21st March, 1992. It is admitted case of both the parties that the plaintiff and several other tenderers submitted tender in response to the tender notice which was opened on 21st May, 1992 at the office of the Chief Engineer, Minor Irrigation Department, Government of Bihar (defendant no. 6). It is also admitted that the lowest rate of tender was opened at Rs. 174.95 per meter and although the plaintiff had not quoted the lowest rate but the plaintiff and other tenderers were persuaded by defendant no. 6 to supply the pipe at the lowest rate i.e. Rs. 174.95 per meter. It is also admitted that the plaintiff agreed to the request and accordingly, he was ordered to supply pipe through Memo No. 3956 dated 16.7.1992 of defendant no. 6 whereby the plaintiff was also directed to execute an agreement with the Executive Engineer, Investigation Division, Water Resources (Minor Irrigation) Department, Patna within 15 days of issue of the supply order. It is also admitted that on 8.8.1992 an agreement was executed between the defendant no. 6 and the plaintiff with clear stipulation that in the event of variation in price of steel, the payment would be made at the escalated rate applicable for the quantity of pipes supplied after such escalation comes into force. It is also admitted that during the continuance of agreement the price of steel was increased by the Steel Authority of India Limited on 19.5.1992. It appears that upto this stage there is no controversy between the parties rather the admitted position is that the defendants have accepted that the plaintiff is entitled to get price of pipe at escalated rate as per the terms of the agreement. However, the only point of difference between the parties is that according to the plaintiff, the plaintiff is entitled to get escalated price at the rate of Rs. 199.04 per meter with effect from 16.7.1992 whereas according to the defendants, the plaintiff is entitled to get escalated price at Rs.190.48 per meter.

7. Let me see which of the two contentions raised on behalf of the rival parties is acceptable.

8. In support of its case, the plaintiff has brought on record oral as well as documentary evidence. The defendants have also examined one D.W. and have

also adduced documentary evidence. By way of oral evidence, the plaintiff has examined altogether five witnesses, namely, Arun Kumar P.W. 1, Kishore Kumar More P.W. 2, Dilip Kumar Churiwal P.W. 3, Bindu Kumar Das P.W. 4 and Bishwanath Churiwal P.W. 5. By way of documentary evidence, the following documents have been brought on record which are marked exhibits. Exhibit 1 is the lawyer's notice dated 7.10.95 u/s 80 of the CPC proved by P.W. 1. Exhibit 2 is the Tender submitted by the plaintiff on 21.3.1992 against tender notice issued by the Minor Irrigation Department (hereinafter referred to as "the MID"). Exhibit 3 is the bill of quantity dated 21.3.1992. Exhibit 4 is letter no. 1583 dated 9.4.1992 of the MID. Exhibit 4/A is purchase-cum-supply order no. 3956 dated 16.7.1992. Exhibit 4/B is letter no. 4444 dated 4.8.92 of MID. Exhibit 4/C is letter no. 6287 dated 4.11.1992 of MID. Exhibit 4/D is letter no. 6288 dated 4.11.1992 of MID. Exhibit 4/E is letter no. 28 (GOP) dated 31.1.1992 of MID. Ext. 4/F is letter no. 4862 dated 23.8.1993 of MID. Exhibit 4/G is letter of STL dated 18.6.1992. Exhibit 4/H is letter of the STL dated 18.6.1992. Exhibit 4/I is letter of STL dated 9.11.92. Exhibit 4/J is letter dated 4.6.93. Exhibit 5 is letter no.1 (GOP) of MID dated 12.12.92. Exhibit 5/A is the copy of the agreement dated 8.8.92. Exhibit 6, 6/A, 6/B and 6/C are postal acknowledgments. Exhibit 7 is the calculation chart for escalated rate of HR Coil/ pipes. Exhibit 8 is the copy of the order passed in C.W.J.C. No. 274/94 dated 10.1.1994. Exhibit 9 is the copy of the Challan-cum-invoice of SAIL dated 2.5.1992. Exhibit 9/A is the copy of the Challan-cum-invoice of SAIL dated 23.5.1992 and the copy of the departmental proceedings.

9. The defendants have examined only one witness, namely, Anil Kumar as D.W. 1. However, the defendants have brought on record several documents which have been marked Exhibits. Exhibit A is letter of the plaintiff company i.e. Shakti Tube Ltd. (STL) dated 10.12.1992. Exhibit A/1 is another letter of STL dated 24.2.1993. Exhibit A/2 is letter no. 3956 dated 16.7.1992 of MID. Ext. A/3 is letter no. 7246 dated 11.12.96 of MID. Exhibit A/4 is letter no. 2008 dated 18.3.1993 of MID. Ext. A/5 is letter no. 6287 dated 3.11.1992 of MID. Exhibit A/6 is letter no. 7239 dated 14.12.1992 of MID and Exhibit B is the copy of the order of the High Court passed in C.W.J.C. No. 274/94.

10. In order to decide the point in controversy, the evidence of P.Ws. 2, 3 and 4 of the plaintiff and D.W. 1 of the defendants will be relevant.

11. P.W. 2 Kishore Kumar More has deposed that he is Accounts Officer in the office of the plaintiff. He has further deposed that the plaintiff had submitted tender (Ext. 2) for supply of M.S. black pipe along with bill of quantity against the tender of the Government of Bihar. PW. 3 Dilip Kumar Churiwal is one of the Directors of the plaintiff-firm. He has deposed that he had submitted tender dated 31.3.1992 for supply of pipe which was accepted and the Government of Bihar offered to supply the pipe at the rate of Rs.174.95 per meter and he agreed to supply the pipe at the rate offered by the Government and accordingly, he was asked to supply 7,00,000/- meter of pipe by the Chief Engineer, Minor

Irrigation Department (MID). He has further deposed that in the meantime on 15.5.1992 the Steel Authority of India Limited enhanced the price of steel and he immediately gave information to the State Government with regard to the enhancement of price whereupon the defendants told him that the State Government would take decision on escalation of price at an appropriate time and thereafter the agreement was executed between the plaintiff and the defendants. He has further deposed that after escalation of price of steel, the price of per meter pipe should have been fixed at Rs.199.04 paise as the escalation was upto Rs. 24/25 per meter. He has further deposed that he gave information about the escalation of price of steel to the defendants through letter no. 6288 dated 4.11.1992 and letter no. 6287 dated 4.11.1992. He further deposed that the plaintiff was not paid full escalated price and then the plaintiff wrote several letters to the MID but when no response was given by the Department, the plaintiff filed civil writ before the High Court. He has further deposed that the plaintiff gave notice u/s 80 of the C.P.C, to the defendants and when no decision was taken by the department with regard to escalation of the price then the plaintiff filed the suit.

12. P.W. 4 Bindu Kumar Das, who is the Executive Officer in the plaintiff-firm has deposed that the defendants had invited two tenders for supply of pipe. First tender notice was published on 31.1.1992 and second notice was given on 10.2.1992. With regard to the first tender the plaintiff-firm received the order for supply of pipe on 31.1.1992 and the last date for supply of pipe was fixed on 31.7.1992. For second tender the plaintiff received supply order on 16.7.1992 and accordingly, on 8.8.1992 the plaintiff executed a deed of agreement for second tender. He has further deposed that in the month of May 1992 the Steel Authority of India Limited enhanced the price of steel. The escalation rate was at Rs. 24.09 paise. The plaintiff-firm made demand at escalated rate from the defendants (Minor Irrigation Department) whereupon the Chief Engineer, MID gave written assurance that the demand would be fulfilled after the decision of the State Government and the same was under consideration. P.W. 4 has further deposed that with regard to the first tender, the plaintiff received escalation price but with regard to the second tender, the plaintiffs-firm received escalation price at the rate of Rs.15.43 paise only which was Rs.8.15 paise per meter less than the actual escalation in price. He has further deposed, that the plaintiff requested in writing from the defendants to pay the actual escalation price but the defendants did not agree and then the plaintiff filed a writ before the High Court. He has further deposed that the plaintiff also gave lawyer's notice to the MID and all the defendants and then the plaintiff filed the suit.

13. P.W. 5 Bishwanath Churiwal is one of the Directors of the firm Shakti Tubes Limited. He has deposed that he has filed writ petition bearing C.W.J.C. No. 274/94 before the High Court on behalf of the plaintiff and in that writ the defendants had also appeared. He has produced a copy of the writ petition alongwith its annexures which have been marked "X" for identification.

14. As stated above, the defendants have also examined one witness in this suit. D.W. 1 Anil Kumar is the Executive Engineer of the Minor Irrigation Department, Government of Bihar. He has stated that due to drought in the year 1992 the necessity of 25,00,000/- meters of pipe for installing tubewell arose. Accordingly, on 31.1.1992 tender was invited for supply of pipes. Altogether 13 tenderers including the plaintiff submitted their tenders. The plaintiff submitted rate at Rs. 178.88 paise per meter but the other tenderers quoted rate at Rs.174.95 paise per meter. The plaintiff was asked to supply the pipe at the lowest rate quoted by the other tenderers and the plaintiff agreed to supply 11,00,000/- meters of pipe at the lowest rate for which an agreement was also executed. The last date for supply of pipe was fixed on 31.12.92. He has further deposed that the plaintiff supplied 3,95,500/- meters of pipe upto 31.1.1993. However, the plaintiff was given further extension of time for supply of the remaining quantity of pipes by 30.4.1993 on the basis of request letter dated 24.2.93 but he failed to supply the required quantity of pipe. He has further deposed that the defendants have made entire payment of the price of pipes supplied by the plaintiff till 30.4.1993 and there is no dues. He has further deposed that there was no agreement for payment of interest. He has further deposed that in between 1991 to 1992 the plaintiff had submitted first tender on 27.9.91 and the second tender was submitted on 21.3.1992 and by 30.4.1993 he completed the work of supply of pipes of both tenders He has deposed that as the price of iron was increased only once on 19.5.1992 so, the Government decided to fix escalated rate of price of both the tenders at Rs.190.48 paise per meter. He has deposed that the plaintiff's claim with regard to escalation in price of steel at the rate of Rs. 199.04 paise per meter is wrong. He has stated in his cross-examination that the price of HR Coil before 1992 was at Rs.10,804/- per metric tonne and after increase, the price was at Rs. 13,031/- per metric tonne. So there was increase in price at Rs. 2227/- per metric tonne over which Rs. 89 plus 4 per cent sales tax will be added and thereafter the increase in price will come to Rs. 2316.8 paise. Over this amount the sale tax at the rate 4 per cent will be added again and thus, the total increase will be Rs. 2408.72 per metric tonne. He has admitted in his cross-examination that escalation rate was payable at the prevalent rate and not on the agreed rate. He admitted that the defendants have paid escalation price at the Rs. 23.16 paise but the plaintiff has wrongly claimed escalation price at the rate of Rs. 24.9 per metric ton.

15. On the basis of the oral evidence adduced on behalf of both the parties, some admitted facts have been brought on record which are mentioned below:-

(i) In the month of March, 1992 the plaintiff-company submitted tender for supply of MS black pipes as per tender notice given by the Minor Irrigation Department, Government of Bihar.

(ii) The said tender was opened only on 23rd March, 1992 although the lowest rate was submitted by other tenderers at Rs.174.95 and the rate quoted by the plaintiff was higher rate i.e. Rs.178.88 per meter but even then the plaintiff was

offered to supply the pipe at the lowest rate and the plaintiff agreed to supply the same at the lowest rate."

(iii) The plaintiff's offer was accepted by the defendant no. 6 and the defendant placed the order for supply of 7,00,000/- metre of MS black pipes to the plaintiff. Accordingly, on 8.8.1992 an agreement was executed between the plaintiff and defendant no. 6 with stipulation that in case of rise in price of the steel, the plaintiff will be entitled for escalated rate.

(iv) In the month of May 1992 i.e. on 19.5.1992 the Steel Authority of India (SAIL) increased the price of HR Coil and accordingly, on 18.6.1992 the plaintiff informed the defendants with regard to increase in price of steel and the defendants by letter no. 4444 dated 4.8.1992 assured the plaintiff that the escalation in the price of steel was under consideration of the Government and the escalation rate would be communicated after decision of the Government. On 4.11.1992 the defendant no. 6 communicated to the plaintiff about the decision of the Government with regard to fixation of escalated rate through letter no. 6287 (Ext. 4/C) and accordingly the State Government granted escalation price at the rate of Rs.190.48 per meter of M.S. black pipe.

16. The above facts which have emerged from the oral evidence of both the parties also find corroboration from the documentary evidence i.e. Ext. 2 the tender submitted by the plaintiff, Ext. 3 bill of quantity, Ext. 4 letter of the Chief Engineer dated 9.4.1992 given to the plaintiff for rate negotiation, letter of the plaintiff dated 16.4.1992 for acceptance of the lowest rate i.e. at Rs. 174.95 paise, Ext. 4/A supply order given by the defendants through letter no. 3056 dated 16.7.92 to the plaintiff, Ext. 5/A execution of the agreement dated 8.8.92 between the plaintiff and the defendant no. 6 for supply of the pipe with stipulation with regard to payment of escalated price in case of rise in price of steel by the SAIL Exts. 4/C and 4/H letters dated 18.6.1992 with regard to the intimation of the increase of price of steel by SAIL and Ext. 4C i.e. letter no. 6787 dated 4.11.1992 of the Chief Engineer showing grant of escalated rate at Rs. 190.48 per meter. Thus, from the above oral as well as documentary evidence, it has been established beyond doubt that in compliance of the tender notice, the plaintiff had submitted tender for supply of MS black pipes at the rate of Rs. 174.95 for which an agreement dated 8.8.1992 (Ext. 5/A) was executed between the parties with clear stipulation that in case of rise in price of steel, the plaintiff would be entitled to get the escalation price. It is also established from Ext. 4/C that the plaintiff was granted escalated rate at Rs.190.48 per meter. The differences between the parties starts from this point. According to the case of the plaintiff, the plaintiff is entitled to get escalation price at the rate of Rs. 199.04 per meter M.S. pipe whereas the defendants' contention is that the plaintiff is entitled to get the escalated price at Rs. 190.48 per meter of M.S. pipe.

17. The question is whether the plaintiff is entitled to get the escalation rate at Rs.199.04 or at Rs.190.48. In order to come to right conclusion I will have to see what was the actual rate of escalation in the price of per meter MS black pipes.

According to the case of the plaintiff, the increase in price of per meter MS black pipe was to the extent of 24.08 and this escalation rate was also accepted by the defendants With respect to previous tender and if this increase in the price of steel amounting to Rs. 24.08 is added in the agreed rate of supply of pipe i.e. Rs.174.95 then there will be no difficulty in holding that the plaintiff is entitled to receive the escalated rate of the price of pipe at Rs.199.04. It appears that (D.W.1) Anil Kumar, Executive Engineer, Minor Irrigation Department has admitted at paragraph 27 of his cross-examination that the total increase in price of steel was to the extent of Rs. 2408.72 paise for per metric tonne meaning thereby that the increase of price per meter pipe was to the extent of Rs. 24.08. This fact is also established from the documentary evidence brought on record. Ext. 4/D which is letter no. 6258 dated 4.11.92 of the Chief Engineer of the Minor Irrigation Department will show that MID had granted same escalated rate of price of MS pipe with regard to the previous tender. This letter shows that the previous tender was granted at Rs. 166.40 but after adding escalated rate of price of steel the rate of supply of per meter pipe was fixed by the Government at Rs.190.48 which shows that with regard to the first tender, the escalated rate of price of black pipe per meter was granted at Rs.24.08. Thus, there is admission of the defendants that after increase in the price of steel on calculation it was found that the price of MS black pipe per meter has increased upto 24.08. The other documents also prove the same fact and in this regard Exts. 9 and 9/A Challan-cum-Invoice dated 2.5.92 and 23.5.92 respectively, Ext. 4/E letter no. 28 (GOP) dated 31.1.92 of Chief Engineer MID, Ext. 7 calculation chart are relevant. All these documents conclusively prove that after 19.5.92 the increase in the price of M.S. black pipe per meter was to the extent of Rs. 24.08 paise.

18. It is admitted position that the previous tender for supply of MS black pipes was accepted at Rs.166.40 paise and after escalation of price in the month of May, 1992, the escalation rate was granted and escalated rate of supply of per meter MS black pipe was fixed by the State of Bihar with respect to first tender at Rs.190.48. This fact undoubtedly proves that the escalation was upto Rs. 24.08 per meter, Therefore, I am of the view that the same escalation rate should also be granted in case of second tender allotted to the plaintiff on 21.3.1992. Admittedly, the lowest rate of supply of the tender which is the subject matter of the suit was Rs.174.95 per meter. This rate was granted before increase in price of steel. As per the terms of the agreement, the plaintiff is entitled to get the escalation rate in case of increase in price of steel. Since it is established that increase in price of steel was to the extent of Rs. 24.08, as such this increase should be added in the rate fixed by the defendants for supply of MS black pipe. Thus after adding Rs. 24.08 in the lowest rate of supply of pipe, which was fixed at Rs.174.95 the total amount will come to Rs.199.08 and this will be the actual escalated rate which the plaintiff will be entitled to receive towards price of per meter M.S, black pipe after escalation of price of steel. Thus, on the basis of the above discussion I find and hold that the plaintiff is entitled to get escalated price at Rs.199.04 and not at Rs.190.48 granted by the State of

Bihar. From the impugned judgment it appears that the trial court has also come to the same finding and as such, the said finding of the trial court is hereby upheld.

19. The next question which is to be decided in this appeal is-whether the plaintiff's suit was barred by law of limitation. According to the case of the defendants, the plaintiff has preferred the suit after expiry of period of three years fixed for filing such suit under law of limitation and, therefore the suit is barred by law of limitation. It has been stated that the last date for supply of pipe was fixed on 30.4.1993 and so the plaintiff should have filed the suit within three years period from that very date but the suit was filed beyond three years period from the said date and so, legally the plaintiff is not entitled to get the relief as claimed. However, during the course of argument it was submitted by the learned Advocate appearing on behalf of the defendant-State of Bihar that the period of limitation will run from the date on which the State Government decided to grant escalated rate to the plaintiff at Rs. 190.40 per meter and communicated the decision to the plaintiff through letter no. 6287 dated 4.11.92 (Ext. 4/C) and restated its decision through letter no. 7239 dated 14.12.92 (Ext. A/6). According to his argument, the limitation should be counted from 4.11.92 and not from 30.4.93. As against this, the argument of the learned Advocate of the respondent was that in computing the period of limitation, the period required for service of notice u/s 80 of the CPC should be deducted and further deduction should be made during which period the plaintiff was pursuing the writ application before the High Court. It appears that the learned trial court has dealt with this point at paragraph 12 of its judgment while discussing issue no. 1 and relying upon the two decisions reported in *I.S.P. Trading Co. Vs. Union of India (UOI)*, and *Virendra Kumar Khairulal Jaiswal Vs. K.L. Aney*, the trial court has held that the plaintiff is entitled to add the statutory period of 60 days required for giving notice u/s 80 of the C.P.C, in computing the period of limitation. It appears that the learned trial court on the basis of the above decisions found the filing of the suit within the period of limitation holding that the last date of supply of pipe by way of extension of time was fixed on 30.4.1993 and since that date the limitation will expire on 30.4.96 but after adding 60 days which is required for giving notice u/s 80 of the C.P.C, the period of limitation will expire on 30.6.1996 and since the suit was filed on 25.6.1996, as such the suit is definitely not barred by limitation. The law is very clear and settled that since notice u/s 80 of the C.P.C, is necessary for a suit against the Government as such, in computing the period of limitation the period of notice given u/s 80 of the C.P.C, has to be excluded. In such view of the matter, I am of the view that the learned trial court has rightly added the period of 60 days which is required for giving notice to the Government in computing the period of limitation. But the question is from which date the period of limitation will run. It appears that before the trial court, the defendants-appellants have pleaded that the period of limitation will run from 30.4.1993 but before this Court during the argument, the learned Advocate appearing on behalf of the State has argued that the period of

limitation will run from 4.11.1992 on which date the defendants decided to fix escalated rate and informed the plaintiff through letter no. 6287 dated 4.11.1992 that the Government has decided to give escalated rate at Rs.190.48/-. He submitted that it is not a case of non-payment of price of material supplied which has admittedly been paid to the plaintiff rather it is a case of demand of difference in the price at escalated rate. He submitted that in case of non-payment of price of material the limitation will start from the last date of supply of material but in case of demand of escalated price at a particular rate the limitation will start from the date on which the Minor Irrigation Department, Government of Bihar decided to grant escalation of price at Rs.190.48 paise and communicated the same to the plaintiff through letter no. 6287 dated 4.11.92. He submitted that this date is crucial in deciding the limitation period because of the fact that except the plaintiff, all the tenderers accepted the enhanced price of pipe fixed by the State Government. He submitted that the State Government can not adopt two standard by giving different rates to different tenderers and if the escalated rate was not acceptable to the plaintiff then the proper course for the plaintiff was to stop the supply of pipe and in that situation the defendant no. 6 might have purchased the pipes from other tenderers who were ready to supply the same at the escalated rate fixed by defendant no. 6. He submitted, that in spite of the communication of the escalated price to the plaintiff, the plaintiff did not refuse to supply the pipe at the escalated price fixed by the Government and merely wrote some letters requesting the defendant no. 6 to revise the rate but the defendant no. 6 or any other defendants never gave any assurance to the plaintiff that the Government would revise the rate as claimed by the plaintiff and so the date of limitation will start from the date from which date the Government decided to give escalated rate at the rate of Rs. 190.95 per meter to all the tenderers which was accepted by all the tenderers except to the plaintiff. I am of the view that the argument of the learned Advocate of the defendants-appellants is correct as basically the order/decision dated 4.11.92 by which the defendants had taken decision to grant escalated rate for supply of pipe to the tenderers at Rs.190.48/- per meter which was communicated through letter no. 6287 dated 4.11.1992 to all the tenderers is under challenge and so the limitation will start from 4.11.92 on which date the State Government decided to give escalated price of pipe to all the tenderers. Thus, if the limitation starts from 4.11.92 then period of Limitation will expire on 4.11.95 and after excluding the period of 60 days required for giving notice u/s 80 C.P.C, finally the limitation will expire on 4.1.96. Admittedly, the suit was filed on 25.6.96 and so the plaintiff's suit is barred by limitation.

20. It has been argued by the learned Advocate of the of plaintiff-respondent that the period during which the plaintiff was pursuing writ application before the High Court should also be excluded for computing the period of limitation. In this regard the learned Advocate of the plaintiff has placed reliance upon the decision reported in AIR (36) 1949 P 293 (Lal Bihari Lal and Another, Plaintiffs vs. Bani Madhava Khatri and Others, Defendants). But I am of the view that the said

decision will not apply in this case as the principle laid down in the decision cited above is applicable in such cases where the suit is filed in wrong Court that is a Court having no jurisdiction to entertain it or where a suit is instituted in the wrong Court in consequence of a bona fide mistake of law or defect of procedure and not in cases where the party has chosen altogether a different remedy before a different Court having jurisdiction to grant relief. Under such circumstance, the plaintiff cannot be entitled to exclude the period during which he was pursuing writ application before the High Court in computing the limitation period. Thus, I find no difficulty in holding that the plaintiff's suit is barred by law of limitation. In such view of the matter I find and hold that the finding of the learned trial court that the suit is not barred by limitation is not in accordance with law and so this finding of the trial court cannot be upheld and the same is set aside.

21. On the basis of above discussion I find and hold that the plaintiff's suit is barred by limitation and on this ground alone it is bound to be dismissed. In the result, I find merit in this appeal and as such, the same is hereby allowed. Accordingly, the judgment and the decree passed by the trial court are set aside and the plaintiff's suit is hereby dismissed. However, in the circumstances of the case there will be no order for cost.