

(2001) 05 CAL CK 0036
In the Calcutta High Court
Case No : Appeal No. 476 of 1991

Usha Beltron Ltd.

APPELLANT

Vs

Nand Kishore Parasramka and another

RESPONDENT

Date of Decision : 25-05-2001

Acts Referred:

Limitation Act, 1963 — Section 21(1)

Citation : AIR 2001 Cal 88

Hon'ble Judges : Pranab Kumar Chattopadhyay, J;Ashok Kumar Ganguly, J

Bench : Division Bench

Advocate : P.K. Mallick and Surajit Mitra, for the Appellant;Arindam Sinha and Shakya Sen, for the Respondent

Final Decision : Dismissed

Judgement

Pranab Kumar Chattopadhyay, J.—This appeal is directed against the judgment and decree dated 21st February, 1991 passed by the learned single Judge of this Court. Plaintiff filed a suit against defendant/appellant claiming damages for non-delivery of the ordered goods to the plaintiff in view of the difference in the contract price and the market price as on the due date for delivery of the goods before considering the arguments advanced on behalf of the parties, facts of this case are briefly noted hereunder.

2. The plaintiff No. 2, M/s. N.K. Industries, is a partnership firm which placed an order upon appellant/defendant for supply of High Tensile Galvanised Steel wire in the month of April. 1968. Admittedly the plaintiff No. 2 wanted to purchase from the appellant/defendant 500 M. Ton of High Tensile Galvanised Steel wire under certain terms and conditions which had been specifically mentioned in the written order dated 23rd April, 1968 placed by the said plaintiff No. 2 with the appellant/defendant. The price and delivery schedule was also specifically mentioned in the said written order.

3. It has been alleged on behalf of the plaintiff that the delivery schedule as was

agreed by and between the parties was not adhered to as a result whereof a considerable quantity of goods were not delivered to the plaintiff in terms of the agreement. On the basis of the agreed terms delivery of the material should have commenced by the 15th of June, 1968 and the material were required to be supplied @ 100 M.T. per month in regular installments of 25 M.T. per week.

4. Admittedly, defendant failed to deliver the goods as per the aforesaid schedule. But according to the plaintiff, by mutual consent of the parties, time schedule mentioned in the agreement for delivery of the material was expressly and/or impliedly waived and/ or not given effect to.

5. On 26th August, 1969 defendant asked the plaintiff to increase the price of the ordered material @ Rs. 275 per M.T. on account of increase of the price of High Carbonwire Rods by Hindustan Steel Limited. Plaintiff, however, in its written communication dated 1st September, 1969 disputed the aforesaid demand of the defendant for increase in the price of ordered goods referring to the contract as it was specifically provided in the contract that the price will remain firm through out the contract period. By the said letter plaintiff also requested the defendant to complete the delivery of the material at the original rate. It has been contended on behalf of the plaintiff that thereafter the plaintiff firm accepted the price increase as was suggested by the defendant and it communicated its decision to Mr. Lohia of the defendant company. The defendant supplied thereafter 3,516 M. Tons of such material to the plaintiff No. 2 at the enhanced rate on 3rd October, 1969. Subsequent to the said period no material was supplied in spite of repeated demands made on behalf of the plaintiff. Plaintiff No. 2 by letter dated 8th July. 1971 called upon the defendant to effect supply of the balance material within 15 days from the date of receipt of the said letter but in the said letter it was specifically contended on behalf of the plaintiff that in case material is not supplied within 15 days from the date of receipt of the said letter then the plaintiff would arrange risk purchases on account of the defendant. The defendant neither replied to the said letter of the plaintiff nor did it supply the balance goods.

6. Accordingly, by letter dated 10th January, 1972 plaintiff served a notice on the defendant contending inter alia that the appellant had committed breach of contract by not supplying the balance goods in terms of the contract as a result whereof the plaintiff firm had suffered loss and damages to the extent of Rs. 8,21,321.32 being the difference amount between the contract price and the market price which the appellant/ defendant was liable to pay. Plaintiff called upon the defendant in the said letter to arrange payment of the aforesaid sum of Rs. 8,21,321.32 within a week from the date of the receipt of the said letter. This time the appellant replied to the said notice of the plaintiff by the letter dated 19th/22nd January, 1972. The appellant contended that by mutual arrangement contract in question stood cancelled long ago.

7. The plaintiff thereafter filed this suit, out of which this appeal arises, against the appellant for realisation of damages which was calculated at Rs. 7,85,192.77

on the basis of differences in the contract price and the market price as on the due date for delivery of the balance material.

8. The appellant/defendant opposed the claims of the plaintiff by filing written statement. In the said written statement appellant/defendant contended that under compelling circumstances defendant had to put forward a proposal to the plaintiff No. 2 for increasing the price of the balance material by Rs. 275 M.T. due to increase in price of the raw material but the plaintiff No. 2 by letter dated 1st September, 1969 in reply to the defendant's letter dated 26th August, 1969 refused to accept the said proposal of the defendant regarding enhancement of price and as such the defendant declined to deliver any further goods. The plaintiff No. 2 thereafter made a specific request for delivery of aforesaid 3.516 M. Tons of steel wire at the enhanced price and the defendant delivered the said specific quantity of Galvanised Steel wire to the plaintiff firm at the enhanced rate which the plaintiff No. 2 accepted.

9. According to the defendant, aforesaid delivery was not a part of the original contract and the said was effected only pursuant to the specific request of the plaintiff No.2 made subsequently wherein the plaintiff asked for delivery of the specific quantity of 3.516 M. Tons of steel wire at enhanced price without referring to the earlier contract and the defendant also never supplied the said goods as a part of the balance ordered goods required to be supplied pursuant to the earlier contract dated 23rd April, 1968.

10. It was, however, contended by the defendant that even assuming but not admitting that the original contract was subsisting on 3rd October, 1969 then the same was treated as determined soon thereafter by the parties and/or stood determined by efflux of time soon after 3rd October, 1969 and in any event before 31st December, 1969. It was contended on behalf of the defendant that it was very much within the knowledge of the plaintiffs that the defendant was not going to make any further supplies in terms of the contract and it was also contended that reasonable time for delivery had expired long ago in 1969 and the same could not be unilaterally extended. So according to the defendant, suit was clearly barred by limitation. During the pendency of this suit Ramanand Parasramaka, a partner of the plaintiff firm served a notice of retirement on 1st January, 1983 expressing his intention to retire from the partnership on and from 3rd March, 1983, Thereafter said Ramanand Parasramka died on and about 12th November, 1983.

11. On August, 8, 1985 an application for amendment of the plaint was made for bringing on record that Ramanand Parasramka had retired from the partnership and Nand Kishore Parasramka would continue to carry on the business of the erstwhile partnership firm under the name and style of the N.K. Industries as sole proprietor thereof.

12. On 6th September, 1985 an order was passed in the said application of the plaintiff/respondent No. 1 allowing the amendment as was prayed for. The

appellant thereafter filed its additional written statement wherein it was contended that Nand Kishore Parasramka as a sole proprietor was not entitled to claim the amount due to the said firm and therefore, the suit was not maintainable at the instance of Nand Kishore Parasramka. In view of the aforesaid objection raised by the defendant in the Additional Written Statement, Nand Kishore Parasramka made a further application for amendment of the plaint and for incorporating the name of the plaintiff/respondent No. 2 as the co-plaintiff.

13. On 7th August, 1986, an order was passed on the said second amendment application wherein the amendment was allowed confined only to the cause title and the same was also allowed without prejudice to the rights and contentions of the defendant that the claim in the suit is a new one and is barred by limitation and same was directed to be decided as an independent issue at the time of hearing of the suit.

14. Thereafter, at the time of the trial following issues were framed.

Issues

1. Was there any agreement to increase the price in August/September, 1969 as alleged in paragraph 4 of the plaint?
2. Was the contract treated as determined soon after 3rd October, 1969 as alleged in paragraph 6 of the written statement?
3. Did the defendant commit any breaches of contract as alleged in paragraph 7 of the plaint?
4. Did the plaintiff suffer any damages as alleged in paragraph 7 of the plaint? If so, to what extent?
5. Is the suit, as framed, maintainable?
6. Is the claim of the plaintiff barred by the Laws of Limitation as alleged in paragraph 12 of the written statement?
7. To what relief, if any, is the plaintiff entitled?

15. Learned trial Judge considered the submissions of the learned Counsel appearing on behalf of the respective parties issue wise and decided the same. While considering the issue no. 1 in order to decide whether any agreement was executed to increase the price of the ordered goods in August/September, 1969 learned trial Judge found merit in respect of the claim of the plaintiff that the price were increased by mutual consent of the parties.

16. Learned Counsel of the appellant strongly placed reliance on the letter dated 26th August, 1969 written by the appellant/defendant to the plaintiff No. 2 being Exhibit "B" and the letter dated 1st September, 1969 written by the plaintiff No. 2 in reply to the aforesaid letter of the defendant being Exhibit "C"

17. In the letter dated 26th August, 1969 appellant informed the plaintiff M/s. N.K. Industries that due to the increase in the price of high carbon wire rods by M/s. Hindustan Steel Limited prices of the ordered material had been increased by Rs. 275 per M.T. and the said plaintiff was requested to send necessary confirmation in respect of the aforesaid proposed increase in price of the ordered material in order to enable the defendant to resume further dispatches.

18. The plaintiff No. 2 by letter dated 1st September, 1969 replied to the aforesaid letter of the defendant wherein the said plaintiff No. 2 recorded its disapproval to increase the prices of the ordered goods as was proposed by the defendant and furthermore, the plaintiff asked the defendant to complete the delivery of the ordered material at the old rate. It was submitted on behalf of the plaintiff that though the plaintiff firm did not agree to the proposal of the appellant to increase the prices of the balance quantity of the ordered material but subsequently plaintiff No. 1 as the duly authorised agent of the plaintiff No. 2 verbally agreed to the increase in prices as was sought for by the appellant. According to the plaintiff, appellant supplied a portion of the ordered goods on 3rd October, 1969 and raised bills at the enhanced rate which were duly paid by the plaintiff.

19. The appellant by its letter dated 28th February, 1972 being Exhibit "R" admitted payment of the said enhanced price by the plaintiff in respect of goods supplied on 3rd October, 1969 but it was categorically mentioned in the said letter that the plaintiff did not agree to pay enhanced price as was claimed by the defendant and it was also recorded in the said letter that by mutual consent thereafter the agreement was treated as cancelled. It was submitted on behalf of the plaintiff that the plaintiff firm by letters being Exhibits "J" "K" & "N" reiterated confirmation of price increase to the appellant. Mr. Sinha, learned Counsel of the plaintiff submitted that out of the aforesaid letters objections were raised in respect of only Exhibit "J", that is the letter dated 22nd November, 1969 and as such same was marked as "subject to objection" but the other exhibits being Exhibits "K" & "N" are unimpeachable document according to Mr. Sinha and it was submitted on behalf of the plaintiffs that it would appear from those exhibits that plaintiff firm in writing had confirmed to pay the increased price as was sought for by the appellant for supply of balance ordered material.

20. The learned Trial Judge placed reliance on the letter dated 28th February, 1972 being Exhibit "R". While considering the said issue No. 1 learned trial-Judge quoted a line from the letter dated 28th February, 1972 wherein it was recorded that the plaintiff reluctantly paid enhanced price on a portion of the goods. But on a careful scrutiny of the said letter it appears that the defendant had specifically mentioned in the said letter that the plaintiff did not agree to pay enhanced price. The relevant portion of the said letter dated 28th February, 1972 is quoted hereunder :

You reluctantly paid us enhanced price on a portion of the goods, but ultimately did not agree to pay enhanced price according to the price increase of the raw

material and thereafter by mutual consent, the agreement was treated as cancelled.

21. Learned Counsel of the appellant rightly pointed out that the plaintiffs in the plaint did not make out a case to the effect that the plaintiff No. 2 though Initially refused to pay increase the price tout subsequently agreed to increase the same. The plaintiff also did not make out a case that there were negotiations between the parties or any oral agreement was arrived at subsequent to 1st September, 1969.

22. Accordingly, on the basis of the pleadings it cannot be said that the plaintiff was agreeable to pay the enhanced price of the balance portion of the ordered material. From the evidence it does not appear that the defendant's witness deposed anything contrary to the stand taken by the defendant and specifically recorded in the correspondence.

23. Learned trial Judge erroneously held that the defendant in its letter dated 28th February, 1972 admitted that the plaintiff agreed to pay the enhanced price but if the said letter is taken into consideration in its entirety then it cannot be said that the plaintiff agreed to pay the enhanced price in respect of balance quantity of the raw material. And the defendant never admitted in the correspondence that the plaintiff agreed to pay the enhanced price.

24. Accordingly, we are of the opinion that the learned trial Judge erroneously decided the issue No. 1 which could not be answered in the affirmative and the said finding of the learned trial Judge is, therefore, liable to be set aside.

25. In order to decide whether the contract in question was treated as terminated soon after 3rd October, 1969 as alleged by the defendant, learned trial Judge after considering the material on record and the evidence adduced on behalf of the respective parties came to a conclusion that the contract was not treated as determined soon after 3rd October. 1969 as was alleged by the appellant/ defendant.

26. It was contended on behalf of the appellant that aforesaid supplies were not in accordance with the terms of the contract as the supply of the ordered goods should have commenced by 15th June, 1968 and was required to be supplied @ 100 M. Tons per month in regular instalments of 25 M. Tons per week. Accordingly, the entire quantity of 500 M. Tons of the material were required to be delivered by the defendant to the plaintiff firm within November, 19, 1968.

27. Learned Counsel of the defendant has drawn out attention to paragraph 3 of the plaint where from it appears that between 18th September, 1968 and 2nd November, 1969 the defendant made certain supplies to the plaintiff No. 2. Accordingly to the appellant, 3,516 M. Tons of High Tensile Galvanised Steel wire were delivered to the plaintiff No. 2 on 3rd October, 1968 only after the said plaintiff No. 2 made specific request in this regard and agreed to make payment at the enhanced rate. It is the specific stand of the appellant that the appellant/

defendant made it clear to the plaintiff that unless the plaintiff agrees to further increase the price of the ordered material commensurate with the increase of the price of the raw material no further supplies would be made.

28. The learned trial Judge had observed that the plaintiff was repeatedly demanding delivery of the goods from the defendant. It appears from the records that prior to August, 1969 defendant made certain supplies to the plaintiff No. 2 from time to time and wherever supplies were not made by the defendant letters were written to the defendant on behalf of the plaintiff No. 2 demanding delivery of the ordered goods and the defendant in its turn not only acknowledge the receipt of such letters but also admitted its obligation to supply the balance material.

29. The letter dated 7th November, 1968 of the plaintiff addressed to the defendant being Exhibit "E" and the reply of the defendant to the said letter being Exhibit "F" and subsequent letters exchanged between the plaintiff firm and the defendant being letters dated 26th March, 1969, Exhibit "H" and 1st April, 1969, Exhibit "T" are very much relevant in this regard wherefrom it can be safely inferred that though the defendant failed to supply the ordered material in accordance with the terms of the contract but all along acknowledge its obligation to supply the material whenever objections were raised on behalf of the plaintiff for non-supply of the ordered material.

30. Surprisingly, after 3rd October, 1969 a complete different picture emerged. It was alleged on 22nd November, 1969 that the plaintiff No. 2 wrote a letter to the defendant being Exhibit "J" but the said letter is not an admitted letter. From the depositions of the PW. 1, Nand Kishore Parasramka in answer to questions being Nos. 334 to 337, 346 to 353 and 415 it would appear that the plaintiff could not prove the delivery of the said letter to the defendant. The aforesaid depositions of PW. 1 are set out hereunder :

Q 334. (Shown a copy of a purported letter dt. 22-11-1969 allegedly written by N.K. Industries to the defendant) Kindly look at it?

Ans. Yes.

Q. 335. Apart from your mere statement from the box do you have anything to show that this letter was actually delivered to the defendant?

Ans. There should be an acknowledgement received for the letter. I would have to check it in the records.

Q. 336. Take it from me that no such acknowledgement receipt has been tendered before this Hon'ble Court?

Ans. No acknowledgement receipt has been shown in regard to this letter.

Q. 337. I suggest to you that no acknowledgement receipt has been tendered before this Hon'ble Court because the original of the purported letter was never delivered to the defendant?

Ans. This is not correct. When we went to their office we held discussion with the various officers and in the course of our dealings with them we left the letter with their officer without taking any receipt. On good faith we did not insist for an acknowledgement receipt from higher-ranking officer.

Q. 346. After your purported letter dated 22-11-1969 when did you write the next letter, according to you, to the defendant?

Ans. It is in the record.

Q. 347. If I say that according to the disclosures made by you in this Hon'ble Court the next letter was written on 7-10-1970. Can you deny that?

Ans. Yes. It is a matter of exhibits here.

Q. 348. According to you, you have suffered damages for non-supply of the material by the defendant?

Ans. That is so.

Q. 349. And in spite of the fact that no material was supplied to you after 22-11-1969 you kept quiet and for nearly a year till 7-10-1970?

Ans. This is incorrect.

To Court :

Q. 350. Do you find the letter and/or the copy letters which have been exhibited and are stated to be returned by you bear serial numbers and also file numbers?

Ans. Yes.

Q. 351. Whether you maintained a register in which all the upward letters were entered into?

Ans. Yes.

Q. 352. Have got that register in your possession?

Ans. I will have to check up.

Q. 353. You try to find it out and bring it on the next day ?

Ans. Yes.

Q.415. Have you got any of the papers or documents which were asked to produce?

Ans. I tried to trace those documents but those being very old papers could not be traced in such a short time.

31. Furthermore, when the Court also directed the plaintiff to produce the necessary register the same was not even produced. Curiously enough the plaintiff No. 2 in deviation to its usual practice of sending letters to the defendant

demanding supply of ordered material, did not write any letter till October, 1970. Between 7th October, 1970 and 15th December, 1970 it was alleged that the plaintiff No. 2 wrote four letters to the defendant which are Exhibits "K" "L" "M" & "N" but the validity and/or existence of those letters were disputed by the defendant/appellant herein. Thereafter, plaintiff No. 2 wrote a letter to the defendant admittedly on 8th December, 1971 i.e. after lapse of one year and most significantly the said letter dated 8th December, 1971 does not contain any reference to any of the aforesaid letters allegedly written previously by the plaintiff No. 2 herein. The next letter which was written by the plaintiff No. 2 is the letter dated 10th January, 1972 which also does not contain any reference to any of the aforesaid letters allegedly written on behalf of the plaintiff No. 2. The only reference contained in the letter dated 10th December, 1972 is the letter dated 1st September, 1969 written by the plaintiff No. 2.

32. So, from the aforesaid circumstances it is very difficult to hold that the parties were treating the contract to be continuing after 3rd October, 1969. The learned trial Judge erroneously held that the defendant never wrote any letter to repudiate the contract or to dispute the demand of the plaintiff for delivery under the contract. While arriving at the aforesaid decision the learned trial Judge totally ignored the communication dated 1st September, 1969 being Exhibit "C". In the said latter plaintiff had specifically refused to increase the price of the ordered material as was requested by the defendant by its letter dated 26th August, 1969 and the plaintiff asked the defendant to complete the delivery of the material at the original rate. The last paragraph of the letter dated 1st September, 1969 is quoted hereunder:

Under the circumstances, we would request you to kindly look into the matter and complete the delivery of the material at the original rate immediately and oblige.

33. In view of the aforesaid facts it is clear that the contract between the parties were not subsisting after the aforesaid refusal of the plaintiff to enhance the price of the ordered material. The supply of High Tensile Galvanised Steel wire by the defendant to the plaintiff against its specific request on 3rd October, 1969 was a solitary case which was not a part of the balance quantity of the ordered material. The plaintiff only on that particular occasion agreed to make payment to the defendant at the enhanced rate and received the delivery of 3.516 M. Tons of High Tensile Galvanised Steel wire.

34. Though the learned trial Judge observed that the plaintiff repeatedly demanded the delivery of the goods from the defendant on the basis of the Exhibits "J" "K" "L" "M" "N" & "T" but the validity and/or existence of those exhibits had been disputed by the defendant. The plaintiff failed to establish that it had demanded the delivery of the balance quantity of the ordered material from the defendant only prior to 3rd October, 1969 or within a reasonable time after receiving the delivery of the material from the defendant on 3rd October, 1969 and as such it can be safely held that the supplies made by the defendant

to the plaintiff on 3rd October, 1969 was not a part of the regular supply required to be made in terms of the contract as the plaintiffs failed to establish that it had agreed to increase the price of the raw material was demanded by the defendant even after refusing to do so initially as was recorded in the written communication dated 1st September, 1969 being Exhibit "C" Assuming that the delivery made on 3rd October, 1969 was part of the balance quantity of the ordered material but the plaintiff even thereafter didn't demand the supply of the material from the defendant and no correspondence was either exchanged between the parties immediately after 3rd October, 1969 nor the existence of the same could be established by the plaintiff No. 2.

35. In such circumstances we are constrained to hold that the parties were not treating the contract in question as subsisting even after 3rd October, 1969 and as such we hold that the learned Trial Judge erroneously decided the issue No. 2 and we are of the opinion that the parties never treated the contract as subsisting after 3rd October, 1969.

36. The next point which was decided by the learned trial Judge was whether the defendant had committed any breach of contract as was alleged on behalf of the plaintiffs. It was submitted on behalf of the plaintiffs that in spite of repeated demands and/or request made to the defendant for delivery of the ordered material the entire quantity of the contracted goods was not delivered by the defendant. It was further submitted on behalf of the plaintiffs that the employees of the plaintiff No. 2 repeatedly approached the directors of the defendant company for the fulfilment of its demand by delivering the contracted goods without any delay but the delivering the contracted goods without any delay but the defendant company in spite of assuring the plaintiffs to deliver the entire balance quantity of the contracted goods failed and/or neglected and/or refused to do the same.

37. Mr. Laxminarayan, PW3, while adducing evidence on behalf of the plaintiffs admitted that the defendant in spite of receiving raw material did not deliver the contracted goods to the plaintiff. The depositions of the said PW3 in answer to question Nos. 253 to 255 and 278, 279 in support of the aforesaid contentions made on behalf of the plaintiffs are very much important and the said depositions of the PW3 are reproduced hereinbelow,

Q. 253. This defendant company according to you used to produce more than one thousand tones of steel products?

Ans. Yes.

Q. 254. Those products used to be sold in the market?

Ans. Yes.

Q. 255. The price at this these goods were sold in October, 1969, December, 1970 and in the various months of 1971 will appear from their records which they are maintaining ?

Ans. That is so.

Q. 278. And this company, viz., the defendant company used to manufacture wire ropes and other items?

Ans. That is so.

Q. 279. And this company was continuously manufacturing High Tensile Galvanized steel wire?

Ans. Yes.

38. The learned advocate of the plaintiff placed much reliance on the letter dated 8th December, 1971 written by plaintiff No. 2 to the defendant company. As by the said letter plaintiff No. 2 sought to extend the time for delivery of the material unilaterally which according to the defendant, could not be done. According to the defendant, contract was determined soon after 3rd October, 1969 and as such it was submitted on behalf of the defendant that committing any breach of the contract thereafter by the defendant company cannot and do not arise.

39. Learned trial Judge while deciding the aforesaid point also placed reliance on the evidences adduced by PW1 in answer to questions Nos. 152 and 153 and had come to the conclusion that the defendant extended the time for delivery of the contracted goods at least up to 23rd December, 1971. We fail to understand how the time initially fixed at the time of executing the contract by the parties for delivery of the goods can be unilaterally extended at the behest of one of the parties particularly when the defendant company took the stand that the contract was treated as terminated soon after 3rd October, 1969. In the event it is accepted that the delivery made by the defendant company on 3rd October, 1969 was in respect of a portion of the quantity of the balance material required to be delivered by the defendant company to the plaintiff in terms of the contract, then also it cannot be said that the time to deliver the contracted goods was extended unilaterally by the plaintiff firm at its whims and/or sweet will without obtaining the consent of the defendant company in this regard.

40. In the circumstances, it cannot be said that the defendant had committed breach of contract by not effecting deliver of the balance quantity of the ordered goods within the alleged extended time period as was mentioned by the plaintiff firm in its letter dated 8th December, 1971.

41. We, therefore, do not think that the learned trial Judge correctly decided the aforesaid point as it cannot said that the defendant had committed breach of contract by not delivering the balance portion of the ordered material within 23rd December, 1971 as was requested by the plaintiff had no authority to extend the time limit of the contract period unilaterally.

42. According to the plaintiff, defendant company committed breach of contract by not delivering the balance portion of the ordered material within the time as

mentioned in the said letter dated 8th December, 1971 but the learned trial Judge overlooked this important factor that the plaintiff firm cannot unilaterally fix up any particular date for performance of the contract by unilaterally extending the original time period and thereafter it cannot contend that the defendant company had committed any breach of contract by not delivering the balance portion of the contracted goods within the time limit which was unilaterally fixed by the plaintiff firm without any basis and without obtaining any consent from the defendant company. In the aforesaid circumstances, we are of the opinion that the learned Judge erroneously decided the aforesaid issue in favour of the plaintiff firm.

43. The learned trial Judge also held that the plaintiff had suffered damages for a sum of Rs. 7,85,192.77. It was contended on behalf of the plaintiff that it had suffered damages for non-delivery of the balance portion of the ordered material by the defendant company and such damages were calculated on the basis of the difference of market price in respect of the ordered material at that relevant point of time. After scrutinizing the plaint it appears that the plaintiff never demonstrated how it suffered damages and how such damages could be quantified particularly when the plaintiff firm did not purchase any material at an enhanced rate pursuant to the risk purchase notice which was served by the plaintiff firm on the mentioned defendant company. The plaintiff firm did not mention specifically in the plaint in respect of the actual damages suffered by the plaintiff firm on account of alleged non delivery of the balance quantity of the ordered material.

44. The learned Counsel of the defendant company rightly submitted that loss of damages must be actual and not by way of punishment. Damages are obviously required to be in the nature of compensation and it cannot be a penal one. As no actual purchase had been made by the plaintiff firm on the alleged failure of the defendant company to supply the balance quantity of the ordered material the plaintiff No. 2 admittedly it could not suffer any loss and the question of suffering any damages or quantification of such damages under such circumstances, therefore, does not arise. It has been held by the various courts that damages can be quantified only by way of compensation for loss suffered and not by way of punishment. The learned Counsel of the defendant company cited following decisions which are very much relevant in this regard.

(i) AIR 1958 A P. 533 (DB)-HN (J) Paragraph 19 at Page 541.

(ii) Pannalal Jugatmal Vs. State of Madhya Pradesh, at Pages 245-246.

It is a settled principle that in case of risk purchase, market price prevailing on the date should be taken into consideration. In the present case material was required to be supplied latest by December, 1969 but the market price in respect of the ordered material prevailing in December, 1969 was proved. The PW1 failed to prove the correctness of the content of the offer received from Specials Steel Limited.

45. Mr. Pradip Banerjee, PW2, though adduced evidence as an officer of Special Steels Limited but he also could not prove the correctness of the contents of the documents. In the basis of the depositions of the said Pradip Banerjee it can be said that he has at best proved the signature contained in the documents received from Special Steels Limited but under no circumstances it can be said that the contents of the documents have been proved or said Pradip Banerjee was competent to prove the correctness of the contents of the said documents which are Exhibits "V" "X" "EE"

46. It was contended on behalf of the plaintiff that the exhibits were duly proved and referred to the depositions of PW1 in answer to question Nos. 95 to 09 which are set out hereunder.

Q. 195. Do you know a Company by the name of Special Steel Ltd.?

Ans. Yes.

Q. 196. Where is this Company situated?

Ans. At Bombay.

Q. 197. What kind of business has this Company engaged in?

Ans. This company manufactures specialist steel wires and it is registered with the Govt. of India and is now under the Tata Group.

Q. 198 Does this Company manufacture High Tensile Galvanised Steel Wires ?

Ans. Yes, it does.

Q. 199. Did you have any occasion of purchasing High Tensile Galvanised Steel wire?

Ans. Yes.

Q. 200. When did you purchase?

Ans. In the years 1966-67-68.

Q. 201. In the early part of 1972 did you ask for quotation from this Company?

Ans. 201. In the early part of 1972 did you ask for quotation from this Company?

Ans. yes, we asked the quotation for similar material i.e. High Tensile Galvanised Steel wire.

Q. 202. Shown a copy letter dated 17th March, 1972 being plaintiffs further document No. 9. Is this the letter you have in your mind?

Ans. Yes.

Q. 203. Where is the original of this letter?

Ans. It was sent to Special Steel Ltd., Bombay.

Q. 204. Are the contents of this letter correct? Ans. Yes.

Q. 205. Who is the signatory of this letter?

Ans. Mr. N.K. Agarwal.

Q. 206. Do you know his signature?

Ans. Yes.

Q. 207. Did you addressee i.e. Special Steels Ltd. reply to this letter?

Ans. Yes. (Tendered and marked Ext. "U" to objection)

Q. 208. Shown the original document which is plaintiffs further document No. 10. Tell whether this is the reply you have in your mind?

Ans. Yes.

Q. 209. Did you receive this document in the usual course of business?

Ans. Yes. (Tendered and marked Ext. "V" subject to objection.)

47. Referring to Exhibit "H" learned counsel of the plaintiffs contended that Exhibit X is the reply of Special Steels Limited where they stated that Rs. 4,100/- per M.T. was price up to 31st September, 1971. It was further submitted by the learned Counsel of the plaintiffs that the contents of the documents and the letters of quotation and clarification from Special Steels Limited being in original were believed and relied upon by the learned Trial Judge. Learned Counsel of the plaintiffs also submitted that on the basis of the aforesaid documents prevailing price as on December 19, 1971 was fixed at Rs. 4,100/- per M.T.

48. According to the learned Counsel of the plaintiffs, fixation of the aforesaid price was to the advantage and benefit of the appellant. Learned Counsel also submitted on behalf of the plaintiffs that it would appear from the quotation of the Hindustan Wires limited being Exhibit "EE" that the price of the said goods was Rs. 5,100/- per M.T. Learned Counsel of the plaintiff contended that the defendant had admitted in para 3 and 6 of the written statement that 334.837 M.Tons of goods were required to be supplied and as such there had been no difficulty for the learned Trial Judge to quantify the damages suffered by the plaintiff firm. Since the price of the ordered material prevailing at the relevant point of time had been determined by the learned Trial Judge, accordingly, the learned Counsel of the plaintiffs submitted that the learned Judge rightly assessed the damages suffered by the plaintiff which was quantified to the tune of Rs. 7,85,192.77.

49. It also appears that the learned Trial Judge was very much persuaded by the fact that the defendant failed to produce records from its custody in order to show at what rate the goods were being sold by the said defendant from time to time to its customers. According to the learned Trial Judge, if the records were brought before this Court then the market rate prevailing at the point of time

could be proved but since defendant has chosen not to produce such records or to tender the same for evidence before the trial Court, the learned Trial Judge is entitled to presume that if such documents were brought on evidence then the same could have gone against the defendant.

50. We fail to understand how the defendant is obliged to produce documents and/or adduce evidences to prove the case of the plaintiff. In our opinion the plaintiff has to prove its case as pleaded in the plaint by producing relevant records and adducing necessary evidence. The plaintiff can under no circumstances shift the responsibility on the defendant for proving the case as made out in the plaint. The learned Trial Judge, in our opinion, erroneously held against the defendant on account of non-production of the documents for proving the market rate of the material at the relevant point of time. Under the circumstances, we are of the view that the learned Trial judge had erroneously held the plaintiff suffered damages and further committed mistake by quantifying such damages at Rs. 7,85,192.77 in absence of proper material and/or evidence.

51. Now the most important aspect considered by the learned Trial Judge was the maintainability of the suit filed by the plaintiff herein. The defendant had raised a specific objection regarding maintainability of the suit. Though the learned Trial Judge held that no arguments were really advanced with regard to the maintainability of the suit but learned Counsel of the appellant/defendant submitted that the said point was specifically argued before the learned Trial Judge and referred to the written notes of the arguments submitted on behalf of the plaintiff before the learned Trial Judge wherein plaintiff had clearly dealt with this point. Learned Counsel of the defendant/appellant has further submitted that the question of maintainability of the suit is a question of law and as such the same can be considered by the Appellate Court even for the first time.

52. The suit was originally filed by the partnership firm. By virtue of the order dated 6th September, 1995 passed on the first amendment application of the plaintiff no. 1 the suit became a suit by an individual carrying on business as the sole proprietor under the name and style of N.K. Industries. The case made out in the plaint is case of devolution as has been specifically mentioned in para 9(A) of the plaint. Devolution can take place only by operation of law which is not the present case. No case of assignment was made out by the plaintiffs and no evidence was led by the plaintiffs to prove any assignment. The letter dated 1-1-1983 (Ext. "HH") which has been relied on by the plaintiff no. 1 in support of his claim does not say that he would be entitled to the benefits of the firm being the plaintiff No. 2 which allegedly stood dissolved. Thus no question of assignment was either made pleaded and far less proved. Under the circumstances, by virtue of the order dated 6th September, 1985 the suit became a new suit by the plaintiff No. 1. The plaintiff No. 1 cannot maintain the suit as the sole proprietor of N.K. Industries which, the original plaintiff. Even if it is assumed that the firm, the original plaintiff stood dissolved during the pendency of the suit, the suit should have been continued by a dissolved

partnership firm and not by the plaintiff No. 1 as the sole proprietor thereof.

53. The firm was again sought to be added as plaintiff No. 2 in 1986. Only the plaintiff No. 2 was allowed to be added without any consequent amendment in the body of the plaint. The order allowing amendment being the order dated 7th August, 1986 did not provide that such addition would take effect from the date of filing of the suit. As there was no such direction as required under the proviso to S. 21(1) of the Limitation Act, 1963, such addition of the plaintiff No. 2 could not be as on the date of filing of the suit. Moreover, in 1986 the plaintiff No. 2 was not functioning as a partnership firm and the manner in which the plaintiff No. 2 was described was erroneous. As no partnership firm by the name of N.K. Industries was in existence in 1986, the addition of the plaintiff No. 2 could not improve the situation and the suit continued to be non-maintainable.

54. Learned Counsel of the appellant defendant cited following decisions in support of its contention in this respect.

(i) AIR 1942 335 (Oudh)

(ii) Lahoriram Prashar Vs. State of West Bengal and Others,

(iii) 2001 (3) JT(SC) 179 : (AIR 2001 SC 1185) Ramalingam Chettiar v. P.K. Pattabiraman)

(iv) AIR 1981 Kar 16. (Mahadeva Rao v. S.G. Chikkanageswariah)

55. In view of the aforesaid discussions we are of the view that the learned Trial Judge erroneously held that the suit as framed by the plaintiffs was maintainable.

56. The most crucial issue in this matter, which fell for consideration before the learned Trial Judge was whether the claim of the plaintiff was barred by the laws of limitation particularly when the defendant specifically raised the point of limitation in the written statement and the learned Trial Judge also specifically framed an issue In this regard.

57. The learned Counsel of the defendant submitted that the suit was barred by laws of limitation on the grounds mentioned hereinafter. Firstly, due date for delivery under the contract can at best extended up to December, 1969. As per the contract, the contracted material of 500 M. Tons was to be supplied @ 100 M.Tons per month commencing from June, 1969. In the other words, the entire material was to be supplied by the defendant by November, 1968. So, the suit filed in June, 1973 is barred by the laws of limitation.

58. Even if it is assumed that the parties agreed to the price increase in August/ September, 1969, the balance material which remained undelivered weighing about 300 M. Tons was to be supplied by the defendant at the said rate of 100 M. Tons per month. So, such supply was to be completed by December, 1969. So, in any event, the suit filed in June, 1973 is barred by the laws of limitation.

59. The plaintiff sought to make out a case that after the alleged agreement to

increase the price in August/September, 1969 the defendant was to supply @ 50/70 M. Tons per month. Even in that case the supply of the balance material was to be completed by March, 1970. In that event also the suit as filed in June, 1973 is barred by the laws of limitation.

60. The learned Counsel of the appellant/defendant further submitted that the plaintiff No. 1 did not or could not have any cause of action against the defendant. The plaintiff No. 2 was added as the plaintiff by the order dated 7th August, 1986. So the suit filed by the plaintiff No. 2 should be deemed to have been filed on 7th August, 1986. According to the learned Counsel of the appellant, the partnership firm of N.K. Industries was originally a plaintiff.

61. Mr. Mallick, learned senior Counsel of the appellant, submitted that the plaintiffs with their eyes wide open initially deleted the name of the partnership firm of N.K. Industries as plaintiff and thereafter, brought back the said partnership firm on record as co-plaintiff after filing the second amendment application which was conditionally allowed on 7th August, 1986. Mr. Mallick submitted that S. 21(1) of the Limitation Act applied where the omission to include a new plaintiff or defendant was due to mistake.

62. Learned counsel of the appellant submitted that the suit became barred as a consequence of the first amendment application whereby Nand Kishore Parasramka as sole proprietor of N.K. Industries became a new plaintiff as on the date of amendment i.e. on 6th September, 1985. Mr. Mallick further submitted that a new party was added and/or substituted in place of the original plaintiff that is the partnership firm under the name and style of N.K. Industries. It was specifically urged on behalf of the appellant that Nand Kishore Parasramka carrying on business under the name and style of N.K. Industries became new plaintiff by way of substitution and/or addition and therefore, the suit by Nand Kishore Parasramka should be treated as instituted on 6-9-1985 when the amendment as sought for was allowed by this Court. Though in the case of a partnership firm any two or more persons may sue in the name of the firm but after deleting the name of the partnership firm and substituting an individual person in place of the firm cannot mean that the individual person was a partner of the firm should be treated as a plaintiff from the very beginning.

63. Learned Trial Judge though relied upon the provisions of Order 30 Rule 1 of the CPC in this regard and came to the conclusion that the suit is really by the person who is the partner of the firm and in view of said Order 30 Rule 1 the said partner had the right to sue in the name of the firm learned Trial Judge misconstrued the consequences of the effect of first amendment and came to an erroneous conclusion that Nand Kishore Parasramka was a plaintiff from the very beginning being a partner of the firm who had right to sue in the name of the firm. In the plaint it was specifically mentioned on behalf of the plaintiff that all the rights and obligations of the firm, N.K. Industries, devolved upon Nand Kishore Parasramka.

64. Appreciating the aforesaid stand of the plaintiffs as correct learned Trial Judge held that so far as the first amendment is concerned S. 21(1) of the Limitation Act has no manner of application and the same is governed by S. 21(2) of the said Act. The provision of S. 21 of the Limitation Act is set out hereunder.

21. Effect of substitution or adding new plaintiffs of defendant

(1) Where after the institution of a suit, a new plaintiff of defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in sub-sec. (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit where the plaintiff is made a defendant or a defendant is made a plaintiff.

65. Admittedly, Ramanand Parasramka one of the partners of the partnership firm retired from partnership firm with effect from 3rd March, 1983 and he died thereafter on 12th November, 1983. It may be noted that the learned Trial Judge while coming to the said conclusion observed that the order for amendment was sought for and made on 6th September, 1985 on the ground of assignment when admittedly, the plaintiff in the plaint took a definite stand that the rights and obligations of the firm developed upon Nand Kishore Parasramka. Learned Counsel of the plaintiff also admitted that word "assignment" ought not to have used by the learned Trial Judge as according to the plaintiff, the case was actually of devolution.

66. We fail to understand how a case of devolution can be made out by Nand Kishore Parasramka. Learned Trial Judge, however, correctly held that there was no devolution of interest by the retiring partner in favour of the continuing partner. Relevant extract of the judgment the learned Trial Judge is set out hereunder.

Even assuming that after the retirement of Rama Nand Parasramka, Nand Kishore Parasramka became a sole proprietor of the firm of N.K. Industries, on and from the date of retirement, it did not by itself mean that there was any devolution of interest by the retiring partner, in favour of the continuing partner.

67. Mr. P.K. Mallick, learned Senior Counsel relied on S. 21 of the Limitation Act and submitted that the suit should be deemed to have been instituted by the firm of N.K. Industries when the said firm was made a party i.e. on 7th August, 1986 as the name of the partnership firm was previously deleted in view of the first amendment and it should be treated that the name of the firm was not there

in the plaint at all from the very inception of the suit.

68. It is the case of the plaintiff that being wrongly advised by its counsel the said first amendment was made before this Court, which subsequently appeared to be an erroneous advice in the opinion of the senior Counsel of the plaintiff. Accordingly, the second amendment application was made on the basis of the subsequent advice of the senior counsel engaged on behalf of the plaintiff and it was also specifically contented that the earlier amendment application having been filed on the basis of erroneous advice of the learned Counsel the said amendment was wholly unnecessary. By the said second amendment application partnership firm was again brought back as co-plaintiff and according to the learned Counsel of the appellant the said partnership firm was brought on record as co-plaintiff with effect from 7-8-1986.

69. Learned Trial Judge erroneously held that there was omission to include the name of the partnership firm of N.K. Industries as plaintiff during the period of 6-9-1985 to 7-8-1986 due to mistake of the plaintiff in good faith and the said Trial Judge directed that the suit as regards the partnership firm of N.K. Industries should be deemed to have been instituted on the date of the institution of the suit i.e. on 13-6-1973. Learned Counsel of the appellant, however, rightly submitted that the said S. 21 (1) of the Limitation Act has no manner of application in the instant case as the plaintiff with open eyes has detected the name of a particular plaintiff and thereafter sought to bring back the said plaintiff on record on the ground of alleged mistake. Furthermore, proviso to S. 21 (1) of the said Limitation Act enables the court on being satisfied that the omission to include a new plaintiff or new defendant was due to mistake made in good faith, to direct that the suit as regards such plaintiff or defendant was to be deemed to have been instituted on any earlier date.

70. Mr. Mallick submitted that in the present case this Hon"ble court while allowing the second amendment application did not pass any order directing that addition of the plaintiff firm as co-plaintiff in the suit should take effect on the date of institution of the suit and/or on any earlier date. The learned Judge while allowing the second amendment application on 7th August, 1986 passed the following order.

This is an application for amendment of the plaint. The amendments allowed but it is confined only to the cause title of the plaint as shown in the red ink in the copy plaint annexed to the petition. In other words, there will be two plaintiffs, as shown in the proposed amendment. The consequential amendment of the plaint describing the plaintiff in the body of the plaint shall also be incorporated as would be shown at the time of amendment. This amendment is, however, without prejudice to the contention of Mr. Mallick that the claim in the suit is a new one and is barred by limitation, which will be decided as an independent issue in the suit, when the suit will be heard. Let the amendment be carried out within two weeks from date. The amended copy of the plaint shall be served within two weeks after the amendment. The defendant will be at liberty to file

additional written statement within two weeks thereafter, cross-order for discovery one week thereafter, inspection forthwith thereafter. Liberty to mention for early hearing. The cost of the application and cost of the filing of additional written statement assessed at 30 Gms. To be paid within one week from the date. The plaintiff will be at liberty to re-verify the plaint.

All parties including the department are to act on signed copy of the minutes of this dictated Order.

71. The learned Trial Judge while finally deciding the suit cannot pass any necessary order under S. 21 (2) of the Limitation Act as such order should have been passed by this Court at the time of entertaining the second amendment application not at the time of finally deciding the suit. The law in this regard has already been settled by the Supreme Court in the case of Ramalingam Chettiar v. P.K. Patabiraman reported in 2001 (3) JT(SC) 179: (AIR 2001 SC 1185). The aforesaid decision was also referred to and relied upon by Mr. Mallick on behalf of the appellant herein.

72. From the aforesaid discussions we do not hesitate to hold that the suit is clearly barred by the law of limitation.

73. For the reasons stated hereinabove and particularly in view of our findings disagreeing with the decision of the learned Trial Judge the suit is liable to be dismissed. We therefore, allow this appeal and set aside the judgment and decree passed by the learned Trial Judge. The suit is dismissed.

74. In the facts and circumstances, there will be, however, no order as to costs.

75. Xerox certified copy of this Judgment and order, if applied for, be supplied to the respective parties.