Bhagwandas Metals Ltd vs M/S.Raghavendra Agencies on 14 June, 2011

Author: T. Mathivanan

Bench: T. Mathivanan

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:14.06.2011

CORAM:

THE HONOURABLE MR.JUSTICE T. MATHIVANAN

C.S.No.392 of 1998

Bhagwandas Metals Ltd., ... Plaintiff

Vs.

1.M/s.Raghavendra Agencies
2.L.S.Dwarakanath ... Defendants

Prayer: Suit is filed under Order IV Rule 1 of O.S.Rules read with Order VII Rule 1 of C

For Plaintiff : Mr.S.Raghavan

For Defendants : Mr.K.Manoj Menon
for Mr.V.Nataraj

J U D G M E N T

The factual matrix of the case of the parties to the suit may be summarized in short as follows:

The suit is filed by the plaintiff for recovery of money to the tune of Rs.61,48,000/- with interest at 24% per annum from the defendants towards damages for the breach of contractual obligations on the part of the defendants.

Case of the plaintiff:

2. The plaintiff is engaged in the manufacture and sale of Iron and Steel rolled products, namely C.T.D.Bars, M.S.Rounds, Angles and Channels and it has a re-rolling Mill at Manali. The plaintiff has planned an expansion programme by increasing the installed capacity of the existing re-rolling mill at Manali from 21000 T.P.A. to 36000 T.P.A. and for this purpose it has proposed to set up a new mini steel plant of 38400 T.P.A. capacity for the manufacturing of ingots, which is raw material for the re-rolling mill.

3. Ex.P1 is the project profile for the new expansion programme and in accordance with Ex.P1 the capital outlay was estimated at Rs.532/- lakhs. As per the project appraisal report, the public issue (Ex.P2 is the Prospectus of Public Issue) and the capital expenditure programme was expected to be completed by June 1995 end. The plant and machinery required for commencing production with special reference to induction, furnace and oil circuit breakers/capacitors were to be procured by March/April 1995 as the commercial production of ingots was to start by April 1995, with one furnace and the second furnace to be operational from July 1995 as borne out in the prospectus.

4. One of the basic essential equipment required for its proposed mini steel plant is 11 K.V.A. Bulk Oil Circuit Breaker (hereinafter be referred to as BOCB).

5. The first defendant, who is an authorized dealer of BOCB, manufactured by M/s.Crompton Greaves Ltd., who is the leading manufacturer of the said equipment, by letter dated 12.01.1995 (Ex.P3) offered to supply the BOCB specifying the price of various components required. The plaintiff had informed the defendants that the equipment was needed by the first week of April 1995.

6. On receipt of the offer (Ex.P3) from the defendants, the plaintiff had placed its purchase order dated 13.01.1995 (Ex.P4) at Chennai with the defendants for the supply of BOCB at Chennai at the price of Rs.5,03,350/. Along with the purchase order, the plaintiff paid an advance of Rs.1,00,000/- vide Cheque No.222142 dated 13.01.1995 agreeing to pay the balance at the time of delivery.

7. The defendants vide its letter dated 24.01.1995 (Ex.P6) while confirming the purchase order of the plaintiff acknowledged the receipt of the advance of Rs.1,00,000/- vide receipt dated 17.01.1995 (Ex.P5). The defendants had also informed the plaintiff that the order was placed by it on M/s.Crompton Greaves Limited for the supply of BOCB to the plaintiff and that the machinery would be delivered by the end of March or first week of April 1995. The defendants vide its letter dated 24.01.1995 (Ex.P6) had unequivocally accepted the terms and conditions of supply of BOCB as stipulated in the purchase order.

8. Whileso, the plaintiff had received a letter dated 25.03.1995 (Ex.P7) from the defendant informing that one of the main component used in the BOCB namely Relays manufactured by M/s.English Electric Company of India (who is a leading manufacturer of the said item) was not readily available either in the market or with Crompton Greaves Limited and therefore requested the plaintiff to consent for substitution of the same with Easun Reyrolls Relays for the reliable performance of which the defendants agreed to stand guarantee. In view of the urgency and to avoid any delay in the supply of BOCB, the plaintiff vide its letter dated 06.04.1995 (Ex.P8) had agreed for the substitution as sought for by the defendants.

9. Despite the plaintiff's repeated requests and reminders, the defendants had failed to arrange for the supply of BOCB in time. The plaintiff had received a letter dated 11.07.1995 (Ex.P9) from the defendants enclosing two proforma invoices both dated 11.07.1995 one for Rs.3,46,382/- and the other one for Rs.2,82,048/- totaling Rs.6,28,430/- (proforma invoices Exs.P10 and P11) requesting for the payment of the amount immediately to enable the defendants to arrange for the supply of the machinery.

10. The plaintiff had also received another letter dated 14.07.1995 (Ex.P12) from the defendants asking to release the payment immediately for dispatch of the machinery. Such a demand by the defendants, coupled with the delay in supply, was contrary to and also in breach of the agreed terms and conditions of the purchase order governing the supply, when as per the purchase order, payment had to be made only at the time of delivery.

11. Subsequent to the discussions made with the defendants, the plaintiff had agreed that the defendant would draw a Hundi for a sum of Rs.5,28,403.40 be in the invoice amount, less Rs.1,00,000/- advance already paid on 45 days credit. Accordingly hundi papers were duly accepted by the plaintiff and its Bankers at Madras and delivered to the Madras representatives of the defendants.

12. The machinery was delivered at Madras to the plaintiff on 16.08.1995 after a delay of more than four months beyond the agreed date of supply as per the purchase order dated 13.01.1995.

13. The BOCB was commissioned by the end of August 1995 and the production in the mini steel plant of the plaintiff was commenced immediately. Despite the guarantee and promise made by the defendants, the BOCB had developed major snags, and hence it was not able to be put into effective operation. As such production of the plaintiff came to a grinding halt in the second week of September 1995. This fact was informed to the defendants by the plaintiff through its letter dated 13.09.1995 (Ex.P20).

14. After receiving the information, the defendants had sent a Service Engineer from Crompton Greaves Limited and after rectifying the said defect he had given a report dated 12.09.1995 (Ex.P9) on behalf of the defendants.

15. Due to undue delay caused by the defendants in delivering the BOCB there was in turn delay in commissioning the new expansion programme, which included the setting up of a mini steel plant and thus the entire expansion programme suffered a serious set back, not only in terms of delay in commissioning the new project, but it had also seriously affected the projected profitability figures and resulted not only in monitory loss to it, but also resulted in loss of reputation of the plaintiff in the market.

16. The plaintiff had therefore written a letter to the defendants on 01.10.1995 (Ex.P23) bringing to its notice about the loss of profits to the tune of Rs.51,48,000/- apart from suffering loss of reputation in the market and that the defendants had committed breach of the terms of the contract and is therefore liable to make good the loss of profit of Rs.51,48,000/- as well as damage on the ground of mental agony, stress and strain harassment and loss of market reputation amounting to Rs.10,00,000/- totaling in on Rs.61,48,000/- and called upon the defendants to pay the same within seven days from the date of receipt of that letter. After receiving the same, the defendants had sent a reply on 20.10.1995 (Ex.P25) repudiating the claim made by the plaintiff, setting up a false claim that all the deliveries were subject to force majeure clause, which was never a part of the terms and conditions of the purchase order of the plaintiff dated 13.01.1995.

17. Then the plaintiff had issued a legal notice dated 07.12.1995 (Ex.P25) setting out in detail its claim and called upon the defendants to pay a sum of Rs.61,48,000/-. The defendant had also sent a reply dated 25.12.1995 (Ex.P27) through its Advocate with false allegations and frivolous claim to the tune of Rs.38,28,421.41.

18. The plaintiff is therefore entitled to recover a sum of Rs.61,48,000/- as demanded through its legal notice dated 07.12.1995 (Ex.P5) with interest thereon at 24% per annum from the date of plaint.

Case of the Defendants:

19. Based on the discussions with the plaintiff, the first defendant had furnished a quotation dated 12.01.1995 to the plaintiff for the supply of BOCB on the following terms and conditions:

PRICE BASIS:

The price, quoted is on ex-works, Nasik basis and exclusive of Freight, Insurance charges, sales tax, excise duty, octroi etc., which would be charged as applicable at the time of dispatch. Prevailing rate of excise duty is 20% and CST 4% against C form. Any fresh imposition of statutory levies would be extra to plaintiff's account.

The quoted prices are firm during the validity of the offer.

DELIVERY:

The panels shall be delivered within five months from the date of receipt of technically and commercially clear purchase order or receipt of advance or drawing approval, whichever is later subject to force-majeure conditions.

Make of brought out items shall be of defendants choice to enable them to maintain delivery schedule.

PAYMENT TERMS:

30% value of the order as advance and balance against Proforma Invoice before dispatch.

VALIDITY:

Unless previously withdrawn, offer is valid for the acceptance of the plaintiff for the period of 30 days from the date of this quotation viz. from 12.01.1995.

GUARANTEE:

The equipment is guaranteed for 18 months from the date of dispatch or 12 months from the date of commissioning whichever is earlier, against manufacturing defects.

20. The first defendant after receiving the purchase order dated 13.01.1995 had consequently placed an order dated 18.01.1995 with its Principal, M/s.Crompton Greaves Limited for the supply of the said BOCBs. The first defendant had also written a letter to the plaintiff on 24.01.1995 stating that they would try to advance the delivery of the said BOCBs by the end of March/First week of April. There was no irrevocable commitment by the first defendant to an earlier date of delivery than as stipulated in its quotation dated 12.01.1995.

21. The first defendant was informed by its Principal that Relays , manufactured by English Electrical Company Limited, a critical component in the manufacture of the said BOCBs was unavailable either with itself or in the market. The first defendant vide its letter dated 25.03.1995 had inturn informed the plaintiff of the situation and suggested an equally effective substitute manufactured by M/s.Easun Reyrolle Limited and further also stood guarantee for the effective performance of the substitute. The plaintiff had agreed for the use of the substitute without any reservation vide its letter dated 06.04.1995. The purchase order dated 13.01.1995 included personal visits to its Principal's factory at Nasik.

22. By the diligent efforts of the defendants the said BOCBs were made ready for dispatch and the first defendant vide its letter and Proforma Invoice No.1125, dated 11.07.1995 had informed the plaintiff of the same with the request to make payment of the balance consideration to enable the first defendant to deliver the material at door-delivery basis. But, the plaintiff had insisted that the said BOCBs should be first dispatched and the dispatch particulars furnished to it. This was contrary to the contractual obligations between the plaintiff and the first defendant.

23. It was after a great deal of persuasion, the first defendants' Principal M/s.Crompton Greaves Limited had dispatched the materials on 23.07.1995 through one of their approved transporters and the dispatch particulars were also furnished to the plaintiff vide letter dated 24.07.1995 to arrange for transit insurance. Even after getting all dispatch particulars, the plaintiff had insisted upon the handing-over of the documents rather than releasing of payment as per the contractual obligations. Further the first defendant had agreed for the transaction to be negotiated by a Hundi on 11.08.1995, co-accepted by the plaintiffs Bankers, with all chargers towards Hundi Papers, interest charges, discounting and all other incidental charges being borne out by the first defendant. By the conduct of the plaintiff, the first defendant had to incur a financial loss amounting approximately to Rs.12,000/-. The plaintiff did not raise any objections or demur when the said BOCBs were delivered or when the Hundi, for the entire contract consideration less the advance of Rs.1,00,000/- received from the plaintiff was discounted on 11.08.1995. The plaintiff had therefore accepted the delivery of the said BOCBs and made the payment unconditionally and without any reservation.

24. That on 13.09.1995, the plaintiff had written a letter to the first defendant mentioning about some vague problem with the said BOCBs and in pursuant to the letter of the first defendant to its Principal, M/s.Crompton Greaves Limited's office at Chennai, a Service Engineer was deputed to visit the plaintiff's site on 11 and 12th September, 1995 and he had found that the said BOCBs were fully operational. The plaintiff, despite the first defendant's communications, had not till date furnished the exact nature of the problem if any.

25. It would be relevant to note here that the plaintiff has preferred the suit after more than two years since its legal notice dated 07.12.1995. No details have been given in the plaint as to how the plaintiff has arrived at a sum of Rs.51,48,000/- for the loss of profits. Nowhere has the plaintiff quantified the loss of profit.

26. The alleged delay on the part of the first defendant is not correct and that the first defendant had in its offer letter dated 12.01.1995 clearly stated that the said BOCBs would be supplied within five months from the date of receipt of a clear Order subject to Force Majeure conditions. The non-availability of the Relays is a Force Majure condition beyond the control of the defendants. Assuming, without admitting, that there had been any delay as alleged on the defendants' part, the same is covered by the said Force Majure condition stipulated in the defendant's quotation dated 12.01.1995. The plaintiff had also agreed for use of the substitute vide letter dated 06.04.1995 without any reservation. Therefore, the allegations of delay is wholly incorrect and without any basis.

27. The defendants are not at all liable for loss of profits to the tune of Rs.51,48,000/- or for any sum towards loss of reputation or breach of contract or damages on the ground of mental agony, stress, strain etc., to the tune of Rs.10,00,000/-. The claim for loss of profit is wholly untenable and not legally valid. It is also to be noted here that no part of the cause of action arose at Madras within the jurisdiction of this Court.

28. No part of cause of action arose at Madras within the jurisdiction of this Court and hence the suit is liable to be dismissed on the grounds of lack of territorial jurisdiction.

29. Based on the pleadings of the parties to the suit, this Court has formulated the following issues for the better adjudication of the suit:

1. Have defendants committed breach of the purchase order dated 13.01.1995 (Plaint Doc.No.4)?

2. Whether the machinery (BOCB) supplied by defendants to plaintiff were defective?

3. Whether the plaintiff suffered damage as set out in the plaint?

4. Whether the non-availability of the Relays was a force majeure as contended by defendants in the written statement?

5. Whether the defendants delivered the machinery to the plaintiff within the contracted period?

6. Whether no part of the cause of action for the suit arose at Madras?

7. Whether this Court has no jurisdiction to entertain the suit?

8. To what reliefs parties are entitled?

30. In order to establish their respective cases both the plaintiff and defendants went on trail. One Mr.G.P.Agarwal, Chairman and Managing Director of the plaintiff Company was examined as P.W.1 and during the course of his examination Exs.P1 to P39 were marked. On the other hand, Exs.D1 to D3 alone were marked on behalf of the defendants during the course of the cross-examination of PW1 and no oral evidence was adduced on their side.

Regarding territorial jurisdiction:

31. It is significant to note here that the defendants have contended that no part of cause of action for the suit arose at Madras and that this Court has no territorial jurisdiction to entertain the suit and on that ground the suit is liable to be dismissed. On the basis of this contention, this Court has formulated Issue Nos.6 and 7 relating to territorial jurisdiction and they can be clubbed together and taken up as prime issues and be settled in common.

Issue Nos.6 and 7:

32. Mr.S.Raghavan, learned counsel for the plaintiff, while advancing his arguments, has submitted that prior to the placing of purchase order under Ex.P4, the plaintiff had discussed with the defendants at Madras for the supply of machinery. In pursuant to the discussions, the first defendant had furnished an offer under Ex.P3, dated 12.01.1995 and on 13.01.1995 the plaintiff had also placed its purchase order under Ex.P4 with the defendants at Madras for the supply of BOCBs.

33. The learned counsel has also submitted that the plaintiff had also paid Rs.1,00,000/- towards advance and thereafter several correspondence were taken place between the plaintiff and the defendants between January 1995 and July 1995 and consequently the machinery viz.BOCBs was delivered at Madras by the defendants to the plaintiff on 16.08.1995. In this connection, he would maintain further that since part of the cause of actions were arisen within the jurisdiction of this Court, the suit was very well maintainable as this Court was having territorial jurisdiction to entertain the suit.

34. On the other hand, Mr.K.Manoj Menon, learned counsel appearing for Mr.V.Nataraj, learned counsel, who is on record for the defendants would submit that the first defendant had sent it's quotation to the plaintiff on 12.01.1995 from Bangalore and that the plaintiff's purchase order dated 13.01.1995 (Ex.P4) was received by the first defendant at Bangalore and that the Hundi was also discounted at Bangalore and under this circumstance this Court did not have territorial

jurisdiction to entertain the suit as no part of cause of action was arisen at Madras within the jurisdiction of this Court.

35. No doubt, the plaintiff's company is located at Door No.61, first floor, Sembudoss Street, Chennai. The defendants' firm is located at Bangalore. The defendants have admitted in their written statement that they had discussion with the plaintiff and that the first defendant had submitted a quotation dated 12.01.1995 to the plaintiff for the supply of BOCBs. It is obvious to note here that for the supply of BOBCs, according to the plaintiff discussions between the plaintiff and the defendants took place at Madras and that the purchase order dated 13.01.1995 was also placed with the defendants at Madras for the supply of BOCBs. It is pertinent to note here that the delivery of BOCBs was effected at Madras only by the defendants to the plaintiff on 16.08.1995, which has not been denied by the defendants.

36. In Ex.P4 purchase order also, it has been stated that the personal discussion with the defendants' offecial Mr.L.S.Dwarakanath was held at Madras by the plaintiff's Managing Director Mr.Murali Lal Sonthalia.

37. In this regard, reference to Section 20(c) of the Code of Civil Procedure, 1908 would be more appropriate. Section 20 of the Code of Civil Procedure, 1908 reads as follows:

20.Other suits to be instituted where defendants reside or cause of action arises.-Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction,-

(a) .....

(b) .....

The proviso to Clause 'c' enacts as under:

(C) the cause of action, wholly or in part, arises.

Clause C to Section 20 C.P.C. assumes more important. As per the proviso to Clause C to Section 20 C.P.C. suit can be instituted in a Court within the local limits of whose jurisdiction the cause of action wholly or in part arises.

38. On coming to the instant case on hand, admittedly part of the cause of actions were arisen within the local limits of the territorial jurisdiction of this Court. Hence, it cannot be heard to say that this Court does not have territorial jurisdiction to entertain the suit.

39. In this regard reliance can very well be placed on the decision reported in M/s.Lakhpat Rai Hukum Chand vs. M/s.Chhedi Ram Rajkumar, AIR 1979 Patna 120. In this case it is held that suit

for recovery of money for breach of a contract can be filed where the part of the cause of action arises within the meaning of Section 20(C) of the C.P.C. It is well settled that cause of action means every fact which it is material for the plaintiff to prove in order to obtain a judgment in his favour. It also cannot be disputed that in relation to a contract, cause of action arises at a place where the contract was made or place where the contract was to be performed or the performance thereof completed or at a place where, in performance of the contract any money to which the suit relates was expressly or impliedly payable.

40. As discussed in the opening paragraph it is unambiguously established that part of the cause of action was arisen within the territorial jurisdiction of this Court, as the discussions between the officials of the defendants and the Managing Director of the plaintiff's company was held at Madras and that the delivery of the machinery viz.BOCBs was effected at Madras. Apparently, the defendants have not chosen to put any question to PW1 with regard to the territorial jurisdiction of this Court when his chief-examination stood tested in the cross-examination. Hence, the question of lack of territorial jurisdiction of this Court does not arise in this case. Accordingly, Issue Nos.6 and 7 are answered in favour of the plaintiff.

Issue Nos.1, 4 and 5:

41. The whole case has been revolving around the proviso to Section 55 of the Indian Contract Act, 1872. For the better adjudication of this case, it may be appropriate to extract Section 55 of the Indian Contract Act, 1872 (hereinafter it may be referred to as the Act). Section 55 of the Act reads as follows:

> 55. Effect of failure to perform at fixed time, in contract in which time is essential:-
>
> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> Effect of such failure when time is not essential:-
>
> If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.
>
> Effect of acceptance of performance at time other than that agreed upon:-
>
> If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss

> occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

42. The scope and application of Section 55 of the Act is that if a party to a contract fails to do a certain thing, which he promises to do at or before a specified time the contract becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

43. The contract does not become voidable by the failure of a party to a contract to do such thing, if it was not the intention of the parties to a contract that time should be of the essence of the contract. In such case the promisee is entitled to get compensation from the promisor for any loss incurred by himself by such failure.

44. If a promisor fails to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss incurred by the non-performance of the promise, unless at the time of such acceptance he gives notice to the promisor of his intention to do so.

45. With this scenario at the back drop let us enter into the merits of the case.

46. Undisputed facts:

> a) Ex.P3 is the offer letter dated 12.01.1995 given by the first defendant for supply of BOCBs. It contained interalia the terms and conditions for the supply of BOCBs. Under the caption of delivery this letter stipulates the condition as under:
>
> Delivery:
>
> The panels shall be delivered within five months from the date of receipt of technically and commercially clear purchase order or receipt of advance or drawing approval, whichever is later subject to Force Majeure conditions.
>
> b) On receipt of Ex.P3 offer from the defendants the plaintiff has placed a purchase Order dated 13.01.1995 (Ex.P4) for the supply of BOCB at Chennai at the price of Rs.5,03,350/-. It stipulates the following conditions:
>
> Price Variation:
>
> No price variation due to any reason will be allowed.
>
> Delivery:
>
> The panel will be delivered by March/April 1995.

Guarantee:

The equipment is guaranteed for eighteen months from the date of dispatch or twelve months from the date of commissioning whichever is earlier, against manufacturing defects.

c) Along with the purchase order (Ex.P4), the plaintiff had paid an advance of Rs.1,00,000/- through a Cheque dated 13.01.1995 agreeing to pay the balance at the time of delivery. Ex.P5 is the receipt dated 17.01.1995 for having received the advance.

d) Through the letter dated 24.01.1995 (Ex.P6), the first defendant had informed the plaintiff that they had registered their purchase order with their Principals M/s.Crompton Greaves Limited and gave an assurance stating that they were trying their best to advance the delivery of the subject breaker by the end of March/1st week of April 1995.

e) The first defendant was informed by its Principal that "Relays" manufactured by English Electrical Co., Ltd., a critical component in the manufacture of the said BOCB was unavailable and as such the first defendant vide its Letter dated 25.03.1995 (Ex.P7) had informed the plaintiff of the situation and suggested an equally effective substitute manufactured by M/s.Easun Reyrolle Limited.

f) The plaintiff had accepted the change of Relays through their letter dated 06.04.1995 (Ex.P8), in which the plaintiff had stated that on your request and personal guarantee for reliable performance of Easun Reyrolle Relays, we herewith approve the same for use in our Panel Board.

g) That on 11.07.1995, the first defendant had sent a letter (Ex.P9) along with Proforma invoice and requested the plaintiff to release of balance payment to enable the first defendant to deliver the material on door delivery basis.

h) Then the first defendant's principal M/s.Crompton Greaves Limited dispatched the materials on 16.08.1995 through one of their approved transporters. The dispatch particulars were also furnished to the plaintiff.

i) The plaintiff did not raise any objection or demur when the said BOCBs were delivered or when the Hundi for the entire contract consideration less the advance of Rs.1,00,000/- received from the plaintiff was discounted on 11.08.1995. The plaintiff had accepted the delivery of the said BOCBs and made the payment for the said BOCBs unconditionally without any reservation.

j) That on 13.09.1995, the plaintiff had written a letter (Ex.P20) to the first defendant stating that there was some mechanical problem in the breaker resulting in the

breaker not functioning properly. The plaintiff had also requested the first defendant to depute a person to look into the matter and do the needful. On receipt of this letter, the defendants had written to its principal M/s.Crompton Greaves Ltd., (Office at Chennai). Then the principal's Senior Service Manager wrote back to the defendants on 22.09.1995 and thereby it was informed that its Service Engineer had visited the plaintiff's site on 11 and 12.09.1995 and found that the said BOCBs were fully operational. Ex.P19 is the Service Engineer's Report.

k) The plaintiff for the first time had alleged the breach of contract and claimed damages of Rs.61,48,000/- through their letter dated 01.10.1995 (Ex.P23). The first defendant had written a letter dated 04.10.1995 (Ex.P20) along with the letter received from Service Engineer stating that the service people had visited the plaintiff's site on 11 and 12.09.2011 and extended their necessary service that was required.

47. In so far as Issue Nos.1, 4 and 5 are concerned the documents under Ex.P3, P4, P6 to P9 are deemed to be vital and supportive evidences.

48. While accepting the purchase order dated 13.01.1995 (Ex.P4) for the supply of BOCBs, the first defendant had stated in Ex.P6 dated 24.01.1995 that they had registered plaintiff's order with their Principals M/s.Cromption Greaves Limited, and that they were trying their best to advance the delivery of the subject breaker by the end March/1st week of April.

49. From Ex.P4 Purchase Order and Ex.P5 Acceptance of Purchase Order, it is clear that the BOCBs should have been delivered by the end of March or by the first week of April, 1995. Admittedly, the BOCB was not delivered within the agreed period.

50. In this connection, Mr.S.Raghavan, learned counsel for the plaintiff would submit that one of the basic and essential equipment required for the plaintiff's proposed mini steel plant was 11 KVA BOCB and even at the time of discussion, the plaintiff had informed the defendants that the said equipment was needed by the first week of April, 1995.

51. In sofar as the issue of non-delivery of the BOCB within the agreed period is concerned the document under Ex.P7 assumes important. Ex.P7 is the letter dated 25.03.1995 addressed to the plaintiff's company by the first defendant firm stating that the defendants were informed by their Principal M/s.Crompton Greaves Ltd., that the relay suppliers M/s.English Electric Company were unable to meet delivery dates and hence there was an acute shortage of relays. They had also stated that several jobs to various customers were getting rescheduled/delayed on account of same and that M/s.English Electric Company were quoting a delivery of five or six months for supply of relays and the same was not honoured. Under this circumstance, they had requested the plaintiff to accord approval for the suitable substitute for Easun Reyrolle relays. The defendants had also assured that they would stand guarantee for reliable performance of Easun Reyrolle Relays. The above said letter further reads that M/s.Crompton Greaves had requested for approval for Easun Reyrolle relays by 28.03.1995 so that they could programme the jobs for production in the first quarter of financial

year 1995-1996.

52. The plaintiff had also accepted the change of Relays in their reply under Ex.P8 dated 06.04.1995 in which the plaintiff had stated as under:

> "On your request and personal guarantee for reliable performance of Easun Reyrolle Relays, we herewith approve the same for use in our Panel Board. We henceforth request you to issue necessary instructions to M/s.Crompton Greaves Ltd., and ensure that the delivery is as per schedule."

53. From Ex.P8 it is seen that the plaintiff had agreed for use of substitute without any reservation.

54. After making the BOCBs ready for the delivery, the first defendant vide its letter dated 11.07.1995 had enclosed their proforma invoice bearing No.RA1123/1995, dated 11.07.1995 for Rs.3,46,382.40 and No.1124/1995, dated 11.07.1995 for Rs.2,82,048.00 and the first defendant had also informed the plaintiff to make the payment of balance consideration to deliver the material.

55. In this connection, Mr.K.Manoj Menon, learned counsel appearing for Mr.V.Nataraj, learned counsel, who is on record for the defendants has contended that instead of making the remaining balance of consideration, the plaintiff had insisted that the said BOCBs should be first dispatched along with the dispatch particulars and that the demand of plaintiff was entirely contrary to the contractual obligations. He has also contended that the considerable delay was solely attributable to the plaintiff's conduct resulting in financial loss to the first defendant amounting to approximately Rs.12,000/-. He has also maintained that the BOCBs were delivered to the plaintiff's on door delivery basis on 16.08.1995 and at the time of delivery the plaintiff did not raise any objections or demur. He has also maintained that the plaintiff had accepted the delivery of the said BOCBs and paid back the remaining balance of consideration unconditionally and without any reservation and as such it was not fair on the part of the plaintiff to claim that the defendant had committed breach of purchase order dated 13.01.1995 (Ex.P4).

56. According to plaintiff, the time for delivery was March/first week of April, 1995. The plaintiff had contended that such delivery by the first week of April is the essence of the contract. As already discussed in the earlier paragraphs, the plaintiff had approved to substitute the relays with M/s.Easun Reyrolle Limited through Ex.P8, dated 06.04.1995. It is obvious to note here that the plaintiff had given his approval to change the relays only on 06.04.1995. When such being the case, it could be easily understood that the BOCBs could not have been delivered by the first week of April 1995.

57. It is significant to note here that in Ex.P3 under delivery schedule the first defendant had specifically stated that the delivery of BOCBs is subject to force majeure. It is also stated that make of bought out items shall be of the choice of the defendants to enable them to maintain delivery schedule.

58. In this connection, the learned counsel for the defendants has made reference to Ex.P3 offer letter dated 12.01.1995 and would submit that the defendants had, originally at the time of furnishing quotation stated that the BOCBs would be supplied within five months from the date of receipt of a clear purchase order subject to force majure conditions. He has also contended that the non-availability of the relays was due to the force majure conditions beyond the control of the defendants. He has also added that even it was presumed that there was any delay on the part of the defendants that was covered by the said force majure conditions stipulated in the defendants' quotation dated 12.01.1995. He has also adverted to that the plaintiff had also agreed for the use of the substitute vide its letter dated 06.04.1995 without any objection or reservation whatsoever and hence the allegations with regard to the delay on the part of the defendants were incorrect.

59. On coming to the evidence of PW1, he has admitted that the machinery was delivered on 16.08.1995 at Madras and the same was installed by them. In his cross-examination he has admitted that the BOCB, which is the suit machinery, was not mentioned in the prospectus under Ex.P2 as an important plant and machinery. Again, he has stated that the important machineries were mentioned in Page No.21 of Ex.P2. He has also admitted in his cross-examination that the date stipulated for supply of machineries was March/April 1995 and that other than the said date, which was mentioned in Ex.P4, Purchase Order, no other date was specified by the plaintiff. He has also admitted in his cross-examination at Page No.7 that in Ex.P4 the purpose for which the equipments was agreed to be purchased was not mentioned and that the suit equipment was not custom made.

60. Further, PW1 in his cross-examination has also admitted that the plaintiff had issued letter under Ex.21 on 13.09.1995 mentioning the defect in the equipment and in the above said letter they had also informed to stop payment and had also marked a copy of the same to the bank. Further, he would admit that under Ex.P19 dated 12.09.1995, Engineer Report, it was stated that the defects in the machineries were rectified and the same was signed by the plaintiff.

61. From the evidence of PW1, it could be understood that at the time of delivery payment was not made. As per Ex.P21, as there was some defects in the equipment, the plaintiff had informed the Bank to stop the Hundi payment. It may also be relevant to note that PW1 himself had admitted that the defects were rectified as evidence from Ex.P9. Even though there is a condition under the delivery schedule that the balance amount shall be paid at the time of delivery of the equipment, the plaintiff had not adhered to the above stipulation.

62. PW1 had also clearly admitted in his cross-examination that under Ex.P8 dated 06.04.1995 the plaintiff had agreed for a change of relays. It is pertinent to note here that prior to the delivery of the equipment ie. prior to 16.08.1995, the plaintiff had not sent any notice to the defendants claiming damages, which has been admitted by PW1 by saying that it was correct to state that they had made a claim for damages much later.

63. It may also be better to make a mention about Ex.P21, letter dated 20.09.1995, which was written by the first defendant to the plaintiff, in which the first defendant had requested the plaintiff to disclose the exact nature of snag, which was said to have developed in the machinery so as to enable them to take further action on the subject matter. But, even inspite of that letter, the plaintiff

had not disclosed the exact problem and discrepancy. This has also been admitted by the plaintiff.

64. Mr.S.Raghavan, learned counsel for the plaintiff, while advancing his arguments has canvassed that due to undue delay caused by the defendants in delivering the BOCBs and due to the delay in commissioning the new expansion programme, which included the set up of a mini steel plant, the entire expansion programme of the plaintiff suffered a serious set back.

65. The learned counsel for the plaintiff has also submitted that the non-availability of the relays was not a force majure and that it could not be strictly stuck on by the defendants as their defence to wriggle out the contractual obligations. The learned counsel has also taken the assistance of Section 32 and 56 of the Indian Contract Act, 1872 to give different dimension to the case of the plaintiff. Section 32 of the Indian Contract Act, 1872 reads as follows:

> 32.Enforcement of contracts contingent on an event happening.-Contingent contracts to do or nor to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Section 56 of the Indian Contract Act, 1872 reads as follows:

> 56.Agreement to do impossible act.-An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.-A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.-Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

66. In support of his contention, he has placed reliance upon a decision in Ganga Saran vs. Ram Charan Ram Gopal, reported in AIR 1952 SC 9. This Judgment speaks about the frustration of contract. It appears that between the 10th and 18th April, 1941, the parties entered into 5 contracts, by which the respondent-firm undertook to supply to the appellant 184 bales of cloth of certain specifications manufactured by the New Victoria Mills, Kanpur, and the Raza Textile Mills, Rampur. Only 11 bales were taken up and there was dispute about the remaining 85 bales. On the 17th October, 1941, a settlement was arrived at between the parties, and it was agreed that the respondent-firm should deliver to the appellant 61 bales, and that the goods should be delivered by 17th November, 1941. As the 61 bales were not supplied, the appellant sent a telegraphic notice to the respondent-firm on 20th November, 1941 and thereby put the respondent under notice to give

delivery of 61 bales through Bank. Otherwise suing within three days. Since the appellant did not receive any response, he instituted the suit claiming a sum of Rs.9,808 and odd, which according to him, represented the loss sustained by him on account of the rise in the market rate of the contracted goods, and he also claimed costs and interest. The main plea of the respondent was that the performance of the contract had been frustrated by circumstances beyond their control. The plea of the respondent was negatinved by the trial court, but it was upheld by the High Court and hence the appellant being the plaintiff in the suit had approached the Supreme Court by way of appeal.

67. The question that was arisen before the Apex Court was as to whether the circumstances of the case afford any basis for the application of the doctrine of frustration of the contract. After analyzing all the materials placed before it, the Apex Court has held that the plea of the respondents must fail on their own admissions and further held that being so, we are unable to hold that the performance of the contract had become impossible. It is also held that the enforcement of the agreement in question was not contingent on the happening of an uncertain future event, nor does the present case call within the second paragraph of Section 56, which is the only provision, which may be said to have any relevance to the plea put forward by the respondents. Clearly, the doctrine of frustration cannot avail a defendant, when the non-performance of a contract is attributable to his own default.

68. On coming to the present case on hand, this Court is of view that the above cited decision cannot be equated with the facts and circumstances of the present case. After giving careful consideration to the above decision, this Court is of view that the proviso to Sections 32 and 56 of the Indian Contract, 1872 are not made applicable to the instant case on hand, instead the proviso to Section 55 of the Indian Contract, 1872 alone would be made applicable.

69. As already discussed in Paragraph Nos.41 to 44 of this Judgment, the contract between the plaintiff and defendants does not become voidable by the alleged failure of the defendants to deliver the machineries within the agreed period. The reason why is that only on the approval of the plaintiff under Ex.P8, the defendants went on to change in the relays from M/s.English Electric Company to M/s.Easun Reyrolle Limited due to acute shortage of relays.

70. Admittedly, the BOCB was delivered on 16.08.1995. It is also specifically admitted by PW1 that they had not issued any notice of intention to claim compensation for non-performance of the contract either prior to the delivery or at the time of acceptance of delivery of BOCBs. The claim of notice for claiming damages was issued for the first time only on 01.10.1995 under Ex.P23. Under these circumstances, it cannot be contended by the plaintiff that the defendants have committed breach of the purchase order dated 13.01.1995 (Ex.P4). From the approval of the plaintiff under Ex.P8 and thereafter from the acceptance of delivery of BOCBs it could very well be understood that the non-availability of relays was a force-majure as contended by the defendants. Issue No.5 need not be answered because as evident from Exs.P7 and P8, the proposal of change of relays given by the first defendant was accepted by the plaintiff under Ex.P8 and therefore this issue does not arise.

71. In sofar as Issue No.1 is concerned, it is answered that there was no breach of the purchase order dated 13.01.1995 (Ex.P4). On coming to the issue No.4, it is also answered in favour of the defendants as the non-availability of the relays was definitely a force-majure. As adumbrated supra

the defendants proceeded to change the relay only after the approval given by the plaintiff. Having accepted the performance other than the agreed time, no breach of contract could be attributed to the defendants.

72. In sofar as the Issue No.2 is concerned, the plaintiff had addressed a letter dated 13.09.1995 (Ex.P20) to the first defendant, in which the plaintiff had stated that the Breakers are not in conformity with the Order, for example the relays fixed were not as per the order and the rear cable box was provided without the cable entry hole etc., Secondly, there was some mechanical problem in the Breaker resulting in the Breaker not functioning properly. For the above reason, the plaintiff had requested the first defendant to depute their person to look into the matter and do the needful. On receipt of this letter, the first defendant had issued a reply dated 20.09.1995 under Ex.P21, in which the first defendant had requested the plaintiff to disclose the exact nature of the problem and discrepancy as pointed out in their letter to enable the first defendant to take further action on the subject matter. Further, the first defendant had also stated in their letter that to extend immediate service, they had advised their Madras Service Centre to look into the matter at once. But, the actual problem or defect had not been disclosed by the plaintiff to the first defendant. In this connection, Ex.P19 assumes important. Ex.P19 is the rectification report given by the technician on 12.09.1995, in which it is stated that rectified all mechanisms and re-assembled, tripping mechanism is in proper condition and it is also stated that now breaker mechanism is in good condition. From the said report (Ex.P19) it appears that there was some snag on the BOCBs and it was subsequently rectified by the technicians of the first defendant.

73. DW1 has also admitted in his cross-examination that on 13.09.1995 they had issued a letter under Ex.P21 mentioning the defect in the equipment and that as revealed from Ex.P19 the defect in the machineries were rectified and the rectification report was also signed by the plaintiff. From the candid admission of the plaintiff it cannot be inferred that the machineries were totally defective.

74. In sofar as Issue No.3 is concerned, with regard to claiming of compensation, the learned counsel for the plaintiff has argued that the delay in supply of BOCBs of the defendants resulted in mounting of interest payable by it to its Bankers and other creditors and loss of production on account of delayed supply of the BOCB and defects in the BOCB which resulted in the production virtually coming to a grinding halt. He has also submitted that the delay in delivery of BOCBs by the defendants also resulted in an erosion of the plaintiff's goodwill in the iron and steel industry, which it had built over the years.

75. According to the case of the plaintiff the BOCB was delivered to the plaintiff after a delay of about 4 = months and due to the laches, delay and inaction on the part of the defendants, the plaintiff had suffered loss of profits to the tune of Rs.51,48,000/-, apart from suffering loss of reputation in the market and that the defendants had committed breach of the terms of the contract and was therefore liable to make good the loss. Apart from this, the plaintiff had also claimed a sum of Rs.10,00,000/- towards the damage on the ground of mental agony, stress and strain harassment and loss of market reputation, in total, the plaintiff had claimed a sum of Rs.61,48,000/-. In order to strengthen his arguments, the learned counsel for the plaintiff has taken umbrage under Section 73 of the Indian Contract Act, 1872. The text of Section 73 of the Indian Contract Act, 1872 runs as

follows:

> 73.Compensation for loss or damage caused by breach of contract.- When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

76. The learned counsel has also to fortify his arguments placed reliance upon the following decisions:

> 1. M/s.A.T.Brij Paul Sing and Others vs. State of Gujarat, (1984) 4 SCC 59,
>
> 2. Maula Bus vs. Union of India, 1969 (2) SCC 554,
>
> 3. Oil & Natural Gas Corporation Ltd., vs. Saw Pipes Ltd., (2003) 5 SCC 705, In the first case viz.M/s.A.T.Brij Paul Sing and Others vs. State of Gujarat, (1984) 4 SCC 59, it is held that ordinarily, when a contractor submits his tender in response to an invitation to tender for a works contract, a reasonable expectation of profit is implicit in it and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract. Where, therefore, the party entrusting the work commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What would be the measure of profit would, however, depend upon facts and circumstances of each case. While estimating the loss of profit for the breach of contract it would be unnecessary to go into the minutest details of the work executed in relation to the value of the works contract. A broad evaluation would be sufficient. Further, it is held that once it is held in consonance with the views of the High Court in the present case as well as in the cognate appeal that the respondent Government was guilty of breach of contract having unjustifiably rescinded the contract, part of which was already performed and for performing which the appellant, a Poona based contractor had transported machinery and equipment from Poona to the work site near Rajkot in Saurashtra, certainly he would be entitled to damages. In the facts and circumstances of the present case, the appellant should be awarded Rs.2 lacs under the head of 'loss of expected profit' for breach of contract by the respondent.

77. In the second case viz.Maula Bus vs. Union of India, 1969 (2) SCC 554, the appellant entered into a contract with the Government of India to supply potatoes and deposited a sum of Rs.10,000/- as security for due performance of the contract. He entered another contract with the Government of India to supply poultry, eggs and fish and deposited Rs.8,500/- for due performance of the contract. The Government of India rescinded the contracts and forfeited the deposits on the ground that the appellant made persistent default in making regular and full supplies of the commodities agreed to be supplied. The appellant filed a suit for Rs.20,000/- being the amounts deposited for due

performance of the contract against the respondent. The Trial Court held that the respondent was justified in rescinding the contract but it could not forfeit the amounts of deposit for it had not suffered any loss in consequence of the default and decreed the suit. On appeal by the respondent, the High Court held that under the terms of the agreement the deposit was to stand forfeited in case the plaintiff neglected to perform his part of the contract, for forfeiture of a sum deposited by way of security for due performance of a contract, where the amount forfeited is not unreasonable, Section 74, of the Contract Act had no application, the Government was entitled to receive from the plaintiff reasonable compensation the deposit may be regarded as earnest money and modified the decree and awarded Rs.416.25 only. On appeal, the Supreme Court held:

> i. That in the present case the deposit was made not of a sum of money by the purchaser to be applied towards part payment of the price when the contract was completed and till then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had deposited the amounts claimed as security for guaranteeing due performance of the contracts. Such deposits cannot be regarded as earnest money.
>
> ii.It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine estimates may be taken into consideration as the measure of reasonable compensation but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him. In the present case, the Government could have proved the rates at which they had to be purchased and also other incidental charge incurred by them in procuring the goods contracted for. But, no such attempt was made.
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> With these binding, the Apex Court has allowed the appeal.

78. In the third case viz.Oil & Natural Gas Corporation Ltd., vs. Saw Pipes Ltd., (2003) 5 SCC 705 the concept of principles and consideration for assessment of damages in case of breach of contract has been elaborately explained in terms of the proviso to Sections 73 and 74 of the Indian Contract Act, 1872. It is held that:

> 1. Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

2. If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

3. Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

4. In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

79. On the other hand, Mr.K.Manoj Menon, learned counsel appearing for Mr.V.Nataraj, learned counsel, who is on record for the defendants has contended that even in accordance with the case of the plaintiff, the delivery of BOCBs should have been made by the end of March/first week of April, 1995. Since the plaintiff had accepted the proposal of the defendants for the change of relay, the delivery was effected on 16.08.1995. He has also submitted that even prior to the delivery of BOCBs or after the acceptance of the delivery, the plaintiff had not issued any notice of intention to claim compensation for non-performance. He has also reiterated his earlier submission that PW1 had also admitted that the plaintiff had not issued any notice to the defendants claiming damages. He has also submitted that the proposal of the defendants in change of relays from M/s.English Electric Company to M/s.Easun Reyrolle Limited due to acute shortage of relays under Ex.P7 and the acceptance of the plaintiff for the change of relays under Ex.P8 and the delivery of the BOCBs on 16.08.1995 to the plaintiff, the non-issuance of the notice to the defendants claiming damages prior to the delivery of BOCBs or at the time of acceptance of delivery of the BOCBs on 16.08.1995 would come under the purview of the third part of Section 55 of the Indian Contract Act, 1872 under the caption of effect of acceptance of performance at time other than that agreed upon.

80. For the better appreciation of this case, the proviso to third part of Section 55 of the Indian Contract Act, 1872 may be extracted hereunder:

Effect of acceptance of performance at time other than that agreed upon.- If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

Obviously, the plaintiff had not issued any notice to the defendants of his intention of claiming compensation.

81. In this connection, the learned counsel for the defendants has submitted that the failure on the part of the plaintiff in not giving notice of his intention of claiming compensation prior to 16.08.1995 or at the time of delivery of BOCBs on 16.08.1995, would not entitle him to claim any compensation as he was disqualified from claiming compensation from the defendants. In support of his arguments, he has placed reliance upon the following decisions:

1. State of Andhra Pradesh v. M/s.Associated Engineering Enterprises, AIR 1990 AP 294,

2.State of Kerala and another vs. M.A.Mathai, 2007 (3) CTC 329,

3. C.V.George and Company vs. M/s.Marshall Sons (Manufacturing) Ltd., 1983 MLJR 525,

4. M/s.Arosan Enterprises Ltd., vs. Union of India and another, AIR 1999 SC 3804,

5. Muhammad Habidullah vs. Bird and Company, AIR 1922 PC 178,

82. In State of Andhra Pradesh v. M/s.Associated Engineering Enterprises, AIR 1990 AP 294, a Division Bench of Andhra Pradesh High Court in Paragraph 20 has held as follows:

"20. The first aspect to be noticed in this behalf is that the contractor did not choose to terminate the contract on account of the Government's delay in handing over the sites. He requested for, and agreed to extension of the period of contract, and completed the work. It is not the respondent's case that while agreeing to extension of the period of the period of contract he put the Government on notice of his intention to claim compensation on that account. Section 55 of the Contract Act reads thus:- (extracted supra)"

In Paragraph No.21 it is held as follows:

"21. According to this Section, it was open to the respondent to avoid the contract on account of the Government's breach of promise to deliver the sites at a particular time; but, he did not choose to do so, and accepted the delivery of sites at a time other than what was agreed upon between them earlier. If so, he is precluded from claiming compensation for any loss occasioned by such delay, unless, of course, at the time of such delayed acceptance of the sites, he had given notice to the Government of his intention to claim compensation on that account. It must be remembered that this provision of law was specifically referred to, and relied upon in the counter filed by the Government to the respondent's claim before the arbitrator. But, it is not brought to our notice that the contractor had given such a notice (contemplated by the last

> sentence in Section 55). We must make it clear that we are not entering into the merits of the decision of the arbitrator. What we are saying is that such a claim for compensation is barred by law, except in a particular specified situation and inasmuch as such a particular specified situation is not present in this case, the claim for compensation is barred. It is well settled that an arbitrator, while making his award, has to act in accordance with law of the land, except in a case where a specific question of law is referred for his decision."

83. In State of Kerala and another vs. M.A.Mathai, 2007 (3) CTC 329, while writing the Judgment on behalf of a Division Bench His Lordship Hon'ble JUSTICE Dr.ARIJIT PASAYAT has held in Paragraph No.8 as follows:

> "8.If, instead of avoiding the contract accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms."

84. In C.V.George and Company vs. M/s.Marshall Sons (Manufacturing) Ltd., 1983 MLJR 525, in Paragraph No.6 it is held that under Section 55 of the Contract Act, if, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim, compensation of the promise at the time agreed unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so. The essential requirement of section 55 of the Contract Act is, if the appellant wants to claim compensation for any loss occasioned by the non-performance of the contract within the stipulated time and if the appellant accepts performance of the contract, he must issue notice to the respondent of his intention to claim damages. It is therefore clear that if the appellant wants to claim damages by resorting to Section 55 of the Contract Act he must issue a notice to the respondent of his intention to claim damages at the time when he accepts performance of the contract. In the instant case, the goods were delivered to the appellant only on 30th January, 1972. Notice was issued on 08th December, 1971, which is long prior to the date when the goods were supplied to it and the performance of the contract was accepted by the appellant. Since the notice was not issued at the time when the appellant accepted

the performance of the contract, the appellant cannot resort to section 55 of the Contract Act to sustain a claim for damages against the respondent.

85. In M/s.Arosan Enterprises Ltd., vs. Union of India and another, AIR 1999 SC 3804 also it has been held that in the event the time is the essence of the contract, question of their being any presumption or presumed extension or presumed acceptance of a renewed date would not arise. The extension if there by any, should and ought to be categorical in nature rather than being vague or in the anvil of presumptions. In the event of the parties knowingly give a go-by to the stipulation as regards the time-the time may have two several effects: (a) parties name a future specific date for delivery and (b) parties may also agree to the abandonment of the contract-as regards (a) above, there must be a specific date within which delivery has to be effected and in the event there is no such specific date available in the course of conduct of the parties, then and in that event, the Courts are not left with any other conclusion but a finding that the parties themselves by their conduct have given a go-by to the original term of the contract as regards the time being the essence of the contract. Further, it has also been held that when the contract itself provides for extension of time, the same cannot be termed to be the essence of the contract and default however, in such a case does not make the contract voidable either. It becomes voidable provided the matter in issue can be brought within the ambit of the first paragraph of Section 55 and it is only in that event that the Government would be entitled to claim damages and not otherwise.

86. The above cited decision articulates the third part of Section 55 more significant in saying that when the time of performance of contract has been extended by the promisee then it cannot be termed that time is essence of the contract and in such a case the act of promisee in extending the time does not make the contract voidable either.

87. In Muhammad Habidullah vs. Bird and Company, AIR 1922 PC 178 it has been held that the effect of Section 55 of the Act is, where the party having the option elects not to avoid, to put the agreement after the original date on the same footing as an agreement just before the original date. Where a specific time is stated, then that substituted date must hold. If there is a simple waiver of the right to extension of the original time, then a reasonable time will be the proper time for delivery. Section 55, Para 3 means that the promisee cannot claim damages for non-performance at the original agreed time, not that he cannot claim damages for non-performance at the extended time. In an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance, an intermediate contract entered into with a third party for the purchase or sale of goods.

88. The learned counsel for the defendants has also maintained that in the light of Section 55 of the Indian Contract Act, 1872 read with the aforesaid Judgments, the plaintiff, having failed to issue notice to claim compensation at the time of delivery of the BOCBs on 16.08.1995 is barred in law from claiming any compensation for alleged delay in delivery. He has also maintained that the alleged damages claimed in the suit is unliquidated damages for a sum of Rs.61,48,000/- in terms of Section 73 of the Indian Contract Act and is not a claim for liquidated damages or penalty under Section 74 of the Contract Act. He has also adverted to that any claim for compensation for loss

production is treated as a remote damages and the Contract Act does not provide for any damages to be paid for such losses which are too remote.

89. Further, the learned counsel would submit that the entire claim is based on the projection made in the project report (Ex.P1), which was prepared for the purpose of initial public offer of shares and that the projections with regard to the production have been set out in the project report, wherein the projected production planned for year ending 31.03.1996, 31.03.1997 and 31.03.1998 was projected as 25,200 tonnes, 30,720 tonnes and 32,640 tonnes respectively. He would submit further that the actual production of the plaintiff's furnace/mini steel plant, as disclosed in the plaintiff's annual reports for the relevant years was far below its projections. The entire claim is based on fictitious projected figures in the project report prepared for the purpose of public issue and infact the plaintiff had sold furnace/mini steel plant within a period of three years from establishing the same would show that it was completely unprofitable and could never have made the projected profits or the projected production which was mentioned in the project report which is used for the purpose of creating the profitable scenario while issuing the public issue of shares and never reflected the true state of affairs of the plaintiff.

90. Further, the learned counsel has also maintained that the Judgment referred to by the learned counsel for the plaintiff while advancing his arguments were with regard to the liquidated damages under Section 74 of the Contract Act and that the same would not be applicable to the present case on hand. He has also submitted that any damages can be claimed only for actual loss suffered and on proof of legal injury. If breach of contract has not resulted in any harm, loss or damage, there is no question of compensation being granted, however serious or grievous an act of breach may be. He has also added that the cost of the BOCBs was about Rs.5,00,000/- and it was delivered to the plaintiff, who received it without any demur or protest. However, the alleged damages claimed is over Rs.61,00,000/- and such claim is not based on any actual loss. The annual reports of the plaintiff disclose that the plaintiff's furnace was never utilized to full capacity and was in fact, completely shut down and sold within three years of establishing the same. Further, he would submit that in any event no notice under Section 55 of the Contract Act had been given by the plaintiff, prior to or at the time of acceptance of the goods claiming any compensation nor any loss as contemplated under Section 73 of the Contract Act, has been established.

91. In support of his contention, he has placed reliance upon the decision in Karsandas H. Thacker vs. M/s.The Saran Engineering Co., Ltd., AIR 1965 SC 1981 (V 52 C339). In this case, the appellants sued the respondents for the recovery of Rs.20,700 for damages for breach of contract alleging that he entered into a contract with the respondent for the supply of 200 tons of scrap iron in July 1952 through correspondence, that the respondent did not deliver the scrap iron and expressed his inability to comply with the contract by its letter dated January 30, 1953. In the meantime, the appellant had entered into a contract with M/s.Export Corporation, Calcutta for supplying them 200 tons of scrap iron. On account of the breach of contract by the respondent, the appellant could not comply with his contract with M/s.Export Corporation which in its turn, purchased the necessary scrap iron from the open market and obtained from the appellant the difference in the amount they had to pay and what they would have paid to the appellant in pursuance of the contract.

92. The respondent contested the suit on grounds inter alia that there had been no completed contract between the parties and that the appellant suffered no damages. The trial Court accepted the plaintiff's case that there was a completed contract between the parties, that the respondent broken the contract and hence the appellant was entitled to the damages claimed. Ultimately, the suit was decreed. On appeal by the respondent, the High Court had reversed the Decree. It held that there had been a completed contract between the parties on October 25, 1952, but held that the respondent was not responsible for committing breach of contract as it could not perform the contract on account of the laches of the appellant and that the appellant suffered no damages in view of the controlled price for scrap iron being the same on January 30, 1953 as it was in July, 1952. Ultimately, the appellant's suit was dismissed.

93. On the appeal, the Apex Court has held that the appellant is not entitled to calculate damages on this basis, unless he had entered into the contract with the respondent after informing the latter that he was purchasing the scrap for export, if there was no controlled price applicable to purchase for export. There is nothing on the record to establish that the defendant was told, before the contract was entered into, that the appellant was purchasing the scrap iron for export. There is nothing about it in the correspondence which concluded the contract. The first indirect indication of the scrap being required for export could be had by the respondent late in October 1952 when it was informed that the scrap iron was to be despatched to the export corporation. The respondent would have inferred then that the scrap iron it was to sell to the appellant was meant for export. Such information to it was belated. Its liability to damages for breach of contract on the basis of the market price of scrap iron for export would not depend on its belated knowledge but would depend on its knowledge of the fact at the time it entered into the contract.

94. The Apex Court had ultimately held that the High Court was right in coming to the conclusion that the defendant respondent did not know that the appellant was purchasing scrap iron for export. The appellant, on the breach of contract by the respondent was entitled under Section 73 of the Contract Act, to receive compensation for any loss by the damage caused to him which naturally arose in the usual course of business from such breach or which the parties knew when they made the contract to be likely to result from the breach of it. Under Section 73 of the Contract Act, such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

95. The above cited Judgment of the Apex Court has brought more clarity on the facts of instant case on hand. It is to be remembered that PW1 himself has admitted that the BOCBs, which is the suit machinery was not mentioned in the prospectus under Ex.P2 as an important plant and machinery. He has also admitted that the date stipulated for supply of machineries was March/April 1995 and that other than the said date which is mentioned in Ex.P4, Purchase Order no other date was fixed by the plaintiff. He has also admitted that in Ex.P4 the purpose for which the equipments was agreed to be purchased is not mentioned and that the suit equipments is not custom made.

96. In this connection, the learned counsel for the defendants called the attention of this Court to the illustration P and Q to Section 73 of the Indian Contract Act, 1872.

Illustration:

> (p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.
>
> (q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

97. In the instant case also as admitted by PW1 in his cross-examination that the purpose for which the equipments was agreed to be purchased was not mentioned in Ex.P4. The plaintiff had also agreed for the proposal submitted by the defendants under Ex.P7 for the change of relay and his approval for the change of relay could be seen from Ex.P8. Hence, it cannot be heard to say that the defendants being the promisors had failed to perform their promise at the time agreed. Further the plaintiff being the promisee had accepted the performance of the contract i.e. the delivery of BOCB on 16.08.1995 i.e.other than the date originally fixed for delivery and it is evident from the candid admission made by PW1 that the plaintiff had not issued any notice expressing his intention to claim compensation either prior to the acceptance of delivery on 16.08.1995 or at the time of delivery of BOCBs on 16.08.1995. Hence, the very conduct of the plaintiff would go to establish that he is not entitled to claim compensation for damage as set out in the plaint.

98. In Ennore Port Limited, Chennai, (Successor of Chennai Port Trust with regard to the Ennore Port Project) vs. Hindustan Construction Company Limited, Mumbai and others, (2005) 4 MLJ 86. In this case, a Division Bench of this Court has held that in the present case, the arbitrator has categorically found that no legal injury had been caused. In the light of the categorical finding of the arbitrator on facts, the Court does not propose to interfere with the said finding. It is settled law that the scope for interference in awards passed by the arbitrator is limited and the Courts are not expected to re-appraise the matter as if it is an appeal as held by the Apex Court in its decision rendered in (2004) 5 SCC 109. It is not laid down in the Supreme Court decision in (2003) 2 CTC 282 that even where no legal injury is caused, the party would be liable to pay the compensation because of mere breach of a term of the contract. In our opinion, therefore, the arbitrator had rightly held that there was no justification for the present appellant to retain any sum. The finding of the Division Bench of this Court in the case is that compensation is payable only when the breach of contract has resulted in legal injury.

99. In M/s.Sarvaraya Textiles Ltd., Kakinada vs. M/s.N.Rajagopal & Co., Coimbatore and others, 2005 AIHC 3372, the case of the appellant was that due to failure of the first respondent in

supplying goods ordered for, there was loss in production and as consequence thereof it incurred loss. Ultimately, it was held that the plaintiff was not entitled to any damages. The same dictum has also been laid down in Union of India vs. M/s.Tribuwan Das Lalji Patel, AIR 1971 Delhi 120 (V 58 C18).

100. In Union of India and another vs. Hari Mohan Ghosh, AIR 1990 Gauhati 14, it is laid down that the loss of profit is not loss or damages which naturally arose in the usual course of things from the breach. In a case of non-delivery of goods such loss would be just the value of goods and the like but not damages due to the loss of profits. The plaintiff could be entitled to damages due to loss of business if he had made known to the Railway when the goods were booked that such loss was likely to result from the breach of it. There was no such evidence on the record. The claim for loss of business was therefore erroneously allowed.

101. In state of Kerala and others vs. M/s. United Shippers and Dredgers Ltd., AIR 1982 Kerala 281, a Division Bench of the Kerala High Court has made distinction between the words 'Loss' and 'Damage'. In this context, it is held that from what we have explained of the connotation of the words 'loss' and 'damage', it has to be seen that these words mean only 'actual or real loss or damage'. The word 'actual' means only 'real'. Sections 73 and 75 of the Act doe not use the word 'actual'. But it cannot be said that for the purpose of Sections 73 and 75 of the Act 'loss or damage' necessary to be established for claiming compensation need not be real or actual, but can be unreal or non-actual, i.e.non-existent. The word 'compensation' can be used only in the context of a real or existing loss or damage. The omission of the word 'actual' in Sections 73 and 75 is not designed for any particular purpose; but only because it is unnecessary. Even in the absence of the work 'actual' compensation can be claimed under Sections 73 and 75 only if the breach is proved to have resulted in loss or damage. The legislature could not have intended that under Section 74, compensation could be claimed even if the breach has not been proved to have resulted in loss or damage.

102. Once again, it is imperative on the part of this Court to refer the evidence of PW1 and the documentary evidences ranging from Exs.P35 to P39 and Exs.D1 to D3. Ex.P35 is the yearly statement of the plaintiff's company pertaining to purchase details for the year ended 31st March, 1996. It also appears from the evidence that this statement was furnished to Sales Tax Department. Ex.P36 is the particulars with regard to purchase of ingots from various parties as per the statement furnished to Sales Tax Department. It depicts the average price of ingots ie.Rs.9,506/- per ton. It also appears that the statement is related to the months of May to September, 1995. Ex.P37 is the details of raw-materials (ingots) purchase bill for the month of May, 1995. Further it discloses that the raw-materials (ingots) was purchased for the month of May, 1995 for Rs.2,08,46,510.46. Ex.P38 is the memo of calculation to show the loss and profit of the plaintiff's company from May, 1995 to 12th September 1995. In this connection, PW1 has deposed evidence that he did not remember as to whether he has filed any document to show the value of the scrap as Rs.5,800/- as stated in Ex.P38. It also reveals from the evidence that the plaintiff was not carrying on manufacturing of ingots and that the plaintiff had sold the ingots in the year 2002-2003. PW1 had also admitted in his cross-examination that the plaintiff could not manufacture to its capacity during the year 1995-1996 due to transformer failure and he has also admitted that the suit claim was based on projected figures under Exs.P1 and P2.

103. It is also pertinent to note here that PW1 specifically admitted in his cross-examination that the plaintiff had manufactured less than the projected figure from the period September 1995 to March 1996. Further, this Court is able to see in the cross-examination of PW1 that the date stipulated for the supply of the suit machineries was after the date fixed for closing of the public issues. The delay in supply of machineries will not have any impact over the subscription of the shares that were issued by the plaintiff. There was no letter from any shareholder refusing to accept the share or return of shares due to non-supply of suit equipments.

104. The defendants have marked Ex.D1 to D3 through PW1 during the course of his cross-examination. Exs.D1 to D3 are the balance sheets of the plaintiff's company for the years 1995-1996, 1996-1997 and 1998-1999. Ex.D1 is the annual report for the year 1995-1996. At page No.4 under the caption of operations it is stated that the overall performance of the company for they ear ended 31st March 1996 was satisfactory. The income from operations increased to Rs.2297 lakhs from Rs.2140 lakhs in the last year. The net profit after depreciation and tax increased from Rs.32 lakhs during the previous year to Rs.47 lakhs during the current year. It is also stated that there was a delay in commencing production in the furnace division due to non-availability of power and the company was able to commence commercial production in the furnace division only from September 1995. During the second half of 1995-96 the company faced severe power problem due to transformer failure and as a result the company could not operate and utilise the full installed capacity, both in the furnace and rolling mill division.

105. Further, in Ex.D1 at Page No.5 under the caption of Promise vs. Performance, the statement pursuant to Clause 43 of the listing agreement is given as shown in the tabular column.

Performance for the financial year ended 31.03.1996 as per the prospectus dated 24.01.1995 (Rupees in Lakhs) Audited financial statement for the year ended March 31st 1996.

Income from operations Profit from interest depreciation and tax Profit after tax It is also stated in the same page under the same caption that the variation between projection and performance is mainly due to power transformer failure in the Manali Sub-station leading to frequent power failure and restrictions during the second half of the year under review. Due to power problems, the company could not achieve the desired level of production in the furnace division and as a result we were forced to purchase ingots for rolling from outside resulting in additional cost. This has affected the overall margin. However, the defective transformer has been replaced on 15.04.1996 and normal power supply has been restored. Further, in Ex.D1 at Page No.18 under the caption of manufacturing activity it is stated as follows:

> (a) Capacity Utilization (As certified by the management) Class of goods Licensed capacity Installed capacity M.T. Actual Production 1995-96 (M.T) Finished Steel Products Delicensed (Delicensed 34000 (21000) 21021.030 (20485.845) M.S.Ingots Delicensed 19200 2243.790

106. Ex.D2 is the annual report for the year 1997-1997. At Page No.3 in Serial Nos.6 and 8 of the tabular column under the caption of financial highlights it has been stated as follows:

Sl.No. Particulars Audited financial statement for the year ended March 31st 1997 (Rupees in lakhs) Audited financial statement for the year ended March 31st 1996 (Rupees in lakhs) Profit/Loss before tax Profit/Loss after tax At Page No.5 under the caption of Promise vs. Performance it is stated as follows:

Sl.No. Particulars Projected performance for the financial year ended 31.03.1997 as per the prospectus dated 24.01.1995 (Rupees in lakhs) Audited financial statement for the year ended March 31st 1997 (Rupees in lakhs) Income from operations Profit before interest depreciation and tax Profit/Loss after tax At Page No.18 under the caption of manufacturing activity it is stated as follows:

(a) Capacity Utilization (As certified by the management) Class of Goods Licensed Capacity Installed Capacity M.T. Actual Production 1996-97 (M.T.) Finished Steel Products Delicensed (Delicensed) 34000 (34000) 20185.975 (21021.030) M.S.Ingots Delicensed (Delicensed) 19200 (19200) 7627.515 (2243.790)

107. Ex.D3 is the annual report for the year 1998-1999. At Page No.4 against Item No.6 it is stated that the company was forced to close down the furnace unit since October' 1997 due to the depressed market conditions and the continuous loss incurred in that unit. However, consequent to the closure of the furnace unit, the profitability of the Company has improved considerably as the loss arising out of the operations of the furnace unit has been avoided. Due to the continuous upward revision in the power tariff, now it is not viable to restart our operations in the furnace unit. In view of this, it is now proposed to dispose of the idle assets of the furnace unit and the proceeds of such sale may be used to repay the term loan of Industrial Investment Bank of India Limited thereby reducing the interest burden and loan liability.

108. From the above context, it has been established that the alleged loss of profits is not due to the delay in delivery of BOCBs. The terms of the contract as evident from Exs.P3 and P4 are required to be taken into consideration and after giving due consideration this Court is of view that the plaintiff is not entitled to claim damages or compensation etc.,

109. As discussed in the opening paragraph of the Judgment as per Section 55 of the Indian Contract Act, 1872, in a contract, where time is essence, if the promisor fails to do the thing promised at or before the specified time, the contract or so much of it as has not been performed becomes voidable at the option of the promisee. As contemplated in 3rd Part of Section 55, if in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

110. The principle laid down in 3rd Part of Section 55 of the Contract Act, 1872, clearly applies to the facts and circumstances of this case and hence in the light of the above context this Court is of firm view that the plaintiff has not been suffered damages on account of the belated delivery of the

BOCBs. It is also established that the production of the plaintiff's company was not at all affected by the delay in delivery of BOCBs. Since, the plaintiff, who has been complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy or make amends. Therefore, he will not be entitled to compensation.

Issue No.8:

111. Keeping in view of the findings given for the issues ranging from 1 to 7, the plaintiff is not entitled to any relief as claimed by him in the suit.

112. In the result, the suit is dismissed with costs.

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