

State of Karnataka and ors. Vs. Stellar Construction Company and anr.

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Court : Karnataka

Decided On : Jun-21-2002

Reported in : AIR2003Kant6; 2003(1)ARBLR40(Kar); ILR2002KAR4367; 2002(5)KarLJ474

Judge : B. Padmaraj and ;D.V. Shylendra Kumar, JJ.

Acts : [Contract Act, 1872](#) - Sections 20 and 70

Appeal No. : Regular First Appeal No. 63 of 1990

Appellant : State of Karnataka and ors.

Respondent : Stellar Construction Company and anr.

Advocate for Def. : M.S. Purushotham Rao, Adv. for Respondent-1, ;H.S. Dwarakanath, Adv. for Caveator-Respondent-1 and ;B.K. Manjunath, Adv. for Respondent-2

Advocate for Pet/Ap. : K.P. Ashok Kumar, Additional Government Adv.

Disposition : Appeal allowed

Judgement :

D.V. Shylendra Kumar, J.

1. This appeal by the State of Karnataka, Union of India and its officers, is directed against the judgment and decree dated 22-8-1989 passed in O.S. No. 2567 of 1986 by the City Civil Court, Bangalore.

2. The Trial Court having decreed the suit of the plaintiff to a substantial extent, the appellants who are the defendants before the Trial Court, have preferred the above appeal impugning the validity of the judgment and decree.

3. For the sake of convenience, we will refer to the parties by their respective ranks in the Court below.

4. The brief facts leading to the above appeal are that the plaintiffs had undertaken contractual work to execute the formation of road on the National Highway No. 4, near Davanagere Town, for the purpose of forming a bypass road to the highway, bypassing the town of Davanagere and for such formation, the work had been entrusted to by the defendants to various contracts.

5. Insofar as the plaintiffs are concerned, the work allotted to them in respect of which the suit had been filed, was between the stretches of National Highway KM. 257.903 to 260 which was characterised as Reach-I of the bypass road required to be formed.

6. The contract had been awarded in favour of the plaintiffs pursuant to an invitation for tenders and the tenders were required to be quoted by the intending contractors with reference to the value of the work which had been fixed for this Reach at a total sum of Rs. 32,00,000/- and odd and the bidders were required to quote with reference to this amount at a percentage of the amount, in the sense, the bidders could indicate whether they could execute the work for this very amount or for an amount lower than the amount fixed by the Government or at an amount higher. The estimated value of the work was to be precise at Rs. 32,30,910/- as against which the plaintiff had offered to execute the work for a sum of Rs. 30,35,500/-. The defendants accepted this offer of the plaintiffs as against other intending bidders' offers and entrusted the work to the plaintiff. The work was to commence on 25-2-1981 and was required to be completed by 24-11-1983. Provision was made for the monsoon period hampering the work which could be

suitably provided for in the contract. The contractor, it appears, had executed works to the tune of Rs. 14,62,640/- by the end of the stipulated period of twenty-four months. It appears the contractor did stop the work thereafter and a notice had been issued by the defendants to the plaintiffs on 21-3-1984 to resume the work. This, it appears, had been preceded by considerable correspondence between the parties. The defendants had issued a further letter dated 11-5-1984 calling upon the contractor to resume the work and he had been requested to be present at the work-spot on 24-4-1984 for taking final measurement. The contractor not having responded to the notice, later, it appears, the defendants were left with no choice but to terminate the contract with this contractor and have this work executed through some other contractor.

7. In the background of these facts, the plaintiffs sued the defendants claiming the following amounts to be due from the defendants as has been indicated in para 11 of the plaint.-

'(a)

Extralead charges for each work for five kms. near workout to

.

Rs.2,00,000/-

(b)

Sinkage in km. 259.400 approximate quantity 2,000 c.mtr.

.

Rs.35,000/-

(c)

Extralead charges for jelly

.

Rs.1,75,000/-

(d)

Special deposit recovered in bill

.

Rs.10,000/-

(e)

6 deposit which has been recovered in running bills

.

Rs.85,000/-

(f)

As per the 9-A Clause, the amount deducted in running bill

.

Rs.1,53,273/-

(g)

10% sinkage amount deducted in running Bill

.

Rs.40,000/-

Total

.

Rs.6,98,273/-

8. The stand of the plaintiff was that pursuant to the contract, they had been executing the works; that in the course of the execution of the work they had come across certain hurdles, particularly in bringing mud or murrain which had been, as pleaded by the plaintiffs, and to their understanding, from a nearby place which was divided by a railway line running in-between. The plaintiffs had further pleaded that metal or jelly for the work was also required to be brought from a nearby quarry which the plaintiffs called as 'koorki quarry' at a distance about 5 kms. from the work-spot. It is the case of the plaintiffs that the distance between the place from where the murrain or mud was to be brought, i.e., from the earth work quarry to the work-spot was about 2 kms., but as there was no approach road in the sense that the railway line couldnot be crossed at the place where the parties thought there was a proper road being not available and further the Railway authorities not having permitted the contractor to form a road at that spot to cut across the railway line, the contractor was required to go round to reach a level crossing and then cut back to the work-spot which increased the distance by which the mud was to be carried. Likewise, in respect of the jelly that was to be carted from the koorki quarry, the pleading of the contractor was that the quarry had not been developed fully and hence, he could not remove metal from this quarry and as there was pressure to complete the work, the contractor was forced to look for other source of metal and as the defendants and their officials approved the metal available at a nearby quarry by name Harapanahalli quarry; they transported the metal from this quarry for the work under execution and the distance from this Harapanahalli quarry to the work-spot was around 43 to 49 kms. and here again the contractor was being compelled to transport the metal for a longer distance.

9. The contractor pleaded that the estimation which had been arrived at by the defendants' department in estimating the value of the work at a sum of Rs. 32,00,0007- and odd was based on the premise that the mud and murrain was available at the nearby quarry which could be transported to the work-spot for a distance of 2 kms., whereas, ultimately it became clear that could not be so transported and the contractor had to cover a longer distance in turn incurring additional costs or expenditure over it and likewise, in respect of the jelly to be transported from koorki quarry being not available and contractor having transported the jelly from Harapanahalli quarry which was at a distance of more

than 40 kms. from the other quarry, the additional transportation cost for transporting jelly to the work-spot was also required to be compensated as the estimation based on the premise which formed the basis for estimation of the work was found to be incorrect while the work was being actually executed and as such the contract providing for the cost towards leads and lifts to be the look out of the contractor cannot be looked as a contract or binding on them and they were required to be compensated for the extra expenditure incurred on these two counts.

10. It appears, the contractor had included such extra cost incurred in the bills presented by them and the defendant-department had not paid. It was the admitted case of the parties that the contractor had executed work of the value of around Rs. 18,00,000/- which was a portion of the work by the end of the period provided for in the contract, but the defendants having paid only the price for the work executed as per the terms of the contract and having not paid the extra expenditure that the contractor had incurred for transportation of mud and jelly, which extra amount, according to the plaintiff was in the vicinity of about Rs. 3,00,000/- at the time and defendant-department having not paid this amount, it became difficult for the contractor to continue the work.

11. The contractor had also pleaded that in the course of the execution of the work at a particular spot where they were laying the road, there was sinkage of the earth and such sinkage of the earth required some special treatment and in this regard also they had incurred extra cost and for which also they had submitted a bill indicating that the sinkage had occurred at 259.4 kms. and the proximate quantity of work was around 2000 cubic feet and which had been worked for rectifying the same and the expenditure incurred by the contractor in this regard was Rs. 35,000/- and for such amount also a bill had been presented. The defendants having not paid the contractor amounts, claim towards extra leads for jelly and the earth work, as also the sinkage charges, the contractor did not evince further interest in carrying the work as it was not practically feasible for him to continue the work when he was not being paid the extra charges towards the above items indicated. Accordingly, it is the case of the contractor that he stopped the work, thereafter, though he had not completed the work in its entirety and

claimed justification for such stopping of the work midway due to the non-payment of the extra amounts which he had claimed and which had not been paid by the department.

12. It appears as the contractor had not completed the work as per the contract, the department not only had to engage the services of some other contractor, but at the same time, as per a term of the contract, they forfeited the amounts which were in deposit in the name of the contractor which were required to be in deposit for the due performance of the contract. While it was the stand of the contractor that he was not to be blamed for the stoppage of the work as he was not paid the amounts due to him and the financial constraint compelled him to stop further work for which the defendants themselves are to be blamed, the stand of the department was that the contractor had stopped the work even when the department had made all payments in accordance with contractual terms and there was no justification for the contractor for either not to complete the work within the stipulated period or for abandoning the work midway and as such in such circumstances the contractor forfeited all the deposits and in fact they forfeited such deposits.

13. The contractor sued the defendants for payment of these amounts which comprises of the extra cost incurred by him due to the additional leads, extra cost incurred by him due to the sinkage of the earth at 259.4 kms. point and also the deposits which had been forfeited by the department. The contractor also claimed interest at the commercial rate of 18% per annum.

14. The defendants contested the suit. The defendants pleaded that they are not liable for the amounts claimed by the contractor. The defendants' main defence was that while they had made payment in respect of the work which had been actually executed by the contractor and as per the contractual rates, the contractor had sought for additional payments over and above the contractual terms. It was the case of the defendants that the plaintiff is not entitled to this amount and as such the question of the department making such payments do not arise. The defendants also pleaded that the contractor had unilaterally stopped the work; that in spite of a notice being issued to the contractor to resume and complete the

work, he did not respond to the same and in such circumstances they were compelled to engage the services of some other contractor and complete the work. It appears the defendants in fact put forth a counterclaim claiming a sum of Rs. 10,82,721/- which was the extra expenditure which they had incurred in completing the balance of work which was left incomplete by the plaintiff-contractor and the defendants claim that while the suit claim was required to be rejected, their counter-claim was required to be decreed with interest at 18% per annum. The defendants categorically pleaded that the plaintiff was not entitled to any extra lead charges inasmuch as lead charges was not a part of the contract and there was no payment towards leads and lift charges separately; that the intending bidders were required to examine the work-spot, its vicinity and give their quotations at a percentage with reference to the estimated work value. The defendants also pleaded that in fact there was no need for the contractor to bring jelly from some other quarry and it was the choice of the contractor to carry jelly from the other quarry. The defendants also specifically indicated that they were not liable to pay any extra lead charges or any other charges as claimed by the contractor and in spite of their specifically calling upon the contractor to resume the work, the contractor having not responded, contractor himself has to be blamed for committing breach of the contract and in which event, as per the terms of the contract, the contractor forfeited the deposits which were for due performance of the works and as such cannot put forth a claim for refund of such amount.

15. In view of such rival pleadings of the parties, the Trial Court framed the following issues.-

- '1. Does plaintiff prove that he is entitled to extra lead charges for earth work for 5 kms., amounting to Rs. 2,00,000/- from the defendants 1 to 5?
2. Does plaintiff prove that he is entitled to extra charges for jelly amounting to Rs. 1,75,000/- from the defendants 1 to 5?
3. Does plaintiff prove that he is entitled to Rs. 35,000/- for the sinkage in kms. 259.400 for the approximate quantity of 2,000 c.mtrs. from the defendants 1 to 5?

4. Does plaintiff prove that he is entitled to refund of special deposit of Rs. 10,000/- and 61/2% deposit of Rs. 85,000/-, Rs. 1,53,273/- as per 9-A Clause and 10% sinkage amount of Rs. 40,000/- which are claimed in the plaint from defendants 1 to 5?

5. To what decree?

Additional issues

1. Whether the plaintiff completed the work within the agreed period, if not whether termination of contract of the plaintiff by the defendant is not legal and valid?

2. Whether the defendants are entitled for a decree for the amount of Rs. 10,82,721/- claimed by way of extra claim? If not, to what amount defendants are entitled?'

16. The issues in effect were on the aspect as to whether the contractor was entitled for the suit claim in respect of the four items namely, additional lead charges for carrying murram or mud, additional lift charges for carrying jelly, additional expenditure in view of sinkage and the forfeited amounts under different heads of deposits.

17. The Trial Court answered the issues relating to the payment of additional charges in favour of the plaintiff-contractor, also answered the issue relating to sinkage in favour of contractor but allowed a sum of Rs. 26,792/- as against a sum of Rs. 35,000/- claimed under this head and held that as the contractor was entitled for these charges and he having not been paid the said amounts, he was justified in stopping the work due to his financial constraint etc., and in such circumstances, the department was not entitled to forfeit the deposits and they have to be refunded to the contractor. Accordingly, the Trial Court decreed the claims of the plaintiff substantially except to the difference in respect of the sinkage claim, decreed for Rs. 26,792/- as against Rs. 35,000/- and also awarded interest at the rate of 18% per annum as the transaction was viewed as a commercial transaction. The Trial Court also dismissed the counter-claim of the defendants in its entirety. The defendants are in appeal against this judgment and

decree before us.

18. Insofar as this appeal is concerned, the appellants have confined the appeal to the suit claim of the plaintiffs being decreed. Sri K.P. Ashok Kumar, learned Additional Government Advocate appearing for the appellants in this appeal submits that in respect of the dismissal of the counter-claim, they have filed a separate appeal. Though it would have been desirable to have both these appeals heard together and disposed off, the other appeal is not before us and in the circumstances, we are left with no choice but to proceed with the appeal which is on board before us.

19. We have perused the judgment of the Court below, looked into the records and have heard Sri K.P. Ashok Kumar, learned Additional Government Advocate for the appellants and Sri M.S. Purushotham Rao, learned Counsel for the respondents.

20. Sri K.P. Ashok Kumar, learned Additional Government Advocate submits that the Trial Court was in error in decreeing the suit claim of the plaintiff; that the Trial Court failed to look into the terms of the contract correctly; that the Trial Court was in error in coming to the conclusion that the provisions of Section 20 of the Contract Act (hereinafter referred to as 'the Act', for short) was attracted to the fact situation of the case; that there was no understanding or contract between the parties that mud and jelly was required to be brought to the work-spot from the various quarries and on the other hand, there is no specific stand that leads and lift charges are all the concern of the contractor and whether before the contract i.e., at the time of inviting offers from intending bidders or even at the time of the execution of the agreement or finalisation of the contract there was any indication that the contractor was required to bring the material from any particular quarry and as such the claim of the contractor was not supported by the terms of the contract; that in such circumstances, the question of charges being under a mistake of fact never arose and the question of provisions of Section 20 of the Act being attracted to the situation to invalidate the contract does not arise also.

21. The learned Additional Government Advocate also submits that the learned Trial Judge was not correct in allowing the additional lead charges on the premise

that the defendants had the benefit of some extra work that had been executed by the contractor and as such they are required to compensate for such extra benefits and not so compensating result in, they retaining the benefits and attracting the provisions of Section 70 of the Act. Learned Additional Government Advocate submits that the work executed by the plaintiff-contractor was only part of the work which was required to be executed under the contract and that no extra work in fact had been executed by the contractor. Learned Additional Government Advocate submits that in such circumstances, the provisions of Section 70 of the Act was not at all attracted as has been indicated and relied upon by the learned Trial Judge for decreeing the claim.

22. Learned Government Advocate also submitted that the contractor being at fault in not completing the work within the stipulated time a'd even in spite of issue of notice and calling upon the contractor to complete the work having not responded, the contractor had committed a breach and as per the terms of the contract, he had forfeited the deposits and the department was perfectly justified in denying this deposit to the contractor and if that was so, the learned Trial Judge was also in error in decreeing the suit claim for refund of such deposits. The learned Additional Government Advocate submits that in totality, the suit claim was required to be dismissed as the contractor was not entitled to even the sinkage charges which on the basis of the evidence on record, could be easily inferred that there was factually no sinkage and as such the question of awarding any amount does not arise.

23. Countering the submission of the learned Government Advocate, Sri M.S. Purushotham Rao, learned Counsel for the respondents submits that the basis for estimating the work at a sum of Rs. 32,30,910/-was on the factual assumption that the raw material could be procured from the nearby quarries and further based on the distance of these quarries to the work-spot. When once the very basis of the estimation was on such premise and if ultimately it is found that such a premise was factually incorrect in the sense that raw material could not be procured from the quarries from which it could have been brought and by the distance based on which the estimation was made, the very basis of the estimation for arriving at the value of the work being faulted, the contract is vitiated by the mistake which the

parties were suffering at the time of contract and as such, applying the provisions of Section 20 of the Act, the contract becomes void and in such circumstances, when once the contractual rates are not applicable, the amount of work which had been executed by the contractor was required to be compensated irrespective of the terms of the contract by applying the principles of Section 70 of the Act and if so, the Trial Court was perfectly justified in decreeing the suit claim.

24. Insofar as the claim towards sinkage is concerned, learned Counsel submits that though it was not part of the terms of the contract, the fact remains that the contractor had incurred such extra expenditure which had been reflected through the bills which he had presented and in fact the contractor had put forth extra claim for this additional work and here again the contractor having actually incurred such extra expenditure for rectifying the defect due to the sinkage and then completing the work at that spot, on the same principle as above, the contractor is definitely entitled for being compensated for the actual work that he has done and the contractor was justified in putting forth the claim and the Trial Court was right in law and facts in allowing this claim also.

25. However, Sri M.S. Purushotham Rao, learned Counsel appearing for the plaintiff-respondents has very fairly submitted that insofar as the forfeiture of the deposit amounts are concerned, it is an aspect which is directly linked to the question as to whether the contractor was at fault for the breach of the contract in the sense that for not completing the work or as to whether the department was at fault in the sense that they prevented the contractor from completing his work by not paying the amounts to the contractor. Learned Counsel submits that the plaintiff-contractor will be definitely entitled for refund of the deposited amounts which the defendants had forfeited on the premise that he had committed a breach, if the Court finds that the contractor had justifiable cause for not resuming or completing the work. Learned Counsel submits that the contractor had every justification for such stoppage of work and as such, decreeing the suit claim for this amount is valid in law. However, learned Counsel submits that the position would alter only if it were to be held that the contractor is at fault and had committed a breach of the contract in not completing the work, in which event, as per the defendants/department may be entitled for operating the forfeiture clause,

but not otherwise.

26. In view of such rival submissions made on behalf of the appellants and the respondents, the points that fall for our consideration in this appeal are.-

(1) As to whether the contract could be said to have been voided because of the parties suffering from any mistake on any relevant aspect of fact forming the basis of the contract either at the time of the contract or such mistake had been discovered at a later point of time and which could attract the provisions of Section 20 of the Contract Act?

(2) Whether the contractor had executed any extra work and if such extra work was required to be compensated independent of the terms of the contract and on applying the principles of Section 70 of the Contract Act?

(3) Whether the contractor was justified in stopping the work midway and not resuming the work in spite of being called upon to complete the work by the defendants?

and

(4) Whether the Trial Court is justified in allowing* the claim of the contractor in respect of sinkage charges?

27. The question of a contract being voided by the provisions of Section 20 of the Act will arise only when the parties to the contract are suffering from a mistake of fact in respect of the subject-matter of the agreement at the time the agreement is made. Section 20 of the Contract Act reads as under.-

'Agreement void where both parties are under mistake as to matter of fact.--Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.--An erroneous opinion as to the value of the thing which form the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact'.

It is significant to notice that as per the explanation an erroneous opinion as to the value of the thing which forms the subject-matter of an agreement, is not to be deemed to be a mistake as to a matter of fact.

28. It is not in dispute in the present case that the contract was entered into subsequent to the tenders being called for by the defendants and the conditions of tender having been made known to the intending bidders. It was one of the conditions of the tender that the submission of tender by a contractor implies that he has read this notice and conditions of contract and made himself aware of the scope and specifications of the work to be done and the availability of the quantity of materials required. This is as per Clause 13 of the tender notice form (Form 1) which forms part of Ex. P. 1. With regard to the supply of murram, metal and sand etc., to the work in question, Clause (3) of the additional conditions reads as under:

'It is not possible for the department to release any quarry (murram, metal and sand etc.) for this work. The contractor has to make his own arrangement. No stipulation regarding lead and lift will be accepted. The contractor will be permitted to make use of departmental quarries but no claim on lead, lift in adequacy or otherwise of quantity etc., will be entertained'.

This is a specific term of the contract. The parties have entered into contract being aware of such a condition. The legal position that obtains in the light of such an agreement between the parties is that this condition binds the parties. Sri M.S. Purushotham Rao, learned Counsel for the plaintiff-contractor seeks to get over this condition by pleading that the estimation in itself was based on the availability of murram and jelly at particular quarries and working out the cost that could be incurred for transporting the material from such quarries, if the material ultimately is not found to be available there, then the very basis of the estimation suffers from a mistake of fact and as such attracts the provisions of Section 20 of the Act.

29. In the first instance, we do not find any factual basis for this. Though learned Counsel tried to make good this submission by drawing our attention to Ex. P. 2 which is a sketch indicating the topography of the area where the work had been executed and its surroundings, the learned Counsel has not been able to draw the

attention of the Court to any material on record to indicate that it was in contemplation of the parties that the raw material was required to be brought from any specific quarry and that while in the course of the execution of the work, the contractor was compelled to bring material from some other quarry and by carrying it for a larger distance. In the absence of anything on record to indicate that there was an agreement between the parties to bring the raw material from any specified place or from any known distance, the argument that because it was brought from some other quarry and over a longer distance, the earlier premise i.e., that the parties were suffering from a mistake of fact with regard to the terms of the contract falls to the ground. The very premise based on which this argument has been developed, has no factual basis at all. On the other hand, the specific term of the contract which is binding between the parties is that it is the exclusive concern of the contractor who offers his bids, to verify these aspects and then to give his offer. It is to be remembered that a contractor is making his offer with reference to the estimation and the value which has already been indicated in the tender form. The contractor is required to give his offer with reference to this estimated value which includes all expenditure that he incurs for the execution of the work and it is the exclusive responsibility of the contractor. It is also a term of the contract that the offer is to be made by the intending bidder after physically verifying either the work-spot and its surroundings. The contractor who has to execute a work of this nature is obviously aware as to what could be the quantity of material and as to from where all it could be procured. The mere fact that the contractor, even if factually was required to move from a nearer quarry to a farther quarry, will not in any way attract the provisions of Section 20 of the Act to void the contract. In fact, in respect of the allegation and the distance of the quarries, there was no contract at all between the parties in respect of which fact there was a mistake. If that is so, the question of the provisions of Section 20 of the Act being attracted, never arises and the parties are not relieved of the terms of the contract.

30. The next question is as to whether the plaintiff-contractor is entitled to be compensated in respect of the extra lead charges. The extra lead claimed itself indicates that it should have been an extra work. It should be borne in mind that there was no actual extra work and on the other hand, the contractor had not even completed the work which he was required to complete as per the contract, but the

extra amount claimed was in respect of the additional cost which the contractor claims to have incurred because of the longer distance of the quarry from which he brought the jelly and the longer distance he had to cover to bring murram to work-spot. When once it is found that there was no agreement on this aspect and the contract was not vitiated by attracting the provisions of Section 20 of the Act, the parties are bound by the terms of the contract and are not relieved by the premise. The extra lead charges are in fact not even in respect of any extra work over and above the contract work. The learned Trial Judge has placed reliance for the award of extra lead charges in respect of the quarrying of jelly and also the murram based on certain correspondence which in fact the learned Counsel for the respondents pleaded, amounted to an assurance and undertaking on the part of the department that such extra lead charges will be paid to them and because of such assurance, the contractor had continued with the work. We notice that Ex. P. 13 which is a correspondence between lower official of the department to a higher official recommending the case of the contractor for payment of extra lead charges because the contractor was bringing the jelly from Harapanahalli quarry, was not a communication which had been sent to the contractor. In fact, it was an internal letter recommending the case of the contractor for some extra payment on that ground. This letter to which the contractor was not even a party nor addressed to him, cannot alter the terms of the contract which is in writing and which has been entered into in the normal course after following the due formalities. It would have been a different matter had the recommendation been accepted and the amount paid. But, when Courts examine claims of this nature and until and unless the Courts find that a claim has a legal basis and even thereafter it is factually substantiated, claims of this nature cannot be decreed by the Courts. It is only when the legal basis is supported by material on record, that a claim of this nature becomes justifiable. We have found that this claim had no legal basis in the sense that the parties were not relieved of the terms of the contract. Even then, learned Counsel, calling in aid the principles of estoppel to say that the contractor having been assured of such payment and induced to continue his work, he is entitled for receiving such additional payment.

31. The difficulty in accepting this submission of the learned Counsel for respondents is that in the light of written agreement stipulating the terms between

the contractor, it will not be possible for the Court to accept a so-called extra expenditure based on a mere internal correspondence namely, a letter written from a lower official of the department to an higher official. We are of the view that the principles of promissory estoppel is not attracted to a situation of this nature when the parties are clearly bound by the agreement which is in the form of a contract. We are also of the view that in the present situation, the provisions of Section 70 of the Act is definitely not attracted inasmuch as the provisions of Section 70 of the Act will be attracted only in a situation where a person derives some extra benefit over and above what was in the contemplation of the parties and for which no stipulation had been made and it is at the cost of the other person. In the light of the view we have taken that there was no extra work that had been executed by the contractor in favour of the defendant-Department, the question of applicability of the provisions of Section 70 of the Act does not arise at all.

32. Learned Counsel Sri M.S. Purushotham Rao has placed reliance in support of his submission on a Single Bench decision of this Court in the case of Y. Thaniappa v. The Belman Town Panchayat, Belman Village and Anr., ILR 1980 Kar. 432. In fact, the principles laid down in the said decision cannot be said to be attracted to support the case of the plaintiff-respondents in the present case. It is only when everything is done legally in accordance with the rules, the terms of the contract apply and otherwise the provisions of Section 70 of the Act is attracted, is the submission of the learned Counsel based on the said decision. In fact in the said decision, the learned Judge has clarified that any inoperative request of an officer cannot form the basis for attracting the provisions of Section 7th of the Act, but it is the actual fact that an extra work has been done and because of such extra work the other party has enjoyed the benefit of it and unless the party who had enjoyed the benefit makes payment, it would amount that such work resulted in unjust enjoyment and the provisions of Section 70 of the Act will be attracted.

33. In the instant case, we have found that no extra work in the sense that extra benefit has accrued to the defendants factually and if at all, the contractor has been working for executing his part of the contract and not for any extra work. It is an incidence of business that one may gain or one may lose. In the course of

executing a work, the contractor, in a given situation, may incur some extra expense and in a given situation may incur a lesser expenditure. It is not as though an extra expenditure was required to be borne by other party or the benefits of a lower expenditure will be passed on to the other side. In fact, it is to obviate from such claims, the contract provides for terms of the contract and in such a situation, Section 70 of the Act is not clearly attracted. Learned Counsel has also placed reliance on a decision of the Supreme Court in the case of *Pannalal v. Deputy Commissioner, Bhandara and Anr.*, : AIR 1973 SC1174 , which again only indicates the scope of the applicability of Section 70 of the Act. If at all, the Supreme Court has said, that it is not only to the individuals but to organizations also the provisions can be applied. There cannot be any two opinions about this proposition, but it is not the situation in the present case. Learned Counsel for the plaintiff-respondents has relied upon two other decisions namely, *Union of India and Anr. v. Sahab Singh*, : AIR1977 All277 and a decision of our High Court in the case of *Hanuman Transport Company Private Limited, Udupi v. Ruby General Insurance Company Limited and Ors.*, AIR 1973 Mys. 335. The said decisions do not apply to the case of the respondents in the present situation.

34. With regard to the claim of the contractor for sinkage charges, it is admittedly a claim which is put forth over and above the contractual rates. We have already noticed that the parties are not relieved of the terms of the contract and they are bound by the contractual terms. If the contractor has to claim any amount over and above the agreed rates, it should be based on any other principle of law.

35. The claim towards sinkage charges is, in the first instance, based on the factual assumption that there was sinkage at the particular point of the road under formation. But this aspect of the matter has been factually disputed ever since the suit claim was presented. The defendants categorically denied that in the first instance the plaintiffs had incurred any extra expenditure to the tune of Rs. 35,000/- due to loose soil and total sinkage. They also denied that they are liable for making good such amount under the contract. The evidence on record, while indicates that an official who had been examined on behalf of the defendants, had deposed that the expert opinion in this regard was that the spot which had been

examined before the work was entrusted had been indicated, there was no such possibility and the embarkment had been decided by Quality Control Sub-Division and Ministry for Surface Transport, Government of India. The authorities had got this aspect examined after the work also and it was never noticed by the experts that there was any such sinkage either before or after.

36. Sri M.S. Purushotham Rao, learned Counsel for the respondents further submitted that no reliance could be placed on the evidence placed on behalf of the defendants inasmuch as the said expert had not been examined before the Court and the depositions of the official, of the department becomes a mere hearsay in such circumstances.

37. However, we notice that the plaintiff-contractor also had not positively placed any material to indicate that there was such a sinkage which necessitated the extra work being done. The learned Counsel is also not in a position to indicate as to how a work done in regard to such sinkage can be said to be an extra work in the first instance.

38. The term of the contract is that the contractor was required to form the road between two points indicated to him. The term of the contract is also that he was required to examine the site and satisfy himself about the conditions there and then to give his quotation. If the contractor offers his bid after such physical verification, it can be presumed that he has taken into account all such possibilities and any disadvantage which he comes across in the course of the execution of the work cannot be made a ground for claiming additional charges over and above the contractual rates. If in respect of every disadvantage the contractor is to be allowed any additional charges, then the very sanctity of the contract is lost and the parties are never bound by the contract in such a situation. However, insofar as the Courts are concerned, when claims arising in the context of a contract are being examined, it is very necessary for the Courts to be satisfied that a claim is justified over and above the contractual term. In the instant case, the plaintiff has not placed any material to indicate that in the first instance it was a term not inclusive of the actual work that was required to be executed and secondly, that contractor had in fact incurred such additional expenditure exclusively attributable

to the particular phenomena.

39. Learned Counsel for the respondent sought to support the submission by drawing the attention of the Court to the fact that the contractor having factually added this amount in the periodical bills that had been presented for payment indicating as additional cost incurred for sinkage, itself is a proof enough to show that there was such a sinkage and in fact the contractor had executed such work. It is not possible to accept such submission and to arrive at a conclusion that there was such sinkage by the mere fact that the contractor had put forth some additional claims. At the best it can constitute a plea and not beyond.

40. The term of the contract in fact very clearly indicated that 'tender must understand clearly that the rates quoted are for completed items of work including all charges due to materials, labour, plant, scaffolding, supervision, service work, power, royalties, sales tax and octroi etc., and it includes all extra to cover the cost of night work if and when required and no claim for additional payment beyond the prices or rates quoted will be entertained subsequently towards any claims on the grounds of misrepresentations, or on point that he was supplied with information or given any promise or guarantee by Public Works Department or by any person (whether a member of an employee in the Public Works Department or not). Any failure on the contractor's part to obtain all necessary information for the purpose of making his tender and fixing the same prices and rates therein shall not relieve him of any risk or liability consequent upon the submission for tender'. In the light of such express condition, it is difficult for us to hold that the contractor was entitled to any such extra expenditure which he perhaps might have incurred in respect of a particular portion of the work. Contract terms clearly indicate that all such extra items are to be included and taken note of before the tenders are submitted. Accordingly, we find that there is actually no legal basis for the claim towards extra charges for sinkage and in fact factually also, it has not been made good except for producing the bills towards extra costs. The plaintiff is unable to support this claim on any other principle of law. Though the learned Counsel for the respondents has sought to place reliance on Exs. P. 12 and P. 13 wherein, the very officials of the department had recommended the case of the contractor for making extra payment and in the context of Clause 32 of the contract which

provides for the officials of the department who were on the spot to issue instructions to the contractor in the course of the execution of the work and based on which the contractor claims to have executed the work and this in itself is sufficient to justify the claim not only towards extra lead charges, but also in respect of sinkage. We are afraid we cannot accept this submission for more than one reason. Firstly, in the light of the express terms of the contract which we have quoted above, the terms between the parties is very clear. A contract of this nature cannot be varied or said to have been varied by the writing of letters which are in the nature of internal correspondence by the officials of the department from a lower official to an higher official.

41. A letter of this nature cannot have the effect of substituting the terms of the contract. Moreover, the reference to Clause 32 of the contract which is in the context of a contractor who is required to execute the work as per the instructions of the officials at the work-spot, is not in the context of varying the terms of the contract, but in the context of the contractor executing work adhering to the terms of the contract and to ensure that the contractor does not deviate from the terms of the contract, particularly when the engineers at the spot find any work that is being executed by the contractor is not in the overall interest of the work, but could hamper or damage the work because the manner in which it is being executed. The official could, as per Clause 32 of the contract, issue instructions to the contractor not to execute the work in the manner as per specification stipulated in the contract but in the manner stipulated by the engineers at the work-spot. A Clause of this nature cannot be construed as a clause having the effect of modifying the terms of the contract. In this view of the matter, we are unable to accept the submissions of the learned Counsel for the respondents that the letters under Exs. P. 12 and P. 13 read with Clause 32 of the contract/agreement, Ex. P. 1 could come to the rescue of the plaintiff to entertain and decree the suit claim.

42. In the result, we are unable to accept the submissions made on behalf of the respondent by its learned Counsel and we are also unable to see justification for decreeing the suit claim in respect of lead charges and sinkage as has been done by the Trial Court.

43. This leads us to the next question as to the claim for refund of the deposit amounts which had been forfeited by the defendants. On this aspect, we have already noticed that the contractor was himself at fault in not continuing the work. In the light of our finding and conclusion that the contractor was not entitled to the additional lead charges and other amounts claimed as per sinkage, the defendants in fact having admittedly made full payment in respect of the work that had been executed as per the contractual rates, the plaintiff-contractor could not have stopped the work on the premise that he had not been paid the extra charges which he had claimed. The stoppage of the work on the part of the contractor which could relieve him from the consequence of breach of contract, will only be when the stoppage is justified and permitted under the contract. In fact, even after the contractor had received the payment as per the contractual terms and what had been not paid was only the additional charges, the contractor on that ground not only stopped the work but also declined to resume the work in spite of clear notice. In such circumstances, it cannot be said that the defendant-department was at fault or committed any breach, but on the other hand, can positively be said that it is the contractor who had committed the breach of the contract in not completing the work under the contract as per the terms of the contract. It is not in dispute that if the contractor was responsible for the breach, as per the terms of the contract, the department was entitled to forfeit the deposits made by the contractor. In that view of the matter, the contractor was not entitled to claim refund of the amount which had been forfeited due to stoppage of work on the part of the contractor. The Trial Court is also in error in decreeing this claim.

44. In the result, we allow this appeal and in reversal of the judgment and decree of the Court below, we dismiss the suit claim in its totality.

45. The appeal said to have been preferred by the defendants in respect of the dismissal of the counter-claim being not placed before us, we would not like to express any view in respect of that matter.

46. Appeal allowed. Parties to bear their own costs in the circumstances of the case.