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State of A.P. and Others Vs. Pioneer Builders, Engineers and Contractors, Hyderabad

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Court : Andhra Pradesh

Decided On : Mar-03-1999

Reported in : 1999(3)ALD140

Judge : N.Y. Hanumanthappa and; Neelam Sanjiva Reddy, JJ.

Acts : Code of Civil Procedure (CPC), 1908 - Sections 34 and 80; Arbitration Act, 1940 - Sections 8 and 20; Contract Labour (Regulation and Abolition) Rules, 1971; Minimum Wages of Labour under the Contract Labour Rules, 1971; Tamil Nadu Recognised Private Schools (Regulations) Act, 1974; Code of Civil Procedure (CPC) (Amendment),1976

Appeal No. : AS Nos. 2206 of 1996 and 236 of 1998

Appellant : State of A.P. and Others

Respondent : Pioneer Builders, Engineers and Contractors, Hyderabad

Advocate for Pet/Ap. : Advocate General and ;Mr. S.R. Ashok, Adv.

Judgement :
ORDER

N.Y. Hanumanthappa, J.

1. Aggrieved by the judgment and decree dated 3-4-1996 made in OS No.11 of 1992 by the learned Subordinate Judge, Nandyal, allowing the suit claim in part, AS No.2206 of 1996 has been filed the defendants-State. AS No.236 of 1998 has been filed by the plaintiff aggrieved by the judgment and decree dated 3-4-1996 passed by the Subordinate Judge, Nandyal in OS No.11 of 1992 dismissing the suit against certain claims. Hence, both the appeals are clubbed together and disposed of by this common judgment. The rank of the parties is reported as in the trial Court.

2. Though facts of the case relating to the suit claim arise on a complex plane and are many, only the relevant facts which are necessary for the disposal of the appeal may be narrated thus :

3. The plaintiff-M/s. Pioneer Builders, Engineers and Contractors, Hyderabad, had entered into an Agreement with the 2nd defendant viz., Superintending Engineer, Srisailam Right Branch Canal (SRBC) Circle No.I, Nandyal, vide agreement No.25/Se/88-89, dated 19-2-1989 to execute the work pertaining to earth work excavation, lining and construction of structures of SRBC from MM, 30.000/34.486 to K.M.33.000/38.865 for a sum of Rs.8,42,93,617/-. According to the agreement, the work is to be executed within a period of thirty six months from the date of handing over the site to the plaintiff which was given on 22-4-1989.

4. At the end of the contract period of three years, the plaintiff could complete only 50% of the total work and according to the defendants the plaintiff did not accelerate the progress of work in spite of several notices issued to it. At that stage, the plaintiff filed the present suit on 24-3-1992. Along with the suit, plaintiff also filed IA Nos.87 and 88 of 1992 seeking injunction against the department from encashing the bank guarantee furnished as performance security at 10% of the contract value and also restraining the defendants from taking action under Clause 50 of the agreement. In the meanwhile on 13-4-1992, the defendants-appellants terminated the contract. ON 16-4-1992 the above interlocutory applications were dismissed by the trial Court and the same was upheld by a Division Bench of this Court in CMA No.526 of 1992 on 13-11-1992. However, by order dated 27-11-1992, this Court clarified that the observations made in the order dated 13-11-

1992 regarding maintainability of the suit shall not be taken into account by the trial Court while disposing of the suit on merits. The Government by G.O. Ms. No.137, dated 22-6-1993 levied penalty on the contractor by effecting recovery of mobilisation advance in full and also levying penalty of 10% in the performance guarantee, and by Memo No.3588/SRSP2/2/93-3 dated 4-8-1993, Government absolved the plaintiff of all further liabilities except to the extent indicated in G.O. Ms. No.137. Plaintiff also filed three applications viz., IA Nos.1, 2 and 3 of 1993 on 18-1-1993 seeking amendments to the plaint which are al lowed on 2-2-1993.

5. The plaintiff filed the suit for recovery of an amount of Rs.7,50,45,459/-on account of various breaches said to have been committed by the defendants in pursuance of the contract, under Sections 8 and 20 of the Indian Arbitration Act.

6. According to the plaint averments, though the plaintiff proceeded to the site with full mobilisation of labour and machinery and commenced execution of work to complete the work within the stipulated period, work could not be completed due to delays and defaults on the part of defendants 2 and 3. According to the plaintiff, the site was not handed over in its entirety and it incapacitated the plaintiff from completing in full the earth excavation work between K.M. 35.486 and K.M. 36.257 and the same was informed to defendants through letters dated 15-5-1990 and 28-6-1990 (Exs.A4 and A5) and according to the letter dated 28-9-1991 (Ex.A6) of the 2nd respondent the land still remained to be acquired, by the defendants.

7. The proposal to divert the drain crossing the canal at K.M. 35.786 was not originally contemplated in the contract but was subsequently thought of by the authorities and the same was not finalised till 1-7-1991, vide Ex.A7 letter of the 3rd defendant dated 1-7-1991 and the land was not acquired and handed over to the plaintiff and there were threats by the villagers of Jalankanur village vide letters of the plaintiff dated 22-7-1989, 17-11-1989 and 20-12-1989 (Exs.AS to A10) addressed to the defendants.

8. Similarly, in the case of another drain crossing the main canal at K.M. 34.752, the proposal had not been finalised, as a result of which, the plaintiff was forced to abandon the work to the extent of 200 meters. The plaintiff was prevented from tackling excavation work admeasuring 250 metres each on account of delay in

finalising the location and design of cross drainage work's across Nakkalavagu at K.M. 36.852 and across the old course ofMeddileru Vagu. After series of correspondence made by the plaintiff, vide letters dated 15-5-1990, 28-6-1990. 1-9-1990 (Ex.A11), 7-2-1991 (Ex.A12), 19-7-1991 (Ex.A13) and 19-12-1991, the defendants finalised drawings on 1-7-1991 with delay of two years and three months in respect of Nakkala vagu and in respect of Meddileru the proposal is not finalised.

9. The plaintiff alleges that there was abnormal delay in shifting the power lines crossing the canal at K.M. 35.486 (LT line), K.M. 36.844 (220 KV line) and at K.M. 37.680 (11 KV line). There was a delay of 2 years and three months in respect of 11 KV line and the plaintiff was forced to stop the work of excavation in Nandyal shales as it required blasting to a length of about 400 metres on each count. There was threat of damage to 220 KV line by normal blasting operation to a length of 200 metres on either side of the power line. As the contract provide for controlled blasting only, the plaintiff was constrained to stop the excavation in the reach as in similar circumstances in respect of package II of SRBC, APSE Board claimed huge damages on the ground of damages of 220 KV line.

10. There was a delay of 2 years in shifting the telephone lines crossing the canal at K.M. to a length of 200 metres at K.M. 342.223/38.09, vide letter dated 7-2-1991 which forced the plaintiff to abandon the work.

11. It is alleged that on account of several days and defaults on the part of defendants in respect to the following structures, the plaintiff suffered heavy loss or caused delay in the progress of work.

12. In respect of structure across Kundu river at K.M. 31.000/35.486 of SRBC, though foundations for abutments, wings and returns for the structure were excavated to the designed levelby 14-8-1990, vide Ex.A16 letter dated 14-8-1990, there was delay of 15 months in supplying the drawings. Similarly, concreting of central piers was stopped on 9-4-1991, vide Ex.A19 telegram dated 94-1991 and Ex.A20 letter dated 19-4-1991, for want of design particulars of holding down bolts. The designs were furnished on 7-11-1991, (Ex.A18) but it required fresh centering and form work materials as the original pattern already processed was

unsuitable, which required additional money and time, vide plaintiff's letter dated 24-11-1991 (Ex.A22).

13. In respect of structures across surplus course of Manchalkatta tank at K.M. 32.766/38.631 of SRBC, though foundation of the end piers foundations for wings and returns were excavated, the drawings which were revised three times were communicated on 7-11-1991 with delay of nine months and the same were again revised and communicated on 10-2-1992, vide Ex.A23 letter which resulted in total delay of 2 yeas and seven months. The concreting of central piers was suspended for want of details of holding down bolts which was communicated on 30-9-1991, vide letter dated 30-9-1991 (Ex.A24) with a delay of 2 years and 7 months. The change in the pattern slab required fresh procurement of centering material as the original designs were unsuitable and this resulted in additional money and extra time.

14. There was a delay of 2 years and four months in shifting 11 KV line crossing the canal at K.M. 31.824/37.689, despite bringing the same to The notice of 3rd defendant, vide letters dated 7-2-1991 and 19-7-1991 and his had resulted in delay in tackling the excavation of foundations and completion of structure located at K.M. 31.824/37.689. The excavation of foundations for the structures at K.M. 31.771/36.257 was forced to be abandoned by the plaintiff for want of adequate land.

15. In respect of structure across Nakkla vagu at K.M. 32,397/36.883, it was instructed to be taken up for consideration only on 1-7-1991 with delay of 2 years and three months. Though plaintiff excavated foundations, cement was not issued by the defendants, vide plaintiff's letters dated 5-2-1992 and 24-2-1992 (Exs.A25 and A26). The progress of the work, therefore, suffered and work had been stopped totally on account of the delays and defaults occasioned by the defendants.

16. The new proposal to construct suitable structures across Meddileru vagu crossing the canal was not finalised despite series of correspondence. The plaintiff believes that the defendants decided to drop the lining work contemplated for canal as the approved designs are contrary to the technical stability.

17. There were persistent objections and interruptions caused to the plaintiff by the contracting agency of spoil bank of quartzite reach of Package V in picking up quartzite stone of sufficient quantity and convenient size of hand picking which has resulted in delay in the execution of work and the defendants failed to solve the problem in spite of series of correspondence, vide telegrams dated 8-5-1990, 28-6-1990, 1-9-1990, 19-7-1991 and 19-10-1991 and defendants admitted the same in their letters dated 3-5-1991 and 11-5-1990 (Ex.A28).

18. Unanticipated rate of under ground seepage into excavation owing to the unforeseen change in hydrological sub surface conditions of the ground caused the plaintiff to suffer the loss in out-turn of machinery besides involving additional expenditure towards dewatering, additionally encountered. The adverse climatic conditions also affected execution of work. Payments were not arranged or arranged with abnormal delay bydefendants in respect of some items. Payment of addilional dewatering was not arranged. Price adjustment clause provided in the contract was not given effect to. The disposal of appeals by 2nd defendant without following the contractual provisions has caused irreparable damage to the plaintiff as several claims were denied ex parte. The increase in fuel prices on account of gulf war has effected the mechanised excavation and working : Devaluation of rupee had affected importing of certain spares of sophisticated hydraulic excavator equipment. The above factors and defaults not attributable to the plaintiff has caused huge loss to the plaintiff and the plaintiff had to mobilise additional money at huge rate of interest.

19. As per para 3.2.6 of Vol.II of agreement, payment (overhaul) shall be made for the quantities of 'excavated materials' by measuring the volume of overhauled materials in the units specified therein for the soils as classified, and that for the haul distance exceeding 100 metres, length shall be measured in the unit of 'kilometre'. 3rd defendant arranged payment on ad hoc basis without actually measuring the quantities in spite of representation made on 9-11-1990 (Ex.A37) which was rejected on 7-12-1990 (Ex.A38). Plaintiff sought reference to the arbitration under clauses 56 and 57 of the contract by letter dated 6-1-1991 (Ex.A40). The appeal made to 2nd defendant was rejected on 22-8-1991 (Ex.A41). The decision of the defendants is in violation of the provisions of agreement and it

is entitled to a sum of Rs.9,81,801/-.

20. Contract contemplated laying cement concrete of different grades for constructing various components of structures. The technical specification, Vol.II of the contract stipulated that the proportions of various ingredients to be used in the concrete for different parts ofwork will be established by proper mix design by the Engineer-in-charge during the progress of work. Accordingly, mixed design had been finalised by the third defendant for M10 grade and the cement used was 205 Kg. per cubic metre of concrete as against 220.8 Kg. specified in the bill of quantities of the contract. While arranging payment for M10 grade, 3rd defendant effected recovery towards the different of cost of cement of 15.8 Kg. on the ground that it was contemplated under clause 6.3.1(c), vide letter dated 30-8-1990 (Ex.A42). Plaintiff made representation on 13-9-1990 (Ex.A43) to the 3rd defendant which was rejected on 26-9-1990 (Ex.A46). On appeal made to the 2nd defendant on 9-10-1990 (Ex.A47) the same was confirmed on 23-10-1990 (Ex.A45) altogether referring a different clause 6.3.9(a). Plaintiff sought reference of the dispute to arbitration by letter dated 5-11-1990 (A44). Under this count, plaintiff is entitled to recover a sum of Rs.1,88,359/- as it had been illegally recovered.

21. According to the plaintiff, price adjustment for the work done under the contract at the end of every quarter shall be determined in accordance with the formula as detailed under sub clause (3) of clause 34, Section 2, Vol.1 of the contract. Though plaintiff quoted its rates keeping in view the amounts payable under the terms of the contract, including price adjustment clause, the defendants have computed the price adjustment clause without regard to the scope and ambit of the constituents as explained in clause 34(1) at p.2.88 of Vol.1 of the contract. Since the total value of work done during the quarter i.e., 'R' is payable in local currency only, the RI in the formula must be construed as 'R' in respect of three components viz., material, labour and fuel of all items specified under Schedule HI, Section 7, Vol.111 of the contract. The 3rd defendant deviated and changed the scopeor meaning of expression given in the contract and considered the value of 'R' as the value of certain individual items of work done during quarter. Though the 3rd defendant accepted the plea put forth by the plaintiff in principle in their

letter dated 23-7-1990 (Ex.A50) pursuant to the representation dated 29-6-1990 (Ex.A49) of the plaintiff requesting to compute price adjustment in accordance with the formula in respect of all items, however, stated that the same might be an omission in the agreement in giving the meaning for value of R. The appeal of the plaintiff dated 16-8-1990 (A51) to the 2nd defendant was rejected by letter dated 13-9-1990 (A52). Plaintiff sought reference of the issue for arbitration, vide letter dated 15-10-1990 (A53). By adopting the total value of the work done during the quarters as the value of 'R', as per the formula, the plaintiff is entitled to a total sum of Rs.4,67,06,658/-towards price adjustment for all the quarters in respect of various items of work executed, but the defendants paid only Rs.76,90,000/- and the plaintiff is entitled to the balance of Rs.3,90,16,658/- as a result of logical working of price adjustment clause as stipulated in the contract. Defendants are not justified in denying the said amount.

22. As per the sub-clause (4), Clause 34 of agreement, additional or reduced cost caused to the contractor due to the change to any national or state statute, ordinance, decree or other law or any regulation or bye-law shall be paid by the employer and contract price adjusted accordingly. Subsequent to the date of submission of rates and prices in tender i.e., 8-9-1998, there was increase in the minimum wages fixed under contract labour (Regulation and Abolition) Rules, 1971 by the Commissioner of Labour, A.P., which is applicable to the workers engaged in the execution of work and such increase in the labour component is to be adjusted quarterly in the interim bills, butthe defendants have not given effect to the same. Price adjustment was not carried out in spite of the representations of the plaintiff dated 29-6-1990 (Ex.A49), 16-8-1990 (A51), vide letter of 2nd defendant dated 28-9-1991. Since the minimum wages per day in the category of unskilled labour had been raised from Rs. 13.50 to Rs.19.25, involving 42.6% increase from 1-6-1989, the plaintiff is entitled to a sum of Rs. 1,59,92,928/- under this count.

23. The upward revision of cost of steel by virtue of budgetary declaration made by the Union Government was also not taken into account by the defendants while giving effect to price adjustment clause. Subsequent to budget 1990-91, Steel Authority of India has increased price from Rs.6,500/- to Rs.8,000/- per M.T. and

in the open market it had increased from Rs.7,000/- to Rs.10,000/- per M.T. and by 1992 it had increased to Rs.12,500/- per M.T. SAIL could not supply the required steel to the plaintiff, and the net escalation has worked out to Rs.48 lakhs which was unanticipated by the plaintiff. The request of the plaintiff to obtain the required quantum of steel from SAIL out of the quota allotted to the Government of A.P. or to obtain necessary permit from SAIL was not considered, as a result, the plaintiff had incurred huge expenditure additionally. Defendants have also not arranged secured advance payment for steel as per sub-clause (3) of Clause 35, Section 2, Vol.1 of the contract, vide letter dated 21-12-1990. The plaintiff as a result of increased in steel price at 5.00 per Kg. on the total quantity of 2,49,965 Kgs. of steel utilised, had incurred additional money of Rs.12,49,875/- and plaintiff is entitled to the same under price adjustment.

24. Due to various acts of commission and omission on the part of defendants, plaintiff could not gear up its men and machinery to the optimum which resulted in slow progress of work which caused huge loss. The defendants beingresponsible for lower productivity and consequential loss by the plaintiff, plaintiff is entitled to payment towards idle charge of men and machinery it deployed on the work. As against 96.83% of contemplated work by the end of 24-1-1992, the progress achieved is 47% and loss in progress works out to 49.83% of contract price and the loss of productivity of men and machinery works out to 24.91% of total value. Plaintiff is entitled for payment of amount worked out at 25% of 24.91 i.e., 6.23% of contract price and as adjustable by price adjustment clause. By the time, plaintiff was expelled i.e.. on 26-3-1992, out of the contract value of Rs.8,42,93,617, plaintiff executed work to a tune of Rs.4,63,24,503/-which comes to 55% and hence loss in progress works out to 45% of the contract price. The loss of productivity of men and machinery works out to 22.5% of contract price. In all. plaintiff is entitled to a sum of Rs.47,41,515 worked out at 25% of 22.5% of contract price towards loss on account of low progress of work, occasioned on account of omissions and commissions on the part of defendants.

25. By the lime plaintiff was expelled on 26-3-1992, though plaintiff executed work to the tune of Rs.4,63,24,503/-, it was paid only Rs.4,38,78,000/-. Defendants have not measured the work the plaintiff had executed by that time and hence it is

entitled to recover the balance of Rs.23,46,503/-.

26. Plaintiff had received Rs.1.26 lakhs from the 3rd defendant towards mobilisation advance loan against the bank guarantees as prescribed in the contract under Clause 9 Section 2, Vol.1 of contract with interest at 14% and the loan should be completely repaid by the plaintiff out of the current earnings under the contract. 3rd defendant effected recovery of additional amount contrary to clause 10, Section 2, Vol.1 of contract. When pointed out the same to the defendants, plaintiff was threatened that the bank guaranteeswould be encashed on the ground that plaintiff is not keeping up progress of the work. Section 2 Vol.1 of the contract makes it clear that the recovery of mobilisation advance is coterminous with the execution of work. The delay in the execution of work is only due to the commissions and commissions on the part of the defendants. Plaintiff by letter dated 19-10-1991, (Ex.A68 requested for extension of contract period upto 31-12-1992 and by letter dated 24-10-1991, 2nd defendant requested the plaintiff communicated the same and also agreed to keep the bank guarantees alive until the dale of completion of work, vide letter dated 26-10-1991. In the meeting with the dcfendanls and by a series of letters, plaintiff explained about the delay in settling payments and the elimination of physical obstructions and for extension of time. However, by notice dated 26-3-1992, 2nd defendant threatened the plaintiff mat penal action would be initialed for slow progress of work ignoring the commissions and commissions on their part which resulted in delay in execution of the work. Earlier, in fact there was recommendation for extcntion of contract period upto 31-12-1992. By letter dated 26-3-1992 also proposed to enter upon the site and informed the plaintiff that the bank guarantees covering mobilisation advance and interest would be encashed and adjusted towards the mobilisation advance. Subsequently, plaintiff was expelled and the three bank guarantees covered by 7/4, 7/5 and 7/6 for Rs.42,00,000/- each aggregating to Rs.1.26 crores were encashed and appropriated towards mobilisation advance alleged to be due.

27. The action of the 2nd defendant in expelling the plaintiff from contract is illegal and arbitrary. The slow progress of work was solely attribuiable only to the acts of commission and commissions on the part of the defendants, Invoking of bank

guarantees is arbilrary and illegal. Ifthe defendants had passed the paid bills for the work done in accordance with contractual conditions, the entire mobilisation advance would have been repaid from the recovery of bills by the plaintiff. By arbitrary withholding of the amounts which were legitimately due, the defendants made the plaintiff to suffer the consequences of encashing the bank guarantees which are liable to be borne by the defendants. Plaintiff by borrowing amounts from third parlies at 24% interest paid the amount to the bank. Therefore, plaintiff is entitled to be compensated for the loss caused to it by the illegal and arbitrary encashing of bank guarantees. Plaintiff is entitled to be reimbursed a sum of Rs.30,24,200/-.

28. If the defendants had discharged the obligations cast on them properly, the plaintiff would have completed the work within the period of contract. The defendants committed breach of contract and caused loss of the plaintiff. Defendants who are guilty of various acts of omissions and commissions acted arbitrarily in rejecting the request for extension of time. Plaintiff at all points of time was ready and willing to complete the remaining work and had the ability and resources to accomplish the same. It would have completed the work, but for the illegal expelling by the defendants. Therefore, plaintiff is entitled to be paid compensation for the loss so caused to it by award of damages. The contract work still remained to be done is Rs.3,79,69,114/-. It is reasonably expected and it is now taken judicial cognizance that the contractor in any work of this nature and magnitude would make a profit of about 10% of the contracted work. Therefore, plaintiff is entitled to recover a sum of Rs.37,96,910/-from the defendants by way of damages.

29. The grievances submitted to the 3rd defendant on various claims in dispute and payments made were negatived andthe appeals made to the 2nd defendant have also not yielded any result. Hence the suit.

30. For the purpose of convenience, the claims made by the plaintiff may be summarised below :

1.Payment towards overhaulin accordance with contract conditions:

Rs. 9,81,801.002.account of illegal thecost of difference of cement used in concrete items :

Rs. 1,88,359.003.Payment due on the basisof correct interpretation of price adjustment clause.

Rs. 3,90,16,658.004.account of hike inlabourunder the Contract Labour (Regulation and Abolition) Rules, 1971.

Rs. 1,59,02,928.005.Payment duetowardsaccount of hike in steel price.

Rs. 12,49,875.006.Payment due on accountof loss of progress on account of commissions and omissions occasioned bydefendants 2 and 3.

Rs. 47,41,515.007.work done but notmeasured and paid :

Rs. 23,46,503.008.Payment due onaccountsuffered by plaintiff due to illegal expulsion of the plaintiff fromthe contract

Rs. 73,93,820.009.Damages for illegalencashment of bank guarantees worth Rs. 1.26 crores pertaining tomobilisation advance :Rs. 30,24,00.00

TotalRs. 7,50,45,459.00

31. The plaint averments were denied by filing a written statement and additional written statement by 3rd defendant which was adopted by defendants 1 and 2.

32. Originally it was not contemplated to acquire the land for dumping the muck obtained out of excavation of foundations of S.P. at K.M. 35-486 and also canals from 35.386 to 35.586 Km. Subsequently, it was found necessary to acquire land of Ac. 12.00 for additional width and also for diversion of drains. The acquisition proposals are pending with the Special Deputy Collector (Land Acquisition) SRBC, Nandyal. Plaintiff was instructed to dump escavated muck at structure in the land already acquired for canal muck and suitable reply was given to the plaintiff's letter dated 28-6-1990 by letter dated 28-9-1991. The entire site was handed over to the plaintiff for tackling the work regarding diversion of the drain crossing the canal at

Km. 35.786 and it is false to say that the defendants did not hand over the site to the plaintiff in its entirety. The excavation of the said diversion channel conies under additional work as per clause 32(i) and the same was notified to the plaintiff, vide letter dated 1-7-1991 and it is an independent work and it will not come in the way of execution of main contract work. The local drain at Km. 34.752 is also an independent work. The work of super passage at Km. 36.883 of SRBC Nakkala Vagu and an inlet for old Maddileru crossing at Km. 38,380 of SRBC though not contemplated in the agreement, but later found necessary and these will not come in the way of excavation of main work. Hence the contention that there was abnormal delay is not correct.

33. The L.T. line crossing at Km.35.486 was removed prior to 24-7-1990which was informed to the plaintiff on24-7-1990. 220 KV lines at Km. 36,822of SRBC will not interfere in the excavationof canal and the same was notified to theplaintiff by letter dated 9-8-1989 and 11 Km. line at Km. 37,680 of SRBC was shifted and plaintiff was informed. Therefore, it is false to say that plaintiff was forced to stop the work of excavation in Nandyal shales which required blasting to a length of 400 metres on each count. It is also not true that there was threat of damage of 220 KV line by normal blasting operations and forced the plaintiff to stop the excavation to a length of 200 metres on either side of power lines. Plaintiff has left gaps for his own convenience that is for plying of vehicles and for passage to workmen. The telephone lines crossing the canal has not caused any obstruction to the excavation work, but it has to be shifted as it may come in the way of information of banks if the work is completed in all respects.

34. It is not correct to say that plaintiff has suffered very heavy loss of progress on account of the defendants in respect of all the four structures. Foundations of concrete for abutments swings etc., were completed except laying of RCC slab. There is provision in the agreement for holding down bolts and the same was exhibited long back. It is admitted that plans were communicated on 7-6-1991 with delay due to some unavoidable administrative reasons. There is little change in the pattern of RCC slab pertaining to super passage which was communicated to the plaintiff on 7-11-1991 and this will not come in the way of execution of all other items such as concrete piers, bid blocks etc., to the bottom of the slab. It is not

correct to say that plaintiff required additional time and money. Plaintiff has not taken any action to lay the RCC slab and it was paid for the works completed. It is admitted that revised plans were communicated on 7-11-1991 and 10-2-1992 due to administrative reasons. There is administrative delay in communicating the drawings of holding bolts, but it is statedthat it did not cause any delays as contended by the plaintiff.

35. The shifting of 11 Km. line crossing the canal did not come in the way of excavation of the foundations of the structures and after the line was shifted plaintiff was informed on 16-8-1991 and thereafter plaintiff had not taken any action to execute the work. The delay in shifting of 11 KV line crossing the canal at 31.824/ 37.689 has no connection in tackling the excavation of foundations and completions of structure located at KM. 3 1.824/37.689. The excavation of foundation of structure at KM. 13.771/36.257 was completed and payment was also made, therefore, the contention of the plaintiff that it was forced to abandon the work in view of the inadequate land is not correct. The structure at KM. 32.397/36.883 which is additional work was entrusted to the plaintiff on 1-7-1991 but subsequently withdrawn. The contention that progress of me work suffered and work had been stopped totally on account of the delays and defaults occasioned by defendant is incorrect.

36. It is false to say that the lining contemplated for canal under the approved designs appended to the contract being unsound and contrary to the technical stability on the anvil of geological formation of Nandyal shale excavated cannot withstand and that the defendants realised the said defect pointed out by the plaintiff. Lining of the canal has been included in the contract, but the same has not been carried out by the plaintiff after completion of excavation of canal work. It is not true to say that the defendants decided to drop the lining work altogether. The allegation that the defendants failed to ensure the quartzite stone of sufficient quantity and convenient size of hand picking from spoil bank of quartzite reach of package V is not correct. It is not correct to say that defendants had admitted theinterference of persistent objections and interruptions of the contracting agency of package V. The entire stone used on structure is taken from package V only and further stone is also available with the department for the balance work also.

The proposal to construct a suitable structure across Maddileru Vagu was an additional structure yet to be taken up and to be entrusted which was not contemplated originally.

37. The contention of the plaintiff that due to unanticipated rate of underground seepage into excavation owing to the unforeseen change in hydrological and subsurface conditions on the ground, it suffered loss in the out turn of machinery etc., involving additional expenditure towards dewatering is denied. Dewatering item has been included in the agreement and there were no climatic changes as seen from the rain fall statistics maintained by the Revenue Dept. The grievances that appeals were not disposed of as per the terms and conditions of agreement is false and no damage has been caused to the plaintiff in that regard. The plaintiff has the exclusive responsibility to procure HSD oil required for the works as per the agreement conditions and the gulf war has no effect.

38. It is admitted that there is a condition in the agreement that the plaintiff is entitled for extra amount on account of devaluation of rupee, loss of productivity etc. It is not correct to say that plaintiff had suffered huge loss of productivity of men and machinery and in fact on account of the failure of the plaintiff to complete the work within time, defendants were put to great hardship and loss. Plaintiff has lo repay the entire mobilisation advance loan with 14% interest before the expiry of original time for completion of work. Request for extension of time has been rejected as there are no valid reasons and there was no recommendation made forextension of contract as contended by plaintiff. Plaintiff has not suffered any loss towards loss of productivity of men and machinery and it is not entitled for payment on that score.

39. The payment for overhaul was made as per agreement rates, but not on ad hoc basis as contended by the plaintiff. It has been clearly staled in letter dated 7-12-1990 that haulage will be paid only for the excavated materials required for the canal embankment. The length of haul will be measured as per the provisions given in the bill of quantities and there is no second procedure in the agreement. The decisions taken are in accordance with the terms and conditions of agreement.

40. The allegations in para 7(1) of the amended plaint are not true. The paid quantities furnished by the plaintiff for items 2-a, 3-b, 6-b, 8-a and 9-b are not correct. The plaintiff has not furnished the break up details for the total quantities payable to it. As per Clause 35.4(b) and (c), the contractor shall submit hills for the work done and measured by the engineer-in-charge on or before the last day of the month which was not followed by the plaintiff. Therefore, plaintiff is not entitled for payment of Rs.9,81,801/- towards overhaul charges.

41. The design mix with concrete M10 grade is notified to the plaintiff by the defendants to use 205 Kgs. of cement per cubic metre of concrete as against 220.80 specified in the bill of quantities of the contract. The said fact was informed to the plaintiff by letter dated 30-8-1990 mentioning agreement clause 6.3.1. Since the cement was supplied to the plaintiff by the department, the rate in the bill of quantities which provides for the use of 220.80 Kgs. of cement is adjusted suitably for using only 205 Kgs. of cement per cubic metre of concrete as per design mix of M10 grade concrete and hence recovery ofRs.1,88,359/- is legal and in accordance with the provisions of the agreement.

42. The price adjustment for the work done under the contract is being paid as per the terms and conditions of the agreement. Since there was no dispute with regard to the same, it was not referred to the arbitrator. The allegation that plaintiff is entitled to Rs.4,67,06,658/-towards price adjustment is not correct. Plaintiff is claiming Rs.4,57,06,658/-lowards price adjustment of Rs.3,53,3 2,250/-of value of work done. The claim for price adjustment is exceeding the value of work done by 133% which is quite absurd. The plaintiff was clearly informed by letter dated 23-7-1990 that the value of 'R' is to be taken as per clause 34, sub-clauses (1) to (i 1) wherein the per cenlage of labour, material and fuels arc given for each item of work. Accordingly, price adjustment was worked out and paid to plaintiff. The 2nd defendant in letter dated 13-9-1990 upheld the payment made by 3rd defendant on this score, clearly mentioning that the per centage of components of labour, materials and fuels are different for different items and these per centages formed the very basis for calculation of price adjustment and as such 'R' means total value of work done under each item prescribed under ciause 34, but cumulative of all items of work done in a quarter. Hence, the plaintiff is not entitled to the difference

amount as claimed by him towards price adjustment and defendants justified in denying the said amount. With a view to gain more money, plaintiff has falsely alleged several claims which arc not as per the terms and conditions of agreement. The plaintiff is not entitled to get payment as per sub-clause (4) of clause 34 of vol.1 of agreement at page 2.36 as the plaintiff was already paid price adjustment as per sub-clauses 1, 2 and 3 of clause 34.

43. The upward revision of the cost of steel by virtue of budgetary declarationmade by the Union Government has no relevance as the plaintiff has to make its own arrangements towards procurement oftested steel required for the work and the rate of steel quoted by the plaintiff at Rs.7.50 per kg. was accepted by the defendants and the same was concluded in the agreement. The agreement does not mention that the defendants have to pay extra amount other than the agreed rate. Therefore, the plaintiff is not entitled for the amount of Rs. 12,49,825/- claimed towards price adjustment for steel.

44. It is incorrect to say that the plaintiff could not achieve progress of work owing to various acts of commissions and omissions on the part of defendants. Plaintiff achieved only 47% of work as against 96.83% and the shortfall at the end of 25-1-1992 is 49.83%. Defendants are not responsible for lower productivity of work and hence no compensation is payable.

45. The plaintiff was expelled by the 2nd defendant by teller dated 13-4-1992 and not from 26-3-1992 as alleged by the plaintiff. The allegation that plaintiff has done work to a tune of Rs.4,63,24.505/- is not correct. Payment was done to him for the work done. Plaintiff has not furnished any details for the balance payment of Rs.23,46,503/- as claimed by it. As per clause 50(iii) at page 2.56 of agreement if the employer expels the contractor, the contractor is not entitled to be paid any money on account of the contract until the expiration of the period of maintenance and thereafter until the cost of execution and maintenance damages for delay in completion, if any, and all other expenses have been ascertained and the amount thereof certified by the engineer. So the claim of the plaintiff that it is entitled for payment of Rs.47,41,515 - towards loss on account of slow progress of work by reason of acts of omissions and commissions on the part of defendants is not

correct.Plaintiff without intimating the department shifted its machinery and men from site of work on the night of 25-3-1992 contrary to the conditions of agreement. Plaintiff has violated the agreement conditions and it was also informed about the facls by telegrams dated 30-3-1992 followed by letter dated 1-4-1992 to bring back the machinery like proclaim units, mixture units, dozers, devvatering units etc., and resume the work. Inspite of the same, plaintiff has not brought the machinery back till now.

46. As regards mobilisation advance loan, it is contended by the defendants that so far an amount of Rs.48.16 lakhs was recovered from the interim bills of the plaintiff together with interest upto the end of March, 1992. The encashment of the three bank guarantees 7/4, 7/5 and 7/6 each of Rs.42,00,000/- was made as per the judgment of the Hon'ble High Court of A.P. slow progress of work was not attributable to the defendants. The High Court in CMA No.526/92 dated 13-11-1992 observed that on careful examination of the matter, it would be difficult to accept the plea of the plaintiff that the delay in execution of work was entirely due to commissions and omissions on the part of the defendants. Plaintiff was very often reminded that the quantity of work carried out by him every month was far behind the scheduled programme of work. It was further observed that when he could execute only 50% of work during the period of 36 months, it is difficult to accept his assurance that he would have completed the remaining 50% within eight months, therefore it is difficult to accept the plea that delay in execution of work was entirely due to the omissions and commissions on the part of defendants and as such he is not entitled to claim special equities of the Court. Invoking of bank guarantees and appropriation of it towards mobilisation advance was done as per the orders of the High Court. Therefore, plaintiff is notentitled to the sum of Rs.30,24,000/-towards damages for encashment of bank guarantees. The contention of plaintiff that at all points of time it was ready and willing to complete the remaining work etc., is not correct. It failed to bring back the machinery as requested by the letter dated 1-4-1992 by the defendants. Hence plaintiff is not entitled to any amount towards loss of profit on account of expulsion muchless the claim of Rs.37,96,910/- claimed by way of damages.

47. Finally, it is stated by the defendants that plaintiff is not entitled to Rs.9,81,801/- towards overhaul charges. Recovery of Rs.1,88,359/- made towards cost of cement is quite legal. Plaintiff is not entitled to Rs.3,90,16,658 towards price adjustment of labour, materials and fuels. It is also not entitled to Rs.1,59,02,928/-towards hike of minimum wages of labour. The claim of Rs.12,49,875/- towards hike in steel is not maintainable. In view of the fact that plaintiff itself is responsible for slow progress of work it is not entitled to Rs.47,41,515/-. It is not entitled to Rs.23,46,503/- under the heading work done, but not measured and paid. Plaintiff is also not entitled to Rs.75,93,820/-towards loss of progress of work as it had shifted all the men and machinery even before expulsion. Since encashment of bank guarantees worth Rs.1.26 crorcs pertaining to mobilisation advance was done as per the orders of this Court, plaintiff is not entitled to Rs.30,24,000/-as damages for alleged illegal encashment of bank guarantees. Therefore, defendants prayed for dismissal of the suit.

48. On the above pleadings of the parties, the trial Court framed the following issues for consideration :

1. Whether the defendants are guilty of committing breach of contract entered into by the plaintiff with defendants ?

2. Whether the defendants have not handed over the site to the plaintifffree from obstacles for the execution of the work under contract

3. Whether the plaintiff is entitled to recover Rs. 9,81,801/- towards overhaul charges

4. Whether the plaintiff is entitled to recover a sum of Rs. 1,88,359/- towards illegal recovery made by the defendants towards cost of the difference of cement

5. Whether the plaintiffs entitled to recover Rs.3,90,16,658/- in view of correct interpretation of the price adjustment clause

6. Whether the plaintiff is entitled to recover Rs. 1,59,02,928/- by virtue of the statutory hike of minimum wages of labour and contract labour

7. Whether the plaintiff is entitled to recover Rs. 12,49,875/- towards statutory hike in steel price

8. Whether the plaintiff is entitled to recover Rs.47,41,515/- towards loss of progress of work on account of the omissions and commissions occasioned by the defendants 2 and 3?

9. Whether the plaintiff is entitled to recover a sum of Rs.23,46,503/-towards work done by the plaintiff, but not measured and paid by the defendants

10. Whether the defendants are guilty of various commissions and omissions attributed to them in para 5 of the plaint

11. Whether the termination or expulsion of the plaintiff from the site by the defendants is legal, just and reasonable and if not whether the plaintiff is entitled to damages from the defendants

12. Whether the plaintiff is entitled to recover Rs.75,93,820/- towards loss ofprofits on account of the work foregone by the plaintiff due to illegal action of the 2nd defendant by which the plaintiff has been expelled

13. Whether the plaintiff is entitled to recover Rs.3 0,24,000/- as damages for illegal encashment of the bank guarantee worth Rs.1.26 crores pertaining to mobilisation advance?

14. Whether the plaintiff is entitled for interest from 21-11-1992 till date of payment

15. Whether the plaintiff is entitled to interest at 21 % p.a. from the date of execution of work till payment

16. Whether the invoking of performance of bank guarantee to an extent of 10% by the defendants is legal and proper

17. Whether the defendants' action in recovering FSD to a tune of Rs.24,83,000/- from the bills due to the plaintiff is valid

18. To what relief?

49. On behalf of the plaintiff, PW1 was examined and Bxs.A1 to A70 were marked and on behalf of the defendants, DW1 was examined and Exs.Bl to B71 were marked.

50. On a consideration of the evidence adduced on record, the learned Subordinate Judge on Issue No.2 held that the defendants not handed over the site to the plaintiff free from obstacles for the execution of the work under contract. On Issue No.3, it was held that plaintiff is entitled to Rs.9,81,801/- towards overhaul charges- On Issue No.6, the trial Court held that plaintiff is not entitled to Rs. 1,59.02,928/- towards hike in wages of labour under the minimum wages rules. It was also held that plaintiff is not entitled to Rs. 12,49,875/- towards hike in steel prices, (on Issue No.7). On Issue No.9, it was held that plaintiff is not entitled toRs.23,46,503/- towards work done but not measured and paid by the defendants. The claim under Issue No.8 towards payment on account of loss of progress due (o omissions and commissions alleged to have been committed by defendants was disallowed. However, the claim of Rs.37,96,910/- i.e.. Issue No.12 which comes to Rs.37.96,910/- towards loss of profit on unexecuted profits of the work at 10% is allowed. On Issue No.5 i.e., regarding correct interpretation of the price adjustment clause, it was held that plaintiff is entitled to recover Rs.3,90,16.658/-. On Issue No.4, it was held that plaintiff is not entitled to recover Rs.1,88,359/- towards recovery of cement. On Issue No.10 it was held that the defendants are guilty of various omissions and commissions and consequently on Issue No. 11 it was held that expulsion of plaintiff from site is not legal, just and reasonable. On Issue No. 1, it was held that defendants are guilty of committing breach of contract. On Issues 14 and 15, it was held by the learned trial Judge that the plaintiff is entitled to interest at 15% only. On Issue No.16, it was held that invoking of performance bank guarantee to an extent of 10% is illegal and improper. On Issue No. 13, it was held that the plaintiff is not entitled to recover Rs.30,24,000/- as damages for alleged illegal encashment of bank guarantee worth Rs.1.26 crores pertaining to mobilisation advance. On Issue No.17, the trial Court held that the action of the defendants in recovering FSD to a tune of Rs.24,83,0007-from the bills due to the plaintiff is not valid.

51. Consequent to the findings on Issues 3,5, 12, 15 and 14, it was held that the plaintiff is entitled to recover a sum of Rs.4,37,95,369/- from the defendants and accordingly decreed the suit in part for Rs.4,37,95,369/- with interest thereon at 15% per annum from the date of filing of the plaint i.e., 24-3-1992 till the date of payment with proportionate costs ofRs.11,22,737/- and directing the defendants to bear their own costs assessed at Rs.15,03,109/-.

52. As mentioned earlier, AS No.2206 of 1996 is filed by the defendants aggrieved by the judgment and decree which was partly allowed and AS No.236 of 1998 is filed by the plaintiff aggrieved by the same judgment and decree of the trial Court in disallowing certain claims.

53. For and against the judgment, the grounds of attack and contentions raised are as follows :

54. It is contended by the defendants that the Court below committed a mistake in enquiring the suit filed under Sections 8 and 20 of the Arbitration Act. The Court cannot grant damages in a suit filed under Arbitration Act. In a suit for recovery of damages, in the absence of specific pleadings and evidence, such relief should not have been granted. The trial Court committed a mistake in not noticing that the suit is not maintainable for want of notice under Section 80 of CPC. The Court below granted relief in the absence of framing proper issues and proving the same by giving evidence. The Court below committed a mistake in holding that there is no law for forming spoil bank. The Court below committed a mistake in not noticing that the acquisition proceedings were only for additional width of canal and for diversion of drains but have nothing to do with the main work as nearly Ac.181.01 cents of land was acquired and handed over to the plaintiff. The pendency of land acquisition proceedings are only in respect of land in Km.35.486 and Km.36.257 and not in respect of remaining extent of Ac.181.01 cents. If the plaintiff was really diligent in proceedings with the work, there was no necessity for the defendants to write letters at Exs.B56 to B60 requesting him to take the site and commence the work. Commencing of work by the plaintiff that too with inadequateequipment rendered slow progress of the work right from the beginning. In this connection several notices were issued to the plaintiff. Regarding crossing of' telephone and

electric wires, the plaintiff was aware of their existence at the time of entering into the agreement. If there was any obstruction or hindrance to execute the work due to the existence of telephone and electric wires, the Court below should have made proper assessment as to the payment of damages. The finding of the Court below that there was delay in supply of drawings and designs is again without any basis. Regarding number of structures to be executed, the plaintiff had executed only 50%. He did not execute the additional work of Nakkala Vagu crossing and as such the defendants did not supply the plans relating to Madditeru Vagu. The Government in G.O, Ms. No. 137, dated 22-6-1993 prohibited the plaintiff from tendering for World Bank work on the ground that he is unable to handle such big works. As such the lapses, if any, was on the part of the plaintiff. The plaintiff is liable to pay penalty of 10%. Ordering overhaul to the plaintiff is contrary to Section 3.2 of Vol.11 of the contract. Placing reliance exclusively on Section 3.2.6 for deciding the claim of overhaul is quite incorrect. The Court below committed a mistake in placing reliance on the decision of the Supreme Court reported in : AIR 1988 SC254 for allowing the claim of overhaul. Holding Issue No. 12 in favour of the plaintiff is quite incorrect. When the Court below rejected Issue No.8 again holding that the low progress work was due to omissions and commissions of the defendants is incorrect. The Court below erred in not taking into consideration the abandonment of the work by the plaintiff. Deciding Issue No.5 in respect of price adjustment in favour of the plaintiff is incorrect. When the percentage of components of labour, material and fuel were different from different items of work the basis for determination of thecalculation of price adjustment should have been as per clause 34.2 of Section 2 of Vol.I. The price adjustment ordered by the Court below goes upto 1100%. In other words, the work done was for Rs.55,912/- whereas the escalation calculated was at Rs.26,40,736/-. The finding as to observalion of formula 'R' is quite incorrect that too when there is no admission by DW1 in his statement. Placing reliance on Exs.B68 and B69 is quite incorrect. When the plaintiff failed to prove its case by its own evidence, granting decree in favour of the plaintiff in respect of certain items is again arbitrary and illegal. Ordering interest at 15% p.a. in favour of the plaintiff is incorrect. The finding of the Court below that invoking the bank guarantees to an extent of 10% by the defendant is illegal, is incorrect. The recovery of FSD by the defendants is only as

per the agreement. The Court below should not have allowed IA Nos. 1, 2 and 3 and permitted the plaintiff to amend the plaint which amendment changes the very nature of the suit. The observation made by this Court in AAO No.526 of 1992, dated 13-11-1992 operates as res judicata regarding breaches and negligent conduct of the plaintiff. Decreeing the suit on several issues is quite illegal.

55. The learned Advocate General once again reiterated the same grounds urged in the memorandum of appeal and further contended that appreciation of evidence by the trial Court is not in proper perspective. The trial Court failed to take into consideration the change of nature of the suit by way of amendment and also failed to consider the jurisdiction. Lastly he contended that the Court below while disallowing certain claims of the plaintiff should not have granted relief on other items as the evidence given by the parties is same. The same is contrary to the known procedure. Thus arguing, he sought the appeal be allowed, and the appeal AS No.236 of 1998 filed by the plaintiff be dismissed.

56. On the other hand, Sri S.R. Ashok, learned senior Advocate appearing for the plaintiff contended that there is no merit in any one of the contentions raised by the defendants. Accordingto him the judgment and decree of the Court below insofar as disallowing certain claims of the plaintiff is quite incorrect and the Court below should have allowed the suit in toto. When the trial Court held that the delay, if any to low progress of work was at the instance of the defendants accepting the plaintiff's claim on other issues, the Court below should have accepted its claim against other items also. Disallowing its claim in respect of hike in wages and steel is quite arbitrary. The judgment and decree of the Court below insofar as disallowing the plaintiffs claim is concerned, it is not the result of proper appreciation of evidence. Regarding the grounds urged by the appellant, it was contended by the plaintiff that those grounds have no merit in the eye of law. As far as decreeing the suit on certain issues is concerned, the same was decreed after appreciating the evidence in proper perspective. The suit was not hit by the provisions of Section 80 of CPC for want of notice. Pursuant to the order of this Court in CMA No.526 of 1992 the application filed under Arbitration Act was converted into one of suit wherein the defendants filed their written statement. But at no point of time, they took objection as to the maintainability of the suit or for

want of jurisdiction. For the first time in the appeal they putforth their plea that the suit is not maintainable, which is impermissible. The participation of the defendants in the proceedings before the trial Court suggests that the defects if any for considering the suit were waived. As such now it is not available for them to contend that the suit is hit by Section 80 of CPC. To support the above contentions, Sri S.R. Ashok learned senior Counsel placed reliance on some of the authorities which will be referred to a little later.

57. In the light of the above grounds and the contentions of the parties, now we have to see how far the findings of the trial Court are correct.

58. Issue No.2 relates as to whether the defendants have not handed over the site to the plaintiff free from obstacles for the execution of the work under contract. The plaintiff's case was that the site was not handed over to him free from obstacles though the agreement was entered into for the entire package No.IV, i.e., from KM.30,000/34.486 to KM.33.000/38.865 on 22-4-1989. Though the plaintiff admitted that he took possession of the site as stated by the defendants, but the same was not free from obstacles. The same was brought to the notice of the defendants whereas the defendants' case was that as per F,x.B4, it is the duty of the contractor to carry out the work. According to them, the entire site need not be handed over as per Clause III Volume I at page 2.5.4. of the contract. The contractor is free to tackle the work at any portion according to his convenience and maintain rate or progress under clause 8(4)(a). Ex.B58 is the letter dated 17-3-1989 written by the defendants calling upon the plaintiff to take over the site. Exs.BS9 dated 31-3-1989 and B60 dated 19-4-1989 are the similar letters addressed to the plaintiff. Ex.B3 is a letter dated 15-2-1990 addressed by the Executive Engineer to the plaintiff informing him about the short fall of progress. According to the defendants, the plaintiff took possession only on 22-4-1989. Thus, the plaintiff delayed in taking over the possession which reduced the progress of the work. There is no proper explanation why there was a delay in taking possession lately. According to the defendants, the delay of 20 days can be attributed only to the plaintiff and not to the defendants. Thus, the contractor referred to Ex.A4, letter dated 15-5-1990 and Ex.A6 letter dated 28-6-1990 addressed by the plaintiff to the SuperintendingEngineer and Executive Engineer

requesting them to acquire the balance area as it is required immediately for spoil formation of bank and diversion of drains. But, no steps were taken by the authorities. It was stated by the defendants that a letter was addressed to acquire the land and the same is pending. The trial Court found that the river diversion Jalakanur could not be carried out due to non-acquisition of the required site. In this connection, the plaintiff addressed letters to the Executive Engineer at Ex.A8 dated 22-7-1989, Ex.A9 dated 7-11-1989 and Ex.A10 dated 20-12-1989 requesting the defendants to hand over the site to the plaintiff free from obstruction and threats of the villagers of Jalakanur as the ryots continued to obstruct the execution of work at Jalakanur. The same was not complied with. Because of the same, the plaintiff suffered heavily. Ex.B70 is the lelter dated 16-6-1990 sent by the Jalakamir people declaring that they handed over their sites measuring Ac.5.05 cents and compensation be ordered. From the above, it is clear that sufficient land acquired was not handed over to the plaintiff. Regarding progress of work, it was submitted that the plaintiff has to complete the work worth Rs. 140 lakhs by the end of February, 1989 but the plaintiff was able to complete the work only worth Rs. 14 lakhs. According to the defendants, the plaintiff had no mind to work. They tried to place reliance on Exs.B15 to B54, the letters written to the plaintiff. The explanation given by the plaintiff for all the short falls is only because of non-handing over the site at various reaches free from obstacles.

59. Regarding shifting of telephone and power lines, it has come in the evidence that the same are crossing across the canal site. 11 KV line was crossing the canal alightment area at 37.680 Km. LT line was crossing at KM.35,486 and 220 KV tine was crossing at KM.36.844. The plaintiff addressed a letter Ex.A4 dated15-3-1990 informing the defendants about the various hindrances and obstructions caused to the plaintiff including the power lines and telephone lines in execution of the work and requested to clear the same. Exs.AS dated 28-6-1990, All dated 1-9-1990, A12 dated 7-2-1991 and Ex. A13 dated 19-7-1991 are similar letters addressed by the plaintiff contending about the existence of power lines and requesting the defendants to take steps for their removal. But, the defendants did not take any action. DW1 in his evidence admitted the existence of such pover and telephone lines crossing across the work places to be carried out. The plea of the defendants that existence of such lines does not affect the work of the plaintiff.

From the evidence given by the plaintiff, the Court below found that if blasting is done near 220 KV line, it will have effect to a length of 400 metres. Therefore, unless the 220 KV line is shifted, the plaintiff is not in a position to take up blasting operations in order to excavate the land in the canal site. It is also explained to the defendants that on earlier occasions in the neighbouring reach, one Mr. A.V.S. Prasad Raju and Co., undertook blasting in package No.2 for excavation of site near 220 KV line passing across the canal alignment and it resulted in damage to the electrical lines and thereupon the Electricity Board imposed penalty of ! .8 lakhs and recovered the same from the contractor. The case of the plaintiff was that the defendants have defaulted in giving designs in time for the structures to be built as per the contract and also for the additional structures to be built under the additional contract. According to the plaintiff, the first structure is at KM.35.486 crossing Kundu river where the plaintiff had carried out excavation to the designed level by the end of March, 1989. The defendants have revised the structural designs repeatedly on four occasions and final designs and drawings were given in the month of June, 1991. This revision of designs wasadmitted by the defendants by a letfer Ex.A21 dated 7-6-1991 addressed by the Executive Engineer to the plaintiff approving the designs. Ex.A23 is another letier addressed by the Executive Engineer to the plaintiff enclosing revised drawings and designs. From this it is clear that there was a delay on the part of the defendants in giving the designs and the' same was also admitted by the defendants in their evidence. Further, it is the case of the plaintiff that new structures which were not contemplated in the agreement, were directed to be constructed across NakkalaVagu at Km.36.883. The same structure was directed to be completed within one year, that is, by the end of 1990 but the drawings were furnished to the plaintiff in the month of July, 1991, which is clear from Ex.A7. Another structure contemplated is at Maddileru Vagu at Km. 38.380. For this work, no designs were furnished, which it is clear from Exs.A5 dated 28-6-1990, All dated 1-1-1990, Ex.A12 dated 7-2-1991 and Ex.A13 dated 19-7-1991. Thus for non supply of designs well in time, the execution of work in various spells was affected. In view of the above reasons, the Court below was right in coming to the conclusion that the defendants failed to hand over the site free from obstacles for the execution of the work under contract.

60. Regarding issue No.3, that is, entitlement of the plaintiff to recover a sum of Rs.9,81,801/- towards overhaul charges is concerned, the plaintiff's case is that under clause 3.2.6 of Volume II of the contract, he is entitled to haulage with reference to the loose soil. The plaintiff requested the defendants in his letter at Ex.A6 dated 9-11-1990 for payment of over-haul charges. He received a reply at Ex.A11 rejecting his claim. The Court below referred to clause 3.2.6 of Volume II of the conlract which reads as follows :

'Clause 3.2.6 of Vol.11 of the contract as follows : Payment for overhaul will bemade only for excavated materials required for canal embankment, temporary and permanent embankment for Roadways and Road crossings and for excavated materials directed to be wasted beyond the limit of free haul (initial lead of 10 metres and life of 2 metres). The entire cost of hauling of the above described materials any distance upto the free haul limit from the original position shall be induced in the price bid in the schedule for excavation of the materials.

Unless otherwise specifically provided, no overhaul payment is made for haul of materials paid for as backfill about structures, revertment, gravel beedings for revertment or for selected bedding materials used in preparing foundation for concrete canal lining.'

The above clause lays down that payment of overhaul shall be made for the quantities of excavated material by measuring the overhauled materials in units but not with reference to the point of excavation, that is pit. According to the Court below, the plea of the plaintiff is strengthened by placing reliance on Clause 3.2.6 of the contract Volume II, which reads as follows :

'In measuring quantities of overhaul for payment, the volume of the overhauled material will be measured in cubic metre units for excavation in soils upto hard disintegrated rock. The length of haul will be measured as stated above in kilometres. Payment of overhaul will be made at the unit price bid for kilometre extra lead therefore in Schedule A'

61. The plaintiff has relied upon the book known as Soil Engineering Principles authored by A. James Russel, which is an authority on the subject, wherein it is

said that the soil loosens itself and overhaul would never be the same as had been found at pit point. According to the principles of Soil Engineering, for one cubic metre measurement of cutting of the ground, therewould be 1.3 cubic metre measure of excavated material, in the context of overhaul in the case of soils. However, in the case of SDR and Nandyal Shales, it is said that the overhauled material would be 1.45 cubic metre and 1.6 cubic metre respectively. The reliance placed by the plaintiff is not denied by the defendants. DW1 did not say anything in the cross-examination to contradict the principles laid down in the Soil Engineering. Thus, the dimensions of the soil would alter to 1.3, 1.45 and 1.6 cubic metre for every cubic metre of excavated soil, odd rock and Nandyal shales respectively. According to the trial Court, the measures will have to be weighed with reference to the quantity that is handled. If for every cubic metre of excavated package 1.3 cm of loose soil is being hauled, it is the hauled material that is to be measured because payment is made for haulage. Haulage is with reference to the loose soil only. The contracting parties would not have provided for payment of haulage with reference to pit point. The said position was though disputed by the defendants, the same has no substance in view of the law laid down by the Supreme Court in the case of S.A. Jais & Co. v. Gujarat Electricity Board, : AIR 1988 SC254 , wherein it is held as follows :

'There would be an increase in the volume of murrain when it is excavated from the ground as when it is forming part of the ground it is in a compact condition whereas once excavated it becomes loose, and there will be an increase in the volume.'

62. An increase of 9.80% in respect of murram is accepted by the Supreme Court in the said decision. The plaintiff consistently in his letters addressed to the defendants has been mentioning that the volume of the soil would work out to 1.3 cubic metre in case of soil, 1.45 in case of SDR and 1.6 cm. in case of Nandyal shales. Nothing has been, the trial Court observed,brought on record by the defendants to contradict the same. On this aspect there is no cross-examination whatsoever by the defendants. Nor did the defendants bring any material to contradict the same. Therefore, the evidence of PW1 is unchallenged and it can be accepted. The principles of soi! engineering also establish that there will be

increase in the volume of material excavated at 1.3, 1.45 and 1.6 cm. respectively. Therefore, it is reasonable to conclude that the plaintiff has proved that the soil, SDR and Nandyal shales do increase in their respective volumes to 1.3, 1.45 and 1.6 cm. respectively for every cubic metre. Thus, observing the Court below held that the plaintiff is entitled to a sum of Rs.9,81,801/- towards overhaul charges and accordingly held Issue No.3 in favour of the plaintiff.Issue No.6 relates as to the entitlement of the plaintiff for recovery of Rs. 1,59,02,928/- due to statutory hike in minimum wages of labour and contract labour. The plaintiff claims for above said amount on account of hike in wages of labour under the Minimum Wages of Labour under the Contract Labour Rules. 1971. According to the plaintiff, under clause 41(3) of Volume I at page 2.47, it is provided that the contractor shall in respect of labour employed by him, comply with or cause to be complied with the provisions of the various labour laws and rules and regulations as applicable to them in regard to all matters provided therein, and shall indemnify the employer in respect of all claims that may be made against the employer for non-compliance thereof by the contractor. At the time when the plaintiff submitted his tender on 8-9-1988, the wage structure was in accordance with the specifications made in the Andhra Pradesh Gazette dated 29-1-1987 and the minimum wage is fixed as per'the said notification at Rs.25/-, Rs.18/- and Rs.13.50 for the skilled, semi-skilled and unskilled labour respectively. But the same wasrevised on 1-6-1989 in pursuance of the notification issued by the Government and the revised rates fixed at Rs.33/-, Rs.25 and Rs.19.25 respectively. According to the plaintiff, because of revision, he is compelled to pay higher wages, which he is entitled to get back. He sought to place reliance on clause 34(4) of Chapter II of Volume 1 of the contract, where it is staled that if there is any additional or reduced cost, caused to the contractor due to change in the minimum wages by virtue of any statute or notification of the Government or Ordinance or decree etc., it shall be paid by the employer and the contract price adjusted accordingly. The Court below taking into consideration the price index for Adoni in respect of the labour, found that the plaintiff is not entitled to recover the said sum of Rs. 1,59,02,928/-.

63. In fact, this finding was not seriously attacked by the plaintiff in the appeal filed by him.

64. Issue No.7 relates to the plaintiff's entitlement to recover a sum of Rs.12,49,875/- towards statutory hike in steel prices. To claim this, reference was made to compensation clause under 34(4) of the contract. According to the plaintiff, he procured and utilised 2,49,965/- Kgs. of steel. The steel price was originally at the rate of Rs.7.50 per Kg. and it was increased to Rs. 12.50 Kg. and thus there was an increase of Rs.5.00 per Kg. in steel price. As per clause 34(4) of the contract, the plaintiff is entitled to be compensated. The said increase in price was quantified at Rs.12,49,8757-. Clause 34(2) of the contract reads as follows :

'To the extent that full compensation for any rise or fall in costs to the contractor is not covered by the provisions of this or other clause in the contract, the unit rates and prices included in the contract shall be deemed to include amounts, to cover the contingency of such rates or fall in costs.'

65. In view of the aforesaid specific provision made under Clause 34(2), the Court below found that the plaintiff is not entitled for the amount claimed under issue No.7.

66. Issue No.9 is one relates to the plaintiff's entitlement to recover a sum of Rs.23,46,503/- towards work done by the plaintiff but not measured and paid by the defendants. Analysing the evidence the Court below found that there is no basis to claim the said amount and accordingly it is rejected.

67. Issue No.8 is one relates to the entitlement of the plaintiff to recover a sum of Rs.47,41,515/- towards loss of progress of work on account of the omissions and commissions occasioned by defendants 2 and 3 and issue No.12 relates to the entitlement of the plaintiff to recover a sum of Rs.75,93,820/- towards loss of profits on account of the work foregone by the plaintiff due to illegal actions of the 2nd defendant by which the plaintiff has been expelled. To answer these two issues, the quantum of work carried out was taken into consideration. According to the plaintiff, he had executed the work to a tune of Rs.4,63,24,503/- by the end of November, 1991 as against the contemplated contract price of Rs.8,42,93,617/-. Thus, the progress achieved was only 55%. Hence the loss in progress works out to 45% of the contract price. The loss of productivity of men and machinery deployed by the plaintiff works out to 22.5% of the contract price. Therefore the

plaintiff estimated the loss of progress at 25% of the contract price and evaluated the same at Rs.47,4I,5I5/-. Under breach of contract, the quantum of loss of expected profit is estimated at 20%. On this point, there was no cross-examination. The plaintiff relied on a judgment of the Supreme Court in the case of Asalamathulla and others v. Government of A.P., : AIR 1977 SC1481 . Though the plaintiff claimed at 20%, the Court below takinginto consideration, the estimate of the profit on unexecuted work at 10% made by the plaintiff in the other suit, OS No.4 of 1992 held that the plaintiff is entitled to 10% of the profit estimated on account of the work foregone due to breach of the contract, which is the reasonable and appropriale amount to be allowed, which comes to Rs.37,96,910/-. Thus he allowed Issue No.12 in part and disallowed Issue No.8.

68. Issue No.5 relates as to whether the plaintiff is entitled to recover a sum of Rs.3,90,16,658/- in view of correct interpretation of the price adjustment clause. According to the plaintiff, in clause 34(2) of Vol.1 of the contract it is mentioned that price adjustment is to be made in respect of three components of work namely material, fuel and labour by applying the formula agreed under the contract. For every component a separate formula is mentioned with the same underlining principle. The price adjustment clause reads as follows :

'The contract price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants in accordance with the following principles and procedures :

(a) The cost of materials and electrical energy supplied by the employer at fixed prices shall be excluded from the scope of price adjustment.

(b) The price adjustment shall apply only for the work carried out within the stipulated time or extensions granted by the employer and shall not apply to work carried out beyond the stipulated time for reasons attributable to the contractor.

(c) The price adjustment shall be calculated for the local and foreign components of the payment for the work done in the manner explained in sub-clause (3) thereof.

(d) The price adjustment shall be determined during each quarter from the formulae as detailed hereinafter under sub-clause (3) thereof. Following expansions and meanings are assigned to the value of work done during each quarter.

R = Total value of work done during the quarter excluding (a) cost of materials and electrical energy supplied by the employer at fixed prices., and (b) any adjustments in payment resulting form legislative or statutory action as per sub-clause (4) of this clause.

RI = Portion of 'R' as payable in local currency.

RE = Portion of 'R' as payable in foreign currency (at fixed exchange rates).

..R = RI + RE.

(2) To the extent that full compensationfor any rise or fall in costs to the contractor is not covered by the provisions of this or other clause in the contract, the unit rates and prices included in the contract shall be deemed to include amounts to cover the contingency of such rise or fall in costs.

(3)(a) Local Currency Component :

(i) Price adjustment for increase or decrease in the cost due to labour shall be paid in accordance with the following formulae:

PI (i-io)VL=0.75---------X RI----------100 io VL = Increase or decrease in the cost of work during the quarter under consideration due to changes in rates for local labour.

io = the average, consumer price index for industrial workers for Adoni Centre for the quarter preceding the date of opening of tenders as published by theBureau of Economics and Statistics, Government of Andhra Pradesh, Hyderabad.

i = The average consumer price index for industrial workers for Adoni Centre for the quarter under consideration as published by Bureau of Economics and Statistics, Government of Andhra Pradesh, Hyderabad.

PI = Percentage of Local labour component (specified in Schedule II Section 7} of the item.

(ii) Price adjustment for increase or decrease in cost of local material procured by the contractor other than fuel and lubricants shall be paid in accordance with the following formulae.

PM (i-io)VM=0.75---------X RI --------100 io Vm = Increase or decrease in the cost of work during the quarter under consideration due to changes in rates for local material other than POL.

io = The average wholesale price index (all commodities except fuel and lubricant) for the quarter proceeding the date of opening of tenders as published by the Ministry of Industrial Development, Government of India, New Delhi.

i = The average wholesale price index (all commodities except fuel and lubricant) for the quarter under consideration as published by Ministry of Industrial Development, Government of India, New Delhi.

pm = Percentage of local (material component other than fuel and lubricant (specified in schedule-Ill Section 77) of the item.

iii) Price adjustment for increase or decrease in cost of fuel and lubricants shall be paid in accordance with the following formulae;-

Pf (i-io)Vf=0.75---------X RI --------100 io Vf - Increase or decrease in the cost of work during the quarter under consideration due to changes in rates for fuel and lubricants.

io = The average official retail price of High Speed Diesel (HSD) at the existing consumers pumps of IOC at Nandyal on the day thirty days prior to the date of opening of tenders.

i = The average officials retail price of HSD at the existing consumer pumps of IOC at Nandyal for the 15th day of middle calender month of quarter under consideration.

PI = Percentage of fuel and lubricants (specified in the schedule-Ill, Section 7) of the item for the application of this clause, the price of High Speed Diesel Oil (HSD) is chosen to present fuel and lubricants group.

b) Foreign Currency component:

(i) The Foreign Currency component :

(i) the foreign currency component of each payment which is convertible into foreign currency at fixed exchange rate shall be adjusted according to the following formulae.

VFC = increase or decrease in cost of work payable due to changes in cost of foreign input.

FO = The index applicable for the foreign input (plaint, material, Engineer's salary etc., as the case may be) 30 days prior to the date of opening of tender as published in the country of origin.

FI = Corresponding index for the quarter under consideration (average index in case indexes are published at lesser intervals)

(ii) The bidder-shall, in his tender, indicate the foreign in put (plaint material,Engineer's Salary etc.,) and appropriate index the sources of which shall be Government or Public organisations, the bidder shall also attach specimen of the publications, for information of the employer of the proceeding 12 months publications, if this index is not acceptable to the employer then he will specify an alternative index and the source of publications of the index.

(iii) If the tenderer has requested payment in more than one foreign currency, RF shall be suitably broken up and the formulae applied separately to each currency component by taking into account the foreign input of the currency and corresponding indices (index and currency belonging to the same country).

(iv) The currency of foreign exchange payment and the index shall belong to the same country. If this is not the case, (hen a suitable correction factor ZO/O (multiplying factor) will be applied to the formula (b)(i) to allow adjustment, where

ZO is the number of units of currency of country of the index, equivalent to one unit of currency of payment on the date 30 days prior to date of opening of tender and Z is the corresponding number of such currency unit on the date of current index.

(4) If after the date thirty days prior to the date of opening of tenders for the works there occur in India changes to any National or State statute.

Ordinance, Decrees or other law or any regulations or bye-law of any local or other duly constituted authority, or the introduction of any such state statute ordinance, Decrees, Z Law regulation or bye-law which causes additional or reduced cost to the contractor, other than under sub-clauses (1), (2) and (3) of this clause, in the execution of the works, such additional or reduced cost shall be thecertified by the Engineer after examining the record provided by the claimant and shall be paid by or credited to the Employer and the contract price adjusted accordingly. Notwithstanding the foregoing, such additional or reduced cost shall not be separately paid or credited if the same shall already have been taken into account either wholly or partly in the indexing of any in-put to the price adjustment formula in accordance with sub-clauses (1) (2) and (3) of this clause.'

69. There is no dispute as to the derivates for each of the abbreviation as mentioned in the formulae in respect of material and fuel. The controversy is only in respect of the meaning attached to the abbreviation 'R' which deal with payment of amount in Indian Currency and Foreign Currency. In case of both foreign Currency and Indian Currency arc involved, it is only Indian currency that has to be considered. In the case on hand foreign currency is not involved. As such payment of Indian Currency abbreviation of RI has only to be payable in the local currency. 'R' defines the total work done during the quarter excluding the cost of material of electrical energy supplied by the employer at fixed rate and any adjustment made in payments resulting out of legislative or statutory action as per sub-clause (4) of the clause. However, in the present case exclusive items are not existing. According to PW1 it is the total value of the work done during the relevant quarter that has to be taken into consideration for effecting the price adjustment. While submitting tender it took into consideration the formulae and its meaning in the

price adjustment clause. Then he submitted his tender. This was admitted by DW1 in his deposition. According to him, it is the total value of the work done during the quarter that has to be adopted while calculating the price adjustment. According to the defendants, definition 'R' is quite meaningless whereasthe plaintiffs case is that having entered into the contract, the formulae prescribed in the contract shall be accepted and both parties shall follow the same. According to him, there is no basis for the Government to say that the value of item that has to be adopted in place of 'R' for price adjustment. When once an offer is accepted, later a separate meaning cannot be substituted to such a contract. For this proposition, he placed reliance on the decision in 'Eastern v. Russ' (1914) 1st Chapter at page 48 as quoted in the Sanjiva Row's book on Contract Act 9th Edition at page 211 Vol.II which is extracted herein:

'It seems on general principles clear that one party to a contract can never defend himself against it by setting up misunderstanding on his part as to the real meaning and effect of the contractor any of the terms in which it is expressed. To permit such a deviation would be open to the door of perjury and to destroy the security of contracts.'

Thus when once an offer is made and accepted, it binds both the parties. If the price adjustment as contended by the defendant is understood it runs contrary to Clause 34 of the contract. If that was the intention of the parlies, the plaintiff would have quoted a different rate than what he mentioned in the tender. The Court below found that the controversy between the parties revolves on the correct interpretation of 'R'. According to the plaintiff 'R' is the total value of the work done during quarter, whereas the defendants interpretation is that it is the total value of the work done during the quarter for each individual item which has to be taken into consideration. Whereas 'R' does not convey the meaning that each individual item of the value for every quarter is to be taken into consideration. As to how the formula has to be adopted towards price adjustment, the Court below went through several clauses in the contract. According to the contract that priceadjustment clause provides 75% of the escalation worked out under the formula has to be paid in respect of individual components on the work carried out under the contract. A separate formula is prescribed in respect of the three

components. He accepted that abbreviations VL, Vm and Vf are to be applied in the case of increase and decrease in the cost of work in respect of three components. Likewise P1, Pm and Pf mentioned in the formula conveyed the meaning of percentage of local labour, material and fuel components. According to him, other abbreviations namely 'i' and 'io' is the price index on the preceding date of opening of tender and ending of the quarter under consideration. The Trial Court was convinced that the controversy not in respect of other abbreviations but only in respect of abbreviation 'R' and 'RI'. According to him, since the foreign currency is not involved, 'RI' be meant as 'R' itself. RI defines as total value of the work done during the quarter. While considering the percentage of labour, material and fuel, the word 'item' is mentioned as percentage of component of the individual item of work. When once the formula is fixed the parties are bound by it. The learned Trial Judge agreed with the contention of the plaintiff if R is taken as one reference as individual item of the total value of the work done during the quarter, then he will be put to heavy loss, because at the time of submitting his tender the formula he understood was as it was mentioned in the contract. The Court below made reference to Ex.X1. According to him, even in the sub-contract given to the plaintiff, there was no change in the meaning of 'R'. In other words, the meaning of 'R' expressed in Ex.B5 and X1 is one and the same. The Court below took into consideration the submission of the plaintiff to subsequent contract the figures quoted by the plaintiff at Ex.B5 was far less. The Trial Court took into consideration the bill of quantity pertaining to the plaintiff's work. The item of work that was entrusted and carried out and the price quoted by himfor different items of work have been detailed in para 69 of the judgment. By making reference under each item of work and the price quoted including item of work that was entrusted by sub-contract and the price quoted by the said contractor therein for different items of similar work which was accepted by the department, the learned Counsel for the plaintiff submitted that the figures quoted by the plaintiff 10 the work entrusted was far less. The plaintiff made the said demonstration to show that there was enormous increase in the price quoted by the plaintiff and the price quoted by the subsequent contractor due to change of percentage in the price adjustment clause by the Government The trial Court compared the price index with all components, namely labour, material and fuel from the date of entrustment

of work till its completion. From the date of entrustment till completion of work, the price index of the labour was increased by 56%. In respect of materials, there was a raise in price index at 34.33%. In respect of fuel, there was raise in 43.70%. Thus, there was increase from period to period in respect of ail the three components. He found that the price quoted by subsequent contractor was 2 to 3 times more than what it was at the relevant period. The representations made by the plaintiff seeking for escalation in price adjustment was rejected by the Executive Engineer. The Court below examined the amount quoted by the plaintiff as equivalent to abbreviation 'R' for the period in question at Rs.3,90,16,658/-. The learned Subordinate Judge took into consideration the admission of DW1 that RI means the total value of the work done during the quarter. Having thus accepted the meaning of R it is not open for the defendants now to plead for adoption of value of each item in the place of R. The conduct of the defendants in changing the meaning of R in the subsequent contract compelled the trial Court to reject the interpretation given by the defendants to the abbreviation 'R'. According to the Court below, the priceadjustment that was worked out at Exs.A54 to A64 for the period from September, 1989 to March, !992 was at Rs.3,90,16,658/-. Nothing contra was elicited by the defendants from the evidence of PW1. The trial Court found, on the other hand, during the course of arguments, the defendants Counsel admitted that the figures submitted by the plaintiff are not at all disputed. The trial Court found that if the defendants had intended to consider the value of the work of individual item during the quarter, they would have supplied the word 'item' for the meaning and expression of 'R' in clause (34). On the other hand, the defendants removed all the items under clause (34) in the subsequent contract. The trial Court found that at the beginning itself both the parlies accepted the real meaning attached to the derivative 'R'. The Court below observed that it is not the duty of the Court to make a contract for the parties or substitute words which are not available in the contract as explained by Lord Wright in Hillas & Co. v. Arcos Ltd., (1932) All ER 494, which is extracted herein :

'Business men often record the most important agreements in crude summary fashion; modes of expression sufficient and clear of them in them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly

and broadly, without being too as tute or subtle in finding defects; but on the contrary, the Court should seek to apply the old maxim of English law 'Verba it a sunt intelligenta ut res magis voleat quatn pereat '. The maxim, however, does not mean that the Court is to make a contract for the parties or to go outside the words, they have used; except insofar as they are appropriate implications of law.'

Ultimately, the Court below found that the plaintiff quoted less price at 18.42% whencompared to the price quoted in the subsequent contract and he quoted less rates believing that the price adjustment clause will come into his aid. Thus observing, the trial Court held that the plaintiff is entitled for recovery of a sum of Rs.3,90,16,658/- towards price adjustment.

70. Issue No.4 relates as to the entitlement of the plaintiff for recovery of a sum of Rs.1,88,359/- towards illegal recovery made by the defendants towards cost of difference of cement. The Court below after taking into consideration Clause 6.3.9 (a) of Vol.II which provides that 'if there is extra usage of cement than required for design mix within pay lines, it shall be paid to the contractor. In case of less usage, it will be recovered from the contractor.' Keeping in view the said clause and examining the demand of the plaintiff for supply of cement which in fact was supplied by the Government (defendants), the Court found that the plaintiff is not entitled to recover the said sum towards costs of difference of cement.

71. Issues 10 and 11 relates as to whether the defendants are guilty of various commissions and omissions attributed to them in para 5 of the piaint, and whether the termination or expulsion of the plaintiff from the site by the defendants is legal, just and reasonable and, if not, whether the plaintiff is entitled to damages from the defendants. According to the plaintiff, the poor progress of the work was due to the omissions and commissions on the part of the defendants. They alone are responsible for the said low progress of the work. According to him the Executive Engineer, Superintending Engineer and the Chief Engineer in-charge of the project site recommended to the Government for extension of time upto 30-12-1992. But no extension was granted. The Superintending Engineer served expulsion order on the plaintiff on 26-3-1992. Thedefendants without going into the merits of the case and for extraneous consideration expelled the plaintiff which is arbitrary and

motivated. Whereas the case of the defendants is that the poor progress of the work was at the instance of the plaintiff. The trial Court did not agree with the contention of the defendants in this respect. It took into consideration the observation of the Superintending Engineer at Ex.B68 regarding extension of time to the effect that 'I am to submit that based on the past performance, his capability and track record of the contractor in execution of the work, it is considered feasibly that the contractor will be able to complete the work in all respects within the extended period sought by the contractor, i.e., upto the end of December, 1992.' The Chief Engineer in-charge also recommended on the same lines at Ex.B69. When the engineers were satisfied with the reasons for low progress of work, to say subsequently that delay if any was at the instance of the plaintiff is incorrect. According to him, the reliance placed by the defendants on Exs.B1 to B35, has no bearing in view of Ex.B68 and Ex.B69 which were the reports submitted by the engineers. According to him, Exs.B68 and Ex.B69 emanated at the time when there was dispute between the parties as to the progress of work. The assessment of officers regarding progress of work was very objective at that time in their internal, reports. For the above reasons, the Court below held Issue No.10 in favour of the plaintiff, namely that the defendants were guilty of various omissions and commissions attributed to them in para 5 of the plaint. Issue No.11 was also held in favour of the plaintiff holding that termination or expulsion of the plaintiff from the site is not legal, just and reasonable.

72. Regarding Issue No.1, namely whether the defendants are guilty of committing breach of contract entered into by the plaintiff with the defendant, the trialCourt in view of its findings on Issues 3 to 9, 10 and 11, held Issue No.1 in favour of the plaintiff and against the defendants.

73. Issue Nos.14 and 15 relates to whether the plaintiff is entitled for interest from 21-11-1992 till the date of payment, and whether the plaintiff is entitled to interest at 21% p.a. from the date of execution of work till payment. While deciding these issues, the trial Court took into consideration its findings on Issue Nos.3, 5 & 12 wherein it held that the plaintiff is entitled for a sum of Rs.4,37,95,369/- and the plaintiff is entitled to recover the same. The interest claimed by the plaintiff is at 21%. Taking into consideration the effect of Section 34 of CPC and exercising his

discretion, the learned Subordinate Judge ordered interest at the rate of 15% p.a. from the date of institution of the suit till the date of payment. Thus, he answered Issue Nos.14 and 15 in favour of the plaintiff.

74. Issue No. 16 relates to whether invoking of Bank Guarantee to an extent of 10% by the defendants is legal and proper. The Court below took into consideration the effect of G.O. Ms. No. 137, dated 22-6-1993 and its findings on Issues 2, 10 and 11, and held this issue in favour of the plaintiff observing that invoking of performance bank guarantee by the defendants to an extent of 10% is illegal.

75. Issue No. 13 relates as to whether the plaintiff is entitled to recover a sum of Rs.30,24,000/- towards damages for illegal encashment of bank guarantee worth Rs.1.26 crores pertaining to mobilisation advance. The plaintiff had already paid Rs.53 lakhs in instalments. 73 lakhs remained to be paid to the defendants. According to the plaintiff, if the price escalation is adjusted on correct interpretation, the defendants themselveswould be due to the plaintiff an amount of Rs.3,90,16,658/-, If that amount was realised at the relevant time, the plaintiff would not have been liable to pay any amount to the defendants in respect of mobilisation advance. According to him, on mobilisation advance, the defendants are recovering interest at 14% p.a. The interest calculated at 14% flat rate for three years, works out of Rs.52,92,000/-. The mobilisation advance paid was Rs.1.26 crores, and thus both put together it will not exceed Rs.1,78,92,000/- whereas the plaintiff already paid Rs.53 lakhs. Thus, the amount payable is only Rs. 1,25,92,000/-. Thus on correct interpretation of the price adjustment, the plaintiff is entitled for more amount. Therefore invocation of bank guarantee is illegal and as such the plaintiff claims compensation of Rs.30,24,000/-. According to the defendants, there is no illegality in encashing the bank guarantee. To support its contentions, the plaintiff also placed reliance on a decision in U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd, : [1988]1SCR1124 , wherein it was held to the effect that there cannot be injunction against invocation of bank guarantee as normally the promise made by the party to the bank shall be honoured. The banker can be restrained only when there is a dispute between the parties and that dispute is a genuine one or party therein to

invoke the bank guarantee played fraud. The Court below taking into consideration the legal position as settled and the conduct of the parties including payments made and received, found that the plaintiff is not entitled to recover damages of Rs.30,24,000/-. Thus observing, the trial Court held Issue No. 13 against the plaintiff.

76. Issue No. 17 relates as to whether the defendants action in recovering FSD to a tune of Rs. 24,83,000/- from the bills due to the plaintiff is valid. The defendants recovered 5% amount from the monthlyinterim bills due to the contractor towards retention money (FSD). These amounts are to be paid to the plaintiff on completion of the work as per clause 26. As the contract has come to an end the plaintiff is entitled for retention of money outstanding to his account. According to the plaintiff the action of the defendants in recovering Rs.24,83,000/- from the bills due towards FSD is not valid. The Court below held that when the contract came to an end, the plaintiff is entitled to recover the said amount and accordingly held this issue in favour of the plaintiff.

77. Issue No. 18 relates as to what relief. On this issue, the Court below held that the plaintiff is entitled to recover a sum of Rs.4,37,95,369/- from the defendants and accordingly passed the decree for recovery of the same amount with proportionate costs and future interest at 15% p.a. from the date of filing of the suit till the date of payment. The Trial Court also held that the Spl. G.P. is entitled to the fee as per rules.

78. Before considering the correctness of the reasoning adopted by the trial Court in decreeing the suit in pat and disallowing certain claims of the plaintiff, first it is proper to consider the legal contention raised by the learned Advocate General appearing for; the defendants about the maintainability of the suit. The main ground of attack by the learned Advocate General regarding the maintainability of the suit is that the suit filed against the Government is not maintainable in the absence of notice under Section 80, CPC. He further contended that when the proceedings initiated under the Arbitration Act were converted into a suit by virtue of amendment, there should have been a notice to the defendants and non-compliance of the same vitiated the entire proceedings and as such the suit itself

liable to be dismissed.

79. Against these contentions,Mr. S.R. Ashok, learned Counsel appearing for the plaintiff submitted that the contention now raised by the learned Advocate General is not sustainable for the reasons that the State was quite aware of the initiation of proceedings under the Arbitration Act and then converting the same into suit pursuant to the orders passed in CMA No.526/92. When amendment was sought to convert the proceedings under the Arbitration Act to original proceedings, no objection was raised by the defendants and no plea about the maintainability of the suit was taken in the written statement and the additional written statement filed after the amendment. He further contended that when several issues were framed by the Trial Court, the issue as to the maintainability of the suit was not framed. Both the parties understood the scope of the suit, effect of non-issuing notice under Section 80 of CPC and went to the witness box. Further, when the parties have waived certain issues and participated in the proceedings, they are not permitted to raise such an issue subsequently. In support of his contentions, Mr. Ashok placed reliance on several decisions of High Courts and the Supreme Court. In Puma Chandra Sarkar v. Radharani Dassys, AIR 1931 Calcutta 175, the Calcutta High Court while dealing with Section 80 of CPC held as follows:

'The plea of want of notice under Section 80, CPC, which is a clear bar to the institution of proceedings against public officer must be taken at the earliest possible opportunity and must be specifically pleaded. Where such a plea is taken by the defendant at a very late stage of the suit and at a time when the plaintiff would be precluded by the law of limitation from bringing a further suit against the defendant, the defendant must be deemed to have waived the privilege of notice.'

80. A Full Bench of Rajasthan High Court in Rajasthan State v. Girdharilal,, holding that it was not open to the Rajasthan State to raise the plea of notice under Section 80, CPC for the first time in appeal as it must be deemed to have been waived, observed as follows:

'When the case came up for hearing before this Full Bench, learned Counsel for the respondent contended that even ifthe notice be assumed to be invalid so far as the Rajasthan State was concerned, the objection could not be raised at the

appellate stage, and must be deemed to have been waived in the circumstances of the present case. After hearing learned Counsel for the parties, we are of the opinion that in the circumstances of the case, the objection as to want of notice to the Government of Rajasthan must be deemed to have been waived.

There was some conflict of opinion among the High Courts in India as to whether the objection as to want of notice or invalidity of notice under Section 80 could be waived, but the controversy has been set at rest by a decision of the Privy Council in Vellayan Chettiar v. Government of the Province of Madras, AIR 1947 PC 197. It was observed:

'There appears to their Lordships to be given under Section 80, should not be waived if the authority concerned thinks fit to waive it. It is for his protection that notice is required; if in the particular case he does not require that protection and says so, he can lawfully waive his right.'

As to what acts of the defendant were necessary to constitute a waiver, the observations of their Lordships of the Supreme Court in Dhian Singh Sobha Singh v. Union of India, : [1958]1SCR781 , are pertinent:

'it is relevant to note that neither was this point taken by the respondent in thewritten statement which it filed in answer to the appellants claim nor was any issue framed in that behalf by the Trial Court and this may justify the inference that the objection under Section 80 had been waived.'

In the present case, the plea as to want of notice or the insufficiency of notice which was given to the then Government of Jaipur was not raised by the defendant State of Rajasthan, and no issue was framed on this question. The contention on behalf of the Rajasthan State that the notice given by the plaintiff to the then State of Jaipur was not sufficient compliance with Section 80 in the present suit, which was instituted against the State of Rajasthan, was taken for the first time in appeal. We are of the opinion that it is not open to the Rajasthan to raise that plea now, which on the authorities mentioned above must be deemed to have been waived. It is, therefore, not necessary to consider whether 1958 Raj LW 542 had been correctly decided.'

Similarly, in the case of Gaja v. Dosa Koeri, AIR 1964 Allahabad 171, the Allahabad High Court, while dealing with Section 80 of CPC observed as follows:

'The object of a notice under Section 80 is to acquaint the authorities mentioned in the Section of the facts and circumstances which are said to necessitate the institution of the threatened suit and to afford them an opportunity to take stock of the situation and avoid litigation, if so advised, by setting the claim or making amendments. The Section is thus intended to grant to such authorities a special protection for their own benefit of which, if they so choose, they may avail. The objection to the entertainability of a suit for want of notice may be waived by the authorities concerned.'

'If a notice can be said has been waived by the authority concerned, it is not opento any other parly to the suit to urge want of notice against the maintainability of the suit.'

The Bombay High Court in the case of Vasant Ambadas v. Bombay Municipality, MR 1981 Bombay 394, held that:

'No suit can be instituted without service of notice if such service of notice is required statutorily as a condition precedent. The giving of the notice is a condition precedent to the exercise of jurisdiction. But this being a mere procedural requirement, the same does not go to the root of jurisdiction in a true sense of the term. The same is capable of being waived by the defendants and no such waiver, the Court gets jurisdiction to entertain and try the suit.'

A learned single Judge of Madras High Court in the case of 'N. Parameswara Kurup v. Stole, AIR 1996 Mad. 126, observed as follows:

'The other point raised by the learned Government Advocate appearing for the State is that in OS No.9/77, the plaintiff has not given notice under Section 80 CPC and therefore the suit should fail. But my attention is invited by the learned Counsel appearing for the appellant in S.A.1847/ 79 to the fact that the plaintiff in OS No.9/ 77 filed a writ petition WP 938/75 (N. Parameswara Kurup v. State of Tamil Nadu, rep. by the Secretary to Government, Education Department, Madras)

against the State of Tamil Nadu challenging the Tamil Nadu Recognised Private Schools (Regulations) Act 29 of 1974, and a Bench of this Court dismissed the said writ petition granting three months time to the petitioner to seek the remedy by way of suit. Accordingly, the plaintiffs filed the suit, OS No.9/77, within three months from the date of judgment in WP No.938/75. Therefore, I must hold that the suit is not bad for want of notice under Section 80 CPC.'

In the case of Supreme Co-op Group Homing Society v. M/s H.S. Nag & Association (P) Ltd., 1998 (5) Supreme 147, the Supreme Court observed that rigour of notice under Section 80 CPC was softened by CPC 1976 Amendment Act in directing in an appropriate case post suit notice.

81. Though there is substance in the argument advanced by the learned Advocate General appearing for the defendants that the suit is not maintainable for want of notice under Section 80 of CPC the same is not agreeable at this stage since the parties, particularly the defendants knowing fully well about non-issuing of notice under Section 80 CPC have not raised such a plea in the written statement or additional written statement filed in the suit. Even when the Issues were framed, the defendants did not complain that proper Issues were not framed particularly as to the maintainability of the suit. Having participated in the original proceedings, now it is not open for the defendants to raise a fresh issue as to the maintainability of the suit, in view of waiving the defect, if any at earliest point of time.

82. It is the case of the plaintiff that the defendants committed breach of contract that was entered into between both the parties. According to the plaintiff, the site where the work had to be executed was not handed over to it free from obstacles and obstructions. It has come in the evidence that major portion of the site was under encroachment and inspite of the complaint made at Ex.A1 no steps were taken by the defendants to clear the obstructions. Even land acquisition proceedings initiated in respect of the site that has to be handed over to the plaintiff were not completed. The defendants took the stand that when once the plaintiff accepted in support of their stand, the defendants placed reliance on Ex.A9. The learned Subordinate Judge discussed about the obstacles and obstructions in the site inparagraph 36 of his judgment. He referred to the long

correspondence between the plaintiff and the defendants. He took into consideration the correctness of Ex.A1, dated 12-2-1989, Ex.A3, dated 6-4-1989; Ex.A4 dated 13-5-1989; Ex.A9, dated 24-5-1989; Ex.A5, dated 29-5-1989; Ex.A6 dated 26-7-1989; Ex.A7, dated 4-8-1989 and Ex.AS dated 3-12-1989. He also found that delivery of possession under Ex.B1 was only formal and that physical possession was not handed over to the plaintiff. The trial Court also found that at a number of places ground-nut, cotton, paddy, sunflower and other crops were risen, which fact was also admitted by DW1. The learned Subordinate Judge discussed on this point in his judgment from paragraphs 39 to 44 which includes the evidence of PW2 Advocate-Commissioner who inspected the site and gave his report (Ex.C1) as to the existence of crops on the site. From Ex.C1 report, it was found that number of structures including residential buildings and other structures are abutting the canal alignment area. The Trial Court observed that non-clearing of the site from several obstacles and obstructions including non-removal of shifting of power lines and telephone lines has to be held as default on the part of the defendants.

83. Regarding over-haul charges, the said item is covered under clause 3,2.6 of Vol.11 of the contract. It envisages the plaintiff's entitlement for over-haul charges. Clause 3.2.6 reads as follows:

'In measuring grantities of overhaul for payment, the volumes of the overhauled material will be measures in cubic metre units for excavation in rock including Nandyal shales and ten cubic metre units for excavation in soils upto hard disintegrated rock. The length of haul will be measured as stated above in kilometres. Payment for overhaul will be made at the unit price bid for kilometre extra lead.'

According to the above clause, the payment for over-haulage will be made only for excavated materials required for canal embankment. The above clause supports the case of the plaintiff. The 'earned Subordinate Judge discussed about the entitlement of the plaintiff for over-haul charges in paragraphs 49 to 51 of his judgment and reiteration of same again is not warranted.

84. Regarding price adjustment clause and the correctness of the plaintiff's claim for recovery of a sum of Rs.3,90,16,658/-, the learned Subordinate Judge found that as per clause 34(2) of Vol.I of the contract, the contract price shall be adjusted for increase or decrease in rates and price of labour, materials, fuels and lubricants as detailed in the said clause. The said clause refers to various abbreviations, derivatives. The defendants contention was that adoption of the total value of the work done in the place of 'R' to work out the price adjustment formula is incorrect. The learned Subordinate Judge found that when once the contract is entered into between the parties, both the parties are to follow the same and that it is not open to the Government to contend that it is the value of the item concerned that is to be adopted in the place of 'R' for causing price adjustment. The learned Judge observed that merely because a party to the contract misunderstood the terms of the contract, it is not permissible to deviate from it or to request the Court to take a different view. The meaning of 'R' etc., has been defined in the contract itself. 'R' is the total value of work done during the quarter. The learned Subordinate Judge discussed about the price adjustment on different items namely labour, fuel and material in respect of various items of work carried out. He took into consideration the rise in prices of various items and price index and rejected the contention of the defendants that the claim made by the plaintiff under price adjustment clause is more than the valueof the to a work executed, i.e., the claim increased by 69%. But the same was negatived by the Court below by referring to percentage of work carried out, rise in prices etc. The Court below also found the effect of the word 'item' which finds in Clause 34 and observed that having once entered into the contract and understood the terms of the contract, it is not permissible to deviate from it or to request the Court to take a different meaning as held by Lord Wright in Hillas & Co., Ltd. v. Areas Ltd., (1932) A1I.E.R. 494, which reads as follows:

'Business men often record the most important agreements in crude summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to this unfamiliar with the business far from complete or precise, it is accordingly the duty of the Court to construe such documents fairly and broadly, without being too as tute or subtle in finding defects; but on the contrary, the Court should seek to apply the old maxim of English law 'Verba it a

sunt intelligents ut res magis voleat quam pereat.' The maxim, however, does not mean that the Court is to make a contract for the parties or to go outside the words, they have used; except insofar as they are appropriate implications of law'.

The Court below found that because of changes effected by the defendants in clause 34 in the subsequent contract, the prices quoted by the subsequent contractor are enormously increased, whereas the plaintiff quoted less prices i.e. 18.42% less than the estimated rates and accordingly held that the plaintiff is entitled to claim a sum of Rs.3,90,16,658/- towards the amount due on account of price adjustment.

85. As far as the claim of hike in wages and hike in the prices of steel is concerned, the Court below rejected the claims of the plaintiff holding that having once entered into the contract, merelybecause there is rise in prices of certain materials, the contractor (Plaintiff) cannot claim extra amount. The learned Subordinate Judge discussed the effect of clause 34(4) of the contract and took into consideration the price index at Adoni which is a neighbouring town and rightly rejected the claim of the plaintiff in respect of hike in wages.

86. The argument advanced by the learned Counsel for the plaintiff that the Court below erred in disallowing the claims of the plaintiff in respect of hike in wages and steel prices, in view of the above discussion does not stand to reason.

87. Regarding the claim of the plaintiff in respect of the work done, which was not paid by the defendants, the evidence adduced by the plaintiff to substantiate his claim was not acceptable to the lower Court. Therefore, the learned Judge rightly rejected the claim of the plaintiff.

88. Regarding the contention that the progress of work as hit by the omissions and commissions of the defendants 2 and 3, the Court below framed Issue No.9 and dealt with it at para 83 of its judgment.

89. The case of the plaintiff was that the progress of work was hit by different omissions and commission of the defendants and other factors not attributable to the plaintiff such as resistance from villagers, non-clearance of site free from

obstacles and obstructions. The issue is almost similar to Issues 1 and 2. Under Ex.A65, the plaintiff explained the difficulties which he had to undergo while executing the work. Exs.A66 and A67 are on the similar lines. It has come in the evidence that there was seepage of water on account of release of water from Srisailam demand that there was standing crop on the site which contributed to delay in the execution of work. The learned Subordinate Judge took into considerationthe failure on the part of the defendants in not complying with the various requirements, particularly in supplying the drawing and designs, dropping out certain items form the drawing and design like causing lining in the canal system. The Trial Court also took into consideration the report of the authorities and found that there was no omission or commission on the part of the plaintiff in executing the work. On the other hand, the omissions and commission were attributable to the defendants. If there was omission or commission on the part of the plaintiff, there was no necessity for the Superintending Engineer to submit the report at Ex.B42 explaining the problems the plaintiff had to face while executing the work. Thus, the Court below held that on account of the omissions and commissions on the part of the defendants and other factors not attributable to the plaintiff, the progress of the work suffered substantially.

90. Regarding termination of the contract, the Court below took into consideration the experience, equipment and capacity of the plaintiff in executing the work, the terms of contract entered into, the reports of various Engineers, total work carried out, admission of DW1 in the cross-examination, several letters written by the authorities requesting the Government to extend the contract period. It has come in the evidence that the defendants committed breach of contract in the matter of handing over the site free from obstacles and obstructions. Further, the plaintiff did not receive the payment under price adjustment clause, which prevented the progress of work. All these factors prevented the plaintiff's capacity to proceed with the work. The grievance of the plaintiff was explained to the authorities, but they resorted to terminate the contract without considering the problems faced by the plaintiff in executing the work. The Court below taking into consideration all thesefactors held that the termination of the plaintiff's contract as illegal. However, the learned Judge refused the plaintiffs request to direct the defendants to pay certain amount towards loss of profit in the work saying that such a claim is not

reasonable. Regarding the loss or profit and the plaintiff's entitlement the Court below taking into consideration various factors which prevented the plaintiff from carrying out the work, held that the plaintiff is entitled to claim a sum of Rs. 75,93,820/-towards loss of profit on the unexecuted portion of work.

91. Regarding plaintiff's demand for recovery of Rs.30,24,000/- as damages for illegal encashment of the bank guarantee worth Rs. 1.26 crores pertaining to mobilisation advance, the Trial Court observed that if the plaintiff is allowed to be paid the damages, it will be receiving the amounts twice, as on the amounts claimed by the plaintiff interest is being awarded at 15% per annum as compensation and accordingly disallowed the claim of the plaintiff. We are of the view that the trial Court was right in disallowing the claim of the plaintiff.

92. As regards interest, though the plaintiff claimed interest at 21%, the Court below taking into consideration the effect of Section 34, CPC ordered interest at 15% per annum on the amount payable by the defendants, which is reasonable in our view. The finding of the Court below that the plaintiff is entitled to recover a sum of Rs.4,37,95,369/- from the defendants with interest at 15% per annum from the date of filing of the suit till the date of payment, is just one.

93. Sri Ashok learned Senior Advocate for the plaintiff tried his best to convince us that the Trial Court is not justified in disallowing certain claims of the plaintiff. But the grounds urged by him to allow the remaining claims which were rejected by the Trial Court in the lightof the nature of evidence available, and discussions made by the Trial Court as to how far the same is acceptable and stands to reason, we are of the opinion, the same has no merit and partial dismissal of the suit is a just one.

94. Having gone through the entire evidence as also the judgment of the Court below and its findings on several issues and after hearing the learned Counsel on both sides, we are of the view that the judgment and decree passed by the Court below do not call for interference by this Court and both the appeals are liable to be dismissed.

95. Accordingly AS No.2206 of 1996 and AS No.236 of 1998 are dismissed and judgment and decree of the Court below are confirmed. The bank guarantee, if

any, given by the plaintiff pursuant to the interim directions of this Court is hereby discharged and the amount if any, deposited in the Court towards bank guarantee the same shall be returned to the plaintiff. There shall be no order as to costs.

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