

The State of Rajasthan Vs. Banarshi Lal's Legal Representatives and Ors.

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Court : Rajasthan

Decided On : Nov-18-1992

Reported in : 1992WLN(UC)240

Judge : B.R. Arora, J.

Appeal No. : S.B. Civil First Appeal Nos. 112 and 113 of 1976

Appellant : The State of Rajasthan

Respondent : Banarshi Lal's Legal Representatives and Ors.

Judgement :

B.R. Arora, J.

1. These two appeals are directed against the decree and judgment dated July 20, 1976, passed by the District Judge, Bhilwara, by which the learned District Judge partly decreed the suit filed by the plaintiff.

2. Plaintiff Boota Mal filed a suit in the Court of the District Judge, Bhilwara, for the recovery of an amount of Rs. 1,01,300/-. Rs. 21,500/- were claimed on account of loss of profit' on the reduced amount of the work; Rs. 51,596/- were claimed for the correct amount of 16th running bill; Rs. 55,598/- were claimed as the refund of the security deposit, which the department did not pay and Rs. 2607/- were claimed as interest on the amount illegally deducted by the defendant. Out of this total claim

of Rs. 1,31,300/-, the plaintiff has forgone his claim for Rs. 30,000/- which amount was to be deducted on account of hiring charges of the tractors etc. by the department. It is alleged in the plaint that the plaintiff was granted the contract by the State Government for the construction of Part I of Gambhiri (Irrigation) Project Dam, Nimbaheda (District Chittorgarh) from Chain No. 10 to Chain No. 59.50 and the total value of the work was Rs. 10,49,561/-. The work was to be started from December 1, 1954, and was to be completed within the period of 1-1/2 years, i.e., by June 30, 1956. The work could not be started on account of some technical difficulties and ultimately it was started on September 22, 1955. The period for completion of the work was, thereafter, extended upto March 1, 1957. The plaintiff's work of the construction of the dam was in progress and the plaintiff had already completed 90% of the earth work and stone-pitching work by June 15, 1956, when the defendant abruptly decided to close the diversion of the river and to fill the water in the dam in the rainy season of 1956 and asked the plaintiff to hand-over the work as in stands. The plaintiff, therefore, requested the defendant to get the measurements completed before the rainy season starts and to prepare the bills of the work done by him, but the defendant did not pay any heed to the request of the plaintiff and prepared the 16th running bill after about three months when the rainy season was over. In the rains, the earth work measuring 3,17,000 cubic feet and the stone-pitching work measuring 43,000 cubic feet, which was done by the plaintiff after the preparation of the 15th running bill and before the preparation of the 16th running bill, was washed away due to rains. The plaintiff completed the work during this period amounting to Rs. 59,095/-, but the defendant prepared the bill only for Rs. 28,268/- and that amount too was not paid to the plaintiff, but was illegally adjusted by the defendant towards the charges of hiring the tractors engaged by the plaintiff and for the stores supplied to the plaintiff, though the plaintiff was not liable for the engagement of the tractors and for the hiring charges incurred thereon by the defendant. It is further alleged in the plaint that in the running bills No. 16th, 17th, 18th and the Final Bill No. 19, a deduction of 5% shrinkage was made by the defendant, which is illegal, improper and against the terms of the contract. According to the plaintiff, the Final Bill was prepared after a lapse of more than two years and by that time, two rainy seasons had already elapsed and the soil by that time had already settled and, therefore,

on the basis of the measurements made after two years, the deduction of 5% on the ground of shrinkage could not have been made. It was further averred in the plaint that the defendant illegally forfeited the security amount of Rs. 55,598/- and the forfeiture of the security amount was absolutely wrong and incorrect and is based on misinterpretation of the letter concerned. The forfeiture of the security amount was illegal, arbitrary, ultra-vires and malicious. It was further averred in the plaint that though the notice was served upon the defendant under Section 80 C.P.C. for an amount of Rs. 1,76,818/-, but the plaintiff has forgone his rest of the claim and claimed only Rs. 1,01,300/- as mentioned in para No. 17 of the plaint. It was, therefore, prayed that the suit filed by the plaintiff may be decreed with cost.

3. The defendant denied the claim of the plaintiff. It was admitted by the defendant in the written statement that the plaintiff was granted contract for the construction of Part I and II of the Gambhiri (Irrigation) Dam and that the time for the completion of the work was extended upto March 1, 1957, but the remaining averments made in the plaint were emphatically denied. It was averred in the written statement that the time was the essence of the contract and as the plaintiff failed to perform his part of the contract, therefore, the Chief Engineer, in exercise of the power conferred under Clauses (2) and (3) of the Agreement, ordered for the forfeiture of the security amount and, therefore, the security amount was rightly forfeited by the defendant in consequence of the order passed by the Chief Engineer. It is further stated in the written statement that the plaintiff did not complete the work assigned to him in spite of repeated requests and, therefore, some of the work was got completed by the department itself and some was got done through some other contractors. After the adjustment of the amount of the security forfeited, an amount of Rs. 57,085/- is still outstanding against the plaintiff which the defendant is entitled to recover from him. The preparation of the running bill No. 16 for the lesser amount was denied and the washing of the earth work measuring 3,17,00 cubic feet and the stone-pitching work of 43,000 square feet, were, also, denied. It was stated that no such work was done by the plaintiff and whatever work was done by the plaintiff before the preparation of the 16th running bill and after the preparation of the 15th running bill, was measured and the amount was included in the 16th running bill. It was, also, averred in the written statement that the tractor of the department were employed by the plaintiff for the

completion of his work at the site and, therefore, the plaintiff is liable to pay the hire charges of those tractors. Regarding the 5% shrinkage charges, it was averred that as per the conditions of the contract, the shrinkage has to be deducted at the time of preparation of the Final Bill. So far as the preparation of the Final Bill is concerned, it was stated that the plaintiff was informed time and again to remain present so that the measurements may be taken in his presence, but he did not turn-up and that was the cause for the delay in the preparation of the Final Bill and the bill was prepared in his absence. It was, therefore, prayed that the suit, filed by the plaintiff, may be dismissed with cost.

4. On the basis of the pleadings of the parties, the trial Court framed twelve issues. Both the parties led their evidence in support of their case. The plaintiff, in support of its case, examined himself as PW 1 and placed on record the statement of Mr. A.C. Sood, recorded in Civil Suit No. 4 of 1961 of the Court of the District Judge, Bhilwara, relating to the Part III of this very contract. Mr. A.C. Sood could not be examined in this case as, during the pendency of the suit, he died. The plaintiff, also, placed reliance over 18 documents. The defendant, in support of its case, examined four witnesses, namely, DW 1 Mr. B.V. Shah, who was working as the Technical Assistant to the Chief Engineer at the relevant time, DW 2 Arjun Singh, Executive Engineer, who was the Incharge of the work, DW 3 Sukhdeo Singh, Over-seer, Incharge of the work and DW 4 Narendra Kumar Kaushik, Assistant Engineer on the Project at the relevant time and placed on record 279 documents. The learned District Judge, after trial, decided issues No. 1, 4, 5, 6-A, 6-B and 11 in favour of the plaintiff and decided issues No. 2, 3, 7, 8, 9 and 10 against the plaintiff and decreed the plaintiff's suit only for an amount of Rs. 55,598/- alongwith interest @ 6% p.a. from the date of the decree. Dissatisfied with the decree and judgment dated June 20, 1976, passed by the learned District Judge, Bhilwara, the State of Rajasthan preferred appeal No. 112 of 1976 the State of Rajasthan v. Banarsi Lal's Legal Representatives and Ors., while the plaintiff filed S.B. Civil First Appeal No. 113 of 1976 Smt. Aruna Sachdeva and Ors. v. the State of Rajasthan.

5. In the appeal filed by the defendant-appellant State of Rajasthan, the controversy raised in the appeal is; whether the learned trial Court was justified in

decreeing the suit filed by the plaintiff for refund of the security amount said to have been forfeited by the Chief Engineer. Clauses (2) and (3) of the Agreement are relevant to resolve this controversy which relate to the powers of the Chief Engineer to order for the forfeiture of the Security amount, which read as under:

Clause (2) - COMPENSATION FOR DELAY:

The time allowed for carrying-out the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date noted in the written order to commence. The work shall throughout the stipulated period of the contract be proceeded with all due diligence (time being deemed to be the essence of the contract on the part of the contractor) and the contractor shall pay as compensation an amount equal to one per cent or such smaller amount as the Chief Engineer (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work as shown by the tender for every day that the work remains uncommenced or unfinished after the proper dates. And further to ensure good progress during the execution of the work, the contractor shall be bound, in all cases in which the time allowed for any work exceeds one month to complete 1/4 of the whole of the work before 1/3 of the whole time allowed under the contract has elapsed; one-half of the work before one-half of such time has elapsed; and three-fourths of the work before three-fourths of such time has elapsed. In the event of the contractor failing to comply with this condition he shall be liable to pay as compensation an amount equal to one per cent or such smaller amount as the Chief Engineer (whose decision in writing shall be final) may decide on the said estimated cost of the work for every day that the due quantity of work, remains incomplete; provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed 10 per cent on the estimated cost of the work as shown in the tender.

Clause (3) - Action when whole of security deposit is forfeited:

In any case in which under any clause of this contract the contractor shall have rendered himself liable to pay compensation amounting to the whole of his security deposit (whether paid in one sum or deducted by instalments) the Chief Engineer or other duly authorised Engineer on behalf of the Rajasthan Government shall

have power to adopt any of the following courses as may deem best suited to the interest of the Government:

(a) To rescind the contract of which rescind notice in writing to the contractor under the hand of the Chief Engineer or other duly authorised Engineer shall be conclusive evidence, and in which case the security deposit of the contractor shall stand forfeited and be absolutely at the disposal of the Government.

(b) To employ labour paid by the P.W.D. Department and to supply materials to carry out the work, or any part of the work debiting the contractor with the cost of the labour and the price of the materials (of the amount of which cost and price a certificate of the Chief Engineer shall be final and conclusive against the contractor) and crediting him with the value of the work done in all respects in the same manner and at the same rates as if it had been carried out by the contractor under the terms of his contract; the certificate of the Chief Engineer or other duly authorised Engineer as to the value of the work done shall be final and conclusive against the contractor.

(c) To order that the work of the contractor be measured up and to take such part thereof as shall be unexpected out of his hands and to give it to another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor, if the whole work had been executed by him (of the amount of which excess the certificate in writing of the Chief Engineer shall be final and conclusive) shall be borne and paid by the original contractor and may be deducted from any money due to him by the Government under the contract or otherwise or from his security deposit or the proceed of sale thereof, or a sufficient part thereof.

In the event of any of the above courses being adopted by the Chief Engineer or other duly authorised Engineer the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials or entered into any engagement, or made any advance on account of, or with a view to, the execution of the work or the performance of the contract. And in case the contract shall be rescinded under the provision aforesaid, the contractor shall not be entitled to recover or be paid any sum for any work therefore actually

performed under this contract unless and until the Chief Engineer or other duly authorised Engineer shall have certified in writing the performance of such work and the value payable in respect thereof, and he shall only be entitled to be paid the value so certified.

According to the learned Counsel for the State, the time was the essence of the contract and the plaintiff had to complete the work by March 1, 1957, but the plaintiff did not complete the work within the stipulated period and even left the work incomplete. The defendant, therefore, had to get the work completed departmental as well as through some other contractors and, therefore, the security amount was rightly forfeited and the department is entitled to get the amount adjusted from the outstanding bills of the plaintiff which was spent in excess of the contractual amount.

6. The question, which, therefore, requires consideration in the present case is, whether any work was got done by the defendant which was left over by the plaintiff and for that any excess amount has been spent by the defendant which the plaintiff is liable to pay to the defendant. The defendant, in support of its case, has produced four witnesses, viz., DW 1 B.V. Shah, DW 2 Arjun Singh, DW 3 Sukhdeo Singh and DW 4 Narendra Kumkar Kaushik. The defendant has, also, placed on record the documents Ex. A. 220 to Ex. A. 273 to prove the work done by the department or through the other contractors, which work was left over by the plaintiff. DW 2 Arjun Singh and DW 3 Sukhdeo Singh have proved these documents and from the evidence of these two witnesses, namely, DW 2 Arjun Singh and DW 3 Sukhdeo Singh, and the documents Ex. A.220 to Ex. A.273, the total work amounting to Rs. 52,749.22P. only, stands proved, which was got done by the department departmentally and through other contractors. Out of this total work, Rs. 52,749.22P. stone-pitching work of Rs. 15,316.04 was got done through the departmental agencies and the stone-pitching work of Rs. 20,764.15p. was got done through the other contractors, viz., Ghisa Lal, Nana Lal, Lalu Lal and K.L. Handa, and the earth work of Rs. 3,234.15p. was got done by the department and the earth work of Rs. 8283/- was got done through the other contractors. Stokes worth Rs. 405/- were, also, purchased and an amount of Rs. 4,796.37p. was the hire charges of the tractors. The amount spent by the defendant is less than the

actual amount which was contracted-to and, therefore, the defendant has not been able to prove that it is entitled to recover the amount of Rs. 57,995/- from the plaintiff.

7. The next question, which requires consideration is; whether in the present case, the time was the essence of the contract or not and whether the plaintiff completed his work within time? Initially, the work was to be completed before 30.6.1956, but the time was extended upto 1.3.1957. Even thereafter, as appears from the record, this work continued. While extending the time, no condition for the completion of the work was imposed. Initially the time was the essence of the contract, but later-on this condition was not imposed on the plaintiff when the time was extended and the work even continued after the expiry of the extended period of 1.3.1957, and no further time limit was fixed. In the facts and circumstances of the case, after the expiry of the extended period when the work continued and, therefore, it is idle on the part of the State to contend that the time was the essence of the contract and the action could be taken against the plaintiff for not completing the work within the stipulated period.

8. Apart from this, there is no term in the agreement between the parties which enables the State to forfeit the security deposit. The only right given to the defendant was to deduct out of the security deposit the amount of loss occurred to the defendant due to non-completion of the work by the plaintiff in time and to recover the extra-cost of the work which was got completed by the department on account of leaving the work Incomplete by the plaintiff. The defendant, in the present case, failed to prove any such damages incurred by it. The defendant, also failed to prove the incurring of extra cost. The department has been able to prove only the spending of Rs. 52,749.22p. for the completion of the remaining work left incomplete by the plaintiff and the contractual amount was more than this amount and, therefore, the department has not suffered any damages nor has it spent any amount in excess of the contracted amount and, therefore, the department was not entitled for the deduction of the amount from the security deposit or to forfeit the security amount on this count.

9. The next question, which requires consideration in the present case is whether any order was passed by the Chief Engineer ordering for the forfeiture of the security amount? For this, the evidence produced by both the parties have to be taken into consideration. PW 1 Boota Mal, in his statement, has stated that he did not receive any notice for rescinding the agreement as per Clause (3-a) or for debiting the amount under Clause (3-B) of the conditions of the agreement. He has further stated that no order for the forfeiture of the security amount was passed by the Chief Engineer and the letter Ex. A. 5 which has been placed on record, has been misinterpreted by the defendant and the defendant has no valid reason to forfeit the security amount. He has, also, stated that he completed 90% of the work by June, 1956, and only 10% work remained and the plaintiff had nine months' time with him to complete the remaining work, but the defendant asked him to hand-over the work in whatever state it was because the water has to be filled-in the dam the water was filled-in beyond its capacity. No stone-pitching was done by the defendant and due to heavy rains, soil washed-away and fresh earth work was got done by the department by scrappers and trackers. DW 1 B.V. Shah, who was the Technical Assistant to the Chief Engineer at the relevant time and was the Chief Engineer thereafter, has only stated that he cannot say whether the security amount of the plaintiff was forfeited or not and this can be said only by the concerned Executive Engineer who was working there at the relevant time. DW 2 Arjun Singh, who was the concerned Executive Engineer at the relevant time, has, also, not stated that the amount of security of the plaintiff was forfeited. DW 3 Sukhdeo Singh, who was the Assistant Engineer in the Irrigation Department and was posted at Gambhiri Irrigation Project, has, also, not stated regarding the forfeiture of the security amount. DW 4 N.L. Kaushik, who was the Assistant Engineer on the project at the relevant time, has, also, not stated anything about the forfeiture of the security amount. There are two documents on record which have some connection with the controversy relating to the forfeiture of the security amount. Ex.5 is the certified copy of the letter dated 13.6.1959, issued from the Office of the Chief Engineer, (Irrigation), Rajasthan, Jaipur, to the Superintending Engineer, Udaipur, which was produced by the defendant in Civil Suit No. 4 of 1961. The defendant has, also, placed on record the copy of this letter Ex. A. 5. The letter reads as under:

The contractor did not finish the work in time although an extension was granted to him. Every opportunity was given to the contractor to finish the job but he did not restart the work. The department had to get completed items worth Rs. 68,900/- through other agency. The extra cost incurred by the Government can, therefore, be recovered from the contractor. In addition to the above, the contractor is liable to penalty under Clause 2 of the agreement. The entire amount of security with the department can, therefore, be forfeited in satisfaction of the above.

Reliance has been placed by the defendant over this letter to show that the Chief Engineer ordered for the forfeiture of the security amount, but this letter, also, does not show that the security amount has been ordered to be forfeited by the defendant. What has been mentioned in this letter is that the contractor has not finished the work in time inspite of extension granted to him and opportunity was given to him to complete the work, but he did not complete the work and, therefore, the department has to get the work worth Rs. 68,900/- done through other agencies and the extra cost incurred by the government, therefore, should be recovered from the contractor and the contractor is liable to penalty under Clause (2) of the Agreement. The letter further states that the security amount can, therefore, be forfeited in satisfaction of the amount. The letter only mentions that the amount of the security can be forfeited but no order forfeiting the security has been placed on record. In the absence of any such order for the forfeiture of the amount, the security amount cannot be forfeited. Similar quest on came-up for consideration before this Court in the case between the same parties relating to Part III of the same contract in D.B. Civil First Appeal No. 16 of 1965 Boota Mal v. State of Rajasthan and Ors. and almost identical evidence was produced by both the parties and this Court, after consideration of the evidence on record came to the conclusion that no order for the forfeiture of the security amount was passed by the defendant and the letter only suggests some mode by which the contractor can be dealt with. This Court, therefore, decided the question of forfeiture of the security amount against the State of Rajasthan and decreed the plaintiffs suit on this count and held that the plaintiff is entitled to the refund of the security amount. The State against that decree and judgment with respect to Part III of the same contract, preferred an appeal before the Hon'ble Supreme Court and the Hon'ble Supreme Court vide its judgment dated August 2, 1989, passed in Civil Appeal No.

1044 of 1972 the State of Rajasthan v. Boota Mal Sachdeva dismissed the appeal filed by the State and held that there is no term in the agreement between the parties enabling the appellant to forfeit the security deposit. The only right given to the appellant was to deduct out of the security deposit the amount of loss incurred by the appellant which was caused to them by reason of non-completion of the work by the respondent in time and to recover the extra-cost of the work which has to be completed by the appellant department on account of the failure of the respondent subject to certain limitations. The agreement in question is same except the part of the project to that of the agreement entered into in that case. In the present case, the work is with respect to Part I of the Project and in that suit it was with respect to part m of the same Project. The defendant, therefore, failed to place on record any order regarding the forfeiture of the security amount and no condition exists in the present case under which the amount of security could be forfeited, and, therefore, the learned lower Court was justified in ordering for the refund of the forfeited security amount. The appeal, filed by the State, therefore, deserves to be dismissed.

10. In the appeal filed on behalf of the plaintiffs Legal Representatives Smt. Aruna Sachdeva and others, the first contention, raised by the learned Counsel for the plaintiff is regarding the loss of Rs. 21,500/- suffered by the plaintiff on account of reduction of the work. According to the plaintiff, initially the work, which was agreed to be performed by the plaintiff, was amounting to Rs. 10,49,561/- but when the work was completed, it was only for an amount of Rs. 6,33,326/- and the defendant reduced the work by Rs. 4,15,000/- without giving any notice to the plaintiff. His case is that if the amount of the work, would not have been reduced then the plaintiff would have earned 10% profit over this reduced amount of work which comes to Rs. 41,500/-, but he forgoes the remaining claim and restricts his claim only for a sum of Rs. 21,500/-. It was only an estimated work which was given to the plaintiff. At the time of inviting the tender and giving the contract, an approximate work is to be taken into consideration and for that the tenders are invited. The work can exceed the estimated work or it can be decreased, also. But after the completion of the work, the exact work can be ascertained. It is not the case of the plaintiff that some part of the work, which was given to him on contract, was taken-away from the plaintiff or was given by the defendant to some other

contractor or some part of the work was left-out from the contractual work, which was got done through other agencies. Whatever, the work was there for which the tenders were invited, were got completed by the plaintiff and, therefore, it cannot be said that any amount of the work was reduced and taken put of the contract and was handed-over to any other contractor. There was no question, therefore, of earning any profit by the plaintiff. Even otherwise, the plaintiff has failed to prove the loss suffered by him due to reducing the work. The plaintiff has only stated that he purchased the trucks, trollies etc. and has to invest a lot of amount looking to the volume of the work. The plaintiff was given Parts I and III of Gambhiri (Irrigation) Dam and for that purpose he purchased trucks and trollies, which were even found loss at both the places and the plaintiff had to hire the trucks and trollies from the department. So far as the percentage of the profit is concerned, the plaintiff has not produced any evidence to show that the percentage of the profit in all the work is atleast 10%. The plaintiff, in this contract, on the other hand, has stated that he suffered the loss. The plaintiff, thus, failed to prove any loss caused to him on account of the reduction of the work from Rs. 10,49,561/- to Rs. 6,32,000/-. The issue No. 2 relating to this point was, therefore, rightly decided by the learned trial Court against the plaintiff and in favour of the defendant.

11. It is next contended by the learned Counsel for the plaintiff-appellant that the learned trial Court was not justified in deciding the issue No. 7 against the plaintiff. According to the learned Counsel for the plaintiff-appellant, after preparation of the 15th running bill, the plaintiff did the earth work of 3,17,000 cubic feet amounting to Rs. 15,800/- and the dry-stone pitching work measuring 43,000 cubic feet amounting to Rs. 17,200/- and collected 33,000 cubic feet of stones at the site amounting to Rs. 133.25 and a work on extra items amounting to Rs. 5220/-. The total work done by the plaintiff was Rs. 59,095/- but he forgoes the claim for Rs. 7500/- for the collection of 33,000 cubic feet of stones and claimed Rs. 51,596/-, but the defendant prepared the 16th running bill for Rs. 28,268/- only, and that amount, too, was not paid to the plaintiff and was adjusted by the defendant. According to the learned Counsel for the plaintiff-appellant, the plaintiff proved from the evidence on record that the 16th running bill was prepared for the lesser amount and the measurements were taken wrongly by the departmental representative. The plaintiff, in his statement before the Court, has stated that the

dam was filled-up upto the level of 1417 feet while the department had made arrangements only upto 1410 feet. No pitching work was done and even the aprin filters were not applied on the outer part of the band and, therefore, the soil washed away on account of the flow of water and the department placed more soil by scappers and trackers and debited the amount in his account, which was wrongly done by them. He has further stated that in the bill the amount of dry stones pitching work has been shown amounting to Rs. 14,943/- which should have been of Rs. 17,000/-. He has further stated that the amount of the work done by the plaintiff in the guide band is, also, included in the 16th running bill, but that amount has not' been paid to him. He has, also, stated that he did some work for extra items and the amount of this has not been included in the 16th bill. He has further stated that he did the earth work measuring 3,17,000 cubic feet, amounting to Rs. 15,850/- and that work has not been included in the bill. He has, also, stated that 5% shrinkage in this bill has wrongly been deducted. In the cross-examination, he has admitted that he cannot say how-much soil (earth work) washed away on being non-applying the aprine filters. He has, also, admitted that he did not make any objection to the department with respect to the amount of running bill No. 16. DW 4 Narendra Kumar Kaushik, who was the Assistant Engineer Incharge of the work and who prepared the 16th running bill, has specifically stated that he took the measurements of the work done by the plaintiff at the site and made the 16th running bill amounting to Rs. 28,260/- and the measurements given in the bill were the actual measurements of the work done by the plaintiff at the site, which were taken by him at the time when the bill was prepared and out of the bill of Rs. 28,260/-, an amount of Rs. 1320/- was adjusted against the price of the store supplied by the department to the plaintiff, Rs. 24.019.50p. were deducted for the hiring charges of the tractors and Rs. 2828/- were deducted against 10% of the security amount and the whole amount of this bill was adjusted against the amount out-standing against the plaintiff. The 16th running bill Ex. 19/2 shows the earth work done by the plaintiff measuring 3,02,023 cubic feet amounting to Rs. 12,018.14p. dry stone pitching work measuring 2,31,127 cubic feet amount to Rs. 12,239.10p. The plaintiff has received the amount to Rs. 13,225/- for the work of guide band in the 16th running bill and has, also, got the amount of the extra items. The only dispute, therefore, remains is for

the payment of Rs. 15,880/- which was for the earth work of 3,17,000 cubic feet which, according to the plaintiff, washed away and the difference of Rs. 2006/- of the stone pitching work, as the amount of Rs. 14,894/- for the dry stone pitching work has been included in the 16th running bill. This work was not found to be done by the plaintiff when the actual measurement was taken by DW 4 Narendra Kumar Kaushik. From the evidence produced by both the parties, it is, thus, clear that whatever the amount of work was done by the plaintiff after the preparation of 15th running bill and at the time of preparation of the 16th running bill, that was included by DW 4 Narendra Kumar Kaushik in the 16th running bill. The plaintiff has not produced any evidence to prove that the earth work of 3,17,000 cubic feet as well as 2000 cubic feet dry stone pitching work, was done by him in addition to the work already taken in the measurement book and included in the running bill No. 16. The learned lower Court was, therefore, right in disallowing this claim of the plaintiff and rightly decided issue No. 7 against the plaintiff.

12. The next contention raised by the learned Counsel for the plaintiff-appellant is that in the final bill, 5% shrinkage from the earth work done by the plaintiff, has wrongly been deducted. His case is that the final measurements were taken after the lapse of more than two years and by that time the earth work had already settled down and, therefore, there was no question of shrinkage being charged. He has placed reliance over the Division Bench judgment of this Court in the case of the plaintiff and the defendant with respect to the Part III of this contract in D.B. Civil First Appeal No. 16 of 1965 Boota Mal v. The State of Rajasthan and Ors. decided on March 15, 1971, wherein it has been observed that after the lapse of two rainy seasons, the earth work settles by itself and, therefore, in the facts arid circumstances of the case, shrinkage would not have been deducted from the earth work done by the plaintiff. His further submission is that against the decree and judgment passed by the Division Bench of this Court, the State of Rajasthan preferred an appeal before the Hon'ble Supreme Court and the Supreme Court dismissed the appeal filed by the State of Rajasthan. His submission, therefore, is that the plaintiff is entitled for the amount of 5% shrinkage wrongly deducted by the defendant from the final bill of the plaintiff. Though the plaintiff made averments in the plaint regarding deduction of 5% shrinkage charges and stated that the defendants were not entitled to deduct from the final bill this amount, but the

plaintiff gave-up his claim on this count and claimed the amount as per Para No. 17 of the plaint, on three counts, i.e. Rs. 21,500/- for the loss of profit on the reduced amount of work, Rs. 51,596/- for the corrected amount of 16th running bill, Rs. 55,998/- towards refund of the security deposit and Rs. 2607/- for the interest and damages on account of Illegal with holding of the amount-the total being Rs. 1,31,300/- and out of this, he deducted the amount of Rs. 30,000/- for hiring charges of the tractors etc. vide Para No. 13 of the plaint and claimed only Rs. 1,01,300/- and has forgone the rest of the claim. When the plaintiff himself did not claim any amount for the deduction of shrinkage charges and gave-up his claim in the plaint and sued the State only for Rs. 1,01,300/-, as mentioned in para No. 17 of the plaint, then, now, he cannot claim this amount and is not entitled for any relief on that count. He neither set-up a claim for shrinkage charges in the plaint nor did he pay the Court Fee on that amount and, it is, therefore, not necessary to consider whether the plaintiff was entitled for shrinkage charges or not as the claim with respect to this was given-up by the plaintiff at the time of filing the suit. It is contended by the learned Counsel for the plaintiff-appellant that even if the plaintiff has not made any claim but he is entitled for the same if it stands proved from the case set-up by the defendant itself. In support of its case, the learned Counsel for the plaintiff-appellant has placed reliance over : Firm Srinivas Ram Kumar v. Mahabir Prasad and Ors. : [1951]2SCR277 and Bhagwati Prasad v. Chandramani : [1966]2SCR286 . So far as the law laid down by the Apex Court in these two judgments, on which the reliance has been placed by the learned Counsel for the plaintiff-appellant, is concerned, there is no dispute that when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in its written statement but it expressly put forward as an answer to the claim which the plaintiff made in the suit there will be nothing improper in giving the plaintiff a decree upon the case which the defendant himself has made and though a plea has not been specifically made yet it is covered by an implication and the parties know that the said plea was involved in the trial then the more fact that the plea was not taken in the plaint will not disentitle the party from relying upon it if it is satisfactorily proved by the parties. The present case is not the case where an alternative plea has not been taken by the plaintiff which stand proved from the evidence produced by the parties or from the case set-up

by the defendant. In the present case, the plaintiff filed the suit only for three items, mentioned in para 17 of the plaint, and has forgone all the other claims. When the plaintiff did not sue for the amount of deduction of 5% shrinkage and did not claim the same in the suit, though an issue has been framed to this effect, he is not entitled to any such relief as he has forgone the same. The claim on this count is not sustainable. When the plaintiff seeks the recovery of money on a particular point, it is required of him that he should state the precise amount claimed in the plaint. No such amount was claimed by the plaintiff in his plaint. Order 7 rule 7 C.P.C. requires that the plaintiff should specifically state the relief which he claims either simply or in the alternative. The plaintiff, who its the relief to which he may be entitled in respect of the same cause of action, his suit cannot be decreed on that count later on unless he amends the suit and base the claim there upon and the decree can be passed only for the amount for which he claims and is found entitled. The plaintiff-appellant is, therefore, not entitled for any amount on this count as he has given-up his claim with this respect.

13. The last contention, raised by the learned Counsel for the plaintiff-appellant, is that the learned lower Court, while passing the decree for the refund of the security amount, awarded the interest only from the date of the decree and not from the date of the suit. The amount of security amounting to Rs. 55,598/- was wrongly retained by the defendant and, therefore, the plaintiff is entitled for the interest since the date of the suit.

14. The appeal filed by the plaintiff-appellant is, therefore, allowed to this extent that the plaintiff-appellant is entitled to the interest at the rate of 6% per annum on the amount of Rs. 55,598/- from the date of the suit till realization.

15. In the result, the appeal filed by the State S.B. Civil First Appeal No. 112 of 1976 the State of Rajasthan v. Banarst Lal's Legal Representatives and Ors. Is dismissed and the appeal filed by the plaintiff-appellants S.B. Civil First Appeal No. 113 of 1976-Aruna Sachdeva and Ors. v. the State of Rajasthan is partly allowed and the plaintiff-appellants are entitled for the interest at the rate of 6% per annum on the amount of Rs. 55,598/- from the date of the suit till realization. In the facts and circumstances of the case, I leave the parties to bear their own cost.

