IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 440 OF 1995
WITH
CROSS OBJECTION STAMP NO. 26931 of 1995
(Original Plaintiff's Cross Objection)
(In First Appeal No. 440 of 1995)

1] Government of Maharashtra
Through, the Collector, Latur

2] Godawari Marathwada Irrigation
Development Corporation, Aurangabad
Through its Executive Engineer,
Lower Terna Canal Division No.2
Old Ausa Road, Latur.

3] Superintending Engineer,
Majalgaon Project Circle,
Nagar Road, Beed.

4] Executive Engineer,
Lower Terna Canal Division No.2,
Old Ausa Road, Latur **... APPELLANTS**
(Orig.Defendants 1 to 3)

Versus

1] M/s G. Siva Prasad Reddy & Company,
Hyderabad (A.P.) a duly registered
Partnership under the provisions of
Indian Partnership Act, 1932, Through
its partner G. Shiva Prasad Reddy s/o
late G.K. Reddy, age 39 years, Occ. Business,
R/o 120, Srinagar Colony,
Hyderabad [A.P.]

2] The Manager,
United Commercial Bank,
Pushpanjali Complex Kothi,
Hyderabad 500 195. **... RESPONDENTS**
(Orig.Plaintiff & Deft.4)

...

Mr. P.P. More, AGP for appellant No.1

Mr. S.S. Thombre, with Shri S.V. Deshmukh, Advocate for appellant Nos. 2 and 3
Mr. Mukul Kulkarni, Advocate for respondent No.1
Mr. N.V. Jaykumar & Mr.P. Prabhakar, Advocates for respondent. No.2 - Absent.

CORAM : B.P. DHARMADHIKARI &
A.M. BADAR, JJ.

DATE OF RESERVING THE JUDGMENT: 20th DECEMBER, 2014.

DATE OF PRONOUNCEMENT OF JUDGMENT :19/03/2015.

JUDGMENT (PER A.M. BADAR, J.):

1] By this appeal under Section 96 of the Code of Civil Procedure, 1908, appellants – State of Maharashtra alongwith Godavari Marathwada Irrigation Development Corporation, Aurangabad, are challenging the judgment and decree passed by the learned Joint Civil Judge Senior Division, Latur in Special Civil Suit No. 21 of 1993 between the parties on 30.6.1995, thereby partly decreeing the suit filed by respondent No.1 – M/s. Shivprasad Reddy and Company. By the impugned judgment and decree appellants/original defendants 1 to 3 were directed to pay to the plaintiff an amount of Rs. 31,00,703/- with interest @ 15% p.a. from the date of filing of the suit. Defendants were further restrained permanently from invoking the 3 bank guarantees furnished by respondent No.1/original plaintiff which were issued by respondent No.2 (original defendant No.4) bank. Defendant Nos. 1 to 3 were further permanently restrained from deducting or recovering the amount of penalty imposed on respondent No.1/original plaintiff and amount of interest on advances. Defendant Nos.

1 to 3 were directed by the impugned judgment and decree to release 3 bank guarantees furnished by respondent No.1. Counter claim of defendant Nos. 1 to 3 came to be dismissed by the impugned judgment and decree.

2] In this appeal filed by original defendant Nos. 1 to 3, respondent No.1/original plaintiff has filed cross objection thereby challenging the rejection of part of the claim made by him. For the sake of convenience, the parties shall be referred to in their original capacity.

3] Facts leading to the institution of the present appeal, can be summarized thus :-

(a) Original plaintiff/respondent No.1 is duly registered partnership firm carrying on business as a civil contractor. Original defendant No.2/appellant No.3 Executive Engineer, invited tender for the work of “Construction of Balance Earth Work, CC Lining and Structure in Km. 35 to Km. 50 of Lower Terna Left Bank Canal”. Tender submitted by plaintiff M/s. G. Shivprasad Reddy and company, for Rs. 2,36,32,101/- came to be accepted and on 24.2.1989, work order came to be issued in his favour. In terms of this work order, the work was to be completed within 30 months i.e. on or before 23.8.1991. The plaintiff furnished bank guarantee of Rs. 2.16 Lakhs towards Security Deposit apart from two bank guarantees of Rs. 5.4 Lakhs each towards mobilization advances.

(b) It is case of the plaintiff that in terms of the agreement, defendant Nos. 1 to 3 were under obligation to supply Cement, Steel and other material work execution of the work apart from helping him for completion of the tender work. According to plaintiff, during execution of the tender work by him, the Department has committed delay, default and lapses in performance of obligation imposed upon it by the agreement leading to adversely affecting the progress in work and non-adherence to the programme of work by the plaintiff. Therefore, the plaintiff could not finish the tender work within 30 months from the date of work order i.e. by 23.8.1991. By letter dated 21.2.1992, the plaintiff informed about the delay, lapses and consequential problems caused due to apathy of the Department under Clause 30 of the agreement and sought extension upto 31.8.1993. According to the plaintiff, even the work order was issued on 24.2.1989 i.e. long after commencement of the working season as well as season for importing labourers through piece rated workers. As such, he was constrained to commence the work by diverting labourers from other work on 18.5.1989. During this period, adequate work could not be given to the labourers because of short supply of explosives. Because of abnormal high rain fall from July, 1989 to August, 1989, labour force was required to sit idle. Though in May 1990, stock of cement was not available with the Department, he was asked to concentrate more on slab culvert work in Km. 35 than doing Hume Pipe culvert work in Km. 47, 46 and 37. Machinery deployed at the earth work by the plaintiff required major repairs and, therefore, it was shifted. The plaintiff, therefore, started executing the work with labourers in hard rock patches. Because of shortage of water, alignment work was affected adversely. The plaintiff informed the Department by letter dated 25.5.1990 that arrangement for stepping up and progress in work is made by him.

(c) It is case of the plaintiff that because of heavy rain fall after 18.5.1990 and in week commencing from 21.5.1990, he was forced to re-start foundation work already completed by him as there was accumulation of silt over masonry and concrete. The plaintiff was required to remove the silt, Hume Pipes required re-setting and re-alignment as heavy rains washed away sand and metal. In this way, the plaintiff suffered huge loss because of re-doing the work. In this backdrop, defendant No.3 Executive Engineer, issued a communication informing the plaintiff that progress of the work is unsatisfactory and as per clause 2 of part (ii) of the agreement, penalty/compensation @ Rs. 200 per day shall be imposed from 1.7.1990 for slow work. The plaintiff objected to imposition of penalty by his letter dated 31.7.1990 informing that the work suffered due to defaults and breaches committed by the Department. According to the plaintiff, Department deported piece rated workers summoned by him causing set back in progress of the work. On 27.7.1990, the Executive Engineer informed the plaintiff that he has not paid wages as per Minimum Wages Act, 1948 to the workers and asked the plaintiff to remit an amount of Rs. 10,35,848/- towards the difference of wages. On 19.7.1990, the District Collector, Latur took action under the Contract Labour (Regulation and abolition) Act 1970, and this alleged action regarding bonded labourer caused disruption in contract work, thereby causing loss of Rs.17,65,000/- to the plaintiff.

(d) According to the plaintiff, on 4.8.1990, defendant No.3 Executive Engineer threatened that penalty of Rs. 200 per day will be enhanced to higher amount. The plaintiff objected by replying that he deployed machinery for earth work excavation but final excavation to streamlining canal section to designed line and level had to be done by labourers only. The Plaintiff also informed that main item of cement concrete lining has to be done by labourers but the Department allowed Revenue Department to deport piece rated work during peak working season because of complaint by local leader. This according to the plaintiff, had hampered the work and, therefore, he is not responsible for short-fall in the tendered work.

(e) According to the plaintiff, by letter dated 20.11.1990, he informed the Department that he has made arrangement to shift machinery to work site and he is mobilizing the labour force for resumption of work on 1.12.1990. He requested the Department for ensuring supply of 20000 liters of Diesel per month i.e. 600 liter per day for maintaining continuous progress of the work. He informed the Department that on confirmation, he will shift machinery to the work site and resume work on 1.12.1990.

(f) According to the plaintiff, as informed by him vide letter dated 20.12.1990 to the Department due to heavy rains in 1990 and particularly, after 18.5.1990, finished canal slopes were completely damaged and slope culvert silted up to the top. Hume pipes were lifted up and 38 Hume Pipes were washed away. Therefore, he requested to make payment for de-silting and repairs as well as for reimbursement of losses suffered by him.

(g) It is case of plaintiff that defendant No.3 Executive Engineer, vide communication dated 6.12.1990 threatened to withdraw earth work as per clause 4 r/w. Clause 3(b) of the agreement, requiring plaintiff to inform vide letter dated 30.12.1990 that the work suffered due to deportation of labourers. He requested the Department to make available diesel in order to shift machinery to the work site as there was acute shortage of diesel.

(h) The Plaintiff by letter dated 8.2.1992 informed defendant No.3 Executive Engineer that outstanding amount of Rs. 2 Lakhs towards interest against mobilization advance which is required to be recovered from RA Bills, be deducted in 3 installments. The Plaintiff further informed on 15.2.1991 that due to default and lapses by the Department, he could work only for 3 months from issuance of the work order as it was issued at inappropriate time and as there was heavy rainfall. He pointed out acute shortage of cement and deportation of labourers as causes for delay in execution of the work.

(i) According to the plaintiff, in third season i.e. in the year 1991, he could not deploy labourers due to action by the District Collector, alleging problem of bonded labourer. Scarcity of petroleum product and diesel required him to bear idle charges of machinery. On 19.3.1991, Defendant No.3 Executive Engineer, informed him that work of 3 structures- aquaduct RD 39393, RD 44520 and Slab Culvert at RD 42210 are withdrawn under clause 4 and clause 3(c) of the agreement.

(j) According to plaintiff on 18.4.1991, he informed the Department that material available from Km. 44 to 46 for bed filling in Km 45 is used up. Soil is exhausted and, therefore, material from long distance is required to be brought. Despite incurring extra lead, he is being paid Rs. 13.51 per Cum only. Similarly, he informed vide communication dated 14.4.1991 that work of bed filling in Km. 45 became standstill for want of soil. Non availability of soil in specified quarries/borrow area caused interruption and retardation of progress in work. Working of machinery is stopped for want of diesel and oil requiring payment of idle charges by the plaintiff. It was further informed that plaintiff is required to purchase diesel at higher rates causing huge losses. According to the plaintiff, in such circumstances, the penalty ought to have been waived by the Department but by letter dated 29.4.1991, he was informed that the penalty will not be waived.

(k) According to the plaintiff, on 18.7.1991, he informed the

Department that embankment work was stopped long back for want of banking soil. Excavation of canal, formation of embankment in Km. 43 came to standstill due to court action by villagers. He informed that work of embankment in Km. 36 cannot be done for want of hearting soil. As such, after completion of embankment in Km. 35 the machinery was rendered idle. The plaintiff, therefore, requested for waiver of penalty.

(l) It is case of the plaintiff that difficulty in mobilizing the imported labour due to inappropriate timing of issuance of work order, non-availability of cement, deporting the labourers by treating them as bonded labour and scarcity of diesel and oil due to Gulf Crisis, caused delay in completion of the work. However, in the wake of these reasons, Defendant No.3 Executive Engineer, vide communication dated 2.1.1992 informed the plaintiff that there is no option but to increase the compensation payable by him from Rs. 200 per day to Rs. 1500 per day. The plaintiff, therefore, vide communication dated 12.1.1992 informed the Department that work of embankment in between Km. 45 and 36 is stopped for want of hearting soil and in Km. no. 34 due to court action by villagers of Jewari village. He further informed that machinery cannot be deployed as quarries were not settled by the Department. Because of scarcity of water, progress of culvert in Km. 35 and HPC in Km. 37 is not up to the mark. He informed that Terna river is completely dry and local wells are also drying up.

(m) According to the plaintiff, as per the agreement, he is entitled for escalation in cost for work done beyond initial period of 12 months.

Govt. Resolution dated 10.1.1992 issued by the Public Works Department provides for payment of special relief by way of escalation in respect of contract in force as on 15.10.1990. Though the plaintiff requested for payment towards escalation charges and special relief, he was not paid the same.

(n) According to the plaintiff, on 4.2.1992, he was asked to transport/convey hearting material from the side borrow of canal in km. 49 to bank work of Km. 45 and to submit rate analysis. He submitted the same. However, on 19.2.1992, defendant No.3 Executive Engineer, informed the plaintiff that there is no alternative but to propose compensation of Rs. 1,500 per day. The plaintiff, by letter dated 18.3.1992, informed reasons for short fall in work. No hearting material was made available. There was scarcity of water, slab culvert work was directed to be abandoned and he was asked to take up work of small structures like HPC. According to the plaintiff, it became extremely difficult for him to execute the work under unfavourable conditions and non cooperation from the Department. The quoted rates became unworkable due to rise in prices. Quarries for embankment for km. 45 were not settled and because of court orders work in km. 43 was stopped. Still, by letter dated 18.5.1992, defendant No.3 Executive Engineer informed that as per clause 2 of the tender document, he is compelled to take action of increasing compensation from Rs. 200 per day to Rs. 2,000 per day w.e.f. 1.6.1992. The plaintiff replied by attributing delay, default and lapses to the Department. According to the plaintiff, in the working season of the year 1992, he could not continue work due to drought condition. There was scarcity of water for execution of the work. Even drinking water was not available.

(o) The plaintiff contended that, there was meeting of the plaintiff with defendant No.2 Superintendent Engineer on 20.6.1992 and on 25.6.1992 minutes of the meeting were informed to him and it was mentioned that all claims of extra rates claimed by the plaintiff were rejected. The plaintiff then, by letter dated 16.7.1992 informed that he is eager to resume work in last week of October, 1992. On 24.7.1992, Defendant No.3 informed the bankers regarding invoking 3 bank guarantees submitted by the plaintiff. By letter dated 7.9.1992, defendant No.3 informed the plaintiff that if structures costing Rs. 38,01,400/- are not tackled within 10 days, same shall be withdrawn as per clause 4 and 3(c) of the agreement. The plaintiff by letter dated 26.9.1992 informed that he will resume the work after monsoon break by 10.10.1992 and will commence earth work by December, 1992. However, by letter dated 29.9.1992, defendant No.3 Executive Engineer informed that the work of structures costing Rs. 38,01,400/- is withdrawn from him. The plaintiff as such was required to defer deployment of labour causing heavy loss to him. The defendant department then on 23.10.1992 informed the plaintiff that all works are not withdrawn from him. The plaintiff thereafter, vide letter dated 31.10.1992, communicated to the Department that it is not clear whether order withdrawing work of the structure is cancelled or not.

(p) According to plaintiff, due to these reasons as well as because of defaults, lapses and breach of contract, he is entitled for the following amounts from defendants :-

A] Compensation for the losses of Profit and overhead suffered as on 23.8.1991 :-

The plaintiff contends that he could not complete the work on or before 23.8.1991 i.e. within the contract period due to the delays, defaults, lapses and breach of contract committed by the Department and suffered loss or profit and overheads to the tune of Rs. 76,59,409/- calculated as under:-

Particulars :-		**Amount (Rs.)**
1.	Contract Sum	2,36,32,101/-
2.	Prime cost	1,89,05,681/-
3.	Overheads and profits @20%	47,26,420/-
4.	Period of completion as per agreement.	30 Months.
5.	Value of work done within the stipulated period	41,58,743/-
6.	Pro-rata overheads and profit received/receivable during	

	the stipulated period Items $\frac{(3) \times (5)}{(1)}$ $= \frac{\text{Rs.}47{,}26{,}420 \times 41{,}58{,}743}{\text{Rs.}2{,}36{,}32{,}101}$ = Rs.8,31,749/-	8,31,749/-
7.	Net loss suffered as on the date stipulated for completion Item (3) – (6) = Rs.47,26,420/- (-)Rs.8,31,749/- = Rs.38,94,671/-	38,94,671/-
8.	Rate of overheads and profit per month Item $\frac{(3)}{(4)}$ $= \frac{\text{Rs.}47{,}26{,}420/-}{30}$ = 1,57,547/-	1,57,547/-
9.	Period of delay in months i.e upto 31.8.1993	24 Months & 8 days.
10.	Amount of pro-rata profit and overheads due for the extended period. Item (8) X (9) $= \text{Rs.}1{,}57{,}547/- \times 26\,\frac{8}{31}$ = Rs.38,21,785/-	38,21,785/-
11.	Value of work to be done in the extended period.	

	- Item (1) – (5) = Rs.2,36,32,101/- = (-) Rs.41,58,743/- = Rs. 1,94,73,358	1,94,73,358/-
12.	Amount of work so far done in the extended period	2,85,236/-
13.	Amount of pro-rata received Items $\frac{(3)}{(1)}$ x (12) =Rs.47,26,420 X Rs.2,85,236 Rs.2,36,32,101/- = Rs. 57,047/-	57,047/-
14.	Net loss suffered during extended period = Items (10) – (13) = Rs. 38,21,785/- (-) Rs. 57,047/- = Rs. 37,64,738/-	37,64,738/-
15.	Total loss of profit and overheads @10% each item (7) + (14) = Rs.38,94,671/- + Rs.37,64,738/- = Rs.76,59,409/-	76,59,409/-

B] Compensation for loss due to reduced productivity, Idle labour and Idle machinery as under :-

According to the plaintiff, he suffered loss due to reduced productivity, idle labour and idle machinery due to non completion of work within the stipulated period to the tune of Rs.68,18,419/- as under :-

Particulars :-	Amount (Rs.)
The labour and machinery equipment were adequate enough to give a turnover of Rs.2,36,32,101/- in 30 months. However, actual turnover was Rs.41,58,743/- due to reasons as stated above. Thus, percentage reduction in the productivity is 82.40%. The component of labour and machinery in the over all cost is 40%. Thus the loss suffered is 82.40% X 40% X Rs.1,94,73,358/- = Rs. 64,18,429/-	64,18,419/-
Rs.	64,18,419/-

C] The plaintiff further claimed compensation by way of revision of rates for the balance work to be carried beyond 23.8.1991 amounting to Rs. 16,04,084/-. According to the plaintiff, he is entitled to this amount calculated @ 40% extra over the original tendered rates.

D] The plaintiff further claimed Rs. 17,65,000/- towards loss suffered because of deportation of imported labour during working season. The plaintiff further claimed waiver of levy of penalty of Rs. 200/- per day w.e.f. 1.7.1990 and refund of amount of Rs. 1,21,800/-

as well as waiver of enhanced penalty of Rs. 2000/- per day w.e.f 1.6.1992. The plaintiff further claimed Rs. 2,20,000/- towards price escalation charges by contending that he is not responsible for delay in execution of work and as per the agreement provision for work done beyond 12 months from the date of issuance of work order, he is entitled for price escalation. The plaintiff claimed further amount of Rs. 2 Lakhs towards special relief as per the Govt. Resolution dated 10.1.1992 by way of enhanced escalation in respect of the contract. He also prayed for decree of Rs. 1,04,290/- on account of waiver of interest charge and postponement of recovery of installment for the advances. The plaintiff thus laid total claim for following amounts :-

1.	Compensation for losses of profit and overheads suffered as on 23.8.1991.	Rs.76,59,409/-
2.	Compensation for loss due to reduced productivity, idle labour and idle machinery.	Rs.64,18,419/-
3.	Compensation by way of revision of rates for the balance work to be carried out beyond 23.8.1991	Rs.76,04,084/-
4.	Compensation for the loss incurred due to deportation of imported labour during working season of 1990.	Rs.17,65,000/-

5.	Payment due to price escalation.	Rs.2,20,000/-
6.	Payment of special relief.	Rs.2,00,000/-
7.	Interest on advances.	Rs.1,04,290/-
8.	Levy of compensation/penalty	Rs.1,21,800/-
	Total :	Rs.2,40,93,002/-

Apart from the decree for Rs. 2,40,93,002, the plaintiff prayed for injunction restraining defendant Nos. 1 to 3 from invoking 3 bank guarantees furnished by him and for injunction restraining defendants from recovering any further amount from him towards penalty.

4] Defendant Nos. 1 to 3 opposed the claim by filing written statement at Exhibit 46. They denied each and every adverse averment as well as claims made against them. Defendants admitted acceptance of tender of the plaintiff on 28.1.1989. According to defendants, plaintiff furnished security deposit on 24.2.1989 and on the very same day, the work order was issued to him. The plaintiff himself took the period of about 1 month to furnish the security deposit. Thereafter, the plaintiff took period of about 2 and half months for starting the work. He started work on 18.5.1989 with only 135 labourers. The plaintiff did not bring machinery mentioned in Proforma “C” to the agreement. The plaintiff brought one hired poclain and 4 tippers on 25.11.1989. However, he shifted that machinery on 5.4.1990 without substituting the same. Defendant submitted that, the plaintiff never utilized full working season by commencing work in September/October. Defendants submitted that, as per the tender quantity of Earth work to be executed was 508 TM^3 in 30 calender months according to the programme submitted by the plaintiff, but he has actually executed the Earth work as under:-

Period	Commulative quantity to be executed as per tender programme	Actual commulative quantity executed by plaintiff	Remarks
1.	**2.**	**3.**	**4.**
1/4 period upto 10/89	127 TM^3	12 TM^3	Detail comparative statement of quantity of work to be executed and actually executed is attached for ready reference as statement No. I
1/2 period upto 5/90	380 TM^3	88 TM^3	
3/4 period upto 12/90	472 TM^3	104 TM^3	
Full time upto 8/91			

5] Defendants gave year-wise details of work performed by the plaintiff as well as labour and machinery deployed by him in order to demonstrate that he never employed more than 160 labourers and with that strength he could do maximum work costing Rs. 24 Lakhs as against the tendered work costing Rs. 236 Lakhs as under:-

YEAR WISE DETAILS

Working	Working Period Work started by the agency	Work closed (Temporary) by the agency	Labour and machinery deployed
Ist	18-5-89	8/89	135 labours (Approx)
IInd	12/89	7/90	140 labours approx and one hired poclain which was shifted from site in April 1990.
IIIrd	12/90	6/91	No labours. Work executed with one poclain.
IVth	11/91	29-4-92	100 labours (imported) + 60 labours (Local) and no machinery

6] According to defendants, as per clause 2 of the agreement, if the work is not done or if the same is not as per the agreed programme, then defendants are entitled to levy compensation and, therefore, compensation of Rs. 200/- per day was levied on the plaintiff w.e.f. 1.7.1990. This was done as the work was not done by the contractor as per the scheduled programme and his progress of work was very poor.

7] According to defendants in his programme, the plaintiff has not shown any work to be done in July, August, and September, i.e. in rainy season. He has worked only in mid May 1989 and that too without machinery and with 135 labourers. Hence, defendants by letter dated 20.8.1989 informed the plaintiff that his progress of work is very poor and the plaintiff accepted this fact by his letter dated 4.10.1989. On 9.12.1989, the plaintiff informed that he will bring 200 labourers as well as machinery for earth work, lining and structure. However, till last week of February, 1990, the plaintiff has not started work of single structure out of 19 structures allotted to him. He informed by letters dated 22.2.1990 and 13.3.1990 that earth work of 212 TM^3 was required to be performed by him before June, 1990. However the plaintiff has performed work only to the extent of 52.8 TM^3. The plaintiff was informed that he had not started the work of Aquaduct 39393 meter, HPC at RD 35520 Meters, DHPC 38100 meters and C.T. cum/SP 35995 meters and CTB 34240 meters. The plaintiff had not collected construction material like sand, rubble and metal for slab culvert at RD 34615m and other structures. Progress of masonry work after execution of foundation was also found to be very slow. Prior to rainy season, it was necessary to bring the masonry work to safe level. Therefore, the plaintiff was asked to concentrate on slab culvert so that there shall not be silting of foundation. However, the plaintiff did not concentrate on work and in rainy season, there was silting of foundation requiring defendants to pay to the plaintiff charges for de-silting.

8] According to defendants, on 11.5.1990, the plaintiff informed that local masons are not available. As such, question of skilled labourers remaining idle does not arise.

9] Defendants contended that as per clause 1.1.7 of the agreement, the plaintiff was required to make his own arrangement for water. He ought to have completed work of big structures like aquaduct, slab culvert etc. It is contended that as per para.1.10.0 of the agreement, not later than end of February, the plaintiff was required to furnish estimate of annual requirement of cement from quarterly period from October. He is supposed to furnish indent of monthly requirement at least 3 months in advance. However, the plaintiff never gave such requirement. Still, the Department supplied cement in adequate quantity to him. According to defendants, in April, 1990, the plaintiff was having 1250 bags of cement in balance. In May, 1990, the Department issued 1575 bags of cement out of which only 795 were consumed. In August, 1990, remaining 973 bags were taken back by the Department as the same were not consumed. Therefore, according to defendant, there was no short supply of cement to the plaintiff.

10] According to the plaintiff, part 3 of the contract agreement shows Terna as a source of water. From April to May 1990, ample water was available in the said river. As per clause 1.1.7 of the agreement, the plaintiff was to make his own arrangement for water.

11] Defendants submitted that the plaintiff had done only 17.59% work as on August 1991 with the aid of the following chart :-

Working	As per programme of work given by contractor (Rs. In Lacks)	Actual work done by contractor (Rs. In Lacks)	% achievement
I) May 89 to Oct 09	24.51	14.37	40%
II) Nov 89 to Dec 89	20.10		
III) Jan.90 to June 90	75.46	7.38	10%
IV) July 90 to Aug 91 (end of tender period	95.75	16.22	16.99%
Total :	215.82	37.98	17.59%

12] According to defendants, part 1.1.2 of the agreement deals with climatic conditions so also clause No. 1.6.0. By these clauses, it was informed that rainy season lasts from June up to mid October apart from few sporadic Pre and Post Monsoon Showers which could be quite heavy. According to defendants, rain never disturbed Hume Pipe and the plaintiff was well informed about climatic condition.

13] Defendants further contended that the plaintiff imported 140 labourers from Andhra Pradesh. As per clauses 50,51,53 of the agreement, as well as by letter dated 19.12.1989 the plaintiff was informed that he would be responsible for the consequences arising due to failure to get requisite licence for engaging labourers. It was duty of the plaintiff to pay minimum wages to the labourers and to follow the labour laws. However, as the plaintiff failed to comply, the District Magistrate, Latur took action as per the provisions of the Contract Labour (Regulation and Abolition) Act, 1971. As per clause 1.1.3, it was for the contractor to make enquiry about the availability of labourer or to import them by following labour laws. Therefore, according to defendants, they are not liable for claim of Rs. 17,65,000/- made on this count. Defendants submitted that on 22.12.1990, plaintiff resumed the work with only 23 labourers as well as one Poclain machine.

14] According to defendants, as per clause 1.5.1. of the agreement it was for the contractor to install pump for supply of diesel and oil. Diesel was not to be supplied necessarily by the Department. There was no shortage of diesel or oil. Even plaintiff never demanded diesel or oil. The Department helped the plaintiff by supplying 10200 liter diesel and 16 liter engine oil from 19.1.1991 to 17.6.1991. Similarly, according to defendants, the Department was not under obligation to supply explosives to the plaintiff and the quantity or rates for explosives were not even incorporated in Schedule A.

15] Defendants further contended that on 21.4.1990, work of foundation of concrete slab culvert at Km 34615 was over. The plaintiff ought to have done masonry work upto nala level. Because of non execution of this work, silt accumulated. In April 1990, the plaintiff started excavation of DHPC at RD 4796m. However, bank work was not completed and nala regradation was not done. According to defendants, RCC pipes and collers given to him on 7.3.1990 ought to have protected by the plaintiff. On 11.5.1990, the plaintiff was asked to deploy machinery but he did not comply.

16] Defendants submitted that, as the work of Acqua-duct slab culvert at RD 35615m, 42210m and 44520m was not started by the plaintiff by end of February, 1991, notice for withdrawal of structure was given to him on 19.3.1990. The plaintiff again promised that the work will be expedited and expected target will be achieved. However, the plaintiff never achieved desired progress in work.

17] Defendants submitted that for bank work of Km.45 hearting material was proposed from borrow area with 1 Km lead from Survey 33 of Village Jewari and casing material was proposed from direct utilization. Borrow area and quarry from Survey No. 24 of village Jewari. When the land owner of Survey No.33 of village Jewari did not consent, the Field Officer allowed the plaintiff to use mixed material for bed filling work from Km. 46 to 44. The plaintiff never operated quarry from Survey 24 of village Jewari as proposed in Part III of agreement though same was available from very beginning. The plaintiff could not achieve progress of more than 20% though the tender period was over by August 1991. Lot of cutting work was to be done in Km. 35 to 50. Because of short fall in progress of work, waiver of penalty was not possible. Even required quantity of hearting material was available at side borrow areas of Km. 35. As such, question of suffering of the work of embankment in Km. 36 for want of hearting material site does not arise. The plaintiff never tried to complete the balance work of 35 km. His machinery was not idle for want of hearting material. Only work of embankment in Km. 43 to the extent 50M length was stayed. However that cannot be an excuse for the plaintiff for not doing work in other reaches.

18] Defendants submitted that there was no shortage of water. The plaintiff did not make use of dry spell from July 1991 to March 1992 though there was ample material available. After March 1992 also, water was intermittently let out in Terna river from Terna Reservoir. Site inspection dated 11.1.1992 and 30.1.1992 shows that water was available in bed of river.

19] Defendants submitted that the plaintiff has completely stopped work from 29.4.1992. Mobilization advance of Rs. 10.80 Lakhs was given to him against bank guarantees and the plaintiff requested not to recover it from running bills. After 29.4.1992, the plaintiff started shifting agreement from the side. Hence, action for encashment of bank guarantee was required to be taken. Defendants submitted that as per letter dated 23.10.1992, plaintiff could have started work of the incomplete structures tackled by him apart from earth work. However, he never started this work though promised by him. Defendants submitted that as the plaintiff himself had not taken care to complete the work within time, he is not entitled for loss of profit and other heads. He never deployed machinery as indicated in the tender agreement. The work was started with insufficient labour and there was no idling of labour. As such, according to defendants, the plaintiff is not entitled for compensation on this count. Because of slow progress of work, the plaintiff is not entitled for revision of rates for the balance work. It was for the plaintiff to comply with legal formalities regarding imported labour. Hence, defendants denied the liability on this count. Similarly, defendants denied that the plaintiff is entitled for waiver of penalty or refund of the amount recovered as penalty. Defendants contended that because of delay in execution of work by the plaintiff, he is not entitled to claim price escalation for the work done beyond 12 months from the date of issuance of the work order. Defendants denied that the plaintiff is entitled for special relief as per Govt. Resolution dated 10.1.1992. Defendants contended that the amount of mobilization advance alongwith interest was recoverable from the plaintiff, as the same was not deducted from his RA bills. With this, defendants prayed for dismissal of the suit.

20] Defendants lodged counter claim against the plaintiff and prayed for decree on various counts. According to defendants, the plaintiff is liable to pay Rs. 10,80,000/- towards mobilization advance, Rs. 3,50,553/- towards interest on mobilization advance, Rs.2,16,000/- towards forfeiture of Earnest Money Deposit due to failure to perform the contract. The plaintiff is further liable to pay Rs. 5,20,237/- towards the execution of the work of structures withdrawn from the plaintiff, as the cost of getting this work done is increased by that amount. Defendants claimed that, the plaintiff is further liable to pay Rs. 2,40, 487/- towards penalty/compensation as per the tender agreement. Defendants claimed Rs. 29,165/- towards shortage in material supplied to the plaintiff by contending that there was shortage in collers and steel supplied to the plaintiff. An Amount of Rs. 5,84,400/- was claimed towards loss of irrigation potential . An amount of Rs. 58,50,750/- was claimed by defendants towards 43% increase in cost of original tender regarding balance earth work and other remaining work, not performed by the plaintiff. An amount of Rs.12,30,000/- was claimed towards re-advertisement/cost of preparation of tender document, overhead charges etc. An amount of Rs. 10,35,848/- was claimed towards pending claim in Labour Court. Thus, defendants prayed for decree of Rs. 1,11,37,440/- against defendants.

21] Counter claim of defendants was opposed by plaintiff by filing written statement At Exhibit 56 by denying each and every averment. The plaintiff contended that the Department is not entitled to claim any damages and the counter claim is totally false. The work cannot be completed because of delay, non-cooperation and obstruction of defendants. Bank guarantee is already revoked and the amount is claimed by the Department from the banker of defendants. Calculation of interest is not correct. As the plaintiff is not liable to make payment of amount of bank guarantee, he cannot be held liable to pay interest thereon. Plaintiff contended that, Earnest Money cannot be forfeited as there was no fault or act of commission or omission by the plaintiff. The plaintiff contended that he cannot be held liable for alleged difference in costs of the withdrawn structures as withdrawal was unreasonable, unlawful and illegal. The contract was neither cancelled nor terminated at any time. The claim is made on hypothetical basis. According to the plaintiff, defendants are not entitled to claim any amount under the head "Compensation on account of slow progress and non-adherence to the schedule of the programme of work". Compensation claimed at Rs. 200/-, 2000/- and 300/- per day is illegal. The plaintiff is not liable to make payment for the claim in respect of collar and steel as alleged. The plaintiff further contended that work of the entire canal was not complete and unless the canal work is fully completed, with all branches and minors, irrigation potential cannot be achieved. Hence, the plaintiff is not liable for any payment on that count to the defendants. The claim on account of 43% increased cost of the rates over the original tender rates also came to be denied by the plaintiff by contending that the same is hypothetical. The Department has not actually incurred any loss on that count. The plaintiff further denied the counter claim on account of cost of advertising and overhead charges. According to the plaintiff, during pendency of the claim before the Labour Court, defendants cannot make any claim for future apprehended liability. The plaintiff denied total claim of Rs. 1,11,37,440/- made by defendants and prayed for dismissal of the counter claim.

22] Considering rival pleadings, the learned trial court framed issued at Exhibit 57 and we deem it necessary to reproduce the same alongwith the findings recorded thereon by the learned trial court, which read thus :-

Sr. No.	Issues	Findings
1.	Whether the plaintiff's suit is bad for want or notice on the defendants U/s 80 of C.P.C.?	Negative
2.	Does the plaintiff proves that it could not complete the work of the contract within the contract period i.e. 30/8/91 due to the delay, defaults, lapses and breach of the contract committed by the defendants/department?	Affirmative
3.	Does the plaintiff proves that it suffered loss of profits and overheads to the tune of Rs.76,59,409/- as particularly stated in plaint para 80/1 of the plaint due to the non-completion of work within the stipulated period?	Plaintiff failed to prove that it suffered the loss of Rs.76,59,409/- towards the loss of profits and overheads, but plaintiff – proves that it suffered the loss

		of Rs.23,63,200/-
4.	Does the plaintiff proves that it suffered loss due to the reduced productivity, idle labour and idle machinery to the tune of Rs.64,18,419/- as stated in plaint para 80/2 due to the non-completion of work within stipulated period?	Negative.
5.	Is plaintiff entitled to claim Rs.76,04,084/- from the defendants as the compensation by way of – revision of rates for the balance work to be carried out from 23/8/91 as stated in plaint para 80/3 ?	Negative.
6.	Does the plaintiff proves that it is entitled for the amount of Rs. 17,65,000/- from the defendants as the compensation for the loss incurred due to the deportation of imported labour during working season 1990, as stated in detail in plaint para 80/4 ?	Negative.
7.	Is plaintiff entitled for waival of levy of penalty of Rs.200/- per day w.e.f. 1/ /90 and refund of amount recovered towards penalty from R.A. Bills to the -- extent of Rs.1,21,800/- and waival of enhanced penalty of Rs.2,000/- per day w.e.f. 1/6/1992 as detailly stated in plaint para 80/5 ?	Affirmative, plaintiff is entitled to recover Rs.2,13,213/- from the defendants towards the amount of the penalty recovered from R.A. Bills.
8.	Is plaintiff entitled to receive the amount of Rs.2,20,000/- from the	

	defendant as the payment due to price escalation as stated in detail in plaint para 80/6 ?	Affirmative.
9.	Is plaintiff entitled to claim Rs.2,00,000/- from the defendants as the payment of special relief as per Government Resolution PWD No. BDG/1091/CR-12/BLDG-2 dtd. 10-1-1992 as stated detailly in plaint para 80/7 ?	Affirmative.
10.	Is plaintiff entitled to claim Rs.1,04,290/- as the waival of interest charged on the advances taken beyond the original agreement period as detailly stated in plaint para 80/8 ?	Affirmative.
11.	Does the plaintiff proves that it is entitled to recover Rs.2,40,002/- from the defendants, as detailly stated in plaint para 83 ?	Plaintiff is entitled to recover the amount of Rs. 31,00,703/-.
12.	Is plaintiff entitled for the permanent injunction as prayed ?	Plaintiff is entitled for the perpetual injunction only in respect of prayer clause 2(i) and not in respect of prayer clause 2(ii) of the plaint.
13.	Do the defendants prove that plaintiff committed breach of the contract and failed to complete the work within contract time ?	Negative.
14.	Do the defendants prove that they are entitled to recover the amount of	

	Rs.10,80,000/- from the plaintiff as the amount of mobilisation advance granted by the defendants on the request of contractor to the plaintiff against the bank guarantees ?	Negative.
15.	Are defendants entitled to recover interest of Rs.14,30,553/- @ Rs.18% p.a. From the plaintiff as mobilisation advance as stated in W.S. Para 89/2 ?	Negative.
16.	Are defendants entitled to Rs.2,16,000/- from the plaintiff as the amount of forfeiture of the Bank guarantees as detailly stated in W.S. Para 89/3 ?	Negative.
17.	Do the defendants prove that they are entitled to recover Rs.5,20,237/- from the plaintiff as the difference in cost price as detailly stated in W.S. Para 89/4 ?	Negative.
18.	Are defendants entitled to receive the compensation of Rs.2,40,483/- from the plaintiff as detailly stated in W.S. Para 89/5 ?	Negative.
19.	Do the defendants prove that they are entitled to recover from the plaintiff Rs.29,165/- as the price of the shortage of material supplied by the Department to the plaintiff, as detailly stated in W.S. Para 89/6 ?	Negative.
20.	Are defendants entitled to recover Rs.5,84,400/- from the plaintiffs due to the loss of income to the Government from June 1992 to 1994 Rs.200/- per	

	hour, due to non-completion of work by the plaintiff within time, as stated in W.S. Para 89/7 ?	Negative.
21.	Are defendants entitled to Rs.58,50,750/- from the plaintiff by way of increased cost for completing the work as detailly stated in W.S. Para 89/8 ?	Negative.
22.	Are defendants entitled to recover from the plaintiff Rs.30,000/- as the loss for preparation of tender document and advertisement, as stated in W.S. Para 89/9 ?	Negative
23.	Are defendants entitled to claim Rs.12,00,000/- from the plaintiff towards salary of staff of one Sub-Division for 2 years, as detailly stated in W.S. Para 89 (9)(ii) ?	Negative
24.	Are defendants entitled to recover Rs.10,35,848/- from the plaintiff by way of reimbursement as the claim filed by the Labour Commissioner in the Labour Court ?	Does not survive.
25.	Whether the Counter Claim of the defendants is within limitation ?	Does not survive.
26.	Doe the defendants prove that they are entitled to recover total amount of Rs.1,11,37,440/- from the plaintiff, as prayed?	Negative.
27.	What order ?	As per order

23] The plaintiff examined himself at Exhibit 138 whereas defendants adduced evidence of Shri Swami, Sub Divisional Officer At Exhibit 228, as well as that of Mr. Govind Kendre, Executive Engineer at Exhibit 322. Both the parties relied on voluminous documentary evidence as well. We have carefully perused the pleadings as well as evidence adduced by the parties.

24] After hearing the parties, the learned trial court by the impugned judgment and decree dated 30.6.1995 was pleased to decree the suit partly by directing defendants to pay to the plaintiff an amount of Rs. 31,00,703/- with interest @ 15% p.a. apart from injuncting defendants from invoking bank guarantee given by banker of the plaintiff and from claiming amount of the bank guarantee so also from deducting or recovering the amount of penalty imposed on the plaintiff as well as amount of interest on the advances. Defendants were directed to release bank guarantees given by defendant No.4 for the plaintiff. The counter claim was dismissed by the impugned judgment and order.

25] We have heard Shri Thombre, learned counsel appearing for the appellant – Godavari Marathwada Irrigation Development Corporation alongwith the learned AGP. On behalf of appellants, it was argued that the impugned judgment and decree is totally perverse. It was contended by the learned counsel for the appellants, that the plaintiff never achieved the designated target of work and was not even able to complete $1/4^{th}$ of the work allotted to him, even after period of the work order was over and further up to 29.4.1992 when he stopped the work. The learned counsel for appellants by pointing out the relevant clauses of the tender agreement, contended that, in fact, time for completion of the contract was essence of contract. The work was to be executed within a period of 30 months from work order dated 24.2.1989. According to the learned counsel for the appellants, there was timely supply of cement in terms of para.1.10.0 of the tender agreement, but the evidence on record shows that the plaintiff could not consume the cement supplied by defendants. It was further argued that the Department was not under obligation to supply explosives and no quality as well as rate of the same were incorporated in Schedule A. According to learned counsel for the appellants, as per the tender agreement, it was for the plaintiff to make his own arrangement for making available water for construction work and Terna river was shown as the source. The learned counsel for the appellants further argued that it was the duty of the plaintiff to comply labour laws while importing labourers and defendants were not at all responsible for illegal conduct of the plaintiff in not following the provisions of law in that regard. By relying upon relevant clauses in the tender agreements, on behalf of the appellants it was argued that it was not the responsibility of the defendants to supply diesel and lubricants to the plaintiff. The learned counsel for the appellants pointed out that second extension was given to the plaintiff by accepting revised programme submitted by him on 22.8.1991 and the plaintiff agree to complete the work by 29.4.1992. After grant of this extension on 22.8.1991, there is no evidence to show that the plaintiff suffered difficulties in execution of the work for the reasons attributable to defendant. Therefore, according to the learned counsel for the appellants, the suit claim ought to have been rejected by the learned trial court by dismissing the suit and by decreeing the counter claim.

26] Per contra, Shri Kulkarni, learned counsel for the respondent/original plaintiff contended that even after filing of the suit, the plaintiff was asked to complete the work. He sought extension up to August, 1993 but nothing was informed to him specifically. Some work was withdrawn but remaining work was with the plaintiff and extension was required due to omissions on the part of defendants. Shri Kulkarni, learned counsel for the respondent further argued that the Department was responsible for delay in supply of cement as well as inadequate supply of cement hampering the work and idling the labour force. There was delay in supply of explosives. It was further argued that 50 m portion was not made available due to prohibitory court order. There was scarcity of water hampering the progress of the work. One arm of the State took action for deportation of labour whereas another arm i.e. defendants did not support the contractor and allowed the situation to go out of control of the contractor. This inaction, according to the plaintiff, has hampered the work. There was frequent threat of withdrawal of work and lack of coordination between Executive Engineer as well as Superintending Engineer. Shri Kulkarni further argued that decision to levy penalty was also illegal and, therefore, the learned trial court has rightly decreed the suit. He further argued that the plaintiff has proved the claims which were rejected or partly allowed by the trial court. Only 10% profit was awarded to the plaintiff, though he was entitled for 20% profit. Shri Kulkarni, learned counsel argues that, extended period cannot be treated as splitting the contract. He further argued that claim as to loss suffered due to reduced productivity was wrongly rejected by the learned trial court. However, Shri Kulkarni, learned counsel for the respondent/original plaintiff fairly accepted the position that there was no evidence for claim regarding revision of rates and price escalation as well as regarding compensation towards loss suffered due to deportation of labourers.

27] Finding of the learned trial Court in Issue no.1 to the effect that suit is not bad for want of statutory notice U/s 80 of the code of Civil Procedure is not challenged by defendants. As the learned trial Court on application of the plaintiff had dispensed with such notice by granting leave to the plaintiff. We see no infirmity in such finding.

28] We propose to consider issues framed by the learned trial court as points for determination and as the issues and evidence thereon is interlinked, we propose to take up those issues together for consideration.

29] At the outset let us examine whether time was essence for performance of this contract and which party to the contract committed breach thereof. The question of whether time is essence of the contract depend to a certain extent upon express stipulation to that effect made by the parties. One has to look at the substance rather than stipulation for determining whether the time was essence of contract. Express words used in the contract, subject matter of the contract, nature of the contract and the surrounding circumstances are relevant for determining whether the parties intended that time should be the essence of the contract. If ultimately it is found that the time was the essence of contract then even if it was extended, the extended date also becomes essence of contract. Let us therefore examine whether by prescribing the period of 30 months for completion of the contract, the parties intended the time to be essence of contract. As the nature and subject matter of contract provides a clue to the intention of parties, let us consider these aspects. The contract was for construction of lower Terna Left Bank Canal and the ancillary works thereof in km 35 to 50. Defendants made it clear in the tender document itself that the work of earthen dam is almost completed & masonry dam is nearing completion. With this, defendants made it clear in clause 8 of the agreement that period of completion of work shall be 30 calender months from the date of issue of notice to proceed with the work. The purpose of fixing he time limit for completion of work can also be found in clause 8.1 of the agreement. This outset time limit seems to have been fixed as Defendant state was keen for creating irrigation potential in the area. The agreement contains provision for furnishing earnest money deposit as well as security deposit for performance of tendered work alongwith provision for its forfeiture in the event of non execution of the work. The agreement also contains a clause for imposing compensation for delay in execution of work with a mention that the time shall be deemed to be essence of contract. True it is that the agreement also contains a clause for extension of time if the contractor is unavoidably hindered in execution of work but that can be done only on finding reasonable grounds for doing the same. Evidence of the plaintiff makes it clear that he was to adhere to the work programme Exhibit-206 and to complete ¼th work in ¼th period and so on. It is clear from Clause 8 and 8.1 of the agreement that public money was involved in the contract of construction of left bank canal of Terna for a public element of creating potential for irrigation in the area. Definite time was fixed for the performance of this contract. The intention of the parties as such was to complete performance of contract within a stipulated time. As such if any party fails to perform this contract at the stipulated time fixed originally and extended subsequently such failure gives the other party a right to avoid the contract. Keeping in mind this position let us examine rival claims of parties to the suit.

30] Controversy involved in the instant suit to a large extent revolves around various clauses of the tender agreement at Exhibit-331. It is not in dispute that the plaintiff was awarded contract for execution of construction of balance earth work, cement concrete lining and structures in Kilometers 35 to 50 on Lower Terna Left Bank Canal, in pursuance to the tender submitted by him which was opened on 25-10-1988. It is clear from the letter dated 24th February 1989 (Exhibit 62) issued by defendant no.3, Executive Engineer, that offer of the plaintiff amounting to Rs. 2,36,32,101 i.e. 9.50 % above the estimated rate came to be accepted by issuing work order on 24-2-1989. It needs to mention here, that letter at Exhibit 62 makes it clear that the plaintiff furnished bank guarantee on 24-2-1989 and on the very same day, the work order came to be issued by converting the tender as an agreement. In the backdrop of this fact, we find no merit in contention of the plaintiff that the work order was issued belatedly and long after commencement of the working season making him difficult to procure labourer for executing work of the working season. Undisputedly, this work was to be finished within 30 months from the date of issuance of work order i.e. on or before 23-8-1991. Similarly, it is not in dispute that the plaintiff started actual work on 18-5-1989. As per his version time of about two months was required for bringing labour, staff and material for commencement of work.

31] It would be apposite to refer elevant clauses in the tender agreement which are material for deciding the controversy involved in the instant suit alongwith evidence adduced of parties. As per Condition No.10 of the tender agreement Exhibit 331, the plaintiff was to deposit earnest money of Rs. 2.16 Lacs and in the event of failure to execute the contract, this earnest money deposited was liable to be forfeited. Clause 8 on page 18 of the tender agreement Exhibit 331 deals with period of completion of work and the relevant portion thereof reads thus :

> "8. Period of Completion :
>
> The period of completion shall be 30 (Thirty) – Calender months from the date of issue of notice to proceed with the work.
>
> 8.1 WITH A VIEW TO CREATE IRRIGATION POTENTIAL BY JUNE 1990.

IT IS OBLIGATORY ON THE PART OF THE CONTRACTOR TO COMPLETE THE EARTHWORK AND STRUCTURES BY GIVING PRIORITIES TO THE WORK AS FOLLOWS:

(i) THE WORK SHOULD BE SO PLANNED AND EXECUTED SO AS TO CREATE UNLINED IRRIGATION POTENTIAL BY JUNE, 1990.

(ii) THE ENTIRE WORK TO BE COMPLETED WITHIN THE SCHEDULE TIME OF (30) THIRTY MONTHS.

(iii) TO ADHERE TO THE ABOVE PROGRAMME THE CONTRACTOR WILL HAVE TO COMPLETE PART LINING WORK DURING CLOSURE PERIOD OF CANAL TOO."

32] The plaintiff had provided details of machinery immediately available with the tenderer for use of this work which forms part of this tender agreement. The plaintiff had agreed to provide two excavators of L & T Poclain make, 2 road rollers of Sayaji make, 12 Tippers, 4 lorries, 2 Crushers, 8 cement concrete mixtures, 3 vibrators, apart from other machinery as seen from proforma 'C' to the tender agreement.

33] Clause 2 of the tender agreement provides for compensation for delay as well as schedule of work and it reads thus :

"<u>CLAUSE – 2</u> :-
<u>Compensation for delay :</u> 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 of which the order to commence work is given to the contractor. The work shall throughout the

stipulated period of the contract, be proceeded with, with all due diligence (time being deemed to be of the essence of the contract on the part of the contractor) and the contractor shall pay a compensation as an amount equal to one percent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide, of 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 work in	** $^1/_4$ of the time
$^1/_2$ of the work in	$^1/_2$ of the time
$^3/_4$ of the work in	$^3/_4$ of the time

** Note : The quantity of work to be done within a particular time to be specified above shall be fixed by the officer competent to accept the contracts after taking into consideration the circumstances of each case and inserted in the blank space kept for the purpose. And abide by the programme of detailed progress laid down by the Executive engineer. The following proportions will usually be found suitable.

	In $^1/_4$, $^1/_2$, $^3/_4$ of the time
Reasonable progress of earth work.	$\frac{4}{10}$ $\frac{7}{10}$ $\frac{9}{10}$ of the total value of the work to be done
Reasonable progress of lining work .	$\frac{0}{10}$ $\frac{2}{10}$ $\frac{5}{10}$ of the total

value of the work to be done

Reasonable progress of structures.	$\frac{5}{10}$ $\frac{7}{10}$ $\frac{9}{10}$ of the total value of the work to be done

In the event of the contractor failing to comply with these conditions he shall be liable to pay as compensation on amount equal to one per cent, or such smaller amounts as the Superintending Engineer (whose decision in writing shall be final) may decide of the said estimated cost of the whole work for every day that the due quantity of work remains incomplete, provided always that the total amount of compensation to be paid under the provisions of this clause shall not exceed 10 per cent of the estimated cost of the work shown in the tender."

In his cross examination, the plaintiff candidly admitted that as per the first work programme Exh.206, he had agreed to complete ¼th work in 1/4th period and so on in order to finish the work in 30 months. However, it needs to be noted here that in this work programme no work is shown for the months of July, August and September as admitted by the plaintiff. It is clear that no work was scheduled by the plaintiff in rainy season but still he is pleading that due to heavy rains his men and machinery were idle.

34] Clause 6 of agreement Exh. 331 deals with extension of time on the ground of work being unavoidably hindered on written application by the contractor. As per Clause 10 (page 69) of the agreement, the contractor is not be entitled to claim enhanced rate for any item under any circumstances. As per Clause 26 of the tender agreement, in the event of contract being rescinded, the security deposit of the contractor shall be liable for forfeiture. Clause 40 of the tender agreement provides that no compensation shall be allowed for any delay caused in start of work on account of any acquisition of land.

35] Clauses 51 and 53 of the tender agreement Exh.331 provides for making arrangement of labourers for execution of work and for complying the provisions of labour laws. Clauses 51 and 53 read thus :

> "CLAUSE - 51 :
>
> The contractor shall make necessary arrangements to get his establishment registered with the Assistant Commissioner of Labour concerned well in advance as required by the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 and Maharashtra Contract Labour (Regulation & Abolition) Rule 1971 and get himself duly licensed. The Contractor will be fully responsible for the consequences arising due to failing in getting so licenced and shall have no ground for any claim therefor.
>
> CLAUSE - 53 :
>
> The contractor shall duly comply with all the provisions of the contractor Labour (Regulation and Abolition Act, 1970) (37 of 1970) and the Maharashtra Contract Labour (Regulation and Abolition) rules 1971 as amended from time to time and all other relevant status and statutory provisions thereof concerning payment of wages particularly to workmen employed by the contractor and working on the site of the work. In particular the contractor shall pay wages to

each worker employed by him on the site of the work at the rates prescribed under the Maharashtra Contract Labour (Regulation and Abolition) Rules, 1971. If the contractor fails or neglect to pay wages at the said rates or makes short payment and the Government makes such payment of wages in full or part thereof less - paid by the contractor as the case may be the amount so paid by the Government to such workers shall be deemed to be arrears of land revenue and the Government shall be entitled to recover the same as such from the contractor or deduct the same from the amount payable by the Government to the contractor hereunder or from any other amount's payable to him by the Government."

The plaintiff has admitted these clauses in his cross examination at para 17. He accepted his liability to pay minimum wages to his labourers. The plaintiff further admitted that the District Magistrate, Latur had held enquiry against him in the cases of bonded labourers and then deported those labourers to their native places. The plaintiff admitted that the District Magistrate held that the labourers brought by him were bonded labourers and he has not challenged the decision of the District Magistrate in any Court. It is thus clear that defendants before the Court had no role in deportation of bonded labourers by the District Magistrate, Latur. It was totally independent action by the competent authority in terms of relevant provisions of the law involved. Consequently it cannot be said that execution of work was hampered for the reason attributable to defendants.

36] As per clause 56, advances to the contractors are recoverable along with the interest thereon. Clause 57 of the agreement Exhibit 331 deals with price variation and provides for it in the event if during operative period of contract, there is variation in the consumer price index (new series) for industrial workers for Aurangabad Centre. Operative period mentioned therein means the period commencing from date of work order issued to the contractor and ending on the date when the time allowed for the work expires including extension, if such extension was not necessitated on account of default of the contractor.

37] Part II of the tender agreement provides Schedule for supply of departmental stores, etc. As per Schedule "A", the Department was liable to supply cement as well as Tor Steel and Copper Plates to the contractor. Condition No.8 of this Schedule "A" provides that explosives like special geletine, detonators and fuse coils will be issued if available at the issue rate of the Division from time to time. However, issue rate and quantity of special geletine, detonators and fuse coils is not prescribed in Schedule "A", meaning thereby, that the Department was not liable, as a matter of course, to supply the explosives. In this regard in para 19 of his cross examination, the plaintiff has candidly admitted that the material of which quantity and price is mentioned in the schedule was to be supplied by the department. He further admitted that no quantity and price of the explosive material is mentioned in the schedule. The plaintiff has not even adduced any evidence to show that he had placed an indent or requirement for supply of explosives and admitted that he is not having copies of any indents for explosives.

38] As per Clause 1.0.0 of the General Specification, the contractor was presumed to have informed himself about local conditions, including whether availability of labour, water, etc. Clauses 1.1.0, 1.1.2. 1.1.3 and 1.1.7 are relevant as they deal with availability of labour, water and climatic condition. They read thus :

> "1.1.0 Work and Site Conditions :
>
> "It shall be presumed that the Contractor has fully informed himself as to the nature and locations of works, general and local conditions and particularly those having bearing on approaches to the site, location of stone and sand quarries, availability and transport of material, tools and plants, machinery disposal areas, availability of labour weather conditions and river stages etc. and has estimated his cost accordingly. Government will bear no responsibility for any lack of such acquaintance with site conditions on the part of the contractor or and the consequences thereof to the Contractor. The information and data about site conditions shown in the drawings and mentioned herein is furnished as a rough guide only but Government will not be responsible for the accuracy thereof or for any deductions, interpretations and conclusions drawn there from by the Government."
>
> 1.1.2 Climatic Conditions :
>
> The work site is situated in medium rainfall zone at elevation ranging from R.L. 580 meters to R.L. 600 meters above M.S.L. The rainy season normally commences from about early June and lasts upto middle of October. A few sporadic pre-monsoon and post monsoon showers, however, cannot be ruled out and some of

these can be quite heavy. The annual rainfall in the region normally varies from 69 cms. to 80 cms.

1.1.3 Labour Availability :

Some local unskilled labour may be available during non-agricultural season but skilled labour may not be available. Contractor must however make his own enquiries.

1.1.7 Water Supply :

The contractor will have to make his own arrangements for the water supply required for his work, staff and labour. He will have to provide all arrangement for making water potable and safe for drinking by his staff, labourers and other dependent on contractor's services. Disinfection of all drinking water by – chlorination will be obligatory.

Fresh and potable drinking water shall be made available by the contractor to all persons working at work spots in clean and hygienic earthen or other pots at all working places and in sufficient quantity.

The source of water is River Terna shown in Drawing No.3 para – III of Tender Documents, The water supply arrangements will be through a pipe line to be provided by the contractor."

39] Clauses 1.5.0 and 1.5.1 of the agreement Exh. 331 deals with Petrol Oil and Lubricants and reads thus :-

"1.5.0 Materials :

1.5.1 Petrol, Oil and Lubricants :

The contractor shall have to install his own supply pumps for petrol and diesel at the site. The location of pumps for petrol and diesel at the site. The location of pumps shall have to be got approved from the Engineer-in-charge and usual precautions which are necessary for such installation will have to be taken."

In this regard, in para 19 of his cross examination, the plaintiff has candidly accepted that it was not obligatory for the department to supply diesel to the plaintiff. His cross examination makes it clear that defendants helped him in procuring diesel & Oil by informing the petrol pumps at Killari, Latur and Nilanga. The plaintiff accepted in his cross examination that defendants, by writing letters to the Collector, Latur and Indian Oil Corporation, Nagpur, requested those authorities to supply diesel him. He further admitted that even the department also supplied diesel and oil to him from time to time. He further admitted that the department supplied diesel and oil to him from time to time without there being any obligation for the same.

40] Clause 1.10.0 of agreement Exh.331 deals with supply of cement and relevant portion thereof reads thus :

"1.10.0 Material (Cement) :

The Contractor shall not later than the end of February of each year, submit an estimate of his annual requirement of cement by quarterly periods from October onwards and shall place form indents of his monthly requirements at least 3 months in advance of planned use or as may otherwise be stipulated and in the mode and form as may be directed by the Engineer-in-charge. The Contractor shall be responsible for all consequences arising out of his failure to comply with these requirements and any procedure that may be laid down therefor.

The contractor shall indent his requirements so as to assure utilization of cement within 60 days after the receipt thereof."

The Plaintiff in his cross examination at para 21 has accepted this condition in respect of supply of cement. He admitted that not later than the end of February of each year, he was supposed to submit an estimate of his annual requirement of cement. The plaintiff accepted the fact that he had not submitted his requirement of cement to the department. The plaintiff stated that he is not aware as to whether he had submitted the indent for supply of cement to the department. According to the version of the plaintiff he had not sent the requisition for cement to the department. The plaintiff accepted in cross examination that his grievance is that there was short supply of cement in April 1990. However, the plaintiff admitted that, he received cement on 30/4/1990 and in May 1990 vide receipts at Exhibit 205 to 215 issued by his representative. The plaintiff further admitted that in May 1990, 1575 bogs of cement were available with him and ultimately 595 bags of cement were withdrawn by the department from him. The plaintiff stated that he is not aware as to on what dates the work was held up for want of cement. Though the plaintiff admitted that he was required to maintain Material Site Account Register, he accepted the fact that the same is not produced by him in the court. In this backdrop if the plaintiff was really in need of cement, he ought to have submitted indent for the same as per tender condition. He could have produced the relevant register to show that stock of cement with him was nil and therefore he was not in a position to undertake work. The plaintiff could have pointed out definite situations to demonstrate need of cement. The plaintiff was supposed to adduce cogent evidence by pointing out actual situations prevalent on the site, for example that he had completed digging work, laid foundation murum and therefore he requires cement and the work is held up on that count. If really cement was short in supply then contingency of refunding 595 bags of cement to the department would not have happened. As against this evidence of DW-1 Shri Swami, Divisional Officer shows that cement in adequate quantity was supplied to the plaintiff and ultimately unutilised 595 bags of cement were required to be taken back from him.

41] Undisputedly, the work programme at Exhibit 207 was accepted by both the parties to the suit. This programme at Exhibit 207 dated 23.5.1989 shows how the plaintiff was supposed to execute the work under the contract and to complete it within a period of 30 months ending on 23.8.1991. However, it seen from the evidence on record that the plaintiff was unable to cope up with the work programme at Exhibit 207 for execution of the tendered work of construction of Terna left bank canal in km. 35 to 50. As seen from the evidence of DW-1 Swami, the then Divisional Officer, and the fact which is not disputed by the plaintiff contractor, that the work under the contract started on 18.5.1989 with the help of 1 Poclain machine, few tippers and about 135 imported labourers. As per the version of plaintiff – G. Shiv Prasad Reddy, heavy rains in 1989 caused slowed progress in the work and the same was the reason for slow progress in rest of the years also. In his evidence, the plaintiff attributed delay in work, to shortage of labourers, shortage of material supplied by the Government, shortage of petroleum products due to Gulf War, non payment of escalation charges and other reliefs apart from shortage of water. As against this, it is seen from the evidence of DW-1 Cheniyam Swami that he has taken review of the work done by the plaintiff during the contract period and prepared statement Exhibit 229 showing programme versus the actual work done by the plaintiff. This statement at Exhibit 229 coupled with evidence of DW-1 Swami shows that in 1/4th contract period, the plaintiff had executed work costing only Rs. 2.01 Lakhs, in half of the period of contract the plaintiff executed work costing only Rs. 14 Lakhs, in 3/4th period of contract he had done work costing only Rs. 17 Lakhs and lastly at the end of 30 months period i.e. on 23.8.1989 the plaintiff had executed work costing Rs. 41.90 Lakhs only. In this manner, as seen from the evidence on record that the plaintiff failed to do work costing Rs. 194.42 Lakhs though the contract period expired on 23.8.1991.

42] Reason for this short-fall in work as attributed by DW-1 Swami is to the effect that the plaintiff did not employ enough labourers and had not deployed machinery as mentioned by him in Form “C” of the tender agreement. As per the version of DW-1 Swami, the plaintiff had commenced work with 135 labourers, 1 Poclain machine, 1 Road Roller, one loader and 4 tippers only. On 5.4.1990, the plaintiff removed that machinery. Pleadings of the plaintiff are also reflecting this position. Evidence of DW-1 Swami shows that out of the allotted structures, the plaintiff never tackled 12 structures.

43] On this backdrop, let us examine, the position emerging on record from the documentary evidence adduced by the parties. It is seen from the evidence of both the parties that as the tendered work could not be finished by the due dated of 23.8.1989, there was meeting between the parties at the office of the Superintending Engineer on 8.8.1991. After that meeting, the plaintiff was given extension to complete the work and in pursuance to that extension, the plaintiff had furnished fresh programme (Exh.218) for execution of work for the period from September, 1991 to August, 1993. The plaintiff in his evidence has accepted this fact and his willingness to execute the work as per this fresh programme at Exhibit 218. The letter dated 22.8.1991 (Exhibit 253) of defendant – Superintending Engineer addressed to the Executive Engineer confirms this position. Defendant Superintending Engineer by this letter had informed the Executive Engineer that the plaintiff has given definite programme for speeding up the work and promised to bring the labourers up to 15.11.1991 for speeding up the work and achieving the target. It is thus clear that by furnishing fresh programme in pursuance to the extension, the plaintiff had shown his willingness to completing the work entrusted to him.

44] Now, we will have to concentrate on what is the progress of the work and who was at fault by committing lapses in performance of contract after furnishing fresh programme for completing the tender work by the plaintiff contractor. One will have to examine the evidence on record after this extension so as to determine whether because of delay, defaults and lapses on the part of the Department, the plaintiff could not complete the work within extended period, as alleged.

45] At this juncture, it is apposite to have a brief resume of the correspondents of the plaintiff after getting extension for performing the work allotted to him. Vide letter dated 12.1.1992 (Exhibit 178) the plaintiff informed defendant Executive Engineer that the work is suffering mainly because of shortage of water in the area. Incidentally, the plaintiff has also mentioned that the hearting soil is not available and there is stay of the Court for the work in Km. 43. Letter dated 9.3.1992 (Exhibit 181) of the plaintiff shows that availability of hearing material for bank work at Km. 45. However, the plaintiff mentioned that lead is of more than 4 Km. for transporting the material. Vide letter dated 18.3.1992 (Exhibit 182) the plaintiff informed defendant Executive Engineer that the work is suffering because of hike in price of diesel, problem of bonded labourers, scarcity of water, causing idling of labour and machinery. The plaintiff further informed that he is required to continue the work by purchasing water. With all this, the plaintiff showed his intention to abandon the work because of these problems.

46] Intention of the plaintiff to abandon the work despite seeking extension is writ large as seen from his earlier letters dated 22.1.1992 (Exhibit 179), and letter dated 22.2.1992 (Exhibit 139). Both these letters are important for deciding the issues involved in the instant case and the plaintiff has covered his grievance right since inception of the contract in both these letters. By letter dated 22.2.1992 (Exhibit 139) the plaintiff raised several claims against defendants and informed defendants to settle those claims so as to enable him to execute the work in question.

47] In letter dated 22.1.1992 (Exhibit 179) the plaintiff has given reasons for shortfall in the work right from the year 1990 till date. As per the plaintiff's version in this letter, by the time he received the work order imported labours were already deployed by other contractors and, therefore, there was difficulty in mobilizing the labour. He further informed that unskilled local labourers were not available. His machinery was deputed on other work requiring him to hire machinery from other sources. The plaintiff further informed that the hired machinery became unworkable requiring repairs. With this, by letter dated 22.1.1992, the plaintiff further informed that in working season of 1990 small quantity of diesel was available at far away places, machinery was not available, cement was not available and imported labour was deported by the Revenue Department. So far as working season of the year 1991 is concerned, the plaintiff informed that due to uncertainly piece rated labour was demoralized and afraid to join work, local unskilled labour was not available, due to non availability of diesel the machinery could be put to optimum use and for want of suitable borrow area for embankment work in km. 36 to km. 45 machinery could not be deployed. The plaintiff further informed that the work in km. 43 was stopped due to Court order and for want of hearting soil, work in km. 36 could not be completed. With this, the plaintiff further informed that there is acute shortage of water in the area due to which there is slow progress of the work.

48] This letter of the plaintiff was followed by letter dated 22.2.1992 (Exhibit 139) which is in the nature of suit notice to defendants to settle his claims. By this letter Exh.139, the plaintiff contended that there was slow progress of work in first working season due to receipt of work order in mid-working season causing difficulty in mobilising labour, non-availability of explosives, heavy rains, breakdown of machinery, water shortage and non-availability of cement with the Department. So far as second working season i.e. the year 1990 is concerned, in para 25 of this letter, the plaintiff has given reasons for slow progress in the work by contending that the owner of the hired machinery shifted that machinery for carrying out repairs, Revenue Department treated his labourers as bonded labourers and deported them. These, according to the plaintiff, were reasons for slow progress in the work in the year 1990. So far as third working season, i.e. year 1991 is concerned, in para. 26 of the letter (Exhibit 139) the plaintiff informed that because of problem of bonded labour, he could not deploy imported labour and there was scarcity of diesel causing stoppage of machinery. The plaintiff further informed that embankment work required lot of oil. For these reasons, according to the plaintiff, work suffered in 3rd working season which were beyond his control. Thus by this letter for last working season, grievance of non-availability of water is put forth as an excuse for delay in execution of work.

49] By this letter dtd.22/9/1991 (Exh.139) the plaintiff then gave an undertaking to complete the work as per revised programme with a request not to withdraw work from him. At the same time, by this letter, the plaintiff further informed that it is impossible for him to deploy imported labour by duly fulfilling all legal formalities. The plaintiff further informed that the skilled imported labourers are required for trimming of slopes and bed but they are not available because of deportation. He further mentioned that local labour is available only in small quantity. The plaintiff alleged that there is acute shortage of water and Terna river is dry. By giving reference to the meeting with Superintending Engineer held on 8.8.1991, the plaintiff requested for waiver of compensation and settlement of his claims so as to enable him to proceed with execution of the work. By this letter dated 22.2.1992, the plaintiff made claims identical to the claims made by him in the instant suit and prayed for settlement of those claims so as to enable him to commence the work. At this juncture it needs to be noted that thereafter from 24/9/1992, the plaintiff had stopped and virutally abandoned the work under the contract.

50] After submitting revised programme (Exh.218) for execution of work commencing from September, 1991 by the plaintiff, defendant – Sectional Engineer, vide letter dated 2.11.1991 (Exh.77) informed the plaintiff about the lapses and delay on the part of the plaintiff for execution of the work. It was pointed out to the plaintiff that he commenced work after two or three months and had not brought machinery on site as per the undertaking given in proforma “C” of the tender agreement. The plaintiff was further informed that after stoppage of work in May 1989 the work was commenced only in December 1989 with 140 labourers, one poclain machine and 4 tippers. The plaintiff was informed that in April, 1990, he was having 1250 bags of cement which were not consumed even upto December, 1990. The Sectional Engineer, by this letter dated 2.11.1991, at Exhibit 77, further informed the plaintiff that in June, 1990, labour imported by him were deported by the District Magistrate as he failed to fulfill required legal formalities and by that time, though half of the period was over, execution of work was only 7%.

51] Again, by letter dated 13.12.1991 (Exhibit 78) the plaintiff was informed by the Sectional Engineer, to accelerate the work under the contract and complete it. By letter dated 2.1.1992 (Exhibit 79), the Executive Engineer informed the plaintiff that in pursuance to the revised programme submitted by him, he was supposed to execute the work costing Rs. 25.61 Lakhs during the period from October 1991 to December 1991 but he had actually performed the work costing Rs. 1 Lakh only. By pointing out this slow progress, the plaintiff was informed that if the work is not expedited, action of increase in compensation from Rs. 200/- per day to Rs. 1500/- per day will be taken against him. This letter was then followed by letter dated 4.2.1992 (Exhibit 81) by which the Executive Engineer informed the plaintiff in response to his letter dated 12.1.1992 (Exhibit 178) that upon inspection of the site on 29.1.1992 ample quantity of hearting material was found available in km. 49 i.e. side borrow of canal. The plaintiff was informed that hearting material found available is more than what is required and he should start doing work.

52] Documentary evidence on record shows that in reply to letter dated 22.1.1992 (Exhibit 179) of the plaintiff, vide his letter dated 19.2.1992 (Exhibit 82) defendant Executive Engineer informed the plaintiff that hearting material is available in Km. 35. The plaintiff was further informed that 279.46 Tm^3 earth work is in balance in this work comprising 16Km. in length. The plaintiff was further informed that he should start bank work by obtaining hearting material from borrow pits of Km. 49. The plaintiff was further informed that out of allotted 19 structures, he has started work of 7 structures but the same is incomplete and costing Rs. 6.77 Lakhs only. The fact that work of super passage, HPC, and slab culvert is still incomplete was brought to the notice of the plaintiff. By this letter dated 19.2.1992 (Exhibit 82) attention of the plaintiff was drawn to the revised programme and the short-fall in work.

The plaintiff was informed that for the period from October 1991 to January 1992, the targeted work was costing Rs. 38.41 Lakhs but he had done work costing Rs. 3.10 Lakhs only and shortfall is of work costing Rs. 35.31 Lakhs. The Executive Engineer accepted the fact that in Km. 43 there is stay of the Court so far as work of 50 M length is concerned. Attention of the plaintiff was drawn to the clause No. 1.18.0 (page 200) of the agreement at Exhibit 331, which is reproduced thus :-

> "1.18.0 : DIFFICULTIES IN LAND ACQUISITION :-
>
> If due to difficulties in land acquisition, land does not became available for any length of the canal the same can not be handed over to the contractor in such a situation the contractor shall not be entitled to any claim. If the lands in some lengths do not become available up to 75 percent of the time limit of the tender, the execution of the quantities of works under various items pertaining to such lengths shall be optional."

As such, the plaintiff was made aware that the execution of this work in Km.43 was optional for him. With this information, the plaintiff was requested to accelerate the work. Thereafter again, by letter dated 15.5.1992 (Exhibit 83) the plaintiff was informed by defendant – Executive Engineer, that as per the revised programme submitted by the plaintiff, he was supposed to execute work costing Rs. 75.87 Lakhs for the period from October, 1991 to April, 1992, but, he had actually done work costing Rs. 5.06 Lakhs. It was pointed out to the plaintiff that the shortfall is thus Rs.

70.81 Lakhs. It was brought to the notice of the plaintiff that he had completely stopped working from 29.4.1992.

53] We find this documentary evidence available on record after furnishing revised programme for execution of work by the plaintiff in pursuance to the meeting with the Sectional Engineer held on 8.8.1991. This documentary evidence is throwing light on the fact situation prevalent right from commencement of work by the plaintiff till its abandonment on 29.4.1992. Progress of the work of snails pace prior to securing extension is accepted by the plaintiff in his cross-examination. He stated during the course of his cross-examination that it may be true that at 3/4th period of contract, as against the target of Rs. 107.05 lacks, he carried out work costing Rs.17.07 lakhs and as on 23/8/1991 i.e. at the time of completion of 30 months period, as against the target of work costing Rs.215.80 lakhs, he had carried out work costing only Rs.41.90 lakhs. [Figure as per original quotation]. As against this evidence of DW-1 Swami unshattered in cross-examination categorically shows that, the plaintiff had performed work costing only Rs.41.90 lakhs upto 23.8.1991.

54] At this juncture, we may note the findings recorded by the learned trial Judge. The learned trial court after holding that time was not the essence of contract has held that defendants failed to supply cement as and when required by the plaintiff. The learned trial court further held that defendants failed to supply explosives to the plaintiff. It further held that water was not made available to the plaintiff and shortage of water caused hindrance in the work. It further held that Plaintiff was not paid amount in respect of escalation charges, special relief and extra rates. The learned trial court further held that the plaintiff could not adhere to the joint programme and complete the work as his workers were deported by the Government. The learned trial court further gave a finding that the work suffered because of heavy rains in 1989 and 1990. The learned trial court came to the conclusion that defendants failed to supply petroleum products including diesel to the plaintiff in required quantity due to Gulf War. It further held that site was also not made available to borrow area and quarry for earth work, casing and hearting zone was not made available. With this, the learned trial court came to the conclusion that the plaintiff could not complete the work within stipulated period because of delay, defaults, lapses and breach of contract by defendants and accordingly, suit was partly decreed.

55] Let us deal with the main reason canvassed by the plaintiff for non-execution of the contract work in stipulated period. As seen from the evidence of the plaintiff as well as his correspondence including letters dated 22.1.1992 (Exhibit 179) and 22.2.1992 (Exhibit 139), deportation of imported labour of the plaintiff by the District Magistrate, Latur constitutes the main reason for his inability to complete work in time bound manner. In his letter dated 22.2.1992 (Exhibit 139) this reason is attributed by the plaintiff for flow pace of work in all working seasons including the extended period. In this regard, clause 51-A and 53 of the agreement Exhibit 331 which are already reproduced in foregoing paragraphs, are relevant. It was the duty of the plaintiff to comply with all provisions of labour laws including the Contract Labour (Regulation and Abolition) Act, 1970 and Rules framed thereunder as well as the Minimum Wages Act, 1948. Evidence of the plaintiff goes to show that this deportation was not by the Irrigation Department, but, it was by the District Magistrate in exercise of his powers under the Contract Labour (Regulation and Abolition) Act, 1970 and that too after holding requisite enquiry. It is seen that action of the District Magistrate, Latur in deporting the bonded labourers was proceeded by inspection and inquiry by the Government Labour Officer and the report thereof is at Exhibit 226. It is clear from that report that the labourers on the site were not paid a single pie towards wages. They were only provided with Rice with Curry two times a day for the work done by them apart from just two leaves in a month. Not a single facility was found to be provided to them by the Government Labour Officer, Latur in inspection and inquiry.This report Exhibit 226 was forwarded to the District Magistrate, Latur. The plaintiff has admitted in his cross-examination that he has not challenged the decision of the District Magistrate in deporting the imported labourers by holding them as bonded labourer before any forum. The plaintiff was undisputedly facing trial of the case initiated by the Union before the Labour Court alleging non compliance of the provisions of the Minimum Wages Act, 1948. In terms of the contract, the plaintiff was duty bound to follow all provisions of labour laws while engaging labourers

However, it is seen from his letter dated 22.2.1992 (Exhibit 139) that he took up a strange stand that it is impossible for him to deploy imported labouers for executing the work by duly fulfilling all legal formalities. In other words, the plaintiff in fact wanted that all provisions of law relating to employment of labourers should be relaxed in his case so as to enable him to complete the work with required progress. The evidence on record, as such, goes to show that the plaintiff utterly failed to comply provisions of clause 51A and 53 of the agreement Exhibit 331 by not completing with the legal formalities while engaging labourers for execution of the work. Therefore, the finding of the learned trial court in this regard is totally erroneous. The breach, if any, was attributable to the plaintiff for not complying with the provisions of relevant laws while engaging labourers and the department had no role to play in that regard.

56] The next ground on which the plaintiff is alleging lapses and breach of contract by defendants is non supply of diesel and petroleum products to him for execution of the work. According to the plaintiff, because of short supply of this material by defendants, his machinery remained idle and he could not execute the work. However, clause 1.5.0 and 1.5.1 of the agreement at Exhibit 331 as well as the material elicited from cross-examination of the plaintiff, reproduced in foregoing paragraphs, make it clear that defendant department was not at all liable to supply diesel or petroleum products to the plaintiff, but still, the Department was kind enough to help the plaintiff in all manners for procuring diesel and petroleum products. The finding of the trial court in this regard as such is totally perverse and, therefore, deserves to be set aside.

57] The third reason put forth by the plaintiff and which is upheld by the learned trial court is non-supply of explosives and the consequent failure on the part of defendants to comply with their obligation. We have noted in foregoing paragraphs, provisions of Schedule A and condition No.8 of the said schedule, as well as material brought on record from cross-examination of the plaintiff on this aspect. Schedule A incorporated in the agreement, does not prescribe issue rate and quantity to be supplied so far as special Giletene, detonators and fuge coils is concerned. This is a position which is admitted by the plaintiff in his cross-examination. Even according to the plaintiff, material of which quantity and price is prescribed in the Schedule was to be supplied by the Department. The plaintiff never indented or issued any requisition for supply of explosives to defendants and, therefore, defendants were not under obligation in terms of the contract to supply explosives to the plaintiff. The learned trial court erred in holding that defendants committed lapses by not supplying explosives to the plaintiff.

58] Shortage and inadequate supply of cement is the next ground put forth by the plaintiff for delay and the learned trial court has held that defendants failed to supply cement to the plaintiff causing delay in execution of the work. Clause 1.10.0 of the agreement deals with supply of cement and while dealing with that clause in foregoing paragraphs, we have already noted that there is no evidence on record to justify the contention of the plaintiff that cement was short in supply and the progress of the work was affected thereby. The finding of the learned trial court on this aspect is, therefore, perverse.

59] Alleged heavy and unprecedented rains in 1989 and 1990 is stated to be cause for hindrance in work by the plaintiff. Work programme submitted by the plaintiff on 23.5.1989 is at Exhibit 207. This work programme submitted by the plaintiff shows that no work was to be executed in rainy season i.e. in the months of July, August and September of each working season. Even the plaintiff, in his cross-examination, has admitted that no work was to be performed or executed in rainy season i.e. in July, August and September. Thus, when no work was to be performed in rainy season, contention of the plaintiff that due to heavy rains progress of the was adversely affected, holds no water. We feel it appropriate to mention here that as per clause 1.1.0 and 1.1.2 of the agreement Exhibit 331, the plaintiff was presumed to have informed himself about the local conditions, such as rainfall and climate. It was pointed out to the plaintiff by condition NO.1.1.2 that rainy season normally commences from about early June and last up to middle of October. The plaintiff was made aware that few sporadic pre-monsoon and post-monsoon showers, however, cannot be ruled out and some of these can be quite heavy. It was therefore up to the plaintiff to plan his work accordingly.

60] Scarcity of water is stated by the plaintiff to be the main reason for failure to execute the work within prescribed time. The plaintiff is pressing this reason for shortfall in work after submission of revised programme by him. As per his version, there was no water in Terna river affecting execution of the work. Cross-examination of the plaintiff on this aspect is relevant. He accepted the fact that as per Clause 1.1.7 it was his responsibility to make his own arrangement for the water required for execution of the contract apart from need of his staff. The plaintiff admitted that he used to make arrangement of water by drawing it from Terna river. The plaintiff further admitted his representative used to purchase water from local wells. The plaintiff shows ignorance to the fact that in the year 1991, 1992 and 1993 from time to time, water was released in Terna river from the dam. As against this evidence, there is positive evidence on record coming from the mouth of DW-2 Shri Kendre, the then Executive Engineer, that water was available at the relevant time in Terna River and he had even submitted report to that effect regarding availability of water. Otherwise also clause 1.1.7 of the agreement Exh.331 categorically makes the plaintiff liable for making his own arrangements for the water supply required for his work, staff and labour. As such, the plaintiff cannot be heard to say that because of shortage of water, the work under contract was adversely affected. The finding of the trial court on this aspect is also perverse and cannot be sustained.

61] Factors such as Imposition of penalty/compensation and non payment in respect of escalation charges,special relief and extra rates and breach of contract by defendants were considered by the learned trial Court as reason for delay in work. Compensation of Rs. 200 per day w.e.f. 1.7.1990 was levied on the plaintiff by letter dated 16.6.1990 (Exh.66) on the ground of unsatisfactory progress in work. Initially vide letter dated 10.5.1990 Exh.258, defendant Executive Engineer informed the plaintiff that after lapse of ½ of the period of contract work costing Rs.12 lakhs only is executed as against the targeted work costing Rs.118.16 lakhs and therefore the department is completed to levy compensation @200/- per day, w.e.f. 1.7.1990.This proposed action came to be approved by the Superintending Engineer vide his letter dated 12.6.1990 (Exh.284). This action is as per the provisions of Clause 2 of the agreement at Exhibit 331. Clause 2 provides that the contractor shall pay a compensation of an amount equal to 1% or such similar amount as the Superintending Engineer may decide of the amount of the estimated cost of the whole work as shown by the tender for every day that the work remained uncommenced or unfinished. Thus, the Department was empowered to levy compensation for slow progress in work. It is seen from the evidence of DW-1 Swami that statement of work done by the plaintiff at Exhibit 229 that progress of execution of the work under contract by the plaintiff was too slow in the stipulated period of 30 months. The plaintiff could perform work costing Rs. 41.90 Lakhs and he failed to perform work costing Rs. 173.09 Lakhs. In foregoing paragraphs, we have already held that there was no lapse or default or breach of contract on the part of defendants causing delay in execution of work. In this situation, defendants were justified in levying compensation as per the agreement entered into between the parties. As the proposal to levy compensation was approved by the Superintending Engineer vide communication dated 12.6.1990 (Exhibit 284) we find no substance in argument of the learned counsel for the respondent/plaintiff that the Executive Engineer was not authorized to levy compensation.

62] Clause 57 of the agreement at Exhibit 331 deals with price variation. Price escalation in first 12 months is not admissible. For claiming price escalation below 12 months, the plaintiff ought to have executed the work proportionately during initial period of 12 months. However, evidence on record shows that the plaintiff has not completed the required quantity of work which was to be executed in first 12 months making him eligible to claim price variation. Moreover, benefit of Clause 57 can be claimed only when there is proof of any variation in the Consumer Price Index (New Series) for industrial workers in Aurangabad Sector, as seen from perusal of clause 57. There is no such evidence on record. Therefore, the finding of the learned trial court that escalation charges were not paid to the plaintiff cannot be endorsed and as such is liable to be set aside.

63] Clause 38 (Page 103) of the agreement at Exhibit 331 makes it clear that no revision of tender rates is permissible in respect of any of the items so long as quantity executed is not more than 25% of the tendered quantity. There is no evidence on record to show that the plaintiff had executed work which is more than 25% of the tendered quantity. As such, the plaintiff cannot be said to be entitled for revision of tendered rates.

64] The plaintiff has claimed Special Relief in terms of Government Resolution dated 10.1.1992. Clause (V) of this Government Resolution dated 10.1.1992 (page 223 of R&P) provides that special relief envisaged therein shall be subject to the condition that the work have not been delayed by the contractor and compensation for delay has not been levied on him. In the case in hand contract work is found to be delayed by the plaintiff. Because of delay in execution of work, compensation was also levied on the plaintiff vide letter dated 16.6.1990 at Exhibit 66 and as such, it cannot be said that the plaintiff is entitled for Special Relief. There is no evidence on record to come to the conclusion that the plaintiff is eligible for this relief.

65] There is no evidence on record to show that the plaintiff was not paid for the work executed by him. In his cross-examination, the plaintiff candidly accepted the fact that he is unable to point out what was delay in payment of his RA bills. For this reason, we hold that the finding of the learned trial court that because of non payment for work done, execution of work by contractor under contract suffered, is perverse and as such is liable to be set aside.

66] The plaintiff has alleged that due to non-availability hearting soil, bed filling and embankment work is stopped. According to the plaintiff's contention, machinery could not be deployed for want of suitable borrow areas for the embankment work in Km. 36 to Km. 45. The plaintiff further alleged that hearting soil was not available. As against this, pointed evidence of defendants, and more particularly, letters dated 4.2.1992 (Exhibit 81) and 19.2.1992 (Exhibit 82) make it clear that sufficient hearting material was available at Km. 49 i.e. Side borrow of canal. It is seen that even quarry made available by defendants at Survey No. 24 was not operated by the plaintiff. With this evidence, it cannot be said that the plaintiff proved that hearting soil, borrow areas or quarries were not made available by defendants for execution of work in timely manner and the work suffered on that count. The plaintiff has not adduced any corroborating evidence to show that for want of borrow area and hearting soil, his men and machinery available on the site remained idle. Finding of the learned trial court on this point is erroneous.

67] This discussion leads us to conclude that the plaintiff failed to prove that he was unable to execute the tendered work in timely manner due to delays, defaults, lapses and breach of contract by the acts of omission and commission by defendants. The plaintiff was not even able to complete the work under contract even in extended period and revised programme submitted by him which is at Exhibit 218. He had abandoned the work on 24.9.1992. Issue no.2 as such is answered in negative.

68] As the plaintiff failed to prove that he could not complete the work under contract because of delay, default, lapses and breach of contract by defendants, he is not entitled for alleged loss of profit and overheads to the tune of Rs. 76,59,409/- as originally claimed and consequently, to the decretal amount of Rs. 23,63,200/- awarded by the learned trial court. Shri Kulkarni, learned Counsel for respondent no.1 / original plaintiff relied on judgment of the Hon'ble Supreme Court in ***Civil Appeal No. 10531 of 2014 - Associate Builders Vs. Delhi Development Authority***, decided on 25-11-2014. In that matter, appellant / plaintiff was awarded contract of building a colony and the Hon'ble Delhi High Court was pleased to appoint an Arbitrator for settling claims of the plaintiff therein. Award of the Arbitrator came to be confirmed by the Hon'ble Single Judge of the Delhi High Court, but the Hon'ble Division Bench of that Court was pleased to allow the appeal filed under Section 37 of the Arbitration Act and scaled down the awarded amount. In these background facts, Hon'ble Supreme Court allowed the appeal by setting aside the judgment of the Hon'ble Division Bench of Delhi High Court by holding that the Division Bench could not have entered into pure question of fact to set aside the arbitration award by losing the sight of the fact that it is not a first appellate court and, therefore, cannot interfere with error of facts. This judgment has no application to the facts of the present case where the learned trial court has partly decreed the claim and this Court is examining the legality thereof as a first appellate court.

69] Shri Kulkarni, learned Counsel for respondent / original plaintiff further relied on judgment of Hon'ble Supreme Court in the case of ***M/s. A.T. Brij Paul Singh and Bros. Vs. State of Gujarat***, reported in ***AIR 1984 SC 1703***. In that matter, Hon'ble Supreme Court has held that where in a work contract, the party entrusting the work commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the work's contract and claim under such head is admissible. One cannot dispute this proposition. However, in the case in hand, it is not proved that the Department has committed breach of contract.

70] Shri Kulkarni, learned Counsel for respondent no.1 / original plaintiff further relied on judgment of Hon'ble Supreme Court, in the case of ***Dwarka Das Vs. State of M.P. and another***, reported in ***AIR 1999 SC 1031***, wherein it was held by the Hon'ble Apex Court, that when the contract is found to have illegally rescinded by Government, the contractor can claim recovery of amount as damages on account of expected profit out of contract and such claim cannot be disallowed on the ground that there was no proof that he suffered actual loss. This judgment is also of no help to the plaintiff in the facts of the instant case.

71] In the light of this discussion, we dismiss claim of the plaintiff on account of alleged loss of profits and overheads to the tune of Rs. 76,59,409. Issue No.3 is, therefore, answered in negative. Finding of the learned trial court on this issue is set aside.

72] The plaintiff's claim of Rs. 64,18,419/- on account of reduced productivity, idle labour and idle machinery was rejected by the learned trial court and in view of discussion in foregoing paras, as there is no sustainable evidence in this regard, we uphold rejection of this claim by the learned trial court. We also, therefore, answer Issue No.4 in negative.

73] The plaintiff has claimed Rs. 76,04,084/- as compensation by way of revision of rates for balance work to be carried from 23-8-1991. The plaintiff has not executed the remaining work. Rather the same appears to have got executed through other agencies and, therefore, the learned trial court rightly rejected this claim and we also uphold the said finding. Issue No.5 is, therefore, answered in negative.

74] The plaintiff has claimed Rs. 17,65,000/- as compensation for loss incurred due to deportation of imported labourers. This claim was answered in negative by the learned trial court. We have also came to the conclusion that defendants were not at fault in deportation of imported labourers by the District Magistrate, Latur, after following due process of law. As such, we also answer Issue No.6 in negative.

75] The plaintiff claimed refund of amount of Rs. 1,21,800/- recovered from his running R.A. Bills at the rate of Rs. 200/- per day with effect from 1-7-1990 by defendants with a further prayer of waiver of enhanced penalty of Rs. 2,000/- per day with effect from 1-6-1992. It appears that inadvertently this date and particularly month thereof is kept blank in issue no.7 framed by the learned trial Court. However, that omission is of no consequence. Because of poor progress of work, after approval, from the Superintending Engineer, vide letter at Exhibit 284, compensation of Rs. 200/- per day came to be levied by the Executive Engineer as per order at Exhibit 66. We have already concluded that the work suffered due to poor progress of the work for the reasons attributable to the plaintiff himself. As such, the plaintiff is not entitled for refund of amount of Rs. 1,21,800/- on account of deductions made from his R.A. Bills towards penalty. No deductions were made from R.A. Bills of the plaintiff at the rate of Rs. 2000/- per day with effect from 1-6-1992, as the plaintiff had abandoned work from 24-9-1992 itself. Therefore, claim of the plaintiff for refund of Rs. 1,21,800/- is rejected by answering Issue No.7 in negative and by setting aside the finding of the learned trial court, that the plaintiff is entitled to refund of penalty amount already recovered from the plaintiff.

76] By answering Issue Nos.8 and 9 in affirmative, the learned trial court has held that the plaintiff is entitled to receive an amount of Rs. 2.20 Lacs from defendants towards price escalation and Rs. 2 Lacs towards special relief. In foregoing paras, we have already held that the plaintiff is neither entitled for price escalation nor for the special relief as envisaged by the Government Resolution dated 10-1-1992. Issue Nos.8 and 9 are, therefore, answered in negative by setting aside the finding of the learned trial court in that regard.

77] Issue No.10 is in respect of waiver of interest of Rs. 1,04.290/- charged towards mobilization advance. Issue No.14 is in respect of recovery of amount of Rs. 10,80,000/- from the plaintiff by defendants on account of amount of mobilization advance released in favour of the plaintiff and Issue No. 15 is regarding recovery of interest from the plaintiff at the rate of 18% per annum on mobilization advance amounting to Rs.10,80,000/-. The learned trial court has held that defendants are not entitled to recover interest on mobilization advance. Similarly, the learned trial court had answered Issue No.14 in negative by holding that defendants are not entitled for recovery of mobilization advance released in favour of the plaintiff. Similarly, by answering Issue No.15 in negative, the learned trial court held that defendants are not entitled to recover interest on mobilization advance. In this regard, the fact that the amount of Rs. 10.80 Lacs was released in favour of the plaintiff towards mobilization advance as against two bank guarantees amounting to Rs. 5.4 Lacs each, furnished by the plaintiff, is not in dispute. The chart on page C-553 of record and proceedings shows that on 28-2-1989, an amount of Rs.5.40 Lacs was advanced to the plaintiff towards mobilization advance and on 23-8-1989, and further amount of Rs. 5.40 Lacs was again released in his favour towards mobilization advance. The plaintiff is not at all disputing this chart. The plaintiff has not disputed the fact that he has received mobilization advance of Rs.10.80 lacs from defendants no.1 to 3. Rather by letter at Exhibit 156, dated 8-2-1991, he informed the Department that there is outstanding amount of about Rs. 2,00,000/- towards interest against mobilization advance given to him and this interest is recoverable from his R.A. Bills. The plaintiff further requested the Department by this letter to recover this interest amount in three instalments as the same is heavy amount. The chart at page C-553 of record and proceedings shows that interest amount to Rs. 1,97,290/- was recoverable from the plaintiff towards interest on mobllization advances. Evidence on record do show that vide letter dated 6-7-1991 (Exhibit 297) and letter dated 19-8-1991 (Exhibit 298), defendant - Executive Engineer requested defendant no.4 - United Commercial Bank - for encashment of two bank guarantees worth Rs. 5.40 Lacs each furnished by the plaintiff towards mobilization advances. Evidence of DW 1 Swami, Divisional Officer, shows that defendant no.4 - Bank - had not honoured its commitment by remitting the amount of Rs. 10.80 Lacs to defendant - Department. The plaintiff is certainly liable to refund the amount of Rs. 10.80 Lacs advanced to him by defendants towards mobilization advance as he had obtained it from defendant nos.1 to 3 for making arrangement to execute the work under the contract. The learned trial court by the impugned judgment and decree was pleased to restrain defendants from invoking bank guarantees given by defendant no.4 - Bank - on behalf of the plaintiff. As such, it is seen that those bank guarantees are not renewed thereafter. Therefore, we hold that the plaintiff is liable to refund the amount of Rs. 10.80 Lacs to defendant nos.1 to 3 towards the amount received by him from them as mobilization advances. Consequently, the plaintiff is also liable for payment of interest on the mobilization advances received by him and quantified by defendants at Rs. 3,50,553/-. Issue No.10 is, therefore, answered in negative and Issue Nos.14 and 15 are answered in affirmative by setting aside findings of the learned trial court in that regard.

78] As regards Issue Nos.2 and 13, they are answered in negative and affirmative, respectively, by holding that the plaintiff committed breach of contract and failed to complete the work within the contract time.

79] The plaintiff had furnished bank guarantee of Rs. 2.16 Lacs towards earnest money deposit in terms of Clause 10 of the agreement at Exhibit 331 and this earnest money, according to defendant nos.1 to 3, was liable for forfeiture on failure by the plaintiff to execute the contract within the contract period. By way of counter claim, defendants have prayed for decree of this amount of Rs. 2.16 Lacs. This counter claim was rejected by the learned trial court by holding that in absence of any evidence regarding breach of contract on the part of the plaintiff, defendant nos. 1 to 3 are not entitled for this claim. We have already held that it was the plaintiff who committed breach of contract by not performing contract work within prescribed period despite warning from defendant - Department. He had abandoned the work on 29-4-1992. We have already held that time was essence of contract and, therefore, this contract was voidable at the option of defendant - Department due to non-performance of the same within prescribed time by the plaintiff. According to Section 55 of the Indian Contract Act, 1872, *If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he gives notice to the promisor of his intention to do so*. Evidence on record shows that defendant - Department accepted performance of whatever work done by the plaintiff under the contract by making payment of all his R.A. Bills and without giving him notice at the time of acceptance of performance that he will be liable for payment of compensation on account breach of contract. As such, without there being any notice as contemplated by Section 55 of the Indian Contract Act, 1872, at the time of acceptance, the defendant - Department cannot claim for decree of Rs. 2.16 Lacs towards forefeiture of the earnest money. For these reasons, we answer Issue No.16 in negative, though we are not agreeable for answering this issue in negative by the learned trial court.

80] By making counter claim, defendant nos.1 to 3 prayed for a decree of Rs. 5,20,237/- towards difference in cost price of erecting 12 structures withdrawn from the plaintiff. According to the defendant - Department, it will have to pay Rs. 5,20,237/- in excess as the tender is 9.5 % above the rate of the plaintiff for the said work. There is no evidence on record to show that defendants were actually required to incur this much extra expenditure on erection of 12 structures. The claim is hypothetical and, as such, the same cannot be said to be proved. Issue No.17 is, therefore, answered in negative by upholding the finding of the learned trial court.

81] Defendant nos.1 to 3 are praying decree of Rs. 2,40,487/- towards compensation at the rate of Rs. 200/-, Rs. 2,000/- and Rs. 300/- for various periods. This period is mostly covering the period after the work came to be abandoned by the plaintiff. Performance of the work executed by the plaintiff was accepted by defendant nos.1 to 3 without giving notice to the plaintiff, that he will be liable for payment of compensation for breach of contract and, therefore, defendant nos.1 to 3 are not entitled for recovery of compensation as claimed in the counter claim. Issue No.18 is, therefore, answered in negative.

82] Defendant nos.1 to 3 also claimed an amount of Rs. 29,165/- towards shortage of quantity while returning unused pipes and steel by plaintiff after abandoning the work. No evidence is adduced by defendant nos.1 to 3 to show that there was shortage while returning this material and the same was costing Rs. 29,165/-. As such, Issue No.19 is answered in negative by upholding the finding of the learned trial court.

83] Claim of Rs. 5,84,400/- is made by way of counter claim by defendant nos.1 to 3 by contending that there was loss of irrigation potential. The defendant - Department has not adduced any evidence to show that canal of entire length apart from the length which was entrusted to the plaintiff was complete in all respect but because of default by the plaintiff, irrigation potential could not be achieved. In absence of such evidence, this claim is hypothetical and, therefore, we reject the same by answering Issue No.20 in negative by upholding the finding of the learned trial court.

84] Defendant nos.1 to 3 further claim Rs. 58,50,750/-

towards increased cost of completion of the work. According to the defendant - Department, it will have to pay about 43 % increase cost as per current RSR on original tendered work. This claim is also hypothetical and no evidence is produced on record as to whether remaining work was got executed by making excess payment than at the rates quoted by the plaintiff. Therefore, for want of proof, the defendant - Department is not entitled for this claim and we, therefore, answer Issue No.21 in negative.

85] Defendant nos.1 to 3 have claimed Rs. 30,000/- towards cost of preparation of tender document and cost of advertisement apart from Rs. 12,00,000/- towards salary of the staff of one Sub-Division for two years. Defendant nos.1 to 3 have not adduced any evidence to show that they actually spent Rs. 30,000/- towards preparation of tender document and advertisement nor there is any justification for claim of Rs. 12,00,000/- by supporting of evidence in that regard. Issue Nos. 22 and 23 are, therefore, answered in negative by upholding the finding of the learned trial court.

86] Defendant nos.1 to 3 have prayed for decree of Rs. 10,35,848/- against the plaintiff towards reimbursement of claim pending before the Labour Court, Latur. Exhibit 314 is the copy of judgment and order of the learned Labour Court, Latur, in MWA nO.1/90 AND 2/90 wherein apart from the plaintiff, defendant - Department was also respondent. By its judgment dated 14-3-1995, the learned Judge of the Labour Court, Latur, was pleased to reject these petitions for want of jurisdiction. As such, the defendant - Department was not required to pay any amount towards recovery of minimum wages payable to the labourers employed by the plaintiff. Therefore, claim on this count is rejected by answering Issue No.24 in negative and by upholding the finding of the learned trial court.

87] On receipt of summons of the suit, defendant nos.1 to 3 appeared and then filed written statement raising the counter claim. There is nothing on record to conclude that it was barred by limitation. The same is within limitation. Therefore, Issue No.25 is answered in affirmative.

88] As a result, we hold that the plaintiff has failed to prove any of the monetary claim made against defendant nos.1 to 3. Defendant nos.1 to 3 have proved that they are entitled for recovery of Rs. 14,30,533/- from the plaintiff towards refund of mobilization advances along with interest. Issue Nos.11 and 26 are, therefore, answered accordingly.

89] Issue No.12 is regarding permanent injunction prayed by the plaintiff thereby restraining defendant nos.1 to 3 from invoking bank guarantees and withdrawal of work apart from recovery of amount towards penalty. We have already held that defendant nos.1 to 3 are entitled for recovery of Rs. 10.80 Lacs towards mobilization advances which were secured by them by furnishing bank guarantees of that amount. This claim of the defendant - Department on this count is now decreed. The defendant - Department is not found to be entitled for an amount of Rs. 2.16 Lacs which was towards earnest money deposit. Bank guarantee of this amount was furnished by the plaintiff. Defendants are not found to be entitled for forfeiture of the earnest money deposit. Therefore, the question of invoking bank guarantees does not survive. The plaintiff cannot pray for injunction restraining defendant nos.1 to 3 from withdrawing the work. Defendant nos.1 to 3 are already held to be entitled for recovery of penalty at the rate of Rs. 200/- while answering Issue No.7. There is no evidence to show that the bank guarantees given by the plaintiff are renewed up to date. As such, now Issue No.12 does not survive for consideration.

90] In the result, we partly allow this First Appeal filed by the original defendant nos.1 to 3 and dismiss the cross-objection filed by the original plaintiff / respondent no.1 in it, with the following order :

(A) Special Civil Suit No. 21/1993 filed by the plaintiff is hereby dismissed.

(B) Counter claim of appellants / original defendant nos.1 to 3 in the above suit is partly decreed. The plaintiff do pay an amount of Rs. 14,30,553/- [Rupees fourteen Lacs thirty Thousand, five hundred and fifty three] to original defendant nos.1 to 3 towards refund of mobilization advances and interest thereon, with interest calculated at 6 % p. a. from the date of judgment of the trial court i.e. 30-6-1995, till realization of this decretal amount.

(C) Parties to bear their costs as incurred throughout.

(D) Decree be drawn accordingly.

[A.M. BADAR]
JUDGE

[B.P. DHARMADHIKARI]
JUDGE.

grt/-