

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH**

FRIDAY, THE 11TH DAY OF DECEMBER 2015/20TH AGRAHAYANA, 1937

AS.No. 18 of 2002 ()

**AGAINST THE JUDGMENT/DECREE IN OS 582/1992 of ADDL.SUB COURT, NORTH
PARAVUR DATED 15.6.2001**

APPELLANT/PLAINTIFF:

**C.K. GOVINDANKUTTY NAIR, CONTRACTOR,
SREEKUMAR BUILDINGS, CHALAKUDY.**

BY ADV. SRI.RAJIV ABRAHAM GEORGE

RESPONDENTS/DEFENDANTS:

**1. THE GOVERNMENT OF THE STATE OF KERALA,
REPRESENTED BY ITS SECRETARY TO GOVERNMENT
IRRIGATION DEPARTMENT, GOVERNMENT SECRETARIAT
TRIVANDRUM.**

**2. THE SUPERINTENDING ENGINEER,
IRRIGATION CENTRAL CIRCLE, TRICHUR.**

BY SR. GOVERNMENT PLEADER SRI.M.K.ABOOBACKER

**THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 11-12-2015, ALONG
WITH CO. 10/2003, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

vpv

P.N. RAVINDRAN

&

BABU MATHEW P. JOSEPH, JJ.

=====

A.S. No. 18 of 2002 &

Cross Objection No.10 of 2003

=====

Dated this the 11th day of December, 2015

JUDGMENT

P.N. Ravindran,J.

The appellant is the plaintiff in O.S.No.582 of 1992 on the file of the Court of the Subordinate Judge of North Paravur, a suit instituted by him for a declaration that the respondents/defendants have committed breach of contract resulting in non-completion of the work and a decree allowing him to realise from the defendants the sum of Rs.30,05,686.56 under various heads including the sum of Rs.15,69,350/- under the head prevented gains. By judgment delivered on 15.6.2001, the trial court decreed the suit in part and declared that the defendants have committed breach of contract. The plaintiff was allowed to realise from the defendants the sum of Rs.5,74,817.42 with future interest at 12% per annum from the date of suit till realisation as also proportionate costs. The plaintiff has, aggrieved by the dismissal of the suit in so far as it relates to prayer No.2, filed this appeal. The State of Kerala has aggrieved by the decree granted in favour of the plaintiff filed a memorandum of cross objections. The brief facts of the case are as follows:

2. The work of construction of a Bridge-cum-Regulator at Kanakkankadavu across the Chalakudy river was awarded to the plaintiff as per letter of award dated 30.03.1984. The probable amount of contract, based on the 1982 PWD schedule of rates, was ₹1,82,05,936/-. The tender submitted by the plaintiff was 59.7% above the estimate. The site was handed over to the plaintiff on 29.06.1984 and as per the terms of the agreement, the work was to be completed within 36 months therefrom namely on or before 28.06.1987. Later, supplemental agreements 2, 3 and 4 were entered into in respect of 114 extra items of work involving a total amount of ₹33,72,928/-. No extension of time was however granted for completion of the work. It is the plaintiff's case that on account of the frequent changes in designs which necessitated the execution of three supplemental agreements and on account of the delay in supplying materials in time as also in effecting part payments, the work could not be completed within the stipulated period of 36 months. While the work was in progress, but before the expiry of the period of 36 months, the Superintending Engineer, who had on behalf of the State of Kerala, entered into Ext.P1 agreement with the plaintiff, sent Ext.A17 letter dated 28.05.1987 to the plaintiff. The relevant portion thereof reads as follows:

" The site for the above work was handed over to you on

29.6.'84. As per the agreement the time of completion of the work is 28.6.'87. But the progress so far achieved is far from satisfactory. It is noted that you will not be able to complete the work within the agreed period at this rate of progress. The Department cannot allow to drag on a work of this magnitude without any definite programme for completion. I am therefore to inform you that the work will be allowed to be proceeded after the expiry of time of completion on 28.6.'87 only with proper sanction for time extension provide you will apply for the same, giving a definite programme of work. I therefore request you to apply for time extension showing convincing reason thereof, if any, through proper channel immediately. It must be understood that extension of time will be allowed only if there are valid and convincing reasons, and provided you are agreeable to carry out the works during extended period of completion at your agreed rates, executing necessary Supplemental Agreement."

3. Upon receipt of Ext.A17 letter, the plaintiff sent Ext.B25 letter dated 23.6.1987 in reply to the Superintending Engineer, wherein, after setting out the reasons for the slow rate of progress, attributable according to the plaintiff to the default committed by the State, the plaintiff stated as follows:

"You are fully aware of the fact that as against the agreed PAC of Rs.1,82,05,971/- the total budget allocation for this work from 1984-85 to 1987-88 was less than Rs.45 lakhs which goes to show that during the entire stipulated period of contract from 29.6.1984 to 28.6.1987 the Department did not envisage to spend more than 25% of the agreed PAC. For payment of each bill repeated requests had to be made by me and considerable effort had to be put in by you to get allocations of funds for even belatedly making the payments. Even as on date more than Rs.8 lakhs is due and payable to me for work done. I have been paying very heavy interest at 18% per annum with quarterly rests which works out to 21.5% per annum on the loans availed of by me for executing this work. The inordinate delay in the payment of bills has caused heavy losses and untold hardships to me not to speak of the

adverse effect of it on the proper progress of the work. In the course of the last three years, I have been paid only eight running account bills from 31.3.1985 to 9.6.1987. CC VII and part bill dated 2.9.1986 could not be paid by the Department till fresh budget allocation of 1987-88 was received and funds allotted and you are aware of the fact that CC VII and part bill was paid only on 13.5.1987.

In the meanwhile prices or materials and cost of labour and transport have increased considerably and the Department has revised its Schedule of rates in 1986 showing a 150% increase over the 1980 schedule as compared to 25% over the 1980 Schedule on 1982.

In the light of the above I am unable to appreciate as to how the Department expects me to carry out the works in an extended period of completion at my agreed rates quoted as early as on 2.11.1983 especially when the non-completion of the work within the stipulated period has been caused entirely on account of the defaults of the Department and for no fault of mine.

I am however ready and willing to execute the balance work in an extended period of contract upon the following terms and conditions:-

1. For all works to be executed beyond 29.6.87, I should be paid rates as per 1986 Kerala PWD Schedule of Rates plus my originally quoted tender excess.

2. For the losses to me on account of my having to keep the Security Deposit and retention amount for a period longer than envisaged in the contract, I should be compensated, the minimum of which shall be interest at 21.5% per annum on the retention amount and the difference between 21.5% and the interest offered by the Treasury for my Security Deposit of Rs.3,61,600/- in the form of Treasury Deposit pledged to you.

3. Monthly on account payments should be made to me taking into account all the works executed since previous bill.

4. All departmental materials should be issued to me in time.

5. Time should be suitably extended allowing 27 months more for executing the balance work.

This may please be treated as my formal application for extension of time for executing the balance works on the above lines."

4. The Superintending Engineer did not reply to Ext.B25 letter

dated 23.6.1987 till he sent Ext.A18 letter dated 27.1.1988, wherein after setting out his stand, the Superintending Engineer stated as follows:

"Regarding the terms and conditions put forth by you for proceeding with further works, I have to inform you as follows:

1. As per accepted conditions of contract the rates once agreed shall be final and on no account claims for extra rates will be allowed after the tender is accepted. Hence your claim for extra payment as per revised schedule of rates ie. 1986 is rejected.

2. The delay is not due to fault of the department. If you were earnest and sincere the work could have been completed within the agreed period. Your demand for compensation towards interest on security deposit and retention is against condition and hence is rejected.

3. Department cannot give any assurance regarding monthly payment. The agreement conditions will be followed in the matter. Payments will be made to you, according to the availability of funds for this work, on your executing adequate quantum of work, sufficient to make a part payment.

4. The departmental materials required for the work can be issued subject to the progress of work.

5. Your request for extension of time of completion will be considered, if you agree to the condition that you will not claim any enhanced rates or compensation on account of materials, labour or on any other grounds for which you have to submit a fresh application along with an undertaking in stamp paper worth Rs.15/- to the effect that you will not claim enhanced rates or compensation. If agreeable please give the same, through the Executive Engineer, Irrigation Division, Ernakulam for consideration."

5. The stand taken by the Superintending Engineer in that letter is that the plaintiff's request for extension of time for completion of the work will be considered, if he agrees to the condition that he will not claim enhanced rates or compensation on account of materials, labour

or on any other grounds. He was also asked to submit a fresh application along with an undertaking in stamp paper to the effect that he will not claim enhanced rates or compensation. In that letter, he also incidentally stated that the Department cannot give any assurance regarding the monthly payments, but payments will be made according to availability of funds for the work. Upon receipt of Ext.A18 letter, the plaintiff sent Ext.B27 letter dated 22.2.1988 wherein, after justifying the stand taken by him in Ext.B25 letter, the plaintiff stated as follows:

"23. There is no question of my agreeing to any condition that I will not claim any enhanced rates or compensation as sought for by you nor does the question of my giving any undertaking on stamp paper worth Rs.15/- to that effect arise. I have already submitted my application for extension of time by my letter dated 23.6.1987 addressed to you. If you refuse to consider the application the legal consequences will have to be faced by the Department.

24. There are no conditions in the contract making me bound to carry out the balance works at the rates originally agreed. The work had not been possible to be completed by 28.6.1987, the stipulated date of completion, for the reasons detailed in my letter dated 23.6.1987 and in this letter for which the responsibility is entirely that of the Department and I am in no way responsible for the same. When you are not agreeing to grant extension of time and enter into a Supplemental Agreement regarding the terms and conditions upon which work is to be executed in a period beyond the period stipulated in the contract, your direction to resume the work is not possible to be appreciated. I cannot be expected to execute the work in an unauthorised manner without a validly subsisting agreement.

25. I am still ready and willing to execute the balance work in a further period on fresh terms and conditions to be mutually agreed upon and to be reduced into writing by a Supplemental Agreement in consonance with Article 299 of the Constitution of India.

26. If in spite of what is notified above you choose to take any action as threatened in your letter under reference, you shall be doing so entirely at the risk of the Department as to costs and consequences, which please take notice of."

6. The plaintiff had in the meanwhile submitted Ext.B26 letter dated 1.2.1988 to the Superintending Engineer seeking extension of time. The plaintiff had in that letter stated as follows:

"This is therefore to finally notify the Department through you that if you do not agree to the terms and conditions as set out in my letter dated 23.6.1987 or such other terms as may be mutually agreeable and extend the time suitably to execute the balance work in a period beyond the originally stipulated period of contract within a reasonable period of 15 days from the date of receipt of this letter, I shall construe that the Department is no more interested in getting the balance work executed through me in which case I shall treat the contract as unlawfully repudiated by the Department entitling me to damages by way of gains prevented at 15% of the balance works prevented from being executed besides payment due to me for work done, release of my Security Deposit and retention amounts, interest at 21.5% per annum on all the amounts found due and payable to me etc for which purpose I shall be instituting appropriate proceedings in the court of competent jurisdiction."

7. The demands made by the plaintiff for extension of time and for revision of rates contained in Exts.B25, B26 and B27 letters were placed before the High Level Committee constituted by the State Government. The High Level Committee which met on 9.3.1989 considered the requests made by the plaintiff for the extension of time along with the requests received from contractors executing other works. The High Level Committee that met on 9.3.1989 decided to call

upon the Chief Engineer to submit a detailed report. The relevant portion of the minutes of the meeting of the High Level Committee that met on 9.3.1989 as contained in Ext.B60 reads as follows:

*" 6. (Item No.13/89)17409/MI-I/88/Irrn.
Constructing a Bridge-cum-Regulator at Kanakkankadavu
across Chalakudy river Revised estimate - reg.*

This is a work for which administrative sanction was accorded as early in 1983 and work started on 29-6-84. The work was to be completed on 29-6-87 as per the agreement condition subsequently during execution of the work, certain changes were necessitated in the design and the works executed accordingly. Further, there was delay in supplying departmental materials and due to lack of funds, the payment to the contractor was also delayed. Hence the contractor put forth certain demands which were not acceptable to the department as per the agreement condition. The Chief Engineer has therefore proposed to terminate the contract without risk and cost and requested sanction for a revised estimate.

The matter was placed before the High Level Committee and the committee after careful examination of the proposals came to the following conclusion.

The CE may submit a detailed report on the following points regarding the work.

- 1. progress of work*
- 2. Whether delay occurred in payment of the bill, if so, the reason for the delay ie whether it was due to lack of funds.*
- 3. Details of the nature of the change of design proposed during execution of the work etc.*

The committee also found that the Planning Commission has not approved this work on the ground that it is to be included in the Agriculture sector. However C.E is of the view that this regulator is necessary for the protection of lift irrigation projects upstream. Hence justification for according administrative sanction on that ground may also be explained by the C.E for further consideration."

8. The Chief Engineer thereupon submitted a report and the

matter was again considered by the High Level Committee at its meeting held on 5.10.1990. The High Level Committee that met on 5.10.1990 considered all aspects of the matter and resolved as follows:

"ITEM 18/90:17409/MI-1/88/ir.D. .

Constructing a bridge-cum-regulator at Kanakkankadavu across Chalakudy river.

The contract for the above work was awarded and the contractor executed the agreement in June 1984 (Vide Agt.No.2/SC/84-85). The contractor had also started the work. During the course of the work it was found that certain substantial changes in the design were necessary. The pile foundation was changed to well foundation etc. Moreover, in 1986-87 there was paucity of funds to make payment to the contractor. The contractor asked for enhanced rates due to change in the design. Eventually, the work came to a halt. The matter was considered by the High Level Committee in its meeting held on 9-3-1989. The Committee then wanted more details. The matter came up again in the meeting of the Committee dated 16-9-89 and the Finance Department agreed to get the matter examined by the Chief Technical Examiner. Finance Department has examined the matter as per their note No. 79663/FIW-C1/89/Fin. Dated 10-11-89. They have advised to terminate the contract. The committee has examined the matter and it is found that substantial changes have been made in the design and there were delays in the supply of materials and payment of bills etc. In these circumstances it will not be fair to penalise the contractor. It is also impracticable to proceed with the work as per the agreement executed in 1984. Hence, it is recommended that the contract may be terminated without risk and cost to the contractor."

9. The High Level Committee came to the conclusion that substantial changes have been made in the design, that there was delay in supply of materials and payment of bills and in such circumstances, it will not be fair to penalise the contractor. The

committee also came to the conclusion that it is impracticable to proceed with the work as per the agreement executed in the year 1984. The Government did not for reasons best known to it, take a decision in the matter expeditiously, with the result that the plaintiff/contractor sent Ext.B30 letter dated 3.5.1990 to the Secretary to Government, Irrigation Department and the Superintending Engineer, Irrigation Central Circle, Trichur calling upon them to take a final decision in regard to the execution of the balance work. In that letter he had also stated that in case the Department is not intending to get the balance work executed through him, he may be paid all the amounts due and payable to him in final settlement of accounts including payment for work done, refund of security deposit and retention amounts, damages and compensation for the loss caused to him on account of the breach of contract committed by the department and all other claims notified from time to time in his various letters, with interest. More than six months thereafter, the Superintending Engineer issued Ext.A20 order dated 21.2.1991 terminating the contract. The said order is extracted below:

"The contract for the above work was awarded and the Contractor executed the Agreement in June 1984 (Vide Agt.No.2/SE ICC/84-85). The contractor had also started the work. During the course of the work it was found that certain substantial changes in the design were necessary. The pile foundation was changed to well foundation etc. Moreover, in 1986-87 there was paucity of

funds to make payment to the contractor. The contractor asked for enhanced rates due to change in the design. Eventually, the work came to a halt. The matter was considered by the High Level Committee in its meeting held on 9-3-1989. The Committee then wanted more details. The matter came up again in the meeting of the Committee dated 16-9-89 and the Finance Department agreed to get the matter examined by the Chief Technical Examiner. Finance Department has examined the matter as per their note No. 79663/FIW-C1/89/Fin. Dated 10-11-89. They have advised to terminate the contract. The High Level Committee meeting held on 5.10.1990 examined the matter and found that substantial changes have been made in the design and there were delays in the supply of materials and payment of bills etc. The Committee felt that in these circumstances it would not be fair to penalise the contractor. The Committee also found that it is also impracticable to proceed with the work as per the agreement executed in 1984. Hence, the High Level Committee recommended that the contract may be terminated without risk and cost to the contractor.

In the above circumstances, the work awarded to Sri. C.K. Govindankutty Nair as per Agreement No.2/SE ICC/84-85 is hereby terminated without risk and cost to the contractor."

10. The contractor thereupon caused Ext.B37 notice dated 3.08.1992 to be issued under section 80 of the Code of Civil Procedure claiming a total sum of Rs.28,35,595.79 under various heads and calling upon the Government of Kerala and the Superintending Engineer to pay the same within sixty days from the date of receipt of the notice. The second defendant thereupon caused Ext.A35 reply dated 15.10.1992 to be issued. The instant suit was filed thereafter on 09.11.1992 seeking the aforesaid reliefs. Before the trial court, the plaintiff examined himself as PW1 and the Branch Manager of South Indian Bank Ltd., Market Road branch, Ernakulam as PW2 and

produced and marked Exts.A1 to A37. On the side of the defendants DWs.1 and 2 were examined and Exts.B1 to B64 were produced and marked. The trial court after considering the rival contentions framed the following issues for trial:

1. *Is the plaintiff entitled to a declaration that it is defendants who committed breach of contract resulting in the non-completion of the work under the contract under Agreement No.2/SEICC/84-85 dated 19th June 1984 entered into between the plaintiff and the 1st defendant?*
2. *Is the plaintiff entitled to compensation from the defendants for the losses to the plaintiff by way of gains prevented amounting to Rs.15,69,350/- at 10% of the value of the balance work costing at 10% of the value of the balance work costing Rs.1,56,93,509/- prevented by the defendants from being executed by the plaintiff or to any other amount?*
3. *Is the plaintiff entitled to compensation amounting to Rs.19,063.42 for the work of pending, tying and placing in position 19395.59 kgs. of reinforcement steel in abutments, wing walls and piers but not concreted upon and not measured by the defendants for payment, at the rate of Rs.62.08 plus tender excess of 59.7% above the estimated rates amounting to Rs.99.14 per quintal or to any other amount at any other rate for any other quantity?*
4. *Is the plaintiff entitled to an amount of Rs.5200/- or to any other amount from the defendants by way of payment for the work of fabricating and supplying 4 nons. or rock shoes supplied by the plaintiff under item 1 of Part III of Supplemental Agreement No.II which were not fixed in position but were handed over to the defendants subsequent to the unlawful and unjustifiable repudiation of the contract by the defendants?*

5. *Is the plaintiff entitled to a declaration that the defendants shall not effect any recovery from the final bill of the plaintiff for any quantity of reinforcement steel and for 2.681 tonnes of cement shown in the materials at Site Accounts as due return from the plaintiff which were not taken over by the defendants and got corroded, pilfered or clodded with passage of time?*
6. *Is the plaintiff entitled to be compensated by the defendants for the losses to the plaintiff on account of infructuous expenditure on salaries of watch and ward staff, expenses for maintenance of site sheds, electricity etc. for the period from 1.7.1987 to 31.7.1991 at the rate of Rs.2000/- per month amounting to Rs.1,47,000/- but limited in the suit to Rs.1,02,000/- or to any other amount?*
7. *Is the plaintiff entitled to an amount of Rs.39,954/- or to any other amount by way of Final Bill payment for work done under the contract?*
8. *Is the plaintiff entitled to an amount of Rs.4,76,307/- or to any other amount from the defendants by way of compensation for losses caused to the plaintiff on account of interest liability to the South Indian Bank Ltd., Market Road Branch, Ernakulam, for the overdraft availed of by the plaintiff for the purpose of the work under the contract for the period up to date of release/refund?*
9. *Is the plaintiff entitled to Rs.3,61,600/- from the defendants by way of release/refund of the Security Deposit furnished by the plaintiff for the purpose of the work under the contract in the form of Fixed Deposit Certificate No.103536 dated 6.4.1984 of the District Treasury, Trichur along with accrued interest up to date of release/refund?*
10. *Is the plaintiff entitled to Rs.1 lakh retained by the defendants from the Running Account Bills of the plaintiff by way of retention towards Security Deposit*

along with interest 12% per annum from 21.2.1991, the date of unlawful termination of the contract by the Defendants, till date of payment or realisation?

- 11. Is the plaintiff entitled to interest from the defendants at the rate of 12% per annum or at any other rate on all the amounts found due and payable by the defendants to the plaintiff against issues 1 to 10 above from 3.8.1992, the date of suit notice till date of payment or realisation?*
- 12. Is the plaintiff entitled to all his costs in the suit from the defendants?*
- 13. What should be the reliefs to the plaintiff against issues 1 to 12 above?*

11. On issue No.1, the trial court held that the plaintiff could not complete the work in time due to the recalcitrant attitude of the defendants and that the defendants have committed breach of contract. On issue No.2, the trial court held that the plaintiff is not entitled to the future profits or future gains. On issue No.3, the trial court held that the plaintiff is entitled to get the sum of ₹19,063.42/-. On issue No.4, it was held that the plaintiff is entitled to get the sum of ₹5,200/-. On issue No.5, the trial court held that the plaintiff is not entitled to a declaration that the defendants shall not effect any recovery from the final bills. On issue No.6, the trial court held that the plaintiff is entitled to realise the sum of ₹49,000/- from the defendants. On issue No.7, the trial court held that the plaintiff is entitled to realise the sum of ₹39,954/-. On issue No.8, the trial court

held that the plaintiff is not entitled to realise the sum of ₹4,76,307/- though the said amount was paid by him as interest on the loan availed by him to execute the work. On issue Nos.9 and 10, the trial court held that the plaintiff is entitled to interest at 12% per annum on the sum of ₹3,61,600/- furnished as security and the sum of ₹1,00,000/- retained from the various bills. The trial court accordingly passed a decree declaring that the defendants have committed breach of contract and allowing the plaintiff to realise from the defendants, the sum of ₹5,74,817.42 with future interest at the rate of 12% per annum from the date of suit till realisation, along with proportionate costs. The plaintiff has, as stated earlier, filed this appeal challenging the finding entered on issue No.2 and to the extent prayer No.2 in the plaint was rejected. The State of Kerala has filed the memorandum of cross objections challenging the decree passed by the trial court.

12. We heard Sri.Rajiv Abraham George, learned counsel appearing for the appellant and Sri.M.K.Aboobacker, learned Senior Government Pleader appearing for the respondents. Challenging the finding entered by the court below on issue No.5, Sri.Rajiv Abraham George, learned counsel appearing for the appellant/plaintiff submitted that the court below has declined to grant relief No.2 relying on the stipulation in Ext.B1 agreement to the effect that where the work is abandoned, the contractor will be paid only for the work done and

therefore, the claim for prevented gains is not tenable. Learned counsel contended that as the court below has held that the defendants have committed breach of contract, the plaintiff is entitled to be compensated for damages including prevented gains. Learned counsel also placed reliance on the decisions of the Apex Court in **Mohd. Salamatullah v. Govt. of A.P. [AIR 1977 SC 1481]**, **M/s A.T. Brij Paul Singh & Bros. v. State of Gujarat [AIR 1984 SC 1703]**, **Dwarka Das v. State of Madhya Pradesh [AIR 1999 SC 1031]**, **Mohammed Zakir v. Regional Sports Centre [2009 (4) KLT 755 (SC)]** and the decisions of this court in **State v. Bhaskaran [AIR 1985 KER 49]**, **C. T. Xavier v. P. V. Joseph [AIR 1995 KER 140]** in support of his contentions. Learned counsel contended that section 73 of the Indian Contract Act, 1872 entitles the plaintiff to realise damages or loss of reasonable profits arising from the breach of contract and therefore, the court below erred in declining to grant relief No.2 prayed for in the plaint on the ground that as the work was abandoned, the contractor is not entitled to be paid anything other than payment for the work done by him. Learned counsel submitted that the court below has failed to take note of the law on the point and that the court below has not even correctly understood the nature of the claim made by the plaintiff. Learned counsel also supported the findings entered by the trial court on issue Nos.3, 4, 6, 7, 9, 10 and 11

and contended that no grounds exist warranting interference with the findings entered by the trial court and prayed for dismissal of the memorandum of cross objections filed by the defendants.

13. Per contra Sri.M.K.Aboobacker, learned Senior Government Pleader appearing for the respondents contended that there was no delay in paying the bills or in supplying the departmental materials and therefore, the court below erred in entering a finding to the effect that the defendants have committed breach of contract. Learned Senior Government Pleader also submitted that the suit is barred by limitation for the reason that the cause of action for the suit arose on 01.02.1988, that the plaintiff had in Ext.B26 letter dated 1.2.1988 addressed to the Superintending Engineer cautioned that if the department does not agree to the terms and conditions set out in Ext.B25 letter dated 23.06.1987 or such other terms as may be mutually agreeable, and extend the time suitably beyond the originally stipulated period to execute the balance work, within 15 days from the date of receipt of Ext.B26 letter, he will treat the contract as unlawfully repudiated by the departmental authorities and will be entitled to damages by way of gains prevented at 15% of the balance works and also seek other reliefs and therefore, as the said demand was not acceded to, the plaintiff ought to have instituted the suit for damages within three years from that date. Learned Senior Government Pleader

also submitted that there is no proper pleading in the plaint as regards the quantification of various claims other than in the relief portion; that no evidence has also been adduced to support the claims; that no one other than the plaintiff has been examined to prove his claims and therefore, the trial court erred in granting the plaintiff a decree allowing him to realise the sum of ₹5,74,817.42/-. Learned Senior Government Pleader also placed reliance on the recent decision of the Apex Court in Civil Appeal No.1770 of 2005 [**State of Gujarat v. M/s Kothari & Associates**], the decision of the Patna High Court in **State v. P. K. Jain [AIR 1981 Patna 280]** and the decision of a learned single Judge of this court in **Devaki v. State of Kerala [2000 (1) KLT 458]** in support of his contention that the instant suit is barred by limitation. Inviting our attention to the recent decision of a Division Bench of this court in **Superintending Engineer, K.I.P., L.H. Circle v. Varghese [2015 (1) KLT 549]**, learned Senior Government Pleader submitted that in any view of the matter, the rate of future interest awarded by the court below is liable to be scaled down from 12% to 9% per annum pendente lite and to 6% per annum from the date of decree. Learned Senior Government Pleader also submitted that the court below erred in holding that the plaintiff is entitled to interest on the security deposit of ₹3,61,600/- for the reason that the said amount was not remitted in cash but was deposited in a treasury

savings bank account at District Treasury, Thrissur, that the plaintiff was withdrawing the interest accruing on the deposit periodically at the rate of 13.5% per annum and therefore, the decree to the extent it allows the plaintiff to realise the said sum with interest at 12% per annum is liable to be set aside.

14. We have considered the submissions made at the Bar by learned counsel appearing on either side. We have also gone through the pleadings and the materials on record. We shall first consider the question whether the instant suit is barred by limitation. The contention of the learned Senior Government Pleader is that the cause of action for the instant suit arose on 01.2.1988 when the plaintiff sent Ext.B26 letter of even date to the Superintending Engineer cautioning him that if the time for execution of the work is not extended on terms mutually agreed upon, or on the terms set out in Ext.B25 letter dated 23.06.1987, the plaintiff will be constrained to institute a suit treating the contract as repudiated by the Government and sue the Government for damages including prevented gains. The pleadings and materials on record establish beyond doubt that the period fixed for performance of the contract expired on 28.06.1987. The work was admittedly not completed by then. The work was completed only after it was re-tendered as per Ext.B59 tender notification which was issued after Ext.A20 order dated 21.02.1991 terminating the contract with

the plaintiff without risk and cost was issued. Till Ext.A20 letter was issued, the matter was pending before the high level committee. It is evident from the minutes of the meeting of the high level committee that it was on account of the default on the part of the department, namely delay in supplying materials and in making periodical payments and in changing the scope of the work, that the work could not be completed in time. The high level committee has specifically recommended that such being the situation, it would not be fair and just to penalise the contractor. That recommendation was accepted by the Superintending Engineer when he issued Ext.A20 letter terminating the contract without risk and cost to the contractor. Prior to that date, the various claims made by the plaintiff had not been rejected and the matter was in a state of flux. Neither the contractor nor the department was certain as to whether the time for performance would be extended on the same rate or at different rates. In other words, until Ext.A20 order was passed terminating the contract without risk and cost to the contractor, the plaintiff did not have a cause of action to institute the suit either claiming payment for the work done by him or damages. The cause of action in the instant case arose only when the government terminated the contract by Ext.A20 order without risk and cost, having regard to the fact that the contractor was not at fault and that it was the department which was at fault. In such situation, it

cannot be said that the cause of action for the suit arose on a date earlier than 21.02.1991. The defendants cannot therefore, rely on the decision of the Honourable the Supreme Court in Civil Appeal No.1770 of 2005 [**State of Gujarat v. M/s Kothari & Associates**] and contend for the position that the cause of action for the instant suit had arisen on an earlier date. It is evident from the facts of the said case that the cause of action had arisen on more than one occasion and that the work was also completed after extension of time was granted, subject to the condition that no compensation would be payable for the extension. In the instant case, such a contingency had not arisen. Such being the position, the cause of action to institute a suit for a declaration that the State of Kerala has committed breach of contract arose only after the contract was broken by the State Government. As the State Government was the defaulting party, it cannot be said that the cause of action to institute the suit for a declaration had arisen at an earlier point of time.

15. Under section 73 of the Indian Contract Act, 1872 when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to

result from the breach of it. Under article 55 of the Limitation Act, 1963, the period of limitation to institute a suit for the breach of any contract, express or implied, is three years from the date on which the contract is broken or where there are successive breaches, when the breach in respect of which the suit is instituted occurs or where the breach is continuing when it ceases. In the instant case, the contract was broken when Ext.A20 order of termination was issued by the Superintending Engineer on 21.02.1991. The instant suit was instituted on 11.11.1992 well within the period of three years contemplated therein. We therefore find no merit or force in the submission of the learned Senior Government Pleader that the instant suit is barred by limitation. Though it was contended before us that the plaintiff ought to have instituted the suit at least within three years from the date fixed for completion of the work namely 28.06.1987, we find no merit or force in the submission as well. The plaintiff's request for extension of time was pending with the competent authority and a decision in that regard was taken only on 05.10.1990. The decision taken was to terminate the contract without risk and cost to the contractor as he was not at fault. The minutes of the meeting of the high level committee also disclose that it was impossible to execute the work at the rates prevailing in the year 1984. In such circumstances, by no stretch of imagination can it be said that the

cause of action for the instant suit arose on an earlier date. We accordingly overrule the contention of the respondent cross objector that the instant suit is barred by limitation.

16. We shall next consider the question whether there is any merit in the challenge to the finding entered by the court below on issue No.1 that the defendants have committed breach of contract. It has come out in evidence that after the work commenced, there was change in the designs which necessitated the execution of the three supplemental agreements. It is also not in dispute that 114 extra items of work were included in the supplemental agreements. It has also come out in evidence that there was delay in supplying departmental materials and delay in making part payments. DW2, who was the Assistant Executive Engineer during the period of the work and was working as Executive Engineer at the time when he was examined, has admitted the fact that there were changes in designs and considerable delay in the supply of departmental materials. The minutes of the meeting of the High Level Committee held on 16.9.1989 evidenced by Ext.B60 also establishes the said fact. The High Level Committee had, after considering the materials placed before it, come to the conclusion that as there were substantial changes in the designs and there was delay in the supply of materials and in payment of the bills, it will not be fair to penalise the contractor. The committee had also come to the

conclusion that it is impracticable to proceed with the work as per the agreement executed in the year 1984. The committee accordingly recommended that the work be terminated without risk and cost to the contractor. That decision was accepted and the contract was terminated by Ext.A20 order dated 21.2.1991 wherein also, the contracting authority namely the Superintending Engineer has referred to the recommendations of the High Level Committee. The trial court has, on an elaborate consideration of the pleadings and the evidence on record, more particularly, the vital admissions made by the Assistant Executive Engineer at the work site who was examined as DW2, held that the plaintiff could not complete the work in time due to the default committed by the defendants.

17. After hearing learned counsel appearing on both sides at length and after going through the pleadings and the materials on record, we are not persuaded to hold that the finding entered by the court below in that regard is not based on any evidence or that it is a perverse finding. In the light of the materials placed before us, more particularly Ext.A60 minutes and Ext.A20 order terminating the contract without risk and cost to the contractor, we are of the considered opinion that no conclusion other than the one arrived at by the court below could have been arrived at in the instant case. If as contended by the defendants it was the plaintiff who had committed

breach of contract, the State would not have terminated the contract without risk and cost. It would have terminated the contract even without waiting for the decision of the High Level Committee at the contractor's risk and cost. We accordingly uphold the finding entered by the court below on issue No.1 that it was the defendants who had committed breach of contract.

18. We shall next consider the question whether the finding entered by the court below on issue No.2 to the effect that the plaintiff is not entitled to compensation for prevented gains, is sustainable in law. While the appellant contends that having regard to the finding entered by the trial court that it was the defendants who had committed breach of contract, he is entitled to be compensated for the loss caused to him by way of prevented gains, the contention of the State is that in view of the stipulations in Ext.B1 agreement referred to in paragraph 20 of the impugned judgment, the plaintiff is not entitled to any amount other than the actual expenses incurred by him for the finished items of work. It is evident from Ext.B60 minutes and Ext.A20 order that it was the defendants who were at fault and that it was the defendants who had committed breach of contract. We have also upheld the finding entered by the trial court in that regard. It is now well settled by a series of decisions of the Apex Court and this court that section 73 of the Indian Contract Act, 1872 allows award of

damages/ loss of reasonable profits arising from breach of contract. A Division Bench of this court has in **State of Kerala v. K. Bhaskaran** (AIR 1985 Kerala 49) considered the question whether 10% profit claimed by the plaintiff as a loss of gain prevented can fairly and reasonably be considered as a loss arising naturally, that is according to the usual course of things, within the meaning of the said term occurring in section 73 of the Indian Contract Act. The Division Bench held that the rule applicable in such cases can be summarised as follows:

"12. So the question that has to be decided by this court is whether the 10% profit claimed by the plaintiff as a loss of gain prevented can fairly and reasonably be considered as a loss "arising naturally", i.e. according to the usual course of things. We think Section 73 of the Indian Contract Act allows as damages, the loss of reasonable profits arising from a breach of contract. The rule that is applicable can be summarised as follows:

The defendant is liable only for "natural and proximate consequences of a breach or those consequences which were in the parties' contemplation at the time of contract." The above quoted phrases are words of art and usually represent two ways of expressing a single requirement. Proximate and natural consequences are those that flow directly or closely from the breach in the usual and normal course of events - those which a 'reasonable man' or a person of ordinary prudence would when the bargain is made foresee, as expectable results of later breach. The phrase 'in the parties' contemplation' normally means in the reasonable contemplation of the defendant. Thus understood, it has got only the same meaning as the companion phrase 'natural and proximate'. Brevity and clarity are better served by abandoning these traditional phrases of legal art and using instead the gist of their meaning. We propose the following statement of the rule. The defendant is liable only for reasonably foreseeable losses - those that a

normally prudent person, standing in his place possessing his information when contracting would have had reason to foresee as probable consequences of future breach."

19. The Division Bench thereafter proceeded to consider the manner of estimating the loss of profits and held as follows:

"19. The plaintiff must prove his case. Plaintiffs seeking damages for breach of contract are no exception. They have to bear the burden of proving the financial loss for which they seek recovery. Here the courts face the same dilemma that confronts them when they apply the rule in Hadley v. Baxandale. To be sure, defendant has broken a contract, he should be and he is liable. Simple justice, however forbids saddling him with liability for claims that rest on conjecture and speculation rather than real proof. On the other hand, tender concern for him should not be carried so far as to penalise the plaintiff. Fairness forbids requiring too much of him. After all, defendant did make the contract and did commit the breach which bore the controversy. Sensitive to these conflicting equities, the courts adopt a compromise - the requirement of reasonable certainty. This standard requires plaintiff to prove with fair certainty first, that defendant's breach did cause plaintiff a loss and second the amount of or extent of that loss. Of course the qualifier 'reasonable' is the key to the requirement. Plaintiff is obliged to prove with reasonable certainty, not with fatalistic sureness that defendant's breach prevented gains or otherwise resulted in loss for the plaintiff, nor is he bound to prove with mathematical exactitude the amount of gain or loss in question. Thus if the plaintiff sues to recover profits lost, he need show convincingly that in the normal course of events, he would have realised a gain which he estimates, had the defendant performed his part of the contract. In the context, he has to produce the best estimate of the amount allowed by the circumstances. Fairly persuasive evidence, the most convincing and best available under the particular circumstances of the case will suffice.

20. The plaintiff has clearly stated in the plaint that the estimate amount of the contract was made, reckoning a profit of 10%. This fact has not been denied by the State in their written statement. Nowhere it is stated in the written statement that the damage claimed is excessive,

arbitrary or unjustifiable. It is admitted that normally a 10% profit also is taken as an element in the preparation of the estimate of contract.

21. Considering the overall circumstances of the case and the fact that the trial court has granted a decree estimating the loss sustained by the plaintiff only at 10% of the total amount of the contract, we do not want to interfere with that conclusion. In the result, we have to dismiss the appeal filed by the State. We dismiss the appeal. No order as to costs."

20. The Division Bench held that though the plaintiff is obliged to prove with reasonable certainty that the defendant's breach prevented gains or otherwise resulted in loss for the plaintiff, he is not bound to prove with mathematical exactitude the amount of gain or loss in question. It was held that he need only show convincingly that in the normal course of events he would have realised a gain which he estimates, had the defendant performed his part of the contract. The Division Bench thereafter proceeded to examine the facts of the case before it and held that the plaintiff had in the plaint stated that the estimate amount takes into account a profit of 10%, that the said averment had not been denied by the State in the written statement, that the State had no case that the damage claimed is excessive, arbitrary or unjustifiable and that the State had admitted that normally a 10% profit also is taken as an element in the preparation of the estimate for the work. The decree granted by the trial court estimating the loss sustained by the plaintiff at 10% of the total amount of the contract was accordingly upheld.

21. The plaintiff had in Ext.B37 notice dated 3.8.1992 issued under section 80 of the Code of Civil Procedure set out in paragraph 56 thereof, the particulars of his claim for prevented gains. The relevant portion thereof is extracted below:

"CLAIM. NO.1. As per the terms of the original Agreement the estimated PAC was Rs.1,43,62,902/- which was less cost of departmental materials and tender excess. An Alternate Item, in place of Items 2 (a) and 2 (b) valued at Rs.1,93,125/- under Appendix 'A' of the Schedule for forming ring bund using contractor's own earth was also provided for in the Schedule, which had an estimated value of Rs.3,28,929/-. During actual execution however, Items 2 (a) and 2 (b) of Appendix 'A' as well as the Alternate Item were required to be operated. It would thus be seen that after adding the Alternate Item also to the estimated PAC of Rs.1,43,62,902/- alongwith the cost of departmental materials and tender excess of 59.7%, the agreed PAC amounted to Rs.1,85,14,356.90. Supplemental Agreement Nos. II, III and IV executed between our Client and the Governor of Kerala acting through the second among you for works on 20.2.1985, 27.12.1985 and 17.2.1989 respectively had a total agreed cost of Rs.33,73,179/-. Thus the total cost of work under the contract including the Supplemental Agreements amounted to Rs.2,18,87,535/-. The gross value of work executed by our Client was Rs.62,29,523/-. Thus, works worth a total amount of Rs.1,56,58,012/- was unlawfully and unjustifiably prevented by the Department from being executed by our Client causing losses by way of gains prevented which he would have made but for such breach. Our Client is entitled to compensation for the losses caused to him on account of gains prevented the minimum of which shall be 10% of the agreed contract price of the balance works remaining to be executed under the contract or to an amount of Rs.15,65,801/- which our Client hereby claims from the Department."

22. The plaintiff had in paragraph 56 quoted above stated that the department had unlawfully and unjustifiably prevented him from

executing works worth ₹1,56,58,012/- thereby causing loss by way of gains prevented, which he would have made but for the breach. The plaintiff had also estimated the loss thus caused to him at 10% of the agreed contract price of the balance works remaining to be executed namely 10% of ₹1,56,58,012/- i.e., ₹15,65,801/-. The second defendant did not in Ext.A35 reply notice sent by him, specifically deny the said claim. The only statement in Ext.A35 reply notice as regards the claim for prevented gains reads as follows:

"Claim 1. Total agreed P.A.C. as per the original agreement with the alternative clause was only Rs.1,82,05,936/- against Rs.1,85,14,356.50 as stated by the contractor and the total cost of work incorporating the supplemental agreements amounts to Rs.2,06,75,232/- only. The department was fully agreeable for the work to be carried out by the contractor beyond the original time of completion on the originally agreed terms and conditions. But he was not willing to carry out the work. Hence the department is left with no other alternative than to terminate the contract agreement with him. As such the department did not in any way prevent any gain to the contractor. On the other hand the department is at a loss as the balance work is to be arranged through some other agencies. In the circumstances the claim is denied as the contractor is not at all entitled for the same."

23. The stand taken by the second defendant in Ext.A35 reply notice is that the department was fully agreeable for the work to be carried out by the contractor beyond the original time for completion on the originally agreed terms, but the contractor was not willing to carry out the work and therefore, the department was left with no other alternative but to terminate the contract. It was also contended

that such being the position it cannot be said that the department did not in any way prevent any gain to the contractor. The second defendant also contended that it is the department which has suffered a loss as the balance work is to be arranged through other agencies. The second defendant did not in Ext.A35 reply notice dispute the quantification of prevented gain made by the plaintiff. He had no case that the plaintiff is not entitled to claim 10% of the value of the works remaining to be executed by way of prevented gains. It was the said amount of ₹15,65,801/- which was claimed as damages on account of loss due to prevented gains in relief No.2 in the plaint. The plaintiff had in paragraph 67 of the plaint averred as follows:

"67. Since the defendants had not cared to finalise the Plaintiff's Final Bill and pay the amounts due to the Plaintiff by way of payment for work done, compensation by way of gains prevented, compensation for losses caused to the Plaintiff towards infructuous expenditure on salaries of watch and ward staff, expenses for maintenance of site sheds, electricity charges etc for the period from 1.7.1987 to 31.7.1991, payment of Final Bill, compensation for losses caused to the Plaintiff by way of interest liability to The South Indian Bank Ltd., Market Road Branch, release of Security Deposit, refund of Retention amount alongwith interest etc, the Plaintiff caused Advocates' notice dated 3.8.1992 to be issued to the Defendants by which the Defendants were called upon to pay to the Plaintiff an amount of Rs.28,35,595.79 as per Claims 1 to 10 therein within a reasonable period of 60 days from the date of receipt of the said notice failing which it was notified that the Plaintiff would be instituting appropriate proceedings in the Court of competent jurisdiction to recover the same as also interest and costs."

24. The reference evidently is to the claim made in Ext.B37 suit notice dated 3.8.1992. The defendants did not, notwithstanding the specific claim made by way of prevented gains, dispute the quantification of the claim made by the plaintiff even in the written statement filed by it. It is also not in dispute that a 10% profit for the contractor is factored into while preparing the estimate for the work. Paragraph 10.3 occurring in Chapter 10 of the PWD Manuel inter alia stipulates that the detailed estimate for a work should consist of a data sheet showing the estimated unit rate for the different items of work. It is also stated that if the work is to be done through a contract agency the data should make a provision for contractor's profit at 10% of the net cost of items less cost of departmental materials if any.

25. The Apex Court has in **Mohd. Salamatullah and Others v. Government of Andhra Pradesh** (AIR 1977 SC 1481), **M/s. A.T.Brij Paul Singh and Bros. v. State of Gujarat** (AIR 1984 SC 1703), **Dwarka Das v. State of Madhya Pradesh and Another** (AIR 1999 SC 1031), **Mohammed Zakir v. Regional Sports Centre** [2009 (4) KLT 755 (SC)] and this court has in **State of Kerala v. K. Bhaskaran** (supra) awarded/upheld award of compensation under the head prevented gains taking 10% as the contractor's profit. In some cases, the compensation awarded under that head has gone up to 15%. In such circumstances, we are persuaded to hold that the

plaintiff in the instant case is entitled to be compensated for prevented gains or the loss suffered by him by way of prevented gains in view of the finding entered by the trial court and upheld by us that it was the defendants who had committed breach of contract.

26. Then the question is whether in view of the stipulation in clause 25 of the special conditions forming part of Ext.B1 agreement, the claim in that regard is liable to be thrown out. Paragraph 25 of the first schedule to Ext.B1 agreement reads as follows:

"25. The department reserves the right to abandon the work at any stage if such course is found necessary in the interest of the Government irrespective of what have been agreed to herein and the contractor will be paid only for the finished item of work."

The learned trial judge has taken the view that the said clause would apply to the case on hand. We are afraid the said finding cannot be sustained. The clause referred to above comes into operation when the work is abandoned irrespective of the stage at which it is abandoned. The aforesaid clause recognises the right of the department to abandon the work at any stage. It is also stipulated that in that eventuality, the contractor will be entitled only to payment for the work done. In the instant case, the work was not abandoned. It was retendered without risk and cost to the contractor as can be seen from Ext.B59 agreement dated 26.4.1994. The aforesaid stipulation cannot therefore, on the terms thereof, apply to the case on

hand. Ext.B59 would go to show that the work was proceeded with and completed through another contractor. The plaintiff in the instant case was however not mulcted with liability on that score for the reason that the termination of the contract was without risk and cost to him. The trial court has also non-suited the plaintiff on the ground that the plaintiff has not been able to prove that he has derived any profit from the completed work. In coming to the said conclusion the trial court omitted to take note of the specific claim made in Ext.B37 suit notice and the fact that the said claim had not been denied by the second defendant in Ext.A35 reply. A reading of the impugned judgment discloses that the trial court has proceeded on the basis that the claim made by the plaintiff is for future profits which he would have derived, had he executed the work. The trial court also lost sight of the fact that the plaintiff is not bound to prove with mathematical exactitude the amount of gain or loss in question. He need only show that in the normal course of events he would have realised the gain which he estimates, had the defendants performed their part of the contract. The court below also lost sight of the fact that while preparing the estimate for the work, a provision for contractor's profit at 10% of the net cost of items less the cost of departmental materials if any is also factored into. This fact is conceded by DW2, who was the Assistant Executive Engineer in charge of the work at the relevant time. The

relevant portion of the testimony tendered by DW2 is extracted below:

"estimate തയ്യാറാക്കുമ്പോൾ contractor's profit 10% കാണിക്കും.

Labour chargeൽ ആണ് 10% profit കാണിക്കുന്നത്."

27. As stated earlier, the trial court has declined to award compensation for the loss sustained by the plaintiff by way of prevented gains on the ground that there is no evidence before the court to show that the work which was finished by the plaintiff was profitable and also for the reason that in view of clause 25 extracted above, the plaintiff is not entitled to get future profits. Going by the decisions of the Apex Court and this court referred to above and the unequivocal admission made by the Assistant Executive Engineer who was examined as DW2 and the stipulations in the PWD Manuel as also the claim made in Ext.B37 suit notice which has not been traversed in Ext.A35 reply, we are satisfied that the plaintiff has shown convincingly that in the normal course of events he would have realised a 10% profit if he had not been prevented from executing the balance works remaining to be executed at the time Ext.A20 order of termination was issued. The value of the balance quantity of work remaining to be executed on the date of termination was ₹1,54,15,950/-. The value of works executed by the plaintiff as on the date of termination was ₹62,87,940.37. The value of the work covered by Ext.B1 agreement and Exts.B1(b) and B1(d) and Ext.A19 supplemental agreements is

₹1,82,05,936 + ₹33,72,928 = ₹2,15,78,864/-. The value of the balance quantity of work remaining to be done as on the date of Ext.A20 order of termination was ₹1,54,15,950/-. 10% of that would work out to ₹15,41,595/-. As a matter of fact, in the argument notes submitted before the court below after Ext.B7 final bill was produced by the defendants, the plaintiff had limited his claim for damages on account of the loss caused to him by way of prevented gains to ₹15,41,595/-. As stated earlier, the defendants did not in Ext.A35 reply notice dispute the quantification of prevented gains made by the plaintiff. We therefore find no reason why a decree for ₹15,41,595/- claimed under that head should not be granted in favour of the plaintiff. We accordingly set aside the finding entered by the trial court on issue No.2 and hold that the plaintiff is entitled to a decree allowing him to realise from the defendants, the sum of ₹15,41,595/- as compensation for the loss sustained by him by way of prevented gains.

28. We shall next consider the question whether the finding entered by the court below on issue Nos.3, 4, 6 and 7 merits interference. The trial court has on issue No.3 entered a finding that the plaintiff is entitled to get the sum of ₹19,063.42 as working charges for bending, tying and placing in position 19395.59 kilos of steel. The trial court has on issue No.4 entered a finding that the plaintiff is entitled to get the sum of ₹5,200/- being the value of four

rock shoes belonging to the plaintiff but handed over to the department pursuant to the termination of the contract. The trial court has on Issue No.6 held that the plaintiff is entitled to realise the sum of ₹49,000/- towards the expenses incurred by him to keep the balance materials belonging to the department but kept at the work site, in safe custody. It is not in dispute that the final bill does not take in the claim made by the plaintiff towards the working charges for carrying out the work of bending, tying and placing in position 19395.59 kilos of steel. It is also his case that no check measurement of the said work was done. DW2, the Assistant Executive Engineer, who was in charge of the work, has in his cross-examination admitted the fact that the working charge of 20.867 tonnes of steel has not been included in the final bill. He had also admitted the fact that the working charge would come to ₹99.14/- per quintal. Calculated on that basis, the amount payable towards working charges would be ₹20,685/- i.e., ₹99.14 x 208.67 quintals = ₹20687.54. In the light of the categorical admission made by DW2, who was concerned with the execution of the work, we find no reason or justification to interfere with the award of the sum of ₹19,063.42 under that head. Though as a matter of fact the plaintiff was found entitled to receive the sum of ₹20,685.50, having regard to the fact that he had claimed only the sum of ₹19,063.42, that sum alone was awarded by the trial court. We accordingly uphold the

finding entered by the court below on Issue No.3 as well. As regards Issue No.4, it is not in dispute that consequent on the termination of the contract, four rock shoes were handed over to the department. Though this was clearly stated in paragraph 56 of the suit notice, the second defendant did not in Ext.A35 reply notice specifically deny the said statement. In such circumstances, we find no reason to interfere with the said finding as well.

29. The trial court has on Issue No.6 held that consequent on the termination of the contract, the plaintiff is entitled to realise the sum of ₹49,000/- from the defendants being the expenses incurred by him to keep in safe custody, the departmental materials lying at the site from the date of expiry of the period stipulated for completion of the work. Though the plaintiff had claimed compensation at the rate of ₹2,000/- per mensem for the period of 49 months commencing from 01.07.1987 and ending with 31.07.1991, the trial court awarded only the sum of ₹1,000/- per month aggregating to ₹49,000/- as compensation. It is not in dispute that the departmental materials were lying at the site after the work came to a stand still. The period fixed for completion of the work expired on 28.06.1987. After Ext.A20 order terminating the contract was issued, the Assistant Executive Engineer sent Ext.A27 letter dated 14.03.1991 to return the balance materials to the Assistant Engineer at the earliest. The Assistant

Executive Engineer had in that letter stated as follows :

"With reference to the above reference cited the work awarded to you has been terminated without risk and cost. Therefore you are requested to return the balance materials with your charge as per M.A.S Account to the Assistant Engineer's section No.I & II at the earliest."

30. This implies that the balance materials were lying at the site. On receipt of that letter the plaintiff sent Ext.B31 letter dated 14.05.1991 in reply, wherein he called upon the Assistant Executive Engineer to inform the date on which the Assistant Engineer will be available at site so as to enable him to make suitable arrangements to hand over the balance materials available at site to the department. He had in that letter *inter alia* stated that he is incurring a monthly expenditure of ₹3,000/- to maintain watch and ward staff at the site as notified to the department earlier. It appears that even thereafter nobody was deputed to take charge of the departmental materials lying at the site. The plaintiff thereupon sent Ext.B32 letter dated 09.10.1991 to the Assistant Executive Engineer informing him that he will be present at the site at 11.30 a.m. on 24.10.1991 to hand over the balance materials. He had in that letter specifically stated that if the Assistant Engineer is not present at the site on the appointed day at the appointed time, he will not be responsible for the materials at site. The plaintiff had in Ext.B37 suit notice dated 03.08.1992 referred

to these facts and also stated that it was only on 30.07.1992 that the materials were taken over. The second defendant has not in Ext.A35 reply notice denied and disputed the fact that departmental materials were lying at site even after 28.06.1987 and that they were taken over only long after the contract was terminated. Before the contract was terminated, the plaintiff had sent Ext.B30 letter dated 03.05.1990 to the Secretary to Government, PWD Irrigation Department and the Superintending Engineer, Irrigation Central Circle, Thrissur wherein he had referred to the expenditure being incurred by him in connection with the watch and ward staff. He had in paragraph 23 thereof stated as follows :

"I have spent considerable amounts on salaries of watch and ward staff maintained at site to keep a watch on the materials at site. In the absence of a decision regarding the execution of the balance works and in view of the Department's reluctance to take over the entire balance materials I was forced to continue the watch and ward staff at site incurring a monthly expenditure of Rs.3,000/- towards salary and other expenses for maintenance of site sheds, electricity charges etc. For all such expenses incurred and to be incurred by me I am entitled to be compensated by this Department."

31. The State of Kerala or the Superintending Engineer did not deny or dispute the plaintiff's claim in that letter that he is incurring a monthly expenditure of ₹3,000/- towards salary and expenditure for

the maintenance of site sheds, electricity charge etc. He had also stated that for all such expenses incurred by him, he is entitled to be compensated by the department. Such being the state of affairs, as the defendants do not dispute the fact that the plaintiff was constrained to maintain watch and ward staff after 28.06.1987 till 31.07.1992, he is entitled to be compensated for the expenditure incurred by him in that regard. Though the goods were taken over only on 31.07.1992, the court below has awarded compensation under that head only for the period commencing from 01.07.1987 and ending with 31.07.1991 (49 months) at the rate of ₹1,000/- per mensem. Having regard to the then prevailing rate of wages in the State of Kerala and the expenses incurred for payment of electricity charges, by no stretch of imagination can it be said that the sum of ₹49,000/- awarded under that head is exorbitant or that the claim in that regard is not tenable. We accordingly uphold the finding entered by the court below on issue No.6.

32. The court below has on Issue No.7 held that the plaintiff is entitled to realise the sum of ₹39,954/- from the defendants. The plaintiff has in relief No.7 in the plaint claimed the sum of ₹39,954/- towards the work done by him utilizing 20.867 metric tonnes of steel. It was contended that the said amount is not included in the final bill. DW2 has categorically admitted in his cross-examination that the

working charges for 20.867 metric tonnes of steel has not been included in the final bill and that it would come to ₹20,687.50. Though at the time the suit notice was issued, the amount claimed under this head was ₹75,450/-, the stand taken by the second defendant in Ext.A35 reply notice is that, the final bill is under preparation and if any amount becomes due that will be paid to the contractor. In the light of the categorical admission made by DW2 and the further fact that the plaintiff had executed the work involving 20.867 metric tonnes of steel, no exception can be taken to the award of the sum of ₹39,954/- under that head. Though there is an error in computation (the court below has entered a finding that the balance amount payable for the said work is ₹1,13,184/- instead of the sum of ₹1,04,333/-), nothing turns on that error for the reason that the amount awarded under that head is only ₹39,954/-. We accordingly uphold the finding entered by the court below on issue No.7 that the plaintiff is entitled to realise the sum of ₹39,954/- from the defendants.

33. The court below has on Issue Nos.9 & 10 held that the plaintiff is entitled to realise interest at 12% per annum on the security deposit of ₹3,61,600/- and the retention money of ₹1,00,000/-. Though the learned Government Pleader does not dispute the entitlement of the plaintiff to realise interest on the retention amount

of ₹1,00,000/-, he disputes the entitlement of the plaintiff to realise interest on the sum of ₹3,61,600/- furnished as security for the reason that security was not furnished in cash but was furnished by pledging a fixed deposit receipt for the sum of ₹3,61,600/- . It is contended that the said amount lying in fixed deposit in Treasury Savings Bank was earning interest and therefore, award of interest on the sum of ₹ 3,61,600/- is not called for. It is not in dispute that security was not furnished in cash and the same was furnished by pledging a fixed deposit receipt for ₹3,61,600/- with the Treasury Savings Bank, District Treasury, Thrissur. It is not in dispute that the plaintiff was periodically withdrawing the interest on the deposit and after the suit was decreed, the entire amount deposited together with the interest that had accrued on the deposit was withdrawn by him. It is also not in dispute that in execution of the decree, he had also realised interest on the sum of ₹3,61,600/- calculated at the rate of 12% per annum from the date of suit till realisation. Having regard to the admitted fact that the security deposit was not furnished in cash but was furnished by way of a fixed deposit receipt and the plaintiff was not denied interest and was in fact earning interest at 13.5% per annum, we are of the opinion that it would lead to unjust enrichment, if the State is mulcted with the liability to pay interest on the said amount. Though the learned counsel for the plaintiff contended that the plaintiff is in

any case entitled to the interest on the security deposit of ₹3,61,600/- at least after the contract was terminated without risk and cost to the contractor by Ext.A20 order dated 21.02.1991, we are not persuaded to hold that merely for the reason that the fixed deposit receipt was released only when the impugned decree was put in execution, the State should be mulcted with the liability to pay interest on the said sum of ₹3,61,600/-. As stated earlier, till the date on which the fixed deposit receipt was returned to him, the plaintiff was earning interest on the fixed deposit at the rate of 13.5% per annum. No real prejudice has therefore been caused to the plaintiff. We accordingly set aside the finding entered by the court below on Issue Nos.9 and 10 to the extent it holds that the plaintiff is entitled to interest on the security deposit of ₹3,61,600/-.

34. The court below has by the impugned judgment granted a decree allowing the plaintiff to realise the sum of ₹5,74,817.42 with future interest at the rate of 12% per annum from the date of suit till realisation. The court below has also granted a decree allowing the plaintiff to realise the retention money of ₹1,00,000/- with interest at 12% per annum. A Division Bench of this court has in ***Superintending Engineer, K.I.P., L.H. Circle v. Varghese [2015 (1) KLT 549]*** considered the question whether the State of Kerala can be held liable to pay future interest on the decree amount in excess of

6% per annum in respect of a contract entered into between the Government and the contractor for the construction of the main canal of Kallada Irrigation Project. After considering the question whether the transaction in question is a commercial transaction as mentioned in the proviso to sub-section (1) of section 34 of the Code of Civil Procedure read with Explanation II thereof, the Division Bench held that the transaction is not a commercial transaction giving jurisdiction to the court to award interest in excess of 6% per annum from the date of decree till the date of payment. In that case, the trial court had granted a decree to the plaintiff with interest at 12% per annum from the date of suit till realisation. After entering a finding to the effect that the contract entered into by the Government is not a commercial transaction within the meaning of section 34 of the Code of Civil Procedure and therefore the court below could not have awarded interest in excess of 6% per annum from the date of decree till the date of realisation, the Division Bench proceeded to award future interest from the date of suit till date of decree at the rate of 9% per annum. The Division Bench has however not laid down any reason justifying the scaling down of interest from the date of suit till date of decree from 12% to 9% per annum. It is not in dispute that the plaintiff was earning interest at the rate of 13.5% per annum on the security deposit made by him. In the light of the binding decision

of this court in ***Superintending Engineer, K.I.P., L.H. Circle v. Varghese***, we are of the opinion that the impugned decree and judgment to the extent it awards to the plaintiff future interest from the date of decree at the rate of 12% per annum should be interfered with and future interest on the amount decreed limited to 6% per annum from the date of decree till realisation. However, as regards *pendente lite* interest, namely interest from the date of suit till the date of decree, we find no reason or justification to interfere with the rate of interest awarded by the court below.

35. Though the learned Senior Government Pleader appearing for the defendants contended that there is no proper pleading in support of the quantification made under various heads, we find no merit or force in the said contention as well. The plaintiff had in Ext.B37 suit notice issued by him under section 80 of the Code of Civil Procedure, set out with clarity the details of the claims made by him. It is the very same claim which was put forward in the suit. The defendants were aware of the nature of the claim made by the plaintiff and the quantification of the claim from the suit notice. They had also caused Ext.A35 reply to be sent to the plaintiff. The quantification of the claim was however not disputed, though the entitlement of the plaintiff for the amount claimed was disputed. In such circumstances, merely because the plaintiff had not reiterated the method of

calculation in the plaint, we are not persuaded to hold that any real prejudice has been caused to the defendants. The defendants have no case that on account of the failure of the plaintiff to plead the particulars of the claim in the plaint once again, any prejudice has been caused to them. A reading of the suit notice along with the plaint will give the defendants the basis on which the plaintiff had made this claim. Therefore, merely for the reason that the plaintiff had not reiterated the quantification of the claim made by him in the suit notice again in the plaint, it cannot be said that any real prejudice has been caused to the defendants or disabled them from raising appropriate defences. We accordingly overrule the said contention as well.

For the reasons stated above, we allow the appeal and in modification of the decree passed by the trial court, pass a decree allowing the plaintiff to realise the sum of ₹15,41,595/- together with interest at 12% per annum from the date of suit till date of the decree (11.12.2015) and thereafter at 6% per annum till realisation.

We also allow the memorandum of cross objections filed by the defendants to the limited extent of setting aside the finding entered by the court below that the plaintiff is entitled to interest on the security deposit of ₹3,61,600/- and by scaling down the interest awarded by the court below on the sum of ₹5,74,817.42/- from 12% per annum to 6% per annum from the date of decree (15.06.2006) till realisation.

However it is clarified that we have not interfered with the award of interest by the trial court on the sum of ₹5,74,817.42 at 12% per annum from the date of suit till date of trial court decree (15.06.2006). We also deem it appropriate to clarify that if in execution of the impugned decree, the entire amount payable thereunder has been paid over to the plaintiff, any excess amount paid shall be adjusted towards the amount payable under the decree passed by this court. We also deem it appropriate to direct that both parties shall bear their respective costs in this court.

Sd/-

**P.N.RAVINDRAN
JUDGE**

Sd/-

**BABU MATHEW P.JOSEPH
JUDGE**

The date of trial court decree "**15.06.2006**" occurring in the operative portion of the judgment dated 11/12/2015 in A.S.No.18/2002 and Cross Objection No.10/2003 (13th and 17th lines at page 49) is corrected and substituted as "**15.06.2001**" as per order dated 05/12/2016 in A.S.No.18/2002.

Sd/-
Registrar (Judicial)