

***HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO**

+ C.C.C.A.Nos.62 and 63 of 2013

% Dated 29.01.2016

Between:

A.P.Civil Supplies Corporation

Rep.by its Vice Chairman

& Managing Director

...Appellant/Defendant No.1

and

\$ M/s Mahalakshmi Transport

Rep.by its Proprietor Y.Venkateshwarlu

and others Respondents/plaintiff and
defendants 2 and 3.

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! Counsel for the petitioner : Sri Ravinder Reddy
G.P. for Civil Supplies(TG),

^ Counsel for 1st respondent : Ms. Vladimeer Khatoon
Counsel for 2nd and 3rd respondents : None

< GIST : ---

>HEAD NOTE : ---

? Cases referred: :

1. AIR 1962 SC 366
2. AIR 1954 SC 44
3. 2006 AIHC 1871
4. AIR 1960 SC.588
5. AIR 1968 SC 522
6. AIR 1952 SC 9
7. (1960) 1 SCR 493 (514) = (AIR 1959 SC 1362 (1371))

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

C.C.C.A.Nos.62 and 63 of 2013

COMMON JUDGMENT:

C.C.C.A.No.62 of 2013:

The appeal is maintained by the then A.P.State Civil Supplies Corporation(for short, 'Corporation') represented by its Vice Chairman & Managing Director, Hyderabad, the 1st defendant, among three defendants including the State of A.P. represented by the Chief Secretary, Government of A.P. and State Bank of Hyderabad, Kurnool branch represented by its Manager, impugning the decree and judgment of the trial Court dated dt.14.09.2009 in O.S.No.2172 of 2006 filed by M/s Maruthi Road lines rep. by its Proprietor Y.Venkateshwarlu, for recovery of Rs.5,40,000/- with future interest and costs, for decreeing by the trial Court the suit against three defendants {(the Civil Supplies Corporation(the appellant herein) and the State Government(the then A.P.) and against the 3rd defendant (State Bank of Hyderabad also)} for Rs.3,65,715/- (which includes of Rs.1,30,000/- the claim of the plaintiff on bills, increase of 30% transport rate from 15.10.1990 to the end of December, 1990 of Rs.35,715/-, forfeited security deposit of Rs.50,000/- and forfeited bank guarantee from 3rd defendant –bank of Rs.1,50,000/-) with future interest at 6%p.a. from the date of suit (Dt.22.07.1991) till realization with proportionate costs of Rs.19,878/-.

C.C.C.A.No.63 of 2013:

2. The appeal is maintained by the then A.P.State Civil Supplies Corporation represented by its Vice Chairman & Managing Director, Hyderabad, the 1st defendant, among three defendants including the State of A.P. represented by the Chief Secretary, Government of A.P. and State Bank of Hyderabad, Kurnool branch represented by its Manager, impugning the decree and judgment of the trial Court dated dt.14.09.2009 in O.S.No.2173 of 2006 filed by M/s Maruthi Road Lines rep. by its Proprietor Y.Venkateshwarlu,(self-same plaintiff in O.S.No.2172 of 2006) for recovery of Rs.6,00,000/- with future interest and costs, for decreeing by the trial Court the suit against three defendants {(the Civil Supplies Corporation(the appellant herein) and

the State Government(now the Telangana) and against the 3rd defendant (State Bank of Hyderabad also)} for Rs.3,85,420/-(which includes of Rs.1,70,000/- the claim of the plaintiff on bills, increase of 30% transport rate from 15.10.1990 to the end of November, 1990 of Rs.16,420/-, forfeited security deposit of Rs.50,000/- and forfeited bank guarantee from 3rd defendant–bank of Rs.1,50,000/-) with future interest at 6%p.a. from the date of suit (Dt.23.09.1991) till realization with proportionate costs of Rs.21,388/-.

3. It is pending the two appeals filed by the 1st defendant–Corporation showing the plaintiff, the respective State Governments and the State Bank of Hyderabad, Kurnool Branch as respondents, there was, vide orders in C.C.C.A.M.P.No.287 and 288 of 2013 dated 12.06.2013 interim stay of execution of decree in both suits subject to deposit of half of the decretal amount and suit costs and by permitting withdrawal by plaintiff without furnishing security, is granted.

4. During the course of hearing pending the appeals, the plaintiff/1st respondent to the appeal filed documents to receive as additional evidence under Order XLI Rule 27 of C.P.C. vide M.Ps. 681 and 682/2013 in both the appeals.

5. Coming to the factual matrix of both suits, these two suits filed by the self-same plaintiff with common averments against the three defendants including the appellant/D.1 that the D.1-Corporation appointed the plaintiff as contractor for transport of levy sugar from Kurnool district for the year 1990-91 in O.S.No.2172 of 2006 and for Mahaboobnagar district, in O.S.No.2173 of 2006; that there was agreement between the parties respectively dated 12.03.1990 and the contract period was from 01.03.1990 to 28.02.1991 and the tender of the plaintiff was accepted by the 1st defendant/appellant on 08.08.1990 and 14.03.1990 respectively of Kurnool, and Mahaboobnagar district and as per the said terms of the contract, the

plaintiff started transport to levy sugar from different places indented by the 1st defendant through his agent to respective districts, plaintiff from such compliance demanded for payments of the amounts covered by the bills and the payments were made. However it is further averred that soon after out of the agreement supra, there was a big hike in the prices of various items of diesel, petrol spare parts and tubes and in consequence of the price increase, resulted increase of transport charges and the plaintiff was forced to engage transport vehicles on hire for transporting the levy sugar at the increased costs of the transport charges by more than 33% increase and the plaintiff and other contractors under the 1st defendant represented for a revise and increase in the rates of transport charges therefrom that was promised by the 1st defendant but failed to do so till October, 1990 and even in October, 1990 ultimately there was a revision of rates at only 10% increase from which the plaintiff suffered huge loss in the transport of levy sugar at old rates and having waited till December, 1990, thereafter stopped transport of the material supra by requesting the 1st defendant and his agent the District Manager of Kurnool and Mahaboob Nagar respectively to give payments as per increased rates and also from the factum, after 15.10.1990 there was further increase in rates of diesel due to unexpected Gulf war and on further request of the plaintiff to increase transport charges by 42% (i.e. original request of 15% + subsequent request of 27%) and the post-budget tenders and contractors were given benefit of 33% original increase+10% additional increase in total of 43% . However, the 1st defendant did not pay the bills to plaintiff and not given the benefit of increased rates and from the transport charges payable by the plaintiff, the 1st defendant illegally and unjustly charged transport charges payable to plaintiff and huge amount was deducted towards various counts like interest, penalty, staff charges telephone charges, telegram charges and internal movements etc., and claimed recovery from the plaintiff falsely.

The 1st defendant forfeited security deposit and bank guarantee furnished by the plaintiff and threatened to recover the loss without any right for such unilateral action and the 3rd defendant-bank also without proper intimation to plaintiff and consent paid respective bank guarantee amounts to the 1st defendant and forfeiture of security deposit of Rs.50,000/- which the 1st defendant is liable to repay with interest from that date and also arrears of the bills with interest from 15% increased rates on the bills from March 1990 till 15.10.1990 and thereafter with 42% increase and for the requests under registered notice, 01.03.1991 of plaintiff to defendants, there was no response which made the plaintiff to file two respective suits supra.

6. The contest of the 1st defendant is while disputing territorial jurisdiction of the respective Prl. Subordinate Judge, Kurnool and Mahaboobnagar in entertaining the suits, in saying the agreement was executed at Hyderabad and as per the clause No.24 of the agreement that all civil suits arising under the agreement should be filed in the City Civil Court, Hyderabad only but no other Court got jurisdiction either at Kurnool or Mahaboobnagar and that even the plaintiff was awarded transport of levy sugar contract by the 1st defendant for the period from 01.03.1990 to 28.03.1991 pursuant to the agreement dated 12.03.1990 there was no provision for any increase in rates or escalation of prices or for other reason for enhancement of rates as plaintiff having entered into the contract voluntarily and openly, bound by the same and is not entitled to enhance rates as claimed and there was no representation made by the 1st defendant or 2nd defendant to plaintiff to enhanced rates from alleged escalation of prices or subsequent Gulf war much less at 10% or other upto 42% as claimed and said allegation is false and for the plaintiff's failure to move the stocks entrusted to him by the 1st defendant pursuant to the contract with conditions therein supra, the 1st defendant with no other

alternative, made alternative arrangements of transport at the risk of plaintiff and recovered the amount incurred by the 1st defendant from the plaintiff's non-performance for his failure despite opportunity to adhere to the conditions of the agreement from its breach and the additional amount payable to the plaintiff on account of 10% increase of transport rate was duly adjusted with security deposit and bank guarantee amount encashed towards expenditure incurred by the 1st defendant due to breach of contract committed by the plaintiff and after adjusting amounts still the plaintiff owed an amount of Rs.5,32,660-23ps in O.S.No.2172 of 2006 and Rs.7,14,160/- in O.S.No.2173 of 2006 respectively to the 1st defendant and the action of the 1st defendant by calling spot tenders and got the work done during that period of agreement is in accordance with the terms of the contract only and the suit won't lie also for the reason of there is an arbitration clause of any dispute out of the terms of the contract and plaintiff without waiting for appointment of arbitrator by the 1st defendant suddenly rushed to the civil Court and filed the suits and there is no clause in the agreement to pay interest for payment of bills and the amounts lying with the 1st defendant and sought for dismissal of the suits.

7. The bank as 3rd defendant contested of not aware of the transaction between the plaintiff and the 1st defendant or 2nd defendant and the allegations of without proper intimation to plaintiff and without consent of the plaintiff, bank guarantee amount was paid to the 1st defendant is not correct and according to the bank, as per the terms of the contract of bank guarantee, when the beneficiaries invoked the guarantee, there is no alternative for the Bank herein except payment of the amount and thus the bank committed no illegality and the suit claim against the D.3-bank won't lie for no cause of action and sought for dismissal.

8. It is from the said pleadings of D.1-Corporation supported by the D.2 and the D.3-bank respectively impugning the plaint averments supra, the trial Court after hearing, framed the issues as to 1) Whether the Court has no jurisdiction and only City Civil Court at Hyderabad got jurisdiction to try the suit? 2) whether the present suit cannot be maintained in view of specific clause for arbitration in case of any disputes out of the terms of the contract and thus to the jurisdiction of this Court is ousted? 3) Whether the plaintiff is entitled for the rate and the amount as pleaded in the plaint? 4) Whether the plaintiff was given adequate opportunity to perform contract and whether he failed to do the same and committed breach of it as contended by the 1st defendant?

5) To what relief?

9. The above issues are in O.S.No.2173 of 2013 but in O.S.No.2172 of 2013 there were 7 issues that framed. In the course of trial in O.S.No.2172 of 2013 through plaintiff-P.W.1 Exs.A.1 to A.6 marked and in O.S.No.2173 of 2013 through plaintiff-P.W.1 Exs.A.1 to A.7 were marked and the defendants did not come into witness box and adduced any evidence. It is after closure of evidence and hearing on both suits, the trial Court held that on jurisdiction aspect of suits be filed in City Civil Court and in Kurnool and Mahaboobnagar respectively that was raised in O.S.No.227/91 and 133 of 1991 respectively at the instance of the 1st defendant to decide as preliminary issue and the said applications were allowed on 29.09.1994 dismissing the two suits holding no territorial jurisdiction to maintain and therefrom necessary issue accordingly holding no further necessity on deciding jurisdiction aspect. In fact, those suits were originally filed in respective Courts and later represented with the present numbers on the file of II Senior Civil Judge, City Civil Court, Hyderabad which got jurisdiction as per the agreement, the territorial jurisdiction at Hyderabad. The trial Court was right in so holding

because of the preliminary issue that is answered and subsequent transfer of the suits and thereby the issue became academic from the City Civil Court got jurisdiction. Coming to the other issues, it is observed by the trial Court in both the respective suits with the performance on the plaintiff to prove that he is entitled to 15% of transport charges of March, 1990 to 15.10.1990 and there was with 40% increase from 15.10.1990 and it is also for the plaintiff to establish the security of Rs.50,000/- the 1st defendant is not entitled to bank guarantee of Rs.1,50,000/- to encash the bank guarantee as per the terms of the bank guarantee of Rs.50,000/- was also not entitled to forfeit. It is observed therefrom that the plaintiff relied upon his self-served testimony with reference to the Exs.A.1 to A.6 and A.1 to A.7 respectively in both the suits of which the Ex.A.1 is the terms and conditions of the agreement between the plaintiff and the defendant approving by the 1st defendant and Exs.A.2 and A.3 in O.S.No.2172 of 2006 of the letters dated 21.03.1990 and 12.07.1990 addressed by the plaintiff to 1st defendant whereas, Ex.A.4 legal notice of plaintiff dated 01.03.1991 and Ex.A.5 postal acknowledgment and Ex.A.6 agreement in O.S.No.2172 of 2006 whereas, in O.S.No.2173 of 2006 Exs.A.2, A.3 and A.4 are the legal notice, dt.04.03.1991, postal receipt with acknowledgment with proof of service, Ex.A.5 the Certified copy of judgment in C.M.A.No.6 of 1999 of District Judge, Kurnool and Ex.A.6 is the Certified copy of decree and judgment in A.S.No.34 of 2000 of III Additional District Judge, Kurnool, Ex.A.7 is the certified copy of decree and judgment in O.S.No.445 of 1993 of Prl. Junior Civil Judge, Kurnool. As per the plaintiff's case there is hike in the prices of diesel, petrol, spare parts and tubes in the new budget resulted increase in transport charges. Subsequent to the budget, the 1st defendant entered into agreement with other contractors for transport of levy sugar with 33% increase in the rates of transport charge made the plaintiff among other contractors to make representations to increase

the rate of transport charges and the 1st defendant having promised did not do so till October, 1990 and only in October, 1990 revised rates at increase at 12% and forwarded for approval of 2nd defendant-Government that was not even approved and having waited till November/December, 1990. The plaintiff stopped transporting the levy sugar and for the reason of there was further increase for Gulf war w.e.f. 15.10.1990 and plaintiff made a claim to increase at 42% from the unexpected increase including 15% increase already claimed which is with no response by the 1st defendant which made to maintain the suit. The trial court held from said evidence in this regard of for 15% increase at post-budget rates after the contract entered concerned but for self-serving testimony of plaintiff as P.W.1, he could not place any material as to increase in the petrol, diesel, spare parts, tyres and tubes and the same was unforeseen. However, so far as the increase in transport charges due to Gulf war concerned, there is hike and the Gulf war was unexpected so also the abnormal increase of rates of diesel and petroleum products therefrom to forfeit the Ex.A.1 agreement rates respectively, the 1st defendant in his written statement stated enhanced the transport charges of 10% w.e.f. 15.10.1990 and on humanitarian grounds and the Corporation-1st defendant also allowed 10% increase of transport rates over and above contract rates and on saying plaintiff on account of 10% increase on transport rate, the additional amount payable to the plaintiff were duly adjusted along with the security amount and bank amount and encashed extra expenditure incurred by the 1st defendant corporation due to the breach committed by the plaintiff from non-performing of the contract. From the steep increase in the prices due to Gulf war, from 15.10.1990 in enhancement in the rates, there is a categorical admission of increase in the rates of petrol and diesel due to Gulf war in offering 10% increase against the claim of the plaintiff of 42%. In this regard what the 1st defendant contested is the plaintiff is not entitled to 42%

increase and as the plaintiff committed breach of very contract under Ex.A.1; As per plaintiff, the contract under Ex.A.1 is frustrated and to support the contention, plaintiff placed reliance on **M/s Muralidhar Chiranjilal Vs. M/s Harish Chandra Dwarakadas**^[1] saying where there was an unprecedented increase in the price of goods to be supplied under the contract and the said fact is proved, it cannot be said a party under the contract is still liable to supply the goods from failure, committed breach of the contract. It was therefrom observed by the trial Court saying, same analogy applies to the present facts from steep increase in petrol cost etc., after 15.10.1990 from the Gulf war and from non-transport, it is not a breach. The trial Court also referred another judgment **Sathyabratha Ghose Vs. Mugneeram Bomgur & Co.**^[2] on the scope of Section 56 of the Indian Contract Act used the word impossible has not been used in the sense of physical or literal impossibility and suffice therefrom if it is impracticable and useless from the point on object and purpose which the parties had in view and if untoward even changing circumstances totally incapacitate from foundation upon which parties rescind their bargain from which it can be said promisor finds it impossible to it the fact which he promised as the essential idea upon which the doctrine of frustration barred is impossibility of performance of the contract and the untoward event is change in circumstances when totally opposite from foundation of the terms, it can be said impossibility for the promisor to perform and from the steep escalation and unprecedented increase from Gulf war of the diesel and petrol prices, it is impossible for the plaintiff to perform the contract under the Ex.A.1 from the two propositions of the Apex Court supra as per the trial Court. Apart from another decision in **Bank of India Vs. S.K.Mukharjee**^[3] saying the defendant though filed written statement did not enter into witness box in support of its defence, the plea filing of written statement plea could not take place of evidence and from the knowledge of material facts not even entered witness box to rebut for no sufficient reason warrants to draw adverse interference.

Therefrom the trial Court observed that when the 1st defendant pleaded the plaintiff committed breach of contract under Ex.A.1 and the plaintiff is responsible for the consequence and D.1 not liable for payment of the claim made by the plaintiff in support of any of it when not entered witness box, it is a case to draw adverse inference and held there was no breach of contract committed by the plaintiff after November/December, 1990 as the contract is frustrated from the exorbitant increase in the petrol and diesel costs equally to increase in the transport charges making impossible to perform and thereby the plaintiff is to be allowed for enhanced rate of transport charges by 30% over and above agreed rate by rejecting further 12% claim of enhanced rate sought by the plaintiff. On the aspect of bank guarantee of 1,50,000/- and security deposit of Rs.50,000/- respectively forfeited by the 1st defendant, the trial Court observed that the plaintiff is not liable for the additional amounts said to have been incurred by the 1st defendant from alleged breach of performing the contract to transport the material respectively after end of November/December, 1990 at the agreed cost from increase in the prices and thereby not entitled to forfeit the amounts of bank guarantee and security deposit and thus held plaintiff is entitled to be refunded the same. It is observed further by the trial Court that despite there is arbitration clause under Ex.A.1 agreement, the D.1 filed written Statement and submitted to the jurisdiction of the civil Court and having participated in the proceedings it is not open to impugn, as D.1 otherwise could have been raised the aspect without filing written statement impugning civil Court's jurisdiction for maintainability of the civil suit or in seeking for arbitration and having so submitted it is now not left open to the defendants. The trial Court therfrom decreed the respective suits for the respective amounts supra saying refund of forfeited security deposit and forfeited bank guarantee to plaintiff and by increase of the transport charges payable to plaintiff at 30% respectively from 15-10-

1990 for transport made till breach committed end of November/December,1990 of respected amounts of Rs.1,30,000/- for said increase from 15-10-1990 to end December,1990 in O.S.No.2170 of 2006 and Rs.1,70,000/- increase from 15.10.1990 to end November,1990 respectively.

10. It is impugning the respective decrees and judgments of the two suits in the present appeals are filed by the 1st defendant/appellant supra. The contentions raised in the grounds appeal are that the trial Court went wrong in decreeing the suit despite plaintiff having entered the Ex.A.1 agreement admittedly committed breach by non transporting from end of November/December,1990 pursuant to the agreements for rest of the period from 1.3.1990 to 28.02.1991, apart from not entitled to the increase in the rates from Gulf war; apart from the contract even not frustrated from Gulf war price increase as this is not an impossibility of the performance of the transport contract within the meaning of Sec.56 of the contract Act. It is also contended that the first defendant rightly forfeited the bank guarantee and security amount for non-performance of the contract for remaining period having performed for major period pursuant to Ex.A.1 agreement and for the loss incurred to adjust in claiming the refund back and bank committed no fault in hampering for enforcing the bank guarantee by 1st defendant and thereby sought for dismissal of the plaintiff's both the suit claims respectively by allowing the appeals as prayed for.

11. So far as the petitions vide C.C.C.A.M.P.No.682 of 2015 in C.C.C.A.No.62 of 2013 and 683 of 2015 in C.C.C.A.No.63 of 2013 to receive documents as additional evidence concerned, the execution petition and claim petition which are the subsequent to the passing of the decree under execution, these are no way relevant to the lis much less to receive as additional evidence with any basis. These two additional evidence applications thereby deserves for dismissal for not

even within the scope of order XLI Rule 27(1)(b) C.P.C. of any necessity for arriving of a just decision of the case. Hence, both these petitions are dismissed.

12. Heard both sides at length from the rival contentions of appellants/1st defendant impugning the trial Court's decree and judgment in seeking to dismiss the suit claim by setting aside the trial Court's decree and Judgment respectively by allowing the appeals and the 1st respondent/plaintiff supports the trial Court's decree and judgment and perused the two expressions referred in the trial Court relied upon by the respondent-plaintiff and the expressions placed reliance by the learned Government Pleader on behalf of the appellant-defendant.

13. Now, the points that arise for consideration in the appeals are:-

- i. Whether the trial Court is right in holding the contract is frustrated from the impossibility of performance due to steep raise in prices for transport from petrol and diesel etc., cost and from non-performance by the plaintiff to transport from end of November/December, 1990 till the remaining period upto 28.02.1991 and from the increase in prices supra from Gulf war after 15.10.1990, for the period of performance later and upto above in increasing 30% though D.1 wants to increase 10% only and also in ordering no right to forfeit Bank guarantee and security deposit?
- ii. To what extent from the above this Court while sitting in appeal interfere? And
- iii. With what result?

Points i and ii:

14. To avoid repetition of facts and for convenience, the points i

and ii are taken up together. Before coming to further facts in addition to what are referred supra, coming to the legal position:-

14(a). In the **three judge Bench expression in Alopi Prasad Vs. Union of India** ^[4], it was observed particularly at paras 20 and 21 that a contract is not frustrated merely because circumstances in which the contract was made or altered and does not enable the party to contract to ignore express covenants and to claim payment of consideration for performance of the contract at rates different from the stipulated rates and on some vague plea of equity and the parties to an executory contract often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate a wholly abnormal raise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself effect bargain they have made. If on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point not because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction, it does not apply in that situation. When it is said that in such circumstances, the Court reaches a conclusion which is just and reasonable or one which justice demands, this result is arrived at by putting a just construction upon the contract in accordance with the implication from the presumed common intention of the parties. That is the law both in England and India. Regarding damages and quantum under Section 73 of the Contract Act it was observed compensation quantum meruit is awarded for work done or service rendered, when price thereof not fixed by contract for work done or service rendered pursuant to the terms of the contract, compensation quantum meruit cannot be awarded where the contract provides for the consideration payable in

that behalf. Quantum meruit is but reasonable compensation awarded on implication of a contract to remunerate and an express stipulation governing the relations between the parties under a contract, cannot be displaced by assuming that the stipulation is not reasonable. There the Apex Court three judge bench supra referred several expressions of All England Report of Chancery and Queen Bench right from 1913 to 1952. The earlier decision of the Apex Court in A.I.R. 1954 SC 44 relying upon by the plaintiff is not referred in the above expression.

14(b). Coming to the other decision of three judge bench in **Naihati Jute Mills Limited Vs. Khyaliram Jagannath**^[5] where it was observed mainly at paras-5 to 10 by referring to several expressions including of the Apex Court in Alopri Prasad supra of 1960:

5. SECTION 56 of the Contract Act inter alia provides that a contract to do an act which, after the contract is made, becomes impossible or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. It also provides that where one person has promised to do something which he knew, or with reasonable diligence might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance. As envisaged by sec. 56, impossibility of performance would be inferred by the courts from the nature of the contract and the surrounding circumstances in which it was made that the parties must have made their bargain upon the basis that a particular thing or state of things would continue to exist and because of the altered circumstances the bargain should no longer be held binding. The courts would also infer that the foundation of the contract had disappeared either by the destruction of the subject-matter or by reason of such long interruption or delay that the performance would really in effect be that of a different contract for which the parties had not agreed. Impossibility of performance may also arise where without any default of either party the contractual obligation had become incapable of being performed because the circumstances in which performance was called for was radically different from that undertaken by the contract. But the common law rule of contract is that a man is bound to perform the obligation which he has undertaken and cannot claim to be excused by the mere fact that performance has subsequently become impossible. Courts in England have, however, evolved from time to time various theories to soften the harshness of the aforesaid rule and for that purpose have tried to formulate the true basis of the doctrine of discharge of contract when its performance is made impossible by intervening causes over which the parties to it had no control. One of such theories is what has been called the theory of implied term as illustrated in *F. A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*, 1916-2 AC 397 where Lord Loreburn stated :

"A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their

bargain on the footing that a particular thing or a state of things would continue to exist. And if they must have done so, then a term to that effect would be implied; though it be not expressed in the contract."

He further observed :-

"It is in my opinion the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted... Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said, " if that happens, of course, it is all over between us."

The same theory in a slightly different form was expressed by Lord Watson in *Dahl v. Nelson, Donkin and Co.*, (1881) 6 AC 38 in the following words :-

"The meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and sensible men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence."

In the first case the term is a genuine term implied though not expressed; in the second it is a fiction, something added to the contract by the law: Anson, principles of the English Law of Contract, 22nd Ed. 464. It appears that the theory of implied term was not found to be quite satisfactory as it contained elements of contradiction. For, if the parties foresaw the circumstances which existed at the date of performance they would provide for them in the contract; if they did not, that meant that they deliberately took the risk and therefore no question of an implied term could really arise. In *Russkoe v. John Stirk and Sons Ltd.*, (1922) 10 L. L. R. 214 (quoted at p. 466 in Anson's Law of Contract, 22nd Ed.) Lord Atkin propounded the theory of disappearance of the foundation of contract stating that he could see no reason why if certain circumstances, which the court would find, must have been contemplated by the parties as being of the essence of the contract and the continuance of which must have been deemed to be essential to the performance of the contract, the court cannot say that when these circumstances cease to exist, the contract ceases to operate. The third theory is that the court would exercise power to qualify the absolutely binding nature of the contract in order to do what is just and reasonable in the new situation. Denning L.J. in *British Movie to news Ltd. v. London and District Cinemas Ltd.*, 1951-1 K. B. 190 expounded this theory as follows :-

"Even if the contract is absolute in its term, nevertheless, if it is not absolute in intent, it will not be held absolute in effect. The day is done when we can excuse an unforeseen injustice by saying to the sufferer. "It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself". We no longer credit a party with the foresight sight of a prophet or his lawyers with the draftsmanship of a Chalmers."

This theory would mean that the Court has inherent jurisdiction to go behind the express words of the contract, and attribute to the Court the absolving power, a power consistently held not to be inherent in it. The House of Lords in the appeal from that decision reported in 1952 AC 166 discarded the theory. In more recent times the theory of a change in the obligation has come to be more and more generally accepted. Lord Radcliffe the author of this theory, in *Davis Contractors v. Fareham U. D. C.*, 1956 AC 696 formulated it in the following words :-

"Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed

because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

It is not hardship or inconvenience or material loss which brings about the principle of frustration into play. There must be a change in the significance of obligation that the thing undertaken would, if performed, be a different thing from that which was contracted for.

In para 6 of the judgment relied upon by the plaintiff in *Naihati Jute Mills supra*, the expression in *Satyabrata Ghosh of 1954 supra* was mostly, reproduced and also the earlier expression of **Gangasaran Vs.Ramcharan**^[6]. In para 10 of the judgment in *Naihati Jute Mills supra*, the expression of *Alopi Prasad of 1960 supra* almost reproduced.

14©. It is ultimately in para-12 of *Naihati Jute Mills supra*, it is observed as

“In the view that we take that the said contract cannot be said to be or to have been void and that in any event the stipulation as to obtaining the import licence was absolute, the question that the arbitration clause perished along with the contract and consequently the arbitrators had no jurisdiction cannot arise. But assuming that the appellants had established frustration even then it would not be as if the contract was ab initio void and therefore not in existence. In cases of frustration it is the performance of the contract which comes to an end but the contract would still be in existence for purposes such as the resolution of disputes arising under or in connection with it. The question as to whether the contract became impossible of performance and was discharged under the doctrine of frustration would still have to be decided under the arbitration clause which operates in respect of such purposes. *Union of India v. Kishorilal*^[7]”.

In the *Kishorilal supra*, it was held that in cases of frustration, it is the performance of the contract which comes to an end but the contract would still be in existence for the purposes such as the resolution of disputes arising under or in connection with it. The question as to whether the contract became impossible of performance and was discharged under the doctrine of frustration would still have to be decided under the arbitration clause provided which operates in respect of such purposes.

15. From the above legal position, save the facts covered in

early paragraphs to avoid repetition but for to the core of relevancy, the factum of there is increase in the cost of the petrol and diesel abnormal from Gulf war after 17.10.1990 is not in dispute. There is evidence of plaintiff-P.W.1 in support of it and there is also no oath against oath from the defendants to disprove or to rebut. Then D.1 chosen to increase at 10% and stated increased to adjust out of amounts increased from plaintiff's non-performance, by engaging other agency from end of November/December, 1990. Once it is thereof increase in prices and escalation shown and D.1 and D.2 at post-budget period in relation to other contracts increased the price above to the price agreed with plaintiff and what the law supra speaks not only the literal but the purposive construction including from the intendment at the time of entering the contract and the unforeseen consequence arisen making impracticable without variance and hardship to say impossible to frustrate for not to mean literal impossibility and the trial Court, then rightly came to the conclusion and the expressions referred before the trial Court of 1954 if not of 1962 reiterated and no way deferred the expressions of 1968 and 1960 placed reliance by appellant-D.1, there is nothing to interfere with the trial Court's decree and judgment of the suit claims. Accordingly, these two issues are answered.

Point-iii:

16. In the result, the two appeals (C.C.C.A.No.62 and 63 of 2013) are dismissed with no costs. Consequently, miscellaneous petitions, if any pending in these two appeals shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:29.01.2016

Note: L.R.Copy to be marked.

B/o

Vvr

[\[1\]](#) AIR 1962 SC 366

[\[2\]](#) AIR 1954 SC 44

[\[3\]](#) 2006 AIHC 1871

[\[4\]](#) AIR 1960 SC.588

[\[5\]](#) AIR 1968 SC 522

[\[6\]](#) AIR 1952 SC 9

[\[7\]](#) (1960) 1 SCR 493 (514) = (AIR 1959 SC 1362 (1371))