

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO.60 OF 2011

Mr. P. B. Ibrahim,
Class I P.W.D. Contractor,
H.O. Bunder Road, Bhatkal, Goa
address : D-7, Asro Hsg.
Society, Near BPS Club,
Margao Goa, represented by
his Power of Attorney
Mr. Abdul Salam Kallatra.

... Appellant

Versus

1. State of Goa,
through the Chief Secretary,
Government of Goa,
with its office at Vidhan Sabha Complex,
Porvorim Goa.
2. The Executive Engineer,
Government of Goa,
Public Works Department,
W.D. XV (NH), P.W.D.,
with its office at Ponda Goa.
3. The Superintending Engineer IX-NH,
Government of Goa,
Public Works Department,
Altinho, Panaji Goa.

4. The Chief Engineer – II,
Government of Goa,
Public Works Department, Altinho,
Panaji Goa. ... Respondents

Mr. N. Sardessai, Senior Advocate with Mr. Vibhav Amonkar and Ms. Gautami Kamat, Advocates for the Appellant.

Ms. Priyanka Kamat, Addl. Government Advocate for the Respondents.

AND
FIRST APPEAL NO.33 OF 2017

1. The Executive Engineer,
Works Division XV (NH)
PWD, Government of Goa
Ponda Goa.
2. State of Goa,
Through the Chief Secretary,
Government of Goa,
Vidhan Sabha Complex,
Porvorim Goa.
3. The Superintending Engineer IX-NH
Government of Goa,
Public Works Division,
Altinho, Panaji Goa.
4. The Chief Engineer II,
Government of Goa,
Public Works Division,
Altinho, Panaji Goa. Appellants

Versus

Mr. P. B. Ibrahim,
major in age,
Class I PWD Contractor
H.O. Bunder Road, Bhatkal,
Goa Address :
D-7, Asro Housing Society,
Nr. BPS Club, Margao Goa. ... Respondent

Ms. Priyanka Kamat, Addl. Government Advocate for the Appellants.

Mr. N. Sardesai, Senior Advocate with Mr. Vibhav Amonkar and Ms. Gautami Kamat, Advocates for the Respondent.

***Coram : M. S. Sonak &
Prithviraj K. Chavan, JJ.***

***Reserved on : 4th February, 2019
Pronounced on: 8th February, 2019***

Judgment (Per M. S. Sonak, J)

In both these appeals the challenge is to the impugned judgment and decree dated 28th February, 2011 in Civil Suit No.72/2005 made by the learned District Judge-3, North Goa, at Panaji (Trial Court), which Civil Suit was instituted by P.B. Ibrahim

(plaintiff) against the State of Goa and others (defendants) seeking *inter alia* the several reliefs including for recovery of several amounts from the defendants. The dispute between the parties arises out of contract for “*Improvement of riding quality (under IRQP 2001-02) from kilometer 84/00 to 131/00 (except km 90/00 to km 100/00 and km 105/00 to 116/00) of NH-4A in Goa*” awarded by the defendants to the plaintiffs in pursuance of plaintiff being adjudged as first lowest tenderer.

2. First Appeal No.60 of 2011 has been instituted by the plaintiff, being aggrieved by the rejection of most of the reliefs prayed for by him. By the impugned judgment and decree, the learned Trial Judge was pleased to only partly decree the suit and award the plaintiff an amount of Rs.1,97,070/- with 10% interest from 2.7.2002 till the date of its actual payment by the defendants to the plaintiff.

3. First Appeal No.33 of 2017 is instituted by the defendants, aggrieved by the award of aforesaid amount of Rs.1,97,070/- with 10% interest to the plaintiff. These are therefore the cross appeals against the same judgment and decree and consequently, it is only appropriate that both these appeals are

disposed of by a common judgment and order. The learned counsel for the parties also agree that it would be appropriate if both these appeals are taken up together and disposed of by a common judgment and order.

4. Mr. Sardesai, learned Senior Advocate for the plaintiff submits that in the contract entered into between the parties, the time was not the essence and the learned Trial Court clearly erred in holding so. In any case, Mr. Sardesai submits that the contract clearly stipulates that the period for completion of work was 150 days excluding monsoon. He submits that the learned Trial Court completely ignored the fact that the period of monsoon had to be excluded in the present case. He submits that it was the case of the defendants themselves that there were provisions for extension of time as also levy of compensation in case of delay. He submits that the learned Trial Court failed to appreciate the true import of the rulings of the Apex Court in *M/s. Hind Construction Contractors Vs State of Maharashtra*¹. Mr. Sardesai submits that the impugned judgment and decree to the extent it answers the issue of time being of the essence against the plaintiff, is vitiated by both the error on facts as well as law and therefore warrants interference.

¹ (1979) 2 SCC 70

5. Mr. Sardesai submits that in the present case there is absolutely no dispute and in any case, there is overwhelming evidence that the plaintiff completed the entire works within 150 days i.e. by 2.7.2002, except item no.7, which comprises the work of center line painting. Mr. Sardesai submits that the plaintiff vide letter dated 1st July, 2002 informed the defendants that the monsoon has commenced and therefore, it may not be advisable to undertake this work during the monsoon. Mr. Sardesai however points out that by the said letter, the plaintiff agreed to execute the said work in case the defendants so insist. Mr. Sardesai points out that even the site for center line painting was not made available to the plaintiff because Bharati Telesonic Ltd. was permitted to lay the optical fibre cable at the same time. Mr. Sardesai submits that this crucial aspects have not at all been considered by the learned Trial Court in the impugned judgment and decree.

6. Mr. Sardesai submits that as compared to the scope of the entire works awarded to the plaintiff, which in the monetary terms came to a little more than Rs.4 crores, the item no.7 in relation to the center line painting was valued at Rs.1,04,000/-. Mr. Sardesai submits that apart from the fact that the plaintiff had more than ample

justification for delay in execution of the said item work or for non execution of the said item work, the defendants, have acted totally arbitrary manner in terminating the contract, almost four years after the date of its completion and on such basis forfeited the security deposit of Rs.39.50 lakhs and further levied and even recovered compensation of over Rs.41 lakhs from the plaintiff. Mr. Sardesai points out that the entire approach of the defendants is entirely contrary to the law laid down by the Hon'ble Apex Court in *Vishwanath Sood Vs Union of India and Another*¹.

7. Mr. Sardesai submits that the defendants, upon due satisfaction released 75% amount from Vth R.A. bill submitted by the plaintiff, however, for no apparent reason 25% of this bill amount, which comes to approximately Rs.2.18 lakhs was retained by the defendants. Mr. Sardesai submits that there was absolutely no justification for such retention and the learned Trial Judge erred in not ordering the defendants to pay the balance 25% amount to the plaintiff.

8. Mr. Sardesai submits that the learned Trial Judge has also

¹ (1989) 1 SCC 657

erred in law as well as in facts in denying the plaintiff the rest of the claims as set out in the plaint and as established in the course of evidence. Mr. Sardesai submits that from the reading of the impugned judgment and decree, it is quite clear that the learned Trial Court mixed up the issues relating to the forfeiture of security deposit and levy of compensation. He states that this is also a case where the learned Trial Court has fallen in error of law and there is failure to appreciate in the proper perspective the rulings of the Hon'ble Apex Court in *Hind Construction* (supra) and *Vishwanath Sood* (supra). For all these reasons, Mr. Sardesai submits that the First Appeal No.60 of 2011 may be allowed and the suit be decreed in its entirety.

9. Ms. Priyanka Kamat, learned Additional Government Advocate defends the impugned judgment and decree, except to the extent the same awards the amount of Rs.1,97,070/- to the plaintiff on the basis of the reasons reflected therein. She points out that the plaintiff in paragraph 5 of the plaint has clearly admitted that the time was of the essence, in so far as the present contract is concerned. She points out that even the contractual terms make it clear that the time was the essence. She points out that there were letters addressed by the defendants, from which it is clear that the time was made of the

essence, assuming that there is any ambiguity in the contractual provisions. She submits that the finding recorded by the learned Trial Court that the time was the essence is backed by the evidence on record and in arriving at such a finding, the learned Trial Court has correctly appreciated the legal position as well.

10. Ms. Kamat submits that admittedly in the present case, there was a default on the part of the plaintiff in so far as the completion of item no.7 i.e. center line paving was concerned. She submits that in the plaint itself there is an admission that this work was never executed. She submits that since the time was the essence there was failure to execute this item of work within the stipulated period, the defendants had every right and were justified in terminating the contract. As a consequence of termination, the defendants were further justified in forfeiting the security deposit amount of Rs.39.50 lakhs. She points out that such forfeiture was entirely consistent with the contractual provisions. She submits that again, as per the contractual provisions, Superintending Engineer was very much authorize to levy compensation which could extend up to 10% of the contracted amount. In the present case, since the contracted amount was little in excess of Rs.4 crores, the

Superintending Engineer after considering the response of the plaintiff levied compensation of Rs.41,46,836/-. She points out that since the equivalent amount was already withheld by the defendants from out of IVth and Vth R.A. bill, the same was adjusted as against the levy of such compensation. She submits that there is absolutely no illegality in the view taken by the learned Trial Court on this aspect and therefore, she submits that the appeal instituted by the plaintiff warrants dismissal.

11. Ms. Kamat, in the context of First Appeal No.33 of 2017 instituted by the defendants submits that the learned Trial Judge failed to appreciate that the amount of Rs.39.50 lakhs recovered by the defendants was against the forfeiture of security deposit and the same has nothing to do with the amount of compensation of Rs.41,46,836/- levied by the Superintending Engineer in terms of the contract. She points out that the learned Trial Court incorrectly sought to adjust Rs.39.50 lakhs from the out of the compensation amount and directed the defendants to refund to the plaintiff an amount of Rs.1,97,070/- together with interest at the rate of 10%. She submits that this is in fact an error apparent on the face of record and the impugned judgment and decree, to the extent it directs the refund

of amount of Rs.1,97,070/- clearly warrants interference. She therefore submits that the First Appeal No.33 of 2017 is liable to be allowed.

12. Mr. Sardesai, learned Senior Advocate for the plaintiff, in response to Ms. Kamat's contentions in First Appeal No.33 of 2017 submits that both forfeiture of security deposit and the levy of compensation, in the present case was illegal and unjustified. Therefore, First Appeal No.33 of 2017 instituted by the defendants is liable to be dismissed.

13. Based upon the rival contentions, the following points arise for our determination in the present appeals.

(1) Whether in the facts and circumstances of the present case as emerge from the material on record, was the time of the essence of the contract ?

(2) If the time is held to be of the essence, even then, in the facts and circumstances of the present case whether the defendants justified in terminating the contract almost four years after the date of its completion and after almost 98 to 99% of the works were already completed by the plaintiff ?

(3) Further, even if the time was the essence, whether in the facts and circumstances of the present case the

defendants were justified in forfeiting the security deposit of Rs.39.50 lakhs, when admittedly, the only work that remained to be executed by the plaintiff was item no.7 i.e. the center line painting valued at Rs.1,04,000/- as against the contract value of approximately Rs.4 crores ?

(4) Further, even if the time was the essence, whether in the facts and circumstances of the present case, the defendants were justified in levying compensation of Rs.41,46,836/- on the plaintiff, when admittedly, the only work that remained to be executed by the plaintiff was item no.7 i.e. the center line painting valued at Rs.1,04,000/- as against the contract value of approximately Rs.4 crores ?

(5) If the time was not the essence of the contract whether the defendants, in the facts and circumstances of the present case were justified in terminating the contract, forfeiting the security deposit and levying compensation ?

(6) Whether the learned Trial Court has failed to give due credence to the phrase "*excluding monsoon*" as it appears in contract and thereby incorrectly concluding that the plaintiff failed to complete the works within the stipulated period ?

(7) Whether the plaintiff, in the facts and circumstances of the present case had succeeded in establishing that item no.7 i.e. center line painting could not be completed before 2nd July, 2002 as there

was failure to hand over the site as well as on account of monsoon ?

(8) Whether there was any justification on the part of the defendants in withholding 25% of Vth R.A. bill valued at approximately Rs.2.18 lakhs from the plaintiff ?

(9) Whether the learned Trial Judge was right in directing the defendants to pay to the plaintiff an amount of Rs.1,97,070/- in the facts and circumstances of the present case ?

(10) Whether the plaintiff has established his entitlement to the rest of several claims raised by him in the plaint and therefore is entitled to a decree for the said amount as well ?

14. In the present case, we note that the issues framed by the learned Trial Court are extremely confusing and it is possibly for this reason the findings written in the impugned judgment and decree also suffer from lack of clarity. There are several issues framed by the learned Trial Court, not to mention additional or recast issues. Several issues overlap. In some of the issues, the burden is incorrectly cast on the parties. The issues do not reflect with clarity on the points at which the parties were really at issue. Framing of issues in such a manner neither assist the Trial Court itself nor parties to the *lis*.

Framing of such issues is of no assistance to the Appellate Court as well. However, the learned counsel for the parties agree that no useful purpose would be served at this point of time to recast the issues and remand the matter for fresh consideration. The evidence both oral as well as documentary is available for appreciation before the Appellate Court. This is an old matter. Taking into consideration this aspect, we agree with the learned counsel for the parties that the option of remand, though is easier option, not to be adopted in the present case.

15. There is no dispute that in the present case, the defendants awarded the plaintiff a contract for contractual price agreed upon by and between the parties, in terms of tender bid submitted by the plaintiff, comes to approximately Rs.4 crores. We say this because the contractual documents produced on record refer to the cost of Rs.3,94,97,662/-. However, there is some other material on record which suggest that the price comes to approximately Rs.4.10 crores or there above. This difference is not very significant and in any case a matter of calculations. Clause 4 of the contract provides that the time laid for carrying out the work will be “*150 days excluding monsoon*”. In clause 4 the expression “*150 days excluding monsoon*” is hand written in ink. We mention this because at another place in

the contract i.e. clause 12(e) there is a reference to time allowed for the work was 10th day after the date of written order to commence 150 days including the monsoon. In this clause, expression “ *including monsoon*” is in the standard printed form.

16. Mr. Sardesai contends that whether there is a conflict between the hand written portion specifically inserted in the contract and printed portion signifying a standard form, handwritten portion must be given weightage over the standard form. Though we are inclined to agree with this contention, our decision need not rest on the basis of such acceptance. This is because the plaintiff, in paragraph 4 of the plaint, has clearly pleaded that the stipulated period for completion of work was 150 days excluding monsoon. In response to these pleadings the defendants, in paragraph 3 of the written statement stated that the contents of paragraph 4 of the plaint are not disputed. From this, it is apparent that both the parties understood the contract or rather clause for completion of the contract to mean that the stipulated period was 150 days excluding the monsoon. If the impugned judgment and order in the present case is perused, it does appear that the learned Trial Court has failed to give any weightage to the expression “*excluding monsoon*”.

17. The pleadings on the aspect of time being of the essence are confusing. in paragraph 4 the plaintiff pleaded that the time was of the essence. However, in paragraph 21, the plaintiff pleaded that the time was never intended to be of the essence of the contract. In the written statement filed by the defendants, again the defendants, have chosen to deny either and the contentions to be found in paragraphs 5 and 21 of the plaint. In this state of the pleadings, it is necessary to refer to the contractual terms as well as the evidence on record to determine whether the time was indeed to be of the essence of contract in the present case.

18. The defendants, both in their pleadings as well as evidence clearly admit that there are provisions in the contract for extension of time. The only reason stated by the defendants for non extension of the time for completion was that there was no formal application from the plaintiff seeking extension of time. Such a plea backed by the evidence led by the defendants, itself suggest that the time was never intended to be essence in so far as the present contract is concerned. Besides, the contract itself provides for extension of time, levy of compensation in case of delay and such other provisions. All such provisions clearly militate against the time being of essence of

contract in the present case. No doubt, as contended by Ms. Kamat even if the time is not specifically of the essence, the parties later on, by signifying an intention to do so can make the time of essence of contract. Ms. Kamat points out that letter dated 30th April, 2002 (Exhibit 104) and letter dated 6th May, 2002 (Exhibit 105) addressed by the defendants to the plaintiff makes it clear that the time was made of the essence of the contract, at least at a later stage.

19. We have perused a letter dated 30th April, 2002 (Exhibit 104). This letter merely directs the plaintiff to provide 50 mm thick minimum layer on the Ponda by-pass road as per the instructions of the site Engineer. Second letter dated 6th May, 2002, (Exhibit 105) again directs the plaintiff to complete the Ponda by-pass and thereafter proceed to Km.116. From these two letters we fail to understand as to how the Trial Court would conclude that the time was made of the essence of the contract. There is absolutely nothing in these two letters to suggest any such inference. These two letters appear to be routine letters in the context of execution of the work.

20. Taking into consideration, the clauses in the contract which provide for extension of time, levy of compensation in case of

delay as well as the stance of the defendants themselves that they might have considered the issue of extension on there being a formal application seeking extension, is sufficient to hold that in the facts of the present case the time was not of the essence.

21. The learned Trial Court, has sought to distinguish the rulings of the Hon'ble Apex Court in *Hind Construction* (supra) only on the basis of plaintiff pleaded in paragraph 5 of the plaint. According to us, this is not proper manner to distinguish the ruling of the Apex Court. Incidentally, the contractual clauses which fell for consideration in *Hind Construction* (supra) are almost similar contractual clauses which obtained in the present matter. In *Hind Construction* (supra), the Apex Court has held that whether the time is of the essence of contract is the question of intention of the parties to be gathered from the terms of the contract. The provision for imposition of penalty and extension of time would militate against such an inference. Time can however be made of the essence of the contract by fixing a further period for completion.

22. In *Hind Construction* (supra) this is what the Apex Court observed at paragraphs 8 and 9:

*“8. It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental, for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. The emphasised portion of the aforesaid statement of law is based on *Lamprell v. Billericay Union*, *Webb v. Hughes* and *Charles Rickards Ltd. v. Oppenheim*. It is in light of the aforesaid position in law that we will have to consider the several clauses of the contract Ex. 34 in the case. The material clauses in this behalf are cls. 2 and 6 of the "Conditions of Contract" which run as follows:*

"Clause 2:-The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be reckoned from the date on which the order to commence work is given to the contractor. The work shall throughout the stipulated period of the contract be proceeded with, with all due diligence (time being deemed to be of the essence of the contract on the part of the contractor) and the contractor shall pay as compensation an amount

equal to one per cent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide, of the amount of the estimated cost of the whole work as shown by the tender for every day that the work remains uncommenced, or unfinished, after the proper dates. And further to ensure good progress during the execution of the work, the contractor shall be bound, in all cases in which the time allowed for any work exceeds one month, to complete. 1/4 of the work in 1/4 of the time, 1/2 of the work in 1/2 of the time, 3/4 of the work in 3/4 of the time".

"Clause 6:-If the contractor shall desire an extension of the time for completion of the work on the ground of his having been unavoidably hindered in its execution or on any other ground, he shall apply in writing to the Executive Engineer before the expiry of period stipulated in the tender or before expiry of 30 days from the date on which he was hindered as aforesaid or on which the cause for asking for extension occurred, whichever is earlier and the Executive Engineer, may if in his opinion there are reasonable grounds for granting an extension, grant such extension as he thinks necessary or proper. The decision of the Executive Engineer in this matter shall be final."

Two aspects emerge very clearly from the aforesaid two clauses. In the first place under clause 6 power was conferred upon the Executive Engineer to grant extension of time for completion of the work on reasonable grounds on an application being made by

the contractor (appellant- plaintiff) in that behalf; in other words, in certain contingencies parties had contemplated that extension of time would be available to the contractor. Such a provision would clearly be inconsistent with parties intending to treat the stipulated period of 12 months in clause 2 as fundamental. Similarly, in clause 2 itself provision was made for levying and recovering penalty/compensation from the appellant-plaintiff at specified rates during the period the work shall remain unfinished after the expiry of the fixed date. Such provision also excludes the inference that time (12 months period) was intended to be of the essence of the contract. Further with regard to the provision that is to be found in clause 2 whereunder a time schedule for proportionate work had been set out (namely, 1/4 of the work in 1/4 of the time, 1/2 of the work in 1/2 of the time and 3/4 of the work in 3/4 of the time), the evidence of the Superintending Engineer Pandit (D.W. 1) is very eloquent. In para 13 of his deposition this is what he has stated:

"In the agreement (Ex. 34) the rate of work is based on the valuation. 1/4th time mentioned means 1/4th in 12 months. The suit contract is for Rs. 1,07,000/-. 1/4th work means the work of about Rs. 27,000/-. It is not possible to do the work of Rs. 27,000/- in 1/4th time as the days were rainy. This was not reasonable."

The witness in para 12 of his deposition has also given the following admission:-

"It is not specifically mentioned in the agreement (Ex. 34), that the suit work was urgent and that it was to

be completed within 12 months. In this agreement (Ex. 34) there are the clauses of imposing a penalty and extension of time."

9. Having regard to the aforesaid material on record, particularly the clauses in the agreement pertaining to imposition of penalty and extension of time it seems to us clear that time (12 months period) was never intended by the parties to be of the essence of the contract. Further from the correspondence on the record, particularly, the letter (Ex. 78) by which the contract was rescinded it does appear that the stipulation of 12 months' period was waived, the contractor having been allowed to do some more work after the expiry of the period, albeit at his risk, by making the rescission effective from August 16, 1956."

23. For all the aforesaid reasons, we are of the opinion that from the facts and circumstances as emerge from the record and the application of law laid down in *Hind Construction* (supra) to such facts and circumstances, the time cannot be said to have been of the essence of the contract.

24. However, even if we were to hold that the time was of the essence of the contract, in the facts and circumstances of the present case, we are satisfied that there was no justification whatsoever to order the forfeiture of security deposit of Rs.39.50 lakhs or to levy

compensation at the maximum rate prescribed under the contract.

25. The material on record overwhelming establishes that the plaintiff completed the entire work except the item no.7 i.e. center line painting on or before 2nd July, 2002 which was stipulated date for completion, even if for the present the effect of the expression “*excluding monsoon*” is not taken into consideration. In monetary terms, the value of unexecuted work in item no.7 admittedly comes to Rs.1,04,000/-. This means that the plaintiff has completed the work valued at approximately Rs.3.99 crores within the stipulated period and only because the plaintiff could not complete the balance work of Rs.1,04,000/-, the defendants, have forfeited the amount of Rs.39.50 lakhs which was held by them as security deposit and further, recovered an amount of Rs.41,46,836/- by way of compensation.

26. This means that on account of plaintiff not executing the work valued at Rs.1,04,000/-, the defendants, have recovered from the plaintiff an amount of approximately at Rs.80 lakhs. For the reasons which we shall discuss hereinafter, such recovery, according to us was not at all justified in the facts and circumstances of the present case.

27. In so far as the levy and recovery of compensation valued at Rs.41,46,836/- is concerned, the defendants relied on clause 2 of the contract which reads thus :

“CLAUSE 2. The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be of the essence of the contract on the part of the contractor and shall be reckoned from the tenth day after the date on which the order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the estimated cost of the whole work as shown in the tender, for every day that the work remains uncommenced, or unfinished after the proper dates. And further to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds one month (save for special jobs) to complete one eighth of the whole of the work before one-fourth of the whole time allowed under the contract has elapsed; three eights of the work, before one-half of such time has elapsed, and three-fourths of the work, before three-fourth of such time has elapsed. However, for special jobs if a time-schedule has been submitted by the contractor and the same has been accepted by the Engineer-in-Charge, the contractor shall comply with the said time-schedule. In the event of the contractor failing to comply with this condition, he shall

be liable to pay as compensation an amount equal to one per cent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the said estimated cost of the whole work for every day that the due quantity of work remains incomplete. Provided always that the entire amount of compensation to be paid under the Provisions of this Clause shall not exceed ten per cent on the estimated cost of the work as shown in the tender.”

28. From the perusal of the aforesaid, it is clear that it is not as if Superintending Engineer, in every case of delay is bound to levy compensation corresponds to 10% of the estimated cost of the work as shown in the tender. In fact, this amount is the maximum compensation that can be levied under the clause 2 as aforesaid. The Superintending Engineer has been conferred with discretion to levy compensation for delay and amount of compensation can vary between the same minimum amount and 10% of the estimated cost of the work as shown in the tender.

29. In fact, the Apex Court in the case of *Vishwanath Sood* (supra) while interpreting a similar clause in the contract has held that the compensation amount can even, in a given case be '0' or 'NIL'. The Apex Court has also held that merely because a discretion

is conferred upon the Superintending Engineer, it does not mean that the Superintending Engineer, without recording genuine satisfaction or in some high handed manner can proceed to straightaway levy compensation at the maximum rate permissible under the contract. The Apex Court has held that the power conferred upon the Superintending Engineer is not some undefined power.

30. Relevant discussions on the aforesaid issue is to be found in the paragraphs 8 and 10 of the judgment in *Vishwanath Sood* (supra) and the same read thus :

“8. We have gone through the judgment of the Division Bench of the High Court and we have also considered the arguments advanced on both sides. With great respect, we find ourselves unable to agree with the interpretation placed by the Division Bench on the terms of the contract. Clause 2 of the contract makes the time specified for the performance of the contract a matter of essence and emphasises the need on the part of the contractor to scrupulously adhere to the time schedule approved by the Engineer-in-charge. With a view to compel the contractor to adhere to this time schedule, this clause provides a kind of penalty in the form of a compensation to the Department for default in adhering to the time schedule. The clause envisages an amount of compensation calculated as a percentage of the estimated cost of the whole work on the basis of the number of

days for which the work remains uncommenced or unfinished to the prescribed extent on the relevant dates. We do not agree with the counsel for the respondent that this is in the nature of an automatic levy to be made by the Engineer-in-charge based on the number of days of delay and the estimated amount of work. Firstly, the reference in clause to the requirement that the work shall throughout the stipulated period of the contract be proceeded with due diligence and the reference in the latter part of the clause that the compensation has to be paid "in the event of the contractor failing to comply with" the prescribed time schedule make it clear that the levy of compensation is conditioned on some default or negligence on the part of the contractor. Secondly, while the clause fixes the rate of compensation at one per cent for every day of default it takes care to prescribe the maximum compensation of 10 per cent on this ground and it also provides for a discretion to the Superintending Engineer to reduce the rate of penalty from one per cent. Though the clause does not specifically say so, it is clear that any moderation that may be done by the Superintending Engineer would depend upon the circumstances, the nature and period of default and the degree of negligence or default that could be attributed to the contractor. This means that the Superintending Engineer, in determining the rate of compensation chargeable, will have to go into all the aspects and determine whether there is any negligence on the part of the contractor or not. Where there has been no negligence on the part of the contractor or where on account of various extraneous circumstances referred to by the Division Bench such as vis major or

default on the part of the Government or some other unexpected circumstance which does not justify penalising the contractor, the Superintending Engineer will be entitled and bound to reduce or even waive the compensation. It is true that the clause does not in terms provide for any notice to the contractor by the Superintending Engineer. But it will be appreciated that in practice the amount of compensation will be initially levied by the Engineer-in-charge and the Superintending Engineer comes into the picture only as some sort of revisional or appellate authority to whom the contractor appeals for redress. As we see it, clause 2 contains a complete machinery for determination of the compensation which can be claimed by the Government on the ground of delay on the part of the contractor in completing the contract as per the time schedule agreed to between the parties. The decision of the Superintending Engineer, it seems to us, is in the nature of a considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. In our opinion the question regarding the amount of compensation leviable under clause 2 has to be decided only by the Superintending Engineer and no one else.

10. We may confess that we had some hesitation in coming to this conclusion. As pointed out by the Division Bench, the question of any negligence or default on the part of the contractor has many facets and to say that such an important aspect of the contract cannot be settled by arbitration but should be left to one

of the contracting parties might appear to have far reaching effects. In fact, although the contractor in this case might object to the process of arbitration because it has gone against him, contractors generally might very well prefer to have the question of such compensation decided by the arbitrator rather than by the Superintending Engineer. But we should like to make it clear that our decision regarding non -arbitrability is only on the question of any compensation which the Government might claim in terms of clause 2 of the contract. We have already pointed out that this is a penalty clause introduced under the contract to ensure that the time schedule is strictly adhered to. It is something which the Engineer- in-charge enforces from time to time when he finds that the contractor is being recalcitrant, in order to ensure speedy and proper observance of the terms of the contract. This is not an undefined power. The amount of compensation is strictly limited to a maximum of 10% and with a wide margin of discretion to the Superintending Engineer, who might not only reduce the percentage but who, we think, can even reduce it to nil, if the circumstances so warrant. It is this power that is kept outside the scope of arbitration. We would like to clarify that this decision of ours will not have any application to the claims, if any, for loss or damage which it may be open to the Government to lay against the contractor, not in terms of clause 2 but under the general law or under the Contract Act. As we have pointed out at the very outset so far as this case is concerned the claim of the Government has obviously proceeded in terms of clause 2 and that is the way in which both the learned single

Judge as well as the Division Bench have also approached the question. Reading clauses 2 and 25 together we think that the conclusion is irresistible that the amount of compensation chargeable under clause 2 is a matter which has to be adjudicated in accordance with that clause and which cannot be referred to arbitration under clause 25.”

31. In the present case, the defendants have themselves produced on record the reports dated 14th March, 2002 (Exhibit 90) and 29th April, 2003 (Exhibit 91) prepared by the Assistant Engineer of the Department. The plaintiff has also led evidence and produced documents explaining the circumstances in which the work under item no.7 i.e. center line painting could not be completed before 2nd July, 2002. However, if we go by the evidence led by the defendants itself in the form of Exhibits 90 and 91, it is quite clear that the Superintending Engineer was not at all justified in levying compensation at the maximum rate permissible under the contract. In doing so, the Superintending Engineer has really failed to take into account the relevant considerations which were writ large in the facts and circumstances of the present case.

32. The report dated 14th March, 2002 (Exhibit 90) made by

the Assistant Engineer of the defendants substantially accepts that there was simultaneous work going on for laying optical fibre cable by L & T for Bharati Telesonic Ltd., since permission to lay such O.F.C. was granted by the High Level Committee vide letter dated 18th October, 2001. The report states that after the optical fibre cable was laid by the said agency, they had to restore the site. The report also states that laying of hot mix could not have been done unless restoration has been completed and the plaintiff cannot therefore complete the work before 31st March, 2002. The Assistant Engineer suggested that the plaintiff be called upon to undertake the restoration of work for which the agency laying optical fibre cable had already been paid a sum of Rs.25,00,000/- towards reinstatement charges.

33. The report dated 29th April, 2003 (Exhibit 91), again prepared by another Assistant Engineer of the defendants, refers to the work under item no.7 i.e. center line painting as “*minor item*”. The report states that the plaintiff could not have avoided this work on the ground that no drawings were issued by the department, because this was a minor item of work and there was no serious necessity of drawings.

34. This report however confirms that the plaintiff has completed the work within the stipulated time except item no.7. This report also adds that the rains commenced only intermittently and pre-monsoon and there was no torrential and continuous rains experienced and therefore, the plaintiff could have as well completed the work of center line painting. The report also refers to the value of unexecuted work in item no.7 as Rs.1,04,000/-.

35. Now, two reports are to be considered along with the plaintiff's letter dated 1st July, 2002 addressed to the defendants, well within the stipulated date of completion. Last two paragraphs of this letter dated 1st July, 2002 (Exhibit 64) read as follows:

“As far as centre line is concerned it was kept pending due to slaught of monsoon, as discussed with you. It is not possible to lay centre line during monsoon. This has been also discussed with SE.

However if you insist, we are ready to execute the same in monsoon. However, we take no responsibility for its life.”

36. From the aforesaid material on record, it does transpire that there was some issue of laying of optical fibre cable on account of which it was not easily possible for the plaintiff to complete the item

no.7 i.e. center line painting. There is also some material to hold that in the month of July, there were rains, on account of which, the plaintiff enquired with the defendants as to whether the plaintiff should still proceed with the work of center line painting. There is no dispute that the aforesaid letter dated 1st July, 2002 (Exhibit 64) addressed by the plaintiff to the defendants, was received by the defendants. However, there is no evidence on record to indicate that the said letter was responded by the defendants.

37. As noted earlier, the contract provides that the stipulated work had to be completed within 150 days excluding monsoon. Since, by June, 2002 the monsoon had already commenced, technically, the plaintiff was entitled to exclude the monsoon period. Despite this, the plaintiff offered to complete the center line painting work even during the monsoon. However, there was no response from the defendants. All these circumstances have not at all been taken into consideration by the Superintending Engineer as well as the other defendants, have straightaway proceeded to forfeit the security deposit of Rs.39.50 lakhs and further levying compensation of Rs.41,46,836/- on the plaintiff.

38. The communication dated 14th December, 2004

addressed by the Superintending Engineer for levying compensation under clause 2 of the contract does not reflect that any relevant circumstances were taken into account by the Superintending Engineer. The reply addressed by the plaintiff to the show cause notice dated 26th March, 2004 has been simply dismissed with the observations that the same is “*not convincing*”. Such an approach on the part of the Superintending Engineer, is contrary to the law laid down by the Hon'ble Apex Court in the case of *Vishwanath Sood* (*supra*).

39. At this stage, we must refer to yet another aspect of this matter. The evidence on record suggest that the defendants withheld an amount of Rs.41,46,836/- from out of IVth and Vth R.A. bills payable to the plaintiff. Such withholding was not on account of any default on the part of the plaintiff but because the defendants had no funds to make such payments. Thereafter, when the plaintiff addressed notices and made demands for payment of this amount, the defendants levied compensation which, coincidentally, amounts to Rs.41.46 lakhs and adjusted the unpaid amount towards IVth and Vth R.A. bills towards this compensation amount.

40. The aforesaid fact, emerges from the reasoning in paragraph 18 of the impugned judgment and decree. The reasoning suggest that the learned Trial Court has accepted as valid reason as stated by the defendants for withholding the amount under IVth and Vth R.A. bills i.e. lack of funds. Certainly, lack of funds cannot be a valid reason for withholding payment, if such payments are due and payable under the contract. Besides, the coincidence that the amount withheld corresponds exactly to the amount of compensation levied is also not circumstance without significance. In this state of evidence, we are satisfied that there was no justification on the part of the Superintending Engineer in levying compensation at the maximum rate of 10% and thereby recover from the plaintiff an amount of Rs.41.46 lakhs from out of the amount otherwise due and payable to the plaintiff under IVth and Vth R.A. bills.

41. Similarly, in the facts and circumstances of the present case as emerge from the evidence on record, there was no justification in terminating the contract almost four years after the stipulated date of completion and on such basis forfeiting the security deposit amount of Rs.39.50 lakhs.

42. As noted earlier, this is not a case where the time could have been said to be the essence. Even the termination was not soon after the stipulated date of completion which even according to defendants was 2nd July, 2002. The stipulation date of completion in the facts of the present case also cannot be held as 2nd July, 2002 since, the plaintiff was entitled to exclude the monsoon period. However, no opportunity was granted to the plaintiff to complete the minor item of work valued only at Rs.1,04,000/- either during the monsoon as requested by the plaintiff or soon after the conclusion of the monsoons. Further, for the alleged non completion of such work which the defendants themselves styled as “*minor work*”, the defendants, have now proceeded to recover the amount of over Rs.80 lakhs from the plaintiff. According to us, the evidence on record as also the correct interpretation of the contractual clauses did not entitle the defendants to act in such a manner.

43. From the tenor of the impugned judgment and order, the learned Trial Court was under the impression that the defendants have only recovered an amount of Rs.39.50 lakhs from the plaintiff. On the basis of such reasoning, the learned Trial Court directed the defendants to pay to the plaintiff an amount of Rs.1,97,070/-, being

the difference between the compensation amount of Rs.41,46,836/- and security deposit amount of Rs.39.50 lakhs. However, the record indicates that the defendants have recovered not merely Rs.39.50 lakhs but the amount of Rs.39.50 lakhs + Rs.41, 46,836/-. If therefore, we were to uphold such forfeiture and levy of compensation, then, there would be substance in the contention of Ms. Kamat that the Trial Court was not justified in ordering the refund of Rs.1,97,070/- to the plaintiff. However, since according to us, the forfeiture as well as the levy of compensation was itself improper, we will not be in a position to set aside the decree for payment of Rs.1,97,070/- to the plaintiff. However, since we propose to partly allow the First Appeal No.60 of 2011, the amount to which the defendants will have to pay to the plaintiff will include or subsume this amount of Rs.1,97,070/-. But we agree with Ms. Kamat that there was no justification to levy of interest at the rate of 10% per annum. According to us, the interest at the rate of 6% per annum would be appropriate in facts and circumstances of the present case.

44. Mr. Sardesai submitted that there was no justification for withholding 25% of the Vth R.A. bill amount valued at approximately Rs.2.18 lakh from the plaintiff. There is no clear evidence in this

regard. Besides, admittedly, the plaintiff did not execute the item no.7 valued at Rs.1,04,000/-. Therefore, it is reasonable to proceed on the basis that the defendants would have to spend some amount in order to get this item work carried out either themselves or through some other agencies. Though there is no evidence on record as to whether such work was actually carried out or not, the fact remains that the plaintiff failed to carry out the work under the item no.7. Therefore, even assuming that the amount of Rs.2,18,000/- remained to be paid to the plaintiff under Vth R. A. bill, we do not think that it is appropriate to award the said amount to the plaintiff at this stage.

45. Similarly, as regards the other claims raised by the plaintiff, we find that there is absolutely no evidence on record to sustain the same. The plaintiff has merely relied upon some correspondence, without bothering to prove the contents of such correspondence. Besides, the claims are extremely vague. If the memo of appeal is perused, it is apparent that the plaintiff was basically aggrieved on account of forfeiture of security deposit to the extent of Rs.39.50 lakhs and levy of compensation to the extent of Rs.41,46,836/-. In addition, the plaintiff also had a grievance about non payment of 25% of the Vth R.A. bill which claim comes to

approximately at Rs.2.18 lakhs. Apart from the fact there are no proper grounds in the memo of appeal in regard to any further claims. Even if we were to consider the omnibus clause in the memo of appeal, there is absolutely no evidence to justify award of any other claims to the plaintiff.

46. For all the aforesaid reasons, we partly allow the First Appeal No.60 of 2011 and direct the defendants to pay to the plaintiff an amount of Rs.39,50,000/- + Rs.41,46,836/- i.e. a total amount of Rs.80,96,836/- (Rupees Eighty Lakhs Ninety Six Thousand Eight Hundred and Thirty Six Only) together with interest thereon at the rate of 6% per annum from the date of the institution of the suit till the date of actual payment. This decreed amount will include the amount of Rs.1,97,070/- awarded by the learned Trial Court. Similarly, the First Appeal No.33 of 2017 instituted by the defendants is also partly allowed, in the sense that the interest is reduced from 10% per annum to 6% per annum on the amount of Rs.1,97,070/-. Each of the parties shall bear their own costs. The decree to be drawn accordingly.

Prithviraj K. Chavan, J.

M. S. Sonak, J.

*at**