IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

FIRST APPEAL NO.956 OF 2013

1. Maharashtra Industrial Development Corporation
A Corporation constituted under the provisions of the Maharashtra Industrial Development Act 1961, having its registered address at Udyog Sarthi, Marol Industrial Area, Mahakali Caves Road, Andheri (East), Mumbai -400 093 through its Chief Executive Officer.

2. Additional Chief Engineering,
Maharashtra Industrial Development Corporation, Udyog Bhavan, 4th floor, Civil Lines, Nagpur.

3. The Executive Engineer,
Maharashtra Industrial Development Corporation, Akola Division, Akola. **..APPELLANTS (Orig. Defendants)**

Versus.

Govardhani Construction Company
A partnership firm, duly registered under the Indian Partnership Act 1932, through its Partner-Vijay Narayan Mhatre,
Aged about 55 years, Occupation: Business, having its office at 60-61, Prabhat Centre, Sector 6, C.B.D.Belapur, Navi Mumbai – 400 614 **..RESPONDENT (Orig. Plaintiff)**

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Shri M.M.Agnihotri, Advocate for the appellants/defendants.
Shri C.S.Kaptan, Senior Advocate with Shri J.B.Gandhi, Advocate for respondent/plaintiff.

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CORAM : **A. S. CHANDURKAR AND N. B. SURYAWANSHI JJ.**

Date on which the arguments were heard : 25.01.2021
Date on which the judgment was pronounced : 11.02.2021

Judgment : (Per A.S.Chandurkar, J.)

The appellants are the original defendants who are aggrieved by the decree passed in Special Civil Suit No.99/2009 on 10.04.2012 whereby the suit for recovery of the losses suffered by the plaintiff on account of breach of the contract has been partly decreed and the defendants have been directed to pay an amount of Rs.2,16,53,217.36 with interest @9% per annum from the date of filing of the suit till realisation of the decreetal amount.

2. The facts relevant for deciding the appeal as can be gathered from the pleadings of the parties are being referred to. The parties are described as per their status in the trial Court. According to the plaintiff, it is a partnership firm engaged in undertaking contracts of civil and electrical works. The firm is registered as Class-I contractor with the Public Works Department of the State of Maharashtra and claims to be an expert in undertaking construction and road works. In 2002 the first defendant -Maharashtra Industrial Development Corporation (MIDC) issued a tender notice calling bids for the proposed construction of roads with surface dressing at Transport Nagar, Akola Industrial area. The plaintiff submitted its bid and on 30.01.2003 five bids that were received came to be opened. The bid submitted by one - Phenix Engineers and Contractors was the lowest at 38.59% below the tender estimated rates.

The bid submitted by the plaintiff was the second lowest being 28.49% below the tender estimated rates. On 12.05.2003 the MIDC issued a letter to the plaintiff informing it that the tender submitted by the plaintiff was accepted by the MIDC. The plaintiff was accordingly directed to deposit security amount of Rs.10,06,520/- as well as additional security amount in the sum of Rs.20,12,040/-. These amounts were directed to be deposited within seven days from the date of the said letter and the plaintiff's representative was directed to remain present with all necessary documents. According to the plaintiff, by virtue of this communication the bid submitted by the plaintiff was accepted. The work that was awarded to the plaintiff was of an urgent nature and hence with a view to commence the same immediately, the plaintiff took steps and mobilized its staff, labourers as well as the requisite plant and machinery at the site. It is then the case of the plaintiff that pursuant to the letter dated 12.05.2003 the plaintiff through its representative sought to submit the requisite bank guarantees on 23.05.2003. The MIDC however neglected to accept the said bank guarantees and on 28.05.2003 the MIDC informed the plaintiff that though the said bank guarantees were sought to be presented on 27.05.2003, the same could not be accepted till 30.05.2003. The MIDC stated that after receiving instructions from the superior Officers the bank guarantees would be accepted.

3. It is then the case of the plaintiff that in the meanwhile the contractor who had submitted the lowest bid namely Phenix Engineers filed Writ Petition bearing No. 2059/2003 in this Court challenging the allotment of the tender in favour of the plaintiff. The plaintiff was impleaded as respondent no.5 in the said writ petition. On 15.05.2003 this Court passed an ad-interim order in terms of prayer clause (ii) of the writ petition thereby restraining the MIDC from issuing the work order to the plaintiff. The plaintiff was not aware about filing of the aforesaid writ petition and passing of the interim order. Hence with a view to complete the work expeditiously the plaintiff had organized its engineering staff, labourers as well as plant and machinery on the work site for commencing the work. After getting knowledge of the ad-interim order passed in the writ petition, the plaintiff met the Officers of the MIDC and informed the officers of the MIDC that it had already organized its engineers along with labourers, plant and machinery at the work site. The MIDC moved Civil Application No.5349/2003 praying that the ad-interim order granted on 15.05.2003 be vacated. In the preliminary submissions filed on behalf of the MIDC dated 11.06.2003 it had been specifically stated that the work in question had been awarded to the plaintiff and necessary directions had been issued to the plaintiff for commencing the work. Ultimately on 10.12.2003, Writ Petition No.2059/2003 came to be dismissed for want of prosecution and the order of injunction stood vacated.

4. The plaintiff has further pleaded that after the dismissal of the said writ petition it again approached the MIDC to accept the bank guarantees and sought issuance of necessary directions for commencing the work at the work site. According to the plaintiff the plant and machinery which was already at the site had to be kept idle for all this period. On 30.12.2003 the MIDC informed the plaintiff that the tender submitted by it was under consideration and the plaintiff was directed to re-validate its offer till 30.04.2004. According to the plaintiff in view of the acceptance of the offer on 12.05.2003, the MIDC was not justified in stating that the offer made by it should be re-validated. There was exchange of communication between the parties and on 07.04.2004 the MIDC informed the plaintiff that there was no agreement entered into between them nor had any work order been issued. According to the plaintiff, it informed the MIDC on 16.04.2004 that the contract had already been entered into between the parties and that the signing of the agreement was formal in nature. The plaintiff also called upon the MIDC to take inventory of the idle plant and machinery that had been brought on the work site. This was not done by the MIDC. Without terminating the contract that was awarded to the plaintiff, the MIDC proceeded to allot the same to another contractor. On 10.01.2006 the plaintiff issued a communication demanding compensation of Rs.3,26,00,000/- from the MIDC on account of loss suffered by it due to breach of the contract by the

MIDC. This letter was replied on 08.06.2006 stating therein that the matter would be considered by the MIDC and its decision would be communicated to the plaintiff. After further exchange of communications the plaintiff proceeded to file the suit on 19.06.2009 claiming losses suffered by it on account of breach of the contract to the tune of Rs.3,26,00,000/- mainly on the ground that its labourers as well as plant and machinery were lying idle at the work site for about three hundred and nineteen days.

5. In the written statement filed by the third defendant the claim as made was denied. It was pleaded by the the said defendant that no work order for commencing the work in question was issued to the plaintiff and therefore, there was no question of the plaintiff undertaking such work. According to the defendants, by the letter dated 12.05.2003 the plaintiff was merely requested to deposit the security deposit amount within a period of seven days as mentioned in the said letter. It was then pleaded that in view of the ad-interim order passed in the Writ Petition No.2059/2003 by the High Court the work order could not be issued to the plaintiff as it had not complied with the necessary terms and conditions. It was then stated that as per the letter dated 30.12.2003 the defendants had requested the plaintiff to extend the validity of the rates quoted by it up to 30.01.2004 but the same was not done. Since the

plaintiff did not extend the validity period of its offer, the defendants were not in a position to issue the work order. It was denied that the plaintiff suffered losses to the tune of Rs.3,26,00,000/- as claimed. It was denied that the labour as well as the plaint and machinery of the plaintiff was lying at the site for a period of three hundred and nineteen days. It was then pleaded that the suit was barred by limitation and it was therefore liable to be dismissed.

6. The plaintiff examined about five witnesses in support of its claim while the defendants examined one witness. After considering the entire material on record the learned Judge of the trial Court recorded a finding that there was a concluded contract between the parties pursuant to the letter of acceptance dated 12.05.2003 issued by the defendants. It was further held that when the defendants had accepted the proposal of the plaintiff by issuing the communication dated 12.05.2003, there was no reason for the defendants to seek extension of the validity period of the rates quoted by the plaintiff. After recording a finding that the labour, plant and machinery of the plaintiff remained idle for two hundred and sixty six days, the plaintiff was held entitled to claim damages on account of the loss caused to it after acceptance of its offer. The trial Court granted the claim for loss sustained to the tune of Rs.2,16,53,217.36 by partly decreeing the suit and the decreetal amount was directed to be paid

with interest @9% per annum from the date of the suit till its realisation. Being aggrieved the defendants have come up in appeal.

7. Shri M.M.Agnihotri, learned counsel for the appellants-defendants in support of the appeal made the following submissions :

(a) That the trial Court committed an error in recording a finding that there was a concluded contract between the parties due to which the plaintiff was entitled to claim damages from the defendants. He submitted that though the defendants had issued a communication dated 12.05.2003-Exhibit 46 to the plaintiff and had accepted the offer made by the plaintiff which was 28.49% below the offset price, the conditions stipulated in the tender notice as well as in that communication had not been complied with. The demand draft towards the amount of initial security deposit as well as the demand draft for an additional security deposit which was required to be submitted within seven days was not submitted in its entirety. Though the plaintiff on 23.05.2003-Exhibit 47 sought to submit bank guarantee nos. 2 and 3 for an amount of Rs.1,07,000/- each, the demand draft for the additional security deposit was never tendered. According to him, stamp duty of Rs.30,200/- along with necessary stamp papers for preparing the agreement was also not furnished by the plaintiff. He then submitted that mere issuance of the communication dated 12.05.2003 did not have the effect of there being a concluded contract between the parties. The communication dated 12.05.2003 merely informed the plaintiff that the rates quoted by it were acceptable to the defendants and nothing more. Unless the agreement was entered into between the parties, it could not be said that there was a concluded contract between the parties. In that regard he sought to place reliance on the decisions in ***Maharshi Dayanand University and anr. Vs. Anand Coop.L/C Society Ltd. And anr. (2007) 5 CC 295, Dresser Rand S.A. Vs. Bindal Agro Chem Ltd and anr. (2006) 1 SCC 751, Vedanta Limited Vs. Emirates Trading Agency Llc. (2017) 13 SCC 243, PSA Mumbai Investments Pte. Ltd. Vs. Board of Trustees of the Jawaharlal Nehru Port Trust and anr. (2018) 10 SCC 525*** and ***Rushi Kiran Logistics Private Ltd. Vs. Board of Trustees of Kandla Port Trust and others (2015) 13 SCC 233*** to urge that there was no concluded contract between the parties. He also referred to the provisions of the Indian Contract Act, 1872 (for short, the Act of 1872) to substantiate his contentions.

(b) It was then submitted that the suit as filed was barred by limitation inasmuch as the defendants on 07.04.2004 itself had issued a communication-Exhibit 64 to the plaintiff taking the stand that in absence of any agreement and issuance of work order, it was not possible to consider the claim as made by the plaintiff in its letter dated 16.01.2004. The cause of action having arisen on 07.04.2004 it was necessary for the plaintiff to have filed the suit within a period of three years from this date. The subsequent communications issued by the defendants and especially the communication dated 20.06.2006 at Exhibit 70 did not extend the period of limitation as was wrongly held by the trial Court. This communication merely stated that the claim as made by the plaintiff had been forwarded to the superior authorities and further action would be taken after the response from the superior authorities. The provisions of Section 18 of the Indian Limitation Act, 1963 (for short, 'the Act of 1963') would not be applicable in these circumstances. The trial Court committed an error in holding that the suit as filed was within limitation.

(c) It was then submitted that as per the tender notice-Exhibit 77 the plant and machinery of the contractor was required to be brought at the site only after it was so permitted by the defendants. Referring to Clause 45 of the tender notice, it was submitted that no written instructions were issued by the Engineer In-charge to the plaintiff either to enter upon or commence the work in question. Merely by issuing communication dated 27.05.2003-Exhibit 50 the plaintiff was not justified in bringing its plant and machinery as well as the labour at the site. In any event it was submitted that the documentary evidence brought on record by the plaintiff in that regard was not reliable. Moreover, the claim for compensation based on the machinery user rates 2003-04/Exhibit 58 pertaining to the Irrigation Department could not have been relied upon by the trial Court for determining the amount of compensation. The learned counsel further submitted that Writ Petition No.2059/2003 filed by M/s. Phenix Engineers was pending in this Court from 15.05.2003 to 10.12.2003. After dismissal of the said writ petition the defendants called upon the plaintiff by issuing communication dated 30.12.2003-Exhibit 48 to re-validate its offer by 30.01.2004. This was for the reason that as per the tender notice the validity of the offer was for one hundred and twenty days from the date of opening of the tender or application for refund whichever was later. Since the period of more than one hundred and twenty days had elapsed from the opening of the tender and in the light of issuance of letter of intent dated 12.05.2003, the defendants were justified in calling upon the plaintiff to re-validate its offer. The plaintiff by refusing to do so on 16.01.2004-Exhibit 59 displayed its absence of willingness to carry out the work in question at the rates quoted by it in its bid. Even on this count the plaintiff was not entitled to claim damages for the alleged loss sustained by it from the defendants.

(d) In the alternative and without prejudice to the aforesaid submissions, the learned counsel submitted that assuming that there was a concluded contract between the parties, the plaintiff could at the highest make a claim for being compensated for the period from 10.12.2003 which was the date on which Writ Petition No. 2059/2003 was dismissed till 16.04.2004 when the plaintiff removed its plant and machinery from the site. In any event since the defendants issued a fresh tender notice in January 2004, the plaintiff could not seek damages after such action by the defendants. He also referred to Clause 15 (B) of the tender notice at Exhibit 77 to urge that any claim on account of unforeseen circumstances was required to be made within a period of one month of such claim being arisen. It was thus submitted that without properly construing the various documents on record, the trial Court committed an error in holding that there was a concluded contract between the parties and the suit seeking compensation for the losses suffered was filed within limitation. According to him, on a proper appreciation of the entire material on record as well as on a correct application of the relevant legal provisions, it was clear that the suit as filed was liable to be dismissed. He therefore submitted that the impugned judgment be set aside and the appeal be allowed.

8. On the other hand Shri C.S.Kaptan, learned Senior Advocate for the respondent-plaintiff supported the impugned judgment and urged that :

(a) By virtue of the communication dated 12.05.2003-Exhibit 46, the offer made by the plaintiff was accepted by the defendants. There was no material on record to hold that the acceptance of the plaintiff's offer was conditional in nature. Though a reference was made to the communication at serial no.2 dated 25.04.2003 issued by the Head Office of the defendants, the same was not brought on record. The plaintiff in compliance with the condition of furnishing bank guarantee towards the initial security deposit and the additional security deposit had prepared the bank guarantees for being furnished to the defendants on 23.05.2003 itself. The bank guarantees were not accepted by the defendants and instead the communication dated 28.05.2003 -Exhibit 49 came to be issued. Thus within a period of seven days as directed by the defendants the plaintiff had presented the bank guarantees but the defendants failed to accept the same. In this context, the learned Senior Advocate sought to refer to clause in the tender notice-Exhibit 77 and the conditions therein with regard to furnishing of the security deposit. By such conduct, the plaintiff had demonstrated its readiness and willingness to comply with the conditions imposed by the defendants but it was the defendants who failed to accept the bank guarantees. It was then submitted that furnishing of the bank guarantees was subsequent to the acceptance of the plaintiff's offer and the bank guarantees were only for the purposes of securing the performance of work in question by the plaintiff. Furnishing of the security deposit could not be treated as a condition precedent for the contract. By virtue of the communication dated 12.05.2003-Exhibit 46 there was a concluded contract between the parties and there was no document on record to indicate any contrary intention on the part of the defendants. The learned Senior Advocate referred to the provisions of the Act of 1872 in that regard and sought to place reliance on the decisions in ***Sardar SuchaSingh Vs. Union of India and ors. 1987 Supp. SCC 127, Union of India Vs. A.L.Rallia Ram. AIR 1963 SC 1685, State of Uttar Pradesh and ors. Vs. Combined Chemicals Company Private Ltd. (2011) 2 SCC 151, Jawahar Lal Barman Vs. The Union of India, AIR 1962 SC 378*** and ***M/s. Davecos Garments Factory and anr. Vs. State of Rajasthan (1970) 3 SCC 874*** to submit that the trial Court was legally correct in holding the contract to be duly entered into and concluded between the parties.

Referring to the preliminary submissions filed on behalf of the defendants in Writ Petition No. 2059/2003-Exhibit 53, it was submitted that the defendants had taken a specific stand therein that the tender of the plaintiff had been accepted and the work was allotted to it. Reference was also made to the urgency in undertaking the said work. It was not open for the defendants to take a contrary stand to the one taken in the said preliminary submissions. Moreover, the defendants had brought their plant, machinery and labour at the site on 27.05.2003 as indicated by the document at Exhibit 50. This was done in view of the defendants letter of acceptance dated 12.05.2003-Exhibit 46. There was no suggestion given by the defendants to the witnesses examined by the plaintiff that the plant, machinery and labour were not brought at the site on 27.05.2003. The loss sustained for the period of three hundred and nineteen days was rightly claimed by the plaintiff. Reference was also made to the other communication at Exhibit 49 to indicate that the offer made by the plaintiff stood accepted and only formal documents were to be executed. In the light of the stand taken by the defendants it was clear that there was a concluded contract between the parties and this finding did not call for any interference.

(b) That the trial Court rightly held the suit to be filed within limitation. Referring to the various communications exchanged between the parties and especially reminder issued by the plaintiff on 08.06.2006-Exhibit 69 as well as the reply given by the defendants on 20.06.2006-Exhibit 70 informing the plaintiff that the claim as made in the letter dated 08.06.2006 had been sent to the superior authorities for consideration, it was urged that the reply dated 20.06.2006 clearly indicated that even on that date the defendants were considering the claim for recovery of losses as made by the plaintiff. The suit filed on 19.01.2009 was therefore within limitation. The learned Senior Advocate referred to the provisions of Section 18 of the Act of 1963 to urge that the reply dated 20.06.2006 amounted to an acknowledgment by the defendants which had the effect of extending the period of limitation. In that regard, reliance was placed on the decisions in ***Food Corporation of India Vs. Assam State Co-operative Marketing & Consumer Federation***

Ltd.and ors. (2004) 12 SCC 360, M/s. Lakshmirattan Cotton Mills Co.Ltd. and anr. Vs. The Aluminium Corporation of India Ltd. (1971) 1 SCC 67 and ***M/s. Aries and Aries Vs. Tamil Nadu Electricity Board AIR 2017 SC 1897.***

(c) That the claim for damages on account of the plant, machinery and labour remaining idle from 27.05.2003 to 16.01.2004 had been rightly allowed. Referring to the documents at Exhibits 54, 55 and the rate list at Exhibit 58, it was submitted that the plaintiff's witnesses were not cross-examined on these relevant documents. The rates indicated in Exhibit 58 had been rightly applied for determining the amount of loss sustained. There was no serious challenge to the contents of the communication dated 27.05.2003-Exhibit 50. The learned Senior Advocate then sought to distinguish the decisions relied upon by the learned counsel for the appellants/defendants and submitted that the same were not applicable in the facts of the present case. It was thus submitted that no case had been made out by the defendants to interfere with the judgment of the trial Court and the appeal was liable to be dismissed.

9. After we had concluded the hearing of the appeal and reserved the same for judgment, it was noticed that in the light of the ad-interim order passed in Writ Petition No. 2059/2003 on 15.05.2003 by this Court,

the defendant had been restrained from issuing any work order in favour of the plaintiff. This position continued till 10.12.2003. The applicability of the provisions of Section 56 of the Act of 1872 therefore was required to be considered. However since this aspect was not argued by either of the learned counsel for the parties, by invoking the provisions of Order XLI Rule 2 of the Code of Civil Procedure, 1908, the following order was passed on 15.01.2021 :

> *"We had heard the learned counsel for the parties at length and had thereafter reserved the judgment.*
>
> *It is seen from the record of the trial Court vide Exhibits 53 and 57 that Writ Petition No.2059/2003 had been filed by M/s. Phenix Engineers for challenging the acceptance of tender of the respondent-plaintiff. In that writ petition the High Court on 15.05.2003 passed an ad-interim order restraining the appellants-defendants from issuing any work order in favour of the respondent-plaintiff. This writ petition was thereafter dismissed for want of prosecution on 10.12.2003.*
>
> *In the light of this position obtaining from the record, the question as regards effect of the ad-interim order of injunction and consequently applicability of the provisions of Section 56 of the Indian Contract Act, 1872 arises for consideration. This aspect was not argued by either of the learned counsel for the parties. We however find that this aspect does arise for consideration in the light of the material on record in the form of Exhibits 53 and 57.*
>
> *Thus in terms of the provisions of Order XLI Rule 2 of the Code of Civil Procedure, 1908, an opportunity is granted to the parties to address the Court on the following question :*
> *"Whether in the facts and circumstances of the case, the provisions of Section 56 of the Indian Contract Act, 1872 would be attracted in the light of the ad-interim order dated 15.05.2003 in Writ Petition No.2059/2003 ?*

Put up on 19.01.2021 for hearing on this question alone."

10. Accordingly the learned counsel for the parties were heard on the question of applicability of the provisions of Section 56 of the Act of 1872. The learned counsel for the defendants submitted that after issuance of the communication dated 12.05.2003-Exhibit 46 an unsuccessful bidder had filed Writ Petition No.2059/2003 before this Court challenging the acceptance of the tender of the plaintiff. By virtue of the ad-interim order passed in the said writ petition on 15.05.2003 the defendants were restrained from issuing any work order in favour of the plaintiff. It was submitted that the work in question was to be completed within a period of twelve months including monsoon. However the aforesaid writ petition remained pending for a period of almost seven months and it was disposed of only on 10.12.2003. It was therefore impossible to complete the work in question in the remaining period of five months. For the said reason the defendants had on 30.12.2003-Exhibit 48 requested the plaintiff to re-validate its offer as contained in its bid. On account of operation of the ad-interim order from 15.05.2003 to 10.12.2003 the defendants were not in a position to proceed further in accordance with the earlier communication dated 12.05.2003-Exhibit 46. Neither the plaintiff nor the defendants were responsible for this situation and therefore by virtue of the provisions of Section 56 of the Act of 1872 the contract assuming it to be concluded had been frustrated. Reference

was also made to the provisions of Section 65 of the Act of 1872 to urge that the defendants did not gain any advantage whatsoever by virtue of the ad-interim order passed in the writ petition. On the contrary after dismissal of the writ petition on 10.12.2003, the defendants immediately on 30.12.2003 called upon the plaintiff to re-validate its offer so that the work in question could be completed. This indicated that the defendants were not at fault and therefore there was no question of any breach of the agreement being committed by the defendants. Consequently, there was no basis to award any amount in favour of the plaintiff on that count. To substantiate the aforesaid contentions reliance was placed on the decisions in ***Satyabrata Ghose Vs. Mugneeram Bangur and Co. and anr. AIR 1954 SC 44, Mohammed Gazi Vs. State of M.P. and ors. (2000) 4 SCC 342, Huda and anr. Vs. Dr. Babeswar Kanhar and anr. (2005) 1 SCC 191, South East Asia Marine Engineering and Constructions Ltd. (SEAMEC Ltd) Vs. Oil India Ltd. (2020) 5 SCC 164*** and ***Delhi Development Authority Vs. Kenneth Builders and Developers Pvt. Ltd. and ors. (2016) 13 SCC 561.*** It was thus submitted that even on this count no relief could have been granted to the plaintiff.

11. Responding to the aforesaid submissions, the learned Senior Advocate for the plaintiff submitted that the defendants did not raise any defence whatsoever as to the applicability of Section 56 of the Act of 1872.

As a result there was no evidence led by the defendants on this aspect. It was then submitted that for the purposes of applicability of the provisions of Section 56 of the Act of 1872, there had to be an agreement to do an impossible act. The ad-interim order passed in Writ Petition No.2059/2003 did not make the agreement between the parties to undertake construction of the roads an act which was impossible. In absence of the contingency of there being an agreement to do an impossible act, the provisions of Section 56 of the Act of 1872 were not at all applicable. In any event, the ad-interim order ceased to operate on 10.12.2003 and the subsequent conduct of the defendants in issuing the communication dated 30.12.2003-Exhibit 48 calling upon the plaintiff to re-validate its offer amounted to waiving the impossibility of performance of the agreement. In fact, by virtue of the latter part of Section 56 of the Act of 1872, the plaintiff was entitled to be compensated especially with regard to the deployment of its plant, machinery and labour. The learned Senior Advocate referred to illustration (d) to Section 65 as well as the provisions of Section 73 of the Act of 1872. The plaintiff being always ready and willing to perform its part of the agreement, it was the defendants who committed breach of the agreement. The contract in question having been duly concluded there was no reason to deny the prayer for grant of compensation for the losses suffered by the plaintiff. In that regard the learned Senior Advocate referred to paragraphs 16-17 of the decision in ***Satyabrata Ghose*** (supra) as well as the decision in ***Bhagwandas Goverdhandas Kedia Vs. M/s. Girdharilal Parshottamdas and Co. and ors. AIR 1966 SC 543.*** The decisions relied upon by the learned counsel for the defendants were also sought to be distinguished.

12. In the light of the rival submissions of the learned counsel for the parties the following points arise for consideration :

(a) Whether the plaintiff has proved that there was a concluded contract between the parties ?

(b) In the light of pendency of the Writ Petition No.2059/2003 whether the provisions of Section 56 of the Indian Contract Act, 1872 are attracted in the facts of the case ?

(c) Whether the plaintiff has proved that the defendants committed a breach of the contract and if yes, whether the plaintiff is entitled to claim damages from the defendants ?

(d) Is the suit as filed barred by limitation ?

13. Both the parties have relied upon documentary evidence in support of their respective stands. It would therefore be necessary at the outset to refer to the relevant documentary evidence that is available on record. Pursuant to the tender notice issued by the third defendant bids were invited for construction of WBM roads with surface dressing treatment in Transport Nagar Layout. As per the tender notice dated

14.08.2002 the tender forms were to be issued from 19.08.2002 till 03.10.2002. These were pre-qualification forms which were to be submitted within a period of four days from being issued. The third defendant was then to issue blank tender forms to pre-qualified contractors between 16.12.2002 and 20.12.2002. The tender form which is at Exhibit 77 indicates that the earnest money to be deposited was Rs.1,68,000/-. Initial security deposit was 3% of the tender cost or estimated cost whichever was higher and the security deposit from the RA bills was 2% of the tender cost or estimated cost whichever was higher. The time limit for completion of the work was twelve months including monsoon. Clause 5 of the tender document reads thus :

> **Time Limit :**
> **"***The time limit for the completion of the work shall be 12 (Twelve) months from the date mentioned in the work order inclusive of monsoon.*"

The operative period of the contract was to commence from the date of issuance of the work order. Clause 2 of the tender document reads thus :

> **Conditions referred to in paragraph-I**
> "(i) *The Operative Period of the contract shall mean the period commencing from the date of the work order issued to the contractor and ending on the date when the time allowed for the work specified in the Memorandum of Tender for the work expires, taking into consideration the extension of time if any, for completion of the work granted by Engineer-in-charge under the relevant extension is necessitated on account of default of the contractor.*"

The validity of the offer was to be one hundred and twenty days from the date of opening of the tender or the application for refund whichever was later. As per the directions contained in the tender form, the tenderer was required to duly sign and complete the printed form. Envelope No.1 was to contain challan for earnest money or exemption certificate issued by the defendants. A copy of the current certificate of registration, income-tax certificate as well as rate analysis was also to be submitted in that envelope. In envelope no.2 the offer to be made by the tenderer was to be submitted without any condition. A contractor whose offer was proposed to be accepted and who was to be invited for execution of the agreement was required to pay stamp duty which was 3% as stipulated. Reference to other material conditions of the tender document would be made at later stage.

14. It is not in dispute that the plaintiff submitted its bid and on 12.05.2003 the third defendant issued a communication to the plaintiff which is at Exhibit 46. As per this communication the plaintiff was informed that the bid submitted by it was 28.49% less than the offset price of Rs.3,35,50,648/-. The amount of bid was Rs.2,39,92,068/-. As per reference note no.2 the plaintiff's bid had been accepted. Note no.2 refers to a communication dated 25.04.2003 written by the Chief Executive Officer, Maharashtra Industrial Development Corporation, Mumbai. The plaintiff was then directed that it should deposit initial security deposit

which was 3% amounting to Rs.10,06,520/- by way of demand draft. Similarly additional security deposit to the extent of 6% being Rs.20,13,040/- was also be deposited by way of demand draft. The plaintiff was then informed that if the initial security deposit was being paid further amount of Rs.30,200/- being the value of stamp papers be kept ready. If the security deposit was being submitted in the form of bank guarantee, adhesive stamp paper of Rs.100/- was directed to be kept ready and the plaintiff was called to attend the office of the third defendant for executing the agreement. The plaintiff was accordingly requested to complete the formalities for executing the agreement within a period of seven days from the issuance of that letter. In response thereto the plaintiff on 23.05.2003 issued a letter to the third defendant which is at Exhibit 47 stating therein that bank guarantee nos. 2 and 3 dated 23.05.2003 for Rs.10,07,000/- each towards 6% additional security deposit for the tender work were being submitted and the said bank guarantees were valid upto 23.08.2004. On 27.05.2003 the plaintiff issued a communication to the third defendant which is at Exhibit 50 stating therein that in view of the letter issued by the third defendant on 12.05.2003 machinery was brought at the site. The site was accordingly requested to be surveyed. The third defendant on 28.05.2003 informed the plaintiff that in terms of its letter dated 12.05.2003 the representative of the plaintiff had attended the office of the third defendant on

27.05.2003 along with the bank guarantees. However because of certain administrative difficulties, it was not possible to accept the bank guarantees till 30.05.2003 and hence the bank guarantees were returned to the representative. After receiving the orders from the superior authorities the third defendant informed the plaintiff that the bank guarantees would be accepted.

15. In the meanwhile Writ Petition No.2059/2003 came to be filed by M/s. Phenix Engineers challenging the award of tender by the defendants in favour of the plaintiff. This writ petition was filed on 15.05.2003 in which the MIDC through its officers were arrayed as respondent nos. 2 to 4 while the plaintiff was arrayed as respondent no.5. This Court on 15.05.2003 passed the following order :

> *"Notice before admission, returnable on 30.05.2003.*
>
> *AGP waives service of respondent no.1. He wants time to file reply.*
>
> *Time granted. Reply should be filed within the returnable date.*
>
> *In the meantime, there will be ad-interim order in terms of prayer clause (ii)."*

The plaintiff and the defendants are ad-idem that by virtue of this ad-interim order the defendants were restrained from issuing the work order to the plaintiff. In the said writ petition the third defendant filed its submissions on record which are at Exhibit 53 dated 11.06.2003. In these submissions, reference has been made to the passing of the ad-interim order dated 15.05.2003 and it has been further stated that the third defendant was served with a copy of the writ of the ad-interim order on 19.05.2003. It has also been stated in the said submissions that the proposal submitted by the plaintiff was found feasible and workable due to which it was chosen to perform the job. The defendants accepted the tender of the plaintiff for allotting it the work. It is seen from the record of Writ Petition No. 2059/2003 that the ad-interim order came to be continued on 30.05.2003 and it continued to operate thereafter. The plaintiff entered appearance in the said proceedings on 28.07.2003. On 10.12.2003 in view of the statement made on behalf of the counsel for the original petitioner that the said counsel was unable to proceed with the writ petition for want of instructions, the writ petition came to be dismissed for want of prosecution. This order is at Exhibit 57.

16. Thereafter on 30.12.2003 the third defendant issued a communication to the plaintiff calling upon it to extend the period of validity of its offer. This communication is at Exhibit 48 . In response thereto the plaintiff on 16.01.2004 issued a communication to the third defendant in which it was stated that there was no reason to seek extension of the validity period of the offer as sought by it. It was also stated that a decision be taken at the earliest failing which the staff and machinery which was at the site would be removed. On 07.04.2004 the

third defendant issued a communication to the plaintiff which is at Exhibit 64 stating therein that as no agreement had been entered into with the plaintiff and no work order to commence the work had been issued, the request for joint inventory of the machinery did not deserve consideration. In reply thereto the plaintiff on 16.04.2004 took the stand that on payment of the earnest money deposit and acceptance of the tender the contract between the parties stood concluded. It was also stated that signing of the agreement was only a formality as the plaintiff's offer had been accepted by the defendants. This communication is at Exhibit 62. Thereafter on 28.07.2004 the third defendant again informed the plaintiff that since there was no agreement between the parties the question of taking an inventory did not arise. This communication is at Exhibit 61. Ultimately on 10.01.2006 the plaintiff issued a letter to the third defendant stating therein that on account of the plant and machinery of the plaintiff remaining idle at the site for a considerable period, the plaintiff had to suffer losses. By stating that there was a breach of the contract on the part of the defendants, a demand of Rs.3,26,00,000/- was made by the plaintiff from the defendants towards the loss sustained. This letter is at Exhibit 68. Another communication giving various details was again issued by the plaintiff on 08.06.2006 which is at Exhibit 69. In response thereto the third defendant on 20.06.2006 informed the plaintiff that the claim made by the plaintiff had been forwarded to the superior authorities and in case the claim as made was accepted by the said authorities, further steps would be taken in the matter. It is thereafter that on 19.06.2009 the plaintiff proceeded to file the present suit seeking damages from the defendant to the tune of Rs.3,26,00,000/-.

17. **Whether there was a concluded contract between the parties ?**

It is not in dispute that pursuant to the tender notice issued by the defendants, the plaintiff had submitted its bid and on 12.05.2003-Exhibit 46 the third defendant informed the plaintiff that its bid being 28.49% below the offset price was accepted in view of the communication dated 25.04.2003 issued by the Chief Executive Officer of the MIDC. The third defendant then called upon the plaintiff to furnish demand drafts or bank guarantees towards the initial security deposit as well as the additional security deposit. Further necessary stamp papers and adhesive stamps were directed to be deposited for completion of the agreement. The agreement was to be signed within a period of seven days from the issuance of the letter. According to the plaintiff, issuance of this communication indicated that the defendants by accepting the bid of the plaintiff being the lowest and communicating such acceptance to the plaintiff resulted in there being a concluded contract between the parties. On the other hand, according to the defendants since the bank guarantees were directed to be submitted and the agreement was to be duly signed unless the same was done, it could not be said that there was a concluded contract between the parties. The learned counsel for the parties referred to the provisions of the Act of 1872 to substantiate their stands.

Under Section 7 of the Act of 1872 in order to convert a proposal into a promise the acceptance must be absolute and unqualified and it must be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If such manner is prescribed in the proposal and the acceptance is not made in that manner the proposer could within a reasonable time after the acceptance is communicated to him, insist that his proposal be accepted in the prescribed manner and not otherwise. In the recent decision of the Hon'ble Supreme Court in ***M/s. Padia Timber Company (P) Ltd. Vs. The Board of Trustees of Visakapatnam Port Trust JT 2021(1) SC 44*** it has been held that offer and acceptance must be based or founded on three components, that is, certainty, commitment and communication. We find that the proposal of the plaintiff, that is its bid came to be accepted by the defendants by virtue of the communication dated 12.05.2003-Exhibit 46. This acceptance was absolute and unqualified. It was expressed in an usual and reasonable manner. The bid submitted by the plaintiff did not prescribe a particular manner in which it was to be accepted and hence the latter part of Section 7 of the Act of 1872 would not be applicable. The defendants in clear terms had informed the plaintiff that its bid being the lowest had been accepted and the plaintiff was called upon to complete the formalities for the execution of the agreement.

18. While answering the question as to whether the acceptance of the proposal was absolute or not, the surrounding circumstances as well as the manner in which the parties proceeded in the matter have also to be taken into consideration. These aspects have to be seen from the point of view of the parties to the contract. As stated above the decision of the defendants to accept the bid of the plaintiff resulted in one of the unsuccessful bidders filing Writ Petition No.2059/2003 challenging that action of the defendants. The third defendant sought to justify the acceptance of the bid of the plaintiff in those proceedings by filing preliminary submissions-Exhibit 53. It would be necessary to refer to the stand taken by the third defendant in those proceedings as reflected in its preliminary submissions. It is to be noted that the plaintiff herein was the respondent no.5 in Writ Petition No.2059/2003. In paragraph 7 of the preliminary submissions, it was stated as under :

> *"The respondent no.5 had duly submitted its rate analysis along with the tender. After taking into consideration all the factors, the answering respondent and other co-respondents thought it fit that the proposal given by the respondent was feasible and workable and therefore he was justified to perform the job".*

Similarly in paragraph 8 it has been stated as under :

> *"It may be pointed out here that there is no major*

> *variation in the rates quoted by the respondent no.5 and its feasibility the tender has been duly accepted."*

In paragraph 9 it was further stated as under :

> *"Looking to these facts and urgency it was thought fit by the respondent to accept the tender of the respondent no.5 and allot him the work."*

Perusal of these submissions made on affidavit by the third defendant clearly indicate that the bid submitted by the plaintiff was unconditionally accepted by the defendants and the work under the tender was to be allotted to it. Having taken such stand in Writ Petition No.2059/2003, it would be futile for the defendants to now urge that there was no concluded contract between the plaintiff and the defendants.

19. No doubt, the defendants sought to urge that the bank guarantees towards the initial security and the additional security deposit were not furnished by the plaintiff nor was the agreement signed between the parties and hence no work order was issued to the plaintiff. According to them the communication dated 12.05.2003-Exhibit 46 was merely a prelude to the contract as observed in ***Dresser Rand S.A.*** (supra). Though this may be true, it cannot be lost sight of the fact that on 23.05.2003-Exhibit 47, the plaintiff sought to furnish the bank guarantee bearing nos. 2 and 3 for an amount of Rs.10,07,000/- each. On 28.05.2003-Exhibit 49 the third defendant admitted the fact that the plaintiff's representative had on 27.05.2003 attended the office of the

third defendant along with the bank guarantees but due to administrative reasons the bank guarantees could not be accepted till 30.05.2003. The third defendant also informed the plaintiff that after receiving the orders from the superior authorities the bank guarantees would be accepted. It is undisputed that on 15.05.2003 an ad-interim order was passed in Writ Petition No.2059/2003 and this order was served on the third defendant on 19.05.2003. Even though the third defendant may be justified in not accepting the bank guarantees on 27.05.2003 due to the ad-interim order passed by this Court restraining the defendants from issuing the work order to the plaintiff, the fact remains that the plaintiff was not to be blamed for this state of affairs. The plaintiff was duly communicated that its tender had been accepted on 12.05.2003-Exhibit 46 and accordingly it took the steps to complete the formalities. In these facts when the ad-interim order precluded the defendants from issuing the work order after 15.05.2003, we find that by communicating the acceptance of the plaintiff's bid on 12.05.2003-Exhibit 46 there was a concluded contract between the parties. Absence of execution of a formal agreement in favour of the plaintiff and the issuance of a work order by the defendants cannot be a reason in these facts to hold that there was no concluded contract. The ratio of the decisions in ***State of U.P., Jawahar Lal Barman*** and ***A.L.Rallia Ram*** (supra) support this conclusion.

Another aspect that cannot be ignored is the stand taken by the third defendant in issuing the communication dated 30.12.2003-Exhibit 48 after Writ Petition No.2059/2003 was dismissed. The third defendant called upon the plaintiff to extend the validity of its offer till 31.01.2004. Such request would not have been made by the third defendant if there was no concluded contract between the parties pursuant to the acceptance the bid of the plaintiff on 12.05.2003-Exhibit 46. As held in ***Dresser Rand S.A.*** (supra) a letter of intent could be construed as a letter of acceptance if such intention is evident from its terms. On consideration of the overall material on record the intention of the defendants is clear that the offer of the plaintiff was accepted resulting in a concluded contract between them. Point (a) is accordingly answered by holding that by virtue of acceptance of the plaintiff's bid, which was communicated to it on 12.05.2003-Exhibit 46, there was a concluded contract between the parties. This finding recorded by the trial Court is confirmed.

20. **Whether the contract between the parties was frustrated ?**

It is an undisputed fact on record that the plaintiff issued a communication to the defendant on 12.05.2003-Exhibit 46 stating that the offer made by the plaintiff which was 28.49% lower than the offset price was accepted by the defendant in view of the communication dated 25.04.2003 issued by the Chief Executive Officer of the MIDC. In terms of the tender notice the plaintiff was called upon to furnish initial security deposit of 3% as well as additional security deposit of 6%. Similarly, the plaintiff was called upon to furnish appropriate stamp duty for execution of the agreement and all this compliance was to be done within a period of seven days from the issuance of the said letter. However before expiry of this period of seven days, on 15.05.2003 an ad-interim order was passed in Writ Petition No.2059/2003 filed at the behest of M/s. Phenix Engineers by which the defendants herein were restrained from issuing the work order in favour of the plaintiff. It is further not in dispute that this ad-interim order continued to operate and ultimately on 10.12.2003 the said writ petition came to be dismissed for want of prosecution which order is at Exhibit 57.

From the aforesaid facts on record it becomes clear that though the defendants had accepted the offer made by the plaintiff and had written to it on 12.05.2003 to complete the various formalities as per the tender notice to enable execution of the contract, the same could not be done as the defendants were restrained by the order dated 15.05.2003 from issuing any work order to the plaintiff.

21. It is in the aforesaid facts that the applicability and effect of the provisions of Section 56 of the Act of 1872 is required to be considered. Section 56 of the Act of 1872 reads thus :

> *"Section 56- Agreement to do impossible act.-An agreement to do an act impossible in itself is void.*
>
> *Contract to do act afterwards becoming impossible or unlawful – 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.*
>
> *Compensation for loss through non-performance of act known to be impossible or unlawful – 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 of the promise".*

Perusal of the aforesaid provision and the tender notice indicates that the tender with regard to construction of roads was not an agreement to do an impossible act and was therefore not void. The second part of Section 56 however stipulates that if after making a contract an event occurs which could not be prevented by the promisor or the contract becomes unlawful then such contract becomes void when the act becomes impossible or unlawful. It is clear from the facts on record that by virtue of the ad-interim order dated 15.05.2003 passed in Writ Petition No.2059/2003 restraining the defendants from issuing the work order to the plaintiff, it became impossible for the defendants to go ahead with the execution of the agreement in favour of the plaintiff. The execution of such agreement after 15.05.2003 in the light of the ad-interim restraint order would have also made it unlawful on the part of the defendants as such execution of the agreement would have been in breach of the ad-interim order. We thus find that the second part of

Section 56 of the Act of 1872 would come into operation and would apply to the facts of the present case. The latter portion of Section 56 of the Act of 1872 contemplates knowledge of the promisor or the aspect of getting knowledge with reasonable diligence which the promisee did not know doing of which to be impossible or unlawful then the promisor is required to compensate the promisee for any loss which the promisee sustains through the non-performance of the promise. It is not the case of either of the parties that the other party knew about the ad-interim order and took the advantage of the same. In the light of the aforesaid, the effect of the ad-interim order of restraint that operated from 15.05.2003 till 10.12.2003 when Writ Petition No.2059/2003 came to be dismissed for want of prosecution vis-a-vis Section 56 of the Act of 1872 will therefore have to be considered.

22. One of the earliest decisions recognising and considering application of the doctrine of frustration is by the Nagpur High Court in ***Kesarichand Vs. Governor-General in Council 1949 ILR (Nagpur) 718.*** Vivian Bose J (as His Lordship then was) observed that the doctrine of frustration was nothing but a rule of law invented by Judges to meet an impossible situation. It is something outside and independent of the parties and their will : something beyond their control. It occurs when a violent outside force suddenly dashes against the adventure which forms

the basis of the contract. It was held that the doctrine was a special case of "impossibility" and as such was dealt with in Section 56 of the Act of 1872. It has also been observed that the contract either dies or it does not. If it dies, it dies as a whole at the moment of frustration and therefore both sides are excused from further performance. If it dies, it dies forthwith. The Court cannot remake the contract between the parties but can only determine whether the frustrating event killed the adventure.

23. The leading decision of the Hon'ble Supreme Court with regard to applicability of the provisions of Section 56 has been rendered in ***Satyabrata Ghose*** (supra). Therein the parties to the dispute had entered into an agreement for sale of land. Before the contract could be completed, the land in question came to be requisitioned by the State. A plea was raised on behalf of the defendant that as a result of the orders of requisition the contract was frustrated. Approving the decision in ***Kesarichand*** (supra) it was observed that the word "impossible" used in Section 56 of the Act of 1872 was not limited to physical or literal impossibility. The performance of an act even if it was not literally impossible could always become impractical and useless from the point of view of the object and purpose which the party had and if an untoward event or change of circumstances upsets the very foundation upon which the parties had rested their bargain, it could be said that the promisor

found it impossible to do the act which he promised to do. Reference was made to the law prevailing in England in the context of doctrine of impossibility and it was then observed that such situation in India would be required to be dealt with by Sections 32 and 56 of the Act of 1872. It was observed therein as under :

> *"In the large majority of cases however the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the Court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it.*
>
> *When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the Court which can pronounce the contract to be frustrated and at an end. The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the Court has to form its own conclusion whether the changed*

circumstances destroyed altogether the basis of the adventure and its underlying object - 'Vide Morgan Vs. Manser' 1947-2 All ER 666 (L). This may be called a rule of construction by English Judges but it is certainly not a principle of giving effect to the intention of the parties which underlies all rules of construction. This is really a rule of positive law and as such comes within the purview of Section 56 of the Indian Contract Act".

"20. It is well settled and not disputed before us that if and when there is frustration the dissolution of the contract occurs automatically. It does not depend, as does rescission of a contract on the ground of repudiation or breach, or on the choice or election of either party. It depends on the effect of what has actually happened on the possibility of performing the contract: Per Lord Wright in … '1944 AC 265 at p. 274(I). What happens generally in such cases and has happened here is that one party claims that the contract has been frustrated while the other party denies it. The issue has got to be decided by the court 'ex post facto', on the actual circumstances of the case…...'1944 AC 265 at p. 274(I)"

24. The aforesaid law has thereafter been consistently followed in various subsequent decisions of the Hon'ble Supreme Court. In the light of the facts of the present case, it would be also necessary to refer to the decision of the Hon'ble Supreme Court in ***Shanti Vijay and Company and ors. Vs. Princess Fatima Fouzia and ors. (1979) 4 SCC 602***. The dispute

therein related to removal of trustees of the Trust called 'H.E.M. Nizam's Jewellery Trust. One of the beneficiaries initiated proceedings under Section 74 of the Indian Trusts Act, 1882 for removal of the Trustee In-charge on account of the alleged dereliction of duty, negligence and other grounds. In those proceedings an application for temporary injunction seeking to restrain the trustees from taking any further steps towards finalisation of the sale of jewellery came to be filed. On 14.03.1978 the trial Court granted an ad-interim injunction restraining the trustees from taking any steps to finalise the sale of the jewellery. This order of injunction was however vacated on 27.03.1978. Examining the question as to whether on account of the order of injunction the provisions of Section 56 of the Act of 1872 were attracted, it was held that after the acceptance of tender by four trustees on 09.03.1978 by virtue of resolution dated 08.03.1978, the contract was frustrated on account of grant of an ad-interim injunction by the trial Court on 14.03.1978. On account of grant of such injunction, the alleged contract could not be performed and the balance consideration could not be tendered by the stipulated date as long as the order of injunction operated. In those facts it was held that there was a frustration of the contract.

25. On a careful consideration of the provisions of Section 56 of the Act of 1872 we find that after issuance of the letter of intent in favour of

the plaintiff dated 12.05.2003-Exhibit 46 an ad-interim order was passed by this Court on 15.05.2003 restraining the defendants from issuing the work order to the plaintiff. As per the statement made by the defendants in its preliminary submissions in the said writ petition-Exhibit 56 the defendants got knowledge of the ad-interim order on 19.05.2003 and hence from that date they were precluded by the order of the Court from issuing the work order. Any step taken after that date by the defendants of issuing the work order would have made the same unlawful being in breach of the ad-interim order at least till the period the ad-interim order was operating. Issuing the work order after 15.05.2003 or for that matter on or after 19.05.2003 when the defendants got knowledge of the ad-interim order would have amounted to breach of the ad-interim order and thus unlawful. In the teeth of the ad-interim order which is the frustrating event the performance of the contract by either party became impossible. In these facts therefore there is no scope to invoke the provisions of Section 65 of the Act of 1872 when the defendants did not derive any advantage on account of the ad-interim order.

26. Though it was urged by the learned Senior Advocate for the plaintiff that the defendants in their written statement did not raise the defence of applicability of Section 56 of the Act of 1872, it is clear on a

perusal of paragraphs 8 to 10 of the written statement – Exhibit 11 that in view of the order of stay granted by the High Court the work order could not be issued to the plaintiff. PW1 Vijay Mhatre - Exhibit 19 admitted in his cross-examination that the work had been stayed due to the order passed by the High Court. The parties were thus aware of the fact that in view of the ad-interim orders passed by the High Court, the work in question had been stayed. It was not necessary for the defendants to specifically refer to the provisions of Section 56 of the Act of 1872 in the written statement. This Court is required to examine the legal effect of the provisions of Section 56 of the Act of 1872 in the light of the undisputed position that on 15.05.2003 the High Court by an ad-interim order in Writ Petition No.2059/2003 had restrained the defendants from issuing the work order to the plaintiff. This contention of the learned Senior Advocate therefore cannot be accepted. In our view the trial Court erred in not considering the legal effect of the provisions of Section 56 of the Act of 1872 in the light of the undisputed facts on record. We therefore hold that for the period from 19.05.2003 which is the date on which the defendants got knowledge of the ad-interim order passed in Writ Petition No.2059/2003 till 10.12.2003 on which date the said writ petition was dismissed for want of prosecution, it had become impossible for the defendants to issue the work order in favour of the plaintiff. The letter of intent though issued on 12.05.2003, it could not be taken to its logical end and thus there was a frustration of the contract especially when the order of restraint operated from 15.05.2003 for a period of almost seven months. The operation of the contract became unfeasable after 10.12.2003 as the validity of the rates quoted was to operate for a period of one hundred and twenty days from opening of the tender. Point (b) is answered by holding that under Section 56 of the Act of 1872 the contract between the parties stood frustrated.

27. **Whether the defendants breached the contract for which the plaintiff can claim compensation ?**

It having been held that there was a concluded contract between the parties, the plaintiff's claim for compensation for the loss caused on account of breach of the contract by the defendants would have to be examined as held in ***Vedanta Ltd.***(supra). The claim of the plaintiff for seeking monetary compensation is on account of loss caused due to its plant, machinery and labour remaining idle. The loss has been claimed on the premise that for about three hundred and nineteen days the plant, machinery and labour were lying idle at the work site and despite various requests made by the plaintiff the inventory of the same was not taken by the defendants. In this regard, the plaintiff has relied upon the communication at Exhibit 27.05.2003-Exhibit 50 which was issued to the third defendant informing it that the plaintiff, in view of the communication dated 12.05.2003-Exhibit 46, had brought its machinery at the work site and hence the third defendant should survey the same. The stand of the third defendant as reflected in its communication dated 28.07.2004-Exhibit 61 issued to the plaintiff was that since there was no agreement entered into between the parties there was no question of taking any inventory or inspecting the machinery at the site.

28. It would therefore be necessary to determine whether the plaintiff was justified in bringing its plant, machinery and labour at the work site on 27.05.2003 as alleged. In the plaint it has been averred that on the directions of the defendants it had mobilised its plant, machinery and labour at the site. No doubt, the defendants have disputed issuing any such directions as well as such plant, machinery and labour being brought on the site on 27.05.2003 and the same remaining idle. The trial Court in paragraph 22 of its judgment has proceeded to hold that notwithstanding the denial by the defendants it was likely that on the basis of oral instructions the plaintiff had possibly brought its plant, machinery and labour at the site. Assuming the same having been brought at the site it would be necessary to examine whether such act on the part of the plaintiff was justified under the tender conditions.

Clause 45 of the tender notice-Exhibit 77 reads as under :
Entering upon or commencing any portion of work
Clause 45 – <u>The contractor shall not enter upon or commence any portion of work except with the written authority and instructions of the Engineer-in-charge or of his subordinate in-charge of the work</u>. Failing such

> *authority the contractor shall have no claim to ask to measurements of or payment for work.* (emphasis supplied)

A plain reading of this clause indicates that unless the Engineer In-charge or his subordinate instructed the contractor in writing, it would not be open for the contractor to either enter upon or commence any portion of the work. It has also been stated that in absence of any such direction given under the authority of the Engineer In-charge the contractor would have no claim to seek for measurements or payment for the work. It is an admitted position that there is no document on record to indicate that the Engineer in-charge in terms of Clause 45 of the tender notice had permitted the plaintiff in writing to either enter upon or commence any portion of the work. In absence of any such written authority being given to the plaintiff there would be no basis for the plaintiff either to call upon the defendants to take an inventory and inspect the work site for that purpose. In the light of the clear stipulation in Clause 45 of the tender notice-Exhibit 77, we find that there was no basis whatsoever for the plaintiff to bring its plant, machinery and labour at the work site as alleged on 27.05.2003.

29. The matter can be viewed from another angle. On 15.05.2003 an ad-interim order was passed in Writ Petition No. 2059/2003 restraining the defendants from issuing any work order in favour of the

plaintiff. The defendants got knowledge about this order on 19.05.2003 and the plaintiff had also been arrayed as respondent no.5 in the said writ petition. On 28.05.2003-Exhibit 49 the defendants informed the plaintiff that the bank guarantees would be accepted after receiving instructions from the higher authorities and the same would not be accepted till 30.05.2003. This was obviously on account of the ad-interim order dated 15.05.2003 and the fact that the returnable date in the said writ petition was 30.05.2003. On being served with the copy of the writ petition and the ad-interim order passed therein coupled with the fact that the ad-interim order was subsequently continued on 30.05.2003, a prudent contractor would have removed his plant, machinery and labour if it had been brought at the site for being utilized at some other site as there was a restraint from issuing any work order and consequently from undertaking the work as per the tender notice. It is hard to believe that despite knowledge of the ad-interim order passed on 15.05.2003 in Writ Petition No.2059/2003, the plaintiff would permit its plant, machinery and labour to remain idle at the site at least till 10.12.2003 when the said writ petition came to be dismissed. On the touchstone of preponderance of probability we find that the stand taken by the plaintiff that it permitted its plant, machinery and labour to remain idle at the site at least till 10.12.2003 in the face of the ad-interim order dated 15.05.2003 does not appear probable. Thus in absence of any written authority as contemplated by Clause 45 of the tender notice, the plant, machinery and labour could not have been brought at the site. We therefore find that there was no legal basis whatsoever for the plaintiff to claim loss on account of its plant, machinery and labour remaining idle at the site. As held earlier, the contract having been frustrated on account of the ad-interim order dated 15.05.2003 it cannot be held that the defendants committed any breach of the contract. In any event, in absence of any written authority from the Engineer-in-charge the plaintiff could not have mobilised its plant, machinery and labour at the site on 27.05.2003. There is no basis whatsoever for the plaintiff to claim compensation for the loss sustained on that count.

30. After dismissal of Writ Petition No.2059/2003 on 10.12.2003 the defendants on 30.12.2003-Exhibit 48 called upon the plaintiff to re-validate its offer by extending the validity period. This is sought to be justified by the defendants on the ground that Condition No.14 in the tender notice-Exhibit 77 stipulated that the validity of the offer made by the contractor would be for a period of one hundred and twenty days from opening of the tender or an application for refund whichever was later. In the present case the offer as made by the plaintiff was accepted by the defendants on 12.05.2003 and after about one hundred and twenty days from opening of the tender Writ Petition No.2059/2003 continued to

pend in the High Court. The time limit for completing the work being twelve months from the issuance of the work order, in the facts of the case we find that the defendants were justified in calling upon the plaintiff to extend the validity period of its offer. The period that had elapsed from 15.05.2003 till 10.12.2003 in view of the ad-interim order passed in Writ Petition No.2059/2003 was not attributable to any act of the defendants. Despite conveying its acceptance to the plaintiff's offer on 12.05.2003 the defendants were restrained from issuing the work order. When the defendants were in a position to proceed further with the agreement by issuing the work order after 10.12.2003, the plaintiff was rightly called upon to extend the validity period of its offer. It therefore cannot be said that by issuing the communication dated 30.12.2003-Exhibit 48 the defendants took an unsustainable step of calling upon the plaintiff to extend the validity period of its offer. The defendants therefore did not commit any breach of the contract which even otherwise was frustrated.

31. Perusal of the impugned judgment of the trial Court indicates that it has not given the desired importance to the undisputed fact that by virtue of the ad-interim order dated 15.05.2003 passed in Writ Petition No.2059/2003 the defendants were restrained from issuing the work order to the plaintiff. On the contrary after holding that by virtue of the communication dated 12.05.2003-Exhibit 46 there was a concluded

contract between the parties, the trial Court found that the act of the plaintiff of bringing at the site the plant, machinery and labour to be justified despite referring to Clause 45 of tender notice at Exhibit 77. In paragraph 21 of the impugned judgment, the trial Court has proceeded to hold that since there was an urgency in undertaking the work under the tender, the plaintiff was justified in bringing its plant, machinery and labour at the site on 27.05.2003 possibly on the basis of oral instructions from the defendants though the same was denied. It is on that basis that the trial Court has proceeded to hold that since the plant, machinery and labour of the plaintiff remained idle for about two hundred and sixty six days, the plaintiff was found entitled to be granted the amount of loss sustained by it for that period. Neither was the person who gave such oral instructions named by the plaintiff nor was any witness examined in that behalf. There is no sufficient evidence on record to prove such plant, machinery and labour being brought at the site after due instructions from the defendants. As held earlier in absence of any written authority by the Engineer In-charge as required by Clause 45 of the tender notice, the plaintiff was not justified in bringing its plant, machinery and labour at the site on 27.05.2003 and retaining it thereafter for about three hundred and nineteen days. The learned Judge of the trial Court therefore misdirected herself in proceeding on this basis and the findings recorded in that regard in the impugned judgment cannot be sustained. Point (c) is answered accordingly.

32. **Bar of limitation :**

According to the defendants after Writ Petition No.2059/2003 was dismissed, communication dated 30.12.2003-Exhibit 48 issued to the plaintiff calling upon it to extend the validity of its offer. The plaintiff on 16.01.2004-Exhibit 59 did not agree to this request made by the defendants. On 07.04.2004-Exhibit 64 the defendants took the stand that as no agreement had been entered into with the plaintiff and no work order had been issued, there was no question of permitting the plaintiff to go ahead with the work in question. This according to the defendants gave a cause of action to the plaintiff to seek legal redress against the defendants. The cause of action accrued on 07.04.2004 and as the suit was filed on 19.06.2009 it was urged that it was filed beyond the prescribed period of limitation. On the other hand, according to the plaintiff despite the stand taken on 07.04.2004 that no agreement had been entered into between the parties and there was no work order issued, the plaintiff on 10.01.2006-Exhibit 68 had informed the defendants that on account of mobilisation of the plant, machinery and labour which were thereafter required to be kept idle, there was a breach of contract on the part of the defendants and a claim of Rs.3,26,00,000/- came to be made by the plaintiff. This demand came to be reiterated in the letter dated 08.06.2006-Exhibit 69 issued by the plaintiff. The third defendant on 20.06.2006-Exhibit 70 informed the plaintiff that the claim made by the plaintiff was under consideration of the Office of the Executive Engineer, Akola. Similarly the proposal in that regard had been sent to the superior authorities and if a positive response was received, the claim would be considered. It was further stated that if any dues were found payable by the Office of the Executive Engineer, the same would be accordingly informed and complied with. This communication, according to the plaintiff, amounted to an acknowledgment of liability in writing as contemplated by Section 18 of the Act of 1963 and thus the fresh period of limitation ought to be computed from 20.06.2006. On that count the suit as filed on 19.06.2009 was within limitation according to the plaintiff.

33. It is true that the defendants on 07.04.2004-Exhibit 64 had taken a stand that in the absence of any agreement between the parties and there being no work order issued in favour of the plaintiff the cause of action accrued in favour of the plaintiff for seeking compensation on account of the alleged loss incurred by it pursuant to the steps stated to be taken by it from 27.05.2003 onwards. However prior to expiry of the period of limitation of three years from 07.04.2004, the third defendant on 20.06.2006-Exhibit 70 informed the plaintiff that the claim made by it for being compensated on account of the loss sustained by it due to

deployment of its plant, machinery and labour at site was under consideration coupled with an assurance that if anything was found due the plaintiff would be informed and the needful would be done. This communication issued by the third defendant in clear terms expresses an intention to pay the plaintiff any amount found due to the plaintiff. In other words it would amount to an acknowledgment of liability as contemplated by Section 18 of the Act of 1963. In this regard, useful reference may be made to the following observations in the case of ***J.C.Budhraja Vs. Chairman, Orissa Mining Corporation Ltd ., 2008 (3) Mh L J 33 (S.C.)***

> *"18. It is now well settled that a writing to be an acknowledgment of liability must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability. The admission need not be in regard to any precise amount nor by expressed words. If a defendant writes to the plaintiff requesting him to send his claim for verification and payment, it amounts to an acknowledgment. But if the defendant merely says, without admitting liability, it would like to examine the claim or the accounts, it may not amount to acknowledgment. In other words, a writing, to be treated as an acknowledgment of liability should consciously admit his liability to pay or admit his intention to pay the debt."*

34. Complete reading of the communication dated 20.06.2006-Exhibit 70 clearly reflects the intention of the defendants that if any claim was found due and payable to the plaintiff the same would be duly paid

by them. No doubt, the third defendant had also stated that the claim was under consideration of the superior authorities but at the same time the third defendant also stated that if any amount was found due by its office, necessary compliance would be made and the plaintiff would be informed accordingly. As held in ***Shapoor Freedom Mazda*** and ***M/s. Lakshmirattan Cotton Mills Co.Ltd.*** (supra) the intention to admit jural relationship can be inferred by implication from the nature of admissions and surrounding circumstances. A liberal construction of the statement in question is required to be given. The other decisions relied upon by the learned Senior Advocate for the plaintiff in this regard also support his contention that by virtue of the communication dated 20.06.2006-Exhibit 70, the defendants expressed their intention to pay the plaintiff any amount found due. Thus by virtue of the provisions of Section 18 of the Act of 1963 that communication amounted to an acknowledgment of liability in writing. Though initially the cause of action for seeking compensation for the alleged losses arose on 07.04.2004-Exhibit 64, prior to the expiry of limitation of three years the third defendant on 20.06.2006-Exhibit 70 expressed an intention to pay the plaintiff any amount if found due. By virtue of this communication the fresh period of limitation was required to be computed from 20.06.2006-Exhibit 70. Ultimately on 21.02.2008-Exhibit 73 the third defendant informed the plaintiff that in the absence of any written agreement between the parties it would not be possible to take any joint inventory as requested. Thus the suit as filed on 19.06.2009 is within three years thereof. We therefore hold that the suit as filed is within limitation and the finding in that regard recorded by the trial Court is upheld. Point (d) stands answered accordingly.

35. We thus conclude by holding that pursuant to the bid submitted by the plaintiff which was accepted by the defendants on 12.05.2003-Exhibit 46 there was a concluded contract between the parties. However before the work order could be issued to the plaintiff, the High Court in Writ Petition No.2059/2003 preferred by an unsuccessful bidder restrained the defendants on 15.05.2003 from issuing the work order to the plaintiff. That writ petition was ultimately disposed of on 10.12.2003. As a result of the ad-interim order of restraint the contract between the parties stood frustrated especially when the rates quoted by the plaintiff were to be operative for a period of one hundred and twenty days from opening of the bid. In the absence of any written instructions being issued to the plaintiff under Clause 45 of the tender notice, it was not justified in seeking to mobilise its plant, machinery and labour at the site. Though the suit for recovery of the amount of loss sustained by the plaintiff for breach of the contract was filed within limitation, the plaintiff is not entitled to succeed as the contract itself was frustrated, there was no breach committed by the defendants and

mobilisation of plant, machinery and labour by the plaintiff as alleged was in breach of the tender conditions.

As a sequel to the aforesaid, the judgment of the trial Court cannot be sustained and it is accordingly set aside. The suit filed by the plaintiff stands dismissed. The First Appeal is allowed leaving the parties to bear their own costs.

The amount deposited by the appellants pursuant to the order dated 19.12.2012 is permitted to be withdrawn by the appellants with accrued interest.

JUDGE **JUDGE**

Andurkar..