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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved On : 04.02.2022

Judgment Pronounced On : 06.05.2022

CORAM :

THE HON'BLE MR.JUSTICE T.RAJA

AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

O.S.A.No.60 of 2019

and

CMP.Nos.1087, 19756 of 2021

M/s.Deepam Constructions,  
Mechanised Road Laying Specialists Contractors,  
Rep.by its Managing Partner,  
No.692A/143 B2, 5<sup>th</sup> Street,  
Min Nagar, Vengikkal,  
Thiruvannamalai - 606 604.

... Appellant/Plaintiff

Versus

The Government of Tamil Nadu,  
Highways Department,  
Rep.by the Superintendent Engineer, (Highways),  
Chennai Circle,  
No.299, Anna Salai,  
Chennai - 600 026.

... Respondent/Defendant

Original Side Appeal filed under Order XXXVI and Rule 9 of Appellate side rules read with clause 15 of the Letters of Patent Act, to set aside the Judgment and Decree dated 31.08.2018, made in C.S.No.644 of 2010 and allow the Original Side Appeal.

For Appellant : Mr.Vijay Narayan, Senior Counsel  
for Mr.Prasad Vijayakumar.

For Respondent : Mr.Edwin Prabakar,  
Special Government Pleader (C.S)

JUDGMENT

D.Bharatha Chakravarthi, J.

A. The Suit Claim:

1.The plaintiff, namely M/s. Deepam Constructions, filed the suit for directing the defendant to pay a sum of Rs.4,98,81,821/- along with further interest at 18% per annum on the principal sum of Rs. 4,14,30,084/- from the date of plaint till date of realization and for costs of the suit. The parties are referred to as per suit as the 'plaintiff' and 'defendant' in this Judgment.

B. The Case of the Plaintiff :



2.The plaintiff, is a registered partnership firm in the business of undertaking contracts for laying roads, constructions of bridges and other civil works. Plaintiff is a Class-I contractor with the defendant. The defendant invited tenders for widening and improving Kallakurichi-Tiruvannamalai Road vide tender notice dated 02/05/2005. On 27/05/2005, the plaintiff requested for Tender Schedule by duly enclosing the requisite pay orders. However, the defendant did not issue the Tender Schedule to the plaintiff. The plaintiff approached this Court by way of W.P. No. 18329 of 2005 and by order dated 31/05/2005, this Court directed the defendant to furnish the Tender Schedule to the plaintiff.

3.On 26/06/2005, the defendant again rejected the Tender of the plaintiff at the pre-qualification stage itself without even opening its bid and hence the plaintiff again filed W.P. No. 26544 of 2005. However, the defendant took a stand that the new tender notice will be issued and therefore the said writ petition was dismissed as having become infructuous. Thereafter fresh tender notice was issued on 05/12/2005 fixing the approximate value of the contract at Rs. 635.35 Lakhs. When the plaintiff participated, again on 23/12/2005, the plaintiff was disqualified at the pre-qualification stage.

4.Again, the plaintiff filed W.P. No. 3076 of 2006 and by an order dated 20/04/2006, the plea of the defendant was rejected and it was directed to consider the bid of the plaintiff. Subsequently the bid was opened and the plaintiff's bid was 9.09% lesser than the estimate, was the Lowest, and therefore was awarded the contract.

5.Immediately thereupon the plaintiff by its communication dated 04/08/2006 requested for revision of estimate as the same was prepared in May, 2005 and since then there was a massive surge in the price of bitumen. However by their communication dated 10/08/2006 the defendant insisted the plaintiff to carry on the work at the rate already quoted. Thereupon, the plaintiff requested that the defendant to supply the bitumen by its communication dated 21/08/2006. The said request was rejected by a letter dated 31/08/2006. On 06/09/2006, the plaintiff pointed out that the defendant is neither revising the estimate nor providing bitumen and therefore the plaintiff is signing the contract only under protest.

6.By a letter dated 14/11/2006, the defendant requested the plaintiff to sign the agreement and threatened to forfeit the EMD. This was followed by another reminder dated 30/11/2006. On 02/12/2006, the plaintiff sought time as his representation to the Chief Minister and the Minister for Highways was pending wherein he had prayed compensation for price escalation.

7.Thereafter, the plaintiff signed the agreement on 03/10/2007 and the site was handed over to the plaintiff to complete the work by 04/01/2008. On 09/02/2007, by its communication, the plaintiff requested the defendant authorities to supply the quantity of Bituminous Macadam to



restore the road quality back to normal and requested for removal of trees, electric poles, encroachments, etc. On 07/07/2007, the Assistant Engineer (Highways) after inspection ordered BDO to shift water pipes underground so as to provide space for road widening. Again the plaintiff on 28/09/2007 wrote to the defendant authorities requesting for removal of trees, electric poles, encroachments etc. The defendants removed the Tamarind Trees during September 2007 and auctioned them.

8.The defendant by a communication dated 27/12/2007 addressed to plaintiff stated that the site was handed over on 14/09/2007 and work has to be completed before 13/06/2008 and was required to show progress before 31/12/2007 and threatened that fine will be imposed for default. However, on their own, the defendants repeatedly extended time upto November, 2008. On 10/06/2008, the defendant authorities imposed a fine of Rs. 5,000/- on the plaintiff for not showing progress in the work even after extension.

9.The plaintiff by its communication dated 19/11/2008 sent a letter to the defendant promising completion by 30/11/2008 and pointed out that certain trees, electric polls and encroachments were yet to be removed which caused the delay in completion of the work. Thereafter the plaintiff completed the work on 31/12/2008 and a completion certificate was also issued to the plaintiff on 16/12/2009.

10.The plaintiff on 18/06/2009, made a claim to the Engineer highways, claiming the difference in costs, that is between the contractual rate and escalated rate and refund of fine amount of Rs. 5,000/- and the loss of profit/overheads due to prolongation of the contract. The first claim of the plaintiff is that the due to huge escalation of price of bitumen on account of the delay in the project casued by the defendant. Actually, the plaintiff had incurred an expenditure of Rs. 8,30,54,373/- of which the total value of the final bill received by the plaintiff was Rs. 5,29,39,365/- thereby leaving the plaintiff with a loss of Rs. 3,01,15,008/-, which is claimed from the defendant. The second claim of the plaintiff is the sum of Rs. 5,000/- paid as fine by the plaintiff. The third claim is on account of the prolongation of the contract, the plaintiff had to maintain all its equipments thus resulting in loss of profit and overheads and the same if calculated as per HUDSON's formula, works out to Rs. 1,13,10,076/- and the same is claimed against the defendant. The plaintiff therefore issued a notice under Section 80 of the Civil Procedure Code and thereafter filed the present suit on 21/04/2010.

C. The case of the defendant :

11.On 13/07/2005, the defendant sanctioned taking up the improvement of highways of major district roads at the cost Rs.820 crores. The work of widening and improving Kallakurichi-Tiruvannamalai rod KM 41/3-63/6 was technically approved for Rs. 7 Crores. Thereafter detailed estimate was prepared for the value of the work at Rs. 623.84 lakhs during March, 2005 and tender was called for on 09/06/2005. Pursuant to the same, only



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two tenderers including the plaintiff submitted their bid. However, when the pre-qualification was valued as per parameters, the plaintiff did not fulfil one criteria and hence its bid was rejected. Because there was only one bidder it was decided to call for re-tender. This fact was informed in the pending W.P. No. 26544 of 2005 filed by the plaintiff.

12. Subsequently a short tender was called for vide Tender Notice dated 05/12/2005. The plaintiff again stood disqualified in the pre-tender stage but again challenged the dis-qualification by W.P. No. 3076 of 2006 and upon the order of Court, the plaintiff's bid was accepted. The initial contract value was Rs. 623.84 lakhs and as per the reduced value of 9.09% quoted by the plaintiff, the value became Rs. 5,65,50,382/-. The plaintiff revalidated the tender based on the pricing of materials in the year 2006. As per the original schedule, 12 months period to complete the work expired on 04/01/2008. But however, the plaintiff sought for extensions and the same was granted and the plaintiff was able to complete the work only on 31/12/2008. The plaintiff received the final bill and was also maintaining the road for 5 years as per the terms. Whielso, they have filed the suit, which they cannot maintain. It is the plaintiff's own quote to perform the work at Rs. 5,65,50,382/- which was accepted by the defendant only taking into account the escalation of prices also. Supply of bitumen was not part of the contract.

13. After the award of the contract, the plaintiff even delayed in executing the contract. The contract amount was agreed by the parties by taking into account the prices including that of bitumen in the year 2006. Further as per Clause 103.03 of Standard Specifications to Roads and Bridges (SSRB for short), it is the duty and liability of the plaintiff to inspect the site before signing of the agreement and cannot plead hindrance after entering into the contract. The extension of time was granted considering that the plaintiff did not progress and as per SSRB Clause No. 109.03 defendant has the right to suo moto extend the time. The plaintiff prolonged the execution and therefore is not entitled to claim loss and overheads of Rs. 1,13,10,076/-. There is no breach on the part of the defendant. Therefore, the plaintiff is not entitled to claim any loss or higher costs for escalation, hence, the suit is liable to be dismissed with exemplary costs.

D. The issues & The Evidence :

14. On the above pleadings, the Learned Single Judge framed the following issues:-

"1. Whether the plaintiff has signed the agreement dated 03.01.2007 under protest without prejudice their right to claim the difference in rate in future? If so, to what relief the plaintiff is entitled? Whether the plaintiff is entitled to receive a sum of Rs. 3,01,15,009/- from the defendant as difference in cost between the Agreement Rate and the Escalated Rate ?



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2. Whether the defendant has handed over free site for execution to the plaintiff ?

3. Whether imposition of fine of Rs.5,000/- and recovered thereof from the running bill by the defendant is illegal? If so what relief the plaintiff is entitled ?

4. Whether the plaintiff is entitled to claim an amount of Rs.1,13,10,076/- against the defendant towards Loss of profit and over heads due to prolongation of contract ?

5. Whether the plaintiff is entitled to payment of interest on one or more of the claims? If so, what rate and from which date ?

6. Whether the plaintiff is entitled to cost?

7. To what relief if any the plaintiff is entitled to?"

15. On the said issues the parties lead evidence. One K.V.Sekar Managing Partner of the plaintiff was examined as P.W.1 and Ex.P-1 to P-33 were marked. On behalf of the defendants, the Assistant Divisional Engineer, Highways, was examined as D.W.1 and Ex.D-1 was marked.

E. The findings of the Learned Judge:

16. The Learned Judge considered the above evidence and submissions made on behalf of both sides and found that the plaintiff had ample opportunity to revise their estimates when the litigations were pending, regarding the issue and re-issue of tender and disqualification of the plaintiff. Upon the re-issue of the tender and notice, the Learned Single Judge found that the plaintiff must have submitted a revised estimate and without doing so, it is calling upon the defendant, to revise the estimate of the total costs of the project. Further by a letter in Ex.P10, the defendant had intimated to the plaintiff that the Government will not supply Bitumen and that there is no question of re-validating the estimate.

17. Learned Single Judge further found that the plaintiff after getting the award by filing the repeated Writ Petitions cannot use the same as a sword to revise the rate and the actions have a touch of malafide intention. The actions of the plaintiff in executing the contract under protest and thereafter writing the letter/Ex.P12 amounts to threatening the defendant and without discharging public service by executing the contract, the plaintiff was indulging in filling its private coffers. The plaintiff's malafide intention stood

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18. The defendant has to cajole even for signing the contract in their favour, after the exchange of correspondences in Ex's.P-13, P-14 & P-15, finally, the plaintiff signed the



contract voluntarily. Having failed in its attempt to browbeat the defendant into revising the estimate, the plaintiff has come forward with the claim and answered the issue No.1 against the plaintiff.

18.As far as the issue No.2 regarding the handing over free site for execution of his contract, the Learned Judge found that the nature of obstruction complained, that is, Tamirand Trees, Electric poles and water lines which cannot be subsequently installed are grown after the publication of tender notification and when the plaintiff, which is supposed to have inspected the entire stretch and having made a bid in the tender, signed the contract, cannot belatedly complain and finding so, the issue was answered against the plaintiff. Similarly, the learned Judge found that the imposition of a fine of Rs.5,000/- was legal and correct.

19.On the strength of the findings, the issue No.4 was also held against the plaintiff that the plaintiff was not entitled to claim any loss and there was no question of payment of interest and costs and thus, answering all the issues in favour of the defendant, the suit was dismissed with costs. Aggrieved by the same, the present appeal is filed by the plaintiff.

F. The submissions :

20.Heard Mr.Vijay Narayan, learned Senior Counsel, for the appellant/plaintiff and Mr.Edwin Prabhakar, learned Special Government Pleader, appearing on behalf of the respondent/defendant.

21.Learned Senior Counsel took this Court, first, to the process of award of contract to the plaintiff, more specifically, to the order passed by this Court in the Writ Petitions submitted that even for obtaining the tender schedule the plaintiff was repeatedly made to run pillar to post and only after orders passed by this Court, the tender schedule was supplied to them. Even thereafter, they were disqualified by rejecting their bid pre-qualification stage. This Court again in W.P.No.3076 of 2006 went into every detail and found that the defendant's action was not justified and directed to consider the bid.

22.Learned Senior Counsel taking us through the written statement, would submit that, even after adjudication by this Court in the writ petition, once again in the written statement the defendant is trying to justify the rejection. Taking this Court through various communications, upto the entering into the contract, learned Senior Counsel would plead that from the beginning, the defendant showed an indifferent attitude, as far as the plaintiff is concerned. Finally by pointing out the method of tender i.e., whereby the defendant has given an estimated amount and the bidders are to offer their bid as to the percentage with reference to the estimate and the plaintiff bid at 9.0% lesser than the estimated amount, he would submit that the quantification of the sum payable is not a fixed amount but, is based on the estimate of the defendant.



23.Learned Senior Counsel, taking us through the bills submitted and accepted by the defendant, demonstrated the prices of Bitumen, which was Rs.12,000/- per barrel, when the respondent prepared the estimate, had already become a sum of Rs.22,000/- per barrel, as on date of award of the contract and thus, it may be seen that there was a huge escalation of price. Thus, by demonstrating that the plaintiff had incurred an extra amount of Rs.3,01,15,008/-, learned Senior Counsel would plead that the said amount ought to have been awarded by learned Judge. As far as claim No.2 is concerned, even though in principle, the plaintiff is entitled to contest, the learned Senior Counsel would say that in view of the amount involved, that is Rs.5,000/-, the claim is not pressed.

24.Again relying upon the further communication regarding the extension of time, removal of encroachment, removal of trees, removal of water lines and electric lines, learned Senior Counsel would submit that within a short period after the award of the contract more than 80% of work was promptly and swiftly carried out by the plaintiff. But, however, the remaining work of 20% could not be completed only because of the fault on the part of the defendant and even though only a minor part of the work has been left out, yet the plaintiff, its men and machinery have to be kept waiting and idling in the execution of the present contract as machinery cannot be shifted to some other worksite. Therefore, in view of the prolongation, the plaintiff had to incur overheads and loss of profits and therefore, by calculating the same by adopting Hudson's Formula Learned Senior Counsel submitted that the plaintiff is also entitled to the third claim made in the suit.

25.To assail the findings of the learned Judge, he would rely upon the Judgment of T.P.George Vs. State of Kerala<sup>1</sup>, for the proposition that when the agreement was entered into without prejudice, the plaintiff having addressed various letters to the defendant, is entitled to make a claim notwithstanding the agreement entered into between the parties. Learned Senior Counsel further relying upon the Judgment of K.N.Sathyapalan (Died) by LRs Vs. State of Kerala and others<sup>2</sup>, more specifically relying upon the paragraphs Nos.31 to 33 of the Judgment wherein, it was held that even in the absence of specific Clause entitling the plaintiff an additional sum in case of price escalation, still if the extra costs incurred, is on account of the failure of the other party to live up to its expectation, the plaintiff is entitled to the additional costs.

26.Learned Senior Counsel further relied upon a Judgment in Bengal Traders Vs. West Bengal State Electricity Board<sup>3</sup>, more fully relying upon the paragraphs Nos.8 & 9 of the said

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1. (2001) 2 SCC page 758

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2. (2017) 13 Scc page 43

3. 2000 Scc OnLine SC 24



Judgment, wherein, it was held that even in the presence of Clause which prohibited the claim the escalation of unit rates, it was held that the party aggrieved is entitled to claim its loss. Learned Senior Counsel further pressed into service the Judgment of this Court in Superintendent Engineer, Madurai Circle, and another Vs. Paramasivam and another<sup>4</sup>, more specifically in paragraphs Nos.13,15,16,18,20 & 21, holding that the contractor was entitled to escalation charges especially when the delay was due to handing over of the site.

27.Learned Senior Counsel would further rely upon the Judgment of this Court in Zonal General Manager Vs. Viney Heavy Equipments<sup>5</sup>, whereunder, it was held that the loss of overheads on account of the prolonging the contract can be calculated by applying the Hudson's formula. Learned Senior Counsel would rely upon paragraph No.21 of the Judgment and the Judgment of the Hon'ble Supreme Court of India in Union of India Vs. Ibrahim Udin and another<sup>6</sup>, to receive the additional document filed by the appellant, as the said document is essential to arrive at a correct finding and the reasons mentioned in the affidavit filed in support of the said application are acceptable. For the same proposition, learned Senior Counsel also relied upon the Judgment in Srimathi Chandramathi and another Vs. Premlal<sup>7</sup>. Thus, the learned Senior Counsel would submit that by virtue of the evidence on record and the additional evidence placed before this Court by the plaintiff, the plaintiff has amply proved its case, therefore, the findings of the Trial Court and the approach of finding fault with the plaintiff are liable to be reversed.

28.Countering the above submissions, Mr.Edwin Prabhakar, the learned Special Government Pleader would submit that it may be seen from the various correspondence that the appellant, voluntarily re-validated its bid up to 24.09.2006, twice and therefore, cannot now turn around and complain. The learned counsel would submit that the contract is subject to the Standard Specifications to Roads and Bridges (SSRB) of the Tamil Nadu Highways Manual and Clause 103.03 is relied on, which is extracted hereunder :

"103.03. Examination of Plans, Specifications, Special Provisions and site of Work:-

The bidder is required to examine carefully the site of the work. source of materials of the proposals, plans, specifications, special provision and contract forms for the work contemplated: It will be construed that the bidder has investigated and is satisfied as to the

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4. (2003) 2 CTC 339

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5. (2007) 1 Law Weekly 257

6. (2005) 2 SCSOCL page 4294



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conditions to be encountered for performing the work as scheduled or as at any time altered in conformity with PS.105.05 and as to the Character, quality and quantities of work to be performed and materials to be furnished including increase and decrease and as to the requirements of contract. It is mutually agreed that submission of tender shall be considered conclusive evidence that the bidder has made such examination and is satisfied as to all the conditions and contingencies."

29. Learned Special Government Pleader would contend that in view of the same, it is the duty of the bidder to carefully examine the site of the work and therefore, bidder cannot, thereafter, complain about the encroachments and other obstructions. Relying upon the Clause 105.05 of the SSRB, he would submit that only, if there are any quantity variations of more than 25%, the question of entering into a supplementary agreement at mutually varied rates arises. The same is extracted hereunder for ready reference :

105.05. Increased or Decreased Quantities :

The right is reserved, at any time during which the contract is in force, to make any alterations in the work, that may in the opinion of the Engineer be necessary and for that purpose he shall have power to order that Contractor to do and the Contractor shall do any of the following :-

1. Increase or decrease in quantities of any item of

work included in the contract.

2. To omit any portions of work.

3. Change the specification for any item of work.

4. Change the lines, levels, positions and dimensions

of any part of the work.

5. Execute additional work necessary for the completion of the work and

6. Alterations in the plans.

Such alterations shall be ordered in writing before starting the work on such alterations. No signed drawing shall be taken as in itself as an order for variation, unless accompanied by a covering letter from the Engineer confirming that the drawing is an authority for variation. Alterations as referred to



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above shall not be considered as a waiver of any condition of contract nor invalidate any of the provisions thereof. The contractor shall execute the work at the same rates as in the agreement, for quantities upto 25% increase or decrease of the agreement quantity of the relevant item listed in Schedule A. But a supplemental agreement with the Contractor for the item or items involved will be necessary when the alterations involve an increase or decrease of more than 25% in the quantity of any item listed in the schedule A. Settlement of a new rate and supplemental agreement would arise if only the variation is more than 25%, of the agreement quantity of the relevant item listed in schedule A, provided the value involved is not less than Rs.1000,00. In respect of substituted items and new items the rates shall be settled as per article 110.04 of PS to SSRB. The supplemental agreement would cover quantities varying beyond 25% of the quantities for the respective items listed in Schedule A. In the event of decrease in quantities beyond 25%. Payment would have to be assessed for the difference exceeding 25% of the quantity for the respective item listed in Schedule A. In such cases suitable rates would have to be mutually agreed upon, in accordance with article 110.04 of PS to SSRB and the rates for compensation arrived at supplemental agreement drawn and payment made.

For the purpose of determining increased or decreased quantities of work as herein before set forth, such determination shall be made on the basis of original contract quantities for the respective items.

The Contractor shall not start work on any alteration requiring a supplemental agreement until the agreement setting forth an equitable adjustment of compensation shall have been executed. The contractor shall perform the alterations, deviations as herein before set forth under the supervision of the Engineer and his decision shall be final and binding. Claims for compensation for alterations or deviations performed which have not been authorised shall be rejected. The plan of works to be followed, the equipment to be used and the amount and character of labour to be employed shall be approved by the Engineer.

The unit price for alterations and or deviations which in the opinion of the Engineer shall constitute an extra work



shall be deduced as per 110.04 of PS to SSRB.

30. Relying upon Clause 104.05, if the tenderer does not sign the agreement within the time, then the work order itself stands forfeited and the said clause reads as follows:

104.05. Failure to execute contract :-

Failure on the part of the successful bidder to execute an agreement as provided herein, within the period specified in the order of acceptance of his tender will be considered as just cause of the annulment of the award and the forfeiture of his earnest money to the Government, not as a penalty but in payment of liquidated damages sustained as a result of such failure.

31. Relying upon Clause 109.03, it is submitted that the defendant authorities are entitled to suo moto to extend the time.

109.03. Extension of contract time for completion :

The time for completion of the work contemplated will be specified in the proposal and contract and it is understood that the completion of the work within the time specified is an essential part of this contract. If any delay in the completion of the works is likely to be caused by reason of any of the following circumstances. viz.

a) the execution of any modified or additional work.

b) delay caused by any written instructions issued by the Engineer.

c) any act or default of the Engineer including failure to issue necessary instructions upon written request from the Contractor.

d) any expected risks under P. S. 108.10

e) any circumstances which are wholly beyond the control of the contractor and unavoidable.

The Contractor shall immediately upon the occurrence of the alleged cause of delay give notice thereof in writing to the Engineer and he shall be allowed a reasonable extension of time for completion in respect of any delay caused by any above mentioned circumstances. In assessing any extension of time, account shall be taken of the effect of the omission of any work. Any extension of further extension of time under the provisions



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hereinforce contained may be allowed not withstanding that the Contractor has failed to give notice of the cause therfor or that the date for completion may have passed, or that the work may have been completed.

In case where the Engineer under the terms of the contract with the Contractor is liable to supply any materials, articles, or things to the Contractor for the performance by him, of his part of the contract. the Engineer may at his absolute discretion extend the time within which such materials. or articles or things may be supplied by the Engineer and the Engineer may supply to the Contractor such materials. articles or things within the time so extended without any liability on Engineer's part to compensate the contractor by reason of the extension of lime for the supply of the materials. articles or things."

32.Further, relying upon Clause 2.1 & 2.2 of the agreement between the parties, the learned Special Government Pleader would submit that it is very clear from the commercial conditions that the Bitumen expenses should be borne by the contractor. Therefore, with eyes wide open, the plaintiff entered into the contract in spite of the fact that the defendant will not entertain any request, for revision.

33.In support of his submissions, the learned Speical Government Pleader would rely upon the Judgment of Sathyanarayana Construction Company Vs. Union of India and others<sup>8</sup>, by referring to the paragraph No.11, for the proposition that the Arbitrator or the Court cannot re-write the terms of the agreement. The Judgment of the Bharat Coking Coal Limited Vs. L.K.Ahuja<sup>9</sup>, is relied upon for the proposition that the loss of profit has to be specifically established by more fully relying upon paragraph No.24 of the said Judgment.

34.Learned Special Government Pleader, further pressed into service of the Judgment of the Hon'ble Supreme Court of India in State of Rajasthan and another Vs. Ferro Concrete Construction Private Limited<sup>10</sup>, more specifically paragraph No.55, wherein it is held that in the absence of any evidence of loss, a claim cannot be justified. Learned Special Government Pleader also further submitted that the Judgment of the Hon'ble Supreme Court in State of Haryana Vs. Sivasankar Construction Company and another<sup>11</sup>, wherein in the award of the Arbitrator in respect of award for loss for prolongation beyond the time limit was set aside. Thus, placing reliance on the aforesaid Judgments, the learned Special Government Pleader

8. (2011) 15 SCC page 101

9. (2004) 5 SC page 109

<https://hcservices.ecourts.gov.in/hcservices/>

10. (2009) 12 SCC page 1

11. (2021) SCC Online SC 1239



would submit that after entering into an agreement and accepting the final bill, the plaintiff is indulging in chance litigation and the learned Judge has rightly dismissed the suit, which does not warrant any interference.

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G. The Questions:

35. We have considered the rival submissions and perused the material evidence on record, the Judgment of the learned Judge dismissing the suit and application filed for receiving additional evidence and the additional document filed. According to us, the following questions arise for consideration in this case:-

i) Whether the additional document filed by the appellant is relevant and germane to the issue on hand and if so, whether the same can be taken on file at this appellate stage?

ii) Whether the finding of the learned Judge regarding the process of award of the tender, as if the plaintiff got the award of the contract and started browbeating the defendant is correct and whether the plaintiff had malafide intentions?

iii) Whether there is justification on facts in the claim of the plaintiff, regarding escalation of prices ?

iv) Whether the plaintiff is entitled in law to claim such an escalation in the scheme of the contract between the parties and applicable to the SSRB guidelines?

v) Whether there is any justification for the plaintiff in claiming loss of overhead and whether the quantum of loss, as calculated by adopting the Hudson's formula can be accepted ?

vi) If so, to what reliefs the plaintiff is entitled to?

H. Question No. 1 :

36. Apart from the exhibits originally filed before the trial court now by way of CMP.No.19756 of 2021, one additional document entitled "'Comprehensive Road Infrastructure Development Programme, Thiruvannamalai (H) Division, Widening and Improving Kallakurichi - Thiruvannamalai Road Km 41/3 - 63/6 Main Estimate Rs.700.00 Lakhs'" which part of the tender documents, which was not produced before the learned Judge is sought to be produced as evidence before us.

37. The defendant has filed a counter (though it is mentions as if it is a counter to main appeal), in which the genuineness or authenticity of the additional document is not



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in dispute. The relevancy of the document is that in page 11 of the said document, it is mentioned about the electric poles, encroachments, tress, service utilities etc. It is useful to extract the said portion in the document:-

"Lot of electric poles are to be shifted, lump sum provision for above items have been provided for this purpose.

Some encroachments needed to be removed, Hence, lump sum provision has been provided for this purpose

Lot of trees are to be felled. Hence lump sum provision for avenue plantation has been made in this estimate.

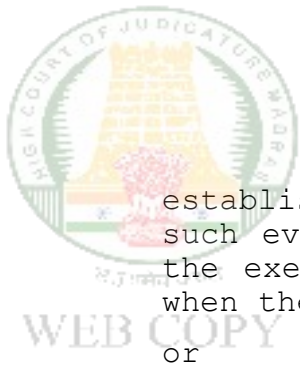
Some service utilities are to be shifted. Hence lump sum provision for avenue plantation has been made in this estimate."

38. In this case, the delay in execution of a contract, handing over of the site, parties taking a pragmatic view apart from the written clauses of the contract, the resultant claim arising out of escalation of prices, the additional overheads /loss are the matters in issue. Therefore we hold that the additional document is relevant and essential in arriving at a correct finding of facts involved in the case, as per Order XLI Rule 27(1)(aa) & 2 of the Code of Civil Procedure.

39. As far as the reason in not producing the same before Trial Court is concerned, in paragraph No.4 of the affidavit filed in support of the application, by extracting paragraph Nos.40 to 43 of the judgment of the learned Single Judge, whereunder the learned Judge arrived at a finding that it was highly inconceivable that the plaintiff would not have inspected the place and it was for the plaintiff to inspect the place and point out to the defendant upfront and in the absence of the same, learned Judge found that the defendant had handed over the free site for execution to the plaintiff. Whereas, a perusal of the said document, it is very clear that it is not the case of the both sides that the entire stretch was a free site for execution and admittedly these hindrances in the form of electric poles, encroachments, tress and public utilities such as water pipelines etc., were there in specific stretches and therefore, the necessity arises now in the appellate stage as it was not even the pleading of the defendant that it had removed all these hindrances and handed over free site for execution for the plaintiff. Thus, the production of the document at the appellate stage is warranted.

40. In this regard the plain reading of the provision of Order 41 Rule 27 of C.P.C, it would be clear that the additional evidence can be produced in any one of the three circumstances mentioned therein namely,

<https://hcservices.ecourts.gov.in/hcservice/> the Court from whose decree the appeal is preferred has refused to admit the evidence which it ought to have admitted; or



ii. The party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed;

or

iii. the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

41. Thus in this case, the reason mentioned in the affidavit is that the necessity arose on account of the finding of the learned Judge which was beyond the scope of the pleadings of the parties and the plaintiff has to establish the true state of affairs as to the handing over of the site, which is crucial to enable this Court to pronounce the judgment in appeal and accordingly, the reason mentioned is within the four corners of Order 41 Rule 27 of Code of Civil Procedure.

42. The law relating to the admissibility of the additional document is summed up by the Hon'ble Supreme Court of India in the judgment cited by the learned Senior Counsel appearing on behalf of the appellant in Union Of India v. Ibrahim Uddin & Anr reported in (2012) 8 SCC 148, and in paragraph Nos. 36 to 49, the Hon'ble Supreme Court has considered the entire law in the issue and it is useful to extract paragraph Nos. 48 and 49 which as follows:-

"48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

49. An application under Order XLI Rule 27 CPC is to be considered at the time of



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hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors, v. The Financial Commissioner, Taxation.)"

43. Thus vide considering the facts on the record, we deem it fit and necessary to take on file the additional document considering the relevancy and the fact that the contents of the document are unassailable, and the necessity of the same to effectively pronounce the judgment in the appeal. We accordingly answer the question No.1.

I. Question Nos.2,3 & 4:

44. Adverting to the findings of the learned Judge, it may be seen that firstly the learned Judge had concluded that the respondent had handed over free site and it was the duty of the contractor to inspect the site prior to the bidding itself and should bring it to the notice of the defendant before entering into the contract. In view of the additional document produced before us and the agreement between the parties and the relevant guidelines of SSRB, it is seen that the time is the essence of the contract and the time commences from the date of handing over of the site and the tenderer is entitled to inspect the site, & it is the duty of the defendant to hand over the free site and it is only the defendant who has powers to remove the difficulties i.e., the shifting of the electric poles required to be done by the defendant through the concerned department namely, the Electricity Board; shifting of the water pipelines have to be done only by the defendant through the concerned department, the Public Welfare Department and Local Body as the case may be; the cutting or uprooting of the trees is also to be done only by the defendant after getting due permission from the concerned authorities as these tamarind trees were grown up and old trees; and the encroachments had to be removed by the defendant by the concerned department namely, the Revenue Department by



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following due process of law. Even though on one hand, the clauses in the agreement as well as the SSRB guidelines were to be adhered to by both parties, the contractor as well as the Government had simultaneously taken a pragmatic approach taking a stand, on the one hand to commence the work and on the other hand, to simultaneously take steps to remove the hindrances so that the Government projects are taken up and completed within reasonable time. Because by the time all the procedures in all cases are to be followed upfront and if only free site has to be made ready first and thereafter the tender is to be floated, in many cases, especially like the one on hand, it would result in efflux of time and the government has to resort to the process once again, right from getting the sanction of the budget. Therefore, a pragmatic approach was taken in the instant case. Whereas, the findings of the learned Judge in this regard by considering the clauses of the tender that it is the duty of the contractor to inspect the site and once he enters into contract, it shall be deemed that the defendant has handed over the free site cannot be accepted by us. When place in question is handed over to the contractor, such place or land shall be free from any obstacles. The reason being that while handing over the site, it is the duty of the defendant department to give the site free from all encumbrances. For example, if the trees are to be removed, the same has to be done by the defendant department within a reasonable time either before the contract is given or within one week after the contract is awarded to the contractor. Even if the electric poles are to be shifted, such exercise shall be done by the defendant department and likewise, if the water pipelines are to be shifted, then such work also to be executed by them without any delay. Even the cutting or uprooting of trees are to be done by them before giving the contract to the contractor after getting due permission from the concerned authority. But, in the present case, the defendant, who has given the contract to the plaintiff, has not discharged their duty, namely, removal or uprooting of trees, shifting of electric poles and pipelines. When the contractor is given the work order, he cannot be made to run from one department to another department to clear all these hurdles and it is the duty of the defendant department to clear all the hurdles so as to complete the contract in time, for, it is practically impossible for the contractor to do so. These crucial aspects have been completely overlooked by the learned Single Judge, therefore, the impugned findings given by the learned Single Judge are liable to be interfered with. It is useful to extract the relevant portion of the cross examination of D.W.1 in this regard:-

'It is correct to state that the contractor has addressed letter to the Divisional Engineer, Highways, Tiruvannamalai to shift the Tamarind Trees, Electric Poles, BSNL cables and Drinking Water Pipeline, Sathanoor Dam to Tiruvannamalai. As per the Ex. P.20 even after the lapse of 9 months, the hurdles such as tamarind trees, electrical post etc. were not cleared and given free site



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to the contractor for work...''

''Under Ex.P.26, the Plaintiff has requested the department to clear the hurdles so as to complete the work by 30/11/2008 such as Tamarind Trees, BSNL cables etc. and the same were not cleared upto 19/11/2008. I have verify the office records whether any reply has not been sent to plaintiff for Ex.P.26...''

45.Now coming to the other sheet anchor finding of the learned Judge that the plaintiff filed repeated writ petitions and got the contract and thereafter with the malafide intention tried to browbeat the defendant in revising the price is concerned, at the outset the nature of the contract which is proposed has to be looked into. In this case, roughly taking into account the work, initially the Government grants technical sanction for a sum of Rs.700.00 Lakhs. Thereafter to arrive at the value of the work, a detailed estimate, is undertaken and the said estimate was done during March, 2005 by adopting a schedule of rates pertaining to Tiruvannamalai District for the year 2004 - 2005 and after such estimate, the value of the contract was arrived at Rs.635.35 Lakhs. The tender notice was first called on 02.05.2005 with the last date of submission of tender on 24.06.2005. Had the said tenders been finalised, the one year period of work would have completed by July 2006 itself. But however, the first default was on the part of the defendant in not even supplying the tender schedule. The plaintiff therefore had to file W.P.No.18329 of 2005 and by order dated 31.05.2005, this Court issued directions to furnish the tender schedule if the application is in order. Once the plaintiff got an order in its favour and obtained the tender schedule, it was the defendant who was a defaulter again for the second time by rejecting the bid of the plaintiff at the pre-qualification stage itself. When the plaintiff filed W.P.No.26544 of 2005, the defendant without standing to its decision, took the plea that there was monsoon in between and therefore they would issue a revised tender. Therefore by an order dated 29.11.2005, this Court dismissed the said writ petition as having become infructuous.

46.This resulted in the defendant calling for a second tender on 05.12.2005, by which time already eight months were lapsed after their estimation. As per the revised tender notice, the last date for receipt of tender was on 25.12.2005. Again the defendant continued to display recalcitrant attitude and disqualified the plaintiff at the pre-qualification stage itself. It is pertinent to state here that even in the written statement filed in the present suit, by detailed averments in paragraph Nos. 7 to 11, the defendant is seeking to justify its rejection of the plaintiff at the pre-qualification stage itself. However, the plaintiff approached this Court by way of W.P.No.3076 of 2006 and after considering the entire issue on merits, this Court had already found that the action of the defendant as unjustifiable. After analysing the contents on



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merits, detailed findings were recorded in paragraph Nos.11 and 13 of the said judgment and consequently the defendant was directed to consider the petitioner's price bid also. It is useful to extract paragraph Nos.11 and 13 of the said judgment which read hereunder:-

'11. A reading of Clause 2.1 makes it clear that the applicant's general and particular experience as well as financial position will be taken as demonstrated by the applicant's response in the forms attached to the letter of application. The Note to Clause 2.3 makes it clear that the current year means, the year corresponding to the date, month and year in which the notice inviting tenders for pre-qualification was published. The notice was published on 05.12.2.005. Therefore, the corresponding current year can only mean the relevant Financial year, namely, 2004-2005 since the multiplying factor as provided in Clause 2.3 has to be applied, such application can only relate to a definite and acceptable figure on some basis. In that respect, Clause 2.1 states that the applicant's general and particular experience should be demonstrated in the forms attached to the letter of application. The forms which are attached to the letter of application cannot be a form which can be the one which is prescribed by the applicant himself. Since the application forms have been annexed to the invitation for pre-qualification in the formats 1-10 and application form (7) specifically makes a reference to the last five financial years and also states that copies of financial statement should be attached for the last five financial years. The proper way of interpreting clause 2.2 (ii) of invitation for pre-qualification would be with reference to 'completed financial years' for which the applicant can support its claim with appropriate audited financial statement. Any other interpretation would give scope to vagaries under uncertain times which cannot be made.'

47. Even after the above findings, strangely the defendant sought to justify the disqualification in paragraph No.11 of the written statement and it is necessary to extract the relevant portion of the same:-

'Upon the plain reading of the above clause which would categorically throw light under which circumstances the plaintiff was disqualified for not complying the criteria in S.No/6 & 7 in the tabular column mentioned above. The Hon'ble High Court by an



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order dated 20.04.2006 allowed the writ petition directed this defendant to consider the petitioner's bid also before taking final decision on the tender notification dated 05.12.2005. It is after the orders passed by the Hon'ble High Court, the plaintiff's bid was accepted."

48.The above observations also clearly speak only the fault of the defendant in repeatedly and high-handedly disqualifying the plaintiff from getting the contract, and therefore the plaintiff was forced to approach this Court repeatedly and in this context we are unable to subscribe or accept the findings of the learned Single Judge that by filing repeated writ petitions the plaintiff wrested the contract and thereafter started using the same as a tool to threaten the defendant authorities, as the same is directly against the findings of this Court in the writ petition inter-parties that it is the defendant who unjustifiably disqualified the plaintiff, therefore, the plaintiff was compelled to approach this Court.

49.Thereafter the work order was issued to the plaintiff only on 10.08.2006 and in the meanwhile on 04.08.2006, the plaintiff made a representation that as already reported before this Court, the revised estimate can be made based on the prevailing rate of bitumen as on date of the work order. In this context, the Court has to see the nature of the contract i.e. the value of the contract is arrived at by making an estimate taking into account the actual prices and then the tenderers are invited to quote the percentage of reduction in the estimated price which they are ready to offer and accordingly whoever bids by offering more percentage of price reduction is selected as bidder, as in this case the plaintiff offered a reduction of 9.09% less than the estimated rate. Again after the issue of the work order, the plaintiff made a representation on 21.08.2006. However, by an express communication dated 31.08.2006, the Superintending Engineer, Highways, rejected the request of revision of estimate. Once again the plaintiff made a representation on 06.09.2006. However by a communication dated 25.11.2006, the Superintending Engineer issued a communication directing the plaintiff to execute the contract whereby the plaintiff was warned that if the plaintiff is not coming forward to execute the contract, the work order will be canceled and thereafter by mentioning as without prejudice, as per their representation dated 06.09.2006, the plaintiff signed the agreement on 03.01.2007. It is pertinent to state here that even though the agreement was signed on 03.01.2007, the entire rates were calculated as per the estimate made in March 2005. The agreement entered into between the parties has the special conditions which read as follows:-

"The special conditions described hereunder shall have the meaning and intent out lined in clause 107 - 05 of PS to S.S.R.B. The contractor's quoted rate shall be



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inclusive of all the elements and costs required to comply with them. The special conditions comprise of two parts viz 1) Technical Specification and ii) Commercial Conditions."

50. Thus it may be seen that the contract quoted rate is as per both technical specification and the commercial conditions. Under the technical specification, the S.S.R.B guidelines as per the fourth revision in August 2001 is deemed to be part and parcel of the agreement. The entire works described is required to be done in accordance with the technical specifications.

51. As far as the commercial conditions are concerned, it is mentioned in Clause 1.1 that cement will not be supplied by the department and it is in Clause 2.1 that bitumen and bitumen emulsion required for use in the work will not be supplied by the department. It is essential to extract Clauses 2.1 to 2.4 of the Commercial Conditions which related to bitumen:-

"2.1 The Bitumen and bitumen emulsion required for use in the work will not be supplied by the department.

2.2 The contractor has to procure the bitumen of appropriate grade and emulsion as per specification required for the items of work as per standard specification and use it on the work.

2.3 The quoted rate shall be inclusive of cost of 80/100 bitumen, conveyance and handling and storage charges and other requisites as contained in Clause 103-04 of P.S. to S.S.R.B.

2.4 All the requisite tests to ensure quality of bitumen have to be carried out before acceptance and certified."

52. From the above itself the importance as to the particular / appropriate grade of the bitumen and their procurement and use thereof and the cost of bitumen including its conveyance and handling and storage charges becoming essential part of the estimate / value of the work can be understood. As a matter of fact, a letter dated 16.04.2007 from the Superintending Engineer to the Chief Engineer, Highways is also appended to the contract along with the check slip and it is pertinent to extract the relevant portion of the said letter which reads as under:-

"The original estimate is prepared as per the site condition as on March' 2005 and since then the road was faced two full monsoon rain fall period in 2005 and 2006. due to heavy monsoon rain fall the road surface is in water logged state most of the stretches and run off water over the road had eroded the crust and the road is sunken in almost all the



stretches, the road travels through thick agricultural lands irrigated by Sathanur dam."

53. Thus it may be seen that, the respondents were cautious of the fact that the estimate was of the year 2005 when it came to make additional quantity of work and accordingly an additional quantity of work worth Rs.9,97,706/- was sanctioned. Again by another letter dated 06.09.2007, which was also appended to the contract, an excess quantity of 369 m<sup>3</sup> was included in the estimate for providing and laying Bitumens Macadam 50 mm thickness using 60/70 grade Bitumen. It is useful to extract the relevant portion of the check slip also which itself in column 2 contains provisions as to the estimate amount, sanction in original, revised sanction and then the name of the contractor with address. The said entries in the said check slip explains the nature of the contract and the normal process adopted by the defendants. The portion of the check slip is extracted hereunder:-

CHECK SLIP

- |                                                                                            |   |   |                                |
|--------------------------------------------------------------------------------------------|---|---|--------------------------------|
| 1. Name of Circle                                                                          | & | : | Chennai                        |
| Name of Division                                                                           |   | : | Thiruvannamalai                |
| 2. i) Estimate amount                                                                      |   | : | Rs.635.40 Lakhs                |
| ii) Sanction in original/<br>Revised sanction no.                                          |   | : |                                |
| iii) Name of Contractor and address<br>Constructions                                       |   | : | M/s.Deepam<br>Thiruvannamalai. |
| 3. Original or supplemental                                                                |   | : | Original                       |
| a) Lumpsum or                                                                              |   | : |                                |
| 4. If Supplemental                                                                         |   | : |                                |
| a) Original agreement No./to written<br>understanding.                                     |   | : |                                |
| 5. Approximate value of work to be done:<br>under this agreement/written<br>understanding. |   | : | Rs.5,65,50,382/-               |
| 6. If this is supplemental approximate<br>value of work to be done.                        |   | : |                                |
| a) Original agreement/<br>Written understanding.                                           |   | : |                                |
| b) Supplemental agreements if any<br>previously accepted.                                  |   | : |                                |
| 7. If tenders have been called for is the<br>lowest tender accepted if not any             |   | : |                                |
| 8. Has the contractor furnished EMD                                                        |   | : |                                |



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and FSD as required.

:

EMD Rs.3,60,000/- Deposit confirmation ING Vysya Bank.648351 dt 23.12.2005.

FSD Rs.8,84,500/-

ASD Rs.12,44,100/- 21,50,000 B.G of Karur Vysya Bank,

Thiruvannamalai.

Is the security is acceptable from and

cover the entire period of contract. (Empahsis Supplied)

54.It is also relevant to extract the proforma as per the completion certificate issued by the defendant.

#### PROFORMA

1. Name of the Division : Tiruvannamalai (H)
2. Name of Sub-Division : Tiruvannamalai (H)
3. Name of work : Widening and improving  
Kallakurichi-Tiruvannamalai  
Road km.41/3 - 63/6
4. Estimate Amount : 700.00 Lakhs
5. Sanction No. : CB No.54/05-00
6. Value of Contract : Rs.5,65,50,382.23p
7. Value of Contract after completion: Rs. 5,28,92,729/-
8. Value of addl. Item of Quantity if  
any : Rs.9,29,126/-
9. Agreement No. : /06-07/ Dt:3.01.07.
10. Name of the Contractor : Thiru.M/s.Deepam  
Construction
11. Date of Commitment : 03.01.2007

55.Thus it may be seen that, the original technical sanction was Rs.700.00 Lakhs, however the tender was floated with the actual estimate done during March' 2005 in which the estimate amount is shown as Rs.635.40 Lakhs and an additional estimate for a sum of Rs.9,97,706/- by way of new works and an additional quantity of works was also made. As per the quote of the plaintiff i.e. by deducting 9.09 percentage from the estimate amount of Rs.635.40 Lakhs, a sum of Rs.5,65,50,382/- has been worked out. But, however, as per the actual calculation, the value was Rs.5,28,92,729/- after execution and the additional quantity was arrived at Rs.9,29,126/-. There was no dispute that the plaintiff completed the work to the satisfaction, hence, the final bill was claimed. The dispute is in respect of the escalation of the price of bitumen as on date of handing over of the site itself which is calculated in accordance with the rates given in the booklet submitted along with the representation of the plaintiff dated 18.06.2009 which is Ex.P-28. Even here, by a perusal of the same and also the evidence



let in in this regard, it would be clear that on the date when the estimate was prepared i.e. during March' 2005, the prevalent price of the bitumen was roughly Rs.12,000 per barrel and in view of the escalation of the petroleum price and its products as on the date of the commencement of the contract, the minimum price was Rs.22,000 per barrel and it even escalated further. Item-wise details are contained in the claim submitted by the plaintiff in the booklet along with the representation dated 18.06.2009. As a matter of fact, the item-wise details which the difference in price of bitumen is not disputed by the defendant. It is their contention that the tender has been floated as per their estimate during March' 2005 and when the revised tender notice has been floated, it was for the plaintiff to take into account the escalated bitumen prices and accordingly it would have made its quote, but it revalidated its earlier tender at the rate of 9.09% itself for which the defendant cannot be made liable. It is their second contention that even in the correspondences prior to the execution of the contract as well as post execution of the contract, the defendant had expressly informed that there will be no revision of the estimate and therefore post execution of the contract the defendant cannot claim the price of escalation. In this context, the learned Special Government Pleader specifically relied upon Clause 103 of the S.S.R.B. which was extracted supra, to press the point that the contractor shall not be entitled to any revision of contract unit rates during the currency of the agreement on account of the variation of prices and materials. This apart, the prayer for supply of bitumen was also rightly rejected as the same was also clearly the part of the commercial conditions as per Clause 2.1 of the agreement.

56. Countering the same, it is the contention of the learned Senior Counsel for the appellant that the appellant has on record proved that it had actually incurred the expenses while widening the road and executing all the works as per the specification incurred a sum of Rs.8,30,54,373/- while the total value of the final bill amount received was Rs.5,29,39,365/- thereby leaving the clear deficit of Rs.3,01,15,008/- which is the exactly the first claim in the plaint. There is no dispute about the said fact that the additional cost amount of Rs.3,01,15,008/- is suffered by the plaintiff but the only question is whether upon reading of the terms of the contract and the correspondences of the S.S.R.B. Specifications, the plaintiff would have entitled to claim the said deficit from the hands of the defendant. The essence of the contentions of the learned counsel for the appellant are as follows:-

(a) Firstly having incurred a total sum of Rs.8,30,54,373/-, there is clear factual justification on the part of the plaintiff as it is demonstrated the price of the bitumen as on date of the preparation of the estimate and the actual price incurred by the plaintiff as these rates are notified rates and cannot be disputed.

(b) Even though as per the terms of the contract,



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normally escalation of prices has to be borne only by the contractor, in this case when the delay in issue of the work order and also in execution thereof is attributable only to the defendant, then notwithstanding the contract between the parties, the plaintiff is entitled to claim such escalation.

57. It is necessary to advert to the judgments relied upon by the parties at this juncture. In *T.P. George v. State of Kerala*<sup>12</sup>, while considering the validity of the arbitral award, whereunder the arbitrator awarded the escalation charges, in the context where there was no provisions in the contract and as a matter of fact, the provisions in the supplementary agreement barring the escalation charges, by its conclusion in paragraph No.8, the Hon'ble Supreme Court of India laid down that the view of the arbitrator was a legally possible view and upheld the award.

58. In *K.N. Sathyapalan v. State of Kerala & Another*<sup>13</sup>, (cited supra), which was also a case of similar facts. The law is laid down by the Hon'ble Supreme Court in paragraph Nos.31 and 32, which is extracted as hereunder:-

"31. The question which we are called upon to answer in the instant appeal is whether in the absence of any price escalation clause in the Original Agreement and a specific prohibition to the contrary in the Supplemental Agreement, the appellant could have made any claim on account of escalation of costs and whether the Arbitrator exceeded his jurisdiction in allowing such claims as had been found by the High Court.

32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the Arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and *M/s. Alopi Parshad's case* (supra) and also *Patel Engg.'s case* (supra). As was pointed out by Mr. Dave, the said principle was recognized by this Court in *P.M. Paul's case* (supra), where a reference was made to a retired Judge of this Court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount awarded by



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the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this Court in T.P. George's case (supra)."

59. Again the Hon'ble Supreme Court of India in the case of Bengal Traders v. West Bengal State Electricity Board<sup>14</sup>, interpreting a clause barring enhancement of unit rates held that when one party is at default, the escalation claimed in the nature of compensation and therefore the disabling clause in respect of escalation of unit rates is not applicable to such a claim and held that the awarding of compensation as correct. To quote the relevant paragraph No.9, which reads as follows:-

"9. We cannot agree. What clause 49 disables the appellant from claiming is escalation of unit rates. It does not apply to a claim for damages of the nature made by the appellant. To the case, the rationale of the judgment in Rayanim case squarely applies."

60. A Division Bench of this Court in the case of the Superintending Engineer, Madurai Circle, TNHB Vs. M. Paramasivam and another<sup>15</sup>, held that the escalation charges was decreed and it is useful to extract paragraph Nos.18 to 20 of the said judgment:-

"18. Coming to the entitlement of the respondent under this head, in the judgment relied upon by the learned Government Pleader in Union of India represented by Chief Engineer Military Engineering Services, Madras Zone vs. Ramnath International Construction Pvt. Ltd., 2003 (1) CTC 4, the Division Bench had an occasion to deal with the terms of the agreement where there is a specific prohibition prohibiting the contractor from claiming the enhanced compensation. While considering such specific clause the Division Bench placed reliance on some of the judgments of the apex Court and held that the contractor in that case is not entitled for compensation.

19. In the case on hand, there is no such prohibitory clause. That makes the world of difference between the facts of the case that has been dealt with by the Division Bench, the decision of which was relied upon by the learned Government Pleader and facts of the present case.



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20. On the other hand, in the judgment relied on by the learned counsel for the respondent in the case of Bengal Traders vs. West Bengal State Electricity Board 2001(2) RAJ 315, the learned Judges of the Supreme Court has held :

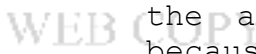
"6. Learned Counsel appearing on behalf of the respondent submitted that a reading of the claims made by the appellant before the Arbitrator showed that they were for escalation in the sense that the claims were for damages for the delay in the execution of the work. He submitted that, therefore, they were covered by the bar of Clause 49.

7. We cannot agree. What Clause 49 disables the appellant from claiming is escalation of unit rates. It does not apply to a claim for damages of the nature made by the appellant. To the case, the rationale of the judgment in Rayanin's case (State of AP vs. R.V. Rayanim, 1990(1) SCC 433) squarely applies."

21. Placing reliance on the above judgment of the apex Court we hold that the respondent is entitled for the escalation of charges. Accordingly, we concur with the findings of the learned Judge."

61. Even in the judgment relied upon by the learned Special Government Pleader in the case of State of Haryana v. Shiv Shankar Construction Co. and Another<sup>16</sup>, it is held by the Apex Court as follows:-

"In view of the above and for the reasons stated above, the present appeals are allowed in part. The award passed by the Arbitrator awarding the amount/compensation at Rs.45,000/ per km per month up to January, 2008 under claim Nos.1 and 8 is hereby confirmed. The award passed by the Arbitrator awarding the amount/compensation at Rs.45,000/ per km per month from February, 2008 to 31.05.2010 i.e. till the end of the contract is hereby quashed and set aside. The amount due and payable has to be worked out accordingly. The present appeals are partly allowed to the aforesaid extent. In the facts and circumstances of the case there shall be no order as to costs."



(a) Normally parties are bound by the rates mentioned in the agreement and cannot claim escalation of prices merely because the contractor has to incur the same;

(c) Such compensation can be claimed even in the absence of an enabling clause in the agreement and even in the teeth of disabling clause in the agreement;

63. Now applying the above principles of law to the instant case, it is seen that after making estimate in March' 2006, from the said date, till the completion of work, the delay all along was only because of the defendant. Even as of September' 2008, the plaintiff has been writing to the defendant to clear the hindrances/encroachments. It is precisely for the said reason, even during substance of contract, suo motu extensions were granted. While on paper blaming the plaintiff, suo motu extensions were given on its own fault. Absolutely there is no justifiable defense in commencing the contract after eighteen months which was only due to the arbitrary action of the concerned Superintending Engineers in firstly not issuing tender specifications, secondly rejecting the pre-qualification bids twice arbitrarily. Therefore by a concrete evidence, the plaintiff has established that there has been escalation of prices more specifically, the prices of bitumen and such escalation during the relevant period was extremely abnormal of even more than 200%, and therefore in our considered view, it would be absolutely unjustifiable on the part of the defendant to deny the same. For When any work order is issued, the price of building/road materials should be fixed based on the prevailing market rate at the time of entering into final agreement or on the date of issuance of work order. But, in the present case, when the work order was issued on 10.08.2006, the cost of the road materials prevailed on that date was denied and the contractor was constrained to carry on the work with old rate prevailed in March, 2005, on which month, the bids were invited from the public. Therefore the Contractor can not be made to lay the Public Road by using his own money.

64. Mere fact the plaintiff went ahead to execute agreement under protest and carried out the work by itself should not be put against the plaintiff as in our view, the plaintiff has chosen the right course by completing the work and claiming the deficit. Otherwise litigating upfront would have only resulted in loss for both parties and party to a <https://www.esecourts.gov.in/hoservices/> should not be penalized for taking a more pragmatic and win-win approach. As a matter of fact, such a conduct would only demonstrate the professional approach of the plaintiff. We



have already found that the delay is solely attributable only on the defendant. We have also found that on facts, the plaintiff had proved the escalation of prices and the differences of the quantum by letting in evidences and the same is clear from Ex.P.9 and the paper book annexed thereto and the quantum in any event is not under dispute in this case. Therefore, for the reasons mentioned above, we hold that the plaintiff is entitled to the claim of escalation of prices being Rs.3,01,15,008/- .

65.That such sum being payable as on the execution of the work and the plaintiff having been unlawfully deprived of the same, the plaintiff is entitled to interest from the date on which the amount became due, that is the date of completion of the work, till date of realization. Even though the plaintiff has claimed interest at the rate of 18 percentage per annum, taking into account the overall of circumstances of the case, the authorities being public authorities, who cannot instantly take a decision of offering compensation of the present the nature as claimed in the suit, we hold that interest at the rate of 9% per annum will be appropriate.

J. Question No. 5:

66.The next claim made in the suit is relating to the loss of profit and overheads due to the prolonging of contract and the plaintiff is claiming a sum of Rs.1,13,10,076/-. In this regard, the pleadings of the plaintiff as contained under Claim No.3 wherein, the plaintiff pleads that the Hudson's formula should be applied and by calculating as follows arrives at the figure of Rs.1,13,10,076/-, which is extracted as follows:-

| Percentage | x Contract Sum | x Extended Period in Weeks |
|------------|----------------|----------------------------|
| 100        | Contractor     | Period in weeks            |

where,

|                                  |   |                                  |
|----------------------------------|---|----------------------------------|
| i) Percentage                    | = | 20% (Profit 10% + Over head 10%) |
| ii) Contract Sum                 | = | Rs.5,65,50,382/-                 |
| iii) Contract Period             | = | 12 months or 52 Weeks            |
| iv) Date of Commencement of work | = | 03.01.2007                       |
| v) Targeted date of completion   | = | 02.01.2008                       |
| vi) Actual date of completion    | = | 31.12.2008                       |
| vii) Extended Period of Contract | = | 31.12.2008 (-)                   |
|                                  | = | 02.01.2008                       |

-----  
29.11.0

363 days or 52 Weeks

<https://hcservices.courts.gov.in/hcservices/>

The Loss of Profit & Over head - 20 x 5,65,50,382, x 52



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100

52

= Rs.1,13,10,076.40 (or)

Say Rs.1,13,10,076/-

Therefore the plaintiff is entitled to receive an amount of Rs.1,13,10,076/- under this head from the Defendant."

67. In this regard, learned Senior Counsel for the appellant relied upon the judgment of this Court in Zonal GM, IRCON Ltd v. Vinay Heavy Equipment<sup>17</sup>, whereby this Court in paragraph No.21 held that Hudson Formula can be applied as a logical method to assess the actual the loss of profit and overheads claimed on account of prolongation of the contract period beyond the agreed period .

68. The learned Special Government Pleader relied upon the judgment of the Hon'ble Supreme Court of India in the case of State of Rajasthan and Another v. Ferro Concrete Construction Private Limited<sup>18</sup>, wherein the award of an arbitrator for the loss of profit for non-settling of the mobilization advance in time was under consideration and when 15 percentage was taken into account as the loss, the Hon'ble Supreme Court of India held that the mere claim statement by itself cannot be taken as proof and no award could have been passed. Similarly in Bharat Coking Coal Ltd v. L.K.Ahuja<sup>19</sup>, when loss of profit was awarded over and above the compensation for escalation, the Hon'ble Supreme Court of India held as follows in paragraph No.24:

"24. Here when claim for escalation of wages bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading 'Loss of Profit'. It is not unusual for the contractors to claim loss of profit arising out of diminution in turn over on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the

<sup>17</sup> (2007) 1 L.W. 257

<https://hcservices.ecourts.gov.in/hcservices/>

<sup>18</sup> (2009) 12 SCC 1

<sup>19</sup> (2004) 5 SCC 109



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absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in Sunleyn (B) & Co. Ltd. vs. Cunard White Star Ltd., [1940] 1 K.B. 740, by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs. 6,00,000/- awarded to the claimant."

(Emphasis Supplied)

69. Thus the legal position with regard to the loss of profit/overheads can be summed up as follows:-

i. A contractor can also claim loss of profit/overhead on the ground that had he completed his contract and invested the machinery, material, men and money into another contract during the period of prolongation, he would have earned a profit and such sum can be claimed;

ii. Such loss of profit/overheads have to be categorically pleaded and evidence in proof thereof had to be let in:

iii. The evidence need not be in respect of the actual quantum and a fixed formula such as the Hudson's formula in the case of construction contracts can be applied.

70. Now keeping the above principles in mind, as far as the claim No.3 is concerned, we are inclined to accept the submissions of learned Special Government Pleader that there is no specific pleading or details either in the plaint or in the evidence as to in what manner there was loss of profit, what machineries were held up in the prolongation, and in what manner the plaintiff would have utilized the said machineries/sums otherwise. While quantum can be arrived at by following the Hudson's formula, there must be basic pleadings and evidence regarding the same. A perusal of the plaint and the relevant portion extracted above in this regard, it would be clear that it is only the calculation on the basis of Hudson's formula which is contained in the pleadings. In the evidence also no details of the machinery being held up, the manner in which the plaintiff occurred loss etc., are given and therefore we are inclined to reject the claim of the plaintiff for want of clear cut evidence in respect of loss of profits is concerned, especially when by this judgment already the escalation of prices is granted, which is in tune even with the judgment of the Hon'ble Supreme Court in Bharat Coking Coal Ltd (cited supra). We therefore answer this question against the appellant and in favour of the defendant.

K. Question No. 6 :

71. In view of our findings, we answer the first issue framed in the suit, that having signed the agreement without prejudice to their right to claim escalation of prices, the plaintiff is entitled to receive a sum of Rs. 3,01,15,009/- with further interest at the rate of 9% per annum from the date of the work till date of realisation. We answer the issue No. 2, framed by the Trial Court holding that the defendant did not hand over free site to the plaintiff to



proceed with the work freely. Since the claim No. 2 is not pressed, it is not necessary to answer issue No. 3 framed by the trial court. Regarding issue No. 4, we answer the issue in favour of the defendant that the plaintiff is not entitled to claim the amount Rs. 1,13,10,076/-. Regarding issue No. 5, we hold that the plaintiff is entitled to interest at the rate of 9% from the date of completion of work till date of realisation. Regarding issue No. 6, we hold that the plaintiff is entitled to the proportionate costs regarding the relief which are granted in its favour and the issue No.7 is answered as detailed in the next paragraph.

L. The Result:

72. In the result, the Original Side Appeal is partly allowed on the following terms:-

(i) The judgment of learned Single Judge dated 31.08.2018 in C.S.No.644 of 2010 is set aside;

(ii) The suit in C.S.No.644 of 2010 on the file of this Court is decreed by directing the defendant to pay a sum of Rs.3,01,15,008/- (Rupees Three Crores One lakh Fifteen Thousand and Eight only) with further interest at the rate of 9 percentage per annum with effect from the date of completion of contract i.e., 31.12.2008 till date of realization;

(iii) that the suit shall stand partially dismissed in respect of claim No.2 of Rs.5,000/- and claim No.3 of Rs.1,13,10,076/-;

(iv) that the plaintiff appellant would be entitled to costs throughout, proportionate to the suit claim decreed.

73. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

klt/pkn

To

The Sub Assistant Registrar, (Original Side),  
High Court, Madras.

+1cc to Mr.Prasad Vijayakumar, Advocate, S.R.No. 31120  
+1cc to the Special Government Pleader(CS), S.R.No. 31234

O.S.A.No.60 of 2019  
and

CMP.Nos.1087, 19756 of 2021