

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1659 OF 2009

M/S. Shri Mahalaxmi Construction
Corporation, Registered Partnership
Firm carrying out business as
contractors and Civil Engineers At
2608/B, Subhash Road, Kolhapur 441
012. ... Appellant

Vs

State Of Maharashtra
represented by Collector of Pune,
And Others ... Respondents.

.....

Mr. Uday P. Bobade a/w. Mr.Yatin R.Shah a/w. Ms. Shweta Singh
a/w. Mr. Vipul Makwana for the Appellant.
Mr. A. R. Patil, Addl.GP for Respondent No.1 - State.
Mr. M. V. Thorat a/w. Mr. Avinash Bailmare for Respondent Nos. 2
to 5.

.....

CORAM : NITIN JAMDAR, AND
MANJUSHA DESHPANDE, JJ.

RESERVED ON : 6 October 2023.
PRONOUNCED ON : 5 January 2024.

JUDGMENT

PER MANJUSHA DESHPANDE, J.:

The Appellant herein is the original Plaintiff and is a Firm carrying on business as Civil Engineer and Contractors. Appellant has challenged the judgment and decree passed by the Small Causes Court, Pune in Special Civil Suit No.272/1999 dated 10 August 2008.

2. The prayers sought by the Appellant as under:

a) *Pay Rs..2,05,74,050/- to the Plaintiffs.*

b) *declare that the recovery towards interest charges on mobilization advance, charges for use of electricity generator as shown in the final bill is illegal, unreasonable and arbitrary and that the plaintiffs are not liable to pay the same and the defendants are not entitled to recover the same from the plaintiffs.*

c) *declare that the Defendants shall not encash Bank Guarantees given by the plaintiffs towards security deposits as postponement of recovery of electricity charges.*

d) *declare that the Defendants are not entitled to recover any amount from the plaintiffs as proposed with effect from 1.12.88 at the rate of Rs.100/- per day which was subsequently enhanced to Rs.1000/- per day with effect from 20.1.90.*

e) *order and direct and Defendants to refund the amount of said penalty recovered from the plaintiffs with interest at the rate of 18% p.a. from 5.8.92.*

f) *Pay cost of the suit to the plaintiffs.*

g) pay interest at the rate of Rs. 18 P.C. P.A. from the date of suit till realization.

h) Such other reliefs as the Hon'ble Court deems fit may be ordered.

3. The original Plaintiff had filed Special Civil Suit No.272 of 1999, with prayers to pay Rs. 2,05,74,050/- to the Plaintiff by the Defendants and to declare that the Defendants are not entitled to recover interest on mobilization advance and charges for use of electricity generator, as shown in the final bill. The Plaintiff has further prayed to declare that the Defendants shall not encash Bank Guarantee given by the Plaintiff, to declare that Defendants are not entitled to recover any amount from Plaintiff as proposed with effect from 1 April 1988 at the rate of Rs. 100/- per day which was subsequently enhanced to Rs. 1000/- per day on 20 January 1990, and to direct the refund of amount from penalty recovered from Plaintiff with interest at the rate of 18% p.a. from 5 August 1992, with other reliefs.

4. The Defendants herein resisted the suit by filing their Written Statement. Evidence was led by both the parties and after hearing both the parties the learned Joint Civil Judge, Senior Division, Pune has been pleased to dismiss the suit filed by the Plaintiff by its judgment and decree dated 10 April 2008. It is against this Judgment the present Appellant/Plaintiff has filed this First Appeal.

5. The brief facts leading to the present litigation is as under:

(For the sake of convenience the parties are referred to as per their status before the Court below)

Respondent Nos. 2 to 5 (Original Defendants) had invited a tender for construction of Manik Doh Hydro Electrical Power House Building and Appurtenant work at the foot of Manik Doh Dam, Pune. The Plaintiff (Appellant herein) made an offer of Rs. 81,34,594/- in response to the said Tender. The said offer was accepted and accordingly the Defendants entered into a contract with the Plaintiff, vide Agreement No.B-I/KI-2 H.O. 1 of 1986-87. As per the Tender conditions there could not be any negotiations regarding the conditions and other terms in the Agreement. After the parties entered into an Agreement, the Plaintiff proceeded with the work. According to the Plaintiff some of the terms/clauses in the contract were unfair, unreasonable, unjust and oppressive. The actual work order was issued on 21 April 1986. The Plaintiff started execution of work on 24 April 1986. The work could not gain speed on account of onset of monsoon season. No work was possible during the monsoon season. The work could commence only after the monsoon season was over some time in October 1986. As a result, the Plaintiff could complete excavation which was necessary part of the work by April 1987, only to the extent of 2000 Cubic Meters.

6. During inspection of Tender work by the Respondent No.3/Chief Engineer on 21 May 1987, it was observed that work of Tail Race Channel (TRC), excavation connecting the Power House and the river was not incorporated in contract between Plaintiff and the Defendants. It was opined that concrete/masonry work, in the Power house pit was likely to be damaged due to blasting operations in the TRC, if constructed prior to the completion of the said TRC. Having visualized this difficulty, the Defendants have offered the Plaintiff to take up the work of TRC as an extra item and there were negotiations in that regard. However, Plaintiff did not agree to take up work of TRC, as the rates offered by the Defendants were not agreeable to the Plaintiff. Therefore, in the month of October 1987 the Defendants allotted the work of TRC to another agency. The Plaintiff had completed the excavation of hard strata for the Power house pit by January 1988, but the Plaintiff was compelled to suspend further work as the TRC work was not completed by the other agency. The said work could commence only in late January 1989. In this process, the valuable period of 40 months was lost, which was beyond the control of the Plaintiff. The said delay was caused only on account of the act of other agency, who did not complete the excavation of TRC within time. Due to such breaches the Plaintiff suffered huge losses for which the Plaintiff has raised claim with the Defendants.

7. It was further contended by the Plaintiff that, the Defendants have illegally, unjustly and arbitrarily imposed penalty at the rate of

Rs.100/- per day upon the Plaintiff for alleged slow progress in the work, such penalty was enhanced to Rs.1000/- per day from 20 January 1990. When the Plaintiff has raised strong protest against the said penalty the Defendants have revoked the action of penalty. The Defendants have granted successive extensions to the Plaintiff for execution of work up to the year 1996. The Plaintiff has raised various claims under the different heads in the plaint which are as under :

- a) Claim for excess dewatering.
- b) Claim for non-liability to pay interest on mobilization advance.
- c) Claim in respect of excavation and revision of rates for the work executed in the extended period.
- d) Claim regarding compensation for loss of overheads and profits.

8. The Defendants resisted the suit by filing the Written Statement. They have admitted the work being allotted to the Plaintiff and Agreement being executed to that effect. The Defendants claim that, the Plaintiff was very much experienced therefore Plaintiff should have clarified all the terms and conditions of the contract before entering into Agreement. The Plaintiff had every opportunity to remove the unfairness or unreasonableness in the pre-bid conference. The Plaintiff had executed the contract after going through the conditions mentioned in the Agreement.

Therefore, the Plaintiff was not entitled to make any grievance with regard to conditions of the Agreement after lapse of considerable period. The Defendants had informed the Plaintiff about slow progress of work through various communications. The Plaintiff did not reply any of the communications and also had not acted accordingly. The Plaintiff himself kept the work suspended for no justifiable reasons. The Plaintiff was required to execute the work of excavation of hard strata by April 1986, and complete the work within two months, i.e. by end of June 1986. Since the Plaintiff did not accept the offer to carry out work of TRC and refused the same, the Defendants were required to get the said work done through other agency. During that period, the work of excavation of Power House was also in progress till January 1988. The total quantity of hard work excavation completed was 3100 cubic meters as against required work of 3640 cubic meters. The excavation of work of TRC was completed by the other agency by July 1988. Therefore, the said delay in completion of work cannot be attributed to the other agency engaged by the Defendants. According to the Defendants the Plaintiff himself had failed to perform his part of the contract. The original period for completion of work was 36 calendar months, which was prolonged to 119 calendar months. The major construction of Power house and auxiliary building have been done up to 30 June 1994, and finishing work was complete by the end of March 1996. According to the Defendants, the claim of the Plaintiff is not maintainable on account of clause 13 of the Agreement of

Appendix H at Page No.172 of the Tender document, which provided that in the event of any conflict, the matter shall be referred to the Arbitration. That being the case, Civil Court did not have jurisdiction to decide the suit. Therefore, the Defendants had prayed for dismissal of the suit.

9. On the basis of rival pleadings the learned Judge has framed the issues they are as under:

ISSUES

Sr.No.	ISSUES	FINDINGS
1	Does plaintiff prove claim of Rs. 1,14,29,935/- towards dewatering waiver of interest, revision of rates and loss of overheads and profit against Defendants?	Negative.
2	Is plaintiff entitled to recover interest of Rs.95,20,267/- or any other such sum ?	Negative.
3	Whether action of penalty initiated by defendants to recover amount at the rate of Rs.100/- per day from 1/12/1988 which was subsequently enhanced to Rs.1000/- per day with effect from 20/1/1990 against plaintiff is legal and proper ?	Affirmative.
4	Is plaintiff entitled to remedy of declaration Regarding Bank Guarantee as prayed ?	Negative.
5	Is plaintiff entitled to refund of penalty recovered with interest at the rate of Rs.18% p.a. from 5/8/1992?	Negative.
6	Whether this court has jurisdiction to entertain and try this suit	Affirmative.
7	What order and decree ?	As per final order below.
	<u>ADDITIONAL ISSUE</u>	
1	Is the suit within limitation?	Partly in the affirmative

10. We have heard the learned Counsel for both the parties and we have gone through the record in respect of the dispute between the parties. Both the parties are placing their reliance on the contents of the Agreement and deposition of their respective witnesses examined by them. All the documents relied upon are the part of record and are admitted in evidence by both the parties. We have gone through the said record and appreciated the said documents.

11. For the sake of convenience we propose to proceed according to the issues and findings recorded by the learned Judge for better understanding.

The first two issues are regarding claim of Rs.1,14,29,935/- towards dewatering and recovery of interest of Rs.95,20,267/-. Both the issues have been dealt with under the common head. The learned Judge has given negative finding in respect of these issues. The first issue has been further bifurcated under different heads. To prove these two issues, the Plaintiff has examined the partner of the Plaintiff- firm at **Exhibit- 43** by filing affidavit of examination-in-chief and the defendant has examined one witness the Deputy Engineer posted at Manikdoh Power House Sub-division at **Exhibit- 60**. The correspondence entered into between the parties was not disputed, therefore, it is admitted in evidence and marked as Exhibit. According to the Plaintiff, because of soil conditions which existed on the site and which were not disclosed by the contractor. There was excess seepage of water, from the dam. There was also

percolation of silt and excess water from the TRC. The execution of TRC was undertaken by other agency, which prolonged for a period of 40 months, resulted into excess dewatering. Therefore, due to such delay, the Plaintiff was required to undertake excess dewatering, resultantly the other cost of work also increased due to delay in the said work. The Plaintiff has relied on the communication issued by the Executive Engineer in a communication to Superintending Engineer, the Executive Engineer seems to have communicated to the Superintending Engineer that “the work seems to have been prolonged and it is extended from 3 years to about 7 years, therefore, the escalation is justifiable and needs to be sympathetically considered”. Relying on the said communication at **Exhibit 96**, the Plaintiff has contended that the Executive Engineer who was in-charge of the site has in fact recommended the claim of the Appellant to be considered as beyond the contract period. However, the said communication was an internal communication and it cannot override the terms and conditions of the Agreement, wherein condition No. 7.7.0 specifically provided that no claim regarding change in design, increase in dewatering and any other thing, whatsoever would be entertained. Therefore, merely internal communication cannot create right in favour of the Plaintiff. The plaintiff has contended that the trial Court has not referred to communication at **Exhibit- 96** and the dewatering charges have been calculated according to the DSR rates issued by the Department every year, which is at **Exhibit – 102**, therefore, the Plaintiff's claim is

based on the said DSR rates. However, the fact remains that all the works under the head of dewatering, a lump sum provision for dewatering work has been made for Rs.10 lakhs. Therefore, according to the said clause, no claim over and above that amount can be entertained. The defendant have resisted the said claim pointing out that the provision of lump sum amount was made for dewatering. **Exhibit – 184** the Schedule – B of the Tender document, contained specifications of work to be carried by the defendant. In the said specifications, Item No. 3 is in respect of dewatering during the excavation and construction of the power house building. The said appurtenant works including Bands or coffer dam directing water to a safe distance as directed was to be complete as per the specifications. For all these works, a lump sum provision of Rs.10,00,000/- is made.

12. As referred above, the Plaintiff has examined the partner Ramesh at **Exhibit- 43** and the Defendant examined the Deputy Engineer at **Exhibit - 60**. According to the Plaintiff, firstly the drawings were not provided for starting the work, initial delay was on account of delay in providing in drawings. Thereafter, the Defendant had directed the Plaintiff to stop the work till completion of work of TRC. Therefore it is on account of stoppage of work at the behest of the Defendant, the delay has occurred. According to the Plaintiff, they had lost 40 calendar months due to excavation of TRC undertaken by the other agency. The Defendant has pointed out that, initially the work of TRC was offered to the Plaintiff, the

Plaintiff had accepted the work however the rates proposed were not agreeable to the Plaintiff, the Plaintiff had refused to do the said work. Therefore, the said work was required to be allotted to some other agency. The said fact is admitted through the correspondence between the parties. Though according to the Plaintiff, a period of 40 months was lost due to excavation of TRC undertaken by the other agency. According to the Defendant, only a period of 10 months was required from October, 1987 to July, 1988. According to the Defendant, the blasting work of TRC was complete, and thereafter, the Defendant had communicated the Plaintiff to start the work by communication dated 28 July 1988 **Exhibit- 130**, 29 July 1988 **Exhibit- 131**, 29 October 1988 **Exhibit- 133**, 18 November 1988 **Exhibit- 134** and 3 December 1988 **Exhibit 135**. Reliance is placed on communication issued by the Executive Engineer requiring the contractor to resume the work. In spite of these instructions, the Plaintiff has not commenced the said work, therefore, according to the Defendant, the said delay cannot be attributed to the Defendant.

13. The correspondence between the parties which is admitted in evidence indicates that, though the third party agency was appointed to carry out the work, the said work has taken only 10 months or there about and the Executive Engineer indeed had asked the contractor to resume the work. Therefore, the claim of the Plaintiff that the delay in execution of the said work has occurred on account of the work of TRC, as they were prevented from carrying out the

work for 40 months is not proved.

14. The witness of the Plaintiff has admitted that total excavation work up to TRC was 3640 cubic meters. The time span for excavation work was six months. The blasting zone up to TRC from beginning was 54 meters. The excavation drawings were provided on 22 January 1987. He further admitted that, the Plaintiff had agreed to carry out the work as per the working drawings, even if there were changes. It is further admitted by him in the cross-examination that, within span of four years from November, 1987 to March, 1991, the Plaintiff could carry excavation work to the tune of 869 cubic meters. Therefore, the claim of the Plaintiff that the delay in carrying out the work was for want of working drawings and the delay in excavation work given to the other agency is not sustainable. So far as the issue regarding dewatering is concerned, the Schedule-B of the Tender document, is admitted in evidence, it contains clause 'work of dewatering' where lump sum provision of Rs. 10,00,000/- (Ten Lakhs) is made. It is the responsibility of the contractor according to Section 7.2.0, 7.2.1 with 7.4.3 regarding dewatering as per plan, constructing and maintaining of protective work operation channels during the contract period. Therefore, it was the duty of the Plaintiff as per the Agreement to do all the dewatering work as provided in the specifications of dewatering and the contractor was not entitled for claiming any damages on account of any reason whatsoever. Section 7.7.0 specifically provided that there shall be no

claim due to change in design of a structure, no claim towards the increase in dewatering area or diversion, arrangement due to change in design of structure etc.. The said stipulation makes it abundantly clear that the Plaintiff will not claim any extra dewatering charges. Considering the conditions of agreement, the contractor was barred from making any extra claims for the work of dewatering.

15. The learned Judge of the Small Causes Court, Pune, has relied on Section 48 and 53 of the Contract Act. He has observed that, Section 53 of the Contract Act imposes the liability upon the party preventing the event on which the contract is to take effect. Accordingly, when a contract contains reciprocal promises, his contract becomes voidable at the option of the party so prevented and he is entitled to compensation from the other party for any loss, which he may sustain in consequence of the non-performance of the contract. In the present case, the work was suspended at the behest of defendant for excavation of TRC, which lasted for about ten months. The said suspension of work has resulted in prevention of work of the Plaintiff to perform his part of the contract, therefore, the said contract became voidable at the option of the Plaintiff. At that stage, the Plaintiff was at liberty to repudiate the contract on his part. The Plaintiff has not taken recourse to the said option and has continued to do the said work.

16. The witness of Plaintiff during the cross-examination has also admitted that as per clause 15(1) of the 'Conditions of Contract' the

contractor was at liberty to give up the contract by giving one month's notice. He has also admitted that the Government has not insisted him to complete the work. Therefore, once having given up the right to exercise the said option, he cannot claim any compensation for the same. In clause 15 of the Agreement there is a specific provision that, if the execution of work is suspended or stopped by the Executive Engineer for any period with a notice in writing, the contractor shall forthwith on receiving such notice suspend or stop the work and the contractor shall have no claim to any payment or compensation whatsoever by reason of or in pursuance of any notice as aforesaid on account of suspension, stoppage or curtailment as provided. Clause 15(2) further provides that if the suspension of such work continued for a continuous period exceeding 90 days, the contractor shall be at liberty to withdraw from contractual obligations. Therefore, considering these two clauses, the Plaintiff has waived of his rights and continued the work, therefore, considering the clauses of Agreement, the claim of the Plaintiff is not tenable. The Plaintiff has also not issued any notice as contemplated under Section 55 of the Contract Act, of his acceptance of performance at the subsequent stage reserving his right to claim compensation. Therefore, taking together the various clauses proved by the deposition of the witness of Plaintiff and the Tender document make the claim of the Plaintiff untenable as far as claim of excess dewatering is concerned.

17. The other head is regarding waiver of interest, the Plaintiff had

agreed to pay interest of 18% per annum on the mobilization advance of Rs.4,56,000/- granted to the Plaintiff. According to the plaintiff, the he had expected to execute 10% of the work by the end of August, 1986 and 75% work till July, 1988, but for the delay caused on account of work of TRC and other lapses attributable to the Defendant, the work could not be completed within the stipulated period of 36 months. Therefore, the excess recovery of interest on the mobilization advance amounting to Rs.3,65,296/- made by the Defendants in the final bill is not justified. Therefore, the Plaintiff has claimed the recovery of the same.

18. The Tender clause 28.14 under head of Special Conditions of Contract of the Tender document, provided mobilization advance. The said Mobilization advance carried an interest at the rate of 18% per annum and was recoverable at suitable installments. The said recovery was permissible only after the first 10% of value of work is completed. The witness of the Plaintiff has conceded in his cross-examination about the stipulation regarding Mobilization advance. He has also admitted in his cross examination that his claim regarding interest on mobilization advance is beyond the scope on the Tender document.

19. The rights and the liabilities of the parties undoubtedly are governed by the Agreement entered into by the parties, therefore they are bound by the said conditions in the Agreement. Since it is

admitted by the Plaintiff that the Agreement does not contain any stipulation regarding interest on Mobilization advance, the waiver of interest as claimed by the Plaintiff would not maintainable. It also needs to be considered that the Plaintiff was aware that, said Mobilization advance is carrying interest and the work is being delayed, in such circumstances, it was not binding on him to retain the said Mobilization advance. The said Mobilization advance could have been returned to avoid interest thereon. The Plaintiff has retained the said amount till it was recovered in suitable installments by the Defendant.

20. Having admitted that such claim is beyond the scope of Tender document. If at all the Plaintiff had any grievance regarding the clauses which are not covered by the Agreement. One such Tender document Appendix- H, clause- 13 provided that, in the event of any dispute or difference arising over the constructions or effects of the settlement, which has not been provided in the said Agreement matter shall be referred to Arbitration. Therefore, considering the said provisions in the Agreement itself, if at all the Plaintiff had any claim, which was beyond the scope of Agreement, the same should have been referred to the Arbitrator. Even otherwise, the basis of waiver of interest on Mobilization advance claimed by the Plaintiff, is based on delay in completion of work, as already discussed hereinabove, the said delay being not attributable to the Defendants. Therefore, the claim of the Plaintiff on that count is also not maintainable.

21. The Plaintiff had claimed escalation of rates for the work executed and compensation for loss of overheads and profit. Even this claim as made by the Plaintiff is a result of delay in execution of work. As referred above, we have already considered the issue of delay, therefore, the said finding regarding delay would also be applicable for deciding the issue regarding escalation of rates. According to the Plaintiff, the five important factors are attributable for delay in completion of the work (i) Non-finalization of drawings and design (ii) TRC work not carried out in time by the other agency (iii) Great dewatering efforts due to leak in dams (iv) Release of water from dam into river (v) Frequent failure in electricity supply. The witness of the Plaintiff has already admitted that excavation drawings were provided on 22 January 1987, therefore, the reason for non finalization of drawings and design is concerned, the said objection is not tenable so also the objection Nos. (ii), (iii) and (v) are governed by the Tender document which cast a responsibility on the contractor to design, plan and carry out the work of dewatering while constructing the power house during the contract period and no damages on any count for any reason is to be entertained, therefore, all the three grounds would not be maintainable. As far as the failure of electricity supply is concerned, even the said objection fails on account of Tender condition 3.3 under the head of work and site conditions restricts the contractor from making any claims for failure of electricity, interruption or anything whatsoever. All these objections nos. (i) to (v) have already taken care of in the Tender

Agreement, which do not permit the parties to agitate the said issues as the Tender conditions are binding on the parties.

22. The correspondence between the parties which is admitted in evidence at Exhibits – 130, 131, 133 and 134 shows that the Department had time to time informed the Plaintiff regarding slow progress of work. The Department had also imposed penalty for slow progress of work. Even this claim would be governed by Section 55 of the Contract Act. In the present case the contract was to be performed within stipulated time, which was not done. Therefore, it became voidable, for the plaintiff. The Plaintiff continued his work. The Plaintiff has not reserved his right to claim compensation before performance of the further work, the claim of compensation is deemed to have been waived. Even otherwise, the Plaintiff having not repudiated his Agreement in terms of Clause 15(2) of the Agreement due to suspension of work for construction of TRC and agreed to perform the work, in spite of delay and stoppage of work without reserving his right to claim compensation thereby submitting himself to the Agreement amounts to waiving his right. Therefore, the Plaintiff's claim as regards escalation of rates for work executed and compensation for loss of overhead and profit is not maintainable. The Plaintiff has failed to prove that due to lapses and delay on the part of the Defendant, the Plaintiff was required to pay excess interest on mobilization advance. Having failed to do so, his further claims regarding entitlement for revision in rates, escalation and loss of overheads also consequently fail.

23. Issue No. 5 is regarding refund of penalty recovered with interest at the rate of 18% per annum from 5 August 1992. The claim of the Plaintiff regarding refund of penalty recovered is covered by the Agreement under the head of conditions of contract. Clause – 2 of the said conditions of contract starting from Page 104 of the Tender document, the nature of penalty is provided in the said clause. The said clause provided the stages of work and time within which the work is required to be completed, at the same time it also provided that the amount of penalty to be imposed for uncommenced work to ensure good progress during the execution of work. Therefore, going by the said schedule and the amount of penalty provided in the said schedule, the contractor is bound by the said clause. Once having entered into the agreement, the said clause was binding on the Plaintiff.

24. The learned Judge has given a finding that the said imposition of penalty is in consonance with the stipulation in clause – 2 of the Tender document at Page 104 of the Tender under the head ‘Conditions of Contract’. The witness of the Plaintiff has admitted witness that the Plaintiff had received communication dated 15 February 1989 at **Exhibit- 136**, whereby the Department had communicated about proportion of the work to be completed within time prescribed as per clause -2 of the Conditions of Contract. Having admitted the said clause and communication at **Exhibit- 136**, we do not find any case for interference with the findings recorded for this claim.

25. The Issue No. 4 is regarding the declaration that, the Defendant shall not encash bank guarantee given by the Plaintiff towards deposit as postponing of recovery of electricity charges. The Plaintiff has sought a negative prayer that the defendant shall not encash the bank guarantee given by the Plaintiff towards deposits as postponing of recovery of electricity charges. Undoubtedly the electricity was consumed by the contractor during the execution of the said work. The bank guarantee has been given by the Plaintiff which is governed by clause 28.14 under the mobilization advance. The said mobilization advance up to 5% of the estimated cost was given, for which the bank guarantee has been issued. The said bank guarantee is to secure the payment found due against the Plaintiff. Only after preparation of the final bill, the liability of the Plaintiff for any dues could be ascertained. Therefore, on preparation of final bill it was found that electricity was consumed by the contractor for which he was liable to pay certain amounts. Therefore considering the same, the Plaintiff cannot seek the said declaration. The said prayer being a negative declaration, it would be governed under Section 34 of the Specific Relief Act. The party in whose favour, a right was accrued cannot be denied of his right by seeking negative declaration, therefore, the finding on the said issue needs no interference:

26. The Defendants have raised objection regarding maintainability of the present Suit, therefore, issue regarding jurisdiction has been framed as Issue No. 6. The Defendant has

raised objection to the jurisdiction on the ground that as per clause – 61 of the Agreement the claims of the contractor and other disputes arising out of Agreement were referable to the Standing Committee at the Government level, if amount of individual claim is not less than Rs. 1 Lakh. The Defendant has also referred to Appendix – H of the Agreement, which has a stipulation that, in the event of any conflict, the matter shall be referred to Arbitration. Therefore, considering these two conditions in the Agreement, according to the Defendant, there was a bar to entertain the suit by Civil Court. As against this, the Plaintiff has relied on clause – 60 of the Agreement under the head of ‘No Arbitration’ Clause- 60.1 provides that in case of any dispute between the Contractor and the Government in the matter, whatsoever those shall be resolved as per the provision of clause- 30 of tender and in no circumstances the reference to Arbitration Act will be entertained. Therefore, considering the said clause, the question of invoking the Arbitration clause would not arise and objection in that regard would not be maintainable.

27. The Defendant has also relied on paragraph 13 of the Appendix – H. However, the said Appendix- H is restricted only in respect of deed pledge for claiming advance. Therefore, finding of the Court that the Civil Court has jurisdiction to try and decide the dispute between the parties to the issue given in affirmative is appropriate and does not require any interference.

28. Additional Issue No. 1 has been framed by the learned Judge

regarding limitation as to whether suit is filed within limitation. According to the Plaintiff, final bill was prepared by the Defendants in the month of January, 1988. When the Plaintiff was called upon to put the signature and accept the bill, the Plaintiff realised the unjust and undue recovery shown, therefore, the Plaintiff refused and right to sue accrued to the Plaintiff. The Plaintiff has filed suit in the year 1999, therefore, according to him, the suit is within limitation. Article 18 of the Limitation Act provides limitation of three years from the date when the work is complete. However in the present case, in the said suit the repayment or recovery has been sought under different heads for which the cause of action and limitation is different. So far as claim for dewatering is concerned, according to the Plaintiff the claim of dewatering was based on breach of condition attributed to the Defendants due to suspension of work. In case suit for compensation for breach of contract, Article 55 of the Act prescribes limitation of three years for filing a suit. Since the said Act of breach was in the year 1988 itself and the Plaintiff had not reserved the right to claim compensation before continuing the said work, the said claim for dewatering would be beyond the period of limitation. The other declaration of recovery towards interest charges on mobilization advance, charges for use of electricity generator being illegal, unreasonable etc. The statement at **Exhibit- 301** filed by the Defendant showing the interest charges and **Exhibit- 302** showing recoveries made on mobilization advance. It shows that by month of May, 1994, entire amount and interest

thereon had been already recovered. Therefore, calculating the period of three years from the last date of May, 1994, the claim for mobilization advance etc. is also not within limitation. It is only as regards the escalation and revision of rates is concerned, it is based on the running bills, because only after preparation of final bill, the Plaintiff could ascertain the escalation and revision of rates, which ought to have been awarded to him. Therefore, the said claim is within limitation for filing a suit.

29. The Agreement in the present matter is undoubtedly an Agreement of which time was essence. The Tender notice itself provided the time limit in calendar months for completion of the project. In the said notice, a period of 36 calendar months has been stipulated. So also in 'Special Conditions of Contract', Item No. 22.1, is a stipulation regarding the time limit for completion of all civil works of power house, penstock and appurtenants, from the date of issue of work order. The date for commissioning of the unit was scheduled in January 1990. Therefore undoubtedly, it is a contract where time was essence. The contract wherein time is essence, are governed by Section 55 of the Contract Act.

The Section 55 reads as under:

55. Effect of failure to perform at fixed time, in contract in which time is essential.

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at

or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.--If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.--If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

The said Section 55 governs the right of promisee, where the promisor fails to perform part of the contract within specified time, so also it restricts the right of the promisee from claiming any compensation, if the promisee accepts the performance of the promise beyond the particular time agreed upon. Unless it gives notice to the promisor of his intention to claim compensation, if any loss is occasioned by non-performance of the promise in the given time. This law is well settled. In the present case, it is the promisor, who is claiming the compensation and also claiming amount for the

extra work done on account of the delay etc., which the Plaintiff claims that it was attributable to the Defendants. Therefore going by the interpretation of Section 55 of the Contract Act, the sum and substance is that, the time essence of contract and a party who does not perform the part of contract within the specified period, and continues after the said specified period, without exercising his option to repudiate the contract, so also without reserving his right to claim compensation or damages for the delay caused, subsequently cannot claim any such damages or compensation. Either the party has to repudiate or if the party continues the work, said continuation should be with intimation to the other party/promisee that, the said work is being continued reserving the right to claim damages or compensation. In the present case, the Plaintiff though had an option to repudiate the contract as per clause 15.2 of the Tender, has not exercised the said option and continued without reserving the right or renewing the conditions of the Agreement for continuation of work. Therefore, applying the principles governed under Section 55 of the Contract Act, the claims of the Plaintiff cannot be granted.

30. In light of the pleadings as well as arguments of both the sides it is clear that, the said Tender prescribed a time limit i.e. 36 calendar months, therefore, time was essence of the Agreement. The terms of the Agreement were clear and no negotiations were permissible. According to the Plaintiff, the delay in completing the work was caused on account of stoppage of work by the Defendant for

completing the TRC work. Because of the said delay, the cost of the work went on increasing. It is also not disputed that, as per the Tender document B- 1, the contractor was at liberty to give up the contract by giving one month notice, so also if the work was suspended exceeding the period of 90 days, the contractor was at liberty to withdraw from the contractual obligations. Having failed to exercise the said option, the claims made by the Plaintiff would not be maintainable in view of the Tender condition and also as per Section 53 and 55 of the Contract Act. All the clauses under the contract, restricted the Plaintiff from making any claims, whatsoever under the various heads from making any extra claims and having entered into the said Agreement willingly, the Plaintiff's claim could not be proved.

31. Therefore, having considered the claims in light of the contents of the Agreement as well as the law governing the contract, we do not find that there is any scope for interference. The findings of the learned Judge are based on law as well as the facts are appropriate, as there is no other view possible to be taken in the present case.

32. The First Appeal is dismissed. No order as to costs.

(MANJUSHA DESHPANDE, J.)

(NITIN JAMDAR, J.)