



C.S.No.801 of 2004

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	21.12.2024
Pronounced On	02.01.2025

CORAM

THE HON'BLE MR. JUSTICE P.VELMURUGAN

C.S.No.801 of 2004

ECI Engineering & Construction
Company Limited,
1-10-44/2/1, Chikoti Gardens,
Begumpet, Hyderabad – 500 016,
Represented by its Managing Director.

...Plaintiff

Vs.

Indian Oil Corporation Limited,
Southern Region, Indian Oil Bhavan,
139, Nungambakkam High Road,
Chennai – 600 034.
Represented by its
Deputy General Manager (Engg.)

...Defendant

PRAYER: Plaint filed under Order IV Rule 1 of Original Side Rules read with Order VII Rule 1 of the Civil Procedure Code praying for judgment and decree against the defendant as follows: (a) directing the defendant to pay the plaintiff a sum of Rs.2,67,98,211/- together with subsequent interest at 18% per annum on Rs.1,12,08,510/- from the date of the plaint till the



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date of realisation; and (b) for costs of the suit.

For Plaintiff : Mr.K.Ravindranath

For Defendant : Mr.P.N.Radha Krishnan

J U D G M E N T

The above suit has been filed by the plaintiff seeking to direct the defendant to pay the plaintiff a sum of Rs.2,67,98,211/- together with subsequent interest at 18% per annum on Rs.1,12,08,510/- from the date of the plaint till the date of realisation and for costs of the suit.

2. The averments as contained in the plaint are as follows :

(i) The defendant awarded a contract to the plaintiff for land development work at its CMT Irumpanam Terminal, Kerala (Phase II), covered by Work Order No.ENG.T.7033:45:003-96-97, dated 17.05.1996. The fundamental dispute that arose between the plaintiff and the defendant was about the initial survey to be carried out to determine the founding levels for the embankment fill in a marshy and yielding over layer of highly fluidized soil lying below water on top of a firm bed. On the representation



made by the plaintiff, the defendant examined and recognized this fact and forthwith conceded by amending the mode of measurement in terms of their letter, dated 22.5.1996 in a manner, which was satisfactory to the plaintiff and the defendant, both technically and contractually. This letter was signed by the Deputy General Manager (DGM) (Engineering) of the defendant, who was the Competent Authority, in and by which, the mode of measurement stood amended and this formed part of the original contract.

(ii) In spite of the aforesaid letter dated 22.5.1996, amending the mode of measurement, the officials of the defendant did not implement the same at the site. In view of the above, one Mr.T.S.Anbazhagan, General Manager (Business Development) of the plaintiff had discussions with the DGM (Engineering) of the defendant-Corporation regarding initial levels. Ultimately, the General Manager (Business Development) of the plaintiff-Company sent a letter dated 27.6.1996 to the DGM (Engineering) of the defendant to take immediate steps to inform their staff present at the site to take measurements as per the letter dated 22.5.1996. Thereafter, by letter dated 15.7.1996 of the defendant, the mode of measurement stood amended, contrary to their earlier letter dated 22.5.1996.



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(iii) To the said letter dated 15.7.1996, the plaintiff sent a reply dated 20.7.1996, setting out the facts and stating that the measurements should be taken as per the mode of measurement mentioned in the letter dated 22.5.1996, which was an amendment to the original contract. Thereafter, a meeting was convened on 26.7.1996 and the minutes of which have been recorded. To avoid the stalemate, it was agreed that two measurements would be taken; one set of reading, namely Reading 'A' as contended by the staff of the defendant; and another set of reading namely Reading 'B' would be taken as per the letter dated 22.5.1996. Further, it was made clear that Reading 'B' would be taken without prejudice to the rights and contentions of the defendant and that the plaintiff would be at liberty to pursue their claim as per Reading B' in accordance with the terms and conditions of the contract.

(iv) Even though the plaintiff-Company was entitled to payment as per measurement 'B', the defendant-Corporation had been making payment as per measurement 'A', contrary to the terms of the contract and also contrary to the letter dated 22.5.1996, by which, mode of measurement



stood amended.

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(v) The plaintiff, by their letter dated 05.3.1997, made it very clear that they should be paid as per Reading 'B' and accordingly, raised supplementary bills as per Reading 'B'. This was followed by another letter dated 30.7.1997 from the plaintiff to the defendant. There was a reply letter dated 24.10.1997 from the defendant stating that payment would be made as per Reading 'A'. Thereafter, the plaintiff, by their letter dated 11.3.1998, made the position very clear that the bills should be paid as per measurement 'B' and requested payments as per measurement 'B' and claimed the amounts due together with interest at 24% per annum. Along with the said letter, the plaintiff enclosed the final bill dated 26.9.1997, for which, the defendant sent a reply letter dated 22.4.1998 through their advocate raising false and untenable contentions.

(vi) The plaintiff, by their letter dated 06.5.1998, invoked the arbitration clause and wrote to the Executive Director, who was the Arbitrator as per the terms of the contract, to resolve the dispute. There was a reply dated 17.6.1998 from Mr.S.Ram Mohan, Executive Director of the defendant stating that he was unable to act as the Arbitrator and that he



appointed one Mr.Mrinal Roy as the Arbitrator. Thereafter, there was a letter dated 13.8.1998 from the said Mr.Mrinal Roy stating that he was not able to act as the Arbitrator and requested the Executive Director of the defendant-Corporation to appoint some other Arbitrator. Then, the Executive Director of the defendant-Corporation, by his letter dated 13.8.1998, appointed one Mr.S.R. Ananthanarayanan, Chief Finance Manager, Indian Oil Corporation, Marketing Division, No.139, Nungambakkam High Road, Chennai-34, as its sole Arbitrator. A copy of the said letter was marked to the plaintiff.

(vii) Subsequently, the said Arbitrator sent a letter, dated 18.08.1998 addressed to the plaintiff calling upon the plaintiff to file their claim statement. The plaintiff, by their letter dated 18.8.1998, addressed to the Executive Director of the defendant-Corporation stating that the nature of the claim was purely technical in character and requested to appoint a technical person as the Arbitrator. In turn, the Executive Director of the defendant, by letter dated 14.9.1998, stated that the said Mr.S.R.Ananthanarayanan had already entered upon the reference on 18.8.1998 and that there was no necessity to appoint another Arbitrator.



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(viii) Pursuant to that, the plaintiff filed their claim statement dated 16.10.1998 and forwarded the same to the Arbitrator, with a covering letter dated 16.10.1998. The defendant filed their counter statement dated 02.2.1999. For that counter statement, the plaintiff filed a reply statement. Then, the arbitration proceedings went on various dates at Madras. The sole Arbitrator passed an Award on 23.8.2000.

(ix) In the said Award, dated 23.8.2000, the Arbitrator raised the following issue among others :

"In the dispute relating to the mode and manner of measurement as raised by the claimant, is there an arbitrable issue and can it be determined as an excepted matter in terms of Clauses 14 and 17 of the agreement?"

(x) While considering the above issue, the learned Arbitrator referred to the letter dated 22.5.1996 and also the subsequent letters and held that these were all excepted matters and not arbitrable. Having held so, the Arbitrator has gone into the merits of the matter and gave findings against the plaintiff. Aggrieved against that, the plaintiff filed O.P.No.933



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of 2000 on the file of the Original Side of this Court for setting aside the said Award. This Court held that since the matter in issue was held to be an exceptional matter, the Arbitrator had no jurisdiction to go into the merits of the matter. This Court confirmed the findings of the Arbitrator that the dispute is an excepted matter and was not arbitrable and set aside all the other findings of the Arbitrator on merits and accordingly allowed the original petition.

(xi) The letter dated 22.5.1996, signed by the General Manager (Engineering) of the defendant-Corporation, clearly spelt out the mode of measurement and the original contract stood amended accordingly. That has become final and is binding upon the defendant. Subsequently, the defendant could not go beyond the said letter dated 22.5.1996. But, in the subsequent letter dated 15.7.1996, the defendant wanted to change the stand, which was not permissible in law. A party to the contract could not change the terms of the contract unilaterally. The letter dated 22.5.1996 clearly explaining the mode of measurement, became final.

(xii) In fact, the letter dated 22.5.1996 was signed by the competent Authority, namely the Deputy General Manager (Engineering). Pursuant to



that, the clauses were amended. When the clauses of the contract stood amended by letter dated 22.5.1996, that alone would decide the rights of the parties. Any subsequent letter contrary to this amendment, will have no legal effect.

(xiii) The measurement 'B' was taken only as per the amended terms of the contract, as amended by letter dated 22.5.1996, which had become final. The plaintiff submitted bills based on that mode of measurement and the defendant was bound to pay the plaintiff as per measurement 'B' referred to in the Minutes of the meeting, dated 26.07.1996. The said minutes of the meeting dated 26.7.1996 had been entered into, without prejudice to the rights and contentions of the parties to see that the work should not suffer and there was no stalemate. The defendant raised a strange contention that in view of the Minutes of the meeting dated 26.7.1996, they could not go behind the amendment as incorporated in their letter dated 22.5.1996. The amendment as incorporated by the defendant's letter dated 22.5.1996 was very much binding upon the defendant and they could not go beyond it. The plaintiff is staking a claim only for the actual work done by them.

(xiv) The defendant, by insisting that they would pay only as per



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measurement 'A', planned to unjustly enrich themselves, which is not permissible in law. The plaintiff had done the work to the quantity of 4,99,0301 cums and they should be paid for that as per the mode of measurement contained in the defendant's letter dated 22.5.1996, referred to above.

(xv) The defendant falsely alleged in another letter that if payment was to be made as per measurement 'B', it would increase the cost by 200% to 300%, which was, on the face of it, false, contrary to facts and absolutely without any basis. The defendant was bound to act as per the terms of the contract, as amended by letter dated 22.5.1996. They could not go beyond the same. The defendant committed breach by not acting as per the terms of the contract, which was duly amended by their letter dated 22.5.1996, as referred to above. Measurement "B" is as per the amended contract pursuant to the defendant's letter dated 22.5.1996.

(xvi) As per measurement 'B', the defendant is bound to pay the plaintiff a sum of Rs.4,49,01,092.14 Ps. But, the defendant paid a sum of Rs.3,36,92.582.16 Ps to the plaintiff. The defendant is due and liable to pay the plaintiff the balance amount of Rs.1,12,08,510/-. The plaintiff raised



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their final bill dated 26.9.1997 and enclosed the same along with their letter dated 11.3.1998.

(xvii) The Arbitration Proceedings commenced on 06.5.1998. The letter dated 06.5.1998 sent by the plaintiff to the defendant, with a request that the dispute be referred to arbitration, was received by the defendant. The arbitration proceedings went on from then onwards and the Award was passed on 23.8.2000. O.P.No.933 of 2000 was filed before this Court within time to set aside the Award. The said petition was allowed on 27.3.2003. Since the dispute is not arbitrable, the arbitration clause is not attracted. Hence, the plaintiff is put to the necessity of filing a suit for recovery of amounts due to them for the work done by them as per the terms of the contract, which was duly amended by the defendant's letter dated 22.5.1996.

(xviii) The suit is in time and is not barred by limitation, in view of Section 43 of the Arbitration and Conciliation Act 1996. Section 21 of the said Act clearly explains the date on which the arbitration shall be deemed to have commenced. In this case, the arbitration shall be deemed to have been commenced on 06.5.1998. The defendant received the plaintiff's letter



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dated 06.5.1998, requesting to refer the dispute for arbitration, on 17.6.1998. This court set aside the Award, vide order dated 27.3.2003. As per Section 43(4) of the said Act, the period between the commencement of the arbitration and the date of the order of the Court, shall be excluded in computing the time prescribed by the Limitation Act, 1963 for commencement of the proceedings with respect to the dispute so set aside. Thus, the time from 6.5.1998 to 27.3.2003 has to be excluded, which works out to 4 years 10 months and 22 days. The final bill is dated 26.9.1997. The three year period will end on 25.9.2000. But, if the period from 6.5.1998 to 27.3.2003, which is the period between the commencement of the arbitration and the date of the order of the Court, is excluded for the purpose of limitation, the suit is filed in time.

(xix) Hence, the plaintiff filed this suit for recovery of a sum of Rs.2,67,98,211/- together with subsequent interest at 18% from the date of plaint till the date of realization. The defendant is liable to pay interest on the amount due and payable by them to the plaintiff under the Doctrine of Unjust Enrichment. The defendant has no right to with-hold the amounts due and payable by them to the plaintiff for the work done by the plaintiff



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under the contract, which was duly amended by letter dated 22.5.1996. The defendant is guilty of breach. The defendant cannot take advantage of their own wrong. The defendant, by committing breach, wrongfully with-held the amount due and payable by them to the plaintiff for the actual work done by the plaintiff under the suit contract, duly amended by the letter dated 22.5.1996 and they unjustly enriched themselves and deprived the plaintiff from using their money. Hence, the defendant is liable to pay interest under the Doctrine of Unjust Enrichment.

(xx) The plaintiff is claiming interest at the rate of 18% per annum. The defendant is liable to pay interest at 18% per annum on the final bill amount of Rs.1,12,08,510/- from 26.5.1997 till the date of payment. The interest claimed from 26.5.1997 upto the date of plaint comes to Rs.1,55,89,701/-. The defendant is liable to pay subsequent interest also at the rate of 18% per annum.

3. The defendant filed a written statement, stating as follows :

(i) The suit is not maintainable either in law or on facts and it has to be dismissed in-limine. The plaintiff having accepted the contract, by signed



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it. In view of Clause 17 of the Works Contract Agreement and Clauses 2 and 14 of the General Conditions of the Works Contract, the plaintiff is bound by the decisions of the DGM (Engg.) of the defendant and hence, the plaintiff is barred from disputing the same and making any claims in respect thereof.

(ii) In view of the fact that this Court has already confirmed, by its order dated 27.3.2003, passed in O.P.No.933 of 2000, that the subject matter of the claim in this suit was in respect of an 'excepted matter' as provided in Clause 17 aforesaid, which order was not further challenged by the plaintiff and in view of the fact that all the disputes and differences arising under the agreement shall be referred to arbitration, save for 'excepted matters', in respect of which, the decision of the DGM (Engg.) relating to measurements, including the method thereof, designs, drawings, specifications, instructions, etc., shall be final and binding on the parties, and there is no scope for the plaintiff to file a suit in respect of the same. Therefore, the suit has to be dismissed in-limine as not maintainable.

(iii) Furthermore, having signed the final bill and having received and accepted payment in settlement of the same, the plaintiff is also bound by



the statements and confirmations contained in the final bill. The defendant filed a counter statement before the Arbitrator, before whom, the plaintiff initially made their claim on the subject matter of this suit as well as before this Court in the said O.P No.933 of 2000, setting out in a comprehensive manner and in detail, their defence to the claims made by the plaintiff on merits. The defendant wholly adopted the defences raised by them in the aforesaid counter statements.

(iv) The tender documents themselves specifically informed the bidders about the soil condition and cautioned them to visit the site and understand the soil conditions before bidding. The Plaintiff was the lowest bidder. As the Plaintiff had quoted lowest bid for the contract work, the defendant required the plaintiff to furnish an additional Performance Guarantee of Rs.25,00,000/- to ensure due performance of the contract. Since the Plaintiff subsequently realized that they had quoted low price, they insisted on the incorporation of two clauses in the Work Order, in order to wriggle out of their predicament, and that the defendant would bear the cost of the Performance Guarantee of Rs 25,00,000/- and that the mode of measurement be defined and incorporated in explicit terms. The defendant



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accepted the same and the DGM (Engg.) of the defendant-Corporation, being the competent authority, issued an amendment letter dated 22.05.1996, incorporating the mode of measurement, and that formed part of the contract. The plaintiff has also admittedly accepted the letter of amendment. It is submitted that the letter of amendment was not issued based on the plaintiff's examination and conceding to any representation as claimed.

(v) The mode of measurement as per the letter dated 22.05.1996 had been fully adhered to by the defendant. It was the plaintiff who failed to implement the mode at the site as spelt out in the said letter. The plaintiff had, even before the award of the contract, confirmed by their letter dated 19.02.1996 that they were aware of the site conditions and had bid accordingly. That letter was in answer to the defendant's own letter dated 16.02.1996, cautioning the plaintiff about the site conditions and the filling that the plaintiff would have to do therein. The letter dated 15.07.1996 issued by the DGM (Engg.) of the defendant, who was the competent authority to issue the letter under the terms of the contract, was not contrary to the letter dated 22.05.1996, but only a confirmation and clarification of



the same.

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(vi) However, in view of the ambiguity introduced by the plaintiff to the interpretation of the letter dated 22.05.1996 and the consequent impasse and hindrance tried to be created by the plaintiff a meeting of both the parties was held on 26.07.1996 in order to avoid any delay in the works under the contract, wherein it was decided, as an interim arrangement, that two sets of measurements would be taken - Measurement A by the defendant and Measurement B by the plaintiff. It was, however, made explicitly clear in the Minutes of the meeting that the defendant would make payments only in accordance with Measurement A taken as decided by them, without prejudice to the rights available to them under the contract. It is submitted that the Measurement B taken by the plaintiff, was not in accordance with the mode of measurement, as agreed upon in the letter dated 22.05.1996 and reiterated in the letter dated 15.07.1996, both of which were also the decisions of the DGM (Engg.) of the defendant-Corporation and as such, it is binding on the parties. It is further submitted that there is no ambiguity between the said two letters when read in conjunction.



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(vii) The defendant had rightly made payment in accordance with the measurement “A”, which is the right measurement in terms of the amendment, and the plaintiff was not entitled to any payment as per the measurement B, which had been taken by them arbitrarily and contrary to the terms of the contract and the amendment. The plaintiff had themselves admitted and conceded, both in the Arbitration proceedings as well as in the O.P.No.933 of 2000 before this Court, that the Memorandum of Minutes of the meeting, dated 26.07.1996 had become nullity, and hence, remedy available to them under the MOM had also become nullity.

(viii) Letters written by the plaintiff are frivolous and self-serving and had been duly replied by the defendant and suffice it to state that (i) the defendant never, at any point of time agreed to pay as per measurement B and (ii) the plaintiff has accepted payment against the final bill on its terms, and cannot make any further claims thereafter, especially in the matter of measurements, etc. As far as the averments made in the plaint are concerned, it is reiterated that mode of measurement adopted by the defendant was in accordance with the letter of amendment, dated



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22.05.1996 and the letter dated 15.07.1996 was a confirmation and clarification of the mode of measurement, as stipulated in the letter dated 22.05.1996 and was not in derogation thereof. A plain reading of the two letters amply proves that there was no contradiction of terms or statements therein and a conjoint reading of the letters, would amply disclose that the mode stipulated therein were unambiguous and same. Both the letters issued by the DGM (Engg.) of the defendant were in the nature of decisions given by him on the mode of measurement and hence, it cannot be called in question by the plaintiff, as per the terms of the Contract.

(ix) When the measurement B had not been accepted by the defendant, the question of raising bills based thereon, did not arise and the defendant was not bound to pay according to that measurement. Memorandum of Minutes was dated 26.07.1996 and not 22.07.1996, as claimed by the plaintiff. There was no Memorandum of Minutes, dated 22.07.1996. It was clearly specified in the Memorandum of Minutes, dated 26.07.1996 that measurement A alone would be considered and payment had to be made only as per measurement A. Further, the plaintiff has admitted and conceded in the earlier proceedings, both in arbitration and



before this Court, that the Memorandum of Minutes was a nullity, and therefore, they cannot take refuge under its terms to suit their purposes. The Memorandum of Minutes had been entered into only as an interim measure to avoid unnecessary delay sought to be caused by the plaintiff.

(x) According to the defendant the letter dated 22.05.1996 was the mode of measurement prescribed by the DGM (Engg.) of the defendant and followed by the defendant in taking measurement A, and that the letter dated 15.07.1996 was only a reiteration and clarification of the earlier letter and not in contradiction thereof. The question of relying on the MOM did not arise, and the measurement A taken by the defendants, was as per the true spirit and intent of the letter dated 22.05.1996, while measurement B taken by the plaintiff was based on a deliberately distorted interpretation of the contents of the letter. It was denied that the plaintiff was claiming only for the actual work done by them.

(xi) It was the measurement A, and not the measurement B., which had been taken in accordance with the true intent, meaning and spirit of the letter dated 22.05.1996. The defendant had agreed to pay only as per



the measurement A, which payment had been made and accepted by the plaintiff. The difference in the modes of measurements A and B was that the measurement A was taken in terms of the contract and the letter of amendment dated 22.05.1996 in that, by making the staff on the marshy surface using normal human pressure till the staff found their own bearing to record it as its initial level, while measurement B taken by the plaintiff was by applying external downward pressure till the staff stopped moving any further in order to record it as the initial level, which mode of measurement was not at all envisaged, either in the contract or in any letter of amendment.

(xii) A staff held vertically in such marshy soil would go down by himself and find his own bearing, unless restricted from moving down by using additional or external human pressure. The meaning conveyed by the letter of amendment dated 22.05.1996 was that no extra effort would be made or human pressure would be exerted to avoid the staff from going down into the soil. The plaintiff had deliberately misinterpreted the letter of amendment dated 22.05.1996 to mean as though additional or external human downward pressure could be applied to the staff till it rested on firm



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soil, without going down any further.

(xiii) In view of that misinterpretation, the DGM (Engg.) of the defendant issued another letter dated 15.07.1996, reiterating the mode stipulated in the earlier letter of amendment and clarifying the same. It is relevant to note that the decision of the DGM (Engg.) in these matters was final and binding on the plaintiff, and it cannot complain or make any claim in respect thereof. The plaintiff was estopped, both in law and by contract, from raising any claim in respect of measurements, since they had unconditionally accepted the terms of the contract which expressly stipulated that the decision of the DGM (Engg.) of the defendant-Corporation regarding the mode of measurement, etc., would be final and binding on them, and hence, they were bound by the same and cannot call it in question. The defendant denied having committed any breach of contract. It was the plaintiff-company which was trying to unjustly enrich themselves to the tune of Crores of Rupees by giving distorted facts and providing hypothetical statistics.

(xiv) The contention of the plaintiff that they had expended an additional sum of Rs.1,12,08,510/- in filling murrum, which was the



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difference in the cost between the values as per measurement A and measurement B, and which allegedly had been paid by the defendant, is false and baseless. The plaintiff has been fully paid for the actual quantities that they had used in filling the murram. The hypothetical calculations given by the plaintiff had been considered in detail by the defendant, and found to be baseless and devoid of any merits. It is not true that the Award had been set aside by this Court, but only the findings of the Arbitrator on merits, had been set aside.

(xv) The plaintiff had referred a claim to arbitration knowing fully well that the matter was an 'excepted matter', outside the purview of arbitration, and further fully aware that the decision of the DGM (Engg.) would be final and binding upon them under the contract. Hence, the period of arbitration and the subsequent period before this Court in O.P.No.935 of 2000, cannot come to their rescue in their attempt to save limitation. In any event, an actual computation of the time would still bar the claims in the suit by limitation.

(xvi) Since the claim in the suit was itself not maintainable, the question of claiming any interest by the plaintiff did not arise. The



defendant had not committed any breach of contract as alleged, nor the defendant sought to take advantage of their own wrongs. On the other hand, it was the plaintiff who was trying to unjustly enrich themselves substantially by making untenable claims. In fact, the Doctrine of Unjust Enrichment applies against the plaintiff and not against the defendant. It was further made amply clear that the rate of interest claimed by the plaintiff, allegedly terming it to be the prevailing bank rate, was totally false. It was submitted that no interest whatsoever was payable by the defendant for the aforesaid reasons.

4. On 04.09.2007, the following issues were framed by this Court:

"i. Whether the suit is maintainable in view of the terms of Works Contract entered into between the parties?

ii. Whether the letters of the DGM (Engineering) of the defendant dated 22.05.1996 and 15.07.1996 are in accordance with law and the terms of the contract are binding on the parties?

iii. Whether the suit is barred by



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limitation?

iv. Whether the defendant can go behind the letter dated 22.05.1996 amending the mode of measurement?

v. Whether the plaintiff is entitled to claim interest?

vi. To what other relief the plaintiff is entitled?

5. On the side of the plaintiff, Mr.Kaja Venkat Rao, who is the Managing Director of the plaintiff/ company, was examined as P.W.1 and he has also filed his proof affidavit, reiterating the contents of the plaint. 23 documents were marked as Ex.P1 to Ex.P23 On the side of the defendant, Mr.M.S.Sachin, who is the Senior Manager (Engineering) was examined as D.W.1 and Ex.D1 was marked.

6. Heard the submissions of the learned counsel on either side and perused the materials available on record.



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7. The learned counsel for the plaintiff submitted as follows :

(i) The plaintiff is a public limited company, involved in Engineering Constructions and promotion and erection of plant and machinery and construction of thermal projects. The defendant is a public sector undertaking. The defendant had floated a tender for land development work at CMT Irumpanam Terminal, Kerala Phase-II, covered by work order No.ENG.T.7033:45:003-96-97, dated 17.05.1996.

(ii) Disputes arose between the parties as regards the manner in which survey has to be carried out to determine the founding levels for embankment skill in a marshy and yielding over layer of highly fluidize soil between water on top of a firm bed. On the representation made by the plaintiff, the defendant examined and recognized the fact and considered the same by amending mode of measurement in terms of the letter dated 22.05.1996. Both the plaintiff as well as the defendant satisfied with the amending the mode of measurement, both technically and contractually. The abovesaid letter was signed by Deputy General Manage (Engineering), who is the competent authority to represent the defendant.



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(iii) The main issue is the mode of measurement to be taken while execution of the earth filling. The original Work Order with the amendment effected under letter dated 22.05.1996/ Ex.P2, forms the integral part of the contract. Pursuant to the exchange of letters between the plaintiff and the defendant, there was a meeting of officials of the plaintiff as well as the defendant, recorded in the Minutes of the Meeting dated 26.07.1996. In the Meeting, it has been recorded that reading of the measurements can be taken in two forms. They are Reading "A" method and Reading "B" method, towards claims raised under various heads. The defendant has paid only a sum of Rs.3,36,92,582 to the plaintiff. The defendant is due and liable to pay the balance amount.

(iv) The plaintiff has raised the final bill dated 26.09.1997. After the amendment of the work, payments were to be made as per the measurement Reading "B" instead of "A". The plaintiff claimed payments as per measurement "B" and enclosed the final bill. Since the work order/Ex.P1 provides for an arbitration clause, vide communication dated 06.05.1998, the plaintiff sought reference to the sole Arbitrator as per the terms of the



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Work Order, so that the claim could be preferred before him, who would adjudicate and determine their claim.

(v) As per the terms of the contract, a technical person, who is well versed with the technical aspects of the contract, shall be appointed as the Arbitrator, under the provisions of the Arbitration and Conciliation Act and thereby, Mr.S.R.Ananthanarayanan entered reference pursuant to the request made by the party on 18.08.1998 and the Arbitral Tribunal was constituted on 14.09.1998. An Arbitral Award came to be passed on 23.08.2000. The said Award was challenged by the plaintiff before this Court in O.P.No.933 of 2000 and order was passed on 27.03.2003, granting liberty to the plaintiff to approach the civil court. Hence, the plaintiff has filed the present suit.

8. Per contra, the learned counsel for the defendant submitted as follows :

(i) The plaintiff was awarded a contract by the defendant for land development work at CMI Irumpanam Terminal, Kerala (Phase II), covered by work order No.ENG.T.7033:45:003-96-97 dated 17.05.1996. The



defendant asked the plaintiff to furnish additional performance guarantee of Rs.25 Lakhs. The plaintiff insisted two clauses in the Work Order, one is that the defendant should bear the cost of the performance guarantee of Rs.25 Lakhs and the other mode is that the mode of measurement which has to be defined and incorporated in explicit terms. The defendant accepted the above request, vide letter dated 22.05.1996. The defendant did not accept the readings taken by the plaintiff, since the initial level taken by the plaintiff by pushing the levelling staff into the marshy surface, was not correct method or the standard practice. The DGM of the defendant-Corporation issued a letter dated 15.07.1996, asking the plaintiff to commence the work. The plaintiff declined to accept the letter dated 15.07.1996.

(ii) Memorandum of Minutes has been signed by both the plaintiff and the defendant and as per the MoM, the defendant will take the readings of the initial levels as per measurement A and the plaintiff will take readings of the initial levels as per measurement B. As per the MoM the defendant has made it clear that reading B would be taken without prejudice to the rights and contentions available to the defendant under the contract



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and that the plaintiff is at liberty to pursue their claim as per reading B in accordance with the terms and conditions of the contract.

(iii) The plaintiff sent a letter dated 30.07.1997, requesting the defendant to settle the measurement as per the reading B, for which, the defendant sent a letter dated 24.10.1997 stating that payment will be made only according to the reading A taken by the defendant. The final bill disclosed that the work has been completed by the plaintiff on 26.09.1997 and the plaintiff has also received sum of Rs.3,36,92,582/- towards payment. The plaintiff, thereafter, sent a letter dated 11.03.1998 to the defendant enclosing the measurements taken by them as per reading B along with the Final Bill prepared by them claiming a sum of Rs.1,12,08,510/- together with interest.

(iv) Later, the plaintiff, by letter dated 06.05.1998, invoked Clause 17 of the Works Contract Agreement and sought for arbitration claiming that the dispute had arisen between the plaintiff and the defendant on account of rejection of the claim of the plaintiff by the defendant. The Arbitrator has passed the Award on 23.08.2000 holding that the DGM(Engg) of the defendant, the named person in the Work Order as the



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Designated Authority, is the person entitled to decide on any issue relating to the mode and method of measurements and that the decision taken by the Designated Authority is final.

(v) The plaintiff filed O.P.No.933 of 2000 before this Court to set aside the Award passed by the Arbitrator. The Court accepted the findings of the Arbitrator and confirmed that the issue between the parties relating to the measurement, was an “excepted matter” covered by Clause 2 of the General Conditions of the Work contract. The plaintiff has not filed any appeal against the said order of this Court passed in O.P.No.933 of 2000, instead, he has filed the present suit.

9. Heard and considered the learned counsel for the plaintiff and the learned counsel appearing for the defendant and perused the materials available on record

10. This Court has carefully considered the submissions of the learned counsel on either side..

11. The specific case of the plaintiff is that the plaintiff-Company is a



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Public Limited Company, involved in engineering constructions and promotion and erection of plant and machinery and construction of thermal projects. The defendant is a Public Sector Undertaking. The defendant awarded a contract to the plaintiff for land development work at CMT Irumpanam Terminal, Kerala Phase-II, covered by work order No.ENG.T.7033:45:003-96-97 dated 17.05.1996. Dispute arose between the plaintiff and the defendant, in which, a survey was carried out to determine the founding levels for the embankment fill in a marshy and yielding over layer of highly fluidized soil lying below water on top of a firm bed. Both the plaintiff and the defendant satisfied with the amended mode of measurement, both technically and contractually. The letter dated 22.5.1996 was signed by the DGM (Engineering) of the defendant-Corporation, which is the Competent Authority to represent the defendant. The letter dated 22.05.1996 was marked as Ex.P2 which forms part of the contract.

12. Pursuant to the exchange of letters between the plaintiff and the defendant, there was a meeting of the officials of the plaintiff as well as the defendant and in the Minutes of meeting dated 26.7.1996, it was recorded



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that reading of the measurement can be taken in two forms; and they are reading A and reading B. As per measurement 'B', the defendant is bound to pay the plaintiff a sum of Rs.4,49,01,092.14 Ps towards claims under various heads. But, the defendant paid a sum of Rs.3,36,92.582.16 Ps to the plaintiff. The defendant is due and liable to pay the plaintiff the balance amount of Rs.1,12,08,510/-. The plaintiff raised their final bill dated 26.9.1997 and enclosed the same along with their letter dated 11.3.1998.

13. Since the work order under Ex.P1 provided for an arbitration clause, vide communication dated 06.5.1998, the plaintiff made a claim before the defendant. Since the work order involved technical aspects, an Arbitrator was appointed and he passed the Arbitral Award on 23.8.2000. The said award was challenged by the plaintiff before this Court in O.P.No.933 of 2000. This Court dismissed the above said original petition by order dated 27.3.2003, granting liberty to the plaintiff to approach the Civil Court. Therefore, the plaintiff filed the present suit seeking to pay the plaintiff, the balance amount with interest from the date of completion of work till filing of the suit and thereafter also, pending suit till the date of



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realisation.

14. On the contrary, the specific case of the defendant is that after entering into the works contract ,dated 17.5.1996, the defendant asked the plaintiff to furnish additional performance guarantee for a sum of Rs.25 Lakhs. The plaintiff insisted for two clauses in the Work Order; one is that the defendant should bear the cost of the performance guarantee of Rs.25 Lakhs and the second is that the mode of measurement should be defined and incorporated in explicit terms. The defendant accepted the above request vide letter dated 22.5.1996. The defendant did not accept the readings taken by the plaintiff, since the initial level taken by the plaintiff by pushing the levelling staff into the marshy surface, was not the correct method or standard practice. The DGM of the defendant issued a letter dated 15.7.1996 under Ex.P4 asking the plaintiff to commence the work. The plaintiff declined to accept the letter dated 15.7.1996.

15. Under Ex.P6, the MoM was signed by both the plaintiff and the defendant. As per the MoM, the defendant will take the reading of the initial levels as per measurement A, and the plaintiff will take the reading of



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the initial levels as per measurement B. As per the MoM, the defendant made it clear that reading B would be taken without prejudice to the rights and contentions available to the defendant under the contract and the plaintiff is at liberty to pursue their claim as per reading B in accordance with the terms of the contract.

16. The plaintiff sent a letter dated 30.7.1997, requesting the defendant to take the measurement as per reading B, for which, the defendant, vide letter dated 24.10.1997, stated that payment will be made only according to the reading A taken by the defendant. The final bill disclosed that the work has been completed by the plaintiff on 26.9.1997. As per the final bill, the payment was also made by the defendant and the plaintiff also received a sum of Rs.3,36,92,582/- and thereafter, the plaintiff sent a letter dated 11.3.1998, enclosing the measurement taken as per reading B along with the final bill prepared by them to the tune of Rs.1,12,08,510/- along with interest.

17. The plaintiff also invoked Clause 17 of the Works Contract



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Agreement and sought for arbitration. The Arbitrator passed an Award on 23.8.2000, holding that the DGM (Engineering) of the defendant is the person entitled to decide any issue relating to the mode and manner of measurement and the decision taken by the Designated Authority is final. Challenging the said finding, the plaintiff filed O.P.No.933 of 2000 on the file of this Court to set aside the Award passed by the Arbitrator. This Court accepted the findings of the Arbitrator and confirmed that the issue between the parties relating to the measurement was an “excepted matter” covered by Clause 2 of the General Conditions of the Works Contract. Challenging the same, the plaintiff did not file any appeal. Further, the claim is barred by limitation.

18. Issue No.i :

*Whether the suit is maintainable in view of
the terms of the Works Contract entered into
between the parties?*

According to the plaintiff, they were awarded a contract by the defendant under Ex.P1 and the same was signed by the DGM (Engineering) of the defendant-Corporation which is the Competent Authority. The dispute arose



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between the plaintiff and the defendant at the very commencement of the work itself and as regards the manner, in which, the survey to be carried out to determine the founding levels for the embankment fill in a marshy and yielding over layer of highly fluidized soil lying below water on top of a firm bed. On the representation made by the plaintiff, the defendant examined and recognized the above fact and forthwith conceded by amending the mode of measurement in terms of their letter dated 22.5.1996 under Ex.P2. Both the plaintiff as well as the defendant satisfied with the amended mode of measurement, both technically and contractually.

19. The core issue is the mode of measurement to be taken while execution of the earth filling. The original work order along with amendment effected under Ex.P2 formed part of the contract. Subsequently, there was exchange of letters between the plaintiff and the defendant under Exs.P3 to P5. Pursuant to the said letters, there was a meeting of the officials of the plaintiff-Company and the defendant-Corporation. In the Minutes of the meeting, dated 26.7.1996, it was recorded that reading of the measurement was taken in two methods i.e., reading A method and reading



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B method. The measurement under Reading “B” was taken as per the amendment letter dated 22.5.1996. As per measurement “B”, the defendant is bound to pay the plaintiff a sum of Rs.4,49,01,092/-, whereas the defendant paid only a sum of Rs.3,36,92.582/-and the defendant has to pay the balance sum of Rs.1,12,08,510/-. Hence, the plaintiff raised the final bill under Ex.P9 letter dated 11.3.1998 along with enclosures. As per Ex.P2, the payment was to be made as per measurement 'B' instead of measurement “A”. The plaintiff claimed the payments as per measurement B and enclosed the final bill dated 26.9.1997. The defendant sent a reply dated 22.4.1998 through their advocate.

20. Since Ex.P1 provided for an arbitration clause, the plaintiff made a reference to the sole Arbitrator. The Arbitrator passed the Award stating that the decision of the DGM (Engg.) would be final. Challenging the same, the plaintiff has filed O.P.No.933 of 2000 before this Court. According to the plaintiff, this Court, while dismissing the said original petition, gave liberty to file a claim before the Civil Court.



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21. According to the defendant, the issue raised by the plaintiff in the suit is related to the mode of taking measurement and readings of initial level as per the contract before the commencement of Earth filling. While the plaintiff took initial level readings as per the measurement B, the defendant took the initial level of reading as per measurement A. The claim made by the plaintiff is for the difference in the reading between the measurements A and B. The issue regarding the mode of taking measurement, lies within the purview of “excepted matters” contained in Clauses 2 and 14 of Ex.A1 - General Conditions of Works Contract and Clause 17 of the Works Contract Agreement.

22. Clauses 2, 14 and 17 of the Works Contract Agreement read as follows:

"Clause 2: In the event of there being any discrepancy, ambiguity or omission or any error or difference of opinion regarding the interpretation or granting or any specifications, designs, drawings, description or instructions relating to the works to be executed the decision of the Deputy General Manager



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(Engineering) thereon shall be final and binding on the contractors and the contractors shall not be entitled to claim any additional or any extra payment or claim any other benefit or advantage for the same.

Clause 14: *All work to be done under this Contract shall be in accordance with the standard measures and forms and practice prevailing in similar contracts. If, however, there is any dispute or difference in the manner or method of measurement or interpretation of such practice, the decision of the Deputy General Manager (Engineering) shall be final and binding on the contractors. Under no circumstance shall the contractors be entitled to claim enhanced rates on any items under this Contract unless previously agreed to by the Corporation in writing. It is further agreed that any change in the specifications, designs, etc., can be done only by the Deputy General Manager (Engineering) or his authorised representative so nominated in writing and the Corporation shall not be liable for any variations in the Contract unless expressly authorised in the manner aforesaid.*

Clause 17: *The decisions, directions and certificates with respect to any matters, decision of which is specially provided for by these conditions given and made by the Corporation or by the Deputy General Manager (Engineering) on behalf of the Corporation, which matters are referred to hereinafter as Excepted matters, shall be final and binding upon the contractors*



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and shall not be set aside or attempted to be set aside on account of any informality, omission, delay or error in proceeding in or about the same or on any other ground or for any other reason and shall be without appeal."

23. When the plaintiff made a claim before the Arbitrator, the same was rejected. Challenging the same, the plaintiff filed O.P.No.933 of 2000 before this Court. In the said O.P.No.933 of 2000, the claim of the plaintiff was that the issue with regard to measurement was not an “excepted matter” and that the Minutes of Meeting dated 26.7.1996, borne out that the right given to the parties therein to resolve the dispute as per terms of the contract amounted to giving up the right of the defendant to treat the issue as an “excepted matter” and to have the issue resolved through arbitration. This misinterpretation by the plaintiff was disputed by the defendant before the Arbitrator and before this Court in the said original petition and it was categorically held that the issue was an 'excepted matter', which is outside the scope of arbitration.

24. The finding of this Court rendered in the said original petition



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that the issue is an 'excepted matter', had become final and is binding on the plaintiff, since the plaintiff has not chosen to file any appeal against the said finding. From the stand taken by the plaintiff in the arbitration proceedings as well as in O.P.No.933 of 2000 before this Court, it is amply evident that the plaintiff wanted to have the issue treated outside the purview of 'excepted matters'. Since the plaintiff was well aware that, in case it was treated as an 'excepted matter', no claim could be legally made in respect of such issue against any decision taken by the DGM (Engineering) of the defendant and it would be final and binding as per the terms of the contract.

25. The further case of the defendant is that the MoM of the meeting dated 26.7.1996 under Ex.P6 held between the parties herein recorded that the plaintiff would be at liberty to pursue their claim as per reading B as per terms and conditions of the contract and it does not confer the right to the plaintiff to file a suit in respect of the claim, since it is their specific claim that the decision of the DGM (Engineering) of the defendant, in this regard would be final and binding on the parties. Further, it is the case of the defendant that 'excepted matters' are common in Government contract and



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public sector contract.

26. It is settled law that 'excepted matters', obviously as the parties agreed, do not require any further adjudication, since the agreement itself provided named adjudicator, namely the DGM (Engineering) in this case and concurrent with the same, obviously, it is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties.

27. Learned counsel for the defendant has also placed reliance on the decisions of the Hon'ble Supreme Court in the cases of

***(i) Food Corporation of India Vs. Sreekanth
Transport [reported in 1999 (4) SCC 491];***

***(ii) General Manager, Northern Railway
Vs. Sarvesh Chopra [reported in 2002 (4) SCC
45]; and***

***(iii) Vishwanath Sood Vs. Union of India
[reported in AIR 1989 SC 952].***

28. It is a settled law that 'excepted matters' satisfied under the arbitration clause in contract fell within the scope of arbitration, but only to



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the extent that the jurisdiction of the Arbitrator himself is limited and he has to determine as to whether the claim made by the party is an 'excepted matter' reserved for the final decision of the Departmental Authority or not, as per the terms of the contract and it would make the claim itself invalid in respect of the excepted matter. As per the explicit terms of the contract, the decision in respect of the 'excepted matters' is purely within the jurisdiction of the DGM of the defendant-Corporation, who is the Designated Authority. Such decisions are final and binding upon the parties and cannot be called in question without any appeal and no claim whatsoever in respect thereof can be entertained.

29. One of the main reasons is that the excepted matters related to highly technical issues involved in the contract, such as quality of materials, quantity of materials, workmanship measurements and mode of measurements of work carried out as in this case etc., and that the courts are generally not armed with the expertise to determine the same and that it can be determined only by the experts, thereby incorporating such clauses in the contract by giving authority to an expert within the organization to



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take the ultimate decision so as to be binding on the parties.

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30. Though the plaintiff attempted to make out the statement made to the above effect by the defendant's witness in his cross-examination as illegal and contrary to the order dated 27.3.2003 passed by this Court in O.P.No.933 of 2000, the observation of this Court in the said original petition is that the Arbitrator had no jurisdiction to deal with the issue on merits and that the right of the plaintiff to approach the civil Court was taken away.

31. Moreover, the legal issue as to whether the plaintiff can approach the civil court in order to adjudicate upon the excepted matter was never an issue before this Court in O.P.No.933 of 2000. Further, no liberty was given by this Court to the plaintiff to make a claim in respect of excepted matters by filing the suit as alleged by the plaintiff. Even if such a liberty is given, it will be against law and not maintainable. Any legal right of the plaintiff to approach the civil Court will be only as per the explicit terms of the contract entered into between the parties. Since the claim in



respect of excepted matters cannot be the subject matter of the civil suit, the Civil court does not have the jurisdiction to entertain such a claim, in view of the decision of the Hon'ble Supreme Court referred to supra.

32. Further, the suit is not maintainable for the other reason that, when the plaintiff signed the final bill dated 26.9.1997 in acceptance of the terms and conditions and the statements contained therein and the plaintiff also received the said final payment against the same, the plaintiff cannot claim any additional payment, especially when the plaintiff accepted the final bill and received the amount, which was shown as the full and final settlement.

33. The specific statement of the parties in the final bill is as follows:

“On behalf of M/s.----- accept the above and further certify that the amount of payment I shall be receiving on this bill will be in full and final of our claims, in respect of this work (Except refund of Security Deposit) and we have no claim against the Corporation with regard to the same.”



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34. After receiving the amount, the plaintiff made further claim as per measurement B and the same was rejected by the defendant-Corporation and hence, the plaintiff referred the matter before the learned Arbitrator and the same was rejected by the learned Arbitrator. Challenging the same, they filed O.P.No.933 of 2000 and this Court, by order dated 27.3.2003, rejected the same. In addition, the plaintiff has not chosen to file any appeal challenging the said order dated 27.3.2003 passed in O.P.No.933 of 2000.

35. Once it is decided by the learned Arbitrator and this Court, in the order dated 27.3.2003 in O.P.No.933 of 2000 that it is an excepted matter, and it can be settled within the Department and no other adjudication is permitted. When such a decision was taken by this Court in the order dated 27.3.2003 in O.P.No.933 of 2000, the plaintiff has not challenged the same. Even assuming that this Court in the order dated 27.3.2003 in O.P.No.933 of 2000, had given liberty to the plaintiff to work out their remedy before the Civil court, it is stated that in the excepted matters relating to involvement of technical issues, the decision of the DGM (Engineering) is



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final.
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36. During cross-examination of D.W.1, the defendant denied that the they agreed to pay as per measurement **B**. The bill was passed, the plaintiff also received the payment without any protest and also certified that it was the full and final settlement and they would not make further claim. Hence, the plaintiff should establish as to how they would be entitled to get the additional amount. The plaintiff mainly relied upon Ex.P2. According to the plaintiff, there had been amendment and as per the amendment, they would be entitled to the additional amount. However, the same was not accepted by the defendant. Even during cross examination, the defendant stoutly denied the same.

37. The relevant portions in the cross examination of D.W.1 are as follows :

*"Q.No.88: Did the defendant measure the works
land before entrusting the land to be developed by the*



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plaintiff?

A: Estimate for the works are prepared only after taking measurements.

.....

Q.No.99: *How the measurements are taken, by human pressure or by holding the scale on the top of the surface?*

A: The scale has to be held vertically on the surface where the level is to be measured so as to allow the scale to rest on its own. Human pressure will not be applied upwards the moment the scale touches the surface. But the scale will be allowed to sink in the surface on its own and once it finds the bearing readings are to be recorded. Normal human pressure is only to hold the scale vertically.

....

Q.No.107: *Is it correct to state that the plaintiff made several requests to the defendant to clear the discrepancies and anomaly in the measurement as adopted by the defendant site supervisors and Engineers?*

A: There were never any discrepancies with respect to the measurement which has been clarified by the DGM Engineering vide this letter dated 15.07.1996 and in the minutes of meeting dated 26.07.1996. It may also be noted that it was amply made clear to the plaintiff that vide clause No.2 and 14 of general conditions of contract DGM Engineering is the final authority to give a decision in case



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of dispute in terms of method of measurement. Even after receipt of clear guidelines from the defendant the plaintiff continued to request for payment which was again clearly denied by the defendant in minutes of meeting held on 26.07.1996, further the defendant had once again denied that any further payment is pending vide letter reference 24.10.1997(Ex.P8).

.....

Q.No.112: *The entire claim of the plaintiff is based on Exs.P1 and P2 and dispute arose out of those two documents?*

A: There was never a dispute in the documents Exs.P1 and P2. However, it was a misinterpretation of the plaintiff for document Ex.P2. Which was clarified by DGM Engineering vide Ex.P4, who is the competent authority as per the contract to give clarification in case of a dispute.

....

Q.No.122: *I put it to you that if there is no chaos or confusion has answered by you why did your Deputy General Manager conduct the meeting.*

A: As replied earlier, there was never any chaos or confusion with respect to the defendant. However, the plaintiff was not commencing the work at site and was creating confusion with respect to the mode of measurement. Even though the same was clarified by DGM Engineering vide Ex.P4.

.....



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Q.No.124: *What prompted the defendant to have two types of readings A and B?*

A: It was never the decision of the defendant. However as seen in Ex.P6. It was a suggestion given by the plaintiff which was agreed to by the defendant with the condition that payment would be made only as per reading A.

.....

Q.No.127: *When parties to the contract have agreed under the minutes how are you entailed to plead before this Court that the plaintiff is entitled to claim under reading A and not reading B?*

A: In the minutes Ex.P6 the plaintiff is at liberty to pursue his claim as per terms and conditions of the contract. As per the terms and conditions of the contract, the plaintiff has only two options. Either he can go for arbitration for matters which do not come under excepted matter as defined the under the work order or as per option two for excepted matter as defined the under the work order or as per option two for excepted matter plaintiff as to refer the same to the DGM Engineering whose decisions would be final and binding on the plaintiff without further appeal."

38. When the defendant asserted that for the excepted matters, the DGM (Engg.) is the final authority, which, both the learned Arbitrator and this Court had also accepted and the plaintiff had received the full and final



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payment, then it is for the plaintiff to establish that they would be entitled to over and above the amount received as the full and final payment under Ex.P.8. Absolutely, there is no material to show except the averment that the plaintiff would be entitled to make a claim as per Ex.P.2. In the absence of any technical experience, the plaintiff had done the measurement to the level of measurement “B”. The decision making power has been given to the DGM (Engineering), who is the Competent Authority as per the contract to give clarification in case of any dispute.

39. The plaintiff neither produced any expert opinion, nor cross-examined any of the workers and no independent witness was examined to establish that as per the works done by the plaintiff, they would be entitled to claim as per measurement B. The plaintiff had also accepted that before entering into contract, they inspected the subject matter of the work place and participated in the tender. According to the defendant, in Ex.P.2, there are two conditions regarding existence of additional security of Rs.25 lakhs and the defendant accepted regarding measurement that the initial level prior to filling, would be taken by holding the staff into the marshy



surface lying under water using normal human pressure, so as to allow it to find a bearing, that once the staff found its bearing and not able to move down any further, the levels were taken and recorded as initial levels till the staff found its own bearing to record it as its initial level and that after filling the compaction, the final levels were taken and volume of filling done would be calculated for the purpose of payment.

40. According to the defendant, they clarified that it was not an amendment to the general conditions of the works contract and as per Clause 14 of the general condition of the works contract, all works should be done under this contract in accordance with law with standard measurement, forms and practice prevailing in similar contract. The plaintiff misinterpreted the same in order to get a higher claim. The plaintiff had not established their case and Ex.P2 alone was not sufficient to get a higher claim as claimed by the plaintiff in the suit. Hence, the suit is not maintainable and the first issue is answered accordingly.

41. Issue No.ii :

Whether the letters of the DGM



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(Engineering) of the defendant dated 22.5.1996 and 15.7.1996 are in accordance with law and the terms of the contract are binding on the parties?

The defendant had clearly stated that there was no amendment to the terms of the works contract entered into between the parties under Ex.P1. The defendant further clearly stated that the letters of the DGM (Engineering) dated 22.5.1996 and 15.7.1996 were clarifications, only to start the work by the plaintiff.

42 In this regard, the defendant had also stated in their cross examination in Q.No.107, which is as follows:-

"Q.No.107: Is it correct to state that the plaintiff made several request to the defendant to clear the discrepancies and anomaly in the measurement as adopted by the defendant site supervisors and Engineers?

A: There was never any discrepancies with respect to the measurement which has been clarified by the DGM Engineering vide this letter dated 15.07.1996 and in the minutes of meeting dated 26.07.1996. It may also be noted that it was amply made cleared to the plaintiff that vide clause No.2 and 14 of general conditions of contract DGM Engineering is the final authority to give a decision in case



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of dispute in terms of method of measurement. Even after receipt of clear guidelines from the defendant the plaintiff continued to request for payment which was again clearly denied by the defendant in minutes of meeting held on 26.07.1996, further the defendant had once again denied that any further payment is pending vide letter reference 24.10.1997(Ex.P8)."

As stated above, it is not an amendment to the terms of contract, it is only a clarification of the DGM (Engg.) regarding the measurement of works.

43. Subsequently, the plaintiff raised a bill and they had also received the same without any protest stating that it was a full and final settlement and that the plaintiff would not make further claim. The plaintiff further tried before the learned Arbitrator and before this Court, by way of filing the said original petition. Since the defendant clearly stated that it is in the nature of clarification only and not an amendment, it is for the plaintiff to prove the same. The plaintiff failed to establish the same. Hence, the terms of the contract are not binding on the parties. Issue No.ii is answered accordingly.



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44. Issue No.iii:

Whether the suit is barred by limitation?

Though the plaintiff submitted that after receiving the bill, they made additional claim and it was rejected by the defendant and thereafter, they invoked the arbitration clause. As against arbitral Award, they filed the said original petition before this Court and liberty was given to the plaintiff by this Court to approach the civil Court. Therefore, the plaintiff filed the suit. Hence, the plaintiff prays that the periods spent during the pendency of arbitration proceedings and the said original petition before this Court, have to be excluded.

45. It is the case of the defendant that it is an excepted matter. Both the learned Arbitrator and this Court negatived the case of the plaintiff. It is only an excepted matter and no authority has jurisdiction to entertain the claim. Hence, the period spent by the plaintiff during the pendency of the arbitration proceedings and the said original petition before this Court, cannot be excluded.



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46. Ex.P.1 was entered into between the parties on 17.5.1996 and the final bill was made on 24.7.1997. The arbitral Award was passed on 23.8.2000. Challenging the same, the plaintiff filed the said original petition and this Court has disposed of the said original petition by passing the order dated 27.3.2003.

47. This Court, while deciding the said original petition on 27.3.2003, observed as follows:

“As rightly submitted by the learned Senior Counsel, in view of the findings given on merits, the right to approach the Civil Court also is taken away. It is well settled that when the Arbitrator has no jurisdiction to deal with the issue on merits, the Arbitrator ought not to have dealt with the issue on merits. Hence while accepting the finding of the Arbitrator that the issue is not arbitral and outside the scope of arbitration reference and the claim made by the petitioner cannot be decided, the findings on merits by the Arbitrator are set aside and to that extent the O.P is allowed. In other respects, the O.P is dismissed.”



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The above extracted order of this Court shows that the learned Arbitrator had no jurisdiction. Hence, the Award passed by the learned Arbitrator was set aside. Despite that, the said original petition was dismissed on the ground that the further right to approach the civil Court was also taken away. Hence, the periods spent during the pendency of the arbitration proceedings as well as the said original petition, cannot be excluded from the period of limitation. This Court ultimately holds that the suit is barred by limitation and issue No.iii is answered accordingly.

48. Issue No.iv :

Whether the defendant can go behind the letter dated 22.5.1996 amending the mode of measurement?

As already held while answering issue No.ii, the defendant made it clear even in the written statement that it is not an amendment, but only a clarification regarding measurement. There is no contra evidence furnished by the plaintiff. As already stated, the other issues are answered against the



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plaintiff and there is no need to give answer for this issue elaborately. The decision of the DGM (Engg.) would be final regarding the measurement. Therefore, the plaintiff also accepted that the condition mentioned in the work order, namely Ex.P1, indicating that the decision of the DGM (Engg.) is final. Therefore, this issue is answered accordingly.

49. Issue No.v :

Whether the plaintiff is entitled to claim interest?

Since other issues are answered against the plaintiff, the plaintiff is not entitled to claim any interest.

50. Issue No.vi :

To what other relief the plaintiff is entitled?

Even assuming that Ex.P.2 is an amendment, the plaintiff accepted the final bill, and the amount was also paid by the defendant and the plaintiff received the same as the full and final settlement. They cannot make any further claim when they accepted the bill without any prejudice. While



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receiving the final bill, the plaintiff had not stated that without prejudice to make a claim for measurement B, they received the amount. In the main contract itself, it was stated that regarding measurements, the decision of the DGM (Eng.) is final. Further, no appeal is filed against that. Both the Arbitrator and this Court in the original petition filed, confirmed the same.

51. Therefore, under the above facts and circumstances, even the Civil Court has no jurisdiction to entertain the claim, unless the plaintiff makes out a case contrary to the decision of the DGM (Engg.). Since the subject matter of dispute itself requires expertise as to take a decision, this Court cannot sit as an expert and as the Appellate Authority over the decision of the DGM (Engg.). Therefore, the plaintiff is not entitled to make any claim as sought for in the plaint.

52. Accordingly, the above civil suit is dismissed. No costs. Consequently, all connected pending applications and original applications are also dismissed.



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Plaintiff's witness: P.W.1 – Mr.Kaza Venkata Rao

Defendants' witness: D.W.1 – Mr.M.S.Sachin

Documents exhibited by the plaintiff:

SNo	Exhibit	Date	Description of the document
1	Ex.P1	17.05.1996	Xerox copy of work order with enclosures-contract dated 17.05.1996
2	Ex.P2	22.05.1996	Xerox copy of letter from the defendant to the plaintiff dated 22.05.1996
3	Ex.P3	27.06.1996	Xerox copy of letter from the plaintiff to the defendant dated 27.06.1996
4	Ex.P4	15.07.1996	Xerox copy of letter from the defendant to the plaintiff dated 15.07.1996
5	Ex.P5	20.07.1996	Xerox copy of letter from the plaintiff to the defendant dated 20.07.1996
6	Ex.P6	26.07.1996	Xerox copy of Minutes of the Meeting dated 26.07.1996
7	Ex.P7	30.07.1997	Xerox copy of Letter from the plaintiff to the defendant dated 30.07.1997
8	Ex.P8	24.10.1997	Xerox copy of letter from the defendant to the plaintiff dated 24.10.1997
9	Ex.P9	11.03.1998	Xerox copy of letter from the plaintiff to the defendant with enclosures dated 11.03.1998
10	Ex.P10	06.05.1998	Xerox copy of letter from the plaintiff to the defendant series dated 06.05.1998
11	Ex.P11	17.06.1998	Xerox copy of letter from the defendant to



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			the plaintiff dated 17.06.1998
12	Ex.P12	13.08.1998	Xerox copy of letter from the defendant to the plaintiff dated 13.08.1998
13	Ex.P13	18.08.1998	Xerox copy of letter from the Arbitrator to the parties dated 18.08.1998
14	Ex.P14	02.09.1998	Xerox copy of letter from the defendant to the plaintiff dated 02.09.1998
15	Ex.P15	14.09.1998	Xerox copy of letter from the defendant to the plaintiff dated 14.09.1998
16	Ex.P16	16.10.1998	Xerox copy of the claim statement filed by the plaintiff before the Arbitrator dated 16.10.1998
17	Ex.P17	02.02.1999	Xerox copy of counter statement filed by the defendant before the Arbitrator dated 02.02.1999
18	Ex.P18	-	Xerox copy of Reply statement filed by the plaintiff to the counter statement filed by the defendant before the Arbitrator.
19	Ex.P19	23.08.2000	Xerox copy of Award passed by the Arbitrator dated 23.08.2000
20	Ex.P20	-	Xerox copy of the petition filed by the plaintiff to set aside the Award in O.P.No.933 of 2000
21	Ex.P21	-	Xerox copy of the Reply/Counter filed by the defendant in O.P.No.933 of 2000
22	Ex.P22	-	Xerox copy of Rejoinder/Reply statement filed by the plaintiff to the reply/counter filed by the defendant in O.P.No.933 of 2000
23	Ex.P23	27.03.2003	Xerox copy of the order passed by this Court in O.P.No.933 of 2000 dated 27.03.2003



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Documents exhibited by the Defendant:

SNo	Exhibit	Date	Description of the document
1	Ex.D1	02.09.2019	Original Authorisation Letter dated 02.09.2019 issued by the defendant's Corporation

02.01.2025

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P.VELMURUGAN, J.

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