

**IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Krishna Rao

C.S. (COM) No. 56 of 2024

[Old No. C.S. 97 of 2014]

With

GA No. 13 of 2022

Rahee - GPT (JV) & Ors.

Versus

The Union of India & Ors.

Mr. Nirmalya Dasgupta

Mr. R.L. Mitra

Ms. Priyanka Dhar

... For the plaintiffs.

Mr. Pramod Kumar Drolia

Mr. Santosh Kumar Pandey

... For the defendant nos. 2 & 3.

Hearing Concluded On : 12.12.2025

Judgment on : 10.03.2026

Krishna Rao, J.:

1. The plaintiffs have initially prayed for declaration that the purported notices dated 3rd July, 2013; 30th January, 2014 and 19th /21st February, 2014, are illegal, wrongful, null and void and is of no effect or further effect and also not binding upon the parties along with the declaration that the purported invocation and/or attempt to invoke the performance bank guarantee bearing No. 01154101IPG000277 dated 19th August, 2010, for a sum of Rs.61,53,350/- is illegal, wrongful, fraudulent, null and void and is of no effect and/or further effects and also not binding upon the plaintiffs and the perpetual injunction restraining the defendants and/or their men, agents, servants, officials, assigns from giving any effect or further effects to the purported notices dated 3rd July, 2013, 30th January, 2014 and 19th/21st February, 2014 in any manner whatsoever and/or to invoke the subject performance bank guarantee being No. 01154101IPG000277 dated 19th August, 2010.
2. Subsequently, the plaintiffs have amended the plaint on three occasions that is in the year 2017, 2020 and 2022 and also incorporated prayers in the plaint in the year 2017 which reads as follows:

“c1) Declaration that the subject contract had stood discharged by reason of supervening impossibility and that the plaintiffs had accordingly stood absolved from any further performance of their reciprocal promises under the contract.

c2) Declaration that the purported communication issued by the defendant No.4 dated January 9, 2020 be adjudged and/or declared as null and void and invalid by this Hon'ble Court.

c3) Declaration that the purported invocation of the said Performance Bank Guarantee being No.01154101IPG000277 dated August 19, 2010 be declared as null and void and invalid by this Hon'ble Court.

e1) Decree in the sum of Rs.4,52,36,276.89 as pleaded in paragraph 55 (s) hereof to be paid by the defendant nos. 1 – 3 jointly and/or severally to the plaintiffs.

e2) In the alternative, as enquiry be conducted by this Hon'ble Court so as to ascertain the loss and damage suffered by the plaintiffs and a decree be passed for such sum or sums as maybe found due and payable to the plaintiffs upon such enquiry.

e3) Interest.”

- 3.** The present dispute revolves around the designing and construction of foundation, substructure, approaches including allied and miscellaneous works for Bridge No. 182 (9 x 45.7 Meters) between River IB and Brajraj Nagar stations in connection with 3rd Line between Chapma-Jharsuguda.

PLAINTIFF'S CASE:

- (i)** The plaintiff no.1 is a Joint Venture project formed by the plaintiff nos. 2 and 3.
- (ii)** The plaintiff nos. 2 and 3 are flagship companies and renowned names in the field of construction and engineering.

- (iii)** The plaintiff no.2 is engaged in the business of construction engineering and the plaintiff no. 3 is also engaged in the similar business to that of the plaintiff no.2
- (iv)** The plaintiff nos. 2 and 3 for the purpose of participating in the tender process, by virtue of Memorandum of Understanding on or around 20th February, 2010, formed the plaintiff no.1 as a Joint Venture Company.
- (v)** The plaintiff nos. 2 and 3 pursuant to the Memorandum of Understanding dated 20th February, 2010, entered into and executed a joint venture agreement amongst the plaintiff nos.2 and 3, on 29th November, 2010.
- (vi)** The plaintiffs pursuant to the tender notice dated 23rd February, 2010, issued by the defendant nos.1 and 2, submitted its offer letter on 20th February, 2010, to undertake the project for designing and construction of foundation, substructure, approaches including allied and miscellaneous works for bridge No. 182 (9 x 45.7 Meters) between IB and Brajraj Nagar station in connection with 3rd Line between Champa-Jharsuguda.
- (vii)** The defendant no.2 by its letter of acceptance dated 28th July, 2010, had duly accepted the offer of the plaintiff no.1 and thus, a contract was entered between the plaintiff no. 1 and the defendant nos. 2 and 3.

(viii) The plaintiffs thereafter deposited the earnest money of Rs. 7,28,300/-. The total value of the said project was a for a sum of Rs.12,30,67,001/-. The plaintiff no.1 furnished Bank Guarantee for a total sum of Rs. 61,53,350/- issued by the defendant no.4, namely, Allahabad Bank now merged with Indian Bank, being the Bank Guarantee No. 01154101IPG000277 dated 19th August, 2010, which was valid upto 27th December, 2012. Subsequently, from time to time the validity of Bank Guarantee was extended and the same was lastly valid upto 29th September, 2014.

(ix) The plaintiffs thereafter had duly honoured the contract by deploying their men, agents, and representatives at the work site.

(x) The plaintiffs submit that a sum of Rs.54,25,050/- is lying with the Railway Authorities, on account of deduction of 10% of the bill value deducted from the eight bills dated between 15th September, 2011 and 13th July, 2012, payable to the plaintiff no. 1, on account of security deposit.

(xi) The plaintiffs submit that even before such approval, the plaintiffs had acquired materials, equipment and machineries for commencement of necessary work.

(xii) The plaintiffs submit that from the very initial day of the contract, the plaintiffs had suffered insurgency and hooliganism

at the site, therefore, on 6th January, 2011, the plaintiff no. 2 had duly lodged complaint with the local police authority and an FIR had been registered on 7th January, 2011.

(xiii) Subsequently by a letter dated 15th January, 2011, the plaintiffs had informed the defendant no.3 about such insurgent activities carried out at the local site along with a copy of the FIR dated 7th January, 2011.

(xiv) The plaintiffs were thereafter handed over with a sub-soil investigation report and approved D.A.B, which was duly conducted by the Railway Authorities, within the scope and ambit of the contract.

(xv) In compliance with the said Purchase Order dated 28th July, 2010, issued by the defendant no.3, the plaintiffs had duly prepared drawings and designs to execute the said project and had submitted the same with the defendant no.2 for their approval and accordingly the Railway Authorities, by its letter dated 31st January, 2011, approved the same.

(xvi) The plaintiffs submit that thereafter from time to time on 23rd November, 2011, 20th December, 2011 and 26th December, 2011, there had been series of letters exchanged between the parties, with regard to the difficulties being faced by the plaintiffs at the work site.

(xvii) The plaintiffs submit that under the aforementioned circumstances by a letter dated 26th September, 2012, the plaintiffs for the first time had applied before the Railway Authorities for an extension of time for completion of the project work till 31st July, 2013.

(xviii) The plaintiffs had further lodged a police complaint and FIR on 29th September, 2012 with regard to the insurgency and local hooliganism at the work site.

(xix) The plaintiffs while undertaking the job of construction of substructure of the bridge over the river IB faced with scarcity of cement of the brand insisted upon by the defendant no.2 and the plaintiffs by a letter dated 29th September, 2012, requested the defendant no.3 to permit the plaintiffs to procure requisite quantity of cement from an alternative source.

(xx) The plaintiffs by a letter dated 1st October, 2012, provided the defendant no.3 with a work progress report of the project and requested the defendant no.2 to extend the time for completion of the project.

(xxi) The plaintiffs submit that in course of execution of the work, the plaintiffs found that the soil report provided by the defendant nos. 1 to 3 was not correct as there was rocks strata in the soil which was not suitable for Well Sinking and drilling was not possible for construction of the Well, thereby requested

the Railway Authorities to re-investigate the soil in as much as the rocky strata by a letter dated 9th October, 2012.

(xxii) The plaintiffs by a letter dated 27th November, 2012, duly appraised the defendant no.2 regarding the stoppage of work due to insurgent activities and accordingly lodged a complaint with different authorities of the railways.

(xxiii) The plaintiffs thereafter had tried to conclude the job but were suffering from not only local insurgency, insufficiency of supply of cement, flood, hooliganism and lastly the rocky strata which was not at all reflected in the geotechnical report whereas the said land had reflected as soft coal, which is wholly contrary to the actual scenario.

(xxiv) The plaintiffs submit that the defendants had further extended the period for completion of the work by its letter dated 9th April, 2013 till 31st March, 2014, as per the request of the plaintiffs.

(xxv) The plaintiffs thereafter were served with a “7 Days’ Notice” on 3rd July, 2013 by the defendant no.3, purported to be in terms of Clause 62 of the General Conditions of Contract threatening the plaintiffs to terminate the contract, to which the plaintiffs had replied by its letter dated 11th July, 2013, stating that there was no scope of issuance of a 7 days’ notice.

(xxvi) The defendants thereafter again on 30th January, 2014, issued a 7 days' notice on the plaintiffs and accordingly the plaintiffs had sent their reply on 14th February, 2014, refuting all the allegations.

(xxvii) The plaintiffs submit that the defendants had further issued a 48 hours' notice dated 19th/ 21st February, 2014, with the threat to rescind the contract.

(xxviii) The contract was subsequently terminated by the defendants on 5th March, 2014 and the present suit was filed by the plaintiffs on 4th March, 2014.

(xxix) The plaintiffs on or around 28th April, 2014, invoked the arbitration clause before the internal Arbitral Tribunal of the Railways for a monetary claim on account of total eight claims for a total sum of Rs.3,88,06,700/-. Thereafter on 21st December, 2015, the Arbitration which was initially initiated by the plaintiffs was not entertained as the claim of the plaintiffs was in excess of 20% of the contract value and as a result, the arbitral proceeding was terminated.

(xxx) Subsequent to the termination of arbitration proceeding filed by the plaintiffs, the application filed by the defendants under Section 8, was dismissed for non-prosecution by an order dated 28th January, 2016.

(xxxix) Thereafter, the plaintiffs have issued notice under Section 80(2) of the Code of Civil Procedure as to the defendants on 19th November, 2016, which was duly replied by the Railways on 10th January, 2017.

(xxxix) After termination of Arbitration proceeding, the plaintiffs had filed an amendment application before this Court for the purpose of including the claims in the present suit, being G.A. No. 4 of 2017 (Old G.A. No. 649 of 2017).

(xxxix) The amendment application filed by the plaintiffs, was allowed by this Court by an order dated 4th May, 2017. The order of amendment allowed by this Court was challenged before the Hon'ble Division Bench by the defendants but the same was dismissed by an order dated 13th June, 2017.

(xxxix) The plaintiffs have filed an application for interim order. By an order dated 10th November, 2017, this Court granted interim order.

(xxxix) The Railway authorities had challenged the said interim order dated 10th November, 2017, and the Hon'ble Division Bench had allowed the same by a judgment dated 30th September, 2019.

(xxxix) Being aggrieved and dissatisfied by the order dated 30th September, 2019, a Special Leave Petition was preferred before the Hon'ble Apex Court which was dismissed on 13th December,

2019. However, the suit was directed to be decided expeditiously within a period of six months from the date of such order.

(xxxvii) The plaintiffs had further amended the plaint on 12th March, 2020, and incorporated the Bank Guarantee amount. Being aggrieved and dissatisfied by the order dated 12th March, 2020, an appeal was preferred by the defendants before the Hon'ble Division Bench of this Court which was subsequently dismissed on 6th January, 2021.

DEFENDANT'S CASE:

(i) The defendant no.1 herein is the Union of India, the defendant no.2 is the South East Central Railway, Bilaspur, the defendant no.3 is the Deputy Chief Engineer (CON) working for gain at South East Central Railway and the defendant no. 4 is the Allahabad Bank now merged with Indian Bank.

(ii) The South East Central Railway at Bilaspur, intended to construct a bridge between IB and Brajrajnagar Stations for a third line in between Chapma-Jharsuguda and accordingly the Chief Administrative Officer (Con/Bilaspur), South East Central Railway in the State of Chhattisgarh initiated Tender Notice in the year 2010 for an estimated cost of Rs. 11,56,53,000/-.

(iii) The plaintiff no.1 had participated in the said tender process and the tender offer of the plaintiff no.1 was accepted by the

defendant no.2 vide a Letter of Acceptance dated 28th July, 2010.

- (iv)** The defendants as per requirement of the Railway Board had assigned the work of Soil Investigation to Vision Labs, Hyderabad.
- (v)** The defendants submit that the defendant no.3 had handed over the Sub-Soil Exploration Report dated 25th March, 2010 to the representative of the plaintiff no.1 on 27th August, 2010.
- (vi)** The defendants submit that in terms of the Letter of Acceptance dated 28th July, 2010, the construction of the bridge was to be completed within 27 months from the date of the Letter of Acceptance.
- (vii)** The defendants submit that the plaintiff no.1 had submitted its drawings and designs to execute the said work and the same was approved by the defendant no.2 by its letter dated 31st January, 2011.
- (viii)** The defendants state that the plaintiff no.1 had alleged that after receiving the approval letter dated 31st January, 2011, it had commenced its works and, in the process, have incurred substantial expenses. It is further alleged by the plaintiff no.1 in the process of construction, submitted necessary bar chart to

the defendant no.3 showing the progress of the construction works.

- (ix)** The defendants further submit that the plaintiff no.1 by its letter dated 1st October, 2012, that is just 27 days prior to expiry of the completion period of the project, had applied for extension of time for a further period of eight months i.e. upto 30th June, 2013 for completion of the said bridge without raising any grievance about the sub-soil investigation report of the Vision Labs, Hyderabad.
- (x)** The defendant no.3 in reply to the request of the plaintiff no.1 duly extended the time of contract upto 31st March, 2013 but in spite of such extension of time for completion of the project work on various pretexts had failed to complete the said work.
- (xi)** The defendant no.3 as per request of the plaintiffs, further extended the time from 28th October, 2012 to 31st August, 2013 under Clause 17A (with PVC) and the remaining period upto 31st March, 2014 under Clause 17B (without PVC) of the General Conditions of Contract, 2001.
- (xii)** The defendants submit that since there was lack of progress towards completion of the bridge, the defendant no.3 by a letter dated 3rd July, 2013, addressed to the plaintiff no.1, issued a seven days' notice under Clause 62 of the General Terms and Conditions of Contract, 2001 for completion of the project work,

failing which the defendants will take necessary actions to terminate the contract.

(xiii) The defendants state that despite service of seven days' notice dated 3rd July, 2013, the plaintiff no.1 failed and neglected to make sufficient progress towards the completion of the project work.

(xiv) The defendants submit that the plaintiff no.1 did not show any progress to complete the project by 31st March, 2014, and as such the defendant no.3 was compelled to issue a seven days' notice dated 30th January, 2014, under Clause 62 of General Conditions of Contract, 2001, and thereafter the defendant no.2 had issue 48 hours' notice on 19th/21st February, 2014, stating that on expiry of the said period of the instant contract for construction of bridge will stand rescinded.

(xv) The defendant no.3 did not receive any reply to the 48 hours' notice dated 19th/ 21st February, 2014, and as such the defendant no.2 by its letter dated 5th March, 2014 in absence of any action from the plaintiff no.1, rescinded the contract in terms of Clause 62 of the General Conditions of Contract, 2001.

(xvi) The defendants submit that the plaintiff no.1 after receiving the 48 hours' notice and prior to termination notice dated 5th March, 2014, on or around 4th March, 2014, instituted the Civil Suit being C.S. No. 97 of 2014 before this Court, praying for

perpetual injunction restraining the defendants from giving any effect to the notices dated 3rd July, 2013; 30th January, 2014 and 19th/21st February, 2014. Further restraining the defendants to invoke the performance Bank Guarantee dated 19th August, 2010, as extended from time to time.

(xvii) The defendants submit that the plaintiffs have filed an arbitration proceeding but the same was terminated and thereafter, the plaintiffs have made several amendments in the plaint and also amended the prayers in the suit.

(xviii) It is the case of the defendants that as the plaintiffs failed to perform the contract of construction of bridge was entrusted to another contractor as a request of which there was considerable delay in construction of the bridge. The trains' movement both passengers as well as goods, trains are delayed due to non-construction of bridge in the time by which the Railway had suffered severe financial loss.

(xix) The defendants say that after termination of the contract of the plaintiffs, the defendants have invited fresh tender for the same bridge and miscellaneous job. The total job value of the said tender was Rs. 22,29,22,866.93 though the contract value of the plaintiffs in the year 2010 was Rs. 12,30,67,001/-, thus the defendants have suffered financial loss of Rs. 9,98,55,865.93.

~~(xx)~~ The defendants have filed written statement along with counter claims for an amount of Rs. 15,30,09,215.53 against the plaintiffs.

4. On the basis of the pleadings of the parties by an order dated 18th January, 2022, this Court had framed the following issues:

ISSUES:-

- “1. Is the suit maintainable, as framed?*
- 2. Whether the plaintiffs failed to perform any part of the contract despite the same being achievable under the contract conditions?*
- 3. Whether the designs; drawings and work methodology approved by the Defendant no.2 on the basis of the Sub-Soil Exploration Report and GAD made over by the defendant no.2 ultimately frustrate the contract and render it impossible of performance?*
- 4. If the answer to the previous issue be in the negative, whether supervening and intervening circumstances, including the work methodology approved by the Defendant no.2, render the contract unworkable and unfeasible in terms of the contract conditions?*
- 5. Whether it was the plaintiffs who were alone responsible for the delay in the performance of their reciprocal promises under the contract or whether such delay was attributable to reasons beyond the control of the plaintiffs, including force majeure conditions?*
- 6. Whether the issuance of the notices dated 3rd July, 2013; 30th January, 2014; 19th/21st February 2014 and*

the issuance of the notice of termination dated 5th March, 2014 were justified, reasonable and warranted in the facts and circumstances of the instant case?

7. Whether the subject contract stood discharged in the facts of the case and the plaintiffs accordingly stood absolved from any further performance of their reciprocal promises under the subject contract?

8. Whether the invocation and encashment by the defendant no.2 of the Bank Guarantee furnished by the plaintiffs, being BG No.01154101IPG000277 dated 19th August, 2010, for Rs. 61,53,350.00/- as extended from time to time, was valid, proper, justified and warranted in the facts and circumstances of the instant case?

9. In the event, the answer to the previous issue be in the negative, to what sum or sums are the plaintiffs entitled, towards and as compensation for the loss and damage suffered by the plaintiffs as a result of the invocation and encashment of the aforesaid bank guarantee?

10. Whether the plaintiffs have become entitled to compensation for the loss sustained by the plaintiffs in the facts and circumstances of the instant case?

11. What sums, if any, are the plaintiffs entitled to in the facts and circumstances of the instant case?

12. Whether the defendant no.2 is entitled to its counterclaim and if so, to what extent?

13. To what other or further reliefs are the parties entitled, in the facts and circumstances of the instant case?

14. Whether the suit is barred by the principles of waiver, estoppel, and acquiescence?

15. Whether the suit is barred by limitation?

16. Whether the suit suffers from want of cause of action?

17. Whether the plaintiffs are liable to pay costs and compensation to the defendants for committing breach of contract?"

5. The plaintiffs in order to prove its case has examined 3 witnesses, namely:

(a) **P.W.-1** - Pradip Khaitan, the Managing Director of the plaintiff no.2.

(b) **P.W.-2** - Pradip Kumar Mukherjee, consultant and advisor in engineering technicalities for construction works.

(c) **P.W.-3** - Anil Kumar Singh, Joint General Manager of the plaintiff no. 2.

6. During the evidence of the plaintiff's witnesses, altogether "74" documents, were marked and exhibited as **"Exhibit - A to Exhibit - VVV"**.

Exhibit – A: *Certified copy of the Resolution passed by the Board of Directors, dated 13th February, 2020.*

Exhibit – B: *Certified and true copy of the resolution dated 6th February, 2020, passed by the Executive Committee of the Board of Directors of GPT Infraprojects Ltd.*

Exhibit – C: *Copy of the Minutes of the Meeting dated 13th February, 2020 of Rahee-GPT (JV).*

Exhibit – D: *Copy of the original agreement dated 7th September, 2011.*

Exhibit – E: *Copy of the Notice Inviting Tender No. CES/BSP/0910/69, issued by the office of the Chief Administrative Officer (Construction), Bilaspur.*

Exhibit – F: *Copy of the offer letter dated 20th February, 2010.*

Exhibit – G: *Copy of the letter dated 7th March, 2022.*

Exhibit – H: *Copy of the Letter of Acceptance dated 28th July, 2010, issued by the defendants in favour of the plaintiffs.*

Exhibit – I: *Copy of the Tender Notice dated 23rd June, 2014.*

Exhibit – J: *Copy of the Completion Certificate dated 14th July, 2015, issued by the Deputy Chief Engineer (Construction), South Eastern Railway, Jharsuguda.*

Exhibit – K: *Copy of the Bank Guarantee for a sum of Rs.61,53,350/- dated 19th August, 2010, furnished by the plaintiffs.*

Exhibit – L: *Copy of the extended Bank Guarantee being the No.0115410IPG000277, for a sum of Rs.61,53,350/-, dated 23rd March, 2013.*

Exhibit – M: Copy of the supplementary agreement dated 9th April, 2013.

Exhibit – N: Copy of a 7 days' notice dated 3rd July, 2013 issued to the plaintiffs by the defendants.

Exhibit – O: Copy of the letter dated 11th July, 2013 issued by the plaintiffs to the defendants that there was no scope of issuance of a 7 days' notice.

Exhibit – P: Copy of a 7 days' notice dated 30th January, 2014 issued by the defendants to the plaintiffs.

Exhibit – Q: Copy of a 48 hours' notice dated 19th / 21st February, 2014 issued by the defendants to the plaintiffs.

Exhibit – R: Copy of the notice dated 5th March, 2014, issued by the defendants, addressing the plaintiffs, for termination of the contract.

Exhibit – S: Copy of the notice dated 6th March, 2014, issued by the South East Central Railway, addressing to the plaintiffs, terminating the work contract.

Exhibit – T: Copy of the letter dated 10th January, 2017, issued by the South East Central Railway, in reply to the letter dated 19th November, 2016, issued by the plaintiffs.

Exhibit – U: Copies of several relevant bills issued for the purpose of the work contract.

Exhibit – V: Copy of a Geo Technical Report/ Sub-Soil Investigation Report, approved by D.A.B., conducted by the Railway, which was handed over to the plaintiffs.

Exhibit – W: Copy of the letter dated 30th August, 2010, issued by Rahee-GPT (JV), addressing the Chief Engineer of the South East Central Railway, regarding the soil exploration report and GAD on 27th August, 2010.

Exhibit – X: Copy of notice dated 19th November, 2016, along with the original postal receipts.

Exhibit – Y: Copy of the Memorandum of Understanding dated 20th February, 2010.

Exhibit – Z, Z/1, Z/2 and Z/3: Copy of the Joint Venture Agreement dated 26th November, 2010 between M/s. Rahee Infratech Ltd. and M/s. GPT Infraprojects Ltd.

Exhibit – AA: Copy of the letter dated 9th December, 2010.

Exhibit – BB & BB/1: Copy of the letter dated 6th January, 2011, issued by Rahee Infratech Ltd. addressing to the Inspector-in-Charge, GRP, South East Central Railway, Jharsuguda.

Exhibit – CC: Copy of the FIR dated 7th January, 2011, recording the loss of the files which had the original documents.

Exhibit – DD and DD/1: Copy of the letter dated 15th January, 2011 along with the copy of FIR lodged by the plaintiffs.

Exhibit – EE and EE/1: Copy of the letter dated 17th February, 2011.

Exhibit – FF and FF/1: Copy of the letter dated 23rd November, 2011.

Exhibit – GG and GG/1: Copy of a letter dated 20th December, 2011.

Exhibit – HH and HH/1: Copy of a letter dated 26th December, 2011.

Exhibit – II and II/1: Copy of the complaint letter dated 29th September, 2012.

Exhibit – JJ, JJ/1, JJ/2 and JJ/3: Copy of the FIR dated 29th September, 2012, Lodged by the plaintiffs.

Exhibit – KK and KK/1: Copy of the letter dated 9th October, 2012.

Exhibit – LL: Copy of the letter dated 29th September, 2012.

Exhibit – MM and MM/1: Copy of the letter dated 27th November, 2012.

Exhibit – NN and NN/1: Copy of the letter dated 14th February, 2014.

Exhibit – OO and OO/1: Copy of the letter dated 5th April, 2014.

Exhibit – PP: Copy of the General Conditions of the Contract.

Exhibit – QQ and QQ/1: Certified true copy of the Resolution passed at the meeting held on 12th October, 2022.

Exhibit – RR and RR/1: Resolution dated 17th July, 2023 of Rahee Infratech Limited.

Exhibit – SS (Collectively), SS/1, SS/2 and SS/3: Copies of the original Invoices raised by Prahlad Biswas in favour of the defendant no.2 for Reinforcement & Shuttering work amounting to Rs.96,159 and TDS Certificates.

Exhibit – TT (Collectively) and TT/1 to TT/4: Copies of the Invoices raised by one Prahlad Biswas.

Exhibit – UU (Collectively), UU/1, UU/2, UU/3 and UU/4 : Copies of the original Invoices raised by Prahlad Biswas.

Exhibit – VV (Collectively) and VV/1: Copies of the original Invoices raised by Prahlad Biswas in favour of the defendant no.2 for Reinforcement & Shuttering work amounting to Rs.96,159 and TDS Certificates along with signatures appearing at the documents.

Exhibit – WW: Copies of several TDS Certificates.

Exhibit – XX (Collectively) : Copies of original bills issued by Rahee Infratech Limited.

Exhibit – YY (Collectively) : Copies of original bills issued by Rahee Infratech Limited.

Exhibit – ZZ (Collectively) : Copies of original bills issued by Rahee Infratech Limited.

Exhibit – AAA (Collectively) : Copies of original bills issued by Rahee Infratech Limited.

Exhibit – BBB (Collectively) : Copies of original bills issued by Rahee Infratech Limited.

Exhibit – CCC (Collectively) : Copies of original bills issued by Rahee Infratech Limited.

Exhibit – DDD (Collectively) : Copies of original bills issued by Rahee Infratech Limited.

Exhibit – EEE (Collectively) : Copies of original bills issued by Rahee Infratech Limited.

Exhibit – FFF (Collectively) : Copies of original bills issued by Rahee Infratech Limited.

Exhibit – GGG (Collectively) : Copies of original bills issued by Rahee Infratech Limited.

Exhibit – HHH (Collectively) : Copies of original bills issued by Rahee Infratech Limited.

Exhibit – III (Collectively) : Copies of original bills issued by Rahee Infratech Limited.

Exhibit – JJJ and JJJ/1 to JJJ/33 (Collectively): Copies of Depositors Copies of Employees State Insurance Corporation along with signatures of Mr. Ravi Khaitan.

Exhibit – KKK: Copy of the Final Bill dated 25th April, 2013, issued by Emak Consulting Engineering Pvt. Ltd. in favour of the Plaintiffs, amounting to Rs.1,100,00/-.

Exhibit – LLL: Copy of an invoice dated 26th April, 2013, issued by Jadavpur University for Mix of M25 Grade Concrete, amounting to Rs.11,236/-

Exhibit – MMM (Collectively): Copies of the original bills raised by M/s. Konark Filling Station, in favour of the plaintiffs.

Exhibit – NNN (Collectively) : Copies of the original bills raised by M/s. Santoshi Maa Security Services, in favour of the plaintiffs.

Exhibit – OOO (Collectively) : Copies of challans issued by the South East Central Railway, on account of Contract Certificate.

X (Marked for identification): Copies of Statement of Accounts of M/s. Rahee Infratech Limited of ICICI Bank.

X1 (Marked for identification): Copies of Statement of Accounts of M/s. Rahee Infratech Limited of Allahabad Bank.

Exhibit – PPP (Collectively) : Copies of Paysheet for Staff (Brijarajnagar) of the Plaintiffs.

Exhibit – QQQ (Collectively) : Copy of a Debit/Credit Certificate dated 9th January, 2020 and a letter dated 20th January, 2020, issued by the Allahabad Bank regarding the Bank Guarantee.

Exhibit – RRR (Collectively): Copies of TDS Certificate of Rahee Infratech Limited.

Exhibit – SSS (Collectively): Copies of TDS Certificate of Rahee Infratech Limited.

Exhibit – TTT (Collectively): Copies of TDS Certificate of Rahee Infratech Limited.

Exhibit – UUU (Collectively): Copies of TDS Certificate of Rahee Infratech Limited.

Exhibit – VVV (Collectively): Copies of TDS Certificate of Rahee Infratech Limited.

7. The defendants in order to prove their case, have examined **two (2)** witnesses, namely:

(a) Mr. Arpit Khunteta, Executive Engineer, Construction Division, South East Central Railway,

(b) Mr. Teophil Ekka, authorized by the Deputy Chief Engineer Construction – II, Bilaspur to depose on behalf of the defendants.

8. To prove the case, the defendants have exhibited “22” documents and are marked as “Exhibit – 1 to Exhibit – 22”:

Exhibit – 1: *Copy of the letter 30th August, 2010, sent by the plaintiffs to defendant no.3.*

Exhibit – 2: *Designs and detailed structured drawings prepared by the plaintiffs on the basis of the sub-soil exploration report.*

Exhibit – 3: *Copy of the letter dated 31st January, 2011, issued by the plaintiffs to the Chief Engineer (Construction) - I.*

X3 (Marked for identification): *Copy of the letter dated 8th February, 2011, issued by the Deputy Chief Engineer Construction, Raigarh, the defendant no.3 herein.*

X4 (Marked for identification): *Copy of a letter dated 16th June, 2011, issued by the defendant no.3, addressing the plaintiffs.*

X5 (Marked for identification): *Copy of the letter dated 24th August, 2011, issued by the defendant no.3, addressing the plaintiffs, conveying the lack of laboratory near worksite.*

X6 (Marked for identification): *Copy of the letter dated 30th August, 2011, addressed to plaintiffs issued by the defendant no.2, Chief Engineer.*

X7 (Marked for identification): Copy of the letter dated 11th October, 2011, issued by the defendant no.3 to the plaintiff no.1.

X8 (Marked for identification): Copy of the letter dated 21st October, 2011, which is a continuation of the letter dated 11th October, 2011, issued by the defendant no.3 to the plaintiffs.

X9 (Marked for identification): Copy of the letter dated 30th November, 2011, issued by the defendant no.3 to the plaintiff no.1, highlighting that the work programme is unsatisfactory.

Exhibit – 4: Copy of the letter dated 20th December, 2011, addressed to the Deputy Chief Engineer from the plaintiffs in response to the defendant no.3's letter dated 30th November, 2011.

X10 (Marked for identification): Copy of the letter dated 10th March, 2012, issued from the defendant no.3 to the plaintiff no.1, highlighting about the slow progress in work.

Exhibit – 5: Copy of the letter dated 4th May, 2012, issued by the plaintiffs to the Deputy Chief Engineer (Construction) II.

X11 (Marked for identification): Copy of the letter dated 5th May, 2012, from the Deputy Chief Engineer to the plaintiff no.1.

Exhibit – 6: Copy of an application filed by the plaintiffs to the Deputy Chief Engineer (Construction) for extension of completion period for the extend agreement.

Exhibit – 7 and 7/1: Copy of the letter dated 27th May, 2013, issued by the Deputy Chief Engineer (Construction) to the plaintiffs.

Exhibit – 8: Copy of the notice dated 3rd July, 2013, issued by the Deputy Chief Engineer (Construction) to the plaintiffs due to unsatisfactory progress in work.

Exhibit – 9: Copy of the letter dated 11th July, 2013, issued by the plaintiffs.

X12 (Marked for identification): Copy of the letter dated 19th September, 2013, issued by the South East Central Railway to the plaintiffs.

Exhibit – 10 and 10/1: Copy of the letter dated 29th October, 2013 issued by the Deputy Chief Engineer (Construction) to the plaintiffs.

X13 (Marked for identification): Copy of the letter dated 25th November, 2013, issued by the South East Central Railway to the plaintiffs.

Exhibit – 11 and 11/1: Copy of the notice dated 30th January, 2014, issued by the Deputy Chief Engineer (Construction) to the plaintiffs.

X14 (Marked for identification): Copy the Railway's 48 hours' notice dated 19th / 21st February, 2014, issued by the Deputy Chief Engineer (Construction) to the plaintiffs.

X15 (Marked for identification): Copy of the termination notice dated 5th March, 2014, issued by the defendants to the plaintiffs.

Exhibit – 12: Copy of the Tender Notice No. CEC/BSP/15-16/71 dated 16th September, 2015.

Exhibit– 13 : Copy of the letter of authorization, issued by the Deputy Chief Engineer (Construction) – II, Bilaspur, authorizing Mr. Teophil Ekka.

Exhibit – 14: Copy of the letter dated 16th June, 2011, issued by the Deputy Chief Engineer Construction – II, Bilaspur, to the plaintiffs.

Exhibit – 15 (with objection) : Copy of the letter dated 24th August, 2011, issued by the Deputy Chief Engineer Construction– II, Bilaspur to the plaintiffs.

Exhibit – 16 (with objection): Copy of the letter dated 30th August, 2011, signed and issued by the

Deputy Chief Engineer Construction-I, Bilaspur, Mr. A.K. Singh, to the plaintiffs.

Exhibit – 17: *Copy of the letter dated 11th October, 2011, signed and issued by the Deputy Chief Engineer (Construction) - II, Raigarh, Shri M.B. Satyanarayan, to the plaintiffs.*

Exhibit – 18: *Copy of the letter dated 21st October, 2011, signed and issued by the Deputy Chief Engineer (Construction) - II, Raigarh, Shri M.B. Satyanarayan, to the plaintiffs.*

Exhibit – 19: *Copy of the letter dated 30th November, 2011, signed and issued by the Deputy Chief Engineer Construction) - II, Raigarh, Shri M.B. Satyanarayan, to the plaintiffs.*

Exhibit – 20: *Copy of the letter dated 5th May, 2012, signed and issued by the Deputy Chief Engineer Construction) - II, Raigarh, Shri M.B. Satyanarayan, to the plaintiffs.*

Exhibit – 21: *Copy of the letter dated 19th September, 2013, signed and issued by the Deputy Chief Engineer Construction) - II, Raigarh, Shri Ashok Kumar Suryavanshi, to the plaintiffs.*

Exhibit – 22: *Copy of the letter dated 25th November, 2013, signed and issued by the Deputy Chief Engineer (Construction) - II, Raigarh, Shri Ashok Kumar Suryavanshi, to the plaintiffs.*

9. DECISIONS WITH REASONS:

Issue Nos. 1, 15 and 16 are taken up together:

- a.** The defendants have raised two questions in the Issue No. 1 i.e.
 - (i) No cause of action arose for filing of the suit within the

jurisdiction of this Court and (ii) The defendant Railway is not having any office within the jurisdiction of this Court.

- b. Mr. Pramod Kumar Drolia, Learned Advocate representing the defendant nos. 2 and 3, relied upon the judgement in the case of ***Rekhab Chand Jain Vs. Paras Das Bhartiya*** reported in ***AIR 1970 Cal 394*** and submits that it is settled law that for the purposes of invoking jurisdiction of the Court the expression “*Case of Action*” has a distinct connotation. Merely saying that something has happened within the jurisdiction of this Court would not be effective in conferring jurisdiction on the Court or to ask for leave under Clause 12 of the Letters Patent. It must first be a cause of action in the suit, secondly, such cause of action must arise within the jurisdiction of this Court and thirdly, that part cause of action on which jurisdiction is sought for, must affect the defendants against whom relief is asked for.
- c. Mr. Drolia relied upon the judgment in the case of ***Karam Chand Thapar and Bros. (Coal Sales) Vs. Inder Mohan Kapoor*** reported in ***AIR 1972 Cal 82*** and submits that to succeed in an application for revocation of leave on the ground of balance of convenience, a strong case has to be made out. In other words, a mere balance of convenience would not be enough but it must be such that it would be overwhelmingly in favour of the suit being heard by the Court other than the Court granting the leave. The paramount consideration for the

Court in such a case would be to consider whether in acquiring jurisdiction it would cause serious prejudice resulting in injustice to the defendant if the suit would be permitted to be proceeded within the Court where it has been instituted with such leave.

- d. Mr. Drolia further relied upon the judgment in the case of ***Ultra Engineering Industries Pvt. Ltd. Vs. Spintex Industries Pvt. Ltd.*** reported in ***AIR 1980 Cal 159*** and submits that admittedly the defendant has no office at Kolkata and the transaction has been entered between the parties outside Kolkata.
- e. Mr. Nirmalya Dasgupta, Learned Advocate representing the plaintiffs, has relied upon the judgment in the case of ***Om Prakash Srivastava Vs. Union of India and Another*** reported in ***(2006) 6 SCC 207*** and submits that cause of action consists of a bundle of facts, which give cause to enforce the legal inquiry for redress in a Court of law.
- f. Mr. Dasgupta submits that in the present case the plaintiffs have submitted its offer from Kolkata and the after acceptance of the offer of the plaintiffs, the defendants have communicated the same to the plaintiffs. He submits that earnest money and performance guarantee have been submitted at Allahabad Bank now merged with Indian Bank at Kolkata, Park Street Branch,

all correspondences have been made between the plaintiffs and defendants at the registered address of the plaintiffs at Kolkata and the defendants have invoked the performance guarantee of the plaintiffs from the Allahabad Bank now Indian Bank which is within the Jurisdiction of this Court.

- g.** Pursuant to the notice issued by the defendant nos.1 and 2, the plaintiff no.1 has submitted its offer from its office at Kolkata to undertake the project for designing and construction of foundation, substructure, approaches including allied and miscellaneous works for Bridge No.182 (9 x 45.7 mtrs.) between IB and Brajraj Nagar stations in connection with 3rd Line between Champa–Jharsuguda.

By a letter dated 28th July, 2010, the defendant no. 3 informed the plaintiffs that the competent authority accepted the offer of the plaintiffs for the abovementioned work. The defendant no.3 addressed the said letter to the plaintiffs at Kolkata address and the plaintiffs have accepted the same at Kolkata. The offer of acceptance is marked as Exhibit –H.

- h.** The plaintiffs while submitting its offer letter to the defendants, the plaintiffs have also deposited earnest money of Rs. 7,28,300/- in the form of fixed deposit Account No. 50026690741 issued by the Allahabad Bank now merged with Indian Bank, Park Street Branch, Kolkata and after acceptance

of the offer of the plaintiffs, the earnest money deposit converted to initial security deposit.

- i. The total values of the work was Rs. 12,30,67,001/-. The plaintiffs were required to furnish bank guarantee for a total sum of Rs. 61,53,350/- by way of performance guarantee in the format as prescribed in the contract. The plaintiffs furnished bank guarantee for a sum of Rs. 61,53,350/- issued by the Allahabad Bank now Indian Bank, Park Street Branch which is within the jurisdiction of this Court being Bank Guarantee No. 01154101IPG000277 dated 19th August, 2010. The Bank Guarantee furnished by the plaintiffs was extended from time to time till 29th September, 2014.
- j. On 3rd July, 2013 and 30th January, 2014, the defendants issued notices upon the plaintiffs at Kolkata address directing the plaintiffs to expedite the work failing which action will be taken to terminate the contract. The said communications were marked as Exhibits-N and P. On 19th /21st February, 2014, the defendants have again issued 48 hours' notice to the plaintiffs at Kolkata being Exhibit-Q informing the plaintiffs that on expiry of the period, the contract of the plaintiffs will be terminated and the security deposit and performance guarantee shall be encashed. In prayer "c3" of the plaint, the plaintiffs have prayed for declaration that the purported invocation of the said performance bank guarantee as null and void and invalid.

- k. In the case of **A.B.C. Laminart (P) Ltd. Vs. A.P. Agencies, Salem**, reported in **(1989) 2 SCC 163**, the Hon'ble Supreme Court held that:

“12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.”

1. This Court finds that though the office of the defendants is situated at Bilaspur outside the jurisdiction of this Court but all the correspondences were made by the defendants with the plaintiffs at Kolkata address and the plaintiffs have deposited earnest money at Allahabad Bank, Park Street Branch, Kolkata, now Indian Bank which subsequently converted as security deposit and the plaintiffs have deposited performance guarantee with the Allahabad Bank, Park Street Branch, Kolkata now Indian Bank and the defendants have accepted

the same and also invoked the said bank guarantee which the plaintiffs have challenged in the present suit.

m. This Court finds that part cause of action for filing the suit arose within the jurisdiction of this Court, no part of the claim is barred by limitation and the suit filed by the plaintiffs, is in proper form. Thus the suit filed by the plaintiffs, is maintainable. Issue nos. 15 and 16 are decided in favour of the plaintiffs and against the defendants.

10. Issue Nos. 2 to 14 and 17 are taken up together for consideration as all the issues are interconnected.

a. Tender of the plaintiffs was accepted by the defendants on 28th July, 2010, which is marked as Exhibit-H. As per the acceptance letter, construction of bridge was to be completed within 27 months from the date of acceptance. After issuance of letter of acceptance, a contract was entered between the plaintiffs and the defendants, which is marked as Exhibit-D.

b. The defendants have relied upon Clauses 5.1 and 7.1 of Chapter XII, Special Conditions of Contract and submit that for use of explosive in process of sinking of wells, it is clearly mentioned that no claim due to any obstruction met with during sinking or due to any other difficulties experience in the process shall be entertained. As per the case of the defendants,

on 4th May, 2012 being Exhibit-5, the plaintiffs have requested for permission to use explosive for the purpose of sinking the wells in hard strata and in response to the request of the plaintiffs, the defendants by a letter dated 5th May, 2012, being Exhibit-20 permitted the plaintiffs to use necessary controlled blasting for sinking of wells as per the relevant guidelines and IS Code.

Clauses 5.1 and 7.1 of the Special Conditions of Contracts:

***“5.1** The curbs shall be places and cast truly in position. The steining shall be constructed in stages and the well sunk vertical within permissible limit (as detailed in clause 6.1) to reach the final founding levels as required. Suitable method of sinking other than pneumatic sinking may include open dredging with contractors construction plant, employment drivers, and use of explosive required in the process of normal sinking, however no claim due to any obstructions such as isolated boulders, log of trees, sunken boats etc. met with during sinking or due to any other difficulties experienced in this process shall be entertained. No claim in respect of difficulties due to sand blowing met with during sinking of wells, on account of heavy Kent ledge required. Either for sinking of wells or for any other reasons shall be entertained by the railways.*

***7.1** Explosives shall generally not be used as an aided for well sinking. However, in cases where explosives are to be used prior approval of the Engineer shall be obtained. All prevalent laws concerning handling, storing and using of explosives shall be strictly followed. If blasting has been used for setting the well after it has reached the designed foundation level, normally 24 hours shall be allowed to lapses before the bottom plug is laid. All safety precautions shall be taken as per IS:4081 “safety Code for Blasting and related Drilling Operations”, to the extent applicable whoever blasting is restored to.”*

- c.** After issuance of letter of acceptance on 27th August, 2010, the defendant no. 3 handed over Sub-Soil Exploration Report to the plaintiffs with the instruction not to carry out any its own independent soil investigation. The Sub-Soil Exploration Report did not indicate the existence of any hard rock and only mentioned soft coal/ sand stone in the geotechnical investigation report. The Schedule of Quantities and Rates forming the part of the contract provided for sinking of 8.0 mtr. to 10.0 mtr. dia circular type wells. The plaintiffs had not anticipated or apprehend the existence of any hard rock strata on an average of 10 mtrs below the ground level. The plaintiffs had agreed to the price schedule and rates in the contract on the believe that the work of construction would be over soft subsoil and not over hard subsoil including coal and accordingly quoted the rates. During execution of the work, the plaintiffs find that the rock strata does not match with the soil report provided by the defendants. The wells had reached the hard rock strata after sinking the wells through the soil bed and to sink the wells further into the thick hard rock blasting of the rock was adopted as it was become necessary and emergent.
- d.** For carrying out blasting activity with the help of explosives necessary licence was required and the same had to be done through a licenced agency having the requisite licence for carrying

out blasting activities. The Bill of Quantities did not provide for the rates to undertake well foundation under rocky strata. Different rates for undertaking well foundation under the rocky strata were not agreed by the defendants. There is no mention of any hard rock in description of Item No. 2 in Schedule-C of the tender document, which reads as follows:

SCHEDULE-C (Well Sinking Works)

Sl No.	Item	Unit	Rate in Figures	Rate in Words	Qty	Amount (Rs.)
2.	<i>Sinking of 8.0m to 10.0 m dia circular type well through all kinds of soils including diverting flow of water, clearing all obstructions like boulder, timbers etc., dewatering if required with contractor's pump and fuel, benching soft rock if any and dredging with use of divers where necessary (complete dredging plants with derricks or cranes grabs pumping sets air compressor consumable stores including explosives for controlled blasting to facilitate placing removing</i>	<i>RM</i>	<i>96000/-</i>	<i>Rupees Ninety six thousand only</i>	<i>100</i>	<i>96,00,000/-</i>

<i>kentleges and seating the wells and specialized staff such as divers and other labour with necessary equipment to be supplied and worked by the contractor at his own cost) in all types of strata till the cutting edge reaches the required level as approved by the Engineer-in-Charge. and including loading, unloading of kent-ledger, sand bags etc. on well, rectification of tilts and shifts, erection and removal of all derrick platform, painting of gauges on outer surface of well steining and disposal of the dredged muck from within the well as directed by the engineer or his representative with all lifts, descents and leads and including all labour and materials etc. complete.</i> Note The depts. of sinking will					
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	<i>be measured from the level at which cutting edges placed initially.</i>					
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- e. As per request of the plaintiffs, the defendants have allowed the plaintiffs to use necessary controlled blasting for sinking of wells as per the relevant guidelines and IS Code. The plaintiffs could not continue with the blasting for sinking of wells as the defendants have not provided different rates for undertaking well foundation under rocky strata. Immediately after the termination of contract, the defendants have published a tender for the balance work in which higher rates was offered to complete the work and in the said tender BoQ items was introduced for undertaking the well foundation under rocky strata. Item no.2 of Schedule-C of the tender in which the plaintiffs have participated and work order was issued, in the said tender document, there is no mentioning of any hard soil, hard rock or coal and an amount for per running metre was Rs. 96,000/- but for the same balance work, in the new tender, the defendants have fixed the rate of Rs. 2,50,000/- per running meter for hard soil, coal and hard rock which is marked as Exhibit-I. This act of the defendants proves that instead of considering the request of the plaintiffs for enhancement of rate for hard soil, hard rock and coal from Rs. 96,000/-, the defendants have forced the plaintiffs to terminate the tender and thereafter the defendants have published a

separate tender and have provided rate of Rs. 2,50,000/-. In the second tender, the defendants have further fixed the rate of other kind of soil except in hard soil and coal of Rs. 1,20,500/- though in the tender of the plaintiffs for the same work, the amount was fixed at Rs. 96,000/-.

- f.** The design, drawing and work methodology (GAD) based on Sub-Soil Exploration Report was handed over to the plaintiffs which is marked as Exhibit-2. In the said report, a bar chart has been appended wherein hard rock has been clearly shown. The plaintiffs by a letter dated 4th May, 2012, being Exhibit-5 sought for permission for use of explosive for blasting in sinking of wells in hard strata. The plaintiffs prepared the design and drawing based on the Sub-Soil Exploration Report. The defendants by a letter dated 31st January, 2011, being Exhibit-3 provided two instructions to the plaintiffs for execution of the project namely:

(i) *All necessary arrangement to penetrate the wells in hard rock should be made prior to fabrication of well curb.*

(ii) *Initially only one well should be lowered completely in the ground so after the success of the sinking of one well completely, the task of sinking of other wells will be easier.*

During the argument, the defendants have taken stand that by a letter dated 31st January, 2011, the defendants have provided two instructions to the plaintiffs for execution of the

project but the plaintiffs did not followed the said instructions due to which the defendants have suffered severe loss. The said stand is contrary to further correspondences made between the parties. After the letter dated 31st January, 2011, the defendants have issued several letters to the plaintiffs to expedite the work. In none of the correspondences, the defendants have restrained the plaintiffs not to proceed with sinking of other wells till one well is completed. In the other hand, the defendants requested the plaintiffs to complete the work.

- g.** At the time of examination of the plaintiffs, witness no.2, namely, Pradip Kumar Mukherjee, who is having degree from Kharagpur IIT in the year 1978 in cell mechanics and foundation engineering has deposed that whenever a rocky strata is encountering the option to sink the well has to be based on the other devices other than the normal sinking process through a grab and which one has to take recourse to control blasting and even if that does not work then it has to be pneumatic sinking. He has further stated that narrative of soil report is completely different from what has been actually encountered during sinking. It is also stated that the narrative was available in the Bills of Quantities (BoQ) items. There was no other reference of any other specification in the contract. The narrative of the BoQ is to be taken as actual soil report.

The basic difference is that in the narrative BoQ item, it was expressly specified that the well has to be sunk through all kinds of soil. Generally all kinds of soil is considered as clay, sand or silt. When actually went on to sink the wells and encountered rock which was not under the category of all kinds of soil. Sinking through soil and sinking through rock are completely different and the methodology is also different.

Exhibit-1 is the Bill of Quantities which includes the item for sinking of the well under Schedule-C. Item-2 of Schedule-C of BoQ proposed sinking is mainly through winch and gravity method. It is a common condition for sinking through such soil. The moment it is to be sunk through rock which means that the well cutting edge has to penetrate rock and the method of sinking completely changes, the sinking then becomes very slow process and an expensive one and it has to be accomplished through blasting, chiselling and removal of debris in very small quantities.

As per the evidence of P.W.2 sink through all types of soil as mentioned in the BoQ, the sinking can be one foot to three feet per day and one has to penetrate rock through blasting, chiselling, the total sinking cannot exceed beyond four inches and the expenditure becomes much more, at least three fold of the given rate.

Exhibit-1 is the First Tender document and Exhibit-D is the Second Tender document. The First Tender document had only one item under item no.2 in Schedule –C for sinking of the wells. In the Second Tender document, another item under item no. 2(a) was added with a separate rate stating that the well is to sink through hard rock having greater value. This itself proved that the rock did exist under the riverbed and the rock does not fall under the category of all kinds of soil. The defendants have proposed additional rate for the portion which has to be penetrate rock.

During the cross-examination of P.W.2, the learned counsel for the defendants had put the specific question that “Did you find any fault in the report?” and the P.W.2 has given a specific answer to the said question that “Fault as such is that the narrative of the soil mentioned there does not really match with the existing soil”.

Another question was put to P.W.2 “that according to you, the report is not perfect?” and the answer was “I agree”.

From the trend of the cross-examination by the defendants to the P.W.2, it is admitted by the defendants that the report is faulty and is not perfect.

Section 56 of the Indian Contract Act, 1872, reads as follows:

“56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do an act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.— Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the nonperformance of the promise.”

In the present case, the defendants in the first tender document had only one item under item no.2 in Schedule –C for sinking of the wells. In the second tender another item under item no. 2(a) was added with a separate rate stating that the well is to sink through hard rock having greater value. This itself proved that the rock did exist under the riverbed and the rock does not fall under the category of all kinds of soil. The defendants have proposed additional rate for the portion which has to be penetrate rock. The defendants have not denied with regard to availability of rock while sinking the well. The defendants have also allowed the plaintiffs for use of blasting. It is also admitted that the procedure for sinking by blasting is costlier than the normal sinking. There is no provision in the

tender document for Bill of Quantities. The defendants were not ready to enhance the rate other than the rate quoted by the plaintiffs in spite of having knowledge and admission about the presence of hard rock. In the second tender for the balance work, the defendants have proposed addition rate which has to be penetrate rock. Thus it was not possible for the plaintiffs to complete the awarded work.

- h.** The defendants have issued notices dated 3rd July, 2013 (Exhibit-8), 30th January, 2014 (Exhibit-P), 19th/21st February, 2014 (Exhibit-Q) and 5th March, 2014 (Exhibit -R) wherein the defendants have issued 7 days and 48 hours' notices to the plaintiffs and lastly terminated the contract of the plaintiffs. On 27th August, 2010, the defendants have handed over sub-soil exploration report to the plaintiffs. The work methodology detailed in the tender document was well foundation and the sub-soil exploration report also confirmed the same methodology. The plaintiffs initiated the work in terms of the said methodology. The plaintiffs could not complete the project on the basis of the methodology provided by the defendants. While executing the work beyond certain depth, the plaintiffs encountered hard rock which was impossible to penetrate given the diameter of the well and the requirement of the depth as per the instructions of the defendants. The report did not envisage and provide for the work methodology to penetrate

into hard rock. Schedule-C, item no.2, suggests soft coal and not hard rock. The plaintiffs have brought to the notice of the defendants that it is not possible for the plaintiffs to penetrate the rocky strata adopting foundation methodology and to allow plugging of well at a lower depth. The defendants instructed the plaintiffs to undertake the well foundation in one of the piers but it was not possible for the plaintiff to undertake pile foundation at the same location. It became impossible for the plaintiffs to continue with the work as BoQ did not provide for the rates to undertake well foundation under rocky strata. The request of the plaintiffs to the defendants for providing different rates for undertaking well foundation under the rocky strata was not agreed by the defendants.

- i. By a letter dated 6th January, 2011, the plaintiffs have made a written report to the Inspector-In-charge, Government Railway Police, SECR Railway, Brajrajnagar, Jharssuguda informing that on 4th January, 2011 at 11 pm. in the night around 12 to 14 persons wearing monkey cap riding motorcycle came to the construction site and have misbehaved with the watchman of the plaintiffs and demanding phone number of the in-charge of the said work and on denial they open the padlock of the godown and other rooms and burnt the materials of the site. The said complaint is marked as Exhibit-BB. On the basis of the said complaint, the police registered an FIR on 7th January,

2011 and the same is marked as Exhibit-CC. The said incident was also informed by the plaintiffs to the defendants by a letter dated 15th January, 2011 which is marked as Exhibit-DD.

j. On 17th February, 2011, the plaintiffs have sent a letter to the defendants informing the defendants that the plaintiffs are facing severe law and order problem even though the plaintiffs have taken steps for procurement of required steel for fabrication of cutting edge and well curb for one well, accordingly a part of its has already reached to fabrication workshop near bridge side. It was also informed to the defendants that the plaintiffs have set up a testing laboratory in their fabrication workshop across the River IB, near NH on Janshugura site and they intend to use the same for requires field lab test. The said letter is marked as Exhibit-EE.

k. The plaintiff by a letter dated 23rd November, 2011, informed the defendants that there is shortage of Ultratech cement in the market but the concrete design mix had been finalized using the said cement and requested the defendants to allow the plaintiffs to use Konark Cement to avoid delay in execution of work. The said letter is marked as Exhibit-FF. On 20th December, 2011 and 26th December, 2011, the plaintiffs have informed the defendants about the work condition and impediments in execution of the work. The said documents are marked as Exhibit-GG and HH.

1. On 26th September, 2012, the plaintiffs have submitted a written complaint to the Inspector-in-charge, Brajranagar Police Station, Jharsuguda about the forceful entry of antisocial elements in the work site and camp and caused damaged to the property at the work site. On the basis of the said complaint, the police registered a FIR on 29th September, 2012 and the same are marked as Exhibit-II and JJ. By a letter dated 9th October, 2012, the plaintiffs submitted a request to the defendants informing the difficulties faced by the plaintiffs in bringing down the well foundation and requested to Re-Soil Investigation. In the said letter, it was informed by the plaintiffs that while sinking the well found rocky strata instead of soil which was provided in the soil investigation report. In the said letter, it was also informed that after a lapse of two years, the plaintiffs are facing consistent obstacles in executing the well foundation and the plaintiffs were of the opinion to undertake an independent soil investigation and requested the defendants to allow the plaintiffs to carry out investigation. The soil condition faced by the plaintiffs during well foundation indicated rocky strata and the tender terms and conditions and BoQ did not provide any scope of payment for undertaking the work under rocky strata and accordingly the plaintiffs requested for separate rate or alternate foundation method to complete the work. The said request is marked as Exhibit-KK.

- m.** On 1st October, 2012, the plaintiffs have made a detailed request to the defendants for extension of time to complete the work wherein it is also mentioned that the work was hampered due to heavy rain and increase of water level in the river. The said letter is marked as Exhibit -6.
- n.** On 20th November, 2012 to 22nd November, 2012, the violent mob threatened the site worker of the plaintiffs and forced to stop the work and the said incident was duly informed to the defendants by a letter dated 27th November, 2012 and the same is marked as Exhibit-MM. By a letter dated 14th February, 2014, the plaintiffs informed the defendants that the plaintiffs have not able to complete the work due to law and order problem at the work site. The plaintiffs submitted detailed design with note that in case hard rock is encountered then the well should be allowed to be plugged at higher level while ensuring adequate socket depth in the rock. The same was not deleted by the Railways while approving the design and railways stipulated a minimum grip length of 6 meters below the rock. It was also informed that even after several representations and consistent work undertaken by the plaintiffs, spending huge amount of money and efforts, the plaintiffs could not achieve the penetration in rock of the wells. Without considering the request of the plaintiffs, the defendant by a letter dated 19th/ 21st February, 2014, issued 48 hours'

notice to rescind the contract and further action against the plaintiffs.

- o.** The defendants have issued several notices to the plaintiffs directing the plaintiff to expedite the work. On 5th March, 2014, the defendants have issued notice to the plaintiffs intimating that since period of 48 hours has expired, the contract stand rescinded in terms of Clause 62 of the General Conditions of Contract and the balance work under the contract will be carried out independently, without the participation of the plaintiffs. The defendants have debarred the plaintiffs and its partner for participation in the tender for executing the balance work. It was also informed to the plaintiffs that the security deposit shall be forfeited and performance guarantee shall be encashed.
- p.** The work methodology detailed in the tender document was well foundation and the soil exploration report also confirmed the same methodology. The plaintiffs initiated the work in terms of the said methodology. The plaintiffs could not complete the project on the basis of the methodology provided by the defendants. While executing the work beyond certain depth, the plaintiffs encountered hard rock which was impossible to penetrate given the diameter of the well and the requirement of the depth as per the instructions of the defendants. The report did not envisage and provide for the work methodology to

penetrate into hard rock. Schedule-C item no. 2 suggests soft coal and not hard rock. The plaintiffs have brought to the notice of the defendants that it is not possible for the plaintiffs to penetrate the rocky strata adopting foundation methodology and to allow plugging of well at a lower depth. The defendants instructed the plaintiffs to undertake the well foundation in one of the piers but it was not possible for the plaintiffs to undertake pile foundation at the same location. It became impossible for the plaintiffs to continue with the work as BoQ did not provide for the rates to undertake well foundation under rocky strata. The request of the plaintiffs to the defendants for providing different rates for undertaking well foundation under the rocky strata was not agreed by the defendants.

- q.** It is established from the evidence of the plaintiffs which has not been challenged by the defendants during cross examination of the plaintiffs witness that whenever a rocky strata is encountered the option to sink the well has to be based on the other devices other than the normal sinking process through grab and which one has to take recourse to control blasting and even if that does not work then it has to be pneumatic sinking. He has further stated that narrative of soil report is completely different from what has been actually encountered during sinking. It is also stated that the narrative was available in the Bills of Quantities (BoQ) items. There was no other reference

specification in the contract. The narrative of the BoQ is to be taken as actual soil report.

The basic difference is that in the narrative BoQ item, it was expressly specified that the well has to be sunk through all kind of soil. Generally all kinds of soil are considered as clay, sand or silt. When actually went on to sink the wells and encountered rock which was not under the category of all kind of soil. Sinking through the soil and sinking through rock are completely different and the methodology is also different.

As per the evidence on record, sink through all types of soil as mentioned in the BoQ, the sinking can be one feet to three feet per day and one has to penetrate rock through blasting, chiselling, the total sinking cannot exceed beyond four inches and the expenditure becomes much more, at least three fold of the given rate.

During cross-examination of the plaintiffs' witness a specific question was put to the P.W.1 by the defendants:

"Can you specify that which part of the agreement of the railway did not abide by the terms and conditions as specified in the agreement?

"253. Can you specify that which part of the agreement the railway did not abide by the terms and conditions as specified in the agreement?"

Ans. To start with the railways failed to inform us about the hostile law and order situation which prevailed at the bridge side which was a territory under the jurisdiction of the railways. Further the tender document and the agreement obliged us to make soil investigation before we submit our design for the foundations and other structures. The agreement document also specified the foundation to be undertaken by well foundation methodology. Subsequent to our signing of the agreement and before we could mobilize independent agency, the railways handed over soil investigation report from their chosen agency and instructed us to follow the same and prepare our design based on the said soil investigation report. The railways who had framed the tender document and had specified the execution methodology for the foundations were aware that the well foundation may not be the correct method of making the foundation. Immediately after signing of the agreement the railways handed over soil investigation report done by their own agency and denied us the opportunity to prepare the design or to bring forward to the railways the incorrect and erroneous choice of stipulating well foundations. The railways being fully aware that the strata at the river bed is rocky had denied us the opportunity to make our own investigation and in a fraudulent manner also deleted the BOQ item under which we were to carry out our independent soil investigation and ascertain the strata of the river bed. During the execution stage at various occasions we had brought to the attention of the railways that we are unable to progress due to the rocky strata as the well is not sinking but the railways completely overlooked our submissions. After repeated difficulty and observing the impossibility the railways themselves suggested that we undertake one foundation so that the progress can be reviewed. However, just to push us further into impossible work situation the railway instructed us to carry out other well foundation also. After almost working for 3 years the impossibility of the work became known to both the parties. All our request and submissions to railway authorities to find a solution were ignored. Finally, the railways terminated the

contract and called for another tender in which the method of work was changed from well foundation to pile foundation. The value of the new tender was almost double to the value of our contract agreement. The change of work methodology proves that the railway were well aware that the methodology as provided in our contract was not correct and in a fraudulent manner knowing well of the technical impossibilities the railways forced us to pursue on a faulty methodology causing financial loss to us.”

Exhibit-1 is the First Tender document and **Exhibit-D** is the Second Tender document. The first tender document had only one item under item no.2 in Schedule–C for sinking of the wells. In the second tender another item under item no. 2(a) was added with a separate rate stating that the well is to sink through hard rock having greater value. This itself proved that the rock did exist under the riverbed and the rock does not fall under the category of all kinds of soil. The defendants have proposed additional rate for the portion which has to be penetrate rock but the defendants failed to provide extra rate to the plaintiffs even having the knowledge that sinking through the soil and sinking through rock are completely different and the methodology is also different. Thus there is no doubt that the termination of contract is illegal.

- r. After termination of contract of the plaintiffs, the defendants by invoking Clause 1.57 of Chapter VI of the Special Conditions of Contract had encashed the performance guarantee of Rs.

61,53,350/-. Clause 1.57 provides that *“Whenever the contract is rescinded the Security Deposit shall be forfeited and the performance guarantee shall be encashed and balance work shall do independently without risk and cost of failed contractor”*. Initially when the plaintiffs have filed the suit, the plaintiffs have also filed an application for grant of interim order with respect to the encashment of security deposit and performance guarantee. This Court has passed an interim order directing the defendants to maintain status quo with regard to the transfer of funds and the same was extended from time to time and by an order dated 10th November, 2017, this Court passed an order restraining the defendants to encash the bank guarantee and shall continue subject to renewal of the performance guarantee by the plaintiffs till disposal of the suit. The plaintiff was directed to keep the bank guarantee renewed from time to time at least 15 days prior to the date of expiry failing which the defendants shall have the liberty to invoke the same.

The said order was challenged by the defendants in an appeal and the appellate Court by an order dated 30th September, 2019, set aside the interim order dated 10th November, 2017. Subsequent to the order of the Hon’ble Appellate Court, the plaintiffs have filed an application in the present suit for amendment of the plaint for bringing certain subsequent events on record. This Court by an order dated 12th

March, 2020, allowed the amendment as sought for by the plaintiffs by passing the following order:

“This Court is of the view that the amendments sought for are necessary since the orders culminating in the order of the Supreme Court on 13th December, 2019 were passed in the interlocutory proceedings where the plaintiffs had sought for an injunction on the invocation of the bank guarantee. Since the bank guarantee has been finally invoked in January, 2020, this is a case where this subsequent event has a real nexus to the original cause of action as pleaded in the un-amended plaint. If the plaintiff is forced to go to trial on the basis of the un-amended plaint, the suit will be decided on an incomplete cause of action and one where the Court will not have an opportunity to try and determine the real questions in controversy, including whether the invocation and encashment of the bank guarantee was illegal and should be declared as such.

This is a fit case where the amendments sought for should be allowed.”

The defendants have challenged the said order in an appeal but the appellate Court by an order dated 6th January, 2021, dismissed the appeal filed by the defendants.

- s.** The defendants have forfeited security deposit and revoked the performance guarantee of the plaintiffs on the pretext that the plaintiffs have not executed the work inspite of several notices served upon the plaintiffs. The specific case of the plaintiffs that the plaintiffs tried to conclude the contract work in accordance with the General Conditions of Contract but due to local insurgency, insufficiency of supply of cement, flood, hooliganism and rocky strata which was not reflected in the geotechnical

report and the said land had reflected soft coal which was wholly contrary to the actual site position. The plaintiffs have made written complaint to the Inspector-in-charge GRP, South East Central Railway and the said document is marked Exhibit-BB and on the basis of the complaint made by the plaintiffs, an FIR is also registered which is marked as Exhibit-CC. There are several correspondences made by the plaintiffs with the defendants with respect to the work informing about the difficulties faced by the plaintiffs during the execution of the work and the said correspondences including the FIR are marked as Exhibits-DD to MM.

- u.** The plaintiffs have examined witness no.3, Shri Anil Kumar Singh who was working as Joint General Manager (Contract) with the plaintiffs. In his evidence, he has stated that the plaintiffs used to raise bills month by month against the executed work. During his evidence, the plaintiffs have exhibited documents being Exhibits-SS to VVV, the said documents were marked as exhibits without any objection. From the Exhibits- SS to VVV, it is proved that the plaintiffs have submitted bills along with all documents. It was also the evidence that till the termination of contract, the plaintiffs have submitted their bills whichever the works executed by the plaintiffs. The defendants during their cross-examination with respect to the said documents, it is suggested that the said documents are inflated

and not genuine. It is not the case of the defendants that without executing work bill is submitted. The defendants even receipt of the said bill neither returned the same to the plaintiffs nor have made any communication that the said bill is not connected with the work executed by the plaintiffs. From the trend of cross-examination, this Court finds that the defence of the defendants was that the plaintiffs have not completed the project, thus the plaintiffs are not entitled to get payment.

v. The defendants have also set up counterclaim along with written statement for recovery of an amount of Rs. 15,30,09,215.93. Out of the said amount, the defendants have claimed an amount of Rs. 9,98,55,865.93 as the defendants have made more expenditure due to increased 2nd contract value. An amount of Rs. 20,00,000/- is claimed being proportionate share of Railway personnel expenditure for organizing and other works for 2nd tender. An amount of Rs. 3,50,00,000/- is claimed being the loss of revenue due to slow train movement both goods and passenger. Further an amount of Rs. 1,00,00,000/- is claimed due to loss of image.

w. The defendants have examined two witnesses none of the said two witnesses were connected with the said work. The defendants have neither exhibited the 2nd contract in which the defendants have made expenditure of Rs. 9,98,55,865.93. The defendants have not exhibited any documents to show that for

the same work the defendants have invested the above amount. After termination of contract of the plaintiffs, the defendants have published another tender for completion of remaining work but even after publication of the fresh tender for completion of the remaining work, none of the contractors have come forward to participate in the said tender.

y. As regard to the proportionate share of the Railway personnel expenditure including the expenditure for organizing and other works for 2nd tender, the plaintiffs have not examined any witness or produced any evidence to show that for the purpose of 2nd tender how the defendants have made expenditure of Rs. 20,00,000/-. With regard to loss of revenue as the movement of goods and passenger trains were slow for which the Railway sustained revenue loss of Rs. 3,50,00,000/-, the defendants have not bring any document which good trains and which passenger trains were moved slow. No documents of any official of railway authorities come forward to say that due to non-completion of work trains were moved slow and the railways have sustained financial loss.

z. The defendants have claimed Rs. 1,00,00,000/- being the loss of image but no one has come forward that due to non-completion of work, the image of the railway has lowered down due to which the defendants have sustained loss of image. D.W.1, Mr. Arpit Khunteta who is the Executive Engineer, Construction Division,

South East Central Railway. He has deposed in the instant case as authorised representative of the defendants. As per his evidence, he has completed his graduation in the year 2015 and joined Railways on 30th July, 2018. Admittedly, when the tender was awarded and the tender was terminated, he was not in service of Railway, has admitted that he has no personal knowledge of the work but after consulting his Headquarter and file, he has come to this Court for giving evidence being the representative of the defendants. He further admitted that he was posted at Jharsugada in the month of October 2023 i.e. much after the termination of contract of the plaintiffs. He has also admitted that no bidder has come forward for the balance work. In his cross-examination, he has also admitted that the Railway has published another tender with respect to all works and all official expenditures in relation to the new tender were incurred. He also admitted that in Exhibit-KK in the last paragraph, it is mentioned that re-soil investigation for the extend contract will be redone.

aa. Maximum documents of the defendants have not proved as the same were marked as Exhibits X3 to X15. Neither the author of the documents nor any of the officials who were conversant with the said documents were examined. Neither the Chief Engineer nor the Deputy Chief Engineers who were posted or connected with the said work were examined as witness in the case. A

specific question was put to the witness by this Court whether the two officials, namely, Ashok Kumar Suryavanshi and Mr. M.B. Satyanarayan are still in service and in answer, the D.W.2 stated that still they are in service. Both the said two officials are the Deputy Chief Engineers but failed to come to adduce evidence in the present case.

bb. Written statement along with counter claim is filed and verified by Mahesh Kumar Agarwal, Deputy Chief Engineer (Construction), the defendant no. 3. The D.W.1 has deposed as representative of the defendants, that is the Railway Authorities. Admittedly, the D.W.1 was not in service of the railway authority when the cause of action for filing of the suit arose. He has no personal knowledge of the case. Only on the consultation with the Headquarter and file, the D.W.1 has deposed in the said case. D.W.2 also not the witness of the work he has only identified some of the signatures of the officials but the fact remains that the officials are in service but shy to appear before this Court to prove the case of the Railway. In the case of ***Manisha Mahendra Gala and Ors. Vs. Shalini Bhagwan Avatramani and Ors.*** reported in ***(2024) 6 SCC 130*** wherein the Hon'ble Supreme Court held that:

“28. The law as understood earlier was that a general power-of-attorney holder though can appear, plead and act on behalf of a party he represents but he cannot become a witness on behalf of the party represented by him as no one can delegate his power to appear in the witness

box to another party. However, subsequently in *Janki Vashdeo Bhojwani v. Indusind Bank Ltd.*, this Court held that the power-of-attorney holder can maintain a plaint on behalf of the person he represents provided he has personal knowledge of the transaction in question. It was opined that the power-of-attorney holder or the legal representative should have knowledge about the transaction in question so as to bring on record the truth in relation to the grievance or the offence. However, to resolve the controversy with regard to the powers of the general power-of-attorney holder to depose on behalf of the person he represents, this Court upon consideration of all previous relevant decisions on the aspect including that of *Janki Vashdeo Bhojwani in A.C. Narayanan v. State of Maharashtra* concluded by upholding the principle of law laid down in *Janki Vashdeo Bhojwani* and clarified that power-of-attorney holder can depose and verify on oath before the court but he must have witnessed the transaction as an agent and must have due knowledge about it. The power-of-attorney holder who has no knowledge regarding the transaction cannot be examined as a witness. The functions of the general power-of-attorney holder cannot be delegated to any other person without there being a specific clause permitting such delegation in the power of attorney; meaning thereby ordinarily there cannot be any sub-delegation.

29. It is, therefore, settled in law that power-of-attorney holder can only depose about the facts within his personal knowledge and not about those facts which are not within his knowledge or are within the personal knowledge of the person who he represents or about the facts that may have transpired much before he entered the scene. The aforesaid power-of-attorney holder PW 1 had clearly deposed that he is giving evidence on behalf of Plaintiffs 2 to 4 i.e. the Galas. He was not having any authority to act as the power of attorney of the Galas at the time his statement was recorded. He was granted power of attorney subsequently as submitted and accepted by the parties. Therefore, his evidence is completely meaningless to establish that Galas have acquired or perfected any easementary right over the disputed rasta in 1994 when the suit was instituted.

30. *The only proper and valuable evidence in this regard could have been that of Joki Woler Ruzer who had instituted the suit but he failed to depose before the court. His pleadings are also vague and do not specifically state that he had been in use of the rasta in dispute for over 20 years or that he had acquired and perfected easementary right over the said rasta by prescription or necessity.”*

cc. In the case of **Chowdamma (Dead) By Lrs. and Another Vs. Venkatappa (Dead) By Lrs. and Another** reported in **AIR OnLine 2025 SC 792** wherein the Hon’ble Supreme Court held that:

“50. *The failure of the defendants to substantiate their claims through documentary evidence is eclipsed by a more consequential omission. In a case where the principal controversy turns on matters lying within her exclusive personal knowledge, the silence of defendant No. 1, her absence from the witness box, is not a procedural lapse but a calculated withdrawal from scrutiny.*

51. *The conspicuous silence of defendant no. 1 strikes not merely as omission but as deliberate evasion. Defendant No. 1, who lies at the heart of the controversy, chose not to step into the witness box and depose regarding the relationship between the plaintiffs' mother and her husband. Her testimony bore direct relevance not only to the status of plaintiffs' mother but also her own position. The only justification advanced was that defendant No. 1, being an octogenarian and suffering from arthritis, was unable to attend the Court proceedings.*

52. *However, this defence is conclusively dismantled by the record itself. The deposition of D.W.1 (Balachandrappa) clearly indicates that*

defendant No. 1 was physically present in the Court during the examination of D.W.2 (G.V. Venkatappa), D.W.3 (Thimmappa) and D.W.4 (V. Thimmappa). It further emerges that defendant No. 1 was also present in the Court when the evidence of P.W.1 (Venkatappa) was being recorded. If defendant No. 1 was capable of attending the Court on multiple occasions, no explanation remains for her failure to offer her own testimony, except for calculated restraint.

53. This inference is inescapable. This is not a case of medical inability but of deliberate silence. In civil proceedings, particularly where the facts lie exclusively within the personal knowledge of the party, the refusal to enter the witness box carries grave evidentiary consequences.

54. This principle is neither novel nor uncertain. This Court in *Vidhyadhar v. Manikrao* held thus:

“17. Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct”

55. The present case is a compelling invocation of the above principle. Defendant No. 1, though physically present in the Court during the trial, abstained from stepping into the witness box to rebut the plaintiffs' assertions — assertions that strike at the very core of the dispute. In the absence of cogent medical evidence to support her alleged incapacity, her abstention from the witness box constitutes deliberate circumvention of the evidentiary burden resting upon her.

56. In the present factual matrix, the adverse presumption under Section 114(g) of the Evidence Act is inevitable.

57. This Court cannot overlook that defendant No. 1, while central to the controversy, chose not

only to abstain from entering the witness box but also wilfully bypassed the statutory remedy available to those pleading physical incapacity.”

In the present case also all the documents issued by the officials who were the author of the documents and were the part of the work awarded to the plaintiffs are in service and connected with the said work but failed to appear before this Court and to depose the case of the defendants. The defendants failed to prove their case made out either in the written statement or in the Counter Claim.

dd. Considering the facts and circumstances above, Issue Nos. 2 to 9, 11 to 14 are decided in favour of the plaintiffs and against the defendants. Issue No. 10 and part of Issue No. 17 as regard to the compensation are against the plaintiffs and in favour of the defendants.

11. Conclusion:

a. The plaintiff is entitled to get an amount of Rs. 7,28,300/- being the earnest money adjusted through the security deposit. An amount of Rs. 54,25,050/- being the security deposit deducted from the running accounts bill of the plaintiffs. An amount of Rs. 61,53,350/- being the amount of Bank Guarantee and an amount of Rs. 70,66,950/- being the bills raised by the plaintiffs and are pending before the defendants on different heads. The plaintiffs are also entitled to get interest at the rate of 9% per

annum from the date of termination of contract i.e. 5th March, 2014 till the realisation of the total decretal amount. The defendants are also liable to pay cost of the suit assessed at Rs. 1,00,000/-.

- b.** The defendants are directed to pay the amount of Rs. 1,93,73,650/- along with interest at the rate of 9% per annum from 5th March, 2014, till the realisation of the total amount to the plaintiff within a period of 60 days from date. The defendants are also directed to pay Rs. 1,00,000/- being the cost of the suit.
- c.** The suit filed by the plaintiffs being **C.S. (Com) No. 56 of 2024 (Old No. CS 97 of 2014)** is **decreed**. Counterclaim filed by the defendants is dismissed. **GA No. 13 of 2022** is **dismissed**. Decree be drawn accordingly.

(Krishna Rao, J.)