
(2016) 03 CAL CK 0042
In the Calcutta High Court
Case No : C.S. No. 49 of 2008

SMPL Infra Limited

APPELLANT

Vs

Bhushan Power and Steel Limited

RESPONDENT

Date of Decision : 09-03-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11(d)
Limitation Act, 1963 — Section 18, Section 3(2)(b)

Citation : (2016) 03 CAL CK 0042

Hon'ble Judges : Debangsu Basak, J.

Bench : Single Bench

Advocate : Dhruba Ghosh, Prithwiraj Sinha, Arnab Basu Mullick, Siddhajyoti Biswas and Saurav Ghosh, Advocates, for the Appellant; Sabyasachi Chowdhury, Arindam Mukherjee, Joydeb Ghorai, Dilip Ghosh and Sougata Banerjee, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Debangsu Basak, J.—1. The claim of the parties revolves around a contract for supply and erection of a Raw Water Intake System. According to the plaintiff, it had executed additional work beyond the scope of the contract. It has also suffered damages. The defendant denies the claims of the plaintiff. According to the defendant, the plaintiff did not discharge its obligations under the contract. Consequently the defendant had to complete the contract through a third party. The plaintiff is liable to pay for the additional costs incurred by the defendant. The defendant had overpaid the plaintiff. The defendant seeks recovery of the same from the plaintiff by way of a counterclaim.

2. By an order dated October 31, 2014 the issues in the suit were settled. They are as follows:--

"1. Whether the suit as against the defendant or the Counter claim of the defendant as against the plaintiff maintainable?

2. Whether the claim of the plaintiff or the Counter claim of the defendant is barred by limitation?

3. Whether the plaintiff is entitled to a sum of Rs. 6,79,93,838.00 or any part thereof as claimed for in the plaint?

4. Whether the plaintiff is entitled to any interest on the amount as claimed for in the plaint?

5. What is the total amount paid by the defendant to the plaintiff?"

3. In the course of hearing an additional issue as to "whether the defendant is entitled to any amount by way of Counter claim?" has been suggested.

4. The defendant is a manufacturer of steel products. The defendant was setting up steel plant in Orissa. The defendant had appointed MECON Limited as a consultant for such project. A steel plant requires a Raw Water Intake Well System. The defendant had approached the plaintiff for supply and erection of a Raw Water Intake Well System. According to the defendant, the plaintiff was awarded the contract for supply and erection of the Raw Water Intake Well System on a turnkey basis. The plaintiff claims that, the contract was not on turnkey basis.

5. The parties have urged that the claims made against them are barred by the laws of limitation and, therefore, the suit and the counterclaim and not maintainable.

6. In the plaint, the plaintiff has claimed that, the defendant made a payment by demand draft on March 31, 2005. The plaintiff has also claimed that, the defendant had acknowledged in writing its liability to make payment and had admitted the existence of jural relationship between the parties. The plaintiff has referred to the defendant's letter dated March 30, 2006 in this regard.

7. Learned Advocate for the plaintiff has relied upon Article 1 of the Limitation Act, 1963. He has also relied upon the answers given by the defendant's witness to question 319-323, 353-361, 364 and 62. According to him there was an open, mutual, continuous account between the parties which was used to be settled at the end of every financial year. In view of the last payment made on February 9, 2005 the limitation would commence from March 31, 2005. A period of 3 years would end on March 31, 2008. The suit has been filed on March 14, 2008 and is therefore within the period of limitation prescribed under Article 1 of the Limitation Act, 1963.

8. Relying upon the letter dated March 30, 2006 learned advocate for the plaintiff has submitted that, in the alternative such letter acknowledges the existence of a jural relationship between the parties. The letter dated March 30, 2006 has been marked as Exhibit "SSS". The defendant's denial of existence of this letter is misplaced. Exhibit "SSS" has been referred to in the subsequent correspondence namely in the letter dated May 6, 2006. The defendant's witness did not state

that Exhibit "SSS" was a forgery.

9. Learned advocate for the plaintiff has relied upon , 2004 Volume 12 Supreme Court Cases page 360 (Food Corporation of India v. Assam State Co-operative Marketing and Consumer Federation Limited & Ors.) in support of the proposition that existence of jural relationship extends the period of limitation.

10. Learned advocate for the defendant has submitted that, going by the averments made in the plaint, the plaintiff had continued with the project till February 2005. The last bill is dated March 14, 2005. The suit has been filed on March 17, 2008 after expiry of a period of 3 years from the date of the last bill. The averment in paragraph 15 of the plaint is incorrect. The demand draft dated March 31, 2005 pleaded in such paragraph of the plaint does not exist. The last payment was made on February 9, 2005. This has been adequately established in evidence. The alleged letter dated June 30, 2006 does not exist. The reference in this regard has been made to the answers given by the witness of the plaintiff to question numbers 471 to 479. Exhibit "SSS" means the letter dated March 30, 2006 which was marked subject to objection. Exhibit "SSS" has been subsequently brought into existence. Referring to the format and font used in Exhibit "SSS" it has been submitted that, the formatting of such letter shows a difference between the original letter of the defendant and that of Exhibit "SSS". The original letterhead of the defendant would be found from the letter dated April 12, 2006. Exhibits "62" and "63" have been compared with Exhibit "SSS" establish the falsity.

11. It has been contended on behalf of the defendant that, the contents of Exhibit "SSS" are improbable inasmuch as the defendant had already issued a winding up notice in February 2006 against the plaintiff. Consequently there was no need for the defendant to offer a reconciliation of the accounts as sought to be suggested by Exhibit "SSS". In any event, the contents of Exhibit "SSS" do not establish a jural relationship between the parties.

12. The issue of limitation and maintainability as raised by the parties requires consideration. The execution of the project admittedly continued up to February 2005. The last part payment made by the defendant was on February 9, 2005. The plaint of the instant suit was presented and admitted on March 19, 2008. On the three dates noted above, the claim of the plaintiff would be barred by the laws of limitation.

13. Article 1 of the Limitation Act, 1963 provides as follows:--

14. For Article 1 of the Limitation Act, 1963 to have any manner of application in the facts of this case, it must be found whether the account between the parties was mutual, open and current or not. Admittedly, the defendant did not pay the plaintiff invoice wise. The defendant had paid diverse amounts from time to time to the plaintiff. At the time of making such payment, the defendant did not specify that the payment had to be adjusted against a particular invoice by the plaintiff. The plaintiff also did not adjust any payment received by it against a

particular invoice. Rather the plaintiff maintained an open and current account where the payments received were adjusted against the total amount then outstanding. In fact, the account was struck at the end of a financial year, that is, March 31 of every year. The defendant also did not ask the plaintiff to square off any particular invoice consequent to payment being made in respect thereof. In my view, the account between the parties was a mutual, open and current account. That being the position, Article 1 of the Limitation Act, 1963 will come into operation. The last part payment admittedly being made on February 5, 2005 the account has to be struck at the end of such financial year, that is, March 31, 2005. The suit being presented and admitted on March 19, 2008 is within the period of limitation.

15. Exhibit "SSS" has been pressed into service by the plaintiff to save the period of limitation. According to the plaintiff, the defendant by Exhibit "SSS" has acknowledged the existence of jural relationship. It is rightly pointed out on behalf of the defendant that Exhibit "SSS" is a suspect document. Exhibit "SSS" purports to be the letter dated March 30, 2006 stated to have been written by the Vice President of the defendant. The letter is stated to be addressed to the plaintiff. The original therefore ought to have been with the plaintiff. The plaintiff did not produce the original of the letter. A photostat copy of the letter dated March 30, 2006 was tendered in evidence and was marked as Exhibit "SSS" subject to the objection raised on behalf of the defendant.

16. Prior to February 28, 2006 the defendant was known as Bhushan Limited. The name of the defendant underwent a change and it became known as Bhushan Power and Steel Limited with effect from February 28, 2006. Three other letters of the defendant contemporaneous to Exhibit "SSS" have been marked as Exhibits in the suit. They are Exhibits "62" and "63". Two letters dated April 21, 2006 have been collectively marked as Exhibit "62". Such letters inform the Deputy Commissioner of Commercial Tax as to the change of the name of the defendant from Bhushan Limited to Bhushan Power and Steel Limited with effect from February 28, 2006. Exhibit "63" is a letter dated April 12, 2006 written by the defendant to the Advocate of the plaintiff. The three letters of Exhibits "62" and "63" have a particular set up. The last line of Exhibit "SSS" is in deviation to the last line of Exhibits "62" and "63". It is extremely unlikely that a printed stationary of the defendant or saved format of the letter head of the defendant in its computer system would have a different get up and setting contemporaneously. Consequently, I am of the view that, Exhibit "SSS" is not the actual letter head of the defendant. It is not a letter written and issued by the defendant.

17. In Food Corporation of India (supra) two letters were found to have extended the period of limitation under Section 18 of the Limitation Act, 1963. Such is not the factual position in the present case. Exhibit "SSS" is not a letter of the defendant.

18. The counter claim has been filed on January 19, 2009 which is admittedly

beyond the period of three years from March 31, 2005. Consequently, this issue has assumed significance.

19. It has been contended on behalf of the plaintiff that, the counter claim of the defendant is hopelessly barred by the laws of limitation. The claim on account of adjustment emanates out of Debit Notes pertaining to the year 2004. These Debit Notes are unilateral in nature. These Debit Notes have not been served upon the plaintiff. These Debit Notes do not find any place in correspondence between the parties. The Debit Notes were never accepted by the plaintiff. Even going by the Debit Notes, the counter claim was filed way beyond the period of three years from the last Debit Note.

20. It has been contended on behalf of the plaintiff that, the counter claim for compensation also is barred by the laws of limitation. The claim that the balance work was completed in August 2006 has not been substantiated by evidence. Consequently, the counter claim is barred by the laws of limitation.

21. Referring to , All India Reporter 2000 Calcutta page 17 (M/s. Oriental Ceramic Products Pvt. Ltd. v. Calcutta Municipal Corporation) it has been submitted on behalf of the plaintiff that, a counter claim is to be treated as a separate suit and if found to be barred by the limitation, it has to be dismissed.

22. On behalf of the defendant it has been contended that, the plaintiff did not complete the project. The defendant had to complete the balance work. The balance work was completed in the middle of 2006. Exhibits "56" and "59" would demonstrate that, payments were made by the defendant to the third parties upto the middle of 2006. Consequently the counter claim filed on January 19, 2009 is within the period of limitation. Alternatively it has been submitted that, the counter claim to the extent of Rs. 17,97,105/- cannot be said to be barred by the laws of limitation inasmuch as the payments in respect thereof had been made in 2006 upto October 29, 2006.

23. Admission of existence of jural relationship between the parties would extend the period of limitation for three years from the date of such admission under Section 18 of the Limitation Act, 1963, is the ratio laid down in Food Corporation of India (supra). The same, however, does not assist the plaintiff the concerned letter being Exhibit "SSS is not a letter of the defendant.

24. In the instant case, the defendant has filed a counter claim on January 19, 2009. The counter claim of the defendant has three components. The first component relates to a claim on account of value of work allegedly done by the defendant in view of the alleged failure of the plaintiff to complete the contract. The defendant claims a sum of Rs. 1,44,88,461/- on such ground. The second component relates to alleged excess payment. The defendant claims a sum of Rs. 2,95,28,742/- on such ground. The third component relates to damages. The claim is for Rs. 81,00,00,000/-.

25. The defendant has given up the third component. Therefore, on the basis of

the surviving two components the issue as to whether the counter claim of the defendant is within the period of limitation is required to be considered. The first component of the counter claim flows from the alleged failure of the plaintiff to complete the work under the contract. The defendant claims that the plaintiff had abandoned the contract some time just prior to January 2005. Averment to such effect appears at paragraph 23 of the written statement containing the counter claim. The jural relationship between the parties had existed upto March 31, 2005. The defendant, therefore, had to file the counter claim within March 31, 2008. The counter claim was filed on January 19, 2009. Counter claim is to be treated as a separate suit in view of Section 3(2)(b) of the Limitation Act, 1963. If the counter claim is barred by limitation it is capable of being rejected under Order 7 Rule 11(d) of the Code of Civil Procedure, 1908 as held in M/s. Oriental Ceramic Products Pvt. Ltd. (supra).

26. The contention on behalf of the defendant that, it had to wait for the completion of the project by the third party to know the quantum of damages and, therefore, the defendant is well within the period of limitation in filing the counter claim taking into account that the final bill of the third party is within the period of three years from the date of filing of the counter claim cannot be accepted. The time period prescribed for limitation cannot be extended between two parties on the basis of a contract with a third party who is not a party to the contract existing between the parties to the suit. The plaintiff had nothing to do with such unilateral act of the defendant. The defendant has failed to establish that the plaintiff was involved in any manner in the course taken by the defendant. The first component of the counter claim of the defendant is barred by the laws of limitation.

27. The second component depends upon the accounts being taken and balance struck on such account. The account has ended on March 31, 2005. The plaintiff has raised an issue with regard to the accounts. The claim of excess payment can be looked into while considering the accounts between the parties. Upon accounts between the parties being taken, a decree in favour of the party found entitled to any sum may be passed.

28. The first two issues are answered by holding that the suit filed by the plaintiff is maintainable. Its claim is not barred by the laws of limitation. The counter claim to the extent of damages is barred by the laws of limitation and is not maintainable. The counter claim of excess payment would be considered along with the claim of the plaintiff while considering the accounts between the parties. The additional issue is answered accordingly.

29. The third issue is taken up for consideration.

30. It has been contended on behalf of the plaintiff that, the parties had entered into two contracts. The terms and conditions of the contract can be garnered from the exchange of correspondence between the parties. None of the two contracts cannot be said to be a turnkey contract for a firm price. Once the

contracts are found not to be turnkey on firm price, the plaintiff would be entitled to additional costs as claimed. None of the two contracts can be said to be a turnkey contract with firm price inasmuch as, according to the plaintiff, these are two separate contracts, one for supply and other for erection which are independent to each other. None of the two letters dated July 12, 2013 of the defendant uses the word turnkey. The offer letter dated July 11, 2003 although uses the word turnkey, the same is qualified as being restricted to the scope of work described in the letter. Thirdly, the user of the turnkey is not decisive. The substance of the contract must be looked into.

31. On the meaning of the turnkey contract reference has been made to the Black's Law Dictionary. It has been contended that, the ingredients for a contract to be considered as turnkey does not exist in the facts of the present case.

32. It has been submitted that, the plaintiff has raised 13 invoices for supply aggregating to Rs. 6,72,52,687/-. The first 12 invoices amount to Rs. 5,02,95,796/- has been certified by the defendant. The plaintiff has raised 32 invoices for erection aggregating to Rs. 4,89,97,088/-. The defendant has certified an aggregate sum of Rs. 3,18,67,198/-. In view of the certifications, the defendant cannot be allowed to raise any dispute with regard to such invoices.

33. Apart from the amounts certified, the plaintiff is entitled to other invoices which the defendant wrongfully did not certify. According to the plaintiff, it has established such bills in evidence. The plaintiff also has other claims which the plaintiff had lodged by its letters. Learned Advocate for the plaintiff has relied upon the various letters issued by the plaintiff in this regard. Learned Advocate for the plaintiff has also contended that, the plaintiff is entitled to amount on account of additional work. The scope of the work had underwent a transformation after the issuance of the contract. The plaintiff is, therefore, entitled to the costs for such additional work. According to the plaintiff, it has a claim on account of supply as well as erection.

34. The defendant has contested the claims made by the plaintiff. According to the defendant, the contract is on turnkey basis. It is for a fixed price. In fact the defendant has paid in excess. Since the plaintiff did not execute the work in its entirety, the question of making any further payments to the plaintiff does not arise.

35. The defence of no further payment being due by the plaintiff to the defendant in view of the contract being a turnkey and fixed price contract requires a finding on the nature of the contract.

36. The defendant was in the process of erecting an integrated steel plant for itself in Orissa. MECON Limited was the consultant for the entire project of the defendant. Apparently the parties had entered into negotiations with each other with regard to the design and construction of a Raw Water Intake structure including M.S. Access Pipe Project, Foot Bridge and Raw Water Transmission Main for the integrated steel plant of the defendant. The consultant was involved in

the discussion. By a letter dated July 11, 2003 being Exhibit "A" the plaintiff submitted a final offer for design and construction of Raw Water Intake structure including M.S. Access Pipe Project, Foot Bridge and Raw Water Transmission Main for the integrated steel plant on turnkey basis. The plaintiff confirmed that the entire offer was on turnkey basis as per the scope of work mentioned in Annexure - A to such Exhibit "A". Annexure - A to Exhibit "A" has been marked as Exhibit "TTT". The defendant issued two letters both dated July 12, 2003. By one letter of July 12, 2003 the defendant placed a purchase order for design, engineering and supply. This has been marked as Exhibit "C". By the other letter dated July 12, 2003 which has been marked as Exhibit "D", the defendant issued a work order for construction of the Raw Water Intake Well System. The price clause in Exhibit "C" states that, for the complete supplies the plaintiff would be paid an amount of Rs. 5.70 Crores. The price was inclusive of freight and all taxes and duties. The terms by payment contemplates staggered payment. Exhibit "D" has a price clause specifying that a sum of Rs. 4.05 Crores would be paid for the construction and erection of the complete system. Such price would include all taxes and duties as applicable. Again the payment would be made in a staggered manner. Both Exhibits "C" and "D" contemplate that the entire Raw Water Intake System would be operative by June 2004.

37. The parties have not disclosed any evidence to establish that they had renegotiated the terms appearing from Exhibits "A", "C" and "D" read with Exhibit "TTT". Therefore, a contract between the parties came into being on the basis of Exhibit "A" read with Exhibit "TTT" and Exhibits "C" and "D".

38. The word "turnkey" has been used in Exhibit "A". Exhibits "C" and "D" state that the offer made by the plaintiff in Exhibit "A" read with Exhibit "TTT" is accepted by the defendant. However, in executing the work the plaintiff would be obliged to incorporate such changes as may be directed by the consultant. The plaintiff accepted the conditions set out in Exhibits "C" and "D" by signing a duplicate copy of Exhibits "C" and "D".

39. The offer of the plaintiff contained in Exhibit "A" read with Exhibit "TTT" is a contract on turnkey basis as per the scope of work mentioned in Exhibit "TTT". The scope of work has not been altered by the defendant while accepting the offer of the plaintiff in Exhibits "C" and "D". The defendant in Exhibits "C" and "D" specified that the plaintiff would be obliged to carry out any alteration in the scope of work commensurate with the directions of the consultant. The defendant accepted such modification. A contract on turnkey basis therefore came into being as offered by the defendant through Exhibit "A" and Exhibit "TTT" with the stipulation that the plaintiff will be obliged to execute any modifications that the consultant may require in the scope of the work.

40. The defendant in Exhibits "C" and "D" has specified the prices that it would pay. The plaintiff agreed to the price. The scope of the work was broken into two parts by the defendant in Exhibits "C" and "D". By Exhibit "C" the defendant placed order for supply while Exhibit "D" was a work order for erection. The offer

of the defendant made through Exhibit "A" in that sense was not altered.

41. A turnkey contract is understood to be one when executed makes over a project of a product in a complete stage for the buyer to utilize. It can be contrasted against a contract where the buyer is required to do something more to utilize the product. In the present case, the plaintiff had made the representation in its offer letter that the project would be in a complete stage and had used the word turnkey. The user of the word turnkey in a commercial transaction has a particular connotation. The plaintiff therefore has to be held to the user of the word turnkey in its offer letter. The substance of the contract also is one which can be said to be turnkey.

42. In the facts of this case therefore the plaintiff cannot claim that the contract was not on a turnkey basis.

43. The contract, however, is not a lump sum or a fixed price one. Although the prices have been specified, the contract cannot be treated as a lump sum or a fixed price contract inasmuch as the parties had agreed that the work would be executed in accordance with the specifications of the consultant. The plaintiff had agreed to execute the modifications as required by the consultant. Modifications, therefore, would entail either reduction or additional costs as the case may be. However, the plaintiff had agreed that the taxes and duties would be borne by the plaintiff.

44. Although the contract specifies a date for completion of the contract, the clause requiring the plaintiff to modulate the execution of the contract in accordance with the instructions of the consultant would necessarily not make it as the essence of the contract.

45. The conduct of the parties subsequent to the execution of the contract establishes that, the parties did not consider the contract to be for lump sum or fixed price. The defendant claims to have paid in excess than the fixed price. This very fact would establish that the defendant did not consider the contract to be of fixed price or lump sum.

46. A turnkey contract may or may not be for lump sum or fixed price. The fact that the contract between the parties is not a lump sum or a fixed price contract, does not take it out of the ambit of a turnkey contract.

47. By Exhibit "C" the defendant offered to pay sum of Rs. 5.70 Crores and by Exhibit "D" a sum of Rs. 4.05 Crores. The defendant therefore in aggregate agreed to pay a sum of Rs. 9.75 Crores to the plaintiff. The plaintiff admits to have received a sum of Rs. 6,58,45,800/- from the defendant. The defendant in paragraph 21 of its written statement has claimed a sum of Rs. 10,53,77,860/- to have been paid to the plaintiff either directly or as payments made to vendors of goods as advised by the plaintiff. In the additional written statement filed by the plaintiff to the counter claim, the denial of the fact that the defendant had made payment to vendors of goods on the advice of the plaintiff is vague.

48. In addition to the sum of Rs. 6,58,45,800/- admitted by the plaintiff to have received from the defendant, a sum of Rs. 2,84,292/- has to be given credit to the defendant on account of tax deducted at source. The defendant has established payment of tax deducted at source for such quantum by Exhibit "15".

49. The plaintiff has admitted receipt of a sum of Rs. 6,58,45,800/- in the plaint. Such admission is qualified with a note that payments made by the defendant to the vendors of the plaintiff have not been included in this figure. The plaintiff in its evidence has stated that, since the defendant did not give the particulars of the payments made to the vendors of the plaintiff, the same could not be included. However, the fact remains that the defendant did pay the vendors on behalf of the plaintiff. The question is how much. The witness of the plaintiff has accepted that payments had been made by the defendant on account of the plaintiff to the vendors. Such payments aggregate to Rs. 34,44,799/-.

50. The defendant has established that in addition to the sum of Rs. 34,44,799/- the defendant has paid a sum of Rs. 17,67,946/- to the vendors by issuing nine several cheques. This would appear from Exhibit "14". Consequently, a sum of Rs. 59,58,835/- has been paid by the defendant to the plaintiff on account of vendors.

51. The defendant claims to have supplied materials to the plaintiff and to have raised Debit Notes in respect thereof. The witness of the plaintiff has accepted that Debit Notes were raised by the defendant on the plaintiff for supply of materials. The plaintiff did receive the Debit Notes as would appear from Exhibits "N" and "O". Exhibit "N" is a letter of the plaintiff by which it disputes the rate at which the materials have been charged. It claims that the rate of supply of materials should be at the tender price rate. According to the plaintiff, a sum of Rs. 16,42,982/- has been overcharged. By Exhibit "O" being a letter dated June 7, 2004 the plaintiff acknowledges rise in the costs of materials specially steel.

52. The defendant has denied that the plaintiff is entitled to any escalation in price. That prices of material had increased has not been denied. The defendant has charged the plaintiff for supplies at an enhanced price. The plaintiff has claim on account of escalation. The parties, therefore, cannot be allowed to contend that, the prices did not escalate and that the parties are not entitled to escalated prices. Consequently the defendant would be entitled to the sum of Rs. 3,06,04,893/-.

53. Exhibits "C" and "D" specify that all taxes and duties would be on account of the plaintiff. The defendant has established by Exhibit "67" that it had paid entry tax of a sum of Rs. 1,00,278/-. It has established by Exhibit "15" that it had paid taxes deducted at source amounting to Rs. 2,84,292/-. By Exhibits "9" and "9A" the defendant has established payment of a sum of Rs. 15,50,000/- to the sub-contractors of the plaintiff. The defendant is entitled to adjustment of the sum. In such circumstances, the defendant has paid the plaintiff the following amounts:--

54. The plaintiff has a claim of Rs. 6,72,52,687/- for 13 invoices in respect of the

supply contract. According to the plaintiff, 12 invoices amounting to Rs. 5,02,95,796/- has been admitted and certified by Exhibit "5". The balance amount of Rs. 1,69,56,891/- in respect of invoice dated March 14, 2005 being Exhibit "GGG" is in dispute. Exhibit "GGG" consists of 3 pages. Page 3 of Exhibit "GGG" relates to payment of supply for which the plaintiff did not raise any invoices earlier.

55. The defendant had contested the claim in Exhibit "GGG". According to the defendant it did not receive Exhibit "GGG". The claim of Rs. 1,69,56,891/- in Exhibit "GGG" comprises of 20 per cent of the value of equipments not supplied to the defendant.

56. The plaintiff has a claim of Rs. 4,89,97,088/- on account of 32 invoices for erection. The defendant in its written statement has admitted a portion. The plaintiff claims that, four invoices dated October 31, 2004, December 4, 2004, February 12, 2005 and March 14, 2005 for erection have not been paid by the defendant.

57. According to the defendant, none of the four invoices are payable. The four bills are part of Exhibit "6". According to the defendant, it had certified a sum of Rs. 2,55,85,037/- to be payable on behalf of the erection contract. These four bills do not find place in Exhibit "Y". The existence of the four bills is disputed by the defendant. The reference of these four bills in Exhibit "Q" being the letter dated July 30, 2004, according to the defendant, is not sufficient. In any event according to the defendant at best the plaintiff is looking at an additional work order for the purpose of sustaining the four bills on account of erection. The additional work order was not issued and, therefore, the invoices are not payable.

58. The plaintiff has claimed to have raised invoices for a sum of Rs. 11,92,58,019/- on the defendant.

59. Exhibit "Q" is the letter dated July 30, 2004 written by the plaintiff. By this letter the plaintiff has sought enhancement of the scope of the work due to the changes in the specifications. It speaks of financial implication by reason of such changes. It speaks of unprecedented increase in the price of raw materials for the project. It seeks an amendment order against both the erection and the supply contracts. The plaintiff follows it up by the letter dated August 11, 2004 marked as Exhibit "R" and August 20, 2004 being Exhibit "S" for making the same request. The requests for amendment to the two contracts were also made by the plaintiff by the letters dated December 4, 2004 being Exhibit "T", January 1, 2005 being Exhibit "U", March 4, 2005 being Exhibit "V" and March 22, 2005 being Exhibit "W". These requests apparently went unattended to by the defendant. The plaintiff through its Advocate's letter dated February 28, 2006 issued a notice demanding payment. The notice was stated to be a statutory notice under the Companies Act, 1956. The reply thereto is Exhibit "AA" being the letter of the Advocate of the defendant dated May 9, 2006. In such reply the defendant claim that, the prices mentioned were firm and final and that price rise

of raw materials would not be taken into consideration. It was claimed that, out of the value of contract of Rs. 9,75,00,000/-, the plaintiff had executed work for the value of Rs. 8,88,86,364/- and, therefore, the defendant has made full payment. In fact, it has overpaid to the sum of Rs. 1,69,09,715/- which the plaintiff must refund along with interest.

60. The defendant did not accept the request for amendment to the erection contract. The defendant, however, did not deny the execution of the work contained in the invoices. No evidence has been produced to establish that the additional work was outside the requirement of the consultant or that the consultant had disapproved of the same. The value of the invoices has been stated in the letter dated July 30, 2004 being Exhibit "Q". The defendant had received such letter. The defendant did not reply thereto.

61. The supply and erection contract contained a clause that the plaintiff would be responsible to execute the work in accordance with the changes required by the consultant. The consultant had directed the plaintiff to make changes in the drawings as well as the execution of the project. The supply and erection contracts have been held by me not to be a lump sum contract. The plaintiff is, therefore, entitled to the value of the deviations as well as escalation. The plaintiff would also be entitled to cost over-run as the time period for completion of the contract had exceeded the specified period.

62. In K.N. Sathyapalan (supra) it has been held that, an Arbitrator is vested with the authority to compensate a party for extra costs as a result of failure of the other party to discharge its objections. The same ratio has been acknowledged in Associate Builders (supra).

63. In the facts of this case, I find that two business entities had entered into the subject contracts in respect of a commercial project. The contention of the defendant that the contracts were for lump sum cannot be accepted as the defendant has admittedly paid much over than the so-called lump sum. It would not have done so if the contracts were lump sum. The defendant has not come up with a convincing argument as to why it had ended up paying in excess of the so-called lump sum.

64. The contracts contemplate deviations, in the sense that, in the event the consultant directs any modification the work has to be executed in accordance with such direction. In the execution of the contract, the consultant did issue instructions requiring execution of the work as directed by it. By reason thereof, the time to execute the project went beyond that time originally envisaged by the parties. The plaintiff is, therefore, entitled to compensation for such portions.

65. There is no argument for interest between the parties. However, on accounts being taken a sum of Rs. 1,49,13,921/- has been found to be due from the defendant to the plaintiff in respect of a commercial transaction. Keeping in view the rate of interest usually charged by nationalized banks and the facts of this case, ends of justice would be sub-served by awarding interest at the rate of

10% per annum calculated on and from the date of filing of the suit till realization.

66. The fourth issue is answered accordingly.

67. According to the plaintiff, the total value of the invoices is Rs. 11,92,58,019/-. The defendant has paid a sum of Rs. 10,43,44,098/-. Therefore, after adjustment the sum of Rs. 10,43,44,098/- paid by the defendant to the plaintiff, a sum of Rs. 1,49,13,921/- (Rs. 11,92,58,019/- - Rs. 10,43,44,098/-) has become due and payable by the defendant to the plaintiff.

68. The third issue is answered accordingly.

69. In view of the discussions above, the fifth issue is answered by holding that the defendant has paid a sum of Rs. 10,27,01,116/- to the plaintiff.

70. C.S. No. 49 of 2008 is decreed in favour of the plaintiff. The plaintiff will be entitled to a decree for the sum of Rs. 1,49,13,921/- along with interest at the rate of 10% per annum on and from the date of filing of the suit until realization from the defendant. The counter claim of the defendant is dismissed. The plaintiff will be entitled to a decree for costs assessed at Rs. 60,000/-.

71. The department will draw up and complete the decree as expeditiously as possible.