

(2006) 06 MAD CK 0309

In the Madras High Court

Case No : O.S.A. No. 9 of 2000 in C.S. No. 937 of 1998

Sports Development Authority of Tamil Nadu

APPELLANT

Vs

M/s Tarapore and Co.

RESPONDENT

Date of Decision : 28-06-2006

Acts Referred:

Citation : (2006) 06 MAD CK 0309

Hon'ble Judges : P.K. Misra, J;M. Jaichandren, J

Bench : Division Bench

Advocate : V.T. Gopalan for Mr. K. Rajendiran, for the Appellant; S. Murari, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—The present appeal has been filed by Sports Development Authority against the Judgment and Decree of the learned Single Judge in C.S. No. 937 of 1998, filed by the present respondent. In the impugned Judgment, the Trial Court has decreed the suit of the plaintiff/respondent for realisation of Rs. 3,94,13,245/- with further interest at the rate of 18% p.a. The facts in brief are as follows:

The plaintiff is a registered firm of Partnership engaged in engineering and construction works. The defendant/appellant is a Society registered under the Tamil Nadu Societies Registration Act, 1975 constituted as per G.O. Ms. No. 641 of 1998 of Government of Tamil Nadu and as such an instrumentality of the State attached to the Education Department of Tamil Nadu. For the purpose of hosting South Asian Federation Games at Chennai, the Sports Development Authority, Chennai contemplated constructing four new stadiums. The Sports Development Authority called for tenders for construction of a Tennis Stadium, Aquatic Stadium, Hockey Stadium and Indoor Stadium. The tenders offered by the plaintiff for construction of Tennis Stadium, Aquatic Stadium and Hockey Stadium was accepted by the defendant and the total value of the contract was Rs. 26,82,48,843.50/-. Three separate agreements containing similar terms were

executed. Apart from the above three works, on the basis of instructions of the subordinate officers of the defendant, the plaintiff had also undertaken the work of Paving Block/Chain Link Fencing in the Hockey Stadium, even though no formal written order had been issued by the defendant or any official. The plaintiff submitted bill for Rs. 30,42,942.36 on 24.01.1996 in relation to the work of the Aquatic complex which was duly certified by the defendant engineers on 10.02.1996. Similarly, plaintiff submitted bill for Rs. 51,22,983.74 on 23.01.1996 of the Hockey Stadium, which was duly certified on 17.02.1996. A bill for Rs.1,64,19,123.89 dated 23.01.1996 was submitted for the Tennis Stadium, which was duly certified on 21.02.1996. For the additional work of Paving Block/Chain Link, bill for Rs. 1,82,430.55 was submitted on 17.04.1996, which was duly certified on 15.07.1996. Thus, the plaintiff was entitled to Rs. 2,47,67,480.54. In addition, Rs. 74,03,781/- representing 2.5% of the retention amount was refundable after the completion of the Defects Liability period and subsequently the defendant realised a portion of the retention money, keeping the balance amount of Rs. 9,83,531/-. The plaintiff had correspondence with the defendant regarding the amount due. The plaintiff also wrote a letter to the Chief Secretary, Government of Tamil Nadu indicating about the amount due to the plaintiff and also complaining regarding the higher rate of interest claimed by defendant on the mobilization advance made to the plaintiff. Since the correspondence with the defendant did not evoke any positive response, the plaintiff filed a suit for realisation of a sum of Rs. 2,57,51,012/- towards the outstanding bills and the balance retention amount and further a sum of Rs. 1,36,62,233/- towards interest at the rate of 18% on the aforesaid amount payable from the due date till the date of filing of the suit. The plaintiff also claimed further interest at the rate of 18% on the principal amount, as according to the plaintiff the work was commercial in nature. In fine, the plaintiff claimed a sum of Rs. 3,94,13,245/- together with further interest on the principal amount of Rs. 2,57,51,012/- at 18%.

2. A written statement was filed by the defendant, wherein it was indicated that as per the original terms and conditions, no mobilization advance was to be given to the plaintiff. But subsequently, on the basis of request of the plaintiff, mobilization advance was given with a specific condition that such advance is repayable with 17% interest. Since the Government subsequently revised the rate of interest to 18%, the difference of interest payable by plaintiff at 1% is yet to be recovered. It was further indicated that as per the contract, the plaintiff was required to point out all the defects within the Defects Liability period of 24 months and many such defects were pointed out and only after rectification of the defects and certification by the concerned officers, the withheld amount had been released to the plaintiff and retention money as regards the non-tendered items only had been kept pending and the delay in realising the retention amount was on account of the plaintiff as defects had been noticed. It was further indicated that the defendant had been taking steps with the State Government to expedite the process with regard to the "alleged bills of the

plaintiff which is pending before the defendant". It was further pleaded as follows:

This defendant further submits that the agreement does not provide for payment of interest on any amount that might be found to be outstanding.

In paragraph 7 of the written statement, it was further pleaded as follows:

This defendant submits the Government vide G.O. Ms. (ID) No. 35, School Education Department, dated 9.3.98 had constituted Two Man Committee comprising of two Engineers in the cadre of Superintending Engineer, one from the Public Works Department, and another from Tamil Nadu State Construction Corporation Ltd., and have referred the bills of the plaintiff pertaining to non-tendered items for verification of the rates as was prevailing at the time of execution. A detailed report has also been called for from the Two Man Committee appointed for the said purpose. The report of the Two Man Committee with regard to the Aquatic complex is awaited. Only upon the receipt of the comprehensive report of the Two Man Committee could this defendant will be able to effectively traverse the various allegations made in the plaint. This defendant reserves the right to file additional written statement if any as and when the final report from the Two Member Committee is received.

3. On the basis of the aforesaid pleadings, the learned Single Judge framed the following issues:

- (i) Whether the plaintiff is entitled for the amount claimed in the suit?
- (ii) Whether the plaintiff is entitled for interest at 18% from the date mentioned in the plaint?
- (iii) To what relief, if any, the plaintiff is entitled?

4. While dealing with issue Nos. 1 and 2, the learned Single Judge, while discussing about the three works done as per the agreements and the work admittedly done on the basis of the oral instruction held that, the entitlement of the plaintiff to the amount mentioned in the final bill is not challenged or disputed by the defendant and therefore the plaintiff is entitled to balance of Rs. 2,57,51,012/- which is the principal amount claimed by the plaintiff. Since the main dispute raised before the learned Single Judge and reiterated before this Court revolves round the question of payment of interest, the relevant findings of the Trial Court on such aspect may be extracted in detail. In paragraph 10 of the order, the Trial Court observed as follows:

The defendant seems to question the claim of interest by stating that there is no wanton delay in payment of bills and there is also no provision in the agreements for payment of any interest. But, it has been elicited from D.W. 1 himself that the amount that becomes due and payable to the plaintiff, if not paid within the date of entitlement, the same is to be treated as debt and this is also found in the agreements themselves. Therefore, it is not as if that Exs. A-1 to A-3 agreements do not provide for payment of interest in case of delayed payments.

Therefore, once it is admitted by the defendant that the amount of Rs. 2 crores and odd has become payable and due to the plaintiff on 21.03.1996, and when the amount is not paid even according to the defendant, the plaintiff is entitled to claim interest and plaintiff has claimed interest only at the rate of 18% per annum. Even if there is no provision in the agreements, the amount has become due and if the defendant is not paying the amount which has necessitated the plaintiff to come to the Court by way of filing this suit, the plaintiff will be entitled to interest. But, here is a case where it has been stated in the agreements themselves that for the amount become payable to either party of the contract, it must be deemed to be a debt and therefore the claim of interest cannot be challenged by the defendant.

5. It was further concluded by the Trial Court that the defendant itself having recovered interest at the rate of 17% on the mobilization advance given and was claiming that the plaintiff is liable to pay a further 1% towards interest on such mobilization advance, the defendant cannot oppose the payment for interest at 17%. On the basis of the aforesaid conclusion, the Trial Court has decreed the suit.

6. Even though the entire Judgment had been challenged in appeal, the grounds raised in the memorandum of appeal revolve round the question of liability to pay interest. The learned Senior Counsel appearing at the time of hearing the appeal also confined his submission to the question of payment of interest, even though in passing he has referred to certain other aspects. These ancillary aspects, we can notice first before coming to the main question raised in the appeal.

7. Before considering the questions raised, it is necessary to notice that in the Trial Court, only certain clauses of the agreement had been formally marked as exhibits, but the entire contract agreement had not been marked. The plaintiff had furnished a list of documents filed; under Order 7 Rule 14(1) of the CPC, such as Clause 14, clause 17, clause 32, clause 34 and clause 42 of the contract and apparently only those copies had been marked obviously on consent of both parties. However the three contract agreements, all dated 15.02.1995 even though furnished were not formally marked as Exhibits. Since in deciding the appeal, it is necessary to refer to the contract agreement, in interest of justice, by exercising power under Order 41 Rule 27 CPC, copy of the contract agreement relating to construction of Aquatic complex at Velacherry road is formally marked as an exhibit, on consent of the counsels appearing for both parties. It may also be noticed that the other two agreements relating to Hockey Stadium and Tennis Stadium executed on the very same day, being similar, it is not necessary to formally mark those documents, as the essential terms and conditions in all the agreements are the same.

8. The learned Senior Counsel has referred to clause 60 of the Contract Agreement, which is as follows:

60. Arbitration: The contract for carrying out the works shall not cover Arbitration for settlement dispute(s) any arise(s). The Member Secretary, SDATN shall be the final authority in deciding all disputes between the parties to the contract. The decision of the Member Secretary/SDATN is final.

9. Relying upon the aforesaid clause, it is submitted by the learned Senior Counsel that at the time when the suit was filed, the matter was under correspondence between the plaintiff-defendant and the State Government, but before a formal decision could be taken by the Member Secretary, Sports Development Authority, Government of Tamil Nadu, the suit was filed. It is submitted by him that even though the term specifically excludes arbitration, it envisages that Secretary, Sports Development Authority, shall be the final authority in deciding all disputes between the parties to the contract and the decision of the Member Secretary is final. This, according to the learned Senior Counsel excludes the jurisdiction of the Civil Court to deal with the matter.

10. We are unable to accept such submission made by the learned Senior Counsel appearing for the appellant. The clause does not purport to specifically exclude the jurisdiction of any Court. Prima-facie, it appears to be an intradepartmental mechanism to decide a particular matter. If it is construed to be akin to arbitration clause, the defendant should have raised such specific objection before the Trial Court. In the written statement, no such objection has ever been taken regarding the excluding of the jurisdiction of the Civil Court. The Learned Counsel has submitted that the decision of the Secretary being final, it must be taken to be implied bar. We are not inclined to accept such submission. Moreover, it is not the case of the defendant that any decision in the matter had been taken by the authority contemplated under Clause 60. The submission of the counsel for the appellant that the plaintiff could have sought for a mandamus compelling the appropriate authority to render a decision as contemplated in clause 60 is too far-fetched to merit acceptance. Such submission made by the counsel for the appellant for the first time in course of hearing of the appeal (it may be indicated that no such ground has been taken in the memorandum of appeal) deserves to be rejected.

11. The other ancillary question raised by the appellant is based on clause 34 of the Contract which relates to claim for extra, which is extracted hereunder:

34. Claim for Extra. When any instruction or decision given at site involves extra work or where the Contractor may plan to claim an extra, it shall be the responsibility of the Contractor to inform the Employer/Architect of the extra amount and get written authorisation from the Architect and or the Employer before proceeding with the work involved. Any modification carried out for expediting or simplifying work at the request of the Contractor or his representatives shall not be taken as the basis for claiming an extra. However, if such modification shall also involve an extra, the rate for such modification shall be settled in advance and written authorisation obtained by the Contractor from the Employer/Architect before proceeding with the work involved. If no such

information is given by the Contractor in writing to the SDATN/Architect such modification shall not be accepted as the basis for extra charge.

Rates for extra items shall be determined as follows:

- a) If already specified he shall carry out at the same rate.
- b) If not specified, the rate for that item shall be derived from the rate for the nearest similar item.
- c) At the actual expenditure incurred in execution of the item inclusive of any taxes, octroi, etc., plus 10% (Ten percent) for contractor's profit and overhead. The actual expenditure will have basis of materials and labour as per the Tamilnadu State P.W. D. Rate Analysis. Where Schedule of rates are not available in Tamilnadu State P.W. D. Rate Analysis, the actual labour/material involved and recorded by the Architects/Employer in executing the item shall be considered. The Labour component of any non-scheduled item as per actual shall be based on Tamilnadu State PWD Rates.

12. It has been submitted by the Learned Counsel appearing for the appellant that in the present case, the additional work relating to Paving Block/Chain link has been done without getting written authorisation from the architect and or the Sports Development Authority.

13. So far as the written statement is concerned, the only averment on this aspect seems to be contending paragraph 6, which is to the effect that the Education Department had been addressed for the approval of the unit cost of non-tendered items and for approval of the additional quantities of tendered items. Apart from the fact that no such question has been specifically raised in the written statement even before the Trial Court, this aspect has not at all been raised. On the other hand, as observed in the Judgment, the defendant had practically conceded that amounts claimed in the final bills were payable.

14. In the grounds of appeal, it has been stated as follows:

3. It is submitted that in the Minutes of Pre-Bid Meeting, it was reduced to writing inter-alia, that Extra items would be dealt with in the following manner:

- (i) For such of those items which are not governed by the Schedule of quantities, only 10% will be allowed on the actual cost.
- (ii) Deviation of rates will not be accepted.

If there is any variation in the quantity, the same will be taken into account while settling the bills.

4. It is submitted that the Plaintiff/Respondent has all along failed to furnish any claim and evidence of actual cost of the construction materials in respect of the suit claim (extra works) and labour, so that 10% profit could be awarded to the Plaintiff. This is vital and fatal.

5. It is submitted that the suit claim is covered by Clause-34 of the Agreement. It provides for written authorisation from the architect and or employer (Appellant herein), before proceeding with extra work. The same was not followed by the Plaintiff (Contractor) and hence the suit claim is not enforceable in Court.

15. Since the bill relating to extra work has been certified, it is obvious that there is no dispute relating to the value of the extra work done. It is of course true that Clause 34 itself contemplated that a written authorisation should be obtained. However, even in the absence of a written authorisation, it is evident that the work was done admittedly on the basis of oral instruction issued by the subordinate officers of the defendant and the defendant has enjoyed the benefit of such work. It is evident that such work was executed by the plaintiff for the benefit of the defendant and the defendant having enjoyed the benefit is required to compensate the plaintiff as envisaged u/s 70 of the Contract Act and therefore, the appellant cannot turn around at this stage and submit that no amount is payable. To be fair to the Learned Counsel appearing for the appellant, it may be stated that even though such a question was raised in passing, the Learned Counsel fairly submitted that the principal amount on this score is payable.

16. As already indicated, the main question raised by the appellant relates to the liability of the appellant to pay interest for the period prior to the date of the filing of the suit. The counsel for the appellant has also submitted that even though pendent lite and future interest is payable, the trial Court should not have granted such pendente lite and future interest at 18%.

17. So far as the period prior to the date of the filing of the suit is concerned, the Learned Counsel for the appellant has contended that the contract specifically excludes payment of interest on the amount due under the final bill. For the aforesaid purpose, the Learned Counsel has referred to the Appendix at page 71 of the contract agreement, with the following heading:

Summary of notice inviting tender and condition of contract.

18. The Learned Counsel has also invited our attention to Clause at Sl. No. 12 which is to the following effect:

12. Rate of interest for delayed payment: Nil

In this context, he has submitted that as per the subsequent correspondence dated 18.01.1995, there is a specific condition regarding payment of interest by the Contractor to mobilization advance and on the other hand Sl. No. 12 of the Appendix itself contemplates no interest is payable for delayed payment. The Learned Counsel appearing for the respondent on the other hand has submitted that the aforesaid is construed as clause prohibiting the payment of interest for delayed payment, more particularly when it was intended that no interest is payable, it has been specifically so indicated in the contract. In this connection,

he has invited our attention to Clause 16 of the general instructions and notice inviting tender which contemplates that earnest money equal to 1% of the tender value, which is equally to be paid at the time of submitting the tender will be returned without any interest if tender is not accepted. Similarly, it is pointed out by him that security deposit as contemplated in condition No. 19(a) and 5% of the value of the work done withheld will be refunded after the expiry of the defects liability period of 24 months. In such clause 19(a), it has been specifically indicated as follows:

The amounts retained by the employer shall not bear any interest.

This stipulation is again been reiterated in paragraph (i) and (ii) of clause 19(a). It is also further pointed out that as per Clause 33 of the Contract, relating to certificate and payment, it is indicated as follows:

The Contract Sum adjusted as necessary in accordance with the terms of these conditions, and the difference (if any) between the two sums shall be expressed in the said certificate as a balance due to the Contractor from the Employer or to the Employer from the Contractor as the case may be, and subject to any deductions authorised by these conditions, the said balance shall as from the fourteenth day after the issue of the said certificate be a debt payable as the case may be by the Employer to the Contractor or by the Contractor to the Employer.

19. In this connection, it is submitted by him that this specifically contemplates that the balance amount 14 days after the issuance of the certificate is considered as "debt payable by the Employer to the Contractor". However, there is no specific clause that no interest is payable. According to the Learned Counsel for the respondent, in the absence of any specific clause, prohibiting payment of interest, as contained in respect of certain other conditions, Sl. No. 12 of the Appendix cannot be considered as a clause prohibiting payment of interest and it only indicates that no specific rate of interest for delayed payment has been provided.

20. On going through the materials on record and after careful consideration of the submissions made by the counsels for both parties, we are unable to accept the submissions made by the Learned Counsel for the appellant that the contract specifically excludes payment of interest on the amount payable. When there are specific terms and conditions, which expressly excluded payment of interest, nothing prevented the defendant from incorporating the specific clause excluding payment of any interest on the amount payable. On the other hand, the very fact that specific terms and conditions have been incorporated expressly excluding payment of interest in respect of certain contingencies will indicate and no such express exclusion in Clause 33 clearly indicates that payment of interest for the delay in payment of final bill is not specifically excluded. On the other hand, paragraph 6 of the written statement clearly states that the agreement does not provide for payment of interest on any amount found to be outstanding. In other

words, the stand of the defendant at that stage appears to be that the agreement was silent on the question of payment of interest on the outstanding amount and the defendant never construed the agreement containing any prohibition regarding payment of interest. Similarly in the memorandum of appeal, it is not specifically contended that the agreement contains any condition prohibiting payment of interest. In ground No. 6, it has been indicated as follows:

It is submitted that there is no negative covenant with regard to any breach of contract in respect of payment schedule and non-payments. Therefore, Plaintiff cannot claim interest in respect of works opted by Tenders and Contract. The suit relates to Non-Tendered Works. There is no contract, either oral or written, in respect of interest on payments due by the Defendant/Appellant. Delay will not earn interest. The claim for 18% interest is imaginary.

21. The tenor of the contentions raised in the written statement or in the memorandum of appeal to suggest that Sl. No. 12 now relied upon by the appellant was not understood by the appellant in the manner now submitted by the Learned Counsel. Since the recital at Sl. No. 12 is ambiguous, the manner in which the defendant itself understood the contract is also relevant. Law is well settled that the terms of contract should be construed not in isolation, but harmoniously. Keeping in view the various aspects and particularly the tenure of contentions raised by the defendant during the trial and even in the memorandum of appeal, we are unable to accept the submissions made by the Learned Counsel for the appellant that the contract specifically excluded the payment of interest so far as the payment of final bill is concerned.

22. In this context, learned Senior Counsel appearing for the appellant has placed reliance upon the decisions of the Supreme Court reported in Collector of Central Excise, Hyderabad etc. etc. Vs. M/s. Vazir Sultan Tobacco Company Limited, Hyderabad Etc. Etc.,) to the effect that nil rate of excise duty prescribed is also a rate prescribed in the context of Excise Law. In the facts and circumstances of this case, the decisions relied upon by the learned Senior Counsel are not applicable to come to a conclusion that the contract had specifically excluded payment of interest.

23. Even though we accept the ultimate conclusion of the learned single Judge that interest was payable on the amount due from the defendant towards final bills for the period anterior to filing of the suit, the rate of interest payable and the date from which such interest is payable are required to be considered.

24. The trial court has granted 18% interest towards pre-suit, pendente lite and future interest on the footing that the transaction was commercial in nature. So far as pendente lite and future interest are concerned, obviously such matter has to be considered in accordance with the provisions contained in Section 34 of the Code of Civil Procedure, hereinafter referred to as "the C.P.C.". So far as interest prior to the date of institution of the suit is concerned, such question depends upon the substantive law or the agreement between the parties. As already

analysed, we have come to the conclusion that the agreement did not contemplate payment of interest on the final bill at any particular rate nor the agreement had excluded payment of interest on the amount payable under the final bill. For considering this question, obviously the provisions contained in the Interest Act, 1978 are to be kept in view.

25. Sections 3 and 4 of the Interest Act, 1978, being relevant, are quoted hereunder:

3. Power of court to allow interest.- (1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,

(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:

Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings interest shall not be allowed under this section for the period after such repayment.

(2) Where, in any such proceedings as are mentioned in sub-section (1), -

(a) judgment, order or award is given for a sum which, apart from interest on damages, exceeds four thousand rupees, and

(b) the sum represents or includes damages in respect of personal injuries to the plaintiff or any other person, or in respect of a person's death, then, the power conferred by that sub-section shall be exercised so as to include in that sum interest on those damages or on such part of them as the court considers appropriate for the whole or part of the period from the date mentioned in the notice to the date of institution of the proceedings, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(3) Nothing in this section, -

(a) shall apply in relation to-

(i) any debt or damages upon which interest is payable as of right, by virtue of any agreement; or

(ii) any debt or damages upon which payment of interest is barred, by virtue of

an express agreement;

(b) shall affect-

(i) the compensation recoverable for the dishonour of a bill of exchange, promissory note or cheque, as defined in the Negotiable Instruments Act, 1881 (26 of 1881); or

(ii) the provisions of rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908);

(c) shall empower the court to award interest upon interest.

4. Interest payable under certain enactments:

(1) Notwithstanding anything contained in section 3, interest shall be payable in all cases in which it is payable by virtue of any enactment or other rule of law or usage having the force of law.

(2) Notwithstanding as aforesaid, and without prejudice to the generality of the provisions of sub-section (1), the court shall, in each of the following cases, allow interest from the date specified below to the date of institution of the proceedings at such rate as the court may consider reasonable, unless the court is satisfied that there are special reasons why interest should not be allowed, namely:

(a) where money or other property has been deposited as security for the performance of an obligation imposed by law or contract, from the date of the deposit;

(b) where the obligation to pay money or restore any property arises by virtue of a fiduciary relationship, from the date of the cause of action;

(c) where money or other property is obtained or retained by fraud, from the date of the cause of action;

(d) where the claim is for dower or maintenance, from the date of the cause of action.

26. Section 3 of the Interest Act, 1978 recognises the power of court to allow interest. However, Section 3(3) makes it clear that nothing in this section shall apply in relation to any debt or damages upon which interest is payable as of right by virtue of any agreement or any debt or damages upon which payment of interest is barred by virtue of an express agreement. Since there is no agreement expressly excluding payment of interest nor there is an agreement by which interest is payable as of right, we have to fall back upon other provisions contained in Section 3 of the Interest Act.

27. Section 3(1) envisages that in any proceedings for the recovery of any debt, the court may, if it thinks fit, allow interest to the person entitled to the debt at a rate not exceeding the current rate of interest. Such interest can be allowed for

the whole or part of the period envisaged in clause (a) or (b) of Section 3(1). If the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then interest can be allowed from the date when the debt is payable to the date of institution of the proceedings and, as per clause (b), if the proceedings do not relate to any debt as aforesaid, then, interest is payable from the date mentioned in the written notice to the effect that interest will be claimed. It is obvious that such interest would be payable from the date which is indicated or from the date of service of notice till the date of institution of the proceedings.

28. A combined reading of the provisions contained in Section 3 makes it clear that where there is any agreement under which interest is payable as of right, the other provisions contained in Section 3 would not be applicable and payment of interest and rate of interest and the date from which interest is to be calculated would be governed by such agreement. Similarly, if there is express agreement prohibiting payment of interest, the other provisions contained in Section 3 would not be applicable and no interest would be payable. Where, however, the agreement is silent regarding payment of interest including the rate of interest and there is no express exclusion, the provisions contained in Section 3(1) would be applicable and the court has discretion to grant interest not exceeding the current rate of interest for the period envisaged u/s 3(1) (a) or 3(1) (b), as the case may.

29. Notwithstanding the provisions contained in Section 3, a mandate has been given to the court u/s 4(1) to pay interest in all cases in which it is payable by virtue of any enactment or other rule of law or usage having the force of law. Section 4(2), which also starts with a non obstante clause excluding the applicability of Section 3, mandates the court to allow interest at such rate as the court considers reasonable in the circumstances contemplated in four clauses, namely (a) to (d) in Section 4(2), from the date of deposit as envisaged in Section 4(2)(a) or from the date of the cause of action as envisaged in other clauses of Section 4(2). In the matters coming within Section 4(2), the court, however, can refuse to allow interest if it is satisfied that there are special reasons why interest should not be allowed.

30. u/s 2(b) of the Interest Act, "current rate of interest" means the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949).

31. The facts in the present case are to be appreciated keeping in view the aforesaid provisions.

In the present case, it is specifically envisaged in the agreement in clause 33 that balance amount payable under final bill shall be a debt payable from the

fourteenth day after the issue of the Final Certificate. The relevant portion in clause 33 relating to certificate of payment is to the following effect:

So soon as is practicable but before the expiration of the period the length of which is stated in the appendix to these Conditions from the end of the Defects Liability Period also stated in the said appendix or from completion of making good defects under clause 44 of these conditions or from receipt by the Architect of the Documents referred to in this Clause of this Condition, whichever is the latest, the Architect shall issue the Final Certificate. The Final Certificate shall state:

The sum of the amount paid to the contractor under Interim Certificate and the amount named in the said appendix as limit of Retention Fund, and,

The Contract Sum adjusted as necessary in accordance with the terms of these conditions, and the difference (if any) between the two sums shall be expressed in the said Certificate as a balance due to the Contractor from the Employer or to the Employer from the Contractor as the case may be, and subject to any deductions authorised by these conditions, the said balance shall as from the fourteenth day after the issue of the said Certificate be a debt payable as the case may be by the Employer to the Contractor or by the Contractor to the Employer.

32. It is thus evident that the amount becomes a debt after the fourteenth day of issuance of the Final Certificate and the court can direct payment of interest from the said due date till the date of institution of the suit. As per Section 3, the court may allow interest not exceeding the current rate of interest. It is obvious that calculation of interest at the rate of 18% for the period prior to the suit by the plaintiff, which has been accepted by the court, is not sustainable and the court could have granted interest at a rate not exceeding the current rate of interest as defined u/s 2(b) i.e., not exceeding the highest of the maximum rates at which interest may be paid on different classes of deposits by different classes of scheduled banks. Even though there is no specific material before the Court, judicial notice can be taken of the fact that interest on special term deposits in the scheduled banks during the relevant period was between 9% and 13% or so.

33. Having regard to the facts and circumstances of the case, we feel that it would be appropriate to allow interest for the period from the fourteenth day of issuance of the final certificate till the date of institution of the suit at 9% on the principal amount.

34. So far as pendent elite and future interest are concerned, the trial court had granted interest at the rate of 18%. Learned Senior Counsel appearing for the appellant has submitted that the defendant is an organisation created for the purpose of development of sports and is not a profit making organisation and, therefore, the transaction cannot be considered as a commercial transaction. However, the question as to whether such transaction is commercial or otherwise is required to be determined by keeping in view the object of the person entitled

to interest rather than the object of the person liable to pay interest. Obviously the plaintiff had entered into a commercial venture of constructing certain works for the benefit of the defendant. In that sense the transaction can be considered as a commercial transaction. Therefore, interest can be calculated at the rate in excess of 6%. Since there is no contractual rate of interest, the rate can be fixed keeping in view the rate on which the monies are lent or advanced by the nationalised banks in relation to commercial transactions.

35. Keeping in view the aforesaid, we are inclined to direct that pendente lite and future interest, as contemplated in Section 34 C.P.C., should be paid at the rate of 9%.

36. As already indicated the claim of the plaintiff related to the final bills for the construction of tennis stadium, aquatic stadium and hockey stadium. The final bill for the aquatic complex of Rs. 30,42,942.36 was submitted on 24.1.1996, which was certified on 10.2.1996. Interest on the aforesaid amount for the pre-suit period should be calculated after expiry of 14 days from the date of the certificate i.e., with effect from 25.2.1996. The bill for Rs. 51,22,983.74/- for the hockey stadium was certified on 17.2.1996. The interest should be calculated on such amount with effect from 3.3.1996. The bill for 1,64,19,123.89/- for the tennis stadium was certified on 21.2.1996. The interest on such amount shall be calculated with effect from 7.3.1996.

37. The amount payable for additional work of Paving Block/Chain Link Fencing in the hockey stadium to a tune of Rs. 1,82,430.55/-, which was submitted on 17.4.1996 and certified on 15.5.1996, however, stands on a different footing. It is not disputed that this work was not envisaged as per the original contract and as such this work should be considered as "extra work". Clause 34 of the contract clearly envisages that extra work could be done only after obtaining specific written instruction. However, in the present case, admittedly there was no specific written instruction. As already indicated, since the defendant had received the benefit of such work and such work was not done gratuitously, the defendant is liable to pay the amount, but it cannot be said that liability to pay such amount arises by virtue of any written agreement. Liability to pay for such work arises by virtue of Section 70 of the Contract Act. Since the amount payable is not by virtue of any written instrument at a certain time, Section 3(1)(a) is not applicable, but Section 3(1)(b) is applicable. Even though there are several correspondences between the plaintiff and the defendant to the effect that the amount payable to the plaintiff was unnecessarily delayed, for the first time, the plaintiff claimed payment with interest by letter dated 6th September, 1997. Therefore, so far as additional work is concerned, the interest should be calculated from such date, namely, 6th September, 1997.

38. Even though as per the original agreement the plaintiff was not entitled to receive any mobilisation advance, subsequently, the defendant had agreed to give mobilisation advance to the plaintiff subject to realisation of interest. Subsequently, such interest rate was fixed at 18%. The plaintiff in its various

correspondence admitted that the defendant had right to receive the balance interest of one per cent on various mobilisation advances.

39. Having regard to all these aspects, the judgment and decree of the trial court is modified in the following manner:

(a) The plaintiff is entitled to claim pre-suit, pendente lite and future interest at the rate of 9% on the amount payable on account of final bills in respect of aquatic stadium from 25.2.1996, hockey stadium from 3.3.1996 and tennis stadium from 7.3.1996 as well as on account of extra work from 6.9.1997.

(b) The defendant is entitled to deduct 1% towards interest on mobilisation advance.

In the result, the appeal is allowed in part to the extent indicated above. There would be no costs in the present appeal.