
(2009) 04 GAU CK 0047

In the Gauhati High Court

Case No : Regular First Appeal No. 142 of 2005

State of Assam and Others

APPELLANT

Vs

Marino Dredg Co. (P) Ltd.

RESPONDENT

Date of Decision : 27-04-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 1, Order 11 Rule 14, 151, 80

Citation : (2009) 2 GLD 171

Hon'ble Judges : Ranjan Gogoi, J;B.K. Sharma, J

Bench : Division Bench

Advocate : S. Sarma, for the Appellant; M.K. Choudhury and M. Dutta, for the Respondent

Judgement

B.K. Sarma, J.—This appeal is directed against the judgment and decree dated 6.8.2004 passed by the learned Civil Judge (Senior Division) No. 1, Guwahati in Money Suit No. 48/98, partially decreeing the suit in favour of the plaintiff respondent declaring that the plaintiff/respondent is entitled to Rs. 12,45,816/- payable by the defendants/appellants No. 1 to 4 jointly or severally with interest at the rate of 9% per annum from 1.4.1995 till realization of the amount within 60 days.

2. The sole respondent as the plaintiff instituted money suit No. 48/98 valued at Rs. 35,13,556.64P against the present four appellants as the defendants and also against the defendant No. 5 by name who was the defendant No. 4 in his official capacity. The learned trial Court has held that the suit against the said defendant No. 5 is not maintainable in view of the fact that he was already a party defendant (defendant No. 4) in his official capacity.

3. The matter relates to execution of the particular work entrusted to the plaintiff/respondent by the defendants-appellants pursuant to floating of tender and the entitlement of the plaintiff/respondent to the amount it had claimed in the suit for execution of the works. It is an admitted position that the plaintiff could not execute the work fully. The prayers made in the suit are as follows:

The plaintiff, therefore, prays before the learned Court for-

(a) A decree for Rs. 35,13,556.64 as mentioned in paragraph 39 thereof against the defendants and each one of them.

(b) Interest on judgment and further interest till date of payment of the decretal amount by the defendants @ 18% per annum or at such other rates this learned Court may deem fit and proper.

(c) Receiver;

(d) Commission for Inspection, Inventory and or Investigation.

(e) Attachment before judgment.

(f) All costs including the amount paid by plaintiff by way of court-fees.

(g) Advocate's costs.

(h) Such other relief and/or further reliefs which this learned Court may be pleased to hold to be just and proper.

4. The case as set out in the plaint is that the plaintiff who had been carrying on, inter alia, the business of dredging of river beds by employing the self owned dredgers was awarded with contract pertaining to the job of river bed dredging vide work order dated 23.12.1992. The work order was preceded by the Letter of Intent (LOI) vide letter dated 9.10.1992, pursuant to which the plaintiff had submitted Bank Guarantee dated 13.12.1992 for Rs. 2,35,000.00 to the defendant/appellant No. 3 towards security and performance guarantee. The plaintiff respondent had also earlier submitted the Demand Draft for Rs. 20,000.00 dated 15.9.1992 towards earnest money.

5. Pursuant to the said work order, the defendant/appellant No. 3 agreed to pay a sum of Rs. 6,98,500/- only as mobilization charge of the dredgers and Rs. 86/- only as excavation charge of dredged material per cubic metre and a further sum of Rs. 2,50,000/- for demobilization of dredgers and re-transportation including handling, dismantling, loading to destination etc. as specified in the Letter of Intent.

6. The plaintiff-respondent took up the job at the specified work site. It is the claim of the plaintiff that it had completed the dredging work on 15.3.1993. The plaintiff had written letters to the defendants/appellants intimating the difficulties it had to face towards execution of the works. As per the own admission of the plaintiff, it could not complete the work within the target date i.e. 9.2.1993 allegedly for the situation beyond its control and accordingly it had prayed for extension of time to complete the work which was granted by the defendants/appellants up to 15.3.1993, vide letter dated 6.3.1993.

7. According to the plaintiff/respondent, measurements of the works were taken by the competent officers of the defendant/appellant No. 3 and defendant No. 5 on 15.3.1993 and such measurement was recorded in presence of the

representative of the plaintiff at the work site in the Site Measurement Book of the Government of Assam. The Measurement Book was signed by the plaintiff in acceptance of the recorded measurement. It is the further case of the plaintiff/respondent that the measurement of the works done by the plaintiff was again rechecked personally by the defendant No. 5 on 23.3.1993 by employing the Engineers under his control and in presence of the plaintiff. The said rechecked measurements were also recorded in the Measurement Book and the same was signed by the defendant No. 5 along with his Engineers on job as well as by the plaintiff confirming the authenticity and acceptance of the said rechecked measurement.

8. After such measurement etc., the plaintiff company requested the defendant No. 5 for clearing the bill pertaining to the works but same was delayed unauthorisedly. The defendant No. 5 prepared bill No. 81/RF-2 dated 10.6.1993 for payment to the plaintiff which according to the plaintiff was on the basis of the measurement showing the quantity dredged by the plaintiff as 68,556 cubic metres. However, when the payments thereof was not made, the plaintiff had to sent its representative to the defendants/appellants requesting for payment. When such efforts failed to evoke any response, the plaintiff/respondent by his letter dated 15.9.1993 requested the defendant No. 5 to return the Bank Guarantee dated 15.11.1992 for Rs. 2,35,000/- and also to return the Demand Draft dated 15.9.1992 deposited towards earnest money. The defendant No. 5 by his letter dated 4.12.1993 addressed to the plaintiff/respondent admitted that in terms of the final bill, the plaintiff had executed 68,556 cubic metre of earth work. The claim of the plaintiff was Rs. 68,44,316/- for dredging the said 68556 cubic metres and for charges of mobilization and demobilization reflected in the said final Government bill No. 81/RF-2 dated 10.6.1993.

9. When the plaintiff failed to recover its balance dues, it sent a letter dated 19.10.1993 to the defendant/appellant No. 2, requesting him to make early payments. Thereafter, the defendant/appellant No. 4 by his letter dated 3.6.1993 informed the plaintiff respondent that the Bank Guarantee was being released by the defendant/appellant No. 3. By the said letter, the aforesaid Demand Draft dated 15.9.1992 was sent back to the plaintiff.

10. It is in the aforesaid circumstances, the case of the plaintiff in the suit was that the defendants/appellants agreed for payment of the amount as raised in the bill dated 10.6.1993 for execution of dredging works quantified at 68,556 cubic metre. When the payment was not made and all out efforts of the plaintiff failed to evoke any response, it made further representation for early payments, one of which was to the Departmental Minister. However, the plaintiff was paid the sum Rs. 55,98,500/- only out of the total billed amount of Rs. 68,44,316/-. The last payment of Rs. 4,00,000/- was made on 29.3.1995. In paragraph 27 of the plaint, the plaintiff has shown the particulars of the payment made to the tune of Rs. 55,98,500/- leaving the balance amount of Rs. 12,45,816/-.

11. In one of the visits of the representative of the plaintiff company to the office

of the defendant No. 4, it was intimated that the defendant No. 5, before his transfer from the place, had corrected the Sectional Measurement Book by scoring through the measurement records, thereby, reducing the bill value by about Rs. 12,00,000/-. On demand, the defendant No. 4, on 3.11.1995, produced the said Sectional Measurement Book to the representative of the plaintiff who could detect the tampering and over-writing in the same by the defendant No. 5. Situated thus, the plaintiff by its letter dated 3.11.1995, requested for early clarification of the irregularity and illegality purportedly committed by the defendant No. 5. However, no response was shown. Thereafter, the plaintiff issued Section 80, CPC notice demanding payment of Rs. 12,45,816/- together with interest at rate of 18% per annum from 1st April, 1995 till 31st October, 1997, amounting to Rs. 5,79,970/-and thus, claiming a total amount of Rs. 18,25,786/-. It was indicated in the notice that upon failure to comply with the demand made, the plaintiff would be left with no option than to file appropriate suit against the defendants/appellants claiming further interest, cost and other relief or reliefs.

12. The notice sent by the plaintiff was duly received by the defendant/appellant No. 2 but none of the defendants took any steps for payment to the plaintiff. Hence, the suit was filed by the plaintiff with the aforesaid prayers.

13. Two separate written statements were filed by the defendants/appellants, one by defendant Nos. 1 to 4 and another by defendant No. 5. In both the written statements, the said defendants denied the claim made in the plaint. It was denied that the plaintiff could complete the specified work on 15.3.1993. According to the defendants, the plaintiff failed to take up the work timely after receipt of the formal work order. The department Additional Chief Engineer by his letter dated 14.12.1992 reminded the plaintiff that it had not started the work till December, 1992, although two valuable months had passed by since the issue of the LOI. The Executive Engineer also by his letter dated 20.12.1992, again reminded the plaintiff that already 75 days had elapsed out of the allotted time of 120 days and the plaintiff had not started the work.

14. According to the defendants, the plaintiff launched the dredger in water only on 8.1.1993 and thus, it failed to comply with the terms and conditions of the tender agreement. The plaintiff was informed that the delay in operation of the dredger was due to lack of proper management of the plaintiff. The defendants also denied the operational hazards about which the plaintiff indicated in the plaint. Further extension of time was granted to the plaintiff upto 15.3.1993 but the plaintiff could not complete the work even within the extended period and the executed work had to be restricted in complete stage. Indicating the terms of extension granted vide letter dated 6.3.1993, it was contended by the defendants that such extension was without prejudice to the right of the Government to recover liquidated damages as per the provisions of the tender agreement.

15. As regards the joint measurement, the plea of the defendants/appellants in

the written statement was total denial. It was denied that the joint measurements were taken by the competent officers of defendant Nos. 3 and 5. According to the defendants, the measurements of the works are taken and recorded by the Sectional Officer in-charge of the works. It was the plea of the defendants that the only recognized Measurement Book is the one issued by the Executive Engineer as per standard Government form. The said Measurement Book bearing No. 2142 on which the bill was recorded was not signed by the plaintiff and that the signing in some site measurement books is not acceptable as the said measurement book is not the final Measurement Book. According to the defendants, the final measurement of the works executed by the plaintiff was taken on 15.3.1993 by the Sectional Officer and upon scrutiny of the relevant measurement book, no signature of the plaintiff was found. It was the specific case of the defendants that the Executive Engineer has got the prerogative to conduct check measurement of the measurement taken and recorded by the Sectional Officer as per Rule 376 of the APWD Code. The defendants in their written statement confirmed the payment of Rs. 55,98,500/- to the plaintiff during the period from 12.2.1993 to 30.3.1995 being the amount payable to the plaintiff against the quantity of works executed by it.

16. As regards the certificate issued by the defendant No. 5, which is the main thrust of the case of the plaintiff and on the basis of which the impugned judgment and decree has been passed, it was the stand of the defendants that the said certificate cannot be accepted as an authority of bona fide measurement as there was no provision in the tender agreement which provided for furnishing of such certificate. According to the defendants, the certificate was issued as requested by the plaintiff. It was the specific case of the defendants that the actual quantity of works executed was finally found to be only 54447 cubic metres and not the one indicated in the certificate. After the check measurement, the quantity of works executed by the plaintiff was calculated as 54,147.25 cubic metres and the bill amount according to the corrected quantity was found to be Rs. 56,05,164/-. The amount already paid to the plaintiff was Rs. 55,98,500.00 leaving a balance of Rs. 6,464/-for adjustment against misc. recovery. It was the plea of the defendants that the certificate in question issued to the plaintiff cannot be used for realizing the excess amount than the actual quantity of the work executed by the plaintiff.

17. As regards the allegations of tampering of Government records, the defendants stated in their written statement that the correction of figures in the Sectional Measurement Book cannot be termed as tampering of Government record. Thus, it was the stand of the defendants that the plaintiff having been paid the actual amount to which it was entitled to for execution of the works, there was no question of working any further payment as was claimed by the plaintiff.

18. The defendant No. 5, who was impleaded in his personal capacity apart from being impleaded in his official capacity as defendant No. 4, in his written

statement, denied the contentions raised in the plaint. He in his written statement, more or less, stated the same things as in the written statement filed by the official defendants. As regards the particular certificate in question, it was the specific case that the same was issued as was requested by the plaintiff for some other purpose and not to certify the actual quantity of works executed by the plaintiff.

19. On the basis of the pleadings of the parties, the learned trial Court framed the following issues:

Issues.

1. Whether the suit is maintainable in its present suit form?
 2. Whether the suit is barred by limitation?
 3. Whether there is any cause of action for the suit?
 4. Whether the plaintiff's tender for dredging work of river- bed of Naodehing River was accepted at the rate of Rs. 86.00 per cubic metre and letter of intent for the job was issued to the plaintiff?
 5. Whether the plaintiff had completed the dredging job successfully within extended period on 15.3.1993?
 6. Whether the joint measurement of completed job was taken on 15.3.1993 in presence of the representative of the plaintiff and recorded in site measurement book of the Government?
 7. Whether measurement was rechecked on 23.3.1993 by the defendant No. 5 and found 68556 cubic metres dredged in presence of the representatives of the plaintiff and such re-check measurement book was signed by all concerned?
 8. Whether the defendant No. 5 raised the final bill dated 10.6.1993 for Rs. 68,44,316.00 and issued completion certificate of works dated 4.12.1993?
 9. Whether the bank guarantee and earnest money were released unconditionally to the plaintiff by defendants on satisfactory completion of the dredging job measuring 68556 cubic metres.
 10. Whether the defendant No. 5 has tampered the measurement book behind the back of the plaintiff?
 11. Whether the plaintiff is entitled to get Rs. 35,13,556.64 with interest thereon from the date of final bills from the defendants?
 12. Any other relief or reliefs to which the plaintiff is entitled to under the law and equity.
20. Both the parties to the suit examined one witness each. While the plaintiff examined its Director Shri Prasanta Kumar Das, the defendants examined the defendant No. 5 Shri K.M. Konwar, the Executive Engineer, who was in-charge of

the work. The plaintiff witness (PW) in his evidence on affidavit generally stuck to the case made out in the plaint. In the cross- examination, he admitted that as per the time schedule of the agreement, the completion time was 120 days w.e.f. 9.10.1992 till 14.12.1992, during which period the plaintiff did not start the work. It was also admitted that the defendants No. 3 and 4 by their letters dated 14.12.1992 and 20.12.1992 requested the plaintiff to start the work immediately. The plaintiff also admitted receipt of letter dated 29.12.1992 from the defendant No. 3 in which it was stated that although more than 2-1/2 months had already elapsed from the date of issuance of the LOI, the dredger had not yet been put into operation. He also admitted that the plaintiff failed to fulfil the condition of the contract and that the time is the essence of contract. The plaintiff also admitted of having received the reply of the defendant No. 3 dated 15.1.1993, by which it was intimated that upon failure of the plaintiff to execute the work within the time schedule, action would be taken as per the terms of the contract agreement and that the Government would be compelled to switch over to any other means to complete the work. In the letter, it was indicated that the time for completion of the work expired on 9.2.1993.

21. The plaintiff admitted receipt of Rs. 55,98,500/- in total. He also admitted that although he had signed the site measurement book but did not sign in the departmental Measurement Book. It was further admitted that there was a rough Measurement Book and one Final Measurement Book. It was further admitted that as per the condition of payment, payment was to be made according to the quantity of work executed. The plaintiff could come to know on 3.4.1995 that there was correction in the Measurement Book. As regards the loss of business etc. due to delay in payment, the witness in his cross-examination, stated that he had not filed any document to show loss of business. As regards the Exhibit-10 certificate, which is the sole base of the claim of the plaintiff, he stated in his cross-examination that although he was in possession of the letter seeking such a certificate from the Executive Engineer but the same was not produced before the Court.

22. The plaintiff cross-examined the defendant No. 5 who had submitted the written statement. In his cross-examination, the defendant No. 5 stated that the departmental staff took the measurement of works done by the plaintiff and that one is the Sectional Measurement Book and another is the Measurement Book, the Sectional Officer writes. As regards the issuance of the completion certificate to the plaintiff, the defendant No. 5 in his cross-examination stated that the same was issued on the request of Shri P.K. Das, the Director of the company and that such request was made in writing. As regards the checked measurement, he stated that his subordinate staff assisted him in taking the measurement of the works done by the plaintiff and that the correction made in the measurement book was after issuance of the certificate.

23. The learned trial Court by its impugned judgment and decree has partially decreed the suit in favour of the plaintiff upon answering the issues in favour of

the plaintiff. Issue Nos. 5, 6, 7 and 8 which pertain to the extension of time for execution of the work; measurement taken and the final bill dated 10.6.1993 for Rs. 68,44,316/- were taken up together and have been answered in favour of the plaintiff. The particular letter purportedly certifying the amount of works executed by the plaintiff and the final bill amount to which the plaintiff was entitled to is Exhibit-10, which is the letter dated 4.12.1993 and the same is quoted below:

Office of the Executive Engineer : Dibrugarh E & D Division Dibrugarh.

No. M-1(A)/Pt. II/93-94/188 dated 4.12.1993

M/s. Marino Dredg Co. Pvt. Ltd. 52-A, Indian Mirror Street, Calcutta 700013.

Subject: Completion Certificate.

Reference : Your No. Nil dated 3.12.1993.

Sir,

With reference to above, I am to inform you that the dredging work for the scheme "FDR to Saikhowa protection bund phase I for 1992-93 (closing of avulsion of river Noadehing) was allotted to you by the Additional Chief Engineer, Upper Assam Zone, Flood Control department, Dibrugarh vide his number ACE/FC/NIT-12/38 dated 23.12.1992. As per final bill you have executed 68556 Cu.M (Sixty-eight thousand five hundred and fifty-six) of earthwork against the allotted quantity of 1,34,000 Cu.M (One lakh thirty-four thousand) in the said work.

Yours faithfully, K.N. Konwar Sd/- 4.12.1993 Executive Engineer, Dibrugarh E & D division, Dibrugarh.

24. The whole basis of the claim of the plaintiff to say that it had executed 68556 Cu.M. of works and thus entitled to the amount in the final bill thereof which is Rs. 68,44,316/- instead of Rs. 55,98,500/-, is the aforesaid Exhibit-10 letter dated 4.12.1993. While it is the case of the plaintiff that the said letter was issued to it on the basis of the measurement taken in the Measurement Book, it is the case of the defendants that the letter was issued not in the context of the actual works executed by the plaintiff but was issued for some other purpose on the request of the Director of the plaintiff company. It is the further stand of the defendants/appellants that such a letter cannot be decisive of the actual works executed by the plaintiff but the same is dependent on the final measurement upon rechecking by the Executive Engineer in the final Measurement Book.

25. We have heard Mr. S. Sarma, learned Counsel for the defendants/appellants as well as Mr. M.K. Choudhury, learned senior counsel assisted by Mr. M. Dutta, learned Counsel for the plaintiff/respondent. While Mr. Sarma submitted that the findings arrived at by the learned trial Court solely on the basis of the aforesaid Exhibit-10 letter dated 4.12.1993, is totally perverse and based on improper appreciation of evidence. Mr. Choudhury, learned Counsel for the plaintiff/

respondent submitted that the Executive Engineer i.e. the defendant No. 4 was not authorized to make any correction in the Measurement Book and such correction was by way of tampering of records. According to him, the Annexure-10 letter dated 4.12.1993 had been issued on the basis of the measurement obtained in the Measurement Book and after such issuance, the said authority could not have tampered with the Measurement Book so as to show lesser quantity of works executed by the plaintiff and to reduce the amount payable to the plaintiff.

26. We have given our anxious consideration to the submissions made by the learned Counsel for the parties as well as the entire evidence on record.

27. While entertaining the suit by order dated 25.3.1998 on the basis of the prayer made by the plaintiff, the learned trial Court issued direction to the defendants to preserve the Measurement Book by preparing an inventory in presence of the Advocate Commissioner appointed by the Court. The order was passed on the basis of the apprehension expressed by the plaintiff regarding the interpolation in the Sectional Measurement Book etc. It is on record that the Advocate Commissioner appointed by the Court prepared the inventory and obtained the photocopies of the documents, production of the originals of which was prayed for by the plaintiff vide application No. 1789/2002. The application was entertained by order dated 5.6.2002 and the defendants were directed to file objection to the same.

28. Although, no objection was filed by the defendants inspire of granting several opportunities on the basis of the prayers made but from the materials on record, it appears that no order was passed calling for the originals of the said documents. By order dated 27.9.2002, last chance was granted to the defendants to file objection fixing the matter on 5.10.2002. However, on 5.10.2002, further time was granted fixing the matter on 28.11.2002. On 28.11.2002 also when no objection was filed, the matter was fixed for evidence of the plaintiff on 3.1.2003. Thereafter, the matter proceeded with the evidence adduced by both the parties and conclusion of hearing and delivery of the judgment and decree, without however, any order on the application filed by the plaintiff to call for the originals of the documents mentioned therein.

29. The application was filed by the plaintiff for recording orders under Order XI, Rule 14 of the CPC read with Section 151, CPC. The documents mentioned in the schedule included the site and Sectional Measurement Books, final bill No. 81/RF/2 dated 10.6.1993 for Rs. 68,44,316/- etc. As noted above, the application was entertained and the defendants were called upon to file objection, if any. Although, no objection was filed but from the order sheets, it appears that the said application was not disposed of and no order calling for the originals of the said documents was passed.

30. Order XI, Rule 14 of CPC under "Chapter Discovery and Inspection" deals with production of documents, which reads as follows:

It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath to such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

31. No order on the application having been passed, there was no production of the originals indicated in the application. However, the Advocate Commissioner had produced the photocopies of the Measurement Books etc. which formed part of the records as Exhibit-13. On perusal of the photocopies of the Measurement Book, it appears that there was some correction in the Measurement Book, which originally stood as 68556 but later on corrected as 68545 and further to 54147 Cu.M. According to the defendants/appellants, the Executive Engineer had carried out the check measurement being vested with the power and jurisdiction under Rule 376 of APWD Code. It is on the basis of such corrected measurement which came to be 54147.25 Cu.M. the total bill amount, according to the corrected quantity was found to be Rs. 56,05,164/-. The amount of Rs. 55,98,500/- having already been paid to the plaintiff, the only balance which stood at that relevant point of time was Rs. 6,464/- and the same was also for adjustment against misc. recovery.

32. The learned trial Court dealing with the plea of the defendants that the departmental authorities were entitled to recheck the quantity of work found to be done has held that such plea on the part of the defendants is not at all acceptable. The only reason assigned therefore is that the above quoted Exhibit-10 letter having been issued on verification of the record, if the defendant No. 5 had any authority to recheck the measurement, the same ought to have been exercised before issuance of the said letter. While holding so, the learned trial Court noticed the fact that the defendant No. 5 was holding the office of the defendant No. 4 at the relevant time. The learned trial Court has observed that if the correction was made by the defendant No. 5 in his official capacity, he did so in discharge of his official duties but while observing so, the learned trial Court has left it open to the authorities to decide the legality or otherwise of such correction made by the said defendant. It has also been observed that if the said defendant by making subsequent correction in the Measurement Books has committed any illegality or irregularity in discharging his duties in his official capacity, same is to be looked into by the authority under whom he had been working.

33. It is on the above account, the learned trial Court has held that the plaintiff cannot claim any relief against the defendant No. 5. In other words, the trial Court has recognized the fact of doing the correction in the Measurement Books by the defendant No. 5 in discharge of his official duty as defendant No. 4 but has left the legality or otherwise of the same to be decided by the departmental authority superior to the said authority, while the task was with the trial Court itself to decide the legality or otherwise of the same when it was the specifically

pleaded case of the defendants/appellants that the defendant No. 4 did the correction in exercise of his power under Rule 376 of the APWD Code.

34. If the Executive Engineer under the aforesaid rule is vested with the power to carry out check measurement about the quantum of work executed by contractor before making the final payment and the correction in the final Measurement Book was carried out by the defendant appellant No. 4 in accordance with the said rule, the Exhibit-10 letter will have to be tested in the touchstone of the said power and authority under the rule. The Exhibit-10 letter which has been quoted above, according to the defendant, more particularly the defendant No. 5, was issued on the basis of the request made by the plaintiff which fact has been admitted by the Director of the plaintiff (PW) in the cross-examination. He admitted that the letter on the basis of which the Exhibit-10 letter dated 4.12.1993 was issued had not been submitted. It was the specific case of the defendants/appellants, more particularly the defendant No. 5, that the letter was issued as requested by the Director of the plaintiff but the same was not by way of certifying the actual work executed by the plaintiff.

35. Even otherwise also, if we go by the language used in the letter, same cannot be said to be the authentic certificate of execution of the works to the tune of 68,556 Cu.M. The letter only speaks of execution of said quantity as per the final bill prepared. It does not say that as per the Measurement Books etc., the quantity of work executed by the plaintiff is 68,556/-Cu.M. The letter does not make any reflection of consultation of the Measurement Book finally prepared. Thus, there was necessity for the trial Court to deal with the Measurement Books, photocopies of which were produced by the Advocate Commissioner (Exhibit-13), production of original of which along with some other documents was also prayed for by the plaintiff vide its aforesaid application No. 1789/2002 dated 5.6.2002 and then to consider the issue Nos. 5, 6, 7 and 8. Instead, the said Exhibit-10 letter dated 4.12.1993 is answering the issues.

36. Apart from the above, nothing has been brought on record that issuance of such a letter as Exhibit-10 dated 4.12.1993 is contemplated under the work agreement. The letter itself shows that the same was issued not in pursuant to any obligation on the part of the defendant No. 5 and for that matter the defendant No. 4, but was issued in reference to the request made by the representative of the plaintiff vide his letter dated 3.12.1993, as clearly indicated in column "Reference" to the Exhibit-10 letter dated 4.12.1993. This fact has been admitted by the PW in his cross-examination. The Exhibit-13? photocopies of the Measurement Books etc. having been placed before the Court, it was incumbent on the part of the trial Court to consider the same before passing the impugned judgment and decree solely on the basis of the aforesaid Exhibit-10 letter dated 4.12.1993, which by no stretch of imagination can be said to be the whole basis, enabling the plaintiff to contend that it had executed the amount of work as indicated in the said letter.

37. The case of Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh, has been

referred to by Mr. Sarma, learned Counsel for the defendants/appellants, so as to contend that for the act of defendant No. 5, the Government cannot be made liable. In the said case, the Apex Court dealing with the principle relating to the liability of the Government for the acts of its servants observed that if a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is, was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of sovereign powers of the State to such public servant? It was held that if the answer is in the affirmative, the action for damages for loss caused for such tortious acts will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, action for damages would lie. Stretching on the significance and importance of making such a distinction, the Apex Court observed as follows:

The significance and importance of making such a distinction has to be realized particularly at the present time when, in pursuit of their welfare ideal, the Government of the States as well as the Government of India naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of governmental activities in which the exercise of sovereign power is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign power, so that if acts are committed, by Government employees in relation to other activities which may be conveniently described as non-governmental or non-sovereign, citizens who have a cause of action for damages should not be precluded from making their claim against the State. That is the basis on which the area of the State immunity against such claims must be limited. The State of Rajasthan Vs. Mst. Vidhyawati and Another, Ref. To.

38. The above position has been referred to by the learned Counsel for the defendants/appellants so as to contend that for the act of commission and omission on the part of the defendant No. 5 towards issuance of the Exhibit-10 letter dated 4.12.1993, the plaintiff cannot bind the State towards making the payment on the basis of the said letter alone without referring to the other related documents.

39. As already noticed above, Exhibit-13 photocopies of the Measurement Book were available before the learned trial Court, production of the originals of which along with some other documents was also prayed for by the plaintiff/respondent vide their application dated 5.6.2002 but the same were not considered and no effort was made to cause production of the originals and the impugned judgment and decree came to be delivered solely on the basis of the aforesaid Exhibit-10 letter. It was to be ascertained as to whether under Rule 376 of the APWD Code, the authority was empowered and competent to make the rechecking of the measurement. It was the specific case of the defendants/appellants that such rechecking was done as per the procedure laid down in the said rule and that the

Exhibit-10 letter dated 4.12.1993 was issued before such rechecking.

40. Even otherwise also, it was the case of the defendants/appellants that such a letter issued by the defendant No. 5 was not on the basis of the actual measurement but was issued for the purpose other than the one with which the matter was concerned. The letter was issued on the basis of the request made by the PW, which is an admitted fact. The PW did not produce the said request letter although he was in possession of the same. The basic foundation of the Annexure-10 letter dated 4.12.1993 was also to be seen and considered before arriving at the finding that the Exhibit-10 letter dated 4.12.1993 is exhaustive and all pervasive towards making the payment as was claimed by the plaintiff.

41. For all the aforesaid reasons, we are of the considered opinion that the matter needs fresh consideration of the learned trial Court after taking into account the relevant Measurement Book. No opinion is expressed regarding the veracity or otherwise in the correction made in the Measurement Books and the same will be decided by the learned trial Court on the basis of the plea advanced by the parties. The originals of the documents as prayed for by the plaintiff in its application dated 5.6.2002 may also be called for, for the purpose of arriving at a just and proper decision in the matter.

42. Parties shall now appear before the learned trial Court on or before 30.5.2009 facilitating consideration of the matter afresh by it as expeditiously as possible. Such consideration shall include Exhibit-13 documents, the documents mentioned in the aforesaid application No. 1789/2002 dated 5.6.2002 including the original Measurement Books, the relevant Rule i.e. Rule 376 of the APWD Code and the letter of the plaintiff dated 3.12.1993, on the basis of which the Exhibit-10 letter dated 4.12.1993 was issued. It is expected that the learned trial Court shall decide the matter as expeditiously as possible.

43. In the result the impugned judgment and decree dated 6.8.2004 passed by the learned Civil Judge (Senior Division) No. 1, Kamrup, Guwahati, is set aside and quashed with the aforesaid direction. The registry shall transmit the case records to the Court below immediately.