

(1993) 01 BOM CK 0016
In the Bombay High Court
Case No : First Appeal No. 259 of 1985

State of Maharashtra and others

APPELLANT

Vs

Saifuddin Mujjaffarali Saifi

RESPONDENT

Date of Decision : 29-01-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34, 80
Contract Act, 1872 — Section 9
Industrial Disputes Act, 1947 — Section 20
Interest Act, 1978 — Section 3

Citation : (1993) 01 BOM CK 0016

Hon'ble Judges : H.H. Kantharia, J;A.A. Halbe, J

Bench : Division Bench

Advocate : Mr. D.U. Mirajkar, for the Appellant; Mr. P.N. Karlekar, for the Respondent

Judgement

Halbe, J.—The State of Maharashtra and its officers have preferred this appeal against the judgment and decree passed by the Civil Judge, Senior Division, Dhulia, in Special Civil Suit No. 17/84, directing the appellant/State to pay Rs. 2,18,755/-, together with six per cent interest from the date of filing of the suit till realization to the respondent/plaintiff. The matter arises as follows.

The State proposed to construct the bridge across river Serpani at Mile No. 76 (622 Kms.) on Surat-Dhulia-Edlabad-Nagpur road. Accordingly, the tenders were invited and in response thereto various contractors submitted their tenders on due date and in time. On the scrutiny of those tenders, the tender of the plaintiff was found to be lowest as he had quoted rates at 4.91 per cent above the estimated rate. The plaintiff had attached certain conditions while submitting the tender, but later on withdrew those conditions and submitted the letter to that effect. Briefly, therefore, the tender of the plaintiff was accepted at the rate 4.91 per cent above estimated amount of the tender. It seems that the tender was published for Rs. 4,55,273/-, but in pursuance of the acceptance of the tender of the plaintiff, the estimated cost of the work rose to Rs. 4,77,627/-. The appellant/

defendant No. 2 issued the work order AB/T/4781/78 on 5.7.1978 and is not in dispute that the plaintiff started that the work of the construction of the bridge across the said Serpani river. The prescribed time limit for this work was 18 months which on the basis of 5.7.1978 was 4.1.1980. It is, however, not in dispute that the date remained on paper and on account of several circumstances beyond the control of the plaintiff as well as the defendant, the construction of the bridge was completed on 15.2.1981.

2. The allegations of the plaintiff are that during the execution of the work, the plaintiff found several defects in putting up the foundation both for abutment and piers. The excavation had to be done deeper than the designed level and this necessitated further dewatering in the river bed. The plaintiff, therefore, wrote a letter to defendant No. 2 on 25.10.1978 pointing out the difficulties in respect of excavation of foundation and dewatering. It was stated in the said letter that the rates in the tender for this work were far less than the cost which he was required to incur for carrying out this work. To the details of this letter, we shall come latter, but suffice it to say at this stage that the difference started right from 24.10.1978. As usual, the appellants did not respond to this letter and this was followed by another letter, from the plaintiff dated 2.10.1979, inter alia, making the same grievance about the demand for rise in rates for the works indicated above. It is further contended that the defendant No. 2, under his letter No. E-8/NW/7594, dated 2.11.1979, replied to the plaintiff that the excavation was made in the soft strata as well as hard strata and thus the total quantity of excavation for foundation had not increased. It may be stated here that in the tender there was no reference whatsoever to the soft strata and digging had to be done or excavation had to be done, it was in hard strata. With this reply, the difference multiplied as the respondent plaintiff could envisage that the appellants/defendants were determined not to pay him as per his demand. The appellant/defendant emphasised that the respondent/plaintiff could not demand the rate for hard strata. There was a classification in strata and the payment could only be made according to the hard strata and soft strata. It must be stated here that for hard strata, the rate was Rs. 30/- per cubic metre. There was no reference whatsoever to soft strata, but the appellant has relied upon, for that purpose, on the District Scheduled Rates (D.S.R.). For this purpose, reference was made to Clause 38 of the Agreement read with the instructions contained in Government, B. & C. Department Circulars/Memorandum No. CAT/1268/59382, dated 14.3.1974 and No. CAT/1268/29382/Q-Desk-2, dated 22.2.1978. Attention of the plaintiff was also drawn to specification item No. 2, Which, according to the appellant/defendant clearly provided that the rates specified in the specification No. 2 included even the additional dewatering sequel to increase in depth. Briefly stated, the stand that was taken by appellant/defendant No. 2 was that under the stipulated conditions of tender, the plaintiff was not entitled to the additional amount or extra rates for excess excavation and dewatering.

3. Turning to the further contentions raised by the plaintiff, it is stated that the

plaintiff was expected to excavate 431.20 cubic metres for foundation in hard strata including shoring and structuring at the above stipulated rate, but the defendants called upon him to go deep in the matter for excavation. The plaintiff has contended that this was strictly done on the implied consent or rather implied persuasion by defendant No. 2. Besides the above letters, the plaintiff sent further letters on 14th December, 1978 and 1.2.1979 claiming Rs. 75/- per cubic metre for the purpose of excavation. This was based on the reasoning that he had to employ additional labours. The defendant did not dispute this position. On the other hand, according to the plaintiff, the defendant No. 2 promised the plaintiff that he will be paid the difference at the claimed rates and as per the instructions of the Executive Engineer, the plaintiff completed the excavation for foundation to the additional depth of 1.81, 0.31, 0.01, 106 R.M. in the pier and 1.78/1.51 R.M. in the abutment, with the result that the total additional excavation for foundation in hard strata was 1186.61 cubic metres. According to the plaintiff/respondent, the defendant has accepted the liability for extra payment and admitted the extra quantity of work done by him. He disputed the strata classifications as suggested by defendant No. 2. In pursuance thereof, the plaintiff accepted the running bill under protest and without prejudice to his legal rights and contentions. The plaintiff had claimed Rs. 40,972/- extra for excavations at the rate of Rs. 75/- per cubic metre.

4. The next claim that has been put forth by the plaintiff is in regard to the dewatering. It is contended that on account of increase depth of the foundation both of abutments and piers in the river bed, the plaintiff was required to do extra dewatering and had therefore, to incur extra expenditure not stipulated in the tender. By his letter, dated 14.12.1978, the respondent/plaintiff called upon the appellants/defendants to pay additional amount at the rate of Rs. 1,000/- depth wise per running metre of dewatering which was below the designed level. According to the plaintiff, the defendants did not dispute this claim. However, when the work was completed, it is alleged by the plaintiff that defendant disputed this payment under his letter No. B/N/NW/7874. According to the plaintiff, this extra dewatering was not the part of the tender and, therefore, not at the specified rates. He was, therefore, entitled to the additional amount both under the head of additional work and also under the promissory estoppel on the part of the defendants to pay for this amount, which has been quantified at Rs. 28,614/-.

5. The third head of claim is the additional quantity of coursed rubble trap store masonry under tender item No. 5. Under the said item the designed trap was of 293 cubic metres subject to increase of not more than 265 cubic metres. The plaintiff has contended that defendants called upon him to excess 596.62 cubic metres of coursed rubble masonry as per tender item No. 6. The plaintiff by his letter, dated 21.9.1981, called upon the defendants to make necessary payment under the aforesaid head providing for trap rubble masonry and claimed additional amount for the additional quantity of 230.27 cubic metres. He has claimed Rs. 19319/- under his head.

6. The further contention of the plaintiff is that on account of rise in prices of the construction material, wages of labourers, transport charges, etc., there was escalation in the cost and the Government Notification, dated 15.9.1981 permitted 10% escalation in cost of the estimated amount in tender. He has, therefore, also amount the escalation in the tender amount.

7. According to the plaintiff, his repeated request to the defendants to pay him this amount, fell on deaf ears and, therefore, the plaintiff had to give notice u/s 80, CPC on 12th May, 1982. However, as there was mistake in calculation in the claim amount, the same was rectified in the another notice, dated 22nd April, 1983. Accordingly, the second notice was given. The plaintiff claimed Rs. 2,56,592/- as the amount due on 31st March, 1983. This was inclusive of the interest by way of damages at the rate of 18% for the period from 1.5.1979 to 31.3.1983. The plaintiff accordingly filed suit for Rs. 2,97,000/- with interest of 18% from the date of institution of the suit till payment.

8. This was stoutly resisted by the defendants in the written statement at Ex. 10. The defendants admitted that the tender of the plaintiff was accepted at 4.91 per cent above the estimated cost, which, as indicated, came to Rs. 4,77,627/-. However, the conditions stipulated by the plaintiff at the time of tender for the additional costs both in regard to the excavation and dewatering were given up by the plaintiff by his letter, dated 29.6.1978. Relying on this letter, the defendants contended that the plaintiff had virtually surrendered all his future claims both for extra excavation and dewatering. It is further stated that the work order was issued on the date indicated above. The letters were received from the plaintiff which have been referred herebefore, but in the reply, dated 2.11.1979, the appellants/defendants clearly indicated that all these claims of the plaintiff were outside the terms and conditions of the tender which formed the basis of the entire transaction.

9. So far as escalation is concerned, it is stated that the excavation comprised of hard strata as well as soft strata and the plaintiff, therefore, could not claim the rate prescribed for hard strata. He has been paid the rate of soft strata relying on D.S.R. and accordingly the entire claim in that behalf has been fully satisfied by the appellant/defendant. He was paid the running bills from time and the final bill was paid in December, 1981.

10. It is further contended that for the hard strata, the plaintiff was paid the rate of Rs. 30/- per cubic metre mentioned in the tender contract. The plaintiff was required to carry out the work as per the directions of Engineer-in-charge and that too as per the terms and conditions, specifications and plans and accordingly, the defendants called upon the plaintiff to carry out the work as per the contract. It is indeed true that the respondent/plaintiff intimated to the defendants about the difficulties encountered by him at the stage of excavation and dewatering. However, the claim of RS. 1,000/- per additional cubic metre for dewatering has been denied. On the other hand, in the tender itself, the figure has been quoted at Rs. 2,000/- and Rs. 4,000/- in all Rs. 6,000/- for dewatering.

The total amount allocated comes to Rs. 36,000/- and in that behalf, the claim for dewatering is not at all sustainable. It is also indicated in the written statement that the plaintiff had enough opportunity to give details about the cost and the nature of work carried out by him and in that light, he is bound by the terms of tender agreement. Regarding the claim for excavation at Rs. 75/- per cubic metre, it is stated that the said claim is not all supported by either tender rates or D.S. rates. In view of the conditions laid down in specification No. 2 in the tender, the respondent/plaintiff was not at all entitled to additional amount for dewatering sequel to additional depth both in respect of the abutments and piers.

11. Further attention is drawn to Clause 50 of the tender agreement and he appellants/defendant have emphatically stated that the proper procedure for the plaintiff was to refer the dispute to Superintending Engineer. The same having not been done, the plaintiff now cannot lay claim for any additional amount. He is, therefore, not entitled to Rs. 40,972/- for extra excavation and Rs. 28,614/- for additional dewatering.

12. Regarding the depth levels, a chart is furnished in paragraph Ii of the written statement and it is suggested that the plaintiff was required to go down by 3 mtrs. only in case of two structures, namely right side abutment and pier No. 1, but certainly not in case of other abutment and remaining piers. As per specifications laid down in column No. 4 of the tender, the rate was to include all the lifts and lead and under these circumstances, the demand at the rate of Rs. 75/- per cubic metre and Rs. 1,000/- for additional dewatering is not maintainable.

13. So far as the claim of Rs. 1,000/- for additional metre depth is concerned, it is contended that this rate is not warranted, firstly in absence of the details regarding the extent of metre depth particulars and secondly because the adequate provisions of the Rs. 36,000/- was made in the original tender and that there was no evidence whatsoever to provide for additional funds for additional dewatering. As per the specification No. 2-A column No. 4, it was clearly laid down that no additional charge for dewatering due to increase of work for such additional depth, width and length of the foundation was permissible.

14. So far as the additional claim regarding increased rubble trap referred in item Nos. 4 and 5, is concerned, the appellant/defendant has contended that adequate provision is made in item No. 5 for increase of work in regard to additional rubble trap and that the payment has been stipulated in the terms of the tender and the respondent/plaintiff is not entitled to Rs. 19,319/- as claimed. There is also no evidence whatsoever with regard to the increase of prices of construction material, wages of labour and charges of transport brought by the respondents/plaintiff on record and the claim in that respect is not all tenable. For these reasons the appellants/defendants have contended that the claim of Rs. 2,34,603.75 ps. deserves to be rejected. Regarding the claim of interest, it is stated that there is no clause whatsoever referring to the payment of interest nor

is there any usage to make such payment towards interest in such context and the same is not permissible. For these reasons, it is claimed that the suit deserves to be dismissed. There is also no escalation resolutions referred by the plaintiff nor the conditions stipulated cover the present tender and on that count also the claim not tenable.

15. The parties went to trial and the learned trial Judge in his judgment, dated 20th February, 1985 was pleased to uphold that the respondent/contractor had carried out excavation in additional depth and was entitled to the rate of Rs. 75/ per cubic metre. The said Judge also upheld the additional claim at the rate of Rs. 1000/- per running metre for dewatering which was required to be done for going below the designed level in the contract. He also upheld the claim regarding additional rubble trap for the abutment and the piers sequel to the increase in depth of those parts of the construction. He also upheld the claim regarding the escalation costs to the tune of Rs. 53,170/- and also the interest of Rs. 61,345/- as claimed in the plaint. In keeping with these findings, the learned trial Judge was pleased to decree the claim of the plaintiff to the extent of Rs. 2,18,755/- together with interest at the rate of six percent per annum from the date of filing of the suit till realization.

16. Being aggrieved by this judgment and decree, the appellant/State has preferred this Appeal and the learned Assistant Government Pleader has vehemently contended that the entire claim is not maintainable firstly in view of the explicit terms provided in the tender secondly the claim is inclusive of the interest on interest, which is also not permissible in view of the ratio laid down by this Court. On the other hand, according to the learned Assistant Government Pleader, the claim with regard to the escalation would at best be available, but so far as interest is concerned, the respondent/plaintiff is entitled to current market rate for the period prior to the suit and six per cent after the institution of the suit on the ground that this activity of the Government is not either business, trade or manufacturing process. This is countered by the learned Advocate for the respondent/contractor. He has taken us through various documents to show that all along he was complaining to the defendant/officers that he was carrying out the additional work and that he was entitled to the extra rates of the amounts mentioned in various letters, to which we shall come later. Regarding the interest, it is claimed that looking to the all round interest rates prevailing, the contractor is entitled to the interest at 18% during the period of the suit. We are, therefore, required to determine as to whether the respondent/plaintiff is entitled to the extra claim made by him under three heads and escalation and whether he is entitled to the interest as claimed in the cross-objections.

17. On perusal of the judgment, recorded by the trial Court, we feel that the learned trial Judge has brought into operation the doctrine of quantum merit after relying on certain documents, but in total disregard of the terms of the tender Ex. 50. It would be, therefore, proper to advert upon the broad parameters of the building contracts and the commentary thereof is to be found

in various books annotating upon the building and engineering contracts, more particularly, with reference to the contracts arising out of the tender. It should be thorough and complete in itself and should give information about all particulars and details relating to the work as otherwise many disputes and complications are likely to arise. It is the pre-condition for inviting tenders that the plans and specifications must be prepared for the work. It is also very necessary to prepare bills or schedule of quantities which are considered necessary to enable the contractor, at least in competition with others to offer a tender satisfactory to both himself and the employer. The plans should be finally approved by the employer, who should also have definitely decide to proceed with the work before inviting the contractor to tender. Whatever system of tendering is adopted, it is essential in order to create a satisfactory contract for the contractual obligations of the parties to be expressed in a suitable documentary form. In addition to the drawings, specifications or bills of quantities prepared for the particular project, the form and conditions of contracts applicable to the work must be identified and specifically set out. Normally, this is done by selecting standard forms widely available for the Government Contracts The Tenders should normally contain various details, but there should be ordinarily the provision for extension of time and also for payment of extra work for which no rates are specified. On the completion of tender as above and the communication of its acceptance to the contractor, a valid and legal contract comes into force Filing of tender is in the form of lodging a proposal and acceptance of the tender and the rates mentioned therein is the acceptance of tender which brings into existence the concluded contract between the parties. A term which is not actually included in a written contract cannot be implied unless the Court comes to a clear conclusion that both the parties must have intended that the term should be implied. However, it must be emphasised that a very important question arises as to whether and in what circumstances a contract between the parties can be implied. The Contract can be implied and it is clear from Section 9 of the Indian Contract Act, but it is the fundamental principle of law that the Court should not make a contract for the parties. It follows that a clear case must be made out before doing so. A contract implied in fact requires meeting of minds. The Court should refuse to read an implied term into a contract which is silent on the point or did not clearly indicate the nature of term. However, when the stipulation are clear and in contemplation of the parties or which necessarily arise out of the contract between the parties, they will be implied i.e. stipulations on the part of the employer to allow the builders to do the work and to give possession of the site, to supply plans, etc. It would be also important to observe that where the contract is an entire contract in the legal sense so that the contractor not only undertakes to carry out the work but also undertakes to complete the work in accordance with the employer's designs or specifications. There is no room for any implied undertaking by the employer that the completion in accordance with the designs or specifications is possible or practicable. Accordingly, the contractor will have to pay the damages if he cannot complete or will be unable to recover extra payment for additional work necessary to achieve completion. Parole

evidence is not admissible regarding the terms of a principal contract, but is admissible to confirm that a new or supplemental contract has been entered into. It would be also important to observe that unexpected difficulty or expense is in general, no excuse for non-performance. The contractor in such a case cannot rely on his ignorance of such matters as defects in the soil nor any implied warranty by the employer that the bills of quantities, plans and specifications are accurate or that the work is capable of performance in the manner set out in the invitation to tender or limit his liability to exactly excavated stated quantities of work. More particularly, when there is a clause that the contractor shall himself acquaint with the site, with the locality and all matters relating to the contract, he cannot back out from this condition and say that the quantities mentioned therein may not be complete or that nature of soil is unknown. He should visualise all probable contingencies and also all other matters which could in any way influence tender or the contract. This risk in such contracts has to be taken by the contractors. He cannot resile and say that he was unaware of the soil or local conditions.

18. Regarding the extra work, it is generally commented that when the contractor does an extra work, the liability to pay by the employer depends upon various considerations. Normally, there is a condition that the contractor must obtain in writing orders for the extra work. The said orders must be signed and duly authorised and if these conditions are complied with, the claim for extra work can be entertained. Where the contractor undertakes voluntarily extra work without obtaining specific instructions in that behalf, he does it at his own costs and he cannot claim any extra charges for such work. It must also be emphasised that it is contemplated by the contract, must be paid for it and will be paid for it, accordance to the prices regulated by the contract. In the book "Building Contracts" by D. Keating (4th Edition) on page 63 in Chapter 5, there is a citation of very relevant case *Sharpe v. Sam Paulo Rly* (1873) LR Ch App 597. In that case contractor had undertaken to make a railway line from terminus to terminus complete. In carrying out the work, it was found that the Engineer's original plan was quite inadequate and had to be replaced by another. As a result, the contractor, upon the Engineer's order, carried out nearly two million cubic yards of excavation in excess of the quantities of work set out in a schedule to the contract and thus nearly doubled the excavation originally contemplated. It was held that these works were not in any sense of the words "Extra Work":

19. From the foregoing observations, it would be clear that the contractor is bound to study the location of the Site of construction, to acquaint himself with all the possible requirements for performance of his contract. He cannot claim any extra rate when the extra work is in Contemplation at the time of the contract. Now, so far as we are concerned, Ex. 50, which is the accepted original tender provides for certain salient conditions, which virtually negate the claim of the plaintiff for extra work at special rates. Complete Machinery is provided for the extra work and it is to be found in clause 14 of the tender Ex. 50. It may be stated that all the documents annexed to Ex. 50 are hot in dispute. They,

therefore, bind both the parties. In clause 14, it is clearly provided that, "the Engineer-in-charge shall have power to make any alteration in or additions to the original specifications, drawings, designs and instructions that may appear to him to be necessary or advisable during the progress of the work, and the contractor shall be bound to carry out the work in accordance with any instructions in this connection, which may be given to him in writing signed by the Engineer-in-charge and such alteration shall not invalidate the contract and any additional work which the contractor may be directed to do in the manner above specified as part of the work shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work and at the same rates as specified in the tender for the main work." From this clause, it would be manifest that when the extra work in contemplation at the time of tender is done, for which the rates are provided in the original tender, the contractor cannot claim any extra rate. He can claim extra rate only if that class of work is not provided in the tender.

20. The nature of contract would be clear by reference to the nature of work that has been entrusted to the respondent/plaintiff. The plaintiff was to carry out the construction of bridge over Serpani river, the specifications for which have been given in the tender. When we look to Schedule "B", it provides for excavation for foundation in hard strata including showering and structuring as necessary and doing of extra work as directed. It also provides for abutment and piers and for that purpose, providing coursed rubble trap masonry, cement material for foundation of piers, abutment, etc. Incidentally, the work regarding dewatering is also mentioned in the tender. Now, when we look to the specifications attached to the said tender, specification No. 2 clearly provides that no extra rate would be paid for the additional dewatering arising out of additional depth, width and length of foundation. When we take into consideration all these conditions, we feel satisfied that the work of excavation, work of providing coursed rubble trap, work of dewatering are incidental to the construction of the bridge. By no stretch of imagination, it could be said that the work of additional excavation, the work of dewatering or the work of providing coursed rubble trap were not at all in contemplation between the parties when the tender was accepted. On the other hand, these works are salient in the bridge constructions contract and it cannot lie to the mouth of the contractor to say that these works were not in contemplation when the tender was entered into. If the contractor makes an attempt to say that he never tendered that he would be required to dig to the extent of 3 mtrs, as against the designed level of 11/2 mtrs., that cannot be swallowed by any stretch of imagination. On the other hand, when the contractor was required to examine the nature of the work he was undertaking, it must be uppermost in his mind that he would be required to do digging in an uncertain conditions, which may invite more excavation. Ultimately, what is proved in the tender conditions is the approximate conditions, approximate quantities and approximate designs. Said matters must be within the mind of the contractor as also the employer/State Government. We are, therefore, of the view that the

claims preferred by the contractor in this behalf are the part and parcel of the tender and conditions No. 14 binds down the contractor to claim the rates which are provided in the tender.

21. The aforesaid observation of ours is further highlighted by the important correspondence which had transpired between the parties. Initially, when the plaintiff submitted the tender on 17.6.1978, he had clearly emphasised that his tender was 4.91 per cent above the estimated value of Rs. 4 lacs 55 thousand and odd. It was also stipulated in the letter that as per specifications mentioned in the maps, the real position was different. There was heavy river flow of water, they may require to dig more than the levels mentioned in the maps annexed to the tender, hence, the rates mentioned in the tender were not binding on them for those extra works. They may have to excavate the deeper and there was difficulty of fast flow of water in that river. The plaintiff contractor, therefore, reserved the right to claim extra rates for excavation and dewatering. There are clear recitals to that effect in that letter, which was annexed to the main tender, it was, therefore, within the contemplation of the contractor that he may be required to suffer hostile conditions during construction. With this condition, the tender was submitted. As indicated, the tender itself was 4.911 per cent above the estimated amount. The appellant defendants, therefore jacked up the price of estimate from Rs. 4.55 lacs and odd to Rs. 4.77 lacs on the basis of 4.91 per cent above the estimated level. Surprisingly enough and although fully aware of what he was doing, the contractor was pleased to resubmit another letter, dated 29.6.1978, which is part of Ex. 50, and the said letter needs reference in detail. That letter reads that :

"With reference to the above letter, it is to state that the water flow in Serpani river is very fast and it is difficult in the flow dewatering. The condition put forth by me (the contractor) with the tender, dated 17.6.1978 is hereby withdrawn by me. Due to high market rates, the rates put forth to tender 4.91 per cent above the estimates are reasonable, which may please be accepted."

This letter unequivocally lays down that the contractor had given up the condition for claiming any special rate for additional excavation and additional dewatering. This was because his contract was accepted at 4.91 per cent above the estimated tender amount. This would, therefore, impliedly mean that the contractor had surrendered all his claims for extra rates with regard to additional excavation or additional dewatering, which he may be required to do during the course of construction. It is in this background that the entire dispute shall have to be scrutinised.

22. It must also be pointed out that in the said tender, there was a condition that the contractor shall be deemed to have carefully examined the work and the site including labour, the general and special conditions, the specifications, schedules and drawing and shall be deemed to have visited the site of work and to have fully informed himself regarding the local conditions and shall have to carry out his own investigations to arrive at the rates quoted by him in the tender. In this

behalf, he would be given necessary information to the best of knowledge of the Department, but without any guarantee, about it. Now, this clause which is binding on the contractor would clearly show that the contractor was under obligation to visit the site, to have his own study about the levels, the depth, the nature of rock, the nature of soil, the nature of construction that would be required to be undertaken for completion of the river bridge. He was required to fully inform himself about the quantities required for construction. It was not part of the guarantee by the Department about the accuracies of the quantities mentioned in the invitation to tender. With such wide conditions entered into between the parties, a cannot lie in the mouth of the contractor to say that he was required to do extra excavation or extra dewatering. It also cannot lie in his mouth to say that he was required to pay for coursed rubble trap sequel to the additional depth.

23. The conditions annexed to the tender also provide for additional machinery or settlement of dispute. In clause 14, it is provided that in case the contractor undertakes the extra work without being informed initially about the rates thereof, the contractor was entitled to the rates stipulated in the district schedule of rates and in absence thereof, the rates mutually agreed upon between the Engineer-in-charge and the contractor. However, if there exists still further dispute, the decision of the Superintending Engineer of the Circle would be final. In clause 30 of the tender, it is provided that all the questions relating to the specification, designs, drawings and instructions hereinbefore mentioned and as to quantity of work or material used in the contract or as to any other question, claiming right in the matter or even whatsoever in any way arising out of the or relating to contract, designs, drawing, specifications, estimates, instructions, orders or those conditions or otherwise concerning the work or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof, the same shall be referred to the Superintending Engineer of the Circle and as indicated the above decisions of the Superintending Engineer would be final. It may be stated here that there is no iota of evidence, in the evidence, which we shall discuss hereafter, to show that the contractor had taken any step to approach the Superintending Engineer in regard to his additional claim. On the other hand, there is a clear admission by the contractor in his evidence that he did not take any steps to claim extra rates by going to the Chief Engineer of the Circle. On this count also the contractor fails and his lapse is rather irretrievable, to the details thereof we shall come later, but suffice it to say at this stage that the terms and conditions of the contract rather required that the contractor should undertake extra work claimed in this matter as a part of the original contracts at the rates specified in the tender, or in absence thereof, the rates mentioned in the District Schedule of Rates (D.S.R.). The said Schedule has been produced on record for the relevant years.

24. The evidence led on behalf of the parties comprise as follows :

On behalf of the contractor, Saifuddin Mujaffarali Saiffee has been examined at Ex. 53. Whereas his evidence is sought to be countered by evidence of DW 1-Hiralal Manaklal Oswal, the Executive Engineer, at Ex. 62, DW 2-Pitambar Suklal Bagul at Ex. 75, DW 3-Krushna Waman Kinikar at Ex. 86, DW 4-Murlidhar Bhaskar Ahirrao at Ex. 86, DW 4-Murlidhar Bhaskar Ahirrao at Ex. 87 and DW 5-Dinanath Krushnaji Sonawane at Ex. 90. We may briefly state here that the reference to conditions mentioned above on the proper scrutiny could have excluded much of the evidence led on behalf of, more particularly, the respondent. It seems that his evidence has been led only to err on safer side. On the other hand, the documents produced on behalf of the plaintiff adequately brought forth the dispute between the parties.

25. Now, turning to the evidence of Saifuddin at Ex. 53, it would be necessary to state that he himself was fully aware of the conditions of tender Ex. 50. He has stated that he had seen the tender, the drawings, the plans and estimate before submitting his tender. He submitted that his tender was on the basis of drawings and estimates given to him. The Executive Engineer and the Deputy Engineer, namely Oswal and Kinikar, incharge of the work directed him to make foundation deeper in the river bed. He was required to go deep in respect of the piers and abutment, and there are endorsement in the order book Ex. 51. Those instructions are in the handwriting of Executive Engineer Oswal and Deputy Engineer Kinikar. Now, as far as this part of the evidence is concerned, it is not in dispute that the contractor was required to carry out more excavation to the extent of extra depth of 3 mtrs. only in case of right abutment and in case pier No. 1. This is still disclosed in para 11 of the written statement. So far as other depths are concerned, they vary between 1 to 1.5 mtrs. in case of other abutment and piers. It would, not, therefore, be proper to say that the uniform depth of additional 3 mtrs. had to be undertaken by the contractor. Regarding excavation, he has stated that all along he encountered hard strata and not the soft strata as suggested in the written statement. He, mainly relies on letters Exhs. 25, 27 and 28 sent by him to the Executive Engineer claiming extra rates. He has made a grievance that none of these letters were replied in time. All long he was telling the Deputy Engineer Kinikar that he was doing work under his direction and that he was entitled to claim extra rates. He further admits that on 14.2.1978 vide Ex. 51 Kinikar had made an endorsement that the contractor was not ready to undertake the work and that the said should be done departmentally. The contractor was also asked to maintain the record of boring and pumping material, but he has disowned the endorsement Ex. 25. Now, it would be seen that on 14.2.1978 possibly the tender was in contemplation. Because the tender has been accepted on 3.7.1978 and the work order was issued on 5.7.1978. The above endorsement which is not in dispute is as early as of February, 1978. This would definitely mean that the contractor was fully aware of the conditions and the nature of construction he was to undertake. Five months before the commencement of his work, he had undertaken the survey of entire site. Unless survey was made, it was unlikely that Kinikar would put such

endorsement that the contractor was not ready to perform the contract and if that be so, when the contractor had made the grievance in the month February, 1978, long before the commencement of the work, this would possibly mean that the contractor had studied the local conditions, the conditions of the site, etc. in all details and still he carried out the extra work. From such endorsement, one cannot draw an inference that Kinikar compelled the contractor to undertake the work and this would be evident from the two letters which have been referred to and which are annexed to the appeal. At the cost of repetition, it can be stated that the first letter refers to the extra rate for excavation and dewatering but the same was given up in the letter, dated 26.7.1978 wherein the extra rates were given up in view of the acceptance of the tender 4.91 per cent above the estimated costs of Rs. 4.55 lacs.

26. Going through the evidence of contractor, it would be necessary to observe that he was required to do extra work of 1157 cubic metres of hard rock from the site. He has stated that no rate for excavation has been mentioned in the bill. The bills were paid between 7.11.1978 and 9.12.1981. It is only in the last running bill that there is reference to extra work done by him, but the rates paid to him were not per his letters at Exhs. 25 to 28 and were at the rates mentioned in the District Scheduled of Rates. He has denied the suggestion that he excavated soft strata and not hard strata throughout. He accepted the running bill No. 6 under protest and so also the last final bill. He has further stated that there is no soft strata in the tender Ex. 50 and in that behalf the soft strata was not at all in contemplation between the parties. The appellants/defendants now cannot turn and say that the respondent contractor is only entitled to the rates meant for soft strata and not hard strata. For extra rates, the justification that is sought to be made by the contractor is, that the labour charges had increased, that he had to pay for extra lead and lift charges because of the additional depth. The details thereof have been mentioned in Exhs. 25 and 26. On account of the extra excavation he had also to do the work of dewatering from the increased depths for which he operated 3 to 4 pumps and he was, therefore, entitled to the extra rates mentioned in the plaint. He is aware of the conditions mentioned in the specification Nos. 2-A and 2-B, Ex. 50 about dewatering. They provided for the no extra charges for additional dewatering sequel to additional depth, additional width or additional length.

27. Regarding the additional coursed rubble trap he has stated that where according to the tender he was required to carry out 290 cubic metres work. He actually carried out 596.62 cubic metres which means that he carried out additional 306.62 cubic metres. As per clause 37 and 38, the extra work up to 25 per cent was liable to be paid at the same rate but not the entire. In terms of the above clauses, he was required to do 362.5 cubic metres work, but in fact he did the work of 596.62 cubic metres in regard to the abutment and piers, he did 234.12 cubic metres of construction more than the tender quantity. Naturally, therefore, the lead and lift of this work also increased and he was, therefore, entitled to additional rate. It is not in dispute that whereas the work was to be completed

on 4.1.1980, the actual work was completed on 15.2.1981. Likewise, it is also not in disputed that the tender was accepted for Rs. 4.77 lacs and the final bill that was paid was to the tune of Rs. 5.61 lacs. The contractor also claimed interest of 18 percent by way of damages from date on which he was not paid to the date of the suit and the similar interest during the period of the suit. However, his admissions in the cross-examination are rather more eloquent and would go to negative the claim of the plaintiff. He admits that the Public Works Department provided the cement and steel at the same rate at which they were stipulated to be paid right between 1978 to 1981. Although the rates of cement and steel had gone up, the PW Department charged him only at the contracted rates and not the enhanced rates. This would, therefore, imply that the appellants/defendants supplied the cement and steel which formed the major part of the construction of bridge at the same rate and not at the higher rates with the passage of time. He has stated that he had demanded the escalation rate as per the Government Resolution but the same is not mentioned in the tender. He admits that the entire work was for less than 5 lacs, but he was paid Rs. 5.61 lacs for the additional work.

28. He indeed issued notice u/s 80, C.P.C. at Ex. 48, but surprisingly enough, he did not put any claim for additional masonry work both in regard to abutment and piers. He has also admitted that in the final bill, he did not dispute the claim quantity of work done. He simply disputed the charges that were being paid to him. He has denied the suggestion that his claim is afterthought. He admits that he was called for discussion by the Department from time to time in regard to the extra rates claimed by him. But it would be evident from letters Exhs. 70 and 71 which are on record that the contractor did not meet the concerned Officer as early as in 1979 for fixing the rates of the extra items. Incidentally, the contractor has refused to have received these letters and there are suggestions to that effect. But on the fair appraisal of the evidence on record, we feel that when the contractor was anxious to get extra rates, it is unlikely that he would not have received those letters. On the other hand, in his attempt to disclaim those letters, he exposes himself as an incredible witness. The contractor wants to acknowledge only those letters which are convenient to his cause, but when they are detrimental to his case, he has resorted to the theory of blank denial. Incidentally, we must observe that in the notice Ex. 91, dated 12.5.1982, which contains hand cover Exh. 58, the stand of the P.W. Department is manifest. All the items which have been claimed by the contractor have been fairly explained by the Department. The stand of the Department has been that the extra work has been paid at the tender rate and the contractor could not have claimed anything more than that. On perusal of the scheduled list of bills, we are satisfied that the contractor had been paid at the rates mentioned in the tender and also in the District Schedule of Rates for the extra work. It should be stated here that when the letter, dated 12.5.1982 was sent to the contractor, the same was refused by him. The address mentioned on that letter is the official address of the plaintiff/contractor and still he refused to receive it, meaning thereby that he

wanted to disown all the documents that were adverse to his cause, but in his attempt to do so, he exposes himself as a witness who is not telling the truth. He brings himself down in the estimation of the Court. This is in the background of the fact that the grievance of the contractor was to claim extra charges for extra work. Department called upon him to discuss the matter and he conveniently avoided the meeting with the Department. By passing all these communications, he went on to give the notice. To the letters Exhs. 25 to 28 we shall turn later, but suffice it to say at this stage that when the defendants called upon the contractor to meet for extra rates, he avoided to do so and his grievance for claim of extra rates rather stands negated in his avoidance of meeting the Officers of the Department.

29. Going along with the evidence of the contractor, it would be found that he was sent letter on 2.11.1979, but he conveniently stated that he did not receive the same. He also admits that he had signed the order book and the level book Exh. 56. His signatures are scored out and in that regard, the evidence of the appellants/defendant is that there were signatures of the contractor showing various levels recorded during the inspection. The plaintiff clearly admits that although grievance was simmering right from 1978 and although he was aware that the Chief Engineer was the competent officer to resolve these disputes he did not write anything to the Chief Engineer either about the strata or about the grievance regarding rates. He claims the rates Rs. 75/- per cubic metre for excavation as per the District Schedule of Rates. Unfortunately, the contractor has not tendered the evidence in support of his say. On the other hand, the Department has tendered the District Schedule of Rates which are in parity with the rates mentioned in the Schedule, the rates mentioned in the running bills and the rates mentioned in the final bill. We have also endeavoured to go through all the documents and have further tried to find out as to whether the claim of the contractor is supported even remotely anywhere. The documentary evidence on record does not at all show that the claim of Rs. 75/- per cubic metre for excavation was permissible or established at any stage. This rate is mentioned by the contractor only out of his own calculations but without any legal basis thereof.

30. Now, before proceeding to examine the evidence of the witnesses examined on behalf of the department, we feel it our duty to traverse through the four letters Exhibits 25 to 28, which, according to the contractor, are his trump cards to support his claim for extra charge. In the letter Ex. 25, which appears to be dated 24.10.1978, (the date which we reckon from the subsequent letter Ex. 26), it is stated that at the instance of the Officers of the Department, he was required to excavate at more depth and for that purpose, he was required to bore to bring about additional depth of 1 ft. He also referred to the additional level charges and he has computed the figure of rates of Rs. 820/- for digging the depth of 1 ft. He also claimed that he was required to spend for dewatering. He, therefore, requested the Executive Engineer to reconsider the rates which are payable to him. In Ex. 26, dated 14.12.1978 he seems to have rejected the same. He has emphasised that he had to go 3 mtrs. deep below the designed

level. He has, therefore, claimed Rs. 75/- per cubic metre for excavation for foundation, Rs. 1000/- each for dewatering additional metre of depth, i.e. Rs. 3000/- each in addition to the rate of Rs. 2000/-. The final rate which he has claimed is Rs. 5000/-. He has further claimed Rs. 1000/- more for depth mentioned in item No. 2-B at the rate of Rs. 6000/-. Lastly, he has stated that the above rate should be approved so as to facilitate him to proceed with the execution and completion of the work in the stipulated time. The third letter Ex. 27 is dated 1.2.1979 and he has rather threatened that he was not willing to execute the quantity of Excavation more than 25 per cent of the tender. In Ex. 28, which is rather the last letter and seems to be of the latter part of 1979 (it does not bear the date), but we reckon the letter issued to him by the Executive Engineer below this letter. Now, in that letter, he has stated that he is required to spend Rs. 820/- per cubic metre 1 ft. of depth. He has further mentioned that the Executive Engineer was inspecting the site from time to time and he was carrying out the work of additional excavation and dewatering, under the presumption that the rates mentioned by him in the foregoing letters would be paid to him. He has also made a grievance that although he has been making representations from 1978 and although one year had elapsed he had not received any reply from the Division. He has further gone on to say that he had completed the additional work and, therefore, accepted the payment under protest, Ex. 29 also does not bear the date, but the brief grievance, which has been made, was that if cement and steel are not supplied in time, he would not complete the work in the stipulated period.

31. Basing the argument on these letters, it has been forcefully contended by the learned Advocate for the respondent/contractor that in spite of these letters, the Executive Engineer did not pay him the additional amount as claimed. It is also suggested that all along the Officers of the Department rather posed that they were willing or they would see that the additional rates are paid. In absence of any reply controverting these letters by the Departments, it is suggested that the rates were accepted by implication by the Officers of the Department and if that be so, the appellants/defendant cannot now challenge that the extra rates were not payable to him. Absence or silence towards the controversial communications should persuade this Court to hold that the appellant/defendants are bound by the contract to pay the enhanced rates claimed in the letters.

32. However, when we look to other documents, we feel convinced that at no stage the appellants/defendants agreed to pay the extra rate claimed by the plaintiff. At Ex. 70 which is of 15.3.1979, there is a communication by the Deputy Engineer to the contractor that he should attend his office for signing extra item rate list for the works carried out by him. We may state that the contractor has refused to have received such letters. The suggestions are made to this effect to the officers of the Department. It is true that written acknowledgments are not there on record, but the plaintiff/contractor has clearly admitted that he was being called for meeting from time to time. In one of his letters at Ex. 41, he has stated that he could not attend the meeting because of

the personal difficulty. We also cannot lose sight of an important background of this case, and that is, contractor was making the grievance about extra rate for extra item. His grievance that he did not receive the Department letters, cannot be accepted. He should have been rather anxious to settle these claim as soon as possible. His denial of having received letter Ex. 71 is consistent with his claim as well as his conduct. The letter Ex. 71, dated 30th March, 1979, is addressed by the Deputy Engineer to the Executive Engineer and that is to the effect that the contractor had not attended the office for signing the extra item rate list in regard to the extra work done by him. We feel satisfied that the contractor avoided to discuss these matters when sufficient opportunity was given to him by the Officers. He should, therefore, be paid at the rates mentioned in the tender and also in the District Schedule of Rates. Clause 14 rather bound him down not to claim anything more, unless the extra work was not in contemplation at the time. The contractor felt that his discussion would not fetch any fruits in view of tender conditions and, therefore, avoided meeting the Officers, but he did so at his own risk. He cannot make the grievance that his claim was not considered and, he carried out the work under the tacit consent of the Officers. We may further observe that the letter dated 12.5.1982 is self-contained document, which gives the clear picture of the stand that the appellant/defendants wanted to take. This is the final communication sent by the Department to the contractor. In that letter, it is clearly mentioned that what was excavated was soft strata and that the excavation of hard strata was not beyond the permissible limits under clause 37 and 38. There is also a denial about the agreement to pay for escalation. On the other hand, detailed reference are made to the terms of the tender, which disentitle the contractor to claim any extra rate. Brief reference to the contents of that letter appear to be proper at this stage.

33. So far as claim for extra escalation is concerned, it is stated that there is no condition, which provides for payment of extra rate for extra excavation. Regarding dewatering, it is stated that it is squarely covered by specification No. 2 mentioned in the tender. No extra rate should be paid in that behalf. It should also be stated that in this letter, dated 12.5.1982, there is no reference to provision of extra coursed rubble trap and this is highlighted by the fact that even in the first notice u/s 80, C.P.C., the contractor did not refer to any item in tender item Nos. 4 or 5 for additional coursed rubble trap. On the other hand letter Ex. 91, dated 21.5.1982, it is clearly indicated by the Executive Engineer that the contractor had scratched out his signature from the Level Book, possibly because the Field Book reflected the true situation regarding excavation, additional trap material, etc. As stated above, in Ex. 48 notice dated 6th of May, there is claim for extra rates for excavation for foundation, dewatering in abutments and piers. It has been rightly suggested by the learned A.G.P. that this notice reflected only two items. The addition of third claim for coursed material in the subsequent notice should persuade the Court to hold that this claim is nothing but afterthought. The contractor was called upon for discussion on 20th March, 1980 and again on 18.11.1980, but it is manifest that no such

discussion took place between the contractor and the Officers of the defendant in regard to the extra claim. There is also no suggestion from the contractor that he tried to meet these Officers, but they scrupulously avoided meeting him because this is most unlikely when the Executive Engineer was rather anxious to see that the project is completed and made available to the Government for the benefit of the people in that locality.

34. This takes us to the evidence led on behalf of the appellants/defendants. Executive Engineer - Oswal at Ex. 62 has stated that as the tender was 4.91 per cent above the estimated rate being the lowest amongst the tenders lodged and the same was accepted. He has also made it clear that the quantities, designs, etc. were prepared and the contractor was supposed to visit the site and keep himself accustomed to the site conditions. He was supposed to collect himself all the material for securing the rates in the tender. He admits that extra excavation had to be done but part of the strata comprised of soft rock and the contractor was, therefore, entitled only at the rate for soft strata mentioned in the District Scheduled of the Rates. He has also admitted that the contractor has signed the Level Book. He admits that the additional depth had to be excavated at two sites, namely, one abutment and one pier, but so far as other piers and abutments are concerned, extra depth was increased only 1 from 1/2 mtrs. and the excavated material comprised of soft and hard strata. He has also stated that so far as dewatering is concerned, appropriate rates were mentioned keeping in view the heavy water flow in that river.

35. According to the Executive Engineer, so far as dewatering is concerned, the rates of Rs. 2000/- and Rs. 4,000/- mentioned in tender Ex. 50 adequately served that purpose. As a matter of fact, according to him, Rupees 36,000/- allotted to this work are more than sufficient. Emphasis is also laid on the specification No. 2 wherein no separate rate is prescribed for additional excavation or dewatering. The further argument that has been advanced on behalf of the appellants/defendants is that as the tender was accepted at 4.91 per cent above the estimated amount of Rs. 4.55 lacs and further that the respondent/contractor left or surrendered the claim for additional rates for excavation and dewatering clearly tantamounts to withdrawal of claim and in that context there is absolutely no reason to award any additional amount on that count. The further story narrated by Oswal is that although the contractor represented Exhs. 25 to 28 for the extra rates, he clearly intimated that hard strata would be paid at the scheduled rates. He also told him that extra item rates would be prepared and it is only on the approval by Higher Officers the rates would be paid. He has discounted the rate of Rs. 75/- per cubic metre for excavation as propounded by the contractor. According to him, no such rates are to be founded in the tender as well as the District Schedule of Rates. There is a clear indication to that effect in the letter, dated 21.1.1979. He has also stated that when it was obligatory on the part of the contractor to approach the Superintending Engineer for settlement of disputes-canvassed by him, the contractor did nothing and on that count, the claim could not be considered.

Regarding lead and left, the same view is expressed by him. So far as the masonry work is concerned, he has also stated that such work is accordingly paid for in consonance with the conditions of tender. So far as escalation is concerned, he has stated with all emphasis that no escalation has been provided in the tender and that the notifications relied upon by the contractor do not envisage anything in that behalf. It is further submitted that these notifications embrace those works for which the estimates are for Rs. 5 lacs and above and for the period of 12 months. In the cross-examination, he has stated that although the test bore was carried out regarding the strata, the material thereof has not been preserved. However, Oswal is of the view that when the contractor is enjoined upon to study the nature or site over which he has to work, it is for him to collect the test bore and it is none of the obligations of the Department to carry out such test bores. We do feel that looking to the nature of contract and looking to the clauses providing the contractor to study the site of construction, it was really not obligatory for the Executive Engineer to carry out the test bores. All the same, we feel that had the test being carried out and had the result thereof been available to this Court, we would have been able to comment upon the nature of soft strata or hard strata because that is precisely the question in the context of the fact that what has been contemplated in the tender is hard strata and not soft strata. To that extent, we are of the view that there is no adequate material to establish that the entire or major part of excavation comprised of soft strata. On the other hand, in our judgment, it is legitimate on the part of the contractor to have agitated the question that the additional excavation comprised of hard strata and not of soft strata. The contractor to that extent would be justified in laying claim of the extra excavation of the hard rock at the rate of Rs. 30/- per cubic metre as per tender. We are, therefore, of the view that the additional excavation deserves to be considered at the rate of Rs. 22/- instead of Rs. 8/- per cubic metre, as has been granted by the Department. On perusal of the evidence of other Officers, we feel that no assistance is rendered so far as this aspect of the story is concerned. We, therefore, feel that the contractor carried out the work of the extent of 1156 cubic metres as against 531 cubic metres, which is inclusive of basic plus 25 per cent. This additional escalation of 621 cubic metre has been claimed at the rate of Rs. 22/- per cubic metre because Rs. 8/- has already been paid in the final bill. This amount works out to Rs. 13,772/- and to that extent the claim of the respondent/plaintiff has to be granted. It was an error on the part of the trial Court to have awarded the claim of Rs. 75/- per cubic metre. The calculation is patently wrong in view of the foregoing discussion, which, clearly spells out that the terms of the tender did not permit the respondent/plaintiff to claim anything more than Rs. 30/- per cubic metre. The additional excavation had to be computed at the same rate in view of the conditions, to which we have referred in the foregoing discussion.

36. Oswal, in his further cross-examination, has clearly indicated that it was not compulsory for the contractor to do the extra work. He could have left the work or could have declined to do extra work. He is unable to say as to why the

contractor did the extra work in spite of his rates being not approved by the concerned Officers of the Department.

37. Murlidharrao Ahirrao, the Deputy Engineer has deposed that contractor did not sign the receipt of letters, but we have indicated that those letters were received by the contractor. He was vitally concerned with those letters and it is unlikely that he would not receive these communications coming from the defendants, which were going to decide the fate of his claim for additional amount. The other witness Dinanath Sonawane has been examined to prove the despatch of letter, dated 12.5.1982 Ex. 92 and the refused envelope Ex. 58. We have indicated above that the said notice must have been received by the contractor, but he has tried to avoid the service, because he must have known that his claim was not approved by the Department.

38. Witness Bagul at Ex. 75 has been working as a Junior Engineer and he has consistently maintained that at the time of recording the levels, the contractor used to be present. He has drawn the Field Book and has contended that the Field Book bears the signature of the contractor, but the contractor scratched them out. Incidentally, the contractor has denied to have done so, but looking at the portion which has been struck out, it can be fairly said that it is these signatures which are of the contractor. It is indeed a fact that the letter, dated 12.5.1982 has been given after the notice Ex. 48. But the said letter does not indicate that the said letter has been despatched after the receipt of the notice. The net result is that Ex. 92 remains unreplied by the contractor. There is a specific allegation that the Field Book No. 1568 was originally signed by the contractor, but the signature thereof was removed. Of course, this point remains the matter of enquiry, but it lends a serious turn to the contention raised by the defendant that the contractor or somebody else on the part of the contractor removed this signature which would have bound down the contractor about the levels recorded from time to time. All said and done, we find that whatever excavation and additional dewatering has been done has been paid for by the Department in the final bill at scheduled rates. There is a regular schedule which has been drawn up for extra work shown by the contractor, and there is unequivocal admission on the part of the contractor that he does not dispute the quantities, mentioned in the final bill or the payment made to that effect at the said rates. We are further inclined to observe that so far as dewatering is concerned, the contractor did not maintain any record to show that he was operating about three pumps.

39. The other witness Kinikar was also incharge of the work as a Divisional Officer. He has stated that Ex. 56 Field Book has been signed by the contractor from time to time. He has also testified to the issue of letters Exhs. 70 and 71 and also to the fact that they were communicated to the contractor. He has stated that he neither asked the contractor to do the extra work nor he assured the contractor that he would be paid for the extra work at extra rates. This was obvious because this was naturally not the function of the Executive Engineer or

for that purpose the Deputy Engineer or the Junior Engineer. The payment of rates has been the work of Senior Officer, possibly the Chief Engineer, who as per terms of tender is the final authority to decide the disputes regarding the rates, the nature of work etc. Kinikar has emphatically stated that there was no change whatsoever in the design of the work. The basic design of the bridge remained the same. All that was necessary was to have a little more excavation as soft strata was found at early stages of the excavation. He has stated that the contractor was persuaded to do extra work, but it never implied that he was entitled to such rates as have been put in Exhs. 25 to 28. He has also stated that the contractor was never under compulsion to carry out the extra work. He could have left the extra item. The contractor carried out the work in spite of the correspondence by the Department about the proposed approval of the enhanced rates for the extra work done by the contractor. The evidence of these witnesses clearly shows that they had directed the contractor to carry out the extra work. They had all the sympathies for the contractor for the extra work done by him, but nowhere, we find that extra rates were either expressly or impliedly approved by the Deputy Engineer, Junior Engineer or the Executive Engineer. On the other hand, the correspondence which is to be found with the Department is that they had stoutly denied the approval of extra rates. They had put up the matters for confirmation of the rates, but it seems and it is evident from the record that no approval was given by the Department for the rates claimed by the contractor.

40. There is also the evidence that the Executive Engineer directed his subordinates to prepare the revised financial estimate in view of the excavation, dewatering etc. The said report is not on record, nor any attempt has been made to call for the same. It is possible that such reports might have been made but the same might not have been approved by the departmental heads. It would be, therefore, futile on the part of the contractor to canvass that the revision of financial estimates by the defendants-officers would have assured his claim for enhancement.

41. Taking the overall view of the evidence, which has been led on behalf of the respective parties, we feel that although the contractor carried out the extra work, he was bound by the conditions stipulated in Ex. 50 and the scheduled rates as mentioned in those conditions.

42. Regarding the extra work for the coursed material, we feel that such extra claim cannot be maintained in view of specifications Nos. 4, 5 and 6 in the tender. On perusal of the final bill, we find that the extra work has been paid for by the department on the basis of the rates approved in the original tender. As we have taken the view that the contractor cannot claim any rates above the rates mentioned in the tender in view of the settled position of law in the matter of building contracts of roads or bridges, we are unable to accede to the claim regarding the extra rubble for the purpose of trapping, the abutments and piers. The rates which are mentioned in the tender could only be the rates which the

respondent/plaintiff could avail of. This has been the consistent stand of the defendant and, we feel, that stand has been vindicated or fortified by the observations, which we have recorded in the foregoing paragraphs.

43. It would be also pertinent to note that the Supreme Court in the case of Bombay Housing Board (now the Maharashtra Housing Board) Vs. Karbhase Naik and Co., Sholapur, has virtually clinched the issue which has been taken up by the contractor. In that case also the said dispute was considered and the Supreme Court succinctly recorded its observations as below (at page 765) :

"We do not think that the respondent was bound to carry out the additions and alterations as there was no reply to the notice stating the rates it intended to charge. But it was free to commence and complete the work on the basis that since the rates quoted by it were not accepted, it would be paid at such rates to be fixed by the Engineer-in-charge and that if it was dissatisfied with the rate or rates fixed by the Engineer-in-charge, it could raise a dispute before the Superintending Engineer and that the time limit from completion would extended in case of additions or alternations as stated in the last sub-para of clause 14."

The High Court was of the view that clause 14 had no application because it thought that the respondent was bound to carry out the work as directed by the Engineer-in-charge even when there was no agreement as regards the rate to be charged for the extra work, as the nature of work in some cases would be such that if the work was not completed at the time when the work was to be completed, the contractor would have to do much extra work over and above the actual work involved. The Court also said that Clause 14 gave the Engineer-in-charge an absolute power to fix the rate and that would unjust and therefore, the Court decreed in full the amount claimed under items A-3 and A-4.

We think that until the rates were settled by agreement the respondents was under no obligations to carry out the additional or altered work. The respondent could legitimately have said that in the absence of scheduled rates in the division for the type of work in question or an agreement in regard to the rates, it was not bound to carry out the additional or altered work. We are not satisfied that since the Engineer-in-charge did not exercise his liberty to cancel the order there was a concluded contract between the parties. The failure to cancel the order for additional or altered work on receipt of the notice specifying the rate would not result in an agreement as to the rate to be changed. The clause only gave the Engineer-in-charge the liberty to cancel the order and get the work done by another contractor. The fact that an express power was given to the Engineer-in-charge by the clause to cancel the order if he did not agree to the rate would not mean that the failure to cancel the order would result in an agreement as to the rate or rates. The proviso in clause 14 was intended to cover cases where the notice specifying the rate was not given by the contractor, or where, even though the notice was given the Engineer-in-charge did not cancel the order in the event of his not agreeing to the rate specified in the notice. We are of the view that in the absence of some positive act on the part of the Engineer-in-charge agreeing

to the rate, there was no agreement as to the rate and that the respondent was not bound to carry out the work".

The net conclusion which emerges from the aforesaid observations is that if the contractor claims enhanced rates for extra work from time to time by sending the communication to the defendants and the Engineer-in-charge does not reply to any of them, there can never be implied consent and there cannot be any concluded contract on the basis of which the contractor can claim enhanced rate for the extra work. Repeating the observations we are of the view that in the absence of some positive act on the part of the Engineer-in-charge agreeing to the rate, there was no agreement as to the rate and that the respondent was not bound to carry out the work when there has been option to the contractor to stop the work or to abandon the work for want of extra rates. We cannot say that the conduct on the part of the Engineer was such that there was any implied consent. Ultimately, we cannot lose sight of the situation that the Government department comprises of long and big hierarchy of Officers and Subordinates and that is why conditions are explicitly laid down as to who is competent to approve the rates or who is competent to decide the disputes in that behalf. As stated above, Chief Engineer of the Circle seems to be the final authority in the matter of these disputes. It, in that situation, the contractor chooses to seek remedy for his grievance with the Executive Engineer-in-charge, we feel that the Engineer-in-charge was in no way competent to accord any sanction. All that he could do is to send the proposals to the higher-ups and seek the approval, but in absence thereof, merely because the Executive Engineer was approached from time to time in that behalf, it cannot be said that the department would be bound. It is also made clear that the Engineer-in-charge never recorded anything in writing in favour of the contractor. There is not an iota of evidence to support the proposition that the Engineer-in-charge approved all the proposals contained in Exhs. 25 to 28. In view of this situation, we are unable to persuade ourselves to hold that the above letters should bind the Department and that the contractor is entitled to the enhanced claim. In that background, therefore, we are unable to accede to the claim for dewatering, the claim for additional material for rubble trap for the abutment and piers. The claim of the respondent/plaintiff under these heads has to be negated.

44. The last item, on which the respondent/plaintiff seeks reliance is the escalation permitted by the resolutions Exhs. 46 and 47. We have gone through those resolutions. We also find that even the learned Assistant Government Pleader has gone through those resolutions and has conceded that when the revised financial budget was called for in regard to this bridge, the fact is that even the Engineer was aware that the contractor was entitled to escalation. The learned A.G.P. has conceded that the contractor should be awarded 10 per cent of the estimated cost of the bridge. That amount works out at Rs. 53,170/-. An attempt has been made by the learned A.G.P. to show that notification or the resolutions embrace the tenders having estimates of Rs. 5 lacs and above. However, in this case, the net expenditure on this project, as spelt out, is Rs.

5.61 lacs. We do not wish to dilate ourselves on the question of claim that has been granted by the trial Court. The facts is that the financial expenditure did rise to Rs. 5.61 lacs, and we are of the view that the escalation as granted by the trial Court should be confirmed. The learned A.G.P. does not dispute this position and has submitted that the award of this claim appears to be legal and calls for no interference.

45. Now, dilating on the question of interest, there have been strong arguments on either side. According to the learned advocate for the appellant, the award of interest on the principal amount at the rate of 18% was wholly unwarranted. He has also questioned the propriety of the learned trial Judge in awarding the interest on the principal plus the interest prior to the suit. For that, we feel, that he is supported by the ruling of this Court in the case of Union Bank of India Vs. Dalpat Gaurishankar Upadhyay, . Without probing any further, we feel, that the ratio laid down in that ruling deserves to be upheld. It is observed that the expression "principal" used in Section 34 of the Civil Procedure Code, means the original amount without the addition thereto of any interest whatsoever. Therefore, granting interest on the principal plus interest prior to the suit would be obviously erroneous. To that extent, therefore, the trial Court has faltered and the same has to be rectified in this appeal. The learned A.G.P. has drawn our attention to the Interest Act, 1978 (14/78) which governs the transaction where no interest has been stipulated nor usage has been established in that behalf. As we have observed here before that so far as the claim of interest it concerned there is no condition whatsoever in the tender awarding or contemplating the payment of interest by the department to the contractor. Obviously, therefore, the claim of the contractor would be governed by this Interest Act, 1978. In Section 3(1)(b) of the Interest Act, it is provided that in the proceeding for recovery of damages, the Court may allow interest to a person entitled to damages at the rate not exceeding the current rate of interest. Now, the current rate of interest has been defined in Section 2(b) of that Act as the highest of the maximum rates at which the interest may be paid on different classes of deposits by different classes of Scheduled Banks in accordance with the directions given or issued to the Banking Companies, generally by the Reserve Bank of India under the Banking Regulation Act. The learned advocate for the respondent/contractor has vehemently urged that in the notice the claim has been put at 18%. Unfortunately, he has not tendered any evidence to show that these were the rates payable by the Bank on the loans given by Banks with which we are not concerned. On the other-hand, ample evidence has been adduced on behalf of the defendant to show that the current rate of interest payable on the deposits was at the most 11% for three years Schedule is produced on record. An attempt was made to give concession by allowing this rate at 11 1/2% On the ground that the Co-operative Banks give 1/2% more on the deposits. However, the definition of current rate of interest does not take in its sweep the deposits of the Co-operative Banks. It is in respect of Scheduled Banks. All said and done, we are of deposits. The respondent/contractor is, therefore, entitled to 11% on the

above claim on the total sum of Rs. 66,942/- for a period of 3 years prior to the suit, as the claim is governed by the limitation. For facility, we round up this figure to Rs. 67,000/-.

46. Now, regarding the interest to be paid from the date of the suit till realization, our attention is drawn to Section 34 of the Civil Procedure Code. The learned advocate for the respondent/contractor has urged that as per Section 34, Civil Procedure Code, it is not necessary that the Court should award interest at 6%, when he can satisfy that this transaction is a commercial transaction connected with either industry, trade or business of the party in regard to the liability. For that purpose, he relies on the proviso, which reads as follows. "Provided that where the liability in relation to the sum so adjusted had arisen out of a commercial transaction, the rate of such further interest may exceed 6% per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which the monies are lent or advanced by the Nationalized Banks in relation to the commercial transactions." The emphasis is on the commercial nature of transaction. If the respondent/plaintiff can establish that this is a commercial transaction, then he can certainly agitate that question and certainly say that he is entitled to the interest rate of 18%, which is the normal lending rate by the Banks. The loans are advanced at that rate. However, it is vital that he has to establish that this is a commercial transaction connected with the industry, trade or business of the party in regard to the liability. Here we are very sure that it is the appellant/State which has incurred the liability, but after all it is a matter of debate as to whether the appellant/Government is industry, trade or business. The learned advocate for the respondent has contended that this is a contract which is based on tender, the estimates are given, the financial budgets are prepared and, therefore, is a tinge of industry, trade or business. He has further contended that this is virtually the business or trade by the Government. Government is supposed to undertake the constructions of roads, bridges. They constitute their sovereign duties and merely because there is no element of competition it cannot be said that they are not commercial transactions.

47. This argument has been countered by the learned A.G.P. by citing the case of State of Punjab Vs. Kuldip Singh and Another, . In that matter, the similar questions squarely fell for the consideration of the Court. The Court emphasised various aspects of the ratio laid down in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, , and in case of D.N. Banerji Vs. P.R. Mukherjee and Others, . The Court discussed the views recorded by the Supreme Court in those rulings. It should be stated that in Bangalore Water Works case the view of industry was so enlarged as could cover all Government Organization activities u/s 20 of the Industrial Disputes Act, 1947. In that case, P.W. Department was held to be an industry and a claimant to be a workmen. The Court observed that any dispute arising between the management and the workmen should be covered by the Industrial Disputes Act. However, in spite of the ratio, some of the observations are highlighted and they need be mentioned

here. Krishna Iyer, J. speaking for the Court noted some of the observations which could immunise the present activity by the Government regarding the construction of Highways, State Highways and bridges. They may be stated as follows.

"Are Governmental functions *stricto sensu*, industrial and if not, what is the extent of the immunity of instrumentalities of the Government?"

The indepth reading of these observations would show that all governmental activities would not come within the ambit of Industrial Disputes Act. There are some actions which may fall outside the functions of Industry. Four categories are being drawn up to indicate which would fall within the scope of Industrial Disputes Act, and which would not fall within the scope of Industrial Disputes Act.

48. There could be four categories of Governmental activity. (a) One category comprises the Sovereign or regal functions of the State, which are the primary or inalienable rights of a Constitutional Government. For that purpose, it was indicated that policing justicing legislation Defence and Foreign affairs are the legal functions, which cannot be carried out by any authority except the State. Such functions would definitely fall outside the definition of industry. (b) The second category is the economic activity which may not come within the ambit of the previous category, which have the elements of economic adventures, clearly partaking all the nature of trade and business undertaken by it as part of the welfare activities and other organized activity not stamped with the total indicia of business yet bearing a resemblance to or being analogous to trade and business. The illustrations which can be cited of the industry are the opening of fair price shop by the Government for distributing grains and other articles at subsidised rates. The other activity would be opening the State Transport Undertakings wherein there is an organized activity of the State can well be governed under the definition of "Industry". (c) The third category of State activity, which though cannot possibly be stamped as strictly trade or business, yet bears some resemblance or analogy thereof. It marginally bears the resemblance to trade or business. Bangalore Water Works case lays open wide amplitude and variegated fields like Education, Charitable Institutions (apart from spiritual one), Hospitals, Recreational & Research Institutions. (d) The further activity is a residuary activity of the modern State spread over wide spectrum and does not come within aforesaid three categories. That activity is neither analogous to trade nor to industry. It would be outside the ambit of the term "Industry" as defined in Section 2(j) of the Act. Construction of bridges, roads, Highways, on reckoning can be said to be "Industry" or "Trade". Such activity is for the benefit of people at large without no profit even in the remotest possibility. The witness for the appellant clearly stated that the bridge across river Serpent was for the benefit-of Tribals of that area.

49. We are required to make these observations as there are no definitions of trade or industry in Civil Procedure Code. The above analysis clearly establishes that construction of bridge is not trade or industry or business. In *Stroud's*

Judicial Dictionary Vol. 1 Page 323, 1986 Edition, Business, Trade are described as activities for profit. We make it clear that the above observations regarding trade, industry and business are made only with reference to Section 34, CPC and nothing beyond. Hence under the proviso, the present case would not come and State can be made to pay only 6% interest on Rs. 67,000/- from the date of suit till payment.

50. We have calculated here before that the total claim of the respondent/contractor works out to Rs. 67,000/- which shall carry interest of 11% for three years prior to the institution of the Suit and 6% interest from the date of suit till realization.

51. Accordingly the appeal is partly allowed. The respondent/plaintiff is entitled to recover Rs. 67,000/- with 11% interest thereon for the period of 3 years prior to the institution of the suit and 6% interest thereon from the date of suit till realization. It is stated at the Bar that the appellant has deposited Rs. 1,00,000/- which have been withdrawn by the respondent/contractor, by the end of August, 1985. Accordingly, the interest shall be calculated till the period, The appellant shall pay the balance of amount due within next eight weeks and respondent shall be at liberty to withdraw that amount. The amount be deposited in the trial Court. The cross-objections filed by the respondent/contractor are hereby dismissed. In the circumstances, there shall be no order as to costs.

52. Appeal allowed.