
(2007) 02 MAD CK 0209
In the Madras High Court
Case No : O.S.A. No. 193 of 2001

Tamil Nadu Electricity Board

APPELLANT

Vs

Aries and Aries Civil Engineers and Contractors

RESPONDENT

Date of Decision : 26-02-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34
Limitation Act, 1908 — Article 115
Limitation Act, 1963 — Article 120

Citation : (2007) 2 MLJ 1057

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

Bench : Division Bench

Advocate : N. Muthuswami, for the Appellant; T.V. Ramanujam, for B. Divakaran, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—This appeal is filed by the defendant against the judgment of the learned single Judge in C.S. No. 130 of 1987, decreeing in part the claims made by the plaintiff.

2. The admitted facts are as follows:

The defendant / appellant called for tenders for the construction of eight blocks of 8F (LIG) type quarters and nine blocks of 16G (EWS) type quarters at Ennore Thermal Power Station. The cost of one block of 8F type was Rs. 2,90,264.30 and the total cost of eight blocks was calculated as Rs. 23,22,114.40 and the cost of nine blocks of 16G quarters was calculated as Rs. 40,57,765.65 at the rate of Rs. 4,50,862.85 per block. Total estimated value of the contract was thus Rs. 63,79,880.05. The plaintiff submitted its tender quoting Rs. 21,66,880/- for "F" type quarters and Rs. 38,37,204/- for 16G type quarters and with a rebate of 3%, if both the works were given. Subsequently, in reply to the letter dated 7.5.1976, issued by the Superintending Engineer, the plaintiff gave reply letter dated 15.5.1976 extending the validity of the tender period upto 11.7.1976. By

letter No SCFC/E1/A5/Ennore Quarters dated 7.7.1976, the Chief Engineer accepted the offer for the entire construction. The acceptance order provide for payment of security deposit of Rs. 1,40,600/-, being the value of 21/2 % of the total contract value less Earnest Money Deposit of Rs. 5,000/- already paid by the plaintiff. The period of construction was 12 months from the date of handing over the site to the plaintiff. There was a stipulation that additional work that may become necessary shall be paid separately.

3. The grievances as reflected in the allegations of the plaintiff are as follows:

It is not necessary to refer in detail the various claims made by the plaintiff at this stage as these aspects would be highlighted at the time of dismissing various findings of the trial Court. Suffice it to state that the basic allegations are as follows:

(1) The completion of the work was unduly delayed because of the default on the part of the defendant and therefore the defendant is liable to pay at escalated rate or higher rate.

(2) Many extra works had been undertaken by the plaintiff for which either there was no payment or proper measurements had not been taken.

(3) Many deductions had been made at the time of passing the final decree without any justification.

(4) There was unnecessary alteration in the designs during the course of work resulting in loss to the plaintiff.

(5) The rebate offered by the plaintiff on the total value was given on the expectation that the work would be finished quickly but because of the delay such rebate was not available to be given.

4. The defendant filed a written statement denying in general the allegations made. It was stated that site was taken over by the plaintiff on 25.8.1976 and the work should have been completed on 24.8.1977. However, the work was completed only on 31.7.1980 and after completion of minor rectification works, the quarters were taken over by the Department on 14.11.1980. Out of delay of 35 months, there was delay of 7 months in clearance of site, 2 months in supply of cement, 11/2 months in supply of steel, 9 months in switching over to modular bricks and therefore the Department accepted total delay of about 191/2 months as attributable to the Board. However, further delay of about 151/2 months was attributable to the plaintiff. There was no escalation clause in the specification and the plaintiff had agreed for firm prices in its tender. Whenever the company requested for extension, it was clearly certified by the company that no claim in future would be or any monetary benefit due to such extension of time sought for. Therefore, there is no justification for claiming at higher rate.

The issue of steel is governed by clause 19.1 of the tender specification wherein

it is indicated that no extra payment would be made for differences in weight as per standard tables and as per actual measurements.

Additional items of work carried out by the company were accepted as supplemental items and paid for wherever acceptable.

Liquidated damages of 1/2% was levied for the slow progress of the work.

As per clause 7.1 of the contract document, quantities could be altered and value of the contract could be reduced, but it was not contemplated that the contractor would be compensated for reduced quantum of work which occurred due to change in design.

The company had agreed for granting a rebate if both Schedule A and Schedule B works were awarded and it has been so indicated in tender Acceptance Letter No. 874 dated 7.7.1976 as the construction of both types of quarters were awarded to them and, therefore, such deduction of 3% cannot be considered as illegal. The delay in passing the bills cannot be considered as a reason for belated completion of the work. The defendant also denied specifically the claims made by the plaintiff in different sub-paragraphs of paragraph 12, which is not necessary to be recounted in detail at this stage.

5. On the basis of the pleadings, the following issues were framed:

1. Whether the plaintiff has done any extra work beyond the terms and conditions of the contract ?
2. Whether the plaintiff is not entitled to the enhanced rate in view of escalation of prices of materials and labour as claimed in para 13 of the plaint ?
3. Whether the plaintiff had accepted unconditionally the offer of the defendant with all the terms and conditions?
4. Was the delay in completing the work due to the slow progress made by the plaintiff ?
5. Whether the defendant is entitled to reduce the value of the contract based on the measurement and terms and conditions of the offer ?
6. Whether the plaintiff is not entitled to compensation on the arbitrary reduction of contract value ?
7. Whether the defendant has unilaterally changed the design and sizes of structural materials, RCC works without consulting the plaintiff thereby causing loss to the plaintiff ?
8. Has the defendant paid amounts to the plaintiff for the work done as per the terms and conditions of the contract ?
9. Whether the claim for 5% adhoc increase is not justified ?
10. Whether the plaintiff is not entitled to for the value of 3% rebate deducted by

the defendant ?

11. Whether the plaintiff is entitled to any amount for the alleged loss of profit ?

12. Whether the suit claim is maintainable ?

13. Is the suit barred by limitation ?

14. To what relief, the plaintiff is entitled ?

6. Issue No. 1 relates to various extra work done by the plaintiff beyond the terms of the contract. Most of these items had been specified in para 12 of the plaint and it may be convenient to notice the findings in respect of such claims as well as to deal with the contentions in respect of such findings. 7. Para 12(a) relates to washing of machine jelly for concrete. It is the case of the plaintiff that when jelly manufactured through mechanical process (machine jelly) was available, there was no necessity to wash such jelly, but at the instance of the defendant, the plaintiff was required to wash such jelly in baskets which resulted in incurring of extra cost towards labour. According to the learned single Judge, the plaintiff had done such extra work as per the direction of the defendant and therefore the plaintiff was entitled to extra amount and has accordingly observed that the plaintiff is entitled to a sum of Rs. 2,25,022.50, being the extra expenditure incurred by him as claimed in para 12(a) of the plaint.

7.1 This finding has been challenged by the counsel for the defendant by contending that the effect of Ex.D-30, particularly clause 28(4) of such document, has not been considered by the learned single Judge. According to him, as per the MDSS rules, the jelly before mixed for the purpose of concrete is required to be cleaned and, therefore, it cannot be said that insistence of washing of jelly was beyond the contract.

7.2. Clause 5.5 of Ex.P-1 (Page No. 40) indicates that M.D.S.S will be followed for the performance of the contract, wherever applicable and for all particulars not specifically covered by this specification. Clause (v) of 5.5 specifically refers to cleaning up during progress and for delivery. P.W.1 examined on behalf of the plaintiff has admitted that M.D.S.S contemplates washing of jelly. The explanation of the witness is to the effect that such clause was contemplated when jelly was being produced not through machine, but through manual labour and, therefore, such clause should not be applied to cleaning in respect of jelly obtained through mechanical process. Since MDSS has been made applicable which contemplated cleaning, we are unable to accept the conclusion of the learned single Judge on this aspect and the stand of the defendant is acceptable.

8. In para 12(b) of the plaint, the plaintiff has claimed extra expenditure of Rs. 7,920.36 for providing extra shuttering for mat concrete. The trial court has allowed a sum of Rs. 7,920.36 on the above head. Even though such matter had been challenged before the trial court, in this appeal, no serious argument has been advanced combating the conclusion of the learned single Judge and therefore the finding is confirmed.

9. Para 12(c) of the plaint relates to extra expenditure of Rs. 23,807.17 towards extra cement used for first batch of mix, slurry, rich mix, etc. The trial court has allowed such amount.

9.1 Such finding has been challenged by the appellant by contending that there is nothing on record to indicate about incurring of any extra expenditure on the so called claim. It is contended by him that the cement was admittedly supplied to the contractor (plaintiff) and if the plaintiff had to utilise 1140 bags of cement towards this extra work, the plaintiff could have produced relevant documentary evidence for the same and in the absence of any acceptable evidence, this contention should not have been accepted by the trial court.

9.2. The finding of the trial court is based on discussion of relevant materials on record. From the records we find that this aspect was brought to the notice of the defendant from the very inception as per Ex.P-29. There is no contemporaneous record or reply of the defendant countering such assertion made in Ex.P-29. Since the evidence of the plaintiff gets corroboration from such documentary evidence and there is no sufficient rebuttal, we are inclined to confirm the conclusion of the trial court on this score.

10. The claim made in paragraph 12d of the plaint relates to extra shuttering and reinforcement for RCC jolly. The plaintiff had claimed Rs. 3,133.44/- on this score. D.W.1 in his evidence has stated that in Ex.P-1 agreement brick wall was also mentioned and the rate of brick wall would be less than the RCC concrete jolly for the parapet wall. The finding on this aspect has not been seriously challenged during the course of hearing. Therefore, there is nothing to interfere with such finding.

11. Para 12(e) of the plaint relates to construction of cupboards in bed, living and kitchen rooms of 8F and 16G quarters and para 12(g) of the plaint relates to providing of kitchen platform in both the quarters. The conclusion of the trial court relating to para 12(e) of the plaint is available in paragraphs 21 to 24 of the judgment of the trial court. The plaintiff has raised bill for Rs. 1,40,056.96 on this head. Even though it is not disputed by the defendant that such extra work had been done, it is stated that the defendant had measured and paid Rs. 21,000/- for the extra work. According to the plaintiff, the defendant has not adopted the correct method of measurement. It is stated by P.W.1 that slab has to be cast and plastered on both sides and the walls are to be cut for inserting such slabs and the amount has been calculated and payment has been made on the basis of cubic metre and all other additional expenditure including that of the labour had not been considered.

11.1. The trial court came to the conclusion that as per the evidence of P.W.1 and D.W.1, the plaintiff has been asked to provide cupboards in both the quarters which involved extra expenditure and, therefore, the amount claimed by the plaintiff is sustainable. Under para 12g of the plaint, similar claim has been made in respect of kitchen platforms provided in the kitchen room.

11.2. According to the learned Counsel for the appellant the claim made by the plaintiff is an after thought and without any basis and the letter of the plaintiff under Ex.P-11 shows that the alleged extra work involved lifting slabs, placing the same in position and wages for the masons who supervise the said work and similarly superfluous claims had been made for brick work and colour washing. Learned Counsel has also submitted that the measurement books marked as Ex.D-31, 32, 33, 34 and 38 clearly indicate the measurements and, therefore, the plaintiff is not entitled to any additional work than what has been given under the claims relating to para 12(e) and 12(g).

11.3. The conclusion of the trial court that these works were extra works does not appear to be borne out on record. In Ex.P-11 the claim made on behalf of the plaintiff is that the alleged extra work was lifting the slabs, placing the same in position and colour washing extra. If the work was contemplated in the contract itself, it is obvious that the slabs or cupboards had to be placed in position and the rate quoted obviously include the expense for the so called additional labour or work. From the measurement books it is apparent that these works had been measured and paid. Therefore, the conclusion of the trial court relating to paragraph 12(e) and 12(g) cannot be sustained.

12. The claim under para 12(f) of the plaint relates to refund in connection with return of gunny bags. The plaintiff has claimed a sum of Rs. 69,000/- on this score. The plea of the defendant is to the effect that initially cement was supplied in gunny bags for which Rs. 2/- extra is to be charged and for return of gunny bags Rs. 2/- is to be credited to the plaintiff. Initially cement has been supplied in gunny bags, but subsequently cement has been supplied even to the defendant in paper bags, who in turn made similar supply to the plaintiff, and credit was given to the plaintiff for return of gunny bags.

12.1. The trial court accepted the submission of the plaintiff on the basis of evidence of P.W.1. It also appears from the conclusion of the trial court in para 29 that even the plaintiff's counsel has submitted that it was not possible for the plaintiff to preserve the paper bags and such bags had been damaged while opening. The conclusion of the trial court is to the effect that there was possibility of paper bag being torn while opening and it is difficult to preserve the paper bag after its use and those bags will be of no value and, therefore, the defendant was not entitled to deduct Rs. 2/- per bag for the return of 34,500 paper bags.

12.2. In the agreement, it had been indicated that cement will be supplied at Rs. 411/- per tonne in returnable gunny bags and recovery of Rs. 2/- will be made for every empty bag not returned in good condition. It appears that at a subsequent stage, the cement was supplied in paper bags. The case of the plaintiff is to the effect that subsequently when cement was supplied in paper bags, the defendant refused to accept return of paper bags. A reading of the relevant clause in the agreement indicates that the cost of the cement as such was fixed at Rs. 411/- per tonne with the further condition that the cement

would be supplied in "returnable gunny bags" and thereafter empty gunny bags in good condition has to be returned by the contractor and if he was unable to do so, recovery would be made by the Board at the rate of Rs. 2/- for every empty bag not in good condition. Therefore, if the contractor failed to return any empty gunny bag or returned in bad condition, in that case only there would be recovery from the contractor at the rate of Rs. 2/-. Subsequently, since the cement was supplied in paper bags, there is no question of any recovery at the rate of Rs. 2/- as it was not contemplated that the paper bags, which would obviously be damaged while opening, were required to be returned. The conclusion of the trial court is therefore accepted.

13. In para 12(h) of the plaint, the plaintiff claimed a sum of Rs. 1,17,842.80 towards extra expenditure incurred for shuttering columns and beams in 8F and 16G quarters. P.W.1 in his evidence claimed that normally the width of the beam would be 9 inches and sometimes it would be 12 inches and for the column for four floors, it should be 1 x 1 foot and they had procured materials for beam bottom of 9 inch width and since the width of the beam has been reduced, the plaintiff has to cut the size of the planks, which involved lot of labour and costs.

13.1 There are contrary materials on the side of the defendant denying the size of the beam as 8 inches. The rate fixed for concrete wall obviously took into account shuttering and the work had been measured and entered in the measurement book. The trial court seems to have preferred the evidence of P.W.1 without any specific reason. In the absence of any corroborative material, in our opinion, there was no justification for the trial court to direct payment of Rs. 1,17,000/-. The conclusion of the trial court on this score appears to be more like that of an arbitrator rather than that of a court of law, who is required to weigh the evidence and give reasoning for the conclusions. This finding is therefore not sustainable.

14. Item 12(i) of the plaint relates to claim of Rs. 9,469.15/- towards expenditure incurred in respect of extra thickness of flooring and cement mortar in both type of quarters. Even though the amount claimed appears to be comparatively low, the basis of the claim seems to be ingenuous. Obviously, while flooring is done there has to be sloping and it cannot be said that any extra work is involved. The trial court seems to have accepted such claim more as an arbitrator rather than a court of law. Even though the amount claimed appeared to be insignificant, yet we are unable to accept the conclusion of the trial court.

15. The plaintiff has claimed a sum of Rs. 69,265.60 in paragraph 12j of the plaint on the ground that he was asked to give skirting of 12.5 cm height and 10 mm thickness and the total quantity of such work comes to 13,760 metres and a sum of Rs. 69,625.60 should be paid at the rate of Rs. 5.06 per metre.

15.1. According to the defendant's case, as per the rate fixed in the contract for plastering, extra thickness had been measured and paid. As admitted by D.W.1 and rightly concluded by the trial court, skirting obviously is different from mere

plastering which requires more intensive labour. In Ex.P-1 only plastering has been mentioned and therefore skirting can be considered to be an extra work. Moreover, D.W.1 had admitted that in the measurement books that skirting had not been measured in running meters and height of the skirting was also not mentioned in running metres. Considering all these, the trial court has accepted the claim of the plaintiff, which in our opinion does not appear to be unreasonable. The finding on this score, therefore, can be sustained.

16. The plaintiff has claimed a sum of Rs. 21,879.89 in para 12(k) of the plaint. It is contended that the defendant had taken breadth of celcrete brick uniformly as 19 cm as per the expected specification shown in the celcrete factory, whereas in reality the size varied from 19 cm to 21 cm. Therefore, the defendant, while taking measurement, should have taken average in consonance with IS 5489-1969 Article 311 (Table 10) and, therefore, the plaintiff is entitled to recover the cost for the difference in measurement, which comes to Rs. 21,879.89.

16.1. The defence of the defendant is that the plaintiff was asked to procure celcrete bricks of 19 cm which was used and correct measurement had been taken.

16.2. The claim of the plaintiff is again based on the sole testimony of P.W.1 without any corroboration from any source. It cannot be surmised that width of 19 cm measure by the defendant was not correct merely on the assumption that width of some celcrete bricks was 20 cm or more. In the absence of specific evidence, the conclusion of the trial court on this score cannot be accepted.

17. Para 12(l) of the plaint relates to claim of Rs. 9,120/- on account of extra work in the staircase handrail coping measuring 480 metres. The defendant contended that it is not an extra work and it is coming within clause 14 of Ex.P-1.

17.1. On going through Ex.P-1, it is not found that it has been specifically mentioned about handrail coping and the conclusion of the trial court that it is an extra work can be confirmed and the claim of Rs. 9,120/- on the above score accepted by the trial court can be confirmed.

18. Since the claims relating to 12(m) and 12(n) had been rejected by the trial court, it is not necessary to deal with those claims and findings as there is no cross-objection on the side of the plaintiff.

19. Para 12(o) of the plaint relates to claim of Rs. 5,796.03/- on account of providing spout. D.W.1 had admitted that the plaintiff had provided GI water spouts. From the materials on record, the trial court came to the conclusion that such extra work is not covered under the terms of the contract and, therefore, the claim made by the plaintiff has rightly been accepted.

20. In para 11 of the plaint, the contention of the plaintiff was to the effect that it was under the bonafide impression and belief that reinforcement steels of standard supplies like TISCO, HSL would be made and their stock strictly confirm

to the size catalogue. However, the defendant supplied rerolled steel from local suppliers whose stock did not conform strictly to the size mentioned in the catalogue. In other words, even though steel supplied should be of 25 mm diameter, the rod was actually 26 mm when measured. While measuring the rods, it was calculated on the basis of linear length on the assumption that diameter must have been 25 mm. Because of such defective method of measurement, the plaintiff had sustained heavy loss. The entire basis of the claim of the plaintiff was made on the footing that the rod supplied through local suppliers did not conform to the standard measurements expected and since diameter was more than the prescribed, obviously length of the rod supplied was less than the expected. The trial court concluded that there was no evidence to show that the steel supplied was from reputed suppliers and therefore the formula of measurement by length was not acceptable.

20.1. We do not think that the trial court was justified in assuming that the diameter of the steel, even accepting that the supply was from some local supplier, did not meet the standard specification and the diameter was more than what was specified. It was mere surmise on the part of the trial court on the uncorroborated claim of PW1. For the above reasons, we have modified some of the findings relating to Issue No. 1

21. The findings on issue Nos. 2, 4 and 9 are based on the claim of enhanced rate on the cost of materials and labour and allied factors in view of escalation on account of delay in completion of the work. It is not in dispute that work had been delayed and had been completed after about 35 months of the scheduled completion. The plaintiff has claimed at the rate of 50% on the above ground.

22. The defendant has contended that in fact there was justification for delay of about 19 1/2 months, but there was no such justification for delay beyond 19 1/2 months and in fact penalty had been levied. It was also further contended that at the time of extending time for completion of the work, it was always made clear that the plaintiff cannot claim any escalation. The trial court has relied upon the case of the defendant and D.W.1 to the effect that there was justifiable delay for 19 1/2 months for soil test, supply of cement, steel supply, changing over to modular bricks and has accepted the case of the plaintiff.

23. The contention of the appellant is to the effect that the plaintiff had obtained extension by undertaking that no escalation would be claimed and the contract also did not contemplate that merely because time for completion was extended would not be a ground for escalation and on the other hand since the delay beyond 20th month was on account of fault of the contractor, the plaintiff has rightly levied penalty. In this connection, the learned Counsel for the appellant has placed reliance upon the decisions of the Supreme Court reported in *Himachal Pradesh Nagar Vikas Pradhikaran Vs. M/s. Aggarwal and Co.,* .

24. The trial court, while accepting the claim of the plaintiff regarding 50% escalation, has rejected the contention in para 16 of the plaint regarding increase

of 5% on the total cost. However, 50% escalation accepted by the trial court appears to be vulnerable in view of the specific clause in Ex.P-1 agreement that the rates shall be firm till the tenure of the contract and also in view of the fact that at the time of extension it had been made clear that the contractor cannot claim any escalation.

25. Though Issue No. 11 is framed to examine the question whether the plaintiff would be entitled to any amount for the alleged loss as profit, the trial court had discussed such issue by considering whether the claim of interest at the rate of 18% as made in paragraph 19 of the plaint is justified. The trial court has allowed interest at the rate of 12%, even though it has come to the conclusion that in the agreement there was no provision for payment of any interest.

26. So far as interest during pendency of the suit and after the decree is concerned, obviously such question is covered u/s 34 of CPC. However, we are more concerned with the question of liability to pay interest before filing of the suit. This aspect is covered by the provisions contained in the Interest Act. Admittedly in the agreement there is no provision for payment of any interest. The plaintiff has not issued any notice claiming interest at a particular rate or from any particular date. As a matter of fact, interest has been claimed only by way of amendment. Therefore, we are unable to accept the conclusion of the trial court regarding payment of interest prior to the date of filing of the suit. However, since Section 34 of CPC is applicable and it does not contemplate issuance of any particular notice, interest is payable on the amount admissible from the date of filing of the suit till payment.

27. In view of our conclusions in preceding paragraphs confirming some of the findings of the trial court, the question of limitation still remains to be decided.

28. The trial court has considered the question of limitation under Issue No. 13. The materials on record indicate that the work was completed in July, 1980 and after taking measurement the final bill was prepared and payment was made on 13.1.1981. The suit has been filed on 6.11.1984.

29. According to the plaintiff's case, even thereafter some correspondence have been going on and, therefore, it must be treated that the contract was still alive and had not been finalised. The plaintiff has relied upon Ex.P-22 which is dated 6.11.1981.

30. On 16.5.1981, legal notice Ex.P-20 was issued. Ex.P-21 was the reply sent by the counsel. Ex.P-22 was the reply from the Board stating that the matter was under study. According to the plaintiff, therefore, the cause of action arose on the date when Ex.P-21 reply was sent by the counsel. The witness admitted that he has signed in the measurement book dated 7.12.1980, which is at Page No. 92 of Ex.D-15. In the notice sent by the Advocate, it is indicated that on 13.1.1981, payment was received, under a protest. However, the evidence, P.W.1 does not state anything about the protest nor any document has been produced to show about the protest. Whatever it may be, it must be taken that cause of action

arose on the date when the plaintiff received the amount under protest i.e., 13.1.1981. Merely because the plaintiff wrote to the defendant thereafter claiming several amounts and the defendant replied that notices /claims were under consideration and ultimately the Advocate replied that no amount has to be paid, does not mean that cause of action got postponed till the date on which the Advocate of the defendant replied. If at all there was any dispute continuing, it was relating to penalty, which had been levied by the Board for delay in completion of the work.

31. So far as such question of limitation is concerned, the trial court has referred to the fact that under Ex.P-22 the defendant had replied that the matter was under study and the reply would be sent in due course. In Ex.P-21 reply dated 6.11.1981, it had been indicated that the claims made on behalf of the plaintiff in the Advocate notice are specifically refuted. While replying about the penalty recovered in the final bill, it has been stated : "Your client had caused abnormal delay of more than 3 years to complete the work inspite of unconditional undertaking and promises made by your clients that they would complete the work at an earlier date. Hence, the penalty imposed by the field Engineers in the final Bill which is provisional is correct subject to final decision on the quantum of penalty to be imposed on your clients by the Chief Engineer." If at all this only indicates that there was question of reconsideration relating to penalty which had been levied, but, it cannot be said that so far as other claims were concerned that the matter had not been finalised.

32. It is not disputed that after the work was completed, final bill was prepared and amount was paid on 13.1.1981. The plaintiff claims that he received such amount under protest. Such protest is not established from the documents produced. Whether the amount was received under protest or not obviously the cause of action arose on that date. Merely because the plaintiff entered into some correspondence and the defendant replied that such correspondence was under consideration would not be a ground to extend the period of limitation.

33. The trial court has relied upon the decision of the Supreme Court reported in Gannon Dunkerley and Co., Ltd. Vs. Union of India (UOI), , where the Supreme Court applied Article 120 of the old Limitation Act in respect of claim based on enhancement of rate. Even applying ratio of the said decision and applying Article 113 of the Limitation Act, 1963, the suit was to be filed within three years from 13.1.1981 when the final bill was paid and received under protest.... The conclusion of the trial court that contract was kept alive till 6.11.1981, when the reply was given by the Advocate for the defendant cannot be accepted. If the amount claimed was on the basis of the work done as per the original contract, the date of final bill or payment would be the starting point of limitation. Even otherwise if the claim is for additional work, escalation, etc., which are not contemplated in the original contract, the cause of action obviously arose when notwithstanding the claim of the plaintiff for higher amount, lesser amount was paid on 13.1.1981, on which date the plaintiff had received the amount under

protest according to the plaintiff's case and in full and final settlement according to the defendant's case. Even assuming that if it is not received as full and final settlement and it was received under protest on 13.1.1981, obviously that is the date on which the cause of action arose.

34. Article 18 of the Limitation Act, 1963 relates to suit for the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment. Such period is three years from the date when the work is done. Article 55 relates to suit for compensation for the breach of any contract, express or implied, not specifically provided for. The period of limitation is three years from the time when the contract is broken. Article 113 is for any suit for which no period of limitation is provided elsewhere in the schedule. The period is three years from the time when the right to sue accrues.

35. In the decision reported in (1976)17 GLR 638 (State of Gujarat v. Shrinibai), it has been observed that till the final bill is accepted by the Government, it cannot be said that the work is satisfactorily executed for which payment is due to the contractor and, therefore, Article 18 of the Act may not be applicable, but the residuary Article 113 may be applicable. However, the Allahabad High Court has held in Zila Parishad (District Board) Vs. Smt. Shanti Devi and Another, that a suit by the contractor for the price of the work done against a District Board is governed by Article 56 of the Limitation Act, 1908 corresponding to Article 18 of the Limitation Act, 1963.

Similar view has been expressed in Andhra Pradesh High Court in (1965) 1 AWR 207 (Badarwada Bhima Subbaraju v. Village Panchayat). However, in State of Rajasthan Vs. Ram Kishan, , it has been observed that in the event of breach by the non-payment of amount due to the contractor, old Article 115 of the 1908 Act corresponding to Article 55 of the 1963 Act is attracted.

36. In State of U.P. Vs. Thakur Kundan Singh, , it has been held that when the contract provides for time for submission of final bill for payment but does not fix any time for payment of the final bill, Article 18 is attracted.

37. In 2003 (1) ICC 592 (Calcutta)(DB) (M.C. Nally Bharat Engineering Co. Ltd., v. Benoy Krishna Bose), a Division Bench of Calcutta High Court has held that cause of action would arise from the date on which the defendant refused to pay the final bill submitted by the plaintiff.

38. In Nathoolal Vs. State of Rajasthan, , it has been held that when the contractor executed some items of work not covered by the contract and for which the Engineer-in-Chief has to fix rates, a suit by the contractor for payment of such extra work done is not covered under Article 18.

39. In 1992(2) CCC 33 the Bombay High Court has observed that the suit for recovery of the amount deducted from the contractor's bill by the employee was to be filed within three years from the date on which such amount was deducted.

40. Even by applying Article 113, the position does not improve for the plaintiff/

respondent. It is well settled that once the period of limitation starts running, it is not arrested unless there is any supervening circumstance by which it can be said that a fresh period begins to run. Merely because the defendant replied that notice of the plaintiff was under consideration and subsequently the Advocate of the defendant gave reply refuting the claim, it cannot be said that there was any fresh cause of action nor it can be said that there has been any acknowledgment of the liability of the defendant giving rise to a fresh starting point of limitation. When the final bill had been prepared and the Board paid a particular amount, which was accepted by the plaintiff, may be under protest, it is obvious that claim for any additional amount must be made within a period of three years from the date of such payment of final bill.

41. In *Gannon Dunkerley and Co., Ltd. Vs. Union of India (UOI)*, , it has been observed that a suit on contract claiming for enhanced rate for the work done in view of the altered circumstances does not come under Article 56 or Article 115, but comes under Article 113. This decision has been relied upon by the learned single Judge, but we do not think that the decision can come to the rescue of the plaintiff. Here the question is when the right to sue arose.

42. If Article 18 is applicable, the period of three years commences from the time when the work is done. Assuming that as has been done in many decisions that the work is done only when measurement is made and final bill is prepared, the materials in the present case indicate that so far as the Board was concerned it had prepared the Final Bill and paid amount on 13.1.1984. By no stretch of imagination it can be said that even after payment had been made which was accepted under protest by the plaintiff, the right to sue had not accrued. Even assuming that Article 55 is applicable, the breach of contract can be said to have occurred when the defendant did not pay in accordance with the final bill submitted by the plaintiff and paid reduced amount. If it is considered that neither Article 18 nor 55 is applicable and the matter is covered under Article 113, which provides that any suit for which no period of limitation is prescribed should be filed within three years from the date when the right to sue accrues, the same result would follow.

43. The view of the learned single Judge that the contract had been kept alive by virtue of the communication that the notice of the plaintiff was under consideration does not appear to be supported by any authority.

In the above view of the matter, the suit was liable to be dismissed on the ground of limitation.

44. In the result, the appeal is allowed and the suit is dismissed. No costs.