

(1993) 10 BOM CK 0049

In the Bombay High Court

Case No : First Appeal No. 16 of 1991 with Cross-objection St. No. 16152 of 1978

The State of Maharashtra

APPELLANT

Vs

S.N. Dahad and Others

RESPONDENT

Date of Decision : 19-10-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 299
Contract Act, 1872 — Section 55, 74

Citation : (1994) 96 BOMLR 315

Hon'ble Judges : M.S. Vaidya, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.S. Vaidya, J.—The State of Maharashtra, who were the defendants in Special Civil Suit No. 61 of 1972, on the file of Joint Civil Judge Senior Division, Jalgaon, have preferred this appeal against the judgment and decree, dated 13th October, 1977. The decree had declared that the orders dated 30th June, 1969 and 5th July, 1969, passed by the authorities of defendants- Government imposing a fine at the rate of Rs. 200/- per day on the respondents/ plaintiffs, was illegal and not binding on the plaintiffs. The decree had also restrained the appellants/ defendants from recovering the said fine, in pursuance of the said orders. The claim of the respondents/plaintiffs for a declaration that the action taken by the defendants under Clause 3(b) of the contract was illegal, and that the defendants were, therefore, not entitled to recover the difference in the cost of completion of the remaining work and the estimated cost, was dismissed along with the relief for consequential injunction. The defendants were directed to pay to the plaintiffs a sum of Rs. 6,456/- in final settlement of the suit contract including the amount of Security Deposit, with future interest at 6% per annum from the date of the suit till payment. The respondents/plaintiffs had felt aggrieved by the disallowance of certain monetary claims by the learned Civil Judge. Thus, the

defendants have come in appeal in respect of the claim decreed and the plaintiffs have come in appeal with cross-objections only in respect of rejection of some monetary claims, which ought to have been accounted for by the defendant-Government and the declaration regarding application of Clause 3(b) of the contract.

2. The dispute in question had arisen out of a contract entered into by the authorities of the appellants-defendants with the registered firm of the respondents/plaintiffs. In pursuance of tenders dated 22nd June, 1966 (which were tendered on record as a part and parcel of the contract Ex. 56), for the construction of "Pachora Water Supply Scheme-constructing inspection well, gallery, laying of pipe and jack well with circular pump house at head works." The contract was entered into by "the authorities of the defendants with the plaintiffs firm on 10th June, 1966. The work order was issued on the very same day. The entire work was to be completed within a period of 15 months from the date of the work order, i.e. upto 10th September, 1967. The work in the contract was of a total value of Rs. 1,00,994.00. According to the respondents/plaintiff time was not essence of this contract. The execution of the work was dragged on due to several reasons. Ultimately, under a letter, dated 4.6.1969, it was reported that the Contractor had stopped the work altogether. According to the plaintiffs, they had carried out substantial work worth Rs, 98,247.17 ps. and some minor items had remained to be executed. According to them, the work was delayed because of the change in the site and other conditions created by the defendants. In this context, it was further contended by the plaintiffs, that when the tenders were invited, the water flow in Girna river was meagre and the cost of dewatering the said meagre flow was estimated on that basis. The work, particularly or inspection well and gallery was to be carried out in the river bed and it was to be done generally in the summer, i.e. when the flow of water was meagre. Some Government authorities from other Department had discharged water in a large quantity in order to reduce the level of the water in Girna dam, for the purposes of effecting some repairs to the gates of Panzan dam in the summer of 1967-68. As a result, the flow of water in the river bed, at the relevant spot, had increased considerably and, consequently, there was substantial increase in the original de-watering work. When the plaintiffs had requested the Government authorities to compensate them for that extra work, those requests had fallen on deaf ears. The cost of the work of dewatering had consequently increased to an enormous extent. The expectation of the defendants that the plaintiffs should carry out the work, even under the changed circumstances, was unreasonable and indeed, contrary to the terms of the contract. Instead of finding out any remedy for the wrong that was being done, the Executive Engineer, Public Health Works Division at Jalgaon, insisted on the plaintiffs completing the work, and ultimately, proposes in a letter, dated 30th June, 1969 to impose on the plaintiffs a fine of Rs. 200/- per day with retrospective period from 16th June, 1969. The Superintending Engineer upheld his proposal on 5th July, 1969. The plaintiffs, therefore, contended that the

aforesaid action was arbitrary, unwarranted, beyond the authority, illegal and mala fide. The plaintiffs contended further, that they were always ready and willing to perform their part of the contract and to complete the remaining work, and they had, in fact, requested the authorities of the defendants to carry out the work of excess dewatering initially at the cost of plaintiffs, without prejudice to the rights of the parties, in that behalf. Their said proposal also was turned down. It was alleged that the Government authorities were obstinate and wanted to carry out the remaining work departmentally, and even when they had taken up such works departmentally, they were unable to carry out the same on account of the adverse circumstances on the site. The decision to recover from the plaintiffs fine to the tune of Rs. 10,000/- and to carry out the work departmentally,, in spite of the willingness of the plaintiffs, was unwarranted and illegal. Even then, the Executive Engineer, Public Health Works Division, Jalgaon, chose to have recourse to Clause 2(b) of the contract and to carry out the work departmentally at the cost of the plaintiffs. Contending that the defendants were not entitled to do so, the plaintiffs prayed that the final bill be ordered to be prepared without directing the aforesaid recoveries as against the plaintiffs. The plaintiffs had issued a notice u/s 80 of the Code of Civil Procedure, calling upon the defendants not to continue with the breach of contract and not to do any work departmentally, but they continued in perpetrating the wrong, and in doing so, they utilised cement porous pipes belonging to the plaintiffs worth Rs. 1,300. The plaintiffs contended that they were entitled to recover that amount of Rs. 1,300/- as also Rs. 3,000/- towards the extra cost incurred by them for dewatering. It was also contended that on account of change of site, the plaintiffs were required to do additional work of excavation of pipe gallery to the extent of 10,800 cubic feet, worth Rs. 2,440/-. They maintained that even after the excavation work was completed, on the changed site, the same was washed away due to increase in the water level, causing a further loss of Rs. 8,320/-. The plaintiffs contended that, thus, they were entitled to recover from the defendant Rs. 14,720/-, as detailed below -

Rs. 1200/- claim for lowering, laying and jointing towards the pending bills including the bill for lowering, laying and jointing three pipes (perforated) line; Rs. 700/- Price of actual excavation done which was more than what was contemplated in the contract; Rs. 1300/- Being the price of the pipes belonging to the plaintiffs, which were used by the defendants authorities for carrying out the work departmentally; Rs. 200/- Due to wrong deductions in respect of plasters and paint- ing; Rs. 3000/- Being the price of extra and excess work of dewatering and excavation due to change of line and not originally included in the work in the contract; and Rs. 8,320/- Being the loss due to sudden raising of water level on account of excess release of Girna Dam water. ----- Rs. 14,720/- -----

The plaintiffs also contended that the deposit of Rs. 4,040/- made by them to the defendants was sought to be forfeited by the defendants and they were entitled to recover the same in addition to the aforesaid claims.

3. The defendants resisted, the suit contending that the firm of the plaintiffs was not a registered firm, that time was not essence of the contract, that the tender in question was of B-2 type, that the time limit for the suit work was 15 months from the date of issue of the work order, and that the plaintiffs were to complete the work by 6th of September, 1967. They maintained that despite the five extensions granted to the plaintiffs, they did not complete the work. They denied that the non-completion of work was due to change of site or letting of more water in the river bed from the Dam. It was, further, maintained that though the cost of the work was Rs. 1,00,994/-, the plaintiffs had quoted the total cost at Rs. 1,37,246/-, without specifying the rate for each item, According to them, the plaintiffs had completed work worth Rs. 97,649/- and the remaining work was worth Rs. 54,700/-. They denied that the remaining work was in the nature of minor work. The defendants admitted that the suit contract did not mention the quantity of the flow of water in the river, but the plaintiffs were aware of the extent of discharge of water in the river bed, when their tender was accepted. They maintained that the work of dewatering was by itself a complete job and it was not on the basis of flow of water. They denied that the estimated cost and the quoted cost were on the basis of meagre flow of water, at the work site. They denied that the work of the inspection well and the gallery was to be done only in the summer, i.e. when the water flow was less, because, according to them, the agreement was riot made on those lines. The change in circumstances was denied. Excess flow of water was denied and the demand of the plaintiffs for the extra amount of cost incurred by them, due to the additional water flow, was also denied. They admitted that the plaintiffs had, actually, completed four wells, but maintained that they* could bail out the necessary water for that work at the estimated cost of Rs. 2,000/- per inspection well. They denied that the performances of the contract was made impossible on account of the excess flow of water, They admitted that the plaintiffs had laid in river bed four well, 96 ft. of infiltration gallery in the said river bed; but maintained that the remaining length of 380 ft. was left incomplete. According to the defendants, the plaintiffs had, for their benefits, working seasons of 1967, 1968 and 1969, available on account of the extensions granted, and that, even then, the work was left incomplete in the year 1969 and that, therefore, they were obliged to have recourse to Clause 3 of the agreement. A notice in that behalf was issued to the plaintiffs on 25.11.1969, informing the intention of the authorities to act under Clause 3(c) of the contract. It was maintained that in view of the invocation of that clause, the plaintiffs were not entitled to claim any compensation for any loss sustained by them, by reason of having purchased or procured any materials, etc. The action of levying fine was sought to be justified, and it was Contended that though the plaintiffs were to construct temporary coffer dams to divert the flow of water, no such coffer dams were, in fact, constructed. It was maintained that the defendants were entitled to have the work completed at the cost of the plaintiffs. They maintained that the final bill was since prepared and it was a minus bill showing recovery of the amounts from the plaintiffs towards the cost of unfinished works, material supplied to the plaintiffs and the amount of penalty. The details of the claims

made out by the plaintiffs in the plaint, were denied, and it was contended that the defendants were entitled to forfeit the security deposit of Rs. 4,040/-. They prayed that the suit be dismissed with costs.

4. The plaintiffs examined at the trial only two witnesses including the plaintiffs No. 3 himself. The defendants did not examine any witness in defence.

5. After hearing, the learned Civil Judge Senior Division came to the conclusion that the plaintiffs had successfully proved that their firm was a registered firm and that the time was not the essence of contract. He held that the plaintiffs succeeded in proving that they had carried out substantial work of the contract and only some minor items of work had remained to be executed. He held, further, that the plaintiffs had proved that the tenders were called at the estimated cost of dewatering meagre flow of water at the site where the work was to be carried out. But, he negatived the case of the plaintiffs on the point that the work of wells and inspection gallery were to be done only in summer as per the agreement of the parties. The plaintiffs contention that the conditions and circumstances in which the work of well and gallery was to be carried out were materially changed subsequently and that there was greater discharge of water and the work of dewatering had enormously increased, was held to be proved. However, the learned Civil Judge negatived the case of the plaintiffs on the point that they had to do the work under the changed circumstances and against the terms of contract as also on the point that due to the change of work and situation in respect of dewatering items, plaintiffs were not bound to carry out the work under the contract. The plaintiffs case was negatived, further, on the point that there was breach of condition on the part of the defendants, because there was greater flow, as also on the point that the action taken by the Executive Engineer under Clause (3) of the agreement was illegal and beyond authority. The imposition of the fine per day was held to be arbitrary, unwarranted and beyond the authority and the same was held to be unjustified and wrongful. It was also held that the plaintiffs had proved that their cement porous pipes worth Rs. 1,300/- were used by the defendants while carrying out the work departmentally. Out of the money claims made by the plaintiffs, the learned Civil Judge had allowed a claim of Rs. 9,320/-. The technical objections regarding validity of notice u/s 80 of the Code of Civil Procedure, bar of limitation, etc., were negatived. As a result of these findings, the learned Civil Judge had proceeded to decree the suit in part.

6. Mr. Chatterjee holding for Mr. Bora, the learned Counsel for the appellant, rightly relied upon the ruling in Hind Construction Contractors by its Sole Proprietor Bhikamchand Mulchand Jain (Dead) by Lrs Vs. State of Maharashtra, , which laid down that the question, whether or not, time was of the essence of the contract, would essentially be a question of the intention of the parties to be gathered from the terms of the contract, and further, that where the parties had expressly provided that time was of essence of the contract, such a stipulation would have to bread along with other provisions of the contract, and such other

provisions might, on the construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental, for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week, the work undertaken remains unfinished on the expiry of the time provided in the contract, such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. The facts of the aforesaid case also were more or less, similar to the facts of the present case, because in that case, the State Government and a Contractor for the construction of an aqueduct across a river, the work was stipulated to be completed within 12 months, but the power was conferred upon the Executive" Engineer to grant extension of the time for completion of work on reasonable grounds and there was a further provision made for levying and recovering penalty/ compensation from the Contractor at specified rates for the unfinished work after the expiry of the fixed date. The Supreme Court held that such provisions would exclude the inference that the time was intended to be of the essence of the contract and that the rescission of such a contract on the part of the State Government without fixing any further period making the time essence and directing the Contractor to complete the work within such period, was clearly illegal and wrongful. It was held further, that the State Government had, thereby, committed a breach of the contract with the result that the security deposit of the Contractor, could not be forfeited. Mr. Chatterjee also referred to a judgement of Lord Justice Denning in *Charles Rickards Ltd. v. Oppenheim* (1950) (1) K B D 616, which was, in fact," relied upon by the Supreme Court also while deciding the aforesaid case.

7. In the present case, the suit agreement is at Exh. 56 in printed form B-2. The Clause (2) provided that the time allowed for carrying out the work as entered in the tender, should be strictly observed by the Contractor and that the work should, throughout the, stipulated period of contract, be proceeded with, with all due diligence (time being deemed to be of the essence of the contract on the part of the" Contractor) and the Contractor should pay as compensation an amount equal to 1% or such similar amount, as the, Superintending Engineer might decide on amount of the estimated cost of the whole work. Reliance was placed by Mr. Varale, the learned Assistant Government Pleader on this clause in support of his submission, that time was of the essence of the contract. Mr. Chatterjee was right in repelling this submission on three grounds-

(i) the aforesaid clause itself provided for a right to levy compensation, in case the work was not done diligently and within the specified time;

(ii) though u/s 55 of the Contract Act, the defendants could have exercised their right to rescind the contract, finding that the work was not being done diligently or within time, such an action was not taken by the defendants almost till the middle of the year .1969; and

(iii) It was pointed out that under the terms of the contract itself, the Executive

Engineer had power to extend the term. Clause (2) of the tender form itself provided that to ensure good progress during the execution of the work, the Contractor should be bound, in all cases, in which the time was allowed, for work exceeded one month to complete. It stipulated that 1/4th of the work should be done in 1/3rd of time, 1/2 work should be completed in 1/2 of the time and 3/4th of the work should be completed in 3/4th of the time.

It was pointed out that it was never a grievance of the Officers of the Department that the work was not being done in accordance with the aforesaid requirement of the contract. Clause (6) of the contract provided that the Contractor could apply for time by making a written application to the Executive Engineer before the stipulated period and the Executive Engineer could, if in his opinion, there were reasonable grounds, for granting the extension, grant such extension, if he thought it necessary. The decision of the Executive Engineer on the point was to be considered as final between the parties. Mr. Chatterjee was right in relying upon the aforesaid circumstances, in substantiating his contention that in the face of such conditions, as laid down by the Supreme Court in the above quoted ruling, the time could not be considered to be of the essence of the contract. In addition, one has to note that though the plaintiffs had contended that time was never essence of the contract and had stated so in his deposition, none was examined on behalf of the defendants to contradict the plaintiffs oral evidence on the point. Indeed, the evidence of plaintiffs' witness Motilal showed how initially, the Officers of the defendants were considerate in appreciating the un-anticipated difficulties of which the plaintiffs had to face in execution of the contract. The evidence on the record does warrant a conclusion that despite the difficulties which the plaintiffs had to face, they had done the substantial work and it was only at the fag-end, only when a few small items had remained to be done, that a decision was abruptly taken in invoking the application of Clause (3) of the contract and in imposing on the plaintiffs daily fine for non-completion of the work. The learned Civil Judge has considered only some of the aforesaid aspects but he has rightly come to the conclusion that in the circumstances of the case, the time could not be considered to be of the essence of the contract.

8. The plaintiffs' contention that the estimated cost of the work was Rs. 1,00,994/- only is turned down by the memorandum of the tender itself, in the letter, dated 23.3-1966 (Exh. 56), under which the acceptance of the tender given by the plaintiffs was recommended by the Executive Engineer, Public Health Works Division, Bhusawal, the Executive Engineer had stated that though the estimated cost of Rs. 1,00,994/- was put in the tender, the cost of the work was estimated to be Rs. 1,42,605.94 ps. He stated that the Contractor was requested to reduce the amount and after reduction, the cost worked out at Rs. 1,36,394.24 ps. This proposal of the Executive Engineer appears to have been ultimately accepted, with the result that the cost of the work could be considered to be Rs. 1,36,394.24. According to the defendants, when the plaintiffs had left the work incomplete and had stopped the work, considerable work which was of substantive nature, had remained to be done. Their contention was that the work

was worth Rs. 54.700/-. According to the plaintiffs, the unfinished work was worth only Rs. 17.000/-. Mr. Chatterjee invited our attention, in this context, to a letter, dated 30.6.1969 (Ex. 104), from the Executive Engineer to the Superintending Engineer, Public Health Circle, which had listed the items of work pertaining to jack well and pump house, which were not completed by the Contractor. We have checked those items with reference to the item rates given at Exh. 56 and we found that the value of those items was really very meagre as compared with that of the total contract. Item No. 1 in the aforesaid letter was wooden flooring. The item rate was Rs. 1,504.40 ps. Item No. 2 was fixing M.S. Ladders. Page 8 of the tender shows that the item was worth Rs. 457/-. Fixing G. I. sheet ventilating shaft is not to be found in the item rates at all. Item No. 4 was fixing water level indicator, the cost of which was estimated to be Rs. 300/-. Item No. 5 fixing manhole frame and cover was again not to be found in the item rates and Item No, 6 was fixing lightening conductor, which was worth Rs. 400/-. Leaving all margins, the total cost of this work should hardly exceed on amount of Rs. 3.000/- or so. The letter in question does not specify any other item that was left incomplete. It is significant to note, in this context, that in a earlier letter, dated 3.6.1969 (Ex. 139), the Sub-Divisional Officer had conveyed to the plaintiffs that there was 4 ft. 6 inches water in the trench and it was observed that about 6 inches to 11 inches excavation work was yet to be carried out at the centre of the trench. It was also pointed out that the trench was required to be 7 ft. 6 inches clear, but it was hardly about 4 ft. or so. This letter was replied to by the Contractor under his letter dated 5.6.1969, in which the Contractor had explained his own stand on the point. It does not appear that after this letter, anything further was written to the Contractor-plaintiffs in that behalf. Thus, on the whole, there did not appear any person on record, particularly in the absence of the evidence adduced by the parties through their witnesses, who could have told something on the point, to differ from the conclusion arrived at by the learned Civil Judge on the point that the plaintiffs/respondents had completed substantial part of the work by middle of 1969.

9. It was not in dispute that the work in question was to be executed in the bed of the river Girna itself. It was also not in dispute that up above the stream of river Girna, there was a dam called Panzan Dam, The tender form was issued to the plaintiffs on 1st March, 1966, could be seen from the letter No. AB-Tender/1697 of 65 dated 1st March, 1966. It was submitted to the Department in the midst of summer and the decision to accept the tender was admittedly; taken on 6.6.1966. It was nobody's contention that prior to this period, the flow of water in the bed of river Girna was above the normal level at any point of time. The Contractor was supposed to inspect the site before filling the tenders and to have estimated the cost of the work. At the point of time when he might have done so, the flow of water was certainly not above normal. The Deputy Engineer, Public Health Construction Sub-Division, Pachora had written a letter dated 2.3.1968 to the Executive Engineer, Public Health Works Division, Bhusawal (Ex. 50), in which he had stated that even though the discharge of the

water was about 20 cusecs in summer, the work in the river bed could not be started because of the excessive water flow. This indicates that when the site was inspected and the tenders were given, the flow of water must have been lesser than 20 cusecs because but for that, the work in question could not have been undertaken at all. Obviously, the cost of dewatering must have been worked out on the basis. Plaintiff No. 3 Motilal stated that when they had submitted the tender for the suit contract, there was only a meagre water flow in the river at the work site and that, later on, the flow had increased substantially. When the work order was issued on 10.6.1966, the rainy season was just ahead. Naturally, the period of rainy season could not have been availed of for starting the excavation work or dewatering work in the river bed in the rainy season. That work could have started only after the rainy season of 1966 was over. But then, the subsequent correspondence shows what the position regarding the flow of the water in the stream was. One may presume that before entering into the correspondence on the point with different authorities" the Local Officers must have made all sorts of efforts to persuade the Government authorities to regulate the water flow so as to enable the execution of the contract work. The first of such letters on record is a letter, dated 6.3.1967 (Ex. 125-page 225). Under this letter, Executive Engineer, Public Health Works Division, Bhusawal informed the Executive Engineer, Canal Division, Jalgaon, that as the head work of Pachora water supply scheme was in progress in the bed of river Girna and the similar work was in progress at Jalgaon, it was necessary to request the Canal Division to let out as little quantity of water as possible under the intimation to his office, so that the work could be executed. The next letter was, dated 15.3.1967 from the Superintending Engineer, Aurangabad Public Health Circle, Aurangabad to the Superintending/Engineer, Deccan Irrigation Circle, Nasik contending that the tentative programme of letting out water in Girna river was likely to upset the execution of infiltration work in the river bed and render their completion impossible, apart from dislocation work already done, A request was, therefore, made to instruct Executive Engineer of Irrigation Circle not to let out any water as far as possible, or alternatively, to let it out in a very small quantity. Copies of this letter were endorsed to various other authorities. The next letter on the point, on the record, is dated 19.12.1967 (Ex. 130), in which the Superintending Engineer, Aurangabad Public Health Circle informed the Chief Engineer and Joint Secretary to the Government in Irrigation and Power Department, that if the expected flow of the water through Girna river bed was to be 200 cusecs and if the same was to last upto the end of April, 1968 as informed by the Executive Engineer, Girna Canal Division, Jalgaon, the progress of the head work at Jalgaon and Pachora was bound to be hampered, and with a discharge of 200 cusecs in the Girna river, it would not be possible to carry out the works in the river bed at all. Directions were, therefore, sought from Sachivalaya level in that behalf, to the concerned authorities of the Irrigation Department. Under letter dated 9.1.1968 (Ex. 132), the Government had issued necessary directions. The matters were not yet under control. A letter, dated 1.2.1968 (Ex. 131), showed that the Executive Engineer Public Health Works Division, Bhusawal had again

urged to reduce the water flow to enable him to complete the Pachora water supply project. The next letter to be referred to, in this context, is letter, dated 2.3.1968 (Ex. 90). It is pertinent to note that the last observation of this letter states that the coffer dam with empty gunny bags was also constructed to retain the normal for dewatering. However, the excavation of trenches for the above were not completed for a complete length of arms of 120 ft. In earlier paragraph, a grievance was made that the Sub-Divisional Officer Girna Canal Sub-Division had persisted in saying that the water would be let out in the river upto the end of March, 1967 at higher rates. In another letter, dated 13.2.1968 (Ex. 921, a grievance was made that the present discharge in Girna river was above 700 cusecs up stream of Jamda river and the discharge that was utilised by Girna Canals at Jamda was about 250 cusecs. Therefore, it was pointed out that the present discharge in the Girna river down stream was about 450 cusecs and with that much discharge, it was impossible to take up the work in the bed of the Girna river. The, last letter to be referred to, in this context, was dated 6.4.1968, in which the Executive Engineer, Public Health Works Division, Bhusawal wrote to the Superintending Engineer, Aurangabad Public Health Circle that it was expected that the Executive Engineer, Girna Dam Division, Nandgaon would be able to reduce the discharge from Panzan Dam from 800 cusecs to 300 cusecs from 11.4.1968, but the said Executive Engineer, had inform that it was not possible to reduce the discharge upto the end of April, 1968, and even If the discharge was reduced from 1st May, it would take about 8 to 10 days before the normal summer discharge could be executed in the Girna river. It was further informed that under such circumstances, it would not be possible to start infiltration work in the bed of Girna river at Pachora and Jalgaon from 10th of May, 1968 or so and, then, at the most only one month would be available to carry out the infiltration work. It was submitted by the Executive Engineer, that this could mean that the major portion of the infiltration work would remain incomplete even during the year as the discharge was not released by Irrigation authorities as was expected by his office. It was necessary to refer to all these letters, because they make it clear that when the normal discharge of water was expected to be below 20 cusecs, the same had risen in the relevant period upto the end of May, 1968 upto 800 cusecs. When the authorities of the Public Health Department themselves could not regulate the flow of water to the desired extent, it could hardly lie in their mouth to say that the plaintiffs were supported to anticipate this and could quote their rates for dewatering, etc. accordingly. Though the learned Civil Judge has not dealt with this matter in so many details, his conclusion on issue Nos. 4 and 6, that the tenders were called on the estimated costs of dewatering meagre flow of water at site and that the conditions and the circumstances in which the work of inspection and gallery had to be carried on were materially changed subsequently, were correct.

10. The learned Civil Judge was, however, not very correct in holding that plaintiffs had failed to prove that the work of well and inspection gallery were to be done only in summer, as per the agreement between the parties. True it is,

that there was no explicit agreement in this behalf. But, the correspondence, referred to in the previous paragraph, could show that the implicit term in the contract was that the work should be carried out when the water flow was minimum. Indeed, some of the letters referred to above, do indicate that even the experienced Engineers of Public Health Works Department were of the view that the work in question could not be carried out even when the discharge of the water through the river bed was about 20 cusecs, and that they had, therefore, brought that fact to the notice of the Officers of the Canal Division of the Irrigation Department. The matter was not left at the local level, but it was taken right upto the Secretarial level and requests were made to direct the concerned authorities to ensure that the water flow in the river bed was restricted to the minimum, so as to enable the execution of the work Pachora water supply scheme and Jalgaon water supply scheme. If this was the real situation on the site, how could it be expected that in the absence of any term in the contract, the Contractors were expected to complete the work or to carry out the work with adequate progress, when it was impossible for them to do so in view of the larger discharge of water in the river bed. There could be no doubt that there could not be an implied contract between the Government and any other person, because that would nullify the provisions of Article 299(1) of the Constitution of India. The contract could be inferred from the facts and circumstances and a contract not complying with the provisions of Article 299 of the Constitution of India was not a contract at all, and was not enforceable against or by the Government. But, there is no bar to imply a term in a contract that was made by the Government with private Contractor. The principle of law in this regard is that, apart from the term imported by mercantile usage, the Court may imply terms, which are necessary in order to repair an intrinsic failure of the expressions in the contract, in other words, which will implement the presumed intention and give "business efficacy" to the contract. This principle was laid down in the *Moorcock* (1889) 14 PC 64 All England Report 530. It has been, however, acknowledged that the principle laid down in *Moorcock's* case was limited and the current tendency was laid down by the Privy Council in *B. B. Reftnary (Western Port Property Ltd. v. Ships of Hastings)* (1976) 52 ALJR 20. The Privy Council held that the conditions which must be fulfilled before implying a term in a contract, are as follows :

- (i) An implied term must be equitable ;
- (ii) It must be reasonable ;
- (iii) It must be necessary to give business efficacy to the contract and no term can be implied if the contract is effective without it ;
- (iv) It must be so obvious that it goes without saying;
- (v) It must be capable for clear expression; and
- (vi) It must not contradict any express term of the contract.

In the present case, it was very clear that through the contract in question did provide that the work should be completed in a period of 15 months from the date of issuance of the work order dated 10.6.1966, only some work could be executed by the time when the flow of water in the bed of river had increased. The correspondence shows that it was not a temporary increase for a short while also, but it went on increasing further and further, till the month of April, 1968. The letter Ex. 134 showed that even then the authorities were not certain that the flow would be reduced by the end of May, 1968, and it was reported that if it was reduced by that date, only one month would be available thereafter to execute the work, which meant that the work could not be completed even during that current year. If this was the situation and if neither of the parties to the contract had chosen to rescind the contract on that count, and further when the disputes arose between the parties as late as in 1968, the intention of the parties was to have the work completed even at that stage. The work in question was a public service work. Therefore, obviously enough the Department did not want to have it abandoned. As against this, the Contractor/plaintiffs were placed in such a situation, that the acts of some other authorities in the Government had made it impossible for them to execute and complete the work despite the fact that they had put in a lot of extra labour on the work for doing so. The correspondence, referred to above, shows not only the lack of co-ordination between the Irrigation Department and the Public Health Works Department, but it enables one to infer even the non co-operation on the part of the Canal Irrigation,, Department with the authorities in the Public Health Works Department. A private Contractor like the plaintiffs firm could hardly have helped the matter, except by doing the work, as far as it could be executed, whenever it was possible. It could hardly be said that the authorities of the Public Health Works Department had anticipated such a non co-operation from the authorities of the Canal Irrigation Department. Consequently, it could not be said that the authorities were alive of the time of making the contract that if at all there were to be such a non co-operation, the work could not have been executed at all. In such circumstances, one has to interpret the terms of the contract in the interest of business efficacy, and particularly in view of the need of the appellants/defendants to have this public interest work executed and completed. It was, therefore, very equitable and reasonable to suppose that the contract did contain a term that the contract should be executed when the flow of water in the river bed was minimum, and that if at all there was any excess flow, the work should be executed, unless the contract was rescinded, at a time when the flow of water was such as could permit the execution of the work. Such a term was necessary to give business efficacy to contract and it was so obvious, that it went without saying. The term was capable of clear expression and it did not contradict any express term of the contract, though the maximum period for the completion of the contract work was initially stipulated to be 15 months only. The stipulation of this period of 15 months with subsequent modifications, especially in Clause (6) authorising the Executive Engineer to grant extensions, from time to time, without any limitation thereupon, could enable one to presume that the contract

did contain an implied term that the work should be carried out when the execution of the work was possible in the face of the flow of the water in the riverbed. The learned Civil Judge has considered in paragraph 19 of his judgment, the reasonability in these words :-

It is true that the work of the inspection wells which was to be carried out in the river bed could not have been carried out in-rainy season when the river was bound to be flooded. And therefore, ordinarily the work of the inspection well must be expected to be carried out in summer.

11. However, despite this fact he gave a negative finding on issue No. 5 because there was no express term to that effect in the contract. In the light of the legal provisions discussed above and the factual position referred to above, the aforesaid approach of the learned Civil Judge was not very correct. True it is, that he had no alternative but to say that the contract did not contain any explicit term on the point, but it was certainly open to him to consider, whether a term of the type indicated above, could be considered as implied in the contract between the parties. In the light of the discussion made above, we hold that such a term could be considered to be implied in the contract between the parties.

12. The negative finding recorded by the learned Civil Judge on issue No. 7 to the effect that the plaintiffs had failed to prove that they were compelled to do the work under the changed circumstances and against the terms of contract, also was not very satisfactory, in view of the facts and circumstances discussed above. As pointed out earlier, in this judgment, the tenders were invited and accepted at a point of time when there was meagre flow of water in the bed of river Girna, which happens to be a major tributary of river Tapti. The flow of water was regulated on account of Panzan Dam. It so happened subsequently that the gates at Panzan Dam required repairs, as a result of which the flow of water in the bed of river Girna at Pachora had increased. The rainy season had its own contributed to that flow. The problems of irrigation also contributed thereafter and the flow had to be increased to as many as 800 cusecs at the Jamda and Dahigaon weirs (Ex.132). In the face of this correspondence, one wonders how the defendants could contend that the plaintiffs/respondents were not required to execute the work under changed circumstances. Again, had the flow of water in the bed of river been moderate or minimum, there was hardly any question of making coffer dams, It appears, at least, from one letter, that the coffer dam was built by the plaintiffs and that the same had been washed out. It could hardly be said in the face of this circumstances, that the respondents /plaintiffs were not required to carry out the work in a manner, which was not even provided for in the contract. It is surprising to note that the defendants have come out with a false defence on this point, that the plaintiffs had not made any coffer dam, and that no such coffer dam was ever washed away. (See Ex. 90 Page 168). It is pertinent to note, in this context, that the word of plaintiffs witness Motilal, on the point, is not at all contradicted by the defendants by adducing any cogent evidence. There

Is no reason why the case made out by the respondents/plaintiffs on these points should be disbelieved or rejected. "

13. The negative finding recorded by the learned Civil Judge on issue No. 10 also was not very satisfactory. The correspondence, referred to above, does indicate that the Officers of the Public Health Works Department, who had entered into contract with the respondents/plaintiffs, had almost lost the control over the situation when the Officers of Canal Irrigation Department, had declined to regulate the flow of water in the bed of river Girna. Helplessly, they were writing letters after letters and they had reached even the Secretarial level in making the grievance. Despite the directions given by the Government, under letter, dated 9.1.1968 (Ex. 132), there was no change in the position of flow of water on the site. The last letter, dated 6.4.1968 (Ex. 134) itself contains an admission of the Officers of the Public Health Works Department, that it was not possible to complete the work in the year 1968 also, if the flow of the water continued to be so high. If the work was presumptively to be executed when the flow of water was controllable and if on account of non-co-operation of the Canal Irrigation Department or for some other reasons which they also could not regulate, the situation on the work site had become so adverse that the work could not be carried on in pursuance of the contract, there was no reason why one should reject the plea of the plaintiffs that there was, in effect, a breach of an implied term of the contract, and that the flow of water in the river bed where the work was to be carried out was not regulated by the Government so as to enable the respondents/plaintiffs to carry out the work efficaciously,

14. There is one more aspect of the alleged breach of the agreement by the Government. After the expiry of the initial period of 15 months fixed by the agreement, for completion of work, the respondents/plaintiffs had sought, from time to time, extension of the period for completion of the work. It appears that the Executive Engineer had granted such extensions from time to time. According to Mr. Warale, the learned Assistant Government Pleader for the Government, the extension was finally granted upto 15.6.1969. Extension upto 30.6.1969 was sought by the respondents/ Contractors vide Exh. 99, dated 10.3.1969. But, it is seen from the letter Exh.106 dated 25. 11.1969, that extension of time limit upto 13.6.1969, was granted under letter, dated 18.10.1969. The aforesaid letter, dated 18,10.1969, does not appear in the record. None of these letters make it very clear, that while granting the extension, it was indicated that time was of the essence of the contract. As already stated above, thereafter, the proposal was made for levying penalty and the same came to be accepted, in course of time by Superintending Engineer. On this background, a reference may be made again to the decision of the Supreme Court in Amar Chand Vs. State of Punjab and Another, . In that case, the work was to be completed within a period of 12 months and in exercise of the powers conferred upon the Executive Engineer to grant extensions for the completion of work on reasonable grounds, extensions were granted from time to time. While considering this aspect (in Paragraphs 9 and 10 of the A. I. R. report), the

Supreme Court held that rescission of the contract on the part of the State Government, without fixing any further period making the time the essence of contract and directing the Contractor to complete the work within such period, was clearly illegal and wrongful, and thereby, the State Government had committed a breach of contract. In the present case, it appears, that some penalty was levied before a decision was taken to impose a fine. But, that does not by itself, mean that it was conveyed to the respondents/Contractors that time was to be the essence of contract at the end of a particular extension. In the absence of such an extension, the rescission of the contract by the State Government, could not be, as per the principle laid down by the Supreme Court, said to be legal. There was, thus, a breach of contract on the part of the Government itself.

15. In exercise of the powers conferred in Clause (2) of the conditions of the contract the proposal made by the Deputy Engineer for imposition of fine on the defaulting Contractor, came to be accepted ultimately by the Superintending Engineer. As already indicated above, it was not the case of the defendants also, that the 3/4th work of the contract was not completed by the Contractors within the time stipulated in Clause (2) of the contract. The dispute appears to have arisen thereafter. Penalty of Rs. 200/ per day was imposed with effect from 16th June, 1969, presumably because the last extension was upon 15th June, 1969. Exh. 104 is a letter, dated 30th June, 1969, under which the Executive Engineer proposed to the Superintending Engineer, that the fine was to be levied from 16th June, 1969. Till that day, no action under Clause (2) was obviously taken. Perusal of Clause (2) indicated that the action contemplated thereunder for imposition of penalty was to be taken while the contract was in force. The learned Civil Judge, therefore, held that after the expiry of the extended period of 15th June, 1969, it was not open for the Department to impose fine under Clause (2). He, therefore, held that the aforesaid action of the Officers of the defendants/appellants was, therefore, clearly unauthorised and unwarranted. Again, in view of the facts discussed above regarding the excess flow of water in the river bed on account of the non-co-operation of the authorities of the Canal Irrigation Department, it was virtually impossible for the respondents/plaintiffs to execute the work with adequate progress. The learned Civil Judge considered this aspect also and had held that, it was certainly not fair to take such an action. The third point, which is indicated by the learned Civil Judge, was that the action under Clause (3) was taken not with a view to ensure good progress of the work, but it was done with the only intention of carrying on the rest of the work departmentally. He held that such a thing also was not contemplated by Clause (2) or Clause (3). Apart from these considerations, a reference may be made to the provisions contained in Section 74 of the Contract Act. Even if it was" assumed for the sake of argument, that the contract was broken by the respondents/plaintiffs, the sum was named in the contract as amount to be paid in case of breach or if there was any stipulation in the contract for payment by way of penalty, the party complaining of the breach would be entitled, whether

or not, actual damage or loss was proved to have been caused thereby, to receive from the party, who had broken the contract, reasonable compensation for not exceeding the amount so named, or as the case might be, the penalty stipulated for. It was, therefore, obligatory on the defendants to prove specifically that they were entitled to reasonable compensation upto a certain sum. That was never done by the authorities and suddenly, a decision was taken to impose penalty on the respondents/ plaintiffs. That also was not very much in accordance with law. Therefore, the conclusion arrived at by the learned Civil Judge that the defendants/ appellants were not entitled to recover penalty at the rate of Rs. 200 per day, appears to be correct. He was also correct in holding that the action taken by the defendants under Clause 3(b) of the contract was not legal and that, therefore, the defendants/respondents were not entitled to recover the difference in the cost of completion of the remaining work.

16. According to the defendants, the cost of the remaining work, that was not completed by the plaintiffs, was Rs. 54,700. The learned Civil Judge observed in Paragraph No. 17 of his judgment that even if the aforesaid figure was taken to be correct, it was obvious that the plaintiffs had carried out substantial work of the suit contract. But, he did not, in fact, try to evaluate the cost of the remaining work. Indeed, the defendants had not adduced any evidence whatsoever to prove the aforesaid value of the remaining work. On the other hand, in the final bill, they had sought an adjustment of Rs. 10,739 as the difference in the cost of completion of the remaining work and its value at the contract rate. In "Paragraph No. 34 of the judgment, the learned Civil Judge pointed out that this amount was shown in a statement attached to the final bill, showing recoveries. Therefore, the plaintiffs had sought in their plaint a declaration that the action taken by the Executive Engineer, Public Health Works Division, Jalgaon, under Clause 3(b) of the contract, was illegal and ultra vires, and consequently, the plaintiffs were not liable to pay any amount alleged to have been spent by the said Executive Engineer. The Civil Judge had rejected the claim of the plaintiffs/respondents, in respect of this declaration without assigning any satisfactory reason. Indeed, as discussed above, in the preceding paragraphs, the action under Clause 3(b) of the contract was uncalled for in the present case, on account of several reasons. It was sought to be taken not to get the work completed at the hands of the respondents/plaintiffs, but assuming the work to be executed departmentally. The action was taken after the contract was virtually terminated, and that too, without giving any notice to the respondents/plaintiffs about the intention to rescind the contract and to carry out the work departmentally. Therefore, the respondents/plaintiffs were legitimately entitled to the declaration sought by them. The adjustment of Rs. 10,739 made in the statement of recoveries would not, therefore, be binding on the respondents/plaintiffs. The cross-objections must succeed on this point. Accordingly, they are allowed to that extent, and it is declared that the action taken by the Executive Engineer, Public Health Works Department, Jalgaon, under Clause 3(b) of the contract, was not legal and was not binding on the respondents/plaintiffs.

Consequently, it is necessary to direct the defendants/appellants that they should not adjust in the recoveries, the amount of Rs. 19, 739, as was sought to be done in the final bill.

17. The plaintiffs claimed in the suit recovery of Rs. 14,720 and they have paid court fees on that amount also. Out of these amounts, the learned Civil Judge has allowed the following claims -

Rs. 1,300.00 for the use of cement pipes belonging to the plaintiffs;

Rs. 200.00 for wrongful deductions in respect of plasters and painting;

Rs. 3,000.00 the price of extra and excess work of dewatering;

Rs. 4,820.00 Out of Rs. 8,320, Rs. 2,440 being the cost of additional excavation and Rs. 2,380 being the cost of shrouding materials.

We see no reason to differ from the view of the learned Civil Judge in respect of the allowed claims. The appeal preferred by the defendants, in that context, has got to be dismissed.

18. However, the learned Civil Judge was not very right in disallowing Rs. 1,500 of the cost of gunny bags used for coffer dams, which were washed out and Rs. 2,000 being the cost of unnecessary dewatering for a period of two months. True it is, that according to witness Gholap examined on behalf of the plaintiffs/respondents, the coffer dam was washed out due to rainy season. So also, it is true that the unnecessary dewatering had to be done in consequence of the rainy season. But, it is to be noted that this work was done after the stipulated term of the contract was over and that too, on account of inability on the part of the defendants to have the discharge of the water in the river bed regulated, when the respondents/plaintiffs were, in fact, to execute the work. Had the defendants succeeded in regulating the discharge of water supply, the question of carrying out the work in the rainy season, would not have arisen at all. The contention, which was accepted by the learned Civil Judge, was that there being no term in the contract to compensate the plaintiffs for excess charge of dewatering resulting due to excess release of the water in the river from the Dam. This argument appears fallacious to us, because certainly it could not be said that it was an implied term of the contract that the respondents/plaintiffs should do said work gratuitously. If certain excessive work had to be done as a necessary concomitant of the execution of the work, the party in whose benefit the work was done, would be found in law, to compensate the party, who had not done that work gratuitously. Therefore, differing from the view taken by the learned Civil Judge, we allow to the respondents/plaintiffs, the claim of Rs. 1,500 towards the cost of the washed out gunny bags and Rs. 2,000 towards the cost of dewatering which could otherwise have been avoided, had the defendants been diligent in regulating the water supply in proper time. The cross-objections must be allowed to this extent also.

19. For the reasons stated in Paragraphs 27(a) and 27(b) of his judgment, the

learned Civil Judge has disallowed the claims for Rs. 1,200 for lowering, laying and jointing towards the pending bills including the bill for lowering, laying and jointing pipelines and Rs. 700 as the price of actual "excavation done, which was more than that contemplated in the contract, in the context of jackwell. We find that the reasons given by the learned Civil Judge disallowing this claim of Rs. 1,900 are quite good. The cross-objections must be disallowed to that extent.

20. The learned Civil Judge has held in Paragraph 34 of his judgment, that the plaintiffs would be entitled to refund of security deposit of Rs. 4,040, which was still in the custody of the appellants/defendants. We see no reason to differ from this view, but the learned Civil Judge has committed a serious error in deducting this amount, which was due to the plaintiffs from the other amounts, which the learned Civil Judge found due to the plaintiffs from the defendants. He has thus, reduced the decretal claim from Rs, 10,739 to Rs. 6,456. This could hardly be justified. The respondents/plaintiffs must get a clear decree, for this amount of Rs. 4,040.

21. The result of these conclusions is that the appeal preferred by the State must be dismissed, but the cross-objections must be partly allowed. The decree passed by the Lower Court declaring that the orders dated 30.6.1969 and 5.7.1969 imposing fine at the rate of Rs. 200 per day were illegal and not binding on the plaintiffs, and that the defendants be, therefore, restrained from recovering the said fine in pursuance of orders, is confirmed.

The dismissal of the claim regarding the declaration that action taken under Clause 3(b) was illegal and defendant was, therefore, not entitled to recover the difference in the cost of the completion of the remaining work and the consequent prayer for injunction, is set aside. Instead, it is declared that the action taken by the Executive Engineer, Public Health Works Division, Jalgaon, under Clause 3(b) of the contract was not legal and was ultra vires, and that the plaintiffs, were, consequently, not liable to pay any amount allegedly spent by the said Executive Engineer for completion of the work. The said amount should not, therefore, be adjusted in the final bill as recoveries from the respondents / plaintiffs.

The decree passed by the learned Civil Judge decreeing the claim for Rs. 6,456 in final settlement of the contract including the amount of security deposit, is modified and it is ordered that the defendants do pay to the plaintiffs Rs. 12,820 (out of Rs. 14,720 claimed in the plaint) and Rs. 4,040 of security deposit thus a total sum of Rs. 16,860 with future interest of 6% per annum on the said sum from the date of the suit till realisation.

In the circumstances of the case, there shall be no orders as to the costs of appeal, but the defendants/appellants shall pay to the respondents/ plaintiffs the costs of the objections of the claim allowed in this appeal.